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## EDITORIAL

The last year has seen a number of changes for the Journal. Mr John Snape has retired as the Assistant Editor, which gives me an opportunity to thank him for his work for the Journal over a number of years. He played a crucial role in the Journal's development, was the key person in establishing its house style, and undertook the arduous task of preparing the style notes. Always meticulous, he has also performed an immense amount of editorial work for me and the previous editor. His assistance in establishing the Journal has been invaluable. So much so that without him, the Journal may even have ceased to exist in the mid-nineties. He has my very warmest thanks. I am also very grateful that he has agreed to remain as a member of the Editorial Board. Ms Jane Ching is now Assistant Editor, and two other members of staff have joined the Editorial Board. Mr Tom Lewis is dealing with book reviews, and Mr Alan Riley will help with production and marketing.

As always, the contributions in the Journal cover diverse topics, ranging from legal theory, the ethical basis for loyalty, and civil procedure. The latter is based on Professor Peysner's inaugural lecture, which was delivered to distinguished audiences in both Nottingham and London. It is my pleasure to thank all the contributors to the present issue, together with the members of the Editorial and Advisory Boards, and those who have acted as referees. Especial thanks go to Mrs Lesley Comerie, and those others who have assisted in the production of this issue.

MARY SENEVIRATNE, EDITOR



## ARTICLES

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

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### LOYALTY AND THE LAW: DEALING LEGALLY WITH MOTHERS, ARCHBISHOPS AND FOOTBALL CLUBS

MIRKO BAGARIC\*\* and RICHARD HAIGH\*

**Abstract:** *Loyalty is a powerful catalyst for human behaviour. So much so, that it has been suggested that loyalties ground more of the principled, honourable and other kinds of non-selfish behaviour in which people engage than does morality. Curiously the virtue of loyalty has received only scant philosophical discussion and despite the close connection between law and morality, loyalty is virtually totally ignored in our system of law. This article examines the ethical basis for loyalty and discusses whether it is a virtue deserving of greater legal recognition. It then examines fiduciary law, a specific case where loyalty analysis makes sense as a way to understand certain legal decision-making techniques.*

#### INTRODUCTION

EVEN THE MOST ARDENT LEGAL POSITIVISTS agree that, in all properly functioning legal systems, there is (if only incidentally) a connection between law and morality. In the Anglo-Australian legal system this association is very strong. Underpinning most legal rules is a (real or feigned) moral principle – certainly it is difficult to find examples of laws that are *clearly* immoral. The more important moral virtues which are recognised by our system of law include the right to life, liberty and property. Promise-keeping and honesty are also given legal recognition in some contexts such as the law of contract and criminal property law offences.

However, there is a potentially important moral virtue that is almost ignored by the law: loyalty. This is peculiar given the important role that loyalty has in influencing human behaviour. It has been proclaimed that loyalty is the basis of all moral judgments: “in loyalty, when loyalty is properly defined, is the fulfillment of the whole of morality”.<sup>1</sup> For some people, loyalty is such a powerful force that it moves them willingly to lose their life for their country or their friend. In less dramatic contexts,

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<sup>1</sup> J. Royce, *The Philosophy of Loyalty* (Hafner publishing, New York, 1908, 1971 reprint) at p. 15.

loyalty is the force that sees many make great personal sacrifices by caring for sick or infirm relatives or friends. As noted by Oldenquist, the breadth and intensity of loyalty is virtually limitless:

It is the most common thing in the world for a person to decide that he should (or should not) do so-and-so on grounds of loyalty to his friend, family, organization, community, country, or species. Indeed it is likely that loyalties ground more of the principled, self-sacrificing, and other kinds of non-selfish behaviour in which people engage than do moral principles and ideals.<sup>2</sup>

Any analysis of loyalty must begin with an appreciation of the nature of the idea itself. It is necessary to have a definitional framework of any practice before one can commence to morally evaluate it. Although the moral status of euthanasia, abortion or other morally contentious practices, including loyalty, are not resolved by discerning the linguistically correct meaning of such terms, it is important to establish some basic tenets.

Firstly then, loyalty is an imprecise concept:

Loyalty, as the term is popularly used, is a mixed bag that includes both petty and profound attachments of wildly varying strengths. The loyalty that moves martyrs is of a far different order than the loyalty that prompts a sports fan to root for a particular team.<sup>3</sup>

Although loyalty comes in different strengths, the same can be said of most other feelings or sentiments such as love, anger and one's commitment to telling the truth. Secondly, there are two distinct features of loyalty. The first is that loyalty is a term of relation as it must be directed toward an object.<sup>4</sup> The potential objects of loyalty are numerous. People espouse loyalty to living creatures (their family, friends and pets) as well as causes (their country, sporting club or favourite charity).<sup>5</sup> What is more difficult to establish is whether there are limits to the type of objects to which one can act loyally. For instance, can loyalty exist between a person and an inanimate object? It seems nonsensical to avow loyalty to one's car, house or a rock. While such a relation could be seen to evoke loyalty, it would be stretching the concept too thin to say that devotion, or care, is akin to loyalty. In the same vein, one cannot be loyal to oneself. To proclaim loyalty to oneself is simply a misguided expression of egoism or another form of self-interest.<sup>6</sup> Thus, although there must be a relationship for loyalty to exist, there are some boundaries.

The second, and more difficult feature of loyalty is determining its constituent mental state in order to distinguish it from other sentiments. An obvious aspect of loyalty is that it involves a preference or sense of obligation toward the object of the loyalty.<sup>7</sup> A sense of duty, however, may be a necessary aspect of loyalty, but it is not sufficient. The police officer who saves a young child, the plumber who fixes the broken pipe, or

<sup>2</sup> A. Oldenquist, "Loyalties" (1982) LXXIX *The Journal of Philosophy* 173.

<sup>3</sup> M. K. McChrystal, "Lawyers and Loyalty" [1992] 33 *William and Mary Law Review* 367, at p. 370. It has been argued that loyalty to causes may be more uncompromising than loyalty to people: *ibid.*, at pp. 372–386.

<sup>4</sup> McChrystal, *ibid.*, at p. 370.

<sup>5</sup> Royce suggested that the only proper objects of loyalty are causes that have social significance (or that remain "loyal to loyalty"), in that they have value independent to that which the loyal person attaches to it (see above n. 1, at p.20); whereas Oldenquist regards loyalty as principally a relation between people (see above n. 2, at pp.175–181). According to Oldenquist the types of causes stipulated by Royce are more in the form of ideals, rather than ideas (see Oldenquist, *ibid.*, at p.175). However, neither provides persuasive reasons why loyalty should be viewed in such a counter intuitive fashion (see also McChrystal, above n. 3, at p.375).

<sup>6</sup> See also Oldenquist, above n. 2, at p. 176; G. Fletcher, *Loyalty* (Oxford University Press, New York, 1993), at pp. 14–15.

<sup>7</sup> But see Oldenquist, who suggests that loyalty entails a notion of ownership: "when I have loyalty toward something I have somehow come to view it as *mine*" (Oldenquist, above n. 2, at p.175) (emphasis added).

the person who keeps a promise to a friend, are not normally perceived as acting out of a sense of loyalty. Although they are engaging in conduct, that promotes the interests of another, they are doing so out of an obligation imposed by the law or a discrete moral prescript. Thus, the only duties that are referable to loyalty are those *voluntarily* assumed. If the duty is imposed by an identifiable external cause, whether it is the law or a clear moral norm (such as promise-keeping), then it is not loyalty that is the stimulus for the relevant behaviour, but simply the external decree.<sup>8</sup> Accordingly, it follows that loyalty can be described as an obligation or preference<sup>9</sup> that one assumes towards a living object or a cause.<sup>10</sup>

The idea of loyalty as a conceptual basis for rethinking many common law legal principles remains at best latent. Broadly, the purpose of this paper is to raise awareness of the potentially important ramifications that loyalty has for legal doctrine and principle. In the next section of the paper, we undertake a consideration of whether loyalty has a moral foundation or is merely the expression of a personal preference or bias. After that, we discuss the manner in which the law gives effect to loyalty, focusing on fiduciary duties, given that this is the area of law where loyalty is most prominent. In conclusion, we make brief observations concerning other areas of law that may need reform in light of our earlier findings.

## THE MORAL FOUNDATION FOR LOYALTY

Although the concept of loyalty often heavily influences personal decision-making, it has not been the subject of a significant amount of conceptual and philosophical analysis.<sup>11</sup> Loyalty is for the most part, as already noted, ignored in the legal domain.

To assess the usefulness of loyalty as a legal concept, it is first necessary to question whether loyalty is linked to morality in any way. It has been suggested that loyalty and morality are not necessarily harmonious concepts – loyalty is a sentiment that stands outside morality. To this end, moral philosophers have charged that “loyalty changes the moral equation for deciding on a proper course of action”;<sup>12</sup> “at the level of philosophical theory, it may be difficult to make the case for the ethic of loyalty”;<sup>13</sup> and that “loyalties generally lead people to suspend judgment about right and wrong”.<sup>14</sup> Oldenquist states that loyalty falls somewhere between self-interest and impersonal morality (according to him, loyalty is a third category of the normative):

Reasons of loyalty have a general appeal among members of a society whereas a self-interested reason appeals only to the agent. But neither is loyalty impersonal morality, since an obligation of loyalty depends on viewing a thing as one’s own.<sup>15</sup>

It is true that the unbridled pursuit of loyalty can lead to morally unacceptable outcomes. Loyalty to an individual or group can often encourage or endorse morally

<sup>8</sup> Although there is no doubt that there can overlap between the two – one can be loyal to objects to which the law also requires loyalty.

<sup>9</sup> The notion of a preference is also emphasised by M. Baron, *The Moral Status of Loyalty* (1984), at p. 4.

<sup>10</sup> See also McChrystal, above n. 3, at p. 386, where he defines loyalty as “a term of relation, and the possible objects of loyalty are both people and causes”.

<sup>11</sup> The more informative writings on the matter are mentioned in this paper. J. Ladd, in “Loyalty” in the *Encyclopedia of Philosophy* 5 (Paul Edwards ed, reprinted ed. 1972), at p. 97 offers numerous reasons for the dearth of literature on loyalty, including the association of loyalty with obsolete idealist theory and the dominance of utilitarianism, which, as is discussed below, is thought to be antagonistic to the concept of loyalty.

<sup>12</sup> McChrystal, above n. 3, however, ultimately accepts that loyalty does carry moral weight (at pp. 395–406).

<sup>13</sup> Fletcher, above n. 6, at p. 163.

<sup>14</sup> *Ibid.*, at p. 36.

<sup>15</sup> Oldenquist, above n. 2, at p. 176. He ultimately argues that all of social morality may depend on loyalties.

repugnant behaviour. The “brotherhood syndrome”, identified in many police departments, is a classic illustration. Police members fail to disclose the unlawful behaviour of other officers through a sense of loyalty to both their colleagues and the “cause” of policing. Moreover, as is noted by McChrystal, loyalty has been used to justify deception and unfairness, such as advice on tax avoidance, or how to use a technical defence to defeat an otherwise valid claim.<sup>16</sup>

This does not necessarily mean, however, that loyalty and morality are antagonistic. It is merely an illustration of the difficulty of discovering any moral absolute.<sup>17</sup> There are situations where observance of even widely accepted fundamental moral norms leads to undesirable consequences. For example, we are expected to kill enemy soldiers. We *should* lie to the killer looking for his next victim when we know she is hiding in the adjoining room.

Thus the mere fact that allegiance to loyalty does not *always* produce morally acceptable outcomes, neither proves nor disproves whether loyalty is a moral norm. An inquiry into whether the concept of loyalty has a moral justification is made all the more difficult by the large number of moral theories that have been advanced over the years. It is not possible to analyse the concept of loyalty from the perspective of each of them. The role of loyalty in normative ethical theory is considered against the background of what we consider to be the two most influential and cogent moral theories. Consequential moral theories claim that an act is right or wrong depending on its capacity to maximise a particular virtue, such as happiness. Non-consequential (or deontological) theories claim that the appropriateness of an action is not contingent upon its instrumental ability to produce particular ends, but follows from the intrinsic features of the act. These are discussed further below.

## NON-CONSEQUENTIALIST (RIGHTS) JUSTIFICATIONS OF LOYALTY

The leading contemporary non-consequentialist theories are those which are framed in the language of rights. Following the Second World War, there has been an immense increase in “rights talk”,<sup>18</sup> both in number of supposed rights and in total volume. Rights doctrine has progressed a long way since its original aim of providing “a legitimization of ... claims against tyrannical or exploiting regimes”.<sup>19</sup> As Tom Campbell points out:

The human rights movement is based on the need for a counter-ideology to combat the abuses and misuses of political authority by those who invoke, as a justification for their

<sup>16</sup> McChrystal, above n. 3, at p. 368.

<sup>17</sup> See the discussion below.

<sup>18</sup> See T. Campbell, *The Legal Theory of Ethical Positivism* (Dartmouth Publishing, Aldershot, 1996), at pp. 161–88, who discusses the near universal trend towards Bills of Rights and constitutional rights as a focus for political choice. By “rights talk” we also included the abundance of declarations, charters, bills, and the like, such as the *Universal Declaration of Human Rights* (1948); the *International Covenant of Economic, Social and Cultural Rights* (1966); and the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (1966), that seek to spell out certain rights. Granted, numerous examples of rights-based language existed prior to the Second World War, such as the *Declaration of Independence of the United States* (1776) and the *Declaration of the Rights of Man and Citizens* (1789); however, it is only in relatively modern times that such documents have gained widespread appeal, recognition and force.

<sup>19</sup> S. I. Benn, “Human rights – For Whom and For What?”, in E. Kamenka and A. E. Tay (eds), *Human Rights* (Edward Arnold, Melbourne, 1978), at p. 61.

activities, the need to subordinate the particular interests of individuals to the general good.<sup>20</sup>

There is now, more than ever, a strong tendency to advance moral claims and arguments in terms of rights.<sup>21</sup> Assertion of rights has become the customary means to express our moral sentiments. As Sumner notes: “there is virtually no area of public controversy in which rights are not to be found on at least one side of the question – and generally on both”.<sup>22</sup> The domination of rights talk is such that it is accurate to state that human rights have at least temporarily replaced maximising utility as the leading philosophical inspiration for political and social reform.<sup>23</sup>

In the context of loyalty, then, the first question that is raised is whether it is plausible for an agent to assert a “right to (express or demand) loyalty”. It is not a right that is currently part of the mainstream of moral discourse. This is of little moment; novel rights are continually evolving and being asserted. A good example is the recent claim by the Australian Prime Minister (in the context of the debate concerning the availability of IVF treatment to same sex couples or individuals) that “each child has the right to a mother and father”. In a similar vein, in light of the increasing world oil prices, it has been declared that this violates the “right of Americans to cheap gasoline”. In England, the Premier League has been accused of violating the right of football club supporters to an F.A. Cup ticket.

Thus, there is certainly no conceptual incongruity associated with a wife, child or even employer, for example, asserting a right to loyalty. However, such claims are unlikely to sway the unconverted. This is because when pressed, the concept of non-consequentialist rights is epistemologically unsound.

Despite the dazzling veneer of deontological rights based theories, when examined closely they are unable to provide convincing answers to central issues such as: what is the justification for rights? How can we distinguish real from fanciful rights? Which right takes priority in the event of conflicting rights?<sup>24</sup> Such intractable difficulties stem from the fact that contemporary rights theories lack a coherent foundation for rights. It has been argued that attempts to ground rights in virtues such as dignity, concern or respect are unsound and that they fail to provide a mechanism for moving from abstract ideals to concrete rights. A non-consequentialist ethic provides no method for distinguishing between genuine and fanciful rights claims and is incapable of providing adequate guidance regarding the ranking of rights in event of clash.

In light of this, it not surprising that the number of alleged rights has blossomed exponentially since the fundamental protective rights of life, liberty and property were advocated in the 17th century. Today, all sorts of dubious claims have been advanced by reference to rights: for example, the “right to a tobacco-free job”, the “right to sunshine”, the “right of a father to be present in the delivery room”, the “right to a sex break”,<sup>25</sup> and even “the right to drink myself to death without

<sup>20</sup> T. Campbell, “Realizing Human Rights”, in T. Campbell et al (eds), *Human Rights: From Rhetoric to Reality* (Basil Blackwell, Oxford, 1996), at p. 13. Campbell also makes the important point that whether or not human rights are intellectually defensible, they are still needed as a source of protection of important human interests (T. Campbell, *The Legal Theory of Ethical Positivism* (Dartmouth Publishing, Aldershot, 1996), at pp. 165–6.

<sup>21</sup> Almost to the point where it is not unthinkable to propose that the “escalation of rights rhetoric is out of control” (see L. W. Sumner, *The Moral Foundation of Rights* (Clarendon Press, Oxford, 1987), at p. 1.)

<sup>22</sup> *Ibid.*

<sup>23</sup> H. L. A. Hart, *Essays in Jurisprudence and Philosophy* (Clarendon Press, Oxford, 1983), at pp. 196–7.

<sup>24</sup> See M. Bagaric, “In Defence of a Utilitarian Theory of Punishment: Punishing the Innocent the Compatibility of Utilitarianism and Rights” (1999) 24 *Australian Journal of Legal Philosophy* 95, at pp.121–143; M. Bagaric, *Sentencing and Punishment: A Rational Approach* (Cavendish Publishing, London, 2000), Ch. 4.

<sup>25</sup> These examples are cited by J. Kleinig, “Human Rights, Legal Rights and Social Change” in Kamenka and Tay, above n. 19, at p. 40.

interference”.<sup>26</sup> The “right to die” could also be placed within this group.<sup>27</sup> Due to the great expansion in rights talk, rights are now in danger of being labelled as mere rhetoric and losing their cogent moral force. Or, as Sumner points out, rights become an “argumentative device capable of justifying anything [which means they are] capable of justifying nothing.”<sup>28</sup>

Therefore, in attempting to uncover the genesis of a possible moral virtue like loyalty it is unhelpful to consider it from the perspective of a deontological rights-based normative theory. Against the background of such a theory, proponents of loyalty can declare the existence of a right to express or demand loyalty, and equally validly, sceptics will deny it. But there is no underlying ideal that can be invoked to provide guidance on the issue. As with many rights, the victor may unfortunately be the side which simply yells loudest.<sup>29</sup>

This may seem to be unduly dismissive of rights-based theories and to pay inadequate regard to the considerable moral reforms that have occurred against the backdrop of rights talk over the past half-century. There is no doubt that rights claims have proved to be an effective lever in bringing about social change. As Campbell correctly notes, rights have provided “a constant source of inspiration for the protection of individual liberty”.<sup>30</sup> For example, recognition of the (universal) right to liberty resulted in the abolition of slavery; more recently the right of equality has been used as an effective weapon by women and other disenfranchised groups.

It is also accepted that there is an ongoing need for moral discourse in the form of rights. This is so even if deontological rights-based moral theories (with their absolutist overtones) are incapable of providing answers to questions such as the existence and content of proposed rights, and even if rights are difficult to defend intellectually or are seen to be culturally biased. There is a need for rights-talk, at least at the “edges of civilisation and in the tangle of international politics”.<sup>31</sup> Still, the significant changes to the moral landscape for which non-consequentialist rights have provided the catalyst must be accounted for.

There are several responses to this. Firstly, the fact that a belief or judgment is capable of moving and guiding human conduct says little about its truth – the widespread practice of burning “witches” being a case in point. Secondly, at the descriptive level, the intuitive appeal of rights claims, and the absolutist and forceful manner in which they are expressed, has heretofore been sufficient to mask over fundamental logical deficiencies associated with the concept of rights. Finally, and perhaps most importantly, we do not believe that there is no role in moral discourse for rights claims; simply, that the only manner in which rights can be substantiated is in the context of a consequentialist ethic.<sup>32</sup>

<sup>26</sup> S. I. Benn, “Rights”, in P. Edwards (ed), *Encyclopedia of Philosophy* (Collier-MacMillan, 1967) vol. 7, at p. 196.

<sup>27</sup> This supposed right has gained widespread support in the context of the euthanasia debate: “dying is an integral part of living . . . it follows that the right to die with dignity should be as well protected as is any other aspect of the right to life. State prohibitions that would force a dreadful, painful death on a rational but incapacitated terminally ill patient are an affront to human dignity” (see *Rodriguez v. A-G British Columbia* [1994] 85 CCC (3d) 185 (Cory J)).

<sup>28</sup> Sumner, above n. 21, at pp. 8-9.

<sup>29</sup> As is discussed below it could be argued that loyalty is derivative from the “right” of liberty. However, this does not appear to be relevant in a deontological ethic, where foundational, stand alone, rights are the interests that are normally regarded as being worthy of most protection.

<sup>30</sup> Campbell, *The Legal Theory of Ethical Positivism*, above n. 20, at p. 165.

<sup>31</sup> *Ibid.*

<sup>32</sup> See Bagaric, “In Defence of a Utilitarian Theory of Punishment” above n. 24, where it is claimed that utilitarianism is best able to provide a rationale and foundation for the existence of rights. See also J. S. Mill who claimed that rights reconcile justice with utility. Justice, which he claims consists of certain fundamental rights, is merely a part of utility. And “to have a right is . . . to have something which society ought to defend . . . [if asked why] . . . I can give no other reason than general utility” (J. S. Mill, “Utilitarianism” in M. Warnock (ed), *Utilitarianism* (Fontana Press, Glasgow, 1986, first

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## CONSEQUENTIALIST JUSTIFICATION FOR LOYALTY

A range of consequentialist moral theories has so far been advanced, including egoism and utilitarianism. The most cogent of these theories (and certainly the most influential in moral and political discourse) is hedonistic act utilitarianism, which provides that the morally right action is that which produces the greatest amount of happiness or pleasure.

Utilitarianism is a maximising interpersonal theory, and on its face would appear to pay no heed to personal preferences or goals associated with loyalty. The ostensible tension between utilitarianism and loyalty is noted by Oldenquist, who argues that “our duty is to Humanity and . . . doing what benefits your neighbourhood or country is wrong if it prevents a greater good for a larger whole”.<sup>33</sup> Utilitarianism supposedly endorses impartiality and equality as its central tenets and hence the fact that, say, a person happens to be my friend or my spouse adds nothing to the utilitarian calculus.<sup>34</sup> Historically, some of the most persuasive criticisms that have been levelled against utilitarianism have focused on the impartial aggregative nature of utilitarianism. For example, critics such as John Rawls have argued that due to the aggregative nature of utilitarianism the obligation to maximise net happiness swamps every decision we make. This fails to take seriously the distinction between human beings and fails to protect certain rights and interests that are so paramount that they are beyond the demands of net happiness.<sup>35</sup> It is not difficult to see the basis for this criticism. Utilitarianism is a maximising principle, the aim being to maximise the net happiness. On the other hand, notions such as rights and loyalty appear to be individualising, and seem to require that personal interests (including the freedom to indulge in personal likes) are paramount. The nature and force of such objections is encapsulated by the following two famous examples.

Bernard Williams’ well-known Jim and Pedro example specifically aims to show that utilitarianism fails to accord sufficient weight to personal integrity or personal projects. Viewed more broadly it applies to all personal pursuits, including loyalty. It is a simple fable. Jim is a botanist on an expedition in a small South American town where the ruthless government regards him as an honoured visitor from another land. He goes into town and sees 20 Indians tied up. Pedro, the captain in charge, explains that the Indians are a random group of inhabitants who, after recent protests against the government, are about to be executed to deter others from protesting. Since Jim is an honoured guest, Pedro offers him the “privilege” of killing one of the Indians himself. If he accepts, as a special mark of the occasion, the other Indians will be spared. If he refuses they will all be killed. Jim realises it is impossible to take the guns and kill Pedro and the large number of other soldiers. The Indians and other soldiers understand the situation, and the Indians are begging for him to take up the offer.<sup>36</sup>

Williams argues that if Jim were a utilitarian he would kill the Indian. Williams himself has trouble accepting this outcome. Williams’ quarrel is not necessarily with the

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published 1981) at p. 309). Campbell, in *The Legal Theory of Ethical Positivism*, above n. 20, at pp. 161–85, also proposes a reductive approach to rights; however, underlying his rights thesis is not utilitarianism, but rather (ethical) positivist ideals. Ethical Positivism is also discussed in T. Campbell, “The Point of Legal Positivism”, in T. Campbell (ed), *Legal Positivism* (Dartmouth Publishing, Aldershot, 1999), at p. 323.

<sup>33</sup> Oldenquist, above n. 2, at p. 180.

<sup>34</sup> See Fletcher, above n. 6, at pp.11–16. The principle of partiality also led Fletcher to conclude that loyalty has no role in a Kantian ethic.

<sup>35</sup> J. Rawls, *A Theory of Justice* (Belknap Press, Cambridge, Mass, 1971).

<sup>36</sup> B. Williams, “A Critique of Utilitarianism”, in J. C. C. Smart and B. Williams (eds), *Utilitarianism: For and Against* (Cambridge University Press, Cambridge, 1973).

result to which utilitarianism commits one (in fact he has subsequently stated that he too would shoot the Indian), but with the reasoning process employed by the utilitarian to resolve the dilemma. From this is the additional difficulty of how one can be *certain* that killing the Indian is indeed the right choice. Williams contends that utilitarianism cuts out considerations which most would think integral to such cases, such as the idea that each of us is specially responsible for what he or she does, rather than what others do. This, therefore, makes utilitarianism unintelligible, because it fails to appreciate the relationship between a person and his or her projects. People achieve happiness not only by making other people happy, but through a vast range of projects such as being committed to persons, causes, institutions or any other of a multitude of activities.<sup>37</sup> Although Williams does not expressly mention the concept of loyalty, it would seem that the type of commitment that he refers to in relation to persons, causes or institutions is properly encapsulated by loyalty. Our main focus in this discussion is not on whether it is wrong for Jim to shoot the Indian, but rather on the broader point that it supposedly shows that there is no place in a utilitarian ethic for personal projects and preferences.

William Godwin's archbishop and chambermaid example even more clearly draws out the link with loyalty. In this case, Archbishop Fenelon's palace is in flames and a rescuer who comes upon the scene is only able to save one of either the Archbishop or his chambermaid. Who should it be? To Godwin, it ought to be the Archbishop. This is so even if the chambermaid is the rescuer's mother. It is argued that the utilitarian is committed to this course of action despite the strong love and affection towards one's mother, because decisions must be governed by the principle of maximising happiness for the whole of humankind.<sup>38</sup>

In essence, the above examples attempt to illustrate the de-humanising aspect of utilitarianism, which supposedly requires people to make purely clinical ethical decisions, totally detached from their personal preferences and sentiments. Given the intrapersonal nature of loyalty, if these criticisms are right there is no room for loyalty in such an ethic.

There are three central reasons ways of addressing these criticisms and showing why there is considerable room for fixing loyalty within a utilitarian ethic. Firstly, loyalty is a fundamental aspect of human nature. Secondly, loyalty derives from the notion of liberty. Finally, loyalty is instrumental to the forging of bonds which are conducive to attainment of important goals.<sup>39</sup>

### *Loyalty and Human Nature*

There is a strong pragmatic reason for recognising at least some role for loyalty in a consequentialist ethical theory. A normative ethic that prescribed that people must at every point abandon their subjective preferences when there is a chance that pursuit of them would not maximise happiness would risk becoming obsolete. Such a requirement is fundamentally contradictory to an important aspect of human nature. Despite the ostensibly divergent nature of the many things that go toward promoting happiness, human beings, whether as a result of biology or evolution,<sup>40</sup> place enormous importance on the pursuit of personal objectives, including the fostering and

<sup>37</sup> *Ibid.*, at p. 112.

<sup>38</sup> W. Godwin, "The Archbishop and the Chambermaid" in P. Singer (ed), *Ethics* (Oxford University Press, Oxford, 1994).

<sup>39</sup> To this end, we agree with McChrystal, that the value of loyalty depends partially, but not solely, on the value of its object (McChrystal, above n. 3, at p. 386).

<sup>40</sup> Evolutionary psychologists would probably argue that it is a combination of both: friendship and loyalty are favoured attributes in the desire for reproductive success – see Robert Wright, *The Moral Animal* (Abacus, New York, 1994), at pp. 205–07; M. Ridley, *The Origins of Virtue* (1996).

maintenance of relationships with other people. A recent study provides evidence, moreover, that there is a greater consensus on what makes us happy than was previously thought.

Following 11 years of research based on thousands of questionnaires, Professor M Argyle has revealed a general convergence in the things that make us happy. For example, the study has shown that money does not guarantee happiness. People on middle incomes are just as happy as the rich are, and only the very poor are less happy. Happiness only increases with income where people believe they are being paid more than they expect. Purchasing luxury items, such as expensive clothes and oil paintings, does not increase happiness. On the other hand, one of the main guarantees of happiness (especially for men) is marriage. Also, the more challenged a person is, whether by a job, hobby or sport, the happier he or she is likely to be.<sup>41</sup>

Thus, it seems that as a result of the manner in which humans are built, there is a strong innate desire to fulfil personal wants and pursue personal loyalties. This mirrors a common sense understanding of human nature. Loyalty is “an obligation implied in every person’s sense of being historically rooted in a set of defining familial, institutional, and national relationships”.<sup>42</sup> In light of this, a normative ethic that compelled us completely to disavow our personal pursuits would readily become unworkable. It could be argued, however, that morality is normative, not descriptive in nature (an “ought” cannot be derived from an “is”). It is true enough that the manner in which people behave is not decisive of how they should behave. Pervasive aspects of human nature must nevertheless be factored into the types of prescriptions that form the content of a normative ethic, otherwise the whole project lacks any humanity at all, and could be equally applied to a dog or a fish.

Even if the need to engage in personal projects and give effect to our subjective preferences is not so innate to be unchangeable, there are two other reasons why loyalty should be encouraged, in its relationship with ideas of liberty and human bonds.

### *Loyalty and Liberty*

Loyalties often appear to lead to behaviour that is contrary to the common good. Looked at in isolation, for instance, it could be argued that the world would be a happier place if the funds spent on a birthday present for one’s child were instead donated to a fund for starving children; better if instead of treating a spouse to dinner, time were spent helping to build a shelter for the homeless; or even if the archbishop were saved instead of his chambermaid. All these examples fail to recognise that although pursuit of our subjective preferences, such as our projects and loyalties, may not be the most direct path to maximising overall happiness, net happiness consists of the aggregate level of happiness experienced by *each* individual. The most effective means of achieving the ultimate goal may be for each agent generally to pursue that which makes him or her happy. Thus, the pursuit of loyalty may have a place within a utilitarian ethic if the best way to achieve maximum happiness does not require a direct pursuit of this goal, and if it can be established that people with projects and attachments are generally happier than those without. Williams acknowledges this, but argues that it is an inadequate response, because ultimately our ability to pursue our

<sup>41</sup> The study was conducted by Professor M. Argyle, and is due to be published in the near future. One quirky result was that people who watch television soaps were happier than those who did not, but watching lots of soaps was counter-productive to happiness. See T. Reid, “Some Research That May Bring You a Degree of Happiness”, *The Age*, 6 October 1998, at p. 10.

<sup>42</sup> Fletcher, above n. 6, at p. 21.

own projects is subject to the innumerable projects and demands of others which our actions may affect:

It is absurd to demand . . . of a man, when the sums come in from the utility network which the projects of others have in part determined, that he should just step aside from his own project and decision and acknowledge the decision which utilitarian calculation requires. It is to alienate him in a real sense from his actions and the source of his action in his own convictions. It is to make him into a channel between the input of everyone's projects, including his own, and an output of optimistic decision. . . . is to neglect the extent to which actions and his decisions have to be seen as the actions and decisions which flow from the projects and attitudes with which he is most closely identified. It is thus, in the most literal sense, an attack on his integrity.<sup>43</sup>

At the heart of Williams' objection is that generally we should only be responsible for the consequences we have orchestrated, and that we cannot be expected to drop or compromise projects that may be defining of our lives simply because the utilitarian sum may happen to come down against us.

This is not a significant objection, as utilitarianism gives considerable weight to such considerations, even more than Williams is prepared to accept. The direct pursuit of overall happiness is often likely to fail. We cannot at every single point be expected to save the world: we simply do not know how, and an attempt to do so would likely be self-defeating. But one thing we do know is what works for each of us. The collective pursuit of our individual aims is, therefore, at most points likely to be the best method of maximising happiness. A pre-condition to the attainment of individual happiness is the ability to lead a life governed by one's own desires. In this way utilitarianism attaches an enormous amount of weight to personal liberty.<sup>44</sup>

Once this is established, it becomes simpler to extend into the notion that people ought to be permitted to pursue the goals and endeavours which fulfil them unless it is obvious that this will not maximise happiness. To this end, there is little doubt that people obtain an enormous amount of happiness by pursuing their projects and loyalties.<sup>45</sup> In this sense, loyalty can be derived from the principle of personal liberty.<sup>46</sup>

#### *Loyalty and the Bonds of Co-operation*

Further, the desirability of loyalty goes beyond its derivative association with liberty – it is in fact better recognised as a moral virtue its own right. Difficulties in performing the utilitarian calculus regarding each decision necessitate that the general desirability of certain virtues, which evidence shows tend to maximise happiness, be acknowledged.<sup>47</sup> Creating these kinds of guidelines saves time and energy by providing us with short cuts that will assist in attaining desirable consequences. Also, by labelling certain virtues or interests as being morally desirable, we are spared the tedious task

<sup>43</sup> *Ibid*, at pp.116–7.

<sup>44</sup> The most famous statement of this is by J. S. Mill: "the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. The only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant" (above n. 32, at p. 135). The courts too have heavily endorsed the central role of personal liberty: "the right to personal liberty is . . . the most elementary and fundamental of all common law rights. Personal liberty was held by Blackstone to be an absolute right vested in the individual . . . he warned 'of great importance to the public is the preservation of this personal liberty: for if once it were left in the power of any . . . magistrate to imprison arbitrarily . . . there would soon be an end of all other rights and immunities'" (Cited in *R v. Williams* (1986) 161 CLR 278, at 292 (Mason CJ and Brennan J). More recently, see Lord Mustill in his dissenting judgment in *R v. Brown* [1993] 2 WLR 556, at 600.

<sup>45</sup> See the discussion above regarding the results of the "happiness" study by Professor Argyle.

<sup>46</sup> See also C. Fried, "The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation" (1975) 85 *Yale Law Journal* 1060, who argues that our right to befriend whomever we choose is a product of our individual autonomy.

<sup>47</sup> These rights, however are never decisive and must be disregarded where they would not cause net happiness (otherwise this would be to go down the rule utilitarianism track).

of establishing the importance of a particular interest as a first premise in practical arguments.<sup>48</sup> One such virtue is loyalty: as was noted by Mill, the greatest happiness is likely to be achieved if our primary concern is with those closest to us, rather than directly targeting overall happiness. There is more information concerning exactly what it is that makes those around us happy, and hence our efforts are unlikely to be wasted.<sup>49</sup> It is a far more effective process for achieving overall happiness than performing a utilitarian calculus in relation to each important decision we make. The capacity to gather and process information is restricted by a large number of factors, including lack of time, indifference to the matter at hand, defects in reasoning, and so on. It is often not possible to assess all the alternatives and to determine the likely impact upon general happiness stemming from each alternative. The ability to make the correct decision will be greatly assisted by narrowing down the range of relevant factors in light of pre-determined guidelines.<sup>50</sup>

Loyalty is conducive to happiness because the bonds that are forged by it play an important role in creating an environment where people can flourish. Loyalty assists in the establishment and maintenance of many of the virtues that stem from the rule of law. Loyalty secures predictability and certainty and gives people the confidence to enter into mutually beneficial projects, commitments and enterprises that would be impossible in a dispassionate world.<sup>51</sup> People would not nurture and cultivate a marriage (and enjoy all of the benefits flowing from such an enterprise) if they felt that their partner would leave them at the first sign of hard times. Loyalty is the force that holds “lovers or friends in a bond that transcends temporary disaffection”.<sup>52</sup> More generally, absent loyalty, rational agents might well pursue short-term goals and cease striving for the higher pleasures that stem from long term co-operative activities:<sup>53</sup> “[t]o foreswear fidelity is to open yourself up to other ideas, other thoughts, about what love is, what desire is, what happiness is, and what commitment is”.<sup>54</sup>

The good consequences that we claim are brought about by loyalty are similar to those that have been previously claimed to stem from the trust. This is not surprising, given that, as is noted by Petit, loyalty is one of the foundations of trust.<sup>55</sup> Trust is

a mechanism that reduces complexity and enables people to cope with the high levels of uncertainty and complexity of contemporary life. Trust makes the uncertainty and complexity tolerable because it enables us to focus on a few possible alternatives. Humans, if faced with a full range of alternatives, if forced to acknowledge and calculate all possible outcomes of all possible decision nodes, would freeze in uncertainty and indecision. In this

<sup>48</sup> See J. Raz, *Morality of Freedom* (Oxford University Press, Oxford, 1986), at p. 191. Raz also provides that rights are useful because they enable us to settle on shared intermediary conclusions, despite considerable dispute regarding the grounds for the conclusions.

<sup>49</sup> J. S. Mill, “Utilitarianism”, in M Warnock, ed, above n. 32, at p. 251.

<sup>50</sup> This, however, does not lead to a form of rule utilitarianism. As is discussed below, the guideline or rule should be abandoned where it is clear that its observance in a particular situation will not maximise happiness.

<sup>51</sup> *Ibid.* Predictability and certainty are some of the main aims of the rule of law. For a discussion, of the rule of law, see, for example, J. Raz, *The Authority of Law* (Oxford University Press, Oxford, 1979) Ch. 11, especially pp. 211, 214–6; J. Finnis, *Natural Law and Natural Rights* (Clarendon Press, Oxford, 1980), at pp. 270–6; J. L. Jowell, “The Rule of Law Today”, in J. L. Jowell & D. Oliver (eds), *The Changing Constitution* (2nd ed, Clarendon Press, Oxford); J. Waldron, *The Law* (Routledge, London, 1997 reprint), Ch 3.

<sup>52</sup> G. Fletcher, *Loyalty* (Oxford University Press, New York, 1993), at p. 5.

<sup>53</sup> Arguably, it is largely for this reason that political parties which are assured of only three or four year terms in office often implement short term solutions, rather than putting in place long term strategies to deal with fundamental community problems, such as the environment, public transport and education.

<sup>54</sup> J. Smiley, “Why Marriage? Matrimony at the millennium offers solace to capitalism” (2000) 300 *Harpers* 151, at pp.154–5.

<sup>55</sup> See P. Petit, “The Cunning of Trust” (1995) 24 *Philosophy & Public Affairs* 202, at p. 211 where he provides that “to be loyal or virtuous or even prudent is, in an obvious sense of the term, to be trustworthy. It is to be reliable under trust and to be reliable, in particular, because of possessing a desirable trait”.

state, we might never be able to act *in situations* that call for action and decisiveness. In trusting, Luhmann says, ‘one engages in an action as though there were only certain possibilities in the future.’ Trust, further, enables, ‘co-operative action and individual but coordinated action: trust, by the reduction of complexity, discloses possibilities for action which would have remained improbable and unattractive without trust – which would not, in other words, have been pursued.’ According to this account, trust expands people’s capacity to successfully relate to a world whose complexity, in reality, is far greater than anything we are capable of taking in.<sup>56</sup>

Beyond this are other instrumental goods that are brought about by loyalty. Loyalty is a means of overcoming alienation (or a sense of lacking ownership), which Oldenquist claims is responsible for such destructive activities as exploitation of social services and leads to behaviours classified as criminal.<sup>57</sup> In the view of one of loyalty’s chief proponents, it “gives life meaning and direction”.<sup>58</sup>

In sum, loyalty is a virtue that carries, or should carry, considerable weight in the utilitarian calculus. For utilitarians, loyalty is important simply because recognition of it often tends to promote general happiness.

### THE LIMITS OF LOYALTY

There is a place for loyalty in a utilitarian ethic, but it is not untrammelled. There are limits to how far we should go in acting upon our loyalties. One is to note that loyalty is not intrinsically valuable – it is a derivative, not foundational, good. This means that it is not the case that all loyalties should be given equal moral weight. Loyalties to people or causes which are clearly destructive to the common good, such as a loyalty to Hitler or the Ku Klux Klan, although carrying some weight on the utilitarian scales, will never come up trumps, since it is almost certain that whatever pleasure an agent obtains in expressing such loyalties will be outweighed by the harm the object of the loyalty will cause to others. This is not, however, a significant limitation<sup>59</sup> as few objects of loyalty are demonstrably so damaging to the common good.

Secondly, like every other virtue or principle in a utilitarian ethic, loyalty is not absolute.<sup>60</sup> Due to the derivative character of utilitarian secondary moral principles, they must be overridden where pursuit of them is contrary to the common good. The difficulty is determining the point at which loyalty should be subordinated to other principles.<sup>61</sup> Given the important role that loyalty plays in the pursuit of happiness, arguably the scales need to be heavily tilted against it before one is morally required to abandon his or her loyalty.

In order to provide clearer guidance regarding when loyalties must be abandoned, an analogy can be drawn with the scope of the right to liberty. To this end, it has been

<sup>56</sup> H. Nissenbaum, “Can Trust be Secured Online? A theoretical perspective” (1999) *Etica & Politica*: [http://www.univ.trieste.it/~dipfilo/-etica\\_e\\_politica/1999\\_2](http://www.univ.trieste.it/~dipfilo/-etica_e_politica/1999_2) (citations omitted).

<sup>57</sup> Oldenquist, above n. 2, at p. 189.

<sup>58</sup> Royce, above n. 1, at pp. 25–33.

<sup>59</sup> Certainly not as limiting as Royce’s requirement that only objects that serve the quest for the good are worthy of loyalty, for example, loyalty to the truth.

<sup>60</sup> This is point also noted by Oldenquist: “each loyalty determines obligations only *prima facie*” (see above n. 2, at p. 182); but *cf* Royce, above n. 1, who claims that loyalties must be uncompromising. Surely, Royce must be wrong – the possibility of conflicting loyalties demonstrates this. For a discussion of conflicting loyalties, including examples, see Oldenquist, above n. 2, at pp. 179–82; Fletcher, above n. 6, Ch. 8.

<sup>61</sup> But *cf* Fletcher, who believes that morality cannot impose limits on loyalty because there is no common denominator: morality is impartial, whereas loyalty brings to bear an historical self (above n. 6, at p. 172). Our approach escapes this problem, given that loyalty is viewed as being merely one aspect of morality.

suggested that in addition to the negative postulates of morality (such as do not kill or lie) there is one very important positive attribute of liberty, that of assisting others in serious trouble, when assistance would immensely help them at little or no inconvenience to the rescuer.<sup>62</sup> This maxim of positive duty prescribes that a person can engage in whatever behaviour he or she wishes (so long as it is not directly injurious to others) except where an alternative course of conduct would immensely assist another. This same broad criterion could govern the parameters of personal loyalty. Thus, two considerations are relevant in determining how much weight should be accorded to a particular loyalty. First is the strength of the loyalty and second is the good that is done by acting in accordance with it.<sup>63</sup> In this way, we should always be free to express our preference towards our family, friends or sporting teams, except where to do so would be at the expense of not assisting another in serious trouble whom we could easily help.

Finally, in judging the correctness of an act, including that of loyalty, it is necessary to look beyond the immediate effects. This is best explored by returning to the archbishop and chambermaid example. In this case, loyalty provides a strong reason for saving the chambermaid, while the maxim of positive duty does not provide a countervailing reason for choosing the archbishop – he could only be saved at significant (physical) inconvenience and risk to ourselves. Like all guidelines in a utilitarian ethic, however, loyalty and the maxim of positive duty are not absolute. It therefore becomes necessary to save the archbishop if this is the course of action that will definitely promote the greater good, when all of the relevant variables, including distant and more speculative effects are considered.

This broader perspective, however, does not seem to alter the preference in favour of the chambermaid. While the world may initially be a better place if the archbishop were saved, condoning such a course of conduct may weaken the commitment to loyalty and to the general rule that utility is maximised when each takes care of his or her own.<sup>64</sup> Not taking this weakening tendency into account leads to disturbing results. For example, the next rescuer placed in a similar situation, who, except instead of an archbishop, is faced with the quandary of whether to rescue a doctor, engineer, plumber, lawyer, graphic designer, car salesman, nightclub promoter or his mother, and remembering the lesson that was learned from the previous rescuer saving the archbishop, may be inclined to think, instead of dashing in and going straight to his mother, “who should I save?”

Given that moral judgments are universalisable,<sup>65</sup> the rescuer in the new scene must now save the other, upstanding, party unless there is a *relevant* difference between the archbishop and that party. However, due to the vagaries involved with identifying “relevant differences”, practices and principles that are condoned in one context risk being perpetuated to other (similar, but in fact relevantly different) situations. This is

<sup>62</sup> See M. Bagaric, “Active and Passive Euthanasia: Is There a Moral Distinction and Should There be a Legal Difference” (1997) *Journal of Law and Medicine* 143, at pp. 147–150.

<sup>63</sup> See also McChrystal, above n. 3, at p. 385; Freedman, *Understanding Lawyers Ethics* (1990), at pp. 102 -3.

<sup>64</sup> See Oldenquist above n. 2, at pp.186–7. Oldenquist suggests that this is an inappropriate reason why we should save our own (he illustrates the dilemma in the form of an example where one is forced to save either one’s daughter or her friend who are drowning after falling out of a canoe (*ibid*, at p.186) and suggests that the reason that we should save our own is that “loyalty behaviour elicits approbation and opposite behaviour typically elicits guilt in the agent and disapproval in observers” (*ibid*, at p. 187). This response begs the question. The only reason that disloyal behaviour induces guilt or disapproval in others is because it violates the norms of morality.

<sup>65</sup> For a discussion of this concept, see J. L. Mackie, *Ethics: Inventing Right and Wrong* (Pelican Books, London, 1977), at pp. 83–102.

normally termed the slippery slope or dangerous precedent argument.<sup>66</sup> In the above example the relevant difference is the levels of contribution that the new party is likely to make to overall happiness as compared to the archbishop. To make such judgments is inherently difficult. The number of variables is vast. There is a high risk that the rescuer will pick the wrong person. In the end, it again works out that it is best to go for the “sure thing” and save the mother.

## LOYALTY IN THE LAW

It has been shown how utilitarianism can justify the expression of loyalty and how loyalty should be a variable that is factored into the utilitarian calculus concerning the appropriateness of the decisions we make. In light of this, the extent to which the law encroaches on the capacity of people to be loyal needs to be re-evaluated.

As already noted, there is almost negligible express<sup>67</sup> legal recognition of the virtue of loyalty. For example, in criminal matters spouses and family members of the accused are competent and compellable to give evidence against the accused.<sup>68</sup> In civil cases, spouses and former spouses are competent and compellable witnesses for both parties.<sup>69</sup> Loyalty does not constitute a defence to criminal conduct or even an established mitigating factor in sentencing.<sup>70</sup> In the family law context, since the abolition of fault-based divorce, loyalty counts virtually for naught. There is, however, one area of the law where loyalty does appear to have some standing: fiduciary duties.<sup>71</sup> Despite the extremely limited consideration that has been given to loyalty in most of the common law world, the judicial approach to the issue in the context of fiduciaries forms a useful backdrop to the foregoing discussion; if mainly to draw out some of the some central issues relating to it and to highlight the superficial manner in which the principle of loyalty has so far been handled.

## LOYALTY AND FIDUCIARY OBLIGATIONS

### *Fiduciaries and the Role of Loyalty*

Loyalty springs out of the nature of a fiduciary relationship. Every fiduciary relationship is voluntary. Like contractual obligations, one cannot be compelled to

<sup>66</sup> This argument has proven to be particularly persuasive in the context of the euthanasia debate. Five inquiries which have been conducted to inquire into the desirability of decriminalising euthanasia have all advised against it largely due to the perceived slippery slope dangers of such a reform. See Law Reform Commission of Canada, *Euthanasia, Assisting Suicide and the Cessation of Treatment* (1982); Social Development Committee of the Parliament of Victoria, *Inquiry Into Options for Dying With Dignity* (April 1987); Great Britain, *House of Lords Select Committee on Medical Ethics* (1994); New York State Task Force on Life and the Law, *When Death is Sought: Assisted Suicide and Euthanasia in the Medical Context* (1994); and Canada Special Senate Committee on Euthanasia and Assisted Suicide, *Of Life and Death* (1995).

<sup>67</sup> The law does permit people in many contexts to act loyally. However, this freedom does not seem to come about due to any express recognition that is given to the virtue of loyalty, but rather merely as an incident of the right to liberty – which is recognised by the law.

<sup>68</sup> For example, see Crimes Act 1958 (Vic), s. 24; Evidence Act 1929 (SA), s. 16; Evidence Act 1995 (Cth and NSW), s. 12; Evidence Act 1977 (Qld) s. 7. However, in the first three of these jurisdictions a discretion is reposed in the judge to exempt a spouse (and sometimes other family members) if this will cause harm (such as economic or social) to the relationship. But loyalty is not a relevant consideration. In the United Kingdom, see the Police and Criminal Evidence Act 1984, s. 80. The only exception is where the husband and wife are jointly charged (s. 80(4)).

<sup>69</sup> For example, see Evidence Act 1958 (Vic); s. 24; Evidence Act 1929 (SA), s. 16; Evidence Act 1977 (Qld) s. 7; Evidence Act 1995 (Cth and NSW), s. 12. In some jurisdictions (Victoria, Queensland, Tasmania and Western Australia), spouses may claim marital privilege protecting marital communications.

<sup>70</sup> Although, it may be regarded as an aggravating factor, if one associates disloyalty with a breach of trust: see for example, see *Woodley* (1979) 1 Cr App R (S) 141; *Seaman* (1982) 4 Cr App R (S) 108; *Gray* [1977] VR 255.

<sup>71</sup> It has also been suggested, in the American context at least, that the client-lawyer relationship is founded on the lawyer's loyalty (McChrystal, above n. 3). This, however, ignores the contractual duties imposed on lawyers. McChrystal ultimately accepts that the express agreement between the parties has a role in governing the scope of the lawyer's loyalty (*ibid.*, at p. 409).

enter into a fiduciary relationship. But this does not mean that a fiduciary is a willing acceptant of his or her role. The most common fiduciary relationship arises when one party agrees voluntarily to act on behalf of another, but the relationship can arise where a fiduciary voluntarily places him or herself in a position that makes it obligatory that he or she acts in the interests of another. The duties, therefore, derive from the voluntary undertaking, or the relationship that is entered into when a person voluntarily accepts the particular office that is linked to fiducial obligations, such as trustee, solicitor or partner. Obviously, loyalty can exist outside of this fiduciary relationship, but there can be no fiduciary relationship without an attendant loyalty.

Fiduciary duties have long been associated with ideas that approach the philosophy of loyalty, but without completely understanding its true nature. Times are changing, however. A recent express recognition of the loyalty aspect of fiduciaries in company law can be found in the recent report by the Law Commissions of England and Scotland, which, in codifying the principal fiduciary duties of directors, states, under the heading “Loyalty”, that “[a] director must act in good faith in what he considers to be the interests of the company.”<sup>72</sup>

Moreover, “fiduciary obligation” has been used to describe a compendium of equitable rules that are, in a sense, all directed towards the maintenance of loyalty.<sup>73</sup> In these cases, loyalty is promoted only in a negative sense, in the same way criminal behaviour is proscribed – by fiduciary rules that prohibit disloyalty. Equity thus acts proscriptively, or prophylactically, by delineating those activities that are impermissible and consequently attempting to ensure future compliance.

One commentator who has noted the importance of loyalty to a proper understanding of fiduciaries is R. C. Nolan, although he only pays lip-service to the philosophical aspects of loyalty itself. Nevertheless, his ideas are worth setting out as starting points. For him, the main proscription on fiduciary behaviour is known as the self-dealing rule: a fiduciary cannot act in relation to assets both as fiduciary and in his or her personal capacity. In other words, fiduciaries are forbidden from acting in conflict with their duties towards their principal. There are exceptions to this rule, the main one being that prior authorisation, obtained after fully informed consent, renders the transaction valid. Because the self-dealing rule exists to “promote a fiduciary’s loyalty to his principal, by proscribing certain opportunities for disloyalty, [it is] not merely consent, but the principal’s fully informed consent” that is therefore necessary in order to allow a transaction.<sup>74</sup>

The secondary rule, known as the fair dealing rule, maintains that fiduciaries, in transactions between (normally) themselves and their principals, must ensure that the transaction is fair. This usually means that the fiduciary must make full and frank disclosure to the principal, ensure that there was no abuse of the position of fiduciary, that consideration was fair, and that the principal did not rely solely on the fiduciary’s advice. Again, it is possible to see that the motivation behind this rule is to instil a basic sense of loyalty by the principal towards the fiduciary.

The most likely source of fiduciary conflict is where a fiduciary acts to the improper exclusion of a principal and either profits from such activity or causes loss to the principal. These situations involve two distinct, but related, prescriptions. Firstly,

<sup>72</sup> Law Commissions’ Report, *Company Directors: Regulating Conflicts of Interest and Formulating a Statement of Duties* (Law Com No 261; Scot Law Com No 173).

<sup>73</sup> See, for example, *Bristol & West BS v. Mothew* [1996] 4 All ER 698. Loyalty has been seen as at the core of a fiduciary duty (see J. C. Shepherd, *Law of Fiduciaries* (Toronto: Carswell, 1981) Ch. 3 and *Goff and Jones on Restitution*, 4<sup>th</sup> ed. (London: Sweet and Maxwell, 1993), Ch. 33). Both say that a fiduciary owes a “duty of loyalty”.

<sup>74</sup> See R. C. Nolan, “Conflicts of Interest, Unjust Enrichment, Wrongdoing” in W. R. Cornish *et al* (eds), *Restitution Past Present & Future* (Hart Publishing: Oxford, 1988), at p. 91.

fiduciaries cannot take any benefit that their undertaking requires or authorises them to obtain as part of their representative capacity of a fiduciary. Secondly, even if a fiduciary is acting outside of the scope of the representation, he or she cannot retain a benefit made from the misuse of that representative position.<sup>75</sup> Again, the underlying purpose of these rules is to maintain loyalty towards the principal. As noted by Nolan:

[T]he predominant aim of the first rule is to obviate any conflict of duty and interest which might tempt a fiduciary away from loyalty to his principal, while the primary aim of the second rule is to counter the risk that a fiduciary will be disloyal to his principal if he can make some incidental profit out of his activities as a fiduciary.<sup>76</sup>

The famous case of *Phipps v. Boardman*<sup>77</sup> provides an excellent example of this role of loyalty in the fiducial ethic. Although it has been referred to in literally hundreds of subsequent cases and commentaries, it is worth reviewing the facts briefly. John Phipps was one of the residuary beneficiaries of the estate of Charles Phipps with a 5/18 share in the trust. Thomas Boardman, a solicitor to the trustees of the will, and Tom Phipps, another beneficiary, were sued by John Phipps for mismanaging the trust's affairs. Boardman, Tom Phipps and two of the three trustees, Nancy Phipps and Wilfred Fox, were dissatisfied with the way in which the affairs of the major investment of the trust, Lester & Harris Limited, was being conducted. The trust held 8,000 shares of the 30,000 issued shares in Lester & Harris Limited. The trust deed did not allow further investment in Lester & Harris Limited shares. Claiming to represent the trust, the four managed a takeover bid for the company that turned its fortunes around. As a result, Thomas Boardman and Tom Phipps held nearly 22,000 shares in Lester & Harris Limited. The share value was greatly increased. All of this was with the acquiescence of the active trustees, Marquita Noble and Wilfred Fox, but the third trustee, Ethel Phipps (Charles' widow), who was senile, was not consulted. Boardman also wrote to the beneficiaries explaining what he was doing and asking for their consent, which was given.

At the end of the various transactions, both the defendants' shareholdings and the trust increased in value. John Phipps, the plaintiff, claimed that the defendants had breached their fiduciary duty by using information and an opportunity which they had obtained by purporting to represent the trust, and which belonged in equity to the trust. The House of Lords found that Boardman was a fiduciary of the trust, and was liable for all gains made in that position due to his breach of the obligation to avoid conflict. As Lord Hodson stated, "whenever the possibility of conflict is present between personal interest and the fiduciary position" the rule of equity is that a fiduciary must act solely with the interests of the principal in mind.<sup>78</sup>

We can think of Boardman's case as a situation where, in deciding to use his position as fiduciary to gain a position on the board of directors of Lester & Harris Limited and subsequently obtain a greater stake in it, Boardman was acting disloyally to the idea and role of fiduciary. On one view of loyalty, it should have been incumbent upon Boardman, as a loyal subject, to obtain the proper consent of his principals, before embarking on such an adventure. This is a concept of loyalty as conceived by Nolan. But does this notion of loyalty provide a rationale for the House of Lords in the end awarding Boardman an amount for professional expenses incurred in obtaining the

<sup>75</sup> See P. Finn, *Fiduciary Obligations* (Law Book, 1977), at p. 233.

<sup>76</sup> Nolan, above n. 74, at p. 100. See also Finn, *ibid.*

<sup>77</sup> [1967] 2 AC 46 ('*Boardman*').

<sup>78</sup> *Ibid.*, at 111.

additional shares? Despite finding a fiduciary breach, the Court awarded remuneration to Boardman for obtaining the Lester & Harris Limited shares. Here was a case where a fiduciary was acting outside the scope of his authority: Boardman was never under a duty to do what he did, and in fact was expressly forbidden from doing so by the terms of the arrangement. At no point, however, was his perceived loyalty to his principals ever questioned. In his view, he was acting for the good of the beneficiaries, and of the trust, at all times. The disloyalty, where it occurred, was against the concept of a fiduciary, and what it means to be a fiduciary.

Compare this with the case of *Guinness plc v. Saunders*.<sup>79</sup> In *Guinness*, Ward, the defendant and director of the plaintiff company, Guinness plc, was enriched at the expense of Guinness. Ward, in conjunction with two other directors, Saunders and Roux, established themselves as a committee of the Board of Guinness in order to arrange for a takeover bid of Distillers Co. plc. Ward was to provide expert advice and services to Guinness. By virtue of the strict language of the articles of incorporation of Guinness, Ward had no right to the remuneration received from the plaintiff. The court in this instance did not award any remuneration for skill or expertise, noting that the only power to award such remuneration lay with the board of directors. What makes *Guinness* different from *Boardman*? From a loyalty perspective there is a great difference, because there was no evidence in *Guinness* of conflicting loyalties at all. Neither Ward nor any of his cohorts took the action they did in the belief that it was the right thing to do as a fiduciary, or the right thing to do for the company.

Our view is that in such situations, a court should recognise the difficulty that humans have in deciding between conflicting loyalties and award some remuneration for a choice that, in hindsight, was not correct, but that was based on a valid conception of loyalty. As Royce states, in the end the highest duty of all is to be “loyal to loyalty”.<sup>80</sup> Anything that detracts from the utility of overall loyalty should be avoided, but where there is a conflict between loyalties, sometimes the only solution is to avoid wavering, and ensure that one of the two competing loyalties is rewarded fully.

The reason for the court’s initial determination of a breach of fiduciary duty in *Boardman*, however, is that despite Boardman’s good faith and loyal behaviour, he maintained loyalty towards individuals rather than towards an institution. But loyalty, if it is to form part of a properly functioning “fiduciary law” needs to be thought of as loyalty that is directed towards causes or institutions. It is the institution of the fiduciary to which all fiduciaries should show the highest loyalty. In other words, a breach of loyalty, regardless of the consequences, should trigger the full extent of legal liability, but this can be tempered where a legitimate choice was made between competing loyalties. The case of *Boardman* makes more sense in this new light. A careful consideration of the nature of loyalty renders the decision more clear. Despite much of the controversy surrounding it, perhaps *Boardman* should be seen as a condemnation of a misplaced bond of loyalty where loyalty is necessarily of utmost concern.<sup>81</sup>

<sup>79</sup> [1990] 1 All ER 652.

<sup>80</sup> Royce, above n. 1, at p. 20.

<sup>81</sup> See further, R. Goff and G. Jones, *The Law of Restitution* (1998), at p. 715, in which the authors provide the following explanation of equity’s prophylactic anxiety: “A fiduciary’s duty of loyalty is ‘unbending and inveterate’; equity’s rule is ‘inflexible’ . . . and must be applied inexorably by this court. ‘The safety of mankind’ requires that the court should not be required to determine whether a fiduciary acted honestly or whether the beneficiary did, or did not, suffer any injury because of the fiduciary’s dealings, for ‘no court is equal to the examination and ascertainment’ of these facts”. See also, J. Lowry, “*Regal (Hastings) Fifty Years On: Breaking the Bonds of the Ancien Régime*”(1994) 45 *Northern Ireland Law Quarterly* 1.

*Fiduciaries, Loyalty and the Law of Restitution*

Orthodox arguments used to prop up decisions such as *Boardman* generally rely on some form of policy rationale based on prophylaxis – that, like general deterrence in criminal law, applying standards of no-conflict and no-profit absolutely strictly will ensure proper fiduciary behaviour in the future.<sup>82</sup> These arguments, however, are rarely, if ever, underpinned by an analysis of the role of loyalty. On the other hand, those who take issue with *Boardman* are mainly interested in analysing the case from a restitutionary standpoint. For example, Professor Roy Goode makes the argument that giving preference to a principal, by allowing proprietary remedies for breach of fiduciary duty, ignores rival claims from innocent third party creditors. As he states:

[S]tripping the fiduciary himself of benefits attributable to his wrongdoing, as an inducement to future fiduciaries to observe the requisite standards of behaviour [is valid]. It is less clear that the fiduciary's general creditors should be similarly deprived. They have done nothing wrong. Why, then should they be expected to suffer for the fiduciary's delinquency? . . . Th[is] preference . . . is all the more extraordinary when we consider that the proprietary right is accorded not only in cases of bribes but in all cases of receipt of benefit in breach of fiduciary obligation, even where the fiduciary has acted in good faith. What is the moral justification for a rule [such as in *Boardman*] under which money received in breach of fiduciary duty by a fiduciary acting honestly is impressed with a trust in favour of his principal and removed from the reach of his general creditors when a person who was induced to part with his money by fraud is left to prove in competition with other creditors in the fraudster's bankruptcy?<sup>83</sup>

Goode's concern is mainly with competing priorities that result from awarding proprietary remedies. He has little, if anything, to say regarding ideas of prophylaxis, loyalty and duty. A similar argument could be made for a remorseful thief who after stealing money, wishes to return it. On one view, there is no real hurt involved, and to imprison the thief would obviously affect some innocent third parties such as the thief's family and friends. But sentencing laws recognise that there is a societal value in including within the matrix of sentencing guidelines, a component of general deterrence. Fiduciary obligations, to some extent, represent the boundary where the civil law overlaps the criminal law. By seeing them in this way, fiduciary standards act in concert with enlightened views about loyalty, and end up promoting human good. This follows from a point raised above, that it is preferable for loyalty in the fiduciary context to be seen as being true to the institution itself, but not necessarily as being loyal to a particular person. Otherwise, it becomes easy to elide into individualistic arguments about priority rights, a favourite ground for restitutionary scholars. Institutional loyalty is more likely to be accepted, even if it sometimes may not seem fair to an individual.

Moreover, it is arguable that Goode's thesis finds fault only with the proprietary aspect of the fiduciary remedy. By awarding a proprietary remedy to the principal, especially in cases where the wrongdoing fiduciary has not caused a financial loss to the principal, as in *Boardman*, Goode argues that third party creditors are then affected. Any claim they may have had against the same fiduciary will be lessened by an amount made available to the principal under the proprietary claim. There is a neat simplicity to this argument, largely arising out of ideas of property that have developed in the common law over centuries. What Goode is arguing is that proprietary remedies should

<sup>82</sup> For a critical examination of the extent to which prophylaxis demands such an absolute standard see J. Lowry and R. Edmunds, "The Corporate Opportunity Doctrine: The Shifting Boundaries of the Duty and its Remedies" (1998) 61 *Modern Law Review* 515.

<sup>83</sup> R. Goode, "Proprietary Restitutionary Claims" in Cornish *et al* (eds), above n. 74, at pp. 72–3.

only be justified in cases of subtractive unjust enrichment (where the defaulting party actually appropriates property belonging to the victim) and not *in situations* where only a wrong has occurred without a consequent loss (as was the case in *Boardman*). In the end, the matter is a technical disagreement between restitution scholars. It has little to say about promoting loyalty as a fundamental value in relationships such as fiduciary ones. As a way of alleviating this problem without detracting from any loyalty issues, it would be better to disallow proprietary remedies for breaching fiduciaries, and use punitive damages instead. This has already been suggested in the Law Commission's report on *Aggravated, Exemplary and Restitutionary Damages*.<sup>84</sup> Under this formulation, instead of awarding a proprietary remedy, a principal wronged by a breaching fiduciary should, to ensure loyalty is always promoted, obtain punitive damages.

One of the more pressing problems in understanding the law of obligations is fitting recent theoretical musings about restitution into a common law framework already contorted by overlaps between tort, contract and equity. For instance, breach of fiduciary duty could be seen as analogous to tort, differing simply as a result of an historical anachronism. As Andrew Burrows argues, one can only hope that over time, equitable wrongs will be absorbed into torts, in the same way as breach of copyright and patent infringement. For him, this is one of the major challenges facing the law of obligations.<sup>85</sup>

Perhaps thinking about fiduciary obligations in the new light of loyalty theory is another way to do this. Although it would take a great overturning of centuries of accumulated thought, there is no reason why we could not develop the tort of breach of loyalty to replace fiduciary obligations. At least it could begin to counter some of the difficulties of conceptualising such diverse ideas as causation, remoteness, proprietary remedies, restitutionary remedies, equity and restitution. As Burrows is at pains to point out, however, there will still need to be worked out a sophisticated matrix to decipher concurrent liabilities. His theory of allowing a plaintiff to sue in tort or restitution, irrespective of a contract, subject to the three principles of independence, exclusion and anti-circularity, is an excellent starting point. In this view, breach of loyalty would simply fit within the existing framework covered by Burrows for tort and contract overlaps.<sup>86</sup>

This form of reconceptualisation would also deal with other areas of contention involving fiduciaries, such as whether loyalty is simply a goal to which a fiduciary is encouraged to aspire, or a positive obligation to pursue so that breach of it allows an equitable remedy. Current rules related to fiduciary liability are largely negative – they simply aim to deter the fiduciary from acting disloyally in situations where the risk is most acute.<sup>87</sup> Sometimes, however, they are characterised positively as duties of care and skill. This does lead to confusion. In *Henderson v. Merrett Syndicates Ltd*,<sup>88</sup> Lord Brown-Wilkinson noted that positive duties such as care and skill were, as applied to persons acting as fiduciaries, “fiduciary duties”, but that these same duties could also be described according to the principle of proscriptio. It may be that a radical review of the role that loyalty plays in fiduciary obligations could act as a catalyst for changing much of the law regulating human behaviour.

<sup>84</sup> Report LC 247. See also the attached Damages Bill annexed to the Report.

<sup>85</sup> A. Burrows, *Understanding the Law of Obligations* (Oxford, Hart Publishing, 1998) at p. 14.

<sup>86</sup> *Ibid.*, Ch. 2–5.

<sup>87</sup> See, for example, *Breen v. Williams* (1996) 186 CLR 71.

<sup>88</sup> [1994] 3 All ER 506

## CONCLUSION

Consider a situation where a couple has been married for ten years. They have no children. Since marriage, they have pooled all of their resources and money with the joint goal of attaining financial security before they have children. The wife is the primary breadwinner and is a successful architect. The husband is a lawyer. To please her husband, with whom she thought she would stay with forever, the wife has made huge career and personal sacrifices. She has turned down several lucrative overseas jobs which would have resulted in her career further taking off. She did this to please the husband who has no desire to travel due to close friendships and the fact that he would not be able to work overseas and hence his career would be retarded. To please him further, the wife has also made numerous other sacrifices. She gave up a promising tennis career in order that she could work and maintain the household while he finished the last two years of his law degree. Ten years into the marriage, the husband has built up his career to the point where the couple can comfortably live off his money. Just before they are about to commence a family the husband forms a fondness for his young secretary and decides to leave his faithful wife for the secretary. The wife who resigned from her job, excited by the prospect of planning for a family, is now finding it difficult to get a job in her field. Building practices and design trends have changed significantly due to the influence of overseas trends with which she is unfamiliar. The husband is now one of the most successful lawyers in the country. The wife claims that the husband has a duty to be loyal to her and should have remained with her. Due to this breach, she thinks that a legal obligation ought to be imposed on the husband to compensate her.<sup>89</sup>

While many would sympathise with the wife, given the large range of circumstances in which loyalties influence behaviour, it is difficult to draw clear standards concerning when a legal duty to be loyal should be imposed.<sup>90</sup> The range of circumstances in which loyalty may be expected is almost infinitely varied. However, at the extremes there are circumstances where it appears to be unconscionable for an agent to ignore the interests of another who has acted loyally towards the agent. In this regard, we suggest that an analogy should be drawn with the moral norm of honesty (an aspect of which is promise-keeping). The law generally does not enforce the moral duty of honesty. It is lawfully permissible to lie as often one wishes. However, the law demands that one keeps one's promises where one has received a benefit from the promisee (hence, the notion of consideration) or the promisee has reasonably relied upon the promise to his or her detriment (hence, the doctrine of estoppel).<sup>91</sup> In short, where a lie has induced some form of benefit to the liar, the liar is made accountable for this. Similarly, where an agent receives some tangible benefit due to the expression of loyalty by another it could be argued that he or she must reciprocate. Fiduciaries represent one small aspect of this need to ensure legally enforceable elements of loyalty. Using theories of loyalty to aid in our legal understanding of more intimate relationships will be even more difficult.

<sup>89</sup> The more specific issue that this example raises is the concept of fault-based divorce, which was abolished in Australia in 1975. We do not propose to discuss this issue at this point (this in fact is the topic of a separate forthcoming paper), but rather to focus on the wider issue at hand.

<sup>90</sup> As was discussed earlier, there are very few circumstances where the law clearly imposes a duty to be loyal. Fletcher discusses whether the offence of treason is one such offence (Fletcher, above n. 6, at pp. 53–7). However, in the United Kingdom and Australia, this does not appear tenable, given that the offence can be charged against citizens and non-citizens. For example, see Treason Act 1351 (UK); Crimes Act 1958 (Vic) s 1A.

<sup>91</sup> For a defence of this approach to the enforcement of promises, see P. Atiyah, "Contracts, Promises and the Law of Obligations" (1978) 94 *Law Quarterly Review* 193. Other theories are discussed by McChrystal, above n.3, at pp. 396–7.

Loyalty has a strong ethical foundation. The ability to express loyalty is integral to the capacity for human beings to flourish. Loyalty is thus a virtue that should be generally encouraged. Nevertheless, Anglo-Australian law has developed largely in ignorance of the virtue of loyalty. In some cases we too readily require people to betray our loyalties. For example, we are permitted to follow the club of our choice as passionately as we want; choose whichever partner will have us; and associate with our choice of friends. But the only reason that the law generally permits us to act upon our loyalties is because it is an incident of the importance placed on the right to freedom. Given that the benefits stemming from loyalty transcend its derivative association with the right to liberty, the level of legal recognition that is accorded a person who is loyal should be increased. Thus, areas of law where people are required to betray their loyalties, such as the compellability of spouses and family members under rules of evidence, should be reconsidered. As a further example, consideration should be given to making loyalty a mitigating factor in sentencing.

There is also another aspect to loyalty. Apart from the issue concerning how far people should be permitted to express their personal loyalties, there is the perplexing problem of whether there are situations where the law should enforce, by permitting damages to be awarded for its breach, a duty to be loyal. While rescuers should not be prosecuted for saving their mothers instead of archbishops, should their mothers have a cause of action against them if they opt for the archbishop?

According to Royce, a loyalty once chosen, prevents people from “turning back from the cause”.<sup>92</sup> The only case in which Royce would permit abandonment of an object of loyalty is where the agent gains additional knowledge of the object of the loyalty that shows that the object is not worthy of loyalty.<sup>93</sup> This is probably put too strongly. Loyalty does not have an existence independent of an agent’s desire to express it and act upon it. To compel people to follow their loyalties cuts too deeply across the virtue of personal liberty. Yet there still may be circumstances in which agents are disentitled to abandon their loyalties. A properly functioning, sophisticated legal system should account for this.

<sup>92</sup> Royce, above n. 1, at p. 190.

<sup>93</sup> Royce, above n. 1, at p. 191.

## WHAT'S WRONG WITH CONTINGENCY FEES?

JOHN PEYSNER\*

*An Englishman while passing along the main street in Maine stepped in a hole in the sidewalk and, falling, broke his leg. He brought suit against the city for one thousand dollars and engaged Hannibal Hamlin for counsel. Hamlin won the case but the city appealed to the Supreme Court. Here also the decision was for Hamlin's client. After settling up the claim, Hamlin sent for his client and handed him one dollar.*

*"What's this?" asked the Englishman.*

*"That's your damages, after taking out my fee, the cost of the appeal, and several other expenses" said Hamlin.*

*The Englishman looked at the dollar and then at Hamlin. "What's the matter with this?" he asked; "is it bad?"*

*A prominent lawyer died in an accident. When he got to the pearly gates, he complained to St. Peter that he didn't deserve to die so soon. That it was so unfair. That he was only 48 years old. That there most certainly must be some mistake. "There's no mistake" said St. Peter. "We checked, and according to your very own records of hourly billings, you're a hundred and ten".<sup>1</sup>*

### INTRODUCTION

How should individuals and corporations fund the use of lawyers to resolve disputes? The central theme of this article is to examine the progress made in reforming the antiquated system of financing and costs in Britain; to investigate the way in which lawyers are increasingly sharing risk and reward with their clients and to make proposals about what further reforms are required.

The above jokes spring from a millennium of suspicion about lawyers and their works and they do not assist us in determining, in situations where clients need legal services — to bring or defend a claim — which is the most efficient and effective way of paying for those services. This subject is an issue that is generating substantial public debate. There are three reasons for this: first, the Reforms of Civil Procedure; second the limitations on Civil Legal Aid and the growth in alternative means of financing litigation; and thirdly the recent arrival of claims management companies — and their "in your face" TV advertising.

#### *What Do Clients Want From Lawyers*

At the very least they want their lawyers:

- (1) To be on the same side as the client.
- (2) To be knowledgeable about the law.
- (3) To be efficient.

\* Solicitor, Professor of Civil Justice, Nottingham Law School. This is an extended and amended version of Professor Peysner's professorial inaugural lecture, given in November 2000.

<sup>1</sup> From M. Galanter, "Anyone can fall down a manhole: the contingency fee and its discontents" (1998) 47 *DePaul Law Review* 457. In this article Galanter uses a number of methods, including jokes, to examine attitudes to contingency fees in the US context and, in the wider context, uses this as a mirror to societal response to lawyers. The contingency fee has been the normal method of funding litigation, particularly personal injury litigation, in the USA since the late 19<sup>th</sup> century. Does the first joke from the early twentieth century (still circulating in a more modern version on the internet) offer a peculiar attack on the contingency fee arrangements? Not really, as the second joke suggests it is simply part of a wider attitude to the hegemony of lawyers in the USA. (There are probably more jokes circulating about contingency fee lawyers rather than those billing on the hourly rate but this may simply be because the former, concentrating on personal injury practice, are closer to the streets and the latter to the boardrooms).

- (4) To understand the psychology of the client and opponent.
- (5) To offer predictable and cost effective fee structures.

How do these aspirations correspond to reality? Can progress be made towards the ideal by structural changes?

It has been apparent that the environment of civil litigation as identified by Lord Woolf<sup>2</sup>, and numerous commentators prior to him, is far from satisfactory. However, we tend to assume that most lawyers have professional integrity. Indeed, it comes as an enormous surprise to read in novels like *Kowloon Tong*<sup>3</sup> by Paul Theroux of a tale involving a corrupt solicitor who sells out his own client. That is still, very fortunately, a rare event in this country. However, there are elements within the system and the structure of lawyers' fees that tend to place the lawyers' interests against the interests of the client. As such, this can lead to conflicts of interest and issues of inefficiency and poor client care. The recent debacle concerning the Office for the Supervision of Solicitors and the issue of consumerism within the legal area<sup>4</sup> shows that the general public are not seriously concerned about the integrity of their lawyers but they are desperately worried about their efficiency. For example, the charging systems of solicitors are the subject of many complaints. These systems are normally based on charging an hourly rate (divided into a minimum six minute unit for a phone call or letter) that can lead to a perception that lawyers "churn, grind and pad" their files claiming more time than is appropriate.

The key area for discussion in this article concerns the way in which money flows through the dispute resolution system to resolve disputes. That money can flow from a number of different directions. It can come from the client instructing the lawyer or it can come from transferred payments in the course of settlement or adjudication by a court, from the payer to the individual bringing or defending the claim. Here, we come across a major difference between the approach adopted in the USA and that adopted in Britain and the rest of the common law world. Broadly speaking (and there are some substantial exceptions to this) the position in the USA is that clients instruct their own lawyers and, win or lose the case they remain responsible for their lawyers' fees and expenses. The loser contributes little or nothing to those fees. In the common law, and to a lesser extent in civil law jurisdictions, the winner of the case receives some or all of the costs involved in bringing the case.<sup>5</sup>

<sup>2</sup> *Access to Justice: Final Report* (HMSO, 1996).

<sup>3</sup> Penguin, London, 1997.

<sup>4</sup> M. Seneviratne, "Consumer complaints and the legal profession: making self-regulation work?" (2000) 7(1) *International Journal of the Legal Profession* 39.

<sup>5</sup> Definitions:

*Costs* – Lawyers' fees. These may be owed to the client's own lawyer or transferred costs paid to the winner by the loser ("both sides' costs"). The CPR introduces the concept of proportionality plus issue based costs.

*The English Rule* – The loser pays the winner's costs (*c.f.* the American rule: both sides bear their own costs).

*The Indemnity Rule* – English rule costs are paid by the loser to the winner *up to but no more than* the winner would have to pay his own lawyer in any event. If the winner has agreed not to pay his own lawyer *win or lose* then there is a possible breach of the indemnity principle.

*Disbursements* – Outpayments made by a lawyer on behalf of a client for medical reports, court fees, *etc.*

*Contingency Fee* – The winning lawyer takes a piece of the action (damages). The losing client does not pay his own lawyer or the winner. This is a standard approach in personal injury work in the USA. It is available in certain types of work in England and Wales (non *litigation* cases).

*Conditional Fee Agreement (CFA)* – Available in the UK for all cases except crime and family. The losing client does not pay his own lawyer but pays the winner's costs. The lawyer's reward is *not* a share in the damages but an increase (mark up) on normal fees: the success fee.

*Legal Expense Insurance (LEI)* – Available as a stand alone product or a bolt on to other insurance products such as a motor policy. A yearly premium covers the insured against legal costs (own lawyer and the other side).

*After the Event Insurance (AEI)* – This is available to cover legal costs *after* the event (an accident, a breach of contract, *etc.*). It is bought after the event. It covers both CFA cases and "ordinary litigation" where "both sides' costs" must be covered. (Lawyer charges the client *even* if the client loses).

Current cost arrangements are extraordinarily arcane and difficult.<sup>6</sup> Essentially, the cost rule was created in the early Middle Ages, which had its own litigation crisis. This crisis was initiated by an increase in the number of writs issued in the Queen's Bench Division. A large number of those writs involved disputes over land and were an indication of the struggle that was emerging in the feudal system between smaller landowners and tenants and their landowners. In a remarkable analogy with the current complaints of a "litigation crisis" the allegation was made that there was too much litigation around and that it should be restrained. The method chosen was to create a disincentive to litigation by forcing the loser to pay a contribution towards the other side's costs. It was intended in this way to prevent unmeritorious cases being brought and this has been a constant theme since. The Statute of Gloucester 1275,<sup>7</sup> which started the process of introducing transferred costs, also allowed the winner to ask the Court Officer to inflict corporal punishment on the loser in the event that the bill could not be paid. It is interesting to note that this particular rule fell into disuse and was finally laid to rest in the eighteenth century by a somewhat typical pragmatic English approach. Holt C.J., when asked to order punishment of a defendant who had failed to pay costs, said he had never heard of such a thing and his officer did not have a warrant to do it and, therefore, it would not happen.

It is fundamental to the English rule that the loser pays the costs and expenses (disbursements) to which the winner has been put, and if the winner has not been put to any costs then there is nothing to be paid. This is called the indemnity principle<sup>8</sup> and it has haunted the attempts to reform this area of the law. This principle has had a limpet-like attachment to our jurisprudence based on something much more powerful than theory – prejudice. From the early middle ages, it was clear that the courts disliked the idea of lawyers acting speculatively on behalf of clients. Clearly, the same motivations and the same class basis of prejudice is at work in the idea of creating transferred costs – vested interests do not want individuals to have access to the courts. The two principles that were developed by the common law to deal with this so-called "problem" were champerty (sharing in the spoils of the case) and maintenance (supporting litigation brought by another). These principles conflict with the basic economic function of lawyers, as service professionals, which is that it is in lawyers' economic interests to pursue cases which are likely to succeed. While lawyers might aspire to sitting in their offices waiting for work, in reality this has never been the pattern.<sup>9</sup> The development of the solicitors' profession arose out of the concept of lawyers soliciting for business at the Royal Courts, that is, assisting individuals who had cases and needed more help in than that provided by the advocates of the Bar.

A direct comparison with the United States of America can be drawn. The developing legal profession took from England large elements of the common law system but, in key ways, rejected elements in favour of a constitutionally based

*Footnote continued from previous page*

*Recoverability* – Arrangements under the Access to Justice Act allow for the winner's success fee in a CFA and the AEI premium (supporting a CFA or "ordinary litigation") to be recovered from the loser.

*Litigation* – Court based proceedings as opposed to cases that have not yet been issued in a court or are heard in tribunals.

<sup>6</sup> Those readers who are not of a nervous disposition might read A. Walters & J. Peysner "Event Triggering Financing of Civil Claims: Lawyers, Insurers and the Common Law" (1999) 8(1) Nott. L.J. 1.

<sup>7</sup> 6 Edw. 1, c.1

<sup>8</sup> J. Peysner "A revolution by degrees: from costs to financing and the end of the indemnity principle"(2001) 1 Web JCLI. Currently the Rules Committee is considering its limitation or abolition.

<sup>9</sup> Peysner (2000), *op. cit.*

representative democracy. America is pre-eminently a law-based culture and while we in the UK may have our legal soap operas, these are very recent phenomena compared with the central importance of the law and lawyers in US popular culture, for example *Perry Mason*, *LA Law* and *Ally McBeal*. This represents a very different model to the English system, a model based on the right of the citizen to approach the court and have access to it. The US system looks at the problem of financing litigation and answers the question in an entirely different way. *In general, as indicated above, the loser does not have to pay a substantial amount towards the winner's costs and individuals, in appropriate cases, can access lawyers who are able to do the work on a contingency fee basis – in other words a cut of the damages recovered, directly in contravention of the champerty principle.* While this contingency fee system is not universally used in the US, particularly in commercial work, it is fundamental in key areas such as personal injury. It reflects, in part, a common US approach encouraging individuals and corporations to bring actions on their own behalf which are also on behalf of the wider community<sup>10</sup>. This is seen, for example, in the use of private attorney generals in anti-trust jurisprudence. There are companies who bring cases against competitors alleging anti-competitive practices and recover not only damages and declaratory remedies, but also additional or punitive damages (double or treble damages) as an additional punishment to the wrongdoer and an incentive to bring the case. This relates to the central idea of American democracy, which, although often honoured more in the breach, is to disaggregate and reduce the amount of Government control, and retain to individuals as much initiative as possible.<sup>11</sup>

It might seem that the system in Britain is a workable and certainly long lasting, if rather eccentric, system. What has caused it to come under such comprehensive attack? The reason is the growth to maturity, and decline, of Legal Aid. The problem about the litigation cost system outlined above is the price of the entry ticket. Only the wealthy and corporate can afford to use lawyers. As such since 1945 there has been cross party support for a system to support individuals to obtain access to the civil courts: the Legal Aid system.<sup>12</sup>

### *The British Approach Comes Under Attack*

The Legal Aid system became a victim of its own success. The Treasury saw the need to limit, cap, or at least curb the increasing supply of legally aided services interacting with a rising demand for Legal Aid.<sup>13</sup> Even at the height of Thatcherism it was never suggested that the Civil Legal Aid system should be abolished in its entirety leaving the provision of such work entirely to market forces. Whether this was out of tender regard for Mrs. Thatcher's former colleagues at the Bar or some deeper recognition of the need for citizens to have the ability to access the courts was never completely explained. During this period a number of ideas were floated, including that of a "no fault"

<sup>10</sup> It also reflects an approach in the USA that does not disdain the cash nexus in the relationship between lawyer and client. While this may have its downside it does avoid such cant as the idea that a barrister, as "gentleman", does not contract for services with a solicitor but has an arrangement based on honour.

<sup>11</sup> Compare, for example, bail bondsmen and bounty hunters. Whilst in our country the court and police operate a bail system and enforce that bail system, in the USA bail is often put up by a third party, the bail bondsman, who will lose that money if the alleged malefactor fails to attend court and thus has an incentive to employ a bounty hunter to track down and recover the malefactor and deliver him to court. The recent arrangements between Michael Douglas and Catherine Zeta Jones the Hollywood actors are also instructive. As part of their pre-nuptial arrangements they entered into a contingency fee arrangement. For every year the couple stay together Ms. Jones accrues an additional \$1 million. Clearly, there is a strong incentive here for Ms. Jones to remain with Mr. Douglas for as long as possible. There is also a "filing" clause whereby the damages "roll up" if Mr. Douglas strays and Ms. Jones decides to depart.

<sup>12</sup> See M. Spencer "The Common Law Legacy and Access to Justice: Contingency Fees and the Birth of Civil Legal Aid" (2000) 9(2) Nott.L.J. 32.

<sup>13</sup> G. Bevan, "Has there been a Supplier-Induced Demand for Legal Aid" (1996) 15 C.J.Q. 98.

scheme, in various areas of provision (see below) and the contingency Legal Aid Fund promoted by the Bar.<sup>14</sup>

While the Government grappled with how to deal with the problem of the public finance in Legal Aid, other waves of change were sweeping across the legal scene including globalisation and its concomitant reduction in state subsidies, the rise of branding, and the developing commodification of legal work.<sup>15</sup> While this article will not undertake an in-depth examination of the question of market economics in the legal field, it is clear that the legal market was slowly becoming more responsive to pricing mechanisms and the potential of new ways of financing. The question then became how could the State withdraw from supporting litigation and yet still allow access to the courts?

### THE DEVELOPMENT OF CONDITIONAL FEES

The conditional fee emerged from this background. The conditional fee is a meeting of two ideas: The concept that a lawyer shares risk with a client and that insurance (*i.e.* pooling of risk) can be used to cope with the transferred cost problem. While there had been substantial experience in Scotland of a speculative scheme and, indeed, contingency fees were used in other jurisdictions and in non-litigation areas of English practice, they had always foundered on the problem of how to deal with the costs of an unsuccessful case. It is no comfort to a citizen that their own lawyer will not bankrupt them when the other side's lawyer will. The method adopted was to introduce a reward for lawyers taking risks – namely a success fee over and above lawyers' normal costs if the case was won. This represented a reward to the lawyer for taking the risk of losing cases. The problem of transferred costs was addressed by looking back to an old way of dealing with legal costs and bringing it up-to-date. For many years Europe has had legal expense insurance and this had had some impact in Britain.<sup>16</sup> The difficulty was that English consumers were extremely reluctant to buy insurance to cover future contingent risks. The reasons for this are complex and may be because many people thought, often wrongly, that in the event of difficulty they would be covered by the Legal Aid scheme. In any event, most legal expenses insurance was bought almost "accidentally" as an add-on to a motor insurance policy or a household policy. The premiums for these policies were very low, reflecting limited marketing, lack of take-up and lack of claims. If legal expense insurance ("LEI") was not to be the solution to the potential withdrawal of Legal Aid then what was the answer? The resolution to the problem was the creation of an apparently bizarre product: after-the-event insurance ("AEI"). When this proposed product was shopped around Lloyds, it was greeted with a considerable amount of scepticism. How could you insure against an event that had already happened? Of course, the insurable event is losing the case, and that has not yet happened. Once underwriters grasped this there was no difficulty in seeing the theoretical possibility of AEI, but there was, and there remains, a difficulty in two areas. First, who should carry out the risk assessment of

<sup>14</sup> This suggested a fund which would be set up by the Government with a grant and which would then top-slice the damages of cases that the fund supported. All winning cases would, therefore, support the future losing cases. The Bar claimed that they had actuaries who had analysed the figures of such a scheme and ascertained that not only would the initial grant allow the scheme to function, but that it would become self-financing after five years and the Government would get its money back. It is of note that the figures were never exposed to public scrutiny and while the idea had considerable attraction to the Lord Chancellor he was not convinced of the scheme's practicality.

<sup>15</sup> See "Introduction" in J. Peysner (ed.) *Civil Litigation Handbook* (Law Society, London, 2001, forthcoming).

<sup>16</sup> A. Gray and N. Rickman, "The Role of Legal Expenses Insurance in Securing Access to the Market for Legal Services" in A. A. S. Zuckerman and R. Cranston, *Reform of Civil Procedure* (Clarendon Press, Oxford, 1995).

the case (insurer or lawyer) and indeed is risk assessment possible?<sup>17</sup> Second, what is the correct level of premium, bearing in mind the lack of history of setting premiums in this area and the lack of clarity about how much legal costs and disbursements would be generated by a given number of losing cases? When one compares the fact that marine insurance has been around from well before 1800BC<sup>18</sup> this new product might well be written on the basis of premiums that were too low (to attract business) which in due course would cause difficulty; or too high, which would limit the emerging market.<sup>19</sup>

When conditional fees were first introduced under the Courts and Legal Services Act 1990 they generated little activity because, despite the fact that AEI was slowly emerging and the risks of losing the case were limited and more predictable, there was still an alternative available: Legal Aid. As such the Government took the view that the only way of kick-starting the conditional fee market, and achieving its aim of limiting the growth of Legal Aid expenditure, was to begin the process of curtailing Legal Aid and abolishing it in stages. The first abridgment of Legal Aid was in the area of personal injury and this caused some bemusement. It was quite clear that most personal injury cases were successful and as such cost the Legal Aid Fund very little. At the conclusion of the case the solicitor accounted to the Legal Aid Board (now the Legal Services Commission) for all the costs that had been recovered from the loser (often an insurance company). When the solicitor's fees are taken out of those costs, there is usually either a small surplus or a small payment. In any event, the money tends to go round in a circle and, in effect, the Legal Aid Board acts as a bank for personal injury work. Indeed, some years ago Cyril Glasser, the solicitor and former special consultant to the Legal Aid Advisory Committee, suggested to the government that the whole complicated administrative scheme of Legal Aid for personal injury could be replaced by a straight loan from the Government in return for an administrative charge paid by the solicitor.<sup>20</sup> In reality, of course, the reason why the "cheapest" part of Legal Aid was the first to go was that the benefits it had to the Government were also the benefits it would have to an emerging market for AEI: the fact that most cases succeed and the loser pays costs and damages.

The final step in the reform programme was to resolve the problem of the success fee and insurance premium. For many people conditional fees represented a very substantial way of accessing justice. However, there was a downside. First, the insurance premium and the solicitors' mark-up or success fee would have to be paid by the successful client.<sup>21</sup> The impact on some cases, *e.g.* speculative cases involving contract disputes by companies, was minimal. However, in the personal injury field, bearing in mind the current damages doctrine, by paying out a success fee and the insurance premium, the claimant would be *bound* to end up with less money than the court thought was reasonable to represent the tort principle of *restitutio in integrum* (in other words putting the successful party back in the position they should have been in prior to the damage).

<sup>17</sup> W. Goldstein and R. Hogarth, *Research on judgement and decision making* (Cambridge University Press, 1997).

<sup>18</sup> The Code of Hammurabi promulgated then devoted 282 clauses to the topic under the title of "bottomry". (P. Bernstein, *Against the Gods. The Remarkable Story of Risk* (John Wiley, Chichester, 1996), at page 92.

<sup>19</sup> There are rumours that these premiums are too low but as the figures are commercially confidential it is difficult to know. This demonstrates one issue when legal provision is "marketised": data on volumes of cases and, to some extent cost, which was collected and published by the Legal Services Commission tends to disappear.

<sup>20</sup> His committee, the Financial Provisions Working Party, found that an approximate charge of £10 would cover the cost of handling the net cost of legal aid in personal injury cases without the need to charge contributions. (see 27<sup>th</sup> Legal Aid Annual Reports 1996/7). Power was made available in the subsequent Legal Aid Act but the scheme did not proceed.

<sup>21</sup> This can be compared to the legal aid position after costs are paid by the loser. Any shortfall, covered by the statutory charge, was often absorbed by the assisted person's solicitor.

It was clear to lobbying bodies such as the Action for Victims of Medical Accidents (AVMA) and the Association of Personal Injury Lawyers (APIL) that a solution was available in an extension of the cost principle to include the success fee and insurance as, in effect, recoverable expenses. This issue was raised in consultation and although the then Minister was careful not to deal with this issue during the debate on the Access to Justice Bill the resulting scheme was absolutely clear in principle: both the success fee and the insurance premium were recoverable.

It is correct to say that although the principle of these arrangements was simply stated, the actual administrative and regulatory arrangements are highly complex. The author was involved in two large consultation exercises on the recovery of these items and the process of creating collective conditional fee agreements whereby individuals would be introduced to solicitors by membership organisations such as trade unions or motoring clubs. The resulting scheme is agonisingly difficult and contains a central kernel of what can only be viewed as nonsense: the fact the conditional fee agreement has to be fully and comprehensibly explained to a client<sup>22</sup> who (insured under a conditional fee agreement) has no real interest in it except in a theoretical way.<sup>23</sup> This difficulty of the conditional fee arrangements will be returned to later. Thus, the arrangements that have rolled out in 2000 represent a withdrawal of the Legal Aid scheme for most cases<sup>24</sup> and a replacement by a conditional fee scheme.<sup>25</sup>

#### *CFAs and Commercial Litigation*

The area in which there has been little progress has been that of commercial litigation. The Access to Justice Act 1999 allows for a range of risk based cost arrangements. The term conditional fee now covers types of arrangement that are very different from the original idea of a conditional fee. For example, there is no requirement that they need to include a success fee element. This allows a return to the types of arrangements that were possible at common law for a short period following the *Thai Trading* case.<sup>26</sup> Thus solicitors can charge their normal rate or less than their normal hourly rate (a discount) if they are unsuccessful. The question of course is, what is success? This can be defined in sophisticated ways. For example, a defendant company may instruct its lawyers that they will be prepared to defend a case unless it is possible to obtain a settlement whereby they pay the claimant £1 m or less. If the solicitors are able to negotiate a settlement at £750,000 or less then they will be entitled to a supplement of 25% on their hourly rates. If the only settlement available is at more than £1 m then their hourly rates would be discounted by 25%. It is possible to have a matrix of arrangements whereby quantum aims and objectives are linked to time aims and objectives; in other words settlement in a specific period of time. Why, apparently, have there been so few of these agreements? It is clear from the Eversheds Survey<sup>27</sup> that there is considerable interest in reward related agreements in commercial work and clients are talking to their lawyers about them. However, they are not instructing solicitors on this basis. The reasons for this may be quite complicated:

<sup>22</sup> The arrangements are less complex for referrals from membership organisations.

<sup>23</sup> See discussion concerning the problem of the successful client in Peysner (2000), *op. cit.*

<sup>24</sup> Except cases concerning children or patients and cases dealing with family or crime.

<sup>25</sup> The model of risk assessment and the interest of lawyers in risk assessment has also revitalised risk managed work in areas such as employment cases in tribunals which were not historically covered by the limitations on litigation and in which costs are not normally transferred.

<sup>26</sup> A. Walters and J. Peysner, *op. cit.*

<sup>27</sup> Eversheds Solicitors *Access to Justice Survey* (2000) based on a sample of directors and managers of legal departments of UK private companies and public sector bodies. 24% of respondents had discussed conditional fees with their lawyers (29% in the private sector, 12% in the public sector). 48% of respondents indicated that they would be prepared to pay a reward if a case was won and expect to pay less if the case was lost.

(1) There are a range of firms (the blue chip law firms) that are likely to be reluctant to accept instructions on this basis. After all, if one can be paid £350 an hour why would one wish to compromise! It may be that the same applies from the point of view of the corporate client, particularly for the bigger PLCs. They may take the view that they can adequately incentivise their solicitors by paying them high rates and that that is sufficient.

(2) Some firms may overemphasise this type of approach to attract this work, or any work.

(3) Some firms may be risk averse and disguise the amount of work they do on this basis so as not to warn other clients.

We are at the very early days in these arrangements and it is difficult to know how things will turn out. The best comparison is with the United States. Whilst there is a very vigorous risk based litigation system in personal injuries and in some other areas, it has not yet managed to break through into mainstream commercial litigation.<sup>28</sup>

## THE CLAIMS MANAGEMENT COMPANIES

If the Access to Justice Act 1999 was meant to create a simplified and common system based on conditional fees with clients' first port of call being their solicitor, this hope has been thrown into confusion by the rise of the claims management companies. The unexpected arrival of these companies is a reflection of the fact that once the market is opened up by the removal of restrictions, innovation and search for profit will produce unexpected results.

Claims management companies offer a number of models but essentially they operate in a similar way. They are non-lawyers, normally incorporated, who solicit for claims, usually through mass marketing and the use of franchisees, and farm out those claims to solicitors on a panel who then take the work forward. For this reason they are called in the USA "claims farms" and in those jurisdictions they are normally unlawful because of the proprietary right of the local Bar Associations to act as lawyers and to exclude competitors.<sup>29</sup> The claims farms in the US have had limited impact, partly because of pressure from the local Bars, and also because of the existence of contingency fees which allow relatively easy access to lawyers. However, this may not be the case for long, partly because, at the state level, judges are beginning to be more amenable to an argument that lawyers preventing competition is in itself anti-competitive and unlawful and, secondly, that the relatively small units within which contingency fee lawyers operate in the personal injury world in America may benefit from a central agency providing them with referrals.<sup>30</sup>

The claims management companies have made a dramatic impact on the world of personal injury and they are likely to move further into employment work. No doubt their brands (the major player claims that 90% of the population has seen one of their advertisements) are capable of being levered into new marketing opportunities whether

<sup>28</sup> Stuart Benson, law firm management consultant, has advised the author that Motorola has encouraged law firms by instructing them to pursue settlement at a certain level and, if the case does not settle, the litigation will be given to another firm.

<sup>29</sup> As noted in the *Lord Chancellor's Report into Non Qualified Claims Assessors and Employment Advisers* ("The Blackwell Committee").

<sup>30</sup> In the USA the referral system is more sophisticated because lawyers are allowed to share the contingency split and, therefore, are motivated to pass on cases which they cannot do to those that can in return for a kick-back; and to obtain from lawyers work which they can do in return for a share in the proceeds. A basic arrangement for inter-firm referral is lawful in the UK under current practice rules – which in turn are likely to be relaxed – but because there is no contingency split allowed then the reward available to oil the wheels is limited.

it is in conveyancing or other provisions of legal or related services. The capital accumulation available through this model presents an enormous challenge to the role of an independent legal profession where capital units are much smaller. Only by effective co-operation or a series of take-overs will claimant personal injury solicitors be able to compete. The danger of this development is that the claims management companies whose financial arrangements are extremely opaque<sup>31</sup> – partly because of the need to get round maintenance and champerty rules – exercise an extraordinary degree of centralised control over their panel of solicitors. For example, it is the subject of speculation as to how claims management companies earn the money, but it appears that this is done from a mixture of underwriting commissions and commissions on training and marketing.

What has this got to do with risk-managed litigation exemplified by conditional fees? On the face of it the claims management companies appear merely to introduce cases to lawyers who then make their own arrangements with clients. However, under the centralised control of the company those arrangements are often on a “usual costs” basis, in other words not on a conditional fee basis. The costs of both sides, the claimant’s solicitor and the defendant’s are guaranteed by “both sides insurance”. The insurance is paid for by the client, although the money is advanced to the client via a financing house or, conceivably, by way of a magic bullet.<sup>32</sup> Thus, it appears that all risk has disappeared but, of course, risk cannot be removed. There are a number of ways in which risk is retained. Firstly, the insurance premium offers a high premium, currently of £1,500 approximately. While this premium is not fantastically excessive compared with other “both sides’ costs” insurance it has met with resistance (bearing in mind that no success fee is recoverable). Who picks up any unpaid and unrecoverable premium? While Claims Direct offer their clients a guaranteed “no win, no fee” arrangement, what happens to the insurance premium if the case is lost? What happens to the lawyers’ costs? Part of the answer lies in efficient risk assessment and, as illustrated above, the benign background of personal injury law to the claimants’ prospects. With good assessment and management very few cases taken on should not be successful. If the case is lost, then insurance is available to cover any shortfall. However, it is believed that out of the £1,500 the true risk cover is very low indeed (the balance being absorbed in commissions, marketing expenses and profit) and as such it seems that the product could not support a heavy number of claims (in this it is similar, of course, to all other forms of insurance). There must be an incentive within this system for panel solicitors to be reticent about claiming on the insurance for fear that they will be thrown off the panel and lose what maybe a very important part of their caseloads. While no doubt solicitors are making some claims on the policies there is a danger that risk is retained by the solicitor, or passed on to the client, by under-settlement of claims. It should be specifically noted that the Claims Direct arrangements lapse if proceedings are issued (presumably because of maintenance and champerty restrictions) and so there is a built in propensity not to issue proceedings.<sup>33</sup> The horrendously complicated and opaque nature of claims management company arrangements suggest that they might be more than happy to go back to the way in which many of them operated, *i.e.* by taking a contingency fee cut out of clients’ damages.

<sup>31</sup> The original market leader Claims Direct suffered from a media attack on its arrangements and, at the time of writing, has suffered a catastrophic decline in the price of its shares.

<sup>32</sup> In this arrangement no premium is paid at the start of the case. If the case is successful it is recovered or if unsuccessful paid out of the proceeds of the policy.

<sup>33</sup> This in itself is not wholly wrong. The whole trend of the Woolf Reforms and the creation of protocols is to discourage litigation except as a last resort.

While the market leader has had a tremendous effect and has attracted a deal of controversy, the situation is now moving rapidly. The creation of the Blackwell Committee<sup>34</sup> was motivated by industry concern, echoed in the Government, that claims assessors, *i.e.* totally non-qualified people (soliciting for and negotiating claims but not allowed to litigate them) were taking large contingency fee cuts from clients and selling them out by under-settlement. In fact, the Committee, of which the author was a member, indicated in the report that there was little or no evidence of a great deal of activity by such unqualified people. What was discovered was the unexpected rise of the claims management companies. While there have been criticisms of their methods and approach there has equally been praise. Clients in particular like the idea that they are visited by franchisees in their own homes and do not have too much to do with a solicitor. Despite the evidence of successive Law Society surveys, the logic of market success suggests that there is still diffidence from amongst the population about approaching a solicitors' firm and fear of the cost, whether, post Access to Justice Act, this fear is justified or not.<sup>35</sup>

The major difficulty about claims management companies is the fact that they are completely unregulated except when incorporated by company law. If they continue to gain greater and greater power over solicitors, in themselves a heavily regulated profession, the Government must readdress the issue that was put before them by the Blackwell Committee and consider regulation. The author understands that this will be difficult as the market is new, developing and dominated by one or two players. This makes both Government regulation and self-regulation very difficult to move forward. However, it is unlikely that this position will be left for long, partly because of lawyer pressure, partly because of consumer problems from time to time, but mostly because of the public face of the claims management companies. They are, quite literally, "in your face" and anyone who spends any time at all watching day time television will see very large numbers of these advertisements. Claims Direct, Tiger Claims, One Claim: the advertisements range from the subtle to the totally crass. In one extraordinary offering (now apparently scrapped) a glamorous young woman looks longingly at a sports car and says: "I've always wanted one of those and now I have had an accident I can have one". A soothing voice then introduces the slogan: "Every cloud has a silver lining". Such an advertisement is horrendous and plays entirely into the hands of those commentators who allege that civilisation as we know it will collapse because of the "litigation crisis". They appeal directly to a Gordon Gekko type attitude that "greed is good" which is entirely inappropriate to personal injury work. The reality is that damages in these areas are compensatory damages and simply aimed at putting clients back in the position they would have been in if they had not suffered the wrong. Some advertisements suggest that litigation is a game and one simply bends down in the street and picks up a £10 note. They are fundamentally misconceived and do nobody any credit. However, as indicated above, other than the Advertising Standards Association, who do not police bad taste, the industry is unregulated and, therefore there is a substantial risk that new entrants will damage the standing of existing players and, by implication, affect the reputation of solicitors.

All of these problems have to be set against the very obvious advantage to the consumer of ready access, via the media and call centres, to lawyers who will take on their cases, and this is an important prize that should not be neglected – particularly as Government withdraws funding from this area.

<sup>34</sup> See n. 29 above.

<sup>35</sup> H. Genn, *Paths to Justice: what people do and think about going to law* (Hart, Oxford, 1999) at p. 236.

## THE ADVANTAGES AND DISADVANTAGES OF RISK-BASED LITIGATION

*The Advantages*

The advantages of risk-based litigation now need to be considered against the “normal” way of funding litigation by hourly paid costs recoverable in any event from the client. These advantages can be summarised in the following way. First, the lawyer is on the same side as the client – if the client wins, the lawyer wins. Also, the lawyer is motivated. Without treading into areas of morals, it is abundantly clear that whilst a profession may have aspects which are different from a business – such as independent self-regulation and ethical standards shared by its members incorporating a code of discipline – the underlying core of a profession organised in business units must be to be businesslike.<sup>36</sup> It is trite to comment that if a profession’s income falls then it will become unviable and in the process of becoming unviable strange things will happen. For example, during the very rapid decline of domestic conveyancing in the United Kingdom in the late 1980s, caused by the introduction of competition from banks and estate agents and the collapse of the housing market, income from domestic conveyancing fell dramatically. Some firms quietly went out of business; in other firms partners became involved in fraudulent schemes of re-mortgaging or kept their income up by dipping into the client account. The current demise of the Solicitors’ Indemnity Fund can be directly traced to difficulties that began to emerge in this market.

By transferring risk from the client to the lawyer the system offers comfort to the funder, whether the client or the taxpayer. While the extent of subsidy to clients and, therefore, to lawyers from the state is a political issue and outside the scope of this article, it is important to note that in an era of globalisation one key feature of all elected or electable parties is a wish to limit and prescribe the extent of State support. Privatisation in a more or less robust form seems to be the way for the future and, therefore, it seems not unreasonable to produce a system that works with the grain of politics, rather than against it. The alterations to encourage lawyers to be paid by results are undoubtedly economically efficient. There is a long tradition of lawyers overcharging. Indeed, the concept of a professional rent, *i.e.* the ability to earn above the market rate for services, has always been associated with the problem of monopoly by service professionals requiring, as a condition of their professional status, methods of disciplining the potential exploitation of clients.<sup>37</sup> Attempts to limit overcharging have an equally long history. In his spare time from uniting Christendom and running the then known world, the Holy Roman Emperor, Charles V, took an interest in law reform.<sup>38</sup> One of his attempts to limit overcharging was to tinker with the rule whereby barristers were paid to prepare court pleadings by the page. His reform commission introduced a rule that required them to produce not less than four words per line and not less than 14 lines per page. As the figure below shows, counsel in these pleadings

<sup>36</sup> How far professionalism is antipathetical to profit and business is discussed in R. Abel, “The Politics of Professionalism: The Transformation of English Lawyers at the End of the Twentieth Century” 2(2) *Legal Ethics*, and in R. Posner, *Overcoming Law* (Harvard University Press, Cambridge Mass., 1998).

<sup>37</sup> In England and Wales this is accomplished in two ways. Firstly, by court control through assessment of recoverable costs and, secondly, by the right of a client to obtain a certificate from the Law Society as to, whether or not a solicitor’s costs have been reasonable. Whilst both of these controls are relatively rarely applied they do introduce a backstop to the question of costs.

<sup>38</sup> The author is grateful to Professor Dr. C.H. van Rhee of the Department of Metajuridica at the University of Maastricht in the Netherlands for sight of his PhD thesis “Litigation and Legislation: Civil Procedure at First Instance in the Great Council for the Netherlands in Malines” (1522–1559) [archives générales du royaume et archives de l’État dans les Provinces Studia 66] Brussels 1997 which deals with Charles V’s attempts to procedural reform. For followers of Woolf it is instructive to note that the Emperor’s commission took the view that a particular problem was the ability of the litigants to delay and obfuscate proceedings and this should be curbed.



meanz Heinz”; “Guinness is good for you”; “Go to work on an egg”, and so on. More recently, in an attempt by clients to cut costs, more agencies are paid by the hour so their incentives are reversed and they want to do as much work as possible.<sup>41</sup>

Economic efficiency is broader than simply the payment by client to lawyer. The downward pressure on a lawyer’s costs and the need for them to be more effective in spotting winning cases and culling cases that are potentially unsuccessful encourages them to make their businesses more effective. It is clear that viable personal injury practices, for example, will need to invest in much higher levels of information technology and better settlement systems in order to be able to sustain their operations in an era of this litigation. This is because the transfer of risk also transfers the capital requirements from the client (or the Legal Aid fund) to the law firm. For many areas of work that were formerly the province of Legal Aid, or private client funding, this imposes a new requirement for working capital on the business. Formerly, this would be dealt with either by payments on account or interim payments. Again, this is a pressure to make businesses more professional. It is quite clear from work by Zuckerman that systems of payments whereby the price per unit is reduced, for example in the German fixed cost litigation system,<sup>42</sup> do not inevitably lead to a failure of the market. For example, German litigators are able to function profitably within a market that encourages a high turnover and low overheads, rather than low turnover and high cost per visit.

#### *Getting the Balance Right*

What can be set in the balance against the advantages of risk based litigation? A number of issues have been raised as potential disadvantages of which three will be examined: the question of settlement; the question of ethics and under-settlement and the so-called “litigation crisis”.

#### *The Encouragement of Settlement*

Should dispute resolution be best organised through a State sponsored litigation system using the courts and leading to a trial? Some commentators<sup>43</sup> have suggested that encouragement to settlement, including the increase in ADR, is dangerous as it undermines the common law system of precedent. To understand this, it is necessary to take a view as to whether disputes were historically resolved in Britain by litigation or by settlement. Less than 2% of cases actually went to trial prior to the introduction of the Civil Procedure Rules in 1999. Of the great majority of disputes very few cases actually were issued in the court. It is quite apparent from the Access to Justice Inquiry<sup>44</sup> that a good deal of these cases that were filed in the court were issued only in order to encourage or force a settlement. When examining the implications of a potential rise in demand for subsidised court systems, against a need to keep them under control, Woolf took the view that the way to square the circle was to introduce a system of pre-action protocols, with accompanying cost implications, which obliged people to exchange information prior to issuing proceedings. The theme of these arrangements was that the problem of late settlement (*i.e.* close to or at trial) was

<sup>41</sup> *C.f.* “Dentists ruin teeth for profit”, *The Observer*, 16 April 2000: “. . . studies show that dentists replace fillings far more than necessary, and that if they suffer a drop in income they will replace their patients’ fillings more frequently”. Globalisation is also relevant. By creating international commodities the task is to differentiate one from another so agencies produce bizarre and surrealistic advertisements to differentiate their client’s product from the indistinguishable mass of competitors.

<sup>42</sup> A. Zuckerman “Lord Woolf’s Access to Justice: Plus ça change . . .” (1996) 59 M.L.R. 773

<sup>43</sup> Fiss, “Against Settlement” 93(6) *Yale Law Review* 1073.

<sup>44</sup> *Op. cit.*

caused by a failure of the parties to understand fully the case that they faced, and indeed their own case, until late on in proceedings. The issue of precedents suggests that the common law requires the sacrifice of individuals to allow their case to go up through the system in order to create precedents that would benefit the whole system (by allowing the common law to address novel issues and revitalise itself) even if the benefit to the parties is often incidental. An example is *White v. White*,<sup>45</sup> a family law case that has established a precedent on the equal division of assets following divorce. However, this was at the expense of some £500,000 of legal costs, a factor that attracted adverse judicial comment in the House of Lords. The implication of this case is that the precedent system may do good to the generality but can be quite disastrous for individuals.<sup>46</sup> It is also clear that in many cases precedents were established not because the parties had any particular interest in the outcome of the case, but because the costs were so huge that the case went to the Appeal Court solely, or mainly, in an attempt to avoid paying costs. Clearly, if the common law were to be weakened by any reduction in precedents then measures should be taken. Perhaps, in suitable cases, even outside the current provisions of legal aid, the State should indemnify both sides against their costs in order to allow the burden of precedent setting to be shared by the community as a whole.

#### *Ethics and Under-Settlement*

The next question is the issue of ethics and under-settlement. This argument proceeds on the assumption that if a lawyer will only be paid if the lawyer wins then there is a strong incentive to settle a case for less than it is worth rather than risk proceeding and not getting paid at all. This is a highly complex issue and there is no empirical evidence as to the way in which solicitors are operating under the conditional fee regime as compared with their previous behaviour. The argument has to be conducted through proxies, including the way in which US lawyers operate. The literature there is extensive but by no means clear. A number of issues need to be addressed.

First, whether, and to what extent, under-settlement actually is a problem. If you were to ask an individual client whether he would be willing to accept a settlement of £1,000 now or wait for five years (not an unusual period for personal injury claims prior to the introduction of the Fast Track procedure) and get £1,500, then the client, not unnaturally, would be happy to accept the smaller sum. The process of litigation is extraordinarily stressful and clients may well be happy to trade a reduction in that stress for a reduction in quantum. A client who comes into the office asking for compensation for whiplash, or for unfair dismissal, may sometimes be surprised that compensation for smaller cases is more generous than the client would have expected. A reduction in the received damages (whether by way of sharing it with a lawyer or by way of a discount for early settlement) may well be acceptable. Where this analogy breaks down is in the larger cases, particularly cases involving personal injury with continued loss of earnings or nursing care. The way in which damages in the personal injury area are calculated is by a relatively low amount of general damages (in other words the damages for the injury) but to achieve *restitutio in integrum* by catering for each and every need of a client over a long period of time. Take a doubly incontinent claimant with a long expectation of life. Simply by factoring in the additional toilet rolls over, say, a 15-year life then there is already a substantial claim before one considers such issues as nursing care at very high hourly rates.

<sup>45</sup> [2000] 3 W.L.R. 1571

<sup>46</sup> At least in this "big money" case, the parties still had lots of money left.

The next issue is the question as to whether or not it is possible to say that a case has been under-settled. While, as has been indicated above, there will be a range of items of discrete damages which can be quantified, general damages are a moveable feast. In the personal injury area it is instructive to listen to solicitors arguing about the quantum of an injury, despite all the assistance of guides to damages and the multiplier in calculating long-term loss. These are questions of negotiation rather than platonic reality. In other cases, such as discrimination, awards are at large. To demonstrate under-settlement it would be necessary to demonstrate consistently a "correct" level of settlement and this is far from the case.

The final issue is the question as to whether or not a lawyer will be motivated to accept an under-settlement.<sup>47</sup> The risk-bearing lawyer faces a problem, which is common to all lawyers, namely, that the outcome of the case influences their pay. It is not unique to the contingency fee or conditional fee arena. For example, under the Legal Aid arrangements if a case is won then both sides' costs are likely to be much higher than costs obtained directly from the Legal Services Commission. This gives an incentive to move to trial or settle close to trial when there is maximum leverage. It also gives an incentive to under-settle if the defendant is prepared to pay both sides costs rather than let the case go to trial where it may be lost. There is no empirical evidence that this had led to under-settlement. Recent work suggests that lawyers adopt a long view of their relationship with their opponents in the personal injury arena (with whom they will spar frequently) and selling out a client in one case might well produce lower settlement offers (and lower ancillary cost payments) in future cases.<sup>48</sup>

### THE LITIGATION CRISIS

The rise of the claims management companies has fuelled an increasing view that we are moving towards an American style "litigation crisis".<sup>49</sup> The leading polemicists in this area, Simon Jenkins of *The Times* and Frank Furedi, Reader in Sociology at the University of Kent, adopt a similar approach from different political perspectives. They are concerned that the idea of the assertive citizen acting as a knowledgeable consumer enforcing rights, a favourite motif of both the Major and Blair Governments, is one of the engines turning our system into what Jenkins refers to as the "victim-based society". In other words, whinging and complaining have been transformed from a national characteristic into a source of income for "complaint professionals" such as litigation lawyers.

At a cultural level there are clearly issues here and it is quite apparent that society is now far more involved with the tropes of a litigation-based system. This leeches out into all sorts of areas that seem highly inappropriate. Take the author's local taxi company. Living five minutes away from the railway station and frequently using the trains, I constantly have to go through a dialogue which involves me asking the controller to send a taxi driver to come about twenty minutes before the train leaves, which I have decided is a reasonable period of time. Whereupon the controller always says: "Do you know our company's policy?" Confessing ignorance, I am informed:

<sup>47</sup> Discussed in J. Shapland *et al*, *Affording Civil Justice* Law Society, London, 1998; P. Pleasance, *Report of the Case Profiling Study. Personal Injury Litigation in Practice* (London, Legal Aid Research Board Unit, 1998)

<sup>48</sup> R. Dinwall *et al*, "Firm Handling: the litigation strategies of defence lawyers in personal injury cases" (2000) 20(1) *Legal Studies*.

<sup>49</sup> The author is contributing an essay in a book on the so-called "Compensation Crisis" to be published by Hodder and Stoughton in 2001.

“well, unless you leave three quarters of an hour we won't take any responsibility if you miss your train”. I have attempted to debate with the taxi controllers on issues of remoteness, foreseeability and the extent of duty in this area but they are immovable.

### *Is Litigation Increasing?*

The reality is that there is very little evidence about the true amount of litigation and whether it is going up or down. The judicial statistics are unhelpful. They show a recent reduction in the issuing of proceedings but, of course, under the influence of the protocols this would be inevitable. It is likely that there will be supply led increase in disputes because of the influence of claims management companies in the area of personal injury and spreading into that of employment. These will be matched by greater activity by the Community Legal Service, Equal Opportunities Commission, etc. The question then is, what is so wrong with this? If you have a rights based society then remedies should follow. There seems little point in shifting from collectivised rights to individual rights (as both Labour and Conservative parties proclaim) and then not allowing people to exercise those rights. There is still a considerable inertia amongst the population that is reflected in “lumping” problems rather than disputing them.<sup>50</sup> For example, there is evidence that the cost of litigation is not the major spur in preventing people from going to court. People have better things to do with their time. It is necessary to examine in some detail, and far beyond the confines of this paper, the way in which the tort system, or any other method of individual based litigation, can influence society for good.<sup>51</sup> Certainly in the light of Sir William Macpherson's report into the murder of Stephen Lawrence it would be hard to argue that civil actions brought against the police for misbehaviour should be made more difficult because the police will sort their own house out.

### *Ambulance Chasing*

One central issue in this debate is the question of ambulance chasing. Some of the claims management companies and claims assessors are advertising in such a way that they are susceptible to this charge. However, historically ambulance chasing was an allegation made against those solicitors involved in disaster cases. This was a breed of solicitors which arose during the latter part of the last century dealing with mass actions arising out of the same incident, e.g. Kegworth, the Paris air crash, Lockerbie and a number of others. They are also involved in “creeping disasters” such as the HIV litigation and mass pharmaceutical cases. Whilst the efficacy of their approach (particularly in pharmaceuticals) has been criticised elsewhere, it will be very hard to deny that more restrictions on the right of tort victims to bring claims in disaster scenarios will increase safety.

### *What is the Effect of Limiting Litigation?*

A case study on the way in which the alleged abuses of litigation influences behaviour is the case of *Roe v. The Ministry of Health*.<sup>52</sup> This is a case that took place at the beginning of the development of the National Health Service. The plaintiffs had spinal anaesthesia injections prior to surgery. The procedure went badly wrong, leaving them

<sup>50</sup> Genn, *op. cit.*, looks at this issue and shows that people are prepared to accept minor injuries and minor problems without doing anything about them. Of course, one person's silly and insignificant claim is another's important issue. While parents who are high earners may be able to pay for private education and, therefore, choose schools for their children that suit their purposes, individuals using the state system may instruct lawyers if they have been allocated to a school without the decision being taken fairly.

<sup>51</sup> See P. Cane, *Atiyah's Accidents Compensation and the Law* (Butterworths, London 1999).

<sup>52</sup> [1954] 2 Q.B. 66

paralysed. The cause of the paralysis was unclear and, therefore, the plaintiffs issued proceedings on the grounds of *res ipsa loquitur*, in other words the thing explains itself: one does not go into hospital expecting to come out crippled. Lord Denning, in the majority in the Court of Appeal, found that there was no liability because the plaintiffs failed the foreseeability test. While the danger was well recognised at the time of the trial in 1953 it was not known at the date of the accident in 1947. The immediate result was a cessation of the development of spinal anaesthesia injections for many years as, after the case, the problem was foreseeable. Only more recently has their value been recognised. In the instant case, the patients were left without a remedy. It is clear that this was a policy decision relating to Lord Denning's response to criticism of his earlier decision in *Cassidy v. Ministry of Health*.<sup>53</sup> Here he found for the plaintiff by developing a doctrine of the independent and direct liability of hospitals, and therefore the nationalised NHS. This caused a backlash from the medical establishment who raised concerns about the possibility of US-style litigation causing defensive medicine linked to the prospect of financial pressure on the nascent NHS. Accordingly, he took the opportunity in *Roe* to backtrack and ensure that the plaintiff lost. He was characteristically robust about this *volte face*: "The courts are, I find, always sensitive to criticism. So in the next case *Roe*, we sought to relieve the anxiety of medical men".<sup>54</sup>

What has been the effect of Lord Denning's judgment? Perversely, it both set back clinical development and set a trend that offered doctors a less taxing legal environment.<sup>55</sup> A refusal to find liability on the hospital system meant that there was no pressure to take steps to produce a safer system. While professionalism and a desire to treat patients properly should have produced safe medicine, it is abundantly clear that this was not the case and medical accidents have risen annually. New developments, such as evidence-based medicine, are only now coming in some 50 years after Denning's judgment, partly as a response to an increase in clinical negligence cases. It is very hard indeed not to argue that *Roe* set back the interests of patients by a misconceived notion of protecting doctors.

### *The No Fault Alternative*<sup>56</sup>

If litigation needs to be constrained and if, in an advanced society, we do not wish to leave people injured with no redress, then what other alternatives are available? A "no fault" approach was adopted in New Zealand and led to the introduction of a "no fault" scheme to cover all personal injury cases. The New Zealand scheme suffered from a particular defect which was that the claimant still had to prove causation, *i.e.* that a medical accident had caused the injury complained of, rather than the natural history of the disease. However, there was no requirement to prove negligence either in the area of medical injury, pharmaceutical injury or road injury. The difficulty that has emerged is that such a scheme is extremely vulnerable to the pressure on central government budgets. In the New Zealand case an incoming administration slashed the scheme's expenditure. As the right of individuals to take action in the courts had been abridged they were left in a much worse situation.

<sup>53</sup> [1951] 1 All E.R. 574

<sup>54</sup> *The Discipline of the Law* (Butterworths London, 1979), at p. 241.

<sup>55</sup> The author is grateful for sight of a draft copy of an article by Paul Balen and Christopher Hutton "A Legal Theory with a Memory" to be published this year in *Clinical Risk* which analyses the case of *Roe* and the aftermath.

<sup>56</sup> P. Cane "Does No fault have a future?" [1994] J.P.I.L. p 302

Despite this history there is some evidence that “no fault” schemes might have a place. In the author’s view<sup>57</sup> a “no fault” scheme is particularly suitable in discrete areas such as brain injury cases where the claimants are clearly injured and not responsible but the cause of their injury (whether they were born injured or injured by the process of birth) is a matter of debate. In the US they have schemes that cover workmen’s compensation and schemes whereby motorists can choose different regimes of car insurance offering cheaper cover at the expense of limiting access to the courts.<sup>58</sup>

Absent “no fault” schemes, the question to be addressed is whether a system based on people not claiming is a good system. The activities of claims management companies will increase the propensity to claim but by how much is uncertain and, of course, they operate on insurance based risk management systems and one of the complaints might well turn out to be that they do not back sufficient cases.

### THE ADVANTAGES AND DISADVANTAGES OF CONDITIONAL FEES AGAINST CONTINGENCY FEES

This paper now approaches the thrust of the argument, first by comparing and contrasting conditional fees as against contingency fees. It then moves forward to present a menu of possible additional reforms to the system to inject more liquidity and to make lawyers less risk averse.

There are a number of reasons why conditional fees have substantial disadvantages as compared with the contingency fee purpose. First, conditional fees are simply not as economically efficient as contingency fees. In a conditional fee the arrangement involves a multiplier of basic fees with a maximum of 100%.<sup>59</sup> This compares with the contingency fee arrangement that incorporates a fee based on a percentage of damages recovered. The difficulty of conditional fee arrangements is likely to arise when a lawyer is offered a simple and effective way of cutting to the chase, rather than going through a great deal of litigation. Take a case where either the defendant or the court has stayed for Alternative Dispute Resolution (ADR) such as mediation. If it is possible to resolve the case at an early stage then this would be in the interests of the clients, the court and the system as a whole but may not be perceived to be in the interests of the lawyer whose base fee is reduced and, therefore, his success fee. This is a highly complex problem. While understanding the motives that may push lawyers into doing more work than is required, and in particular the pressures on assistants caused by billing targets, the author has campaigned with some success for lawyers to understand the advantages, in terms of cash flow and general efficiency, of rapidly turning over their caseloads.

The original arrangements for conditional fees, prior to the Access to Justice Act, had a number of substantial limitations that affected their take-up. The first problem was the danger of adverse costs, which was addressed by after-the-event insurance. The second was the competition from Legal Aid, which would be addressed by removing the competition. However, there remained a particular difficulty that was the almost incomprehensible nature of the agreement signed by the client on entering a conditional

<sup>57</sup> J. Peysner, “Health Care Litigation: Examination, Diagnosis and Prognosis” (1998) J.P.I.L. 91.

<sup>58</sup> Rand Institute for Civil Justice Research Brief “How would a “Choice” Auto Insurance Plan Affect Insurance Costs and Compensation of Accident Victims?” [www.rand.org/publications/RB/RB9031/](http://www.rand.org/publications/RB/RB9031/)

<sup>59</sup> Prior to the introduction of the recoverability regime there was a voluntary cap of 25% on damages, potentially enforceable by professional discipline. Thus, if basic costs plus the success fee exceeded the cap the balance was irrecoverable. In the light of discussions about ethics it is instructive to note that there is no evidence that the cap was ever broken.

fee agreement. The need to meet the requirements of the regulations and avoid the dangers of maintenance and champerty whilst attempting to produce a clear simple product which offered clients a “no win, no fee” arrangement were extreme. The third problem was the inter-relationship between the regulations and the indemnity principle.<sup>60</sup> The result was a highly complex agreement that the average client found incomprehensible. However, practice rules and the regulations required the arrangements to be explained so here was a Catch 22 situation that was explored in detail by Yarrow and Abrams in their research.<sup>61</sup> The fourth, final and most important problem was, as discussed above, that the winning client lost a substantial cut of his or her damages.

*And with one bound the problem is solved . . .*

This left the Government in a quandary. They wanted to remove legal aid, starting with personal injury cases, but did not wish to move towards pure contingency fees for political reasons<sup>62</sup> and thus they deprived themselves of the opportunity of the enormous simplicity of the American model. In consultation they began to search for an answer to this conundrum and came under considerable pressure from the plaintiff lawyers and victims lobbies to amend the existing conditional fee arrangement model on the grounds that it was unfair to individual claimants. It is popularly believed that the solution to this problem emerged at an Oxford Union debate in 1999, involving Marlene Winfield of the National Consumer Council, Chris Ward of Accident Line Protect (The Law Society conditional fee insurance intermediary) and Geoff Hoon, then Parliamentary Secretary in the Lord Chancellor’s Department. In a graphic illustration of the problem Ms. Winfield stood up and showed the audience a cheque for £1,250 that her “client” had recovered in respect of an accident claim. She then tore off one part of the cheque saying: “that’s what my client has to give up for the insurance premium” and then a second part saying: “that’s what my client has to give up for the success fee” leaving a small part of the cheque available for the client. At this point the Minister then persuaded Chris Ward that he should pick up the two cut off parts of the cheque and return it to Ms. Winfield. Thus, legend says, the concept of recoverability of these items as part of the costs, or disbursements, of the successful claimant was born. While this is a wonderful story, it appears that policy was not created in quite such an “on the hoof” way, but that the Minister used this opportunity to demonstrate a view that had emerged as the potential solution. The idea of recoverability of these additional liabilities seemed a magical solution to the difficulty – the claimant would retain all the damages with the additional costs of insurance and success fee coming from the loser. This would act as an economic incentive on losers not to litigate unnecessarily.<sup>63</sup>

*Recoverability and transparency*

The introduction of the recoverability regime does not remove all the complications from the point of view of the client. Not only do the regulations bizarrely require that all the issues involved in the conditional fee arrangement are explained to the client

<sup>60</sup> See Peysner (2000), *op. cit.*

<sup>61</sup> S. Yarrow and R. Abrams, “Conditional Fees: The Challenge to Ethics” 2(2) *Legal Ethics* 192.

<sup>62</sup> Lord Irvine, the Lord Chancellor, was particularly opposed to them.

<sup>63</sup> Historically insurance companies have tended to play a long game, preferring to reserve their settlement monies earning interest in their own accounts, rather than pay out too early. This works well in an era of inflation and rising interest rates. As inflation and interest rates have been low and steady for some time other pressures apply and insurers are now looking more keenly at their legal costs. Early settlement may increase their cash flow difficulties but can reduce their legal bills. Further, the new Civil Procedural Rules introduce sanctions against delay that, together with the pre-action protocols, suggest an increase in forward loading and early settlement.

even if the client is adequately insured. The insurance products themselves are supremely complicated and present real difficulties in comprehension to clients and lawyers. There is no clear annual percentage rate ("APR") as in the credit industry, or anything like it. The requirement to continue to give an explanation to clients of the agreement is mostly driven by the continued existence of transferred costs under the English Rule and the indemnity principle. With regard to the latter, the Government having taken powers to abolish the rule in the Access to Justice Act should act quickly.

### *A Cloud on the Horizon*

The recoverability solution has rapidly run into difficulties. Despite an extensive consultation programme<sup>64</sup> a major difficulty has arisen starting with the recoverability of after-the-event insurance premiums entered into before proceedings were issued.<sup>65</sup> The situation, at the time of writing, is that defendants' insurers are refusing to pay pre-issue premiums as well as success fees.<sup>66</sup> This offers two major threats to the viability of the system.

First, insurance operates on a pooling of risk. The earlier after-the-event insurance is entered into, particularly if it is to cover the whole of the caseload without adverse selection (as in most of the panel schemes such as Accident Line Protect), potentially the greater the spreading of risk and potentially the lower the premium level. The defendants' insurance organisation, FOIL (the Forum of Insurance Lawyers) believes that some premiums are far too high.<sup>67</sup> One key difficulty is that the way premiums are made up – and this is common throughout the insurance industry – is opaque. It is recognised that *all* premiums contain elements that go towards marketing, administration and profit as well as pure risk money but the AEI market contains examples of premiums (particularly brokered by claims management companies) which seem unusually high and somewhat more than might be required by the risk. Without clarity about the way premiums are made up, it is very hard to offer a clear view of those that are excessive. In any event, there will be little room to reduce premiums if the pre-issue premiums cannot be recovered.<sup>68</sup>

The attitude to paying liabilities incurred pre-issue encourages litigation and flies right in the face of the Woolf Reforms with their emphasis on litigation being the last resort. This problem, as of Summer 2001, is casting a pall over many personal injury firms, and after the event insurance providers, whose cash flow is being adversely affected. There are two parallel streams of activity which may resolve the problem. First, the case of *Callery v. Grey*<sup>69</sup>, an unreported cost appeal from the County Court, will be heard by the Court of Appeal in July. Second, there are joint industry wide discussions taking place, sponsored by the Law Society and the Association of British Insurers (ABI) with a view to a negotiated compact.<sup>70</sup> If neither the courts nor

<sup>64</sup> Nottingham Law School organised a consultation exercise under "Chatham House Rules", chaired by the author, on the recoverability arrangements and the author also chaired a second departmental consultation meeting on collective fee arrangements.

<sup>65</sup> Legal expense insurance is not recoverable. The reason for this is that the general level of legal expense insurance is quite low, thus making it less vital for it to be recovered and, secondly, it is a generic product covering all a client's claims in a particular year and, therefore, it would be quite difficult to allocate part of the insurance to a particular claim.

<sup>66</sup> (This approach has started to spread into cases that have been issued and payments of premiums that the insurers claim to be too high are also not being paid.)

<sup>67</sup> *Litigation Funding* 11 Jan 2001.

<sup>68</sup> In the recoverability regulatory scheme there is little scope to argue about the level of insurance premium. This would seem to be an economically inefficient way of keeping insurance premiums low. However, it would meet a policy requirement to support the development of an immature market.

<sup>69</sup> Unreported. Chester County Court, 29 Jan 2001.

<sup>70</sup> The author is assisting these discussions.

negotiation resolve this issue then the government will have to act quickly to break the impasse by introducing amending legislation.

### *Reliance on Insurance*

If the Government has put all its eggs in one basket – the insurance basket – it is important to examine whether that was a sensible decision. If there are doubts about the long term viability of the insurance market, then that suggests that spreading the pool of risk by including more reward and more risk for lawyers (through a contingency fee system) would be a sensible hedge. The difficulty in assessing the insurance market is that it is wrong to look at it simply from a structural point of view, *i.e.* are there sufficiently big players with robust capital capable of withstanding claims. The big may not be beautiful and there are certainly examples of companies who have made wrong decisions on such a scale that their viability is at risk, whether in the retail trade or in insurance. Probably, a more sensible approach is to look at the track record of insurers and underwriters and here, of course, there are difficulties because the AEI – intriguingly called the market for “morning after pills” by an American commentator<sup>71</sup> – is new and relatively unproven. Certainly, the labile nature of premiums, normally in an upward direction, suggests that more experience will be necessary before there is any consistency of approach.<sup>72</sup> This issue has now emerged in the press.<sup>73</sup> There appears to be a difficulty emerging with more and more AEI products and claims managers chasing sceptical and limited underwriting capacity. Either capacity will increase, possibly through mergers of AEI providers, or products will fall away: the outcome is uncertain.<sup>74</sup>

### *Both Sides Costs Insurance*

One issue is the question of AEI for “ordinary litigation”, *i.e.* non-conditional fee arrangement cases. This is provided by some insurers and has advantages for risk averse lawyers because they receive their normal costs. It is the current insurance vehicle for leading claims management companies and is used by their panel solicitors. In principle this type of cover should be more expensive than AEI for conditional fee arrangements as more is at risk (both sides’ costs rather than the loser’s costs only). In practice the position is more complicated. Very often the reduced AEI plus the success fee would be equivalent to an “ordinary” litigation AEI and as both are recoverable it does not make much difference.

While the theory suggests that “both sides” AEI will be more expensive there are complicating factors. There are no intensive market pressures or professional requirements on solicitors as agents for clients to shop around for insurance. It is impractical to do so. It is inefficient, the best risk management being by delegated panels. As mentioned above, there is no easy APR-like comparison. Everything depends on access to credit and the extent of cover, including self insured elements.<sup>75</sup> Again, as stated above, the recoverability regime for insurance premiums offers little or no court control to ratchet down premiums. The premium price is, therefore, unlikely to be market

<sup>71</sup> J. Evans “England’s New Conditional Fee Agreements: How Will They Change Litigation” 63 Def.Couns.J.376

<sup>72</sup> A related problem is that some finance houses intimately associated with AEI providers or claims management companies are charging high rates of interest (20% or more) on advanced disbursements. This is unrecoverable under the Access to Justice Act 1999 and does not represent good value for money for the consumer, bearing in mind that this is secured by the insurance policy.

<sup>73</sup> Fiona Bawdon, “Tough Time for After the Event Insurers” *Solicitors Journal* 17 November 2000, at p. 1038.

<sup>74</sup> A prudent risk managed approach would suggest that to remove the potential to fund litigation by any other method than insurance – for example, by limiting the current use of contingency fees as the Bar are proposing is premature (see contribution by Matt Kelly QC to the *Blackwell Committee* report).

<sup>75</sup> “thejudge” web site ([www.thejudge.co.uk](http://www.thejudge.co.uk)) is an attempt to produce comparisons.

sensitive. This suggests that the price will be higher than it might be as the buyer is not the ultimate payer.<sup>76</sup> All depends on the propensity to claim against the insurance. If solicitors do not claim because they might be expelled from the AEI's panel, the risk is simply transferred to the lawyer without any concomitant reward as there is no success fee. Thus, winning cases cannot subsidise losing ones.

### *Fixed Costs*

A particular issue arising out of the conflict of contingency fee and conditional fee approaches – albeit one that is theoretically complex – is the way in which they would impact on the introduction of fixed cost regimes. Prior to the introduction of the Fast Track regime Woolf and commentators around his inquiry suggested that it was sensible, and indeed inevitable, that a rationing of procedure in the Fast Track should be accompanied by a rationing of costs. Certainly, work submitted to the Inquiry by Zuckerman, together with research by the author,<sup>77</sup> suggested that there was potential and some advantages in moving to a fixed or capped cost system. This would have particular advantages for the LEI and AEI industry as it would make costs more predictable. If costs are unpredictable then this invites underwriters to put more fat on the premium as they are unclear as to exactly what their downsides would be. The effect is to limit competitive pressures on premium levels.

The current situation is that the Government has stepped back from introducing a fixed cost regime other than for the costs of the Fast Track trial, presumably on the basis that they would like the Fast Track to settle down before they move on to further change.<sup>78</sup>

## CONTINGENCY FEES AND ETHICS

Do contingency fee arrangements represent a greater challenge to ethics than conditional fee arrangements? Yarrow and Abrams<sup>79</sup> have carried out the only major study into the workings of CFAs. Their work was carried out prior to the introduction of recoverability and helps us to understand contingency fees because in many cases a contingency fee split of damages going to the lawyer would not be very much different to the deduction of a success fee and AEI premium. While Yarrow and Abrams recognise that CFAs offer particular challenges to solicitors to ensure that they put their client's interests first, they recognise that conflicts of interest are endemic to the funding of litigation and inherent in a relationship between professional and lay client. Their work is limited in its scope. There has been no large-scale research into outcomes using solicitors' files and, indeed, access would be very difficult to organise. Despite these strictures the Yarrow and Abrams research is useful. In comparison Graffey's work<sup>80</sup> is less helpful. Graffey is vehemently opposed to the contingency fee and its cousin the CFA. She reminds us of the frightening picture drawn by the Royal Commission on Legal Services in 1979<sup>81</sup> of lawyers dipping their hands in the mire of contingency fees and becoming corrupt:

<sup>76</sup> *C.f.* teenage children and trainers!

<sup>77</sup> For A. Zuckerman, see *Access to Justice: Final Report*, Chapter 7, para. 14; J. Peysner and N. Armstrong, "What Price the Fast Track?" (1997) J.P.I.L. 287.

<sup>78</sup> It could be argued that the retention of conditional fees where the risk is reflected in a mark-up based on the fee will act as a break on enthusiasm for fixed fees. After all, if basic costs are going to go down then the success fee goes down. Some modelling needs to be done to determine whether or not risk is adequately reflected in a maximum 100% mark-up on restricted costs. If not, this would suggest that greater risk should be reflected in greater reward.

<sup>79</sup> Yarrow and Abrams "Conditional Fees: The Challenge to Ethics" 2(2) *Legal Ethics*

<sup>80</sup> C. Graffey "Conditional Fees: Key to the Courthouse or the Casino" 1(1) *Legal Ethics*.

<sup>81</sup> Cmnd.7648, 1979, para

“The fact that the lawyer has a direct personal interest in the outcome of the case may lead to undesirable practices including the construction of evidence, the improper coaching of witnesses, the use of professionally partisan expert witnesses, especially medical witnesses, improper examination and cross-examination, groundless legal arguments designed to lead the courts into error and competitive touting.”

We have experienced CFAs for some years and contingency fee arrangements in pre-litigation and in the employment tribunals. Has the bloodcurdling prospect outlined above emerged? There is simply no evidence of an outpouring of corruption. While it would not be unexpected that Geoff Hoon MP, when Parliamentary Secretary to the Lord Chancellor’s Department, constantly repeated a mantra that he never received any complaints about CFAs but did constantly about legal aid, there is equally no evidence that trial judges or procedural judges make adverse comparisons between lawyers acting on CFAs and “ordinary litigation”. At the expense of repetition, all financing arrangements for litigation contain ethical issues and perils. CFAs or contingency fees do not stand out as offering unique dangers.

### AN INCOMPLETE REFORM

It is apparent that the introduction of the changes in litigation financing, together with the procedural changes introduced following Woolf, constitutes a radical new and interlinked approach to dispute resolution. The financing reforms constitute a typically pragmatic English solution to a problem. It is not inevitable that an unresearched and un-piloted scheme is bound to be a failure – far from it – but neither is it bound to be a success. Problems have been revealed, such as recoverability, and there will be more. We must ensure that access to justice is protected at all costs. In the author’s view the reform effort is not complete: CFAs are a transitional phase, and it is time to open up the debate on what might replace or supplement them.

#### *A Menu of Alternatives*

One method is to combine contingency fees with transferred costs. This approach breaks the link between the reward and the costs and links it to the recovery, or in defence the money saved.<sup>82</sup> All or part of the contingency fee could be then be recovered. This could be done in tranches with more of the contingency fee being recovered as the case progresses to give the defendant an incentive to offer an early settlement. The current arrangements under Part 36 of the Civil Procedural Rules would be retained to penalise the claimant in costs and interest if a reasonable offer is refused.

Another alternative is the “Big Bang”. This involves introducing contingency fees *and* removing transferred costs, except perhaps for disbursements such as expert fees and court fees. This will abolish the need for success fees, AEI and the contingency fee itself will not be recoverable. This is the author’s preferred option and would be a particularly suitable approach in personal injury litigation.<sup>83</sup> To address this we need to consider further the role of costs and the potential for using costs as economic levers to influence behaviour. Removing both sides’ costs from personal injury work simply

<sup>82</sup> See R. O’Dair and J. Davis, “Contingency, good; conditional, bad?” (2000) *Litigation Funding*, April at p. 2.

<sup>83</sup> Of course, this system would be equally relevant in employment cases where there is now a compensation limit of £50,000 in unfair dismissal cases and unlimited damages for discrimination. But equally there is no need to do this because it is *already* possible to use contingency fees in this area because they are not classed as litigation! The task is to restrict any attempt (particularly from the Bar) to limit their use in this area and, indeed, publicity should be given of their availability when instructing a solicitor to broaden access.

restores the position for defendants to the position before Legal Aid was abolished when, barring exceptional circumstances, they could not recover costs from claimants. There is no evidence that failure to be able to recover costs from legally aided plaintiffs forced insurers into settling at any cost. Insurers always took into account the “floodgates” argument.<sup>84</sup> Contingency fees should be capped at 25% of general damages recovered pending further research into whether or not this is a viable level and whether pecuniary damages, *e.g.* loss of earnings, might be included.

#### *Arguments for the Big Bang Approach*

The introduction of litigation insurance often involves merely chasing money round. Thus, Lloyd’s names will be in syndicates that write AEI business and public liability, *e.g.* motor business. At least two insurance companies offer both liability and litigation insurance, and are thus in a “heads I win: tails you lose” situation. While the liability insurers have vehemently resisted recoverability in *Callery v Gray*,<sup>85</sup> perhaps they may simply be buying time to allow reserving against these new liabilities and, in the long run, they will be content as long as the position is certain and they can clearly estimate their future liabilities. Perhaps, at that stage they might start taking over the AEIs?

Costs, additional liabilities and the recovery arrangements consequent on them introduce transaction overheads that create grit in the system, unnecessarily increasing overall litigation costs. The additional liabilities are not subject to direct competitive pressures and, therefore, are likely to be too high. Contingency fees, by comparison, encourage claimants’ lawyers to be efficient: they are not rewarded for effort but skill. Without costs and recoverability the client is offered a simple transparent system; essentially: “If you recover £1000 your lawyer will deduct £25.”

This system will not lead to a litigation explosion because lawyers will still risk manage: if they do not win they do not get paid and they will not be protected by “both sides’ costs” litigation insurance.

#### *What else needs to be done to make a contingency fee system work?*

Part 36 offers would be retained to encourage both sides to make sensible offers to settle in penalty of costs<sup>86</sup> and penalty interest.<sup>87</sup> Will the proposed system have any role for AEI? They will still operate as introducers of liquidity by advancing cash to firms or acting as collateral for banks using their AEI acquired experience and statistical information of claims records. They will offer “stop loss cover” to firms and, therefore, protect the public and partners against calamities caused by backing too many losing cases. There will be no requirement for them to offer insurance cover on a case-by-case basis.

The major difficulty that must be overcome is to reform personal injury damages. An unrecoverable contingency fee reduces the claimant’s damages, which are at *resitutio* level only. Therefore, claimants subsidise lawyers. The resolution lies in an understanding that general damages for pain, suffering and loss of amenity have no objective reality. They are value judgments based on precedent and policy.<sup>88</sup> Restitution is what judges individually or through the Judicial Studies Board consider to be fair. If so how

<sup>84</sup> Insurers feel that there is a danger that settling weak cases will simply stimulate more cases.

<sup>85</sup> Unreported, Chester County Court, 29 Jan 2001

<sup>86</sup> This is the only time when costs rear their head.

<sup>87</sup> This would be rather like the former system of obtaining a costs order against the Legal Aid Fund when the assisted person failed to beat a payment in.

<sup>88</sup> The clearest example is bereavement damages.

can it be claimed that deducting 25% from them is inherently unjust? These damages have been described as follows:<sup>89</sup>

“an attempt to measure the immeasurable. . .notional or theoretical compensation, to take the place of that which is not possible, namely actual compensation.”<sup>90</sup>

to convert the degree of worsening (involved in physical injury) into monetary value for the purposes of compensation calls for the application of some arbitrary conversion table.<sup>91</sup>”

An attempt to systematise this approach was made by the Law Commission in its report *Damages for Non Pecuniary Loss*.<sup>92</sup> It conducted a survey of public attitudes as to the “right” level for a range of damages for specific injuries. It also noted that awards had not kept pace with inflation. On this basis it proposed a general increase in awards biased towards more serious cases.<sup>93</sup> In a novel approach it did not propose legislation unless the Court of Appeal could not deal with the issue. The Court in *Heil v. Rankin*<sup>94</sup> considered a series of cases and took careful note of submissions from liability insurers and the Treasury on behalf of the National Health Service Litigation Authority. Its decision introduced some increases but not to the extent recommended by the Law Commission. In particular, the Court expressed concern that large increases would not only substantially increase premiums, but would do so at a stroke. This is implicit in a judge-made decision that what was valued at X should really have been valued at X+Y. Overnight increase in damages would create considerable cash flow problems and strain insurance company reserves.

It is clear that the common law route is not available to a reform intended to raise damages overall. Legislation would be required to introduce a single (henceforth index-linked) increase in general damages that would underpin a contingency fee system. Such an increase would allow the subsidy by claimant to the lawyer to be shared and matched by the general public through increased general liability premiums.

## CONCLUSION

The introduction of risk-managed litigation is economically efficient, encourages lawyers to be more skilful and less wasteful and widens access to lawyers to a range of citizens who were outside legal aid eligibility<sup>95</sup> without unduly disadvantaging those who were inside the increasingly threadbare legal aid net. The current conditional fee arrangements backed by insurance are an ingenious response to the need to protect claimants from costs. They require that claimants, who retain a theoretical liability for costs, are given information about funding arrangements, none of which they understand. Unfortunately, this praiseworthy attempt to protect consumers results in a scheme of Byzantine intricacy replete with opportunities for satellite litigation. It is simply too complex. By comparison the contingency fee offers the merit of transparency and simplicity. It deserves a fair hearing.

<sup>89</sup> See P. Havers QC, “General Damages Raised by One Third” (2000) J.P.I.L (March), at p. 123.

<sup>90</sup> *Rushton v. NCB* [1953] 1 Q.B. 495, per Romer L.J. at 502.

<sup>91</sup> *Fletcher v. Autocar Transporters Limited* [1968] 2 Q.B. 322, per Diplock L. J. at 340D.

<sup>92</sup> L.C. No. 257 (1999) Law Commission

<sup>93</sup> Many claimants in smaller cases, such as whiplash, receive more than they expect.

<sup>94</sup> [2000] 3 All E.R. 97

<sup>95</sup> This includes the vast majority of people in work and even those on high benefits.

# SOCIAL POWER AND THE HOHFELDIAN JURAL RELATION

HAMISH ROSS\*

[Human beings] . . . so far as they aid themselves by legal rules, transform their social relations into legal ones, social dependence into a legal obligation, and the power of influence which they have over each other into rights. The legal rules fixing human interests delimit necessarily the realization of those interests and impose upon each man some obligation of guaranteeing the realization of others' interests.<sup>1</sup>

## HOHFELD'S CELEBRATED "ANALYSIS"

WESLEY NEWCOMB Hohfeld is one of the great unsung heroes of twentieth century legal theory. His eponymous "analysis" – an eight-term relational configuration of legal concepts – represents one of the most perceptive and revealing contributions to the literature of analytical jurisprudence. The immense outpouring of secondary Hohfeldian literature – clarifying, refining and perfecting his analysis, often to the most recondite levels of abstraction – has testified to the profound influence that Hohfeld had in twentieth century jurisprudence.<sup>2</sup> Yet while Hohfeld unquestionably *theorised about* jural relations he fell far short of articulating a *theory of* jural relations. That task was undertaken by Albert Kocourek whose sesquipedalian treatise *Jural Relations* simply failed to capture the imagination of the academic community.<sup>3</sup> Hohfeld, in any event, would have been the first to deny that what he was attempting in *Fundamental Legal Conceptions* was, in theoretical terms, anything more ambitious than a dissertation aimed at clarifying basic conceptions of the law. Hohfeld made no great claims for his dissertation and even specified that its readers should be "law school students" rather than "any other class of readers".<sup>4</sup> Indeed, for all its theoretical importance his dissertation often amounts to no more than an attempt to clarify various terminological usages prevalent in practical legal discourse. But that is perhaps the enduring paradox of Hohfeld and his "analysis". Since its formulation Hohfeld's analysis has never failed to have a "place" in legal theory, in analytical jurisprudence. But the lack of a theoretical or philosophical dimension to Hohfeld's analytical work has made it all too easy for commentators to place Hohfeld at the periphery of "serious" legal theory rather than at its centre.

In this essay, as a step towards showing how Hohfeld might be positioned more centrally within the domain of theory I aim to identify a theoretical context in which

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<sup>1</sup> N. M. Korkunov, *General Theory of Law* (Trans. W.G. Hastings), The Boston Book Company [The Modern Legal Philosophy Series, Vol. IV] (1909), at p. 195.

<sup>2</sup> See generally Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1919) (Ed. Walter Wheeler Cook), (Yale University Press, 4<sup>th</sup> Printing, 1966). Some of the secondary Hohfeldian literature is cited by Roscoe Pound in a footnote which is itself truly voluminous. See Roscoe Pound, *Jurisprudence* (West Publishing Co., St. Paul, Minnesota, 1959) Vol. IV, at p. 83, note 101.

<sup>3</sup> See Albert Kocourek, *Jural Relations*, (2<sup>nd</sup> Ed.) (The Bobbs-Merrill Company, Indianapolis, 1928). As Roscoe Pound comments: "[O]ne cannot but feel that [Kocourek] . . . carries out schematic exposition and terminology far beyond what is practically worth while." Roscoe Pound, *Jurisprudence* (*op. cit.*), Vol. IV, at p. 82.

<sup>4</sup> W. N. Hohfeld, *op. cit.* at p. 27. Hohfeld comments: "If . . . the title of this article suggests a merely philosophical inquiry as to the nature of law and legal relations . . . the writer may be pardoned for repudiating such a connotation in advance. On the contrary . . . the main purpose of the writer is to emphasize certain oft-neglected matters that may aid in the understanding and in the solution of practical, everyday problems of the law. With this end in view, the present article and another soon to follow will discuss, as of chief concern, the basic conceptions of the law. . . ." (See Hohfeld, *op. cit.* at pp. 26–7.)

aspects of Hohfeld's analysis might be productively embedded. I wish to pursue a line of enquiry that is consciously interdisciplinary: demonstrating, in other words, how legal conceptual analysis of the Hohfeldian kind may inform an essentially *sociological* analysis of law as a site of social power. I will argue, for instance, that it is possible to link key aspects of Hohfeld's analysis with Max Weber's analysis of social power. As Hohfeld recognised, legal relationships, in their most abstract and irreducible form, are structured as correlatives: of right ↔ duty and power ↔ liability.<sup>5</sup> Relationality in both the non-legal and legal contexts is part of meaningful social behaviour. Human beings ascribe meaning (*Sinn*, as Weber terms it) to their behaviour and to the behaviour of others: e.g. good, bad, moral, immoral, worthy, unworthy, and so on. They also conceive of their position vis-à-vis others in relational terms: *as* relationships. In the legal context individuals similarly ascribe meaning – again in relational terms – and by reference to legal norms and other normative conceptions. The key assumption underlying much of the argument to follow, however, is that legal *relationships* – as opposed to legal *norms* as such – reveal and at the same time mirror the essentially social nature of the legal world.

Later in this essay I will point to ways in which the Hohfeldian jural relation – specifically, the right ↔ duty nexus – additionally has an underlying social power dynamic. I will focus in particular on the Hohfeldian right ↔ duty jural relation. It is beyond the scope of this essay to consider the Hohfeldian power ↔ liability jural relation in any detail owing to the more complex structure of that type of relationship. I will seek to show that Hohfeldian jural relations may in fact be regarded as relationships of social power in the sense that Weber contemplates. I will also touch upon the idea of legitimacy as an aspect of the wider context of subjective meaning within which legal social power relationships are located. But to begin with I will selectively outline a few of the main features of the jural relation, drawing on the work of Hohfeld and on secondary Hohfeldian literature.

## THE JURAL RELATION

### *The Legal Bond*

The conceptual apparatus of the jural relation by no means originated in the juristic writings of Hohfeld and Kocourek, although the expression “jural relation” appears to have done. While those writers were certainly the principal *twentieth century* “relational jurists” the essential idea of the jural relation probably had its historical origin at least as early as the Roman law concept of the legal bond (*juris vinculum*) which Justinian applied in the *Corpus Iuris Civilis*.<sup>6</sup> Hohfeld did not attempt to define “jural relation”, reinforcing the view that his dissertation was essentially a practical one. Kocourek, on the other hand, whose approach was somehow more scientific – though not necessarily more illuminating – undertook a critical assessment of a number of possible definitions drawn mainly from the work of nineteenth century jurists. According to Kocourek the jurist Puntschart recognised that Savigny had “vaguely apprehended” the *juris vinculum* element of the jural relation. Through the application of legal norms legal bonds were

<sup>5</sup> The use of a two-way arrow here and elsewhere in this essay is intended to accentuate the correlativity of Hohfeldian legal relationships in terms of which one legal concept (e.g. right) implies the other (duty) and *vice versa*.

<sup>6</sup> See *The Digest of Justinian* (Trans. and Eds. Theodor Mommsen, Paul Krueger and Alan Watson) (University of Pennsylvania Press, Philadelphia, Pennsylvania, 1985) (Vol. IV): D.44.7.3pr. See also *The Institutes of Justinian* (Trans. and Comm. J. A. C. Thomas) (North-Holland Publishing Co., Amsterdam, Oxford, 1975): *Inst.* III. 13.pr.: “An obligation is a legal bond whereby we are constrained by the need to perform something according to the laws of our state”. (p. 197)

created “by which persons were gyved to persons and persons to things for definite purposes within the purview of the law”.<sup>7</sup> Puntschart had also shown how the “bond” idea runs through the whole system of Roman legal conceptions. As Kocourek observes:

Puntschart . . . interposes a new mechanical element, the “*juris vinculum*”, as a kind of distributing center through which legal advantages are apportioned among the members of a legal society as the purpose of the law directs. The norm creates the legal bond and from the legal bond are derived such claims and duties as are appropriate.<sup>8</sup>

According to J.A.C. Thomas, the developed Roman law idea of a legal bond contained no other subjection than that of the duty to perform or pay damages. The language used by Justinian, however, had associations with bondage and this more literal connotation reflected something of the true nature of obligation as conceived in early Roman law.<sup>9</sup> It might be argued that it required only a step rather than a great intellectual leap to move from the notion of physical bonds or fetters to that of *conceptual* bonds. Here the conceptual linkage which “gyved” persons to persons and persons to things, to use Kocourek’s phrase, was more important than the physical linkage. Puntschart’s clarification of the Roman law idea of *juris vinculum* of course stresses the conceptual element of the jural bond or *Rechtsverband*, as Puntschart terms it.<sup>10</sup> The idea of jural relation as conceptual linkage finds its expression in Hohfeld’s arrangement of relations in the form of a scheme of correlatives and opposites, in which jural correlatives represent each side of one jural relation, viewed from the respective points of view of each party to the relation.<sup>11</sup> John Austin anticipated this correlativity when he defined legal right as “. . . the creature of a positive law: and it answers to a relative duty imposed by that positive law, and incumbent on a person or persons other than the person or persons in whom the right resides”.<sup>12</sup> Austin was in no doubt concerning the relationality of law and to that extent was quite “Hohfeldian”:

[A]ll rights reside in persons, and are rights to acts or forbearances on the part of *other* persons. Considered as corresponding to duties, or as being rights to *acts* or *forbearances*, rights may be said to avail *against* persons”.<sup>13</sup>

### *Hohfeld’s Table of Jural Relations*

In *Fundamental Legal Conceptions*, Hohfeld arranges jural relations in one table organised around the dichotomy between jural opposition and jural correlativity. Subsequent writers have preferred to show jural correlativity and jural opposition (or

<sup>7</sup> See Albert Kocourek, *op. cit.*, at p. 41.

<sup>8</sup> *Ibid.*, at p. 44. (Kocourek’s references are to Puntschart, *Moderne Theorie des Privatrechts* (1893)).

<sup>9</sup> *The Institutes of Justinian (op. cit.)*, J. A. C. Thomas’ commentary at p. 198. See also W. W. Buckland, *A Textbook of Roman Law* (3<sup>rd</sup> Ed., Peter Stein) (Cambridge University Press, Cambridge, 1963), at p. 406.

<sup>10</sup> See Albert Kocourek, *op. cit.*, at p. 41.

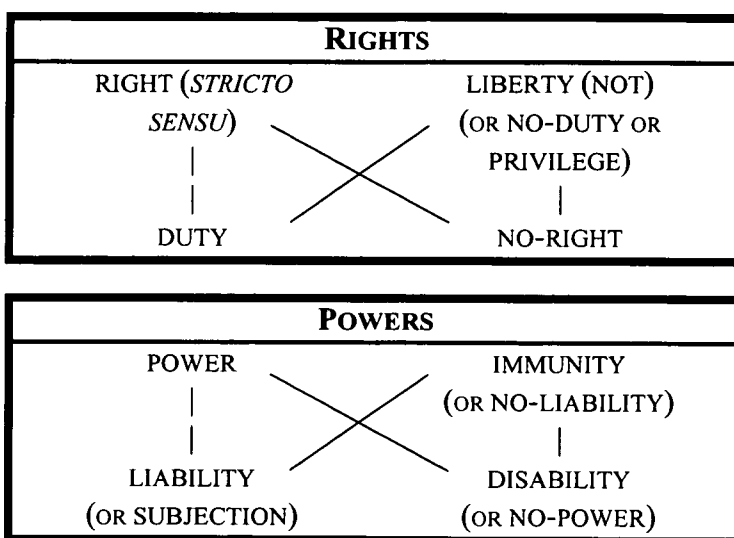
<sup>11</sup> Consider, for example, George W. Goble’s characterisation of the power ↔ liability relation: “All acts or omissions legally significant involve the exercise of powers. The word describes a relationship of two persons from the viewpoint of the dominant or controlling party. The same relationship is described from the viewpoint of the servient or controlled party by the term *liability*”. (See “A Redefinition of Basic Legal Terms” (1935) 35 *Columbia Law Review*, 535, partly reprinted in Jerome Hall (Ed.), *Readings in Jurisprudence* (The Bobbs-Merrill Company, Indianapolis, 1938) at pp. 516 *et seq.*) See also Hans Kelsen, *Pure Theory of Law* (Trans. Max Knight, of *Reine Rechtslehre*, 2<sup>nd</sup> Ed. (1960) (University of California Press, Berkeley and Los Angeles, 1967), at p. 166: “The reflex right is only the legal obligation, seen from the viewpoint of the individual toward whom the obligation has to be fulfilled”. In “The Pure Theory of Law”, (1934) 50 *Law Quarterly Review* p. 474, at p. 493, referring to contractual legal rights, Kelsen comments: “For no one can allocate rights to himself, since the right of the one exists only under the pre-supposition of the duty of another . . .”.

<sup>12</sup> From John Austin, *Lectures on Jurisprudence*, (3<sup>rd</sup> Ed.), London (1869), reprinted in Jerome Hall (Ed.) *Readings in Jurisprudence (op. cit.)* at p. 442.

<sup>13</sup> *Ibid.*, at p. 450 (Austin’s emphasis).

jural “contradiction”<sup>14</sup>) subsisting together in two tables, one pertaining to the right *stricto sensu* family of jural relations, and the other to the power family of jural relations.<sup>15</sup> The following tables are based on those appearing in the eleventh edition of *Salmond on Jurisprudence*. It should be noted that Glanville Williams, the editor, argued that Hohfeld’s “privilege” was best conceived of as a “liberty (not)”<sup>16</sup> and Salmond himself preferred to substitute “subjection” for Hohfeld’s “liability”.<sup>17</sup> The two tables are arranged within rectangles, yet there is no necessary relationship between the rectangles for, as Salmond comments: “[T]he four concepts within each rectangle are intimately related to each other, whereas there is not the same relationship between the concepts in the one rectangle and the concepts in the other rectangle”.<sup>18</sup>

In the tables, correlativity resides in *vertical* lines, while opposition or contradiction resides in *diagonal* lines.



The derivative Hohfeldian arrangement shown in these tables is substantially in line with what has become a characteristically twentieth century analytical position in which a principled distinction is drawn between on one hand rights in the “strict sense” (and duties) and on the other hand powers (and “liabilities”). H.L.A. Hart, of course, brought this distinction to the forefront of more recent jurisprudential writing. In 1964 Lon Fuller noted the “coincidence” of Hohfeld’s analysis and Hart’s distinction between duty-imposing and power-conferring rules:

- The Hohfeldian analysis discerns four basic legal relations: right–duty, no–right–privilege, power–liability, and disability–immunity. Of these, however, the second and fourth are simply the negations of the first and third. Accordingly the basic distinction on which the

<sup>14</sup> See generally Glanville Williams, “The Concept of Legal Liberty” in Robert S. Summers (Ed.), *Essays in Legal Philosophy* (Basil Blackwell, Oxford, 1968), at pp. 121 *et seq.* (especially at pp. 128 *et seq.*)

<sup>15</sup> A distinction between rights “in the strictest and most proper sense” and rights “in a wider and laxer sense” is maintained in *Salmond on Jurisprudence* (Glanville Williams, Ed.) (11<sup>th</sup> Ed.) (Sweet and Maxwell Ltd., London, 1957), at pp. 269–70.

<sup>16</sup> *Salmond on Jurisprudence* (*op. cit.*) at pp. 271–3. See also Glanville Williams, “The Concept of Legal Liberty” (*op. cit.*).

<sup>17</sup> *Salmond on Jurisprudence* (*op. cit.*) at p. 270 and at p. 275 note (c).

<sup>18</sup> *Ibid.*, at p. 270.

whole system is built is that between right–duty and power–liability; this distinction coincides exactly with that taken by Hart.<sup>19</sup>

Fuller’s assertion of an *exact* coincidence between the Hohfeldian and Hartian analyses of legal powers is overstated, however. A close examination of *The Concept of Law* shows that Hart’s power–conferring rules are on any ordinary language account certainly power–conferring rules of a kind, but not of a rigorously Hohfeldian kind. Hart’s distinction between power–conferring and duty–imposing rules centres upon perceived differences in the social functions which the respective rules perform. Hart’s category of power–conferring or facilitative laws is distinguishable in terms of *social function* from certain duty–imposing laws and is probably wider than Hohfeld’s abstract category of power ↔ liability legal relationships. As Hart points out “[l]egal rules defining the ways in which valid contracts or wills or marriages are made do not require persons to act in certain ways whether they wish to or not. Such laws do not impose duties or obligations. Instead, they provide individuals with *facilities* for realizing their wishes, by conferring legal powers upon them to create, by certain specified procedures and subject to certain conditions, structures of rights and duties within the coercive framework of the law”.<sup>20</sup> The point here is that Hart’s power–conferring rules are not in any strict sense *relational* power–conferring rules in the sense that Hohfeld envisages. Indeed, Hart virtually ignores Hohfeld’s analysis in *The Concept of Law*: without doubt to the book’s detriment. There are also very pronounced *analytical* differences between Hohfeldian legal rights *stricto sensu* and legal powers which Hart does not begin to address in *The Concept of Law*. Hart was undoubtedly aware of this, however, because in *Essays on Bentham* he referred to his “previous inadequate approach” to the subject of legal powers in *The Concept of Law*. Hart comments that he (Hart) made no attempt in *The Concept of Law* to analyse closely either the notion of a power or the structure of the rules by which powers are conferred.<sup>21</sup>

### *Jural Correlativity*

Arguably the key notion underlying Hohfeld’s analysis – echoing, as I will later suggest, *sociological* analyses of legal relationships in terms of social power – is that of correlativity. The correlativity of jural relations entails that one term of the relation (e.g. the right) implies the other term (the duty) and *vice versa*. The notion of jural *opposition* (or contradiction) is also important to Hohfeld. He uses the expression “jural opposite” to denote a term that is the negative of another term. This yields two jural correlatives: the negative jural relation of no–right↔privilege (i.e. the jural opposite in the right *stricto sensu* family of relations) and the negative jural relation of disability↔immunity (i.e. the jural opposite in the power family of relations). But jural correlativity is perhaps the more fundamental concept, underpinning as it does the relational nature of legal phenomena. The concept of jural opposition features only as a mode of classifying *types* of legal relationship.

Focusing, then, on correlativity, in the eleventh edition of *Salmond on Jurisprudence* Glanville Williams observes that the question whether rights and duties are necessarily correlative has resolved itself into two schools of thought according to one of which there can be no right without a corresponding duty, or duty without a corresponding

<sup>19</sup> Lon L. Fuller, *The Morality of Law* (Yale University Press, New Haven and London, 1964), at p. 134 note50.

<sup>20</sup> H. L. A. Hart, *The Concept of Law*, (2<sup>nd</sup> Ed., with Postscript edited by Penelope A. Bulloch and Joseph Raz) (Clarendon Press, Oxford, 1994), at pp. 27–8.

<sup>21</sup> See H. L. A. Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Clarendon Press, Oxford, 1982), at p. 196.

right “any more than there can be a husband without a wife, or a father without a child”.<sup>22</sup> The other school of thought does not deny the correlativity of many rights or duties, or types of right or duty, but distinguishes between correlative rights or duties described as “relative”, and rights and duties described as “absolute”. Absolute rights in this sense have no duties corresponding to them, and absolute duties similarly have no rights corresponding to them. Joel Feinberg, for instance, gives consideration to three classes of such duties: duties of status, duties of obedience and duties of compelling appropriateness.<sup>23</sup> Similarly Neil MacCormick has argued that there are some rights – legal rights, no less – which, being logically prior to any correlative duties, are therefore “dutileless” rights.<sup>24</sup>

According to Williams the dispute between the two schools is merely a “verbal controversy” devoid of practical consequences.<sup>25</sup> It may be that the dispute turns more upon how the words “right” or “duty” are used or defined in a particular context than upon the existence of any principled difference between relative rights (duties) and absolute rights (duties). The difficulty faced by the “absolutist” school, however, is to confront the underlying reality of norm-governed social action. It is difficult, in other words, to visualise a right or duty that does not in some sense avail against some other person or is at least in existence because the world of human beings is a *social* world. It may be that arguments favouring a concept of absolute rights or duties turn less on the denial of the possibility that such rights and duties avail against “others” than on the determinacy (or indeterminacy) of the “others” against whom they avail. For instance even if there is no-one in particular against whom (say) Max might assert a right “to life” such an assertion would be meaningless were it not for the existence of “others” – multitudes of indeterminate “others” – who are, minimally, rational and intelligent beings more or less capable of understanding, and respecting, Max’s assertion. The fact of making such an assertion involves at least a tacit assumption that those other beings have a “social nature”. It may be the lack of determinacy of “others” against whom absolute rights or duties avail that lends support to the “absolutist” school. It cannot be maintained, however, that lack of determinacy of such “others” – in the sense of difficulty of ascertainment of the specific individual or class against whom a right or duty avails – means *no-one at all*. In some cases the problem of identifying a party who “correlates with” the holder of an absolute legal right or bearer of an absolute legal duty may derive from a failure to visualise the right or duty in question in its “crystallised” form: that is, on the occurrence of relevant (Hohfeldian) “operative facts”. In such a case, an “uncrystallised” right or duty merely exists as an indeterminate hypothesis.

Correlativity also entails that the *content* of someone’s right is precisely equivalent to the content of someone else’s duty in terms of the subject matter of the prescribed act or forbearance. Similarly, in such a case, the content of someone’s duty is precisely equivalent to the content of someone else’s right. Mere contentual equivalence, however, does not entail that a right *is* a duty or a duty *is* a right. That is the error which Max Radin commits:

A’s demand-right and B’s duty in I are not correlatives because they are not separate, however closely connected, things at all. They are not even two aspects of the same thing. They are two absolutely equivalent statements of the same thing. B’s duty does not follow

<sup>22</sup> *Salmond on Jurisprudence (op. cit.)* at p. 264.

<sup>23</sup> Joel Feinberg, *Rights, Justice, and the Bounds of Liberty* (Princeton University Press, Princeton, New Jersey, 1980), at pp. 137–9.

<sup>24</sup> Neil MacCormick, *Legal Right and Social Democracy* (Clarendon Press, Oxford, 1982), at p. 161.

<sup>25</sup> *Salmond on Jurisprudence (op. cit.)*, at p. 264.

from A's right, nor is it caused by it. B's duty *is* A's right. The two terms are as identical in what they seek to describe as the active and passive form of indicating an act; "A was murdered by B"; or "B murdered A". The fact that A and B are wholly distinct and separate persons must not be allowed to obscure the fact that a relation between them is one relation and no more.<sup>26</sup>

Radin compounds his error by asserting that the fact that A and B are distinct persons may *obscure* the fact that the relationship between them is one relationship. It is precisely *because* the parties to whom such a relationship is ascribed are different that each side of the relationship requires a different term to describe it. Although A's right that B should  $\phi$  is in terms of content (i.e. the prescribed act of  $\phi$ -ing) equivalent to B's duty to  $\phi$ , if the right were truly *identical* to the duty the relationship would be unintelligible. The point is that although there is identity with respect to the content of the prescribed act there is non-identity with respect to other important aspects of the relationship. For example if A has a right that B should  $\phi$  A's position might be understood at least partly in terms of an expectation on A's part that B should  $\phi$  but not in terms of any duty or compulsion to  $\phi$ . In contrast B's position may be understandable in terms of a duty or compulsion on B's part to  $\phi$  in fulfilment of A's assumed expectation. Nevertheless Radin usefully makes clear the identity of subject matter that characterises a jural relation: highlighting in particular that the act or forbearance that is the subject of the duty is also the subject of the right. Depending on the particular state of knowledge of the parties other "identities" that may be highlighted here include: (1) that a specified act ( $\phi$ ) is to be performed by the *same* person (the duty-bearer), (2) that each party's "opposite number" is identifiable (by each party) and (3) that the norms governing the relevant conduct are the same.

If each term of a jural relation, whether it be right or duty, implies the other term – i.e. A's right implies B's duty and *vice versa* – it follows that in order to understand either term properly it is necessary to have regard to the correlative term. In the context of Hohfeldian jural relations each term is inherently relational in that the expression "a right" in a sense *contains* the notion of "a duty" owed by another party. In his analysis of the underlying social power dimension of legal relationships – for example, in his sociological concept of legal right – Weber arguably lays the groundwork for, and demonstrates the relevance of, engaging in Hohfeldian-type legal conceptual analysis. Tellingly, both Hohfeld and Weber accentuate correlativity: for instance in the sense that the right of one may be regarded as the duty of another. In the legal world, social actors – and juridical entities such as corporations – are ideatively connected in a manner analogous to forms of social interaction or social relationships. Natural and juridical persons are, in other words, linked together in a legal nexus that echoes or replicates the social nexus.

### *Legal Relationships as Social Relationships*

At several points in his *General Theory of Law* the Russian jurist N.M. Korkunov also demonstrated that he had grasped this essential correspondence between legal and social relationships. Whilst he did not attempt a sociological analysis of law based on the notion of social relationality he advanced the view that legal relations are social relations "but governed by a legal rule".<sup>27</sup> He argued that social relationships are

<sup>26</sup> Max Radin, "A Restatement of Hohfeld" (1938) 51 *Harvard Law Review* 1141 at p. 1150. See also *Salmond on Jurisprudence* (op. cit.), at p. 265 note (i).

<sup>27</sup> N. M. Korkunov, *General Theory of Law* (op. cit.), at p. 192.

transformed into legal relationships by means of the conceptual apparatus of rights and duties. This stance led Korkunov to the view that not only is every legal relationship composed of a right and a duty<sup>28</sup> but also that legal relationships subsist only between natural and juridical persons: not between persons and *things*. That position was a concomitant of his more general stance according to which legal relationships were to be seen as “juridicised” social relationships. As Korkunov notes:

We cannot in this matter subscribe to the opinion of . . . [those] who recognize the existence of juridical relations with regard to things. The relation of the proprietor of a thing with that thing is not distinguishable from the relation of that thing towards one who has no right over it. The proprietor, just like one who has no ownership but uses it, employs the object according to fixed technical rules and according to personal taste. The only difference between the one and the other is in relation to other persons.<sup>29</sup>

Korkunov held that legal relations exist “not between an individual and a thing but only between several individuals on account of the use of a thing”.<sup>30</sup> This was simply a reaffirmation of his more fundamental position on the nature of legal relationships as essentially social relationships: “Legal relations, it is readily seen, are possible, then, only between individuals. Only individuals can be subjects of juridical relations. They alone are capable of them.”<sup>31</sup>

Korkunov may be right to insist that the only “true” legal relationships are essentially social relationships defined by legal norms. But that is not to say that a relationship – even a relationship endowed with legal significance – cannot exist between individuals and inanimate objects. Human beings *do* factually perceive themselves as standing in a relation to inanimate objects and this is reflected in language such as “this is mine”, “that is hers”, and so on. This use of language undeniably asserts a relationship between a person and a thing which is so compelling that the law cannot lightly disregard it. Person-thing relationships are thus all-pervasive within the law, but it is beyond the scope of this essay to dwell further on that important category of relationships.

Korkunov’s standpoint is nonetheless interesting and instructive because it represents a relatively uncommon – and remarkably prescient – position in the middle ground between analytical jurisprudence and social theory. But I believe that it is *Weber’s* writings, rather than (say) Korkunov’s, that are a more appropriate point of departure for a sociologically informed enquiry into the Hohfeldian jural relation. In his sociological writings Weber sets out, among other things, to define concepts such as “social relationship” and “legal right”, and to outline a theoretical basis for concepts such as social power. More specifically, though, in the *Sociology of Law* Weber combines the role of analytical jurist with that of sociologist. His sociological approach is applied to *law* as a social and institutional phenomenon. This interdisciplinarity gives him a unique insight into the demands of the analytical and expository part of jurisprudence and at the same time the underlying *social* dynamic of law. In the present context, however, what is most significant of all is the fact – already alluded to – that Weber’s analysis of legal rights is strikingly Hohfeldian in character. It is to that, at first sight improbable, state of affairs that I now wish to turn.

<sup>28</sup> *Ibid.*, at p. 199.

<sup>29</sup> *Ibid.*, at p. 200.

<sup>30</sup> *Ibid.*, at pp. 200–1.

<sup>31</sup> *Ibid.*, at p. 201.

## SOCIAL POWER AND THE HOHFELDIAN JURAL RELATION

*Social Relationality and Power*

The relationality underlying Weber's concept of social power probably originates in the more fundamental concept of social relationship, the latter concept implying in turn the related notions of (social) interaction and mutual social action. In sociology, interaction has been analysed as a "process" taking place "between two or more actors". According to Parsons and Shils, the interaction of ego and alter is the most elementary form of social system.<sup>32</sup> One person cannot in any meaningful social sense "interact" with himself or herself. Interaction may be seen as mutual social action – in Weber's sense of action "oriented to the past, present or expected future behaviour of others" – in which each participant acts, or orients his or her action, with respect to the other participant(s).<sup>33</sup> Parsons' concept of interaction closely resembles Weber's concept of the *social relationship*. Weber defines this as "the behavior of a plurality of actors in so far as, in its meaningful content, the action of each takes account of that of the others and is oriented in these terms".<sup>34</sup> Weber adds that as a defining criterion, "it is essential that there should be at least a minimum of mutual orientation of the action of each to that of the others".<sup>35</sup> Clearly it makes no sense to speak of the realm of the "social" unless at least *two* human beings are involved. The smallest possible interactional grouping thus involves two individuals.

The meaningful content of a social relationship – its subjective meaning (i.e. *Sinn* in Weber's terminology) – can be various. Weber's examples include conflict, hostility, sexual attraction, friendship, loyalty or economic exchange. Norms or "maxims", according to Weber, govern the constant or stable components of a social relationship:

The meaningful content which remains relatively constant in a social relationship is capable of formulation in terms of maxims which the parties concerned expect to be adhered to by their partners, on the average and approximately.<sup>36</sup>

Parsons similarly comments that "within the action frame of reference, stable interaction implies that acts acquire "meanings" which are interpreted with reference to a common set of normative conceptions".<sup>37</sup> Action is at least partly explicable through an identification of the norms that individuals apply on one hand to evaluate and to "orient" or modify their *own* social action and, on the other hand, to evaluate and act upon the action, social or otherwise, of *others*. As soon as a norm (for instance, a legal norm) is used as a reference point for the orientation of social action – in other words, it is used by an actor to define some aspect of the content of a social relationship involving that actor and at least one other actor – the social power dimension of the relevant norm and the power dynamic between the actors become relevant objects of enquiry. For instance, let us say that ego has a legal right that alter should  $\phi$ . The norm governing their conduct, using Hohfeldian nomenclature, may take this form:

<sup>32</sup> Talcott Parsons, Edward A. Shils and others (Eds.), *Toward a General Theory of Action* (Harvard University Press, Cambridge, Mass., 1951), at pp. 55 and 105.

<sup>33</sup> Max Weber, *Economy and Society. An Outline of Interpretive Sociology*, Guenther Roth, Claus Wittich and others (Eds. and Trans.) (Bedminster Press, Inc., New York, 1968), at p. 22. For Weber: "Action is 'social' in so far as its subjective meaning takes account of the behavior of others and is thereby oriented in its course". (See p. 4.)

<sup>34</sup> *Ibid.*, at p. 26.

<sup>35</sup> *Ibid.*, at p. 27.

<sup>36</sup> *Ibid.*, at p. 28.

<sup>37</sup> Talcott Parsons, "An Outline of the Social System" in Talcott Parsons, Edward Shils and others (Eds.) *Theories of Society* (Vol. 1) (The Free Press of Glencoe, Inc., 1961), at p. 41.

Under circumstances N:

- (i) alter has a duty to  $\phi$  relative to ego, and
- (ii) ego has a right relative to alter that alter should  $\phi$ .

Here, ego as right-holder has social power over alter to the extent of performance of the specified act  $\phi$ . Ego and alter – assuming that they consciously orient their action by reference to this acknowledged, applicable legal norm – engage in mutual social action equating to Weber’s concept of social relationship. Ego and alter stand in a specific relationship to one another. According to the norm, alter must perform the act  $\phi$ . Although ego for his part need not actually “do” anything, that is not to say that ego has no role as such to play. Ego may in fact tacitly acknowledge the act of  $\phi$ -ing given that he is in a sense a “passive beneficiary” of the act. Doubtless he will have “expectations” that alter will perform the act and he may use persuasion or encouragement to induce her to  $\phi$  if she is reluctant to do so. If, ultimately, alter should fail to perform the act  $\phi$  ego may have to take positive action (e.g. through litigation) to compel performance from alter. Ego’s role is mainly “passive” and expectational, however, whilst alter’s role is essentially “active” and performative.

At the level of actors ego and alter, i.e. respectively right-holder and duty-bearer, the social power underlying the legal right  $\leftrightarrow$  duty nexus takes the form of – to use Weberian terms – an imposition of will or a power to issue commands. In the *Sociology of Law* Weber argues that social power, *Herrschaft* – traditionally translated as “domination” or “legitimate authority” – is manifested in legal relationships. According to Weber social power – the possibility of imposing one’s will upon the behaviour of another person – emerges in a variety of forms. The rights which the law confers upon one person relative to one or more others may be conceived as powers to “issue commands” to the other or others in question. Weber equates the “whole system of modern private law” to the “decentralization of domination” in the hands of those to whom legal rights are accorded. Employees thus have power over their employers in the Weberian sense of “domination” to the extent of the employees’ claim for wages.<sup>38</sup>

Weber stresses the distinction between “commands” directed by the judicial authority to an adjudged debtor and “commands” directed by the claimant to a debtor prior to judgment. An equivalent distinction exists between substantive legal relationships, such as those between litigating parties, and adjective legal relationships, such as those between court personnel – e.g. a judge – and litigating parties. A third class of legal relationships – which we might call *executory* legal relationships, such as those between enforcement organs and litigating parties pursuant to a court order – may be regarded as “commands” issued by the enforcement organ to the party identified by the court order. Thus a *version* of an “Austinian” notion of “command”, which Hart so decisively rejects in *The Concept of Law*, is given a central role in Weber’s characterisation of social power in the legal context. Legal relationships are conceived in terms of structures of “commands” not only at the level of – and as between – private individuals, but at the level of – and as between – the judicial authority (or enforcement agencies) and private individuals. The “commands” in question are, however, derivative: they result from the specific application of legal norms or rules in a given case. Kelsen for instance refers to this as “concretization”. For Kelsen, adjudication is simply a mode of norm production. A material fact determined in the abstract in a general legal norm requires to be established as actually existing in concrete cases. The judicial decision individualises the general norm. Kelsen thus holds that the judicial function is constitutive in a unique sense:

<sup>38</sup> Max Weber, *Economy and Society* (op. cit.), at p. 942.

[I]t is law creation in the literal sense of the word. . . . Thus, the judicial decision is itself an individual legal norm, the individualization or concretization of the general or abstract legal norm. . . .<sup>39</sup>

### *Social Power and Correlativity*

Examining more closely Weber's distinct concepts of social power two separate but complementary standpoints emerge: one causal, the other "hermeneutic" (or "*Verstehende*").

On one hand Weber's concept of "domination" or *Herrschaft* and the wider concept of "power" or *Macht* emphasise the *de facto* or causal element of social power, expressed in terms of probability. For Weber *Macht* is the probability that one actor within a social relationship will be in a position to carry out his or her will despite resistance, regardless of the basis on which this probability rests. *Herrschaft* is the probability that a command with a given specific content will be obeyed by a given group of persons.

The concept of power is sociologically amorphous. All conceivable qualities of a person and all conceivable combinations of circumstances may put him in a position to impose his will in a given situation. The sociological concept of domination must hence be more precise and can only mean the probability that a *command* will be obeyed.<sup>40</sup>

On the other hand Weber offers a "hermeneutic" notion of power that lends weight to Alan Hunt's characterisation of power in the Weberian sense as a "relational concept", concerned as it is with the impact of one person upon another in so far as the behaviour of the one may be analysed as having been determined by the other.<sup>41</sup>

*Herrschaft* (domination) does not mean that a superior elementary force asserts itself in one way or another; it refers to a meaningful interrelationship between those giving orders and those obeying, to the effect that the expectations toward which action is oriented on both sides can be reckoned upon. . . .<sup>42</sup>

Guenther Roth takes the notion of relationality one step further by characterising *Herrschaft* in the sociological sense as a "structure of superordination and subordination, of leaders and led, rulers and ruled".<sup>43</sup> This links in quite significantly to Hohfeld's analysis: superordination and subordination are mutually dependent and *correlative* notions. If ego is superordinate to alter, then alter is subordinate to ego; if alter is subordinate to ego then ego is superordinate to alter. In much the same way: if ego has a right that alter should  $\phi$  then alter has a duty to  $\phi$  relative to ego. If alter has a duty to  $\phi$  relative to ego then ego has a right that alter should  $\phi$ . Relationality and (a distinctly Hohfeldian) correlativity underlie both the Weberian concept of "domination" in the context of *legal* authority and the Weberian concept of legal right. In the legal setting "domination" equates to authoritarian power of command<sup>44</sup> involving a situation in which the will or command of a "ruler" is meant to influence the conduct of one or more others (the "ruled") and actually does influence it in such a way that the conduct of the ruled to a socially relevant degree occurs "as if the ruled had made the content of the command the maxim of their conduct for its very own sake".

<sup>39</sup> Hans Kelsen, *Introduction to the Problems of Legal Theory*, Trans. Bonnie Litschewski Paulson and Stanley L. Paulson (with Introduction by Stanley L. Paulson) (Clarendon Press, Oxford, 1992), at p. 68.

<sup>40</sup> Max Weber, *Economy and Society* (*op. cit.*), at p. 53.

<sup>41</sup> Alan Hunt, *The Sociological Movement in Law* (The MacMillan Press Limited, 1978), at p. 113.

<sup>42</sup> Max Weber, *Economy and Society* (*op. cit.*), at p. 1378. See also pp. 212–3.

<sup>43</sup> See Roth's footnote to Max Weber, *Economy and Society* (*op. cit.*), at p. 61 note 31 (at p. 62).

<sup>44</sup> Max Weber, *Economy and Society* (*op. cit.*), at p. 946.

From Weber's further observations it is clear that the protean concept of domination extends beyond the context of "rule" in the sense of the global-type rule (say) of civil government to more modestly scaled situations such as that of officials operating in different departments of a modern bureaucracy. Each official is subject to the others' powers of command in so far as the latter have jurisdiction. Such a "command structure" is present, according to Weber, even in the case where a customer places an order with a shoemaker for a pair of shoes.

Weber's sociological concept of legal right accentuates one aspect of the social power dimension of a right: the possibility of a "coercive apparatus" being invoked in favour of the right-holder's ideal or material interests. According to Weber this aid consists in the readiness of certain persons to come to the right-holder's support in the event that the "apparatus" is approached in the proper way and that it is shown that recourse to such aid is actually guaranteed by a legal norm.<sup>45</sup> More concretely, in specified circumstances a court can be relied upon in a causal sense to respond to a validly formulated "request" for intervention on the right-holder's behalf, for example, where civil proceedings are issued. Following such a "request" the court, again in a causal sense, can be relied upon to interpret relevant legal norms and also legally relevant facts established in evidence and to apply those norms to the facts so established.

Weber's concept of (correlative) legal *duty* also highlights relationality whilst stressing that (from the standpoint of the right-holder) the legal relationship has an expectational component:

The fact that a person "owes" something to another can be translated, sociologically, into the following terms: a certain commitment (through promise, tort or other cause) of one person [alter] to another [ego]; the expectation [of ego], based thereon, that in due course the former [alter] will yield to the latter [ego] his right of disposition over the goods concerned; the existence of a chance that this expectation will be fulfilled.<sup>46</sup>

The social power element in Weber's sociological definition of legal right<sup>47</sup> perhaps lies more in the "readiness" of a "coercive apparatus" to be mobilised in favour of a right-holder's ideal or material interests than in any quality that attaches to the right-holder personally. In emphasising the link between social power and the availability of an enforcing "coercive apparatus" Weber adopts the viewpoint of the *right-holder* rather than of the "apparatus". This is consistent with his contention that private law may be seen as the decentralisation of social power or "domination" in the hands of those to whom legal rights are accorded. It is clear, in any event, that every right-holder is in the first instance potentially an enforcer of legal rights against relevant duty-bearers regardless of the actual or potential intervention of an organised "coercive apparatus". In seeking payment for goods or services, for instance, a shop assistant does not normally rely on the imminent possibility of court intervention. Shop assistants – or, for that matter, bus conductors, taxi drivers, builders, car salesmen and others – are an initial point of enforcement of legal rights against duty-bearers. For their part, duty-bearers (e.g. "consumers") may accept without question that in a given

<sup>45</sup> *Ibid.*, at p. 315.

<sup>46</sup> *Ibid.*, at p. 327. In this passage I have inserted references respectively to right-holder and duty-bearer ("ego" and "alter") in square brackets to clarify relationality in the situation described. Weber's concept of "legal relationship" designates "that situation in which the content of a right is constituted by a relationship, i.e., the actual or potential actions of concrete persons or of persons to be identified by concrete criteria". See *Economy and Society*, atp. 319.

<sup>47</sup> See Max Weber, *Economy and Society* (*op. cit.*), at p. 315: "Sociologically, the statement that someone has a right by virtue of the legal order of the state thus normally means the following: he has a chance, factually guaranteed to him by the consensually accepted interpretation of a legal norm, of invoking in favor of his ideal or material interests the aid of a 'coercive apparatus' which is in special readiness for this purpose. This aid consists, at least normally, in the readiness of certain persons to come to his support in the event that they are approached in the proper way, and that it is shown that the recourse to such aid is actually guaranteed to him by a 'legal norm'."

situation they have a legal duty to offer payment for goods or services rendered to them. Hart makes an essentially similar point when he stresses that the function of law as a means of social control is best seen in the variety of ways in which law controls, guides and plans life *out of court*.

Yet on the other hand, as Weber also recognises, it remains essential to attend to the viewpoint of those who possess and exercise a more significant degree of social power relative to a particular legal right than the right-holders or duty-bearers themselves. The *sociological point of view* which Weber defines in his *Sociology of Law* urges the adoption of the perspective of those significantly invested with social power.<sup>48</sup> The sociologist's concern – indeed the probable concern of the sociologically inclined jurist – is to discover what “actually happens” in a group owing to the probability that “those exerting a socially relevant amount of power” subjectively consider (legal) norms as valid and orient their conduct by reference to those norms.

It is beyond the scope of this essay to give detailed consideration to a viewpoint other than that of right-holder and duty-bearer. But if the focus of sociological enquiry were to shift to those exerting a socially relevant amount of power we might focus attention on (say) the activities of judges or others operating within ultimately coercive state apparatuses. It would then become clear that the beliefs, understandings and motivations of individual right-holders and duty-bearers are often irrelevant, or only partially relevant, to what “actually happens” as the outcome of some legal process. This holds even where the process has been initiated by those individuals. What, in other words, is arguable, is that the viewpoint of those whose decision-making mobilises specifically coercive agencies to take enforcement action – courts of law and other tribunals for instance – may be of more significance than the viewpoint of actual right-holders, duty-bearers, litigants, criminal defendants or other such individuals. It is always possible for a subject to misperceive his or her legal position. Nor is such perception, in any event, an institutionally authoritative interpretation. Even where the subject is as well informed as it is possible to be, his or her interpretation may remain at variance with an “institutionally correct” interpretation of the legal state of affairs: one that might for instance emerge as the judgment of an ultimate court of appeal or supreme court. An example is where two commercial organisations, benefiting from the expertise of the best available legal advice, enter into a carefully drafted agreement. In the context of a litigated dispute some time later they may find that the agreement has an entirely different legal effect from that intended. So it can matter what the office, status or identity is of the person who asserts the existence of a legal right or duty. It may thus be legally and sociologically more significant – *depending on the investigator's particular interests* – that one person (for instance, a judge in a court of law) rather than another person (for instance, a private individual entering into a contract) asserts the existence of a legal right or duty.

## SOCIAL POWER AND LEGITIMACY

In this, the penultimate, section I wish briefly to consider – as a wider context within which to locate Hohfeldian jural relations – the notion of legitimacy. Often the existence or non-existence of instances of social power depends on the extent to which, if at all, an individual perceives an exercise of power to be either inherently legitimate or legitimate by virtue of the office, status or position of the individual exercising the

<sup>48</sup> *Ibid.*, at p. 311.

power. In a discussion of legitimacy in the context of social power, sociologist Herbert Kelman<sup>49</sup> gives an account of various ways in which a “power–target” may come to accept – and therefore to act upon without challenge – a legitimate request, command or order of a “power–source”. In this context “acceptance” is perhaps similar to Weber’s notion of “obedience”. Obedience may be rendered “without regard to the actor’s own attitude to the value or lack of value of the content of the command as such”.<sup>50</sup>

Kelman analyses social power or social influence in terms of socially induced behaviour change. Social influence occurs whenever a person (P) changes his or her behaviour as a result of induction by another person or group, the influencing agent or O.<sup>51</sup> Induction occurs whenever O offers or makes available to P some kind of behaviour and communicates something about the probable effects of adopting that behaviour. Induction may involve persuading, ordering, threatening, “expecting” or providing guidelines.<sup>52</sup> From this basic starting point Kelman considers influence under conditions of legitimate authority.<sup>53</sup> Situations of legitimate influence are distinctive in that the influencing agent O is perceived as having the right to exert influence and to make demands by virtue of his or her position in the social system.<sup>54</sup> In the context of the Hohfeldian legal right ↔ duty nexus mentioned earlier, ego acting as right-holder, becomes influencing agent O whilst alter as duty-bearer takes the role of power-target P.

According to Kelman, once a demand of the influencing agent is categorised as legitimate the power–target P is in a situation in which personal preferences are more or less irrelevant for determining P’s actions.<sup>55</sup> Ordinarily O would have to convince P that adopting the induced behaviour is preferable, assigning to P a measure of freedom of choice in pursuing a given course of action. Kelman notes that in situations of legitimate influence O does *not* have to convince P that adopting the induced behaviour is preferable, given the available alternatives. O need only demonstrate that the relevant behaviour is *required*.<sup>56</sup> The ability of an influencing agent to elicit desired responses in the context of a particular social system is dependent on the extent to which the system itself is perceived as legitimate. If it is perceived as legitimate it may function on a basis of consent “with relatively little need to resort to coercion or to confront constant challenges”.<sup>57</sup>

### *Modes of Integration*

In the course of his discussion Kelman outlines a model of processes of social influence. While it is beyond the scope of the present discussion to give a full account of Kelman’s model, three modes of integration that he identifies are worth briefly considering here. These indicate possible bases upon which “obedience” might be rendered by such persons as a duty-bearer to a right-holder, or an enforcement official

<sup>49</sup> Herbert C. Kelman, “Further Thoughts on the Processes of Compliance, Identification, and Internalization”, chapter 5 of James T. Tedeschi, (Ed.) *Perspectives on Social Power* (Aldine Publishing Company, Chicago, 1974), at pp. 125 *et seq.*

<sup>50</sup> Max Weber, *Economy and Society* (*op. cit.*), at p. 215.

<sup>51</sup> Herbert C. Kelman, *op. cit.* p. 128.

<sup>52</sup> *Ibid.*, *loc. cit.*

<sup>53</sup> *Ibid.*, at pp. 160 *et seq.*

<sup>54</sup> *Ibid.*, at p. 161.

<sup>55</sup> *Ibid.*, *loc. cit.*

<sup>56</sup> *Ibid.*, *loc. cit.*

<sup>57</sup> *Ibid.*, at p. 162.

in response to an order of a court. Kelman deals generally with influence under conditions of legitimate authority and specifically touches upon conditions of legal influence in his third mode of integration: normative integration.

The first mode of integration is *ideological integration*. According to Kelman:

An individual who is ideologically integrated is bound to the system by virtue of the fact that he subscribes to some of the basic values on which the system is established. These may be the cultural values defining the national identity, or the social values reflected in the institutions by which the society is organized, or both.<sup>58</sup>

The individual internalises system values by incorporating them into a personal value framework. By this means, any demand for behaviour supportive of the system is likely to be met with a positive response provided the demand is consistent with the underlying values of the system, and is thus consistent with the values to which the individual has subscribed.

Kelman's second mode of integration is *role-participant integration*.

An individual who is integrated via role-participation is bound to the system by virtue of the fact that he is personally engaged in roles within the system – roles that enter significantly into his self-definition.<sup>59</sup>

This mode of integration may involve emotional or functional participation in a role which is central to the individual's self-identity. If emotionally involved, the actor may be drawn into symbolic and ritualistic trappings of the role. If functionally involved, the actor may be responsible for the performance of various roles considered necessary for maintaining the system in existence. The actor may identify with power holders if he or she has a stake in maintaining the system-related roles in which self-definition is anchored. The actor's preparedness to respond positively to the system's demands originates in the fact that the *role* also demands this response.

The third mode of integration is *normative integration*.

An individual who is normatively integrated is bound to the system by virtue of the fact that he accepts the system's right to set the behavior of its members within a prescribed domain.<sup>60</sup>

According to Kelman, this involves legitimacy in its "pure form". Here questions of personal values and roles are irrelevant. The actor may accept the system's right to be rendered "obedience" based on his or her commitment to, for example, the state as a sacred object in its own right, or on a commitment – as Kelman puts it – to the necessity of law and order as a guarantor of equitable procedures.<sup>61</sup> The individual faced with demands to support the system may comply without question provided he or she believes that the demands are "authoritatively" presented as the wishes of the leadership or the requirements of law. An indication of authoritativeness, in Kelman's view, is the existence of a positive or negative sanction to control proper performance. The existence of a sanction with its connotations of a "Weberian" coercive apparatus standing in readiness to take enforcement action places Kelman's third mode of integration firmly in the realm of legal authority.

In varying degrees of applicability each of Kelman's three modes of integration is manifested in the relationships of social power that exist at all levels in the legal context. For instance, whilst a judge or enforcement official is likely to be integrated

<sup>58</sup> *Ibid.*, at p. 166.

<sup>59</sup> *Ibid.*, *loc. cit.*

<sup>60</sup> *Ibid.*, at p. 167.

<sup>61</sup> *Ibid.* *loc. cit.*

in all three of the senses that Kelman envisages, role-participant integration may be the dominant influence. The enforcement personnel of a legal system may render “obedience” to the judgment of a court in much the same way as litigants. Such “obedience”, however, is of a qualitatively different nature, linked as it is to the execution of an official function. The “obedience” rendered at a level hierarchically lower than that of officials – for example, at the level of private citizens – may emphasise an entirely different mode of integration. For instance it may be that in a particular community contractual obligations in general tend to be performed faithfully and expeditiously. This may be indicative – or a natural corollary – of a system of values that stresses the importance of keeping promises and honouring agreements. The ideological integration of an individual duty-bearer to the relevant system of values is the wider context of subjective meaning within which the power “wielded” by an individual right-holder in a given instance must be seen. The social power of right-holder vis-à-vis duty-bearer within such a Hohfeldian-type legal relationship – a relationship governed and defined by contractual right ↔ duty legal norms – may thus be enhanced as much by the availability of a coercive apparatus to intervene on behalf of the right-holder (if so called upon) as by the ability of the right-holder to appeal to a widely accepted principle that contractual obligations should be honoured.

## CONCLUSION

Legitimacy is an appropriate point at which to conclude this brief account of the social underpinnings of the Hohfeldian jural relation. If a legal system or system of governance is not invested with legitimacy – attracting some degree of allegiance from those subject to it – it may become dysfunctional and ultimately break down completely. Such a system may, in the end, seek to maintain itself in existence through naked violence, brutality and repression in response to perpetual challenge and dissidence. Law *draws* power from legitimacy. At the same time law is the embodiment of state power. It is both a manifestation and an instrument of social power that permeates every area of human activity. From central sites of origin legal social power percolates to the nerve end of virtually every point of social contact between one human being and another.

In this essay I have sought to show how W. N. Hohfeld’s main analytical writing might be positioned more centrally within the domain of theory. I have identified a (principally) Weberian context of social theory in which aspects of Hohfeld’s analysis might be productively embedded. In identifying linkages between key aspects of Hohfeld’s analysis and Weber’s analysis of social power I have demonstrated how legal conceptual analysis of the Hohfeldian kind may inform an essentially sociological analysis of law as a site of social power. More concretely I have shown how the Hohfeldian right ↔ duty jural relation may in fact be regarded as a relationship of social power in the sense that Weber contemplates.

At a more fundamental level, however, I believe that the linkages between Hohfeldian and Weberian analyses demonstrate that it is necessary – as a first step towards understanding the nature of law as a site of social power – to perceive law not “as norms” but rather as a *relational* medium: one that creates power relationships among social actors, whether in the sense of private individuals or others who perform a specific role, such as a judge or prison officer. Law creates relational structures of social power that may be examined both in the abstract and in specific contexts. It is

possible to perceive those structures at a level of generality and abstraction that permits the discernment of an underlying universality of patterning. That patterning takes the form of legal relationships which “translate” to Hohfeldian-type jural relations.

Relationality is thus so deeply embedded in the subjective meaning of social action, and human social behaviour generally, that we cannot lightly ignore the manifestations of this in the legal context. The relationality of human social behaviour, as Hohfeld perhaps unwittingly taught us, *is* revealed in the concepts and conceptions ordinarily employed in legal thinking. Once recognised, it becomes clear that relationality in the legal context is merely a reflex of the more fundamental relationality of human behaviour in the wider social context. Inevitably, anything that is uniquely social and uniquely human will come to be manifested very markedly in the institutional and conceptual apparatuses of the law.

## CASE NOTES

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

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### PART 36 AND THE “ORDINARY LAW OF CONTRACT”

*Hubert Scammell and others v. Margaret Dicker*

(2001) 98(7) L.S.G. 41 (C.A.) (Aldous and Mance L.JJ.)

#### INTRODUCTION

It only takes a moment's glance at the footers of the Stationery Office edition of the Civil Procedure Rules 1998, each giving the date of its last amendments, to see that Part 36, governing payments into court by defendants and the equivalent claimants' offers,<sup>1</sup> has been amended at least as much as any other rule. An idle comparison between the existing rule and practice direction, newly amended in February 2001, and the original draft in the famous “brown book” appended to Lord Woolf's final report demonstrates a process of shaping and reshaping of the rule that is, in this writer's opinion, yet to be completed. Practitioners will recall the initial uncertainty over CPR r. 36.20 which in its initial version, omitting the word “defendant's” from r. 36.20(1)(b), suggested that a claimant could be penalised for a failure to beat his or her own offer.

It is, of course the penalties<sup>2</sup> that render discussion of Part 36 of such immediate relevance to practitioners. There are penalties on both sides: the obvious penalties against the recipient of a payment or offer defined in rr. 36.20 and 36.21; and the less transparent penalty potentially suffered by a party making a payment or offer: that of having it accepted with such alacrity that it becomes clear the payment or offer was too generous. The parties are, in effect, penalised for a failure to come to an agreement or for coming to an agreement that unduly benefits one party. The latter is – as in the general law of contract – a matter of normal business hazard. It is the fact that the basis of CPR Part 36 is a sanction for a failure to come to an agreement that takes

<sup>1</sup> CPR Part 36 adds to the pre-existing defendant's payment into court (now CPR r. 36.3) the further possibilities of a defendant's offer in relation to non-money issues such as apportionment of liability (in effect regulating the common-law *Calderbank* offer, see for example CPR r. 36.5(4)) and offers to settle by claimants (for money or otherwise). If a claimant's offer is not accepted but is not “beaten” at trial by the defendant – for example, because the offer was to settle for £80,000 and the final award of damages was £100,000 – the defendant will be ordered to pay in addition to the damages awarded, interest of 10% above base rate from the date the offer could have been accepted, indemnity costs for the same period, and interest on those costs again at 10% above base rate: CPR r. 36.21. For an application of this sanction, see *Little and others v. George Little Sebire & Co.*, *The Times*, 17<sup>th</sup> November 1999.

<sup>2</sup> A common but in principle inaccurate description, a judicial preference having been expressed for regarding the costs and/or additional interest as no more than one amongst an armoury of sanctions available to ensure compliance with the rules now governing civil litigation in England and Wales: see *All-in-One Design and Build Ltd v. Motcomb Estates Ltd and another* (2000) 144 S.J.L.B. 219. One must, however, make a significant distinction between this and other sanctions; – here the party is being sanctioned for a failure to give up his or her case, a failure to forfeit the day in court.

it beyond the normal law of contract. It is, however, the interface between the law of contract and the special provisions of CPR Part 36 that informed the discussion of the Court of Appeal in *Scammell v. Dicker*.

## THE FACTS

The facts relevant to this discussion are simple. The defendant made a Part 36 offer in a claim related to the grant of a declaration – and it is significant here to distinguish a Part 36 offer by a defendant from a Part 36 payment by a defendant in a money claim<sup>3</sup> – less than 21 days before trial but otherwise apparently in proper format. Proper format in the circumstances requires the offer, *inter alia*, to “be expressed to remain open for acceptance for 21 days from the date it is made”.<sup>4</sup> In fact, and because of the proximity of the trial, the offer could not in any event be accepted without either agreement between the parties as to costs or the permission of the court.<sup>5</sup> Five days later the defendant withdrew her offer. The claimants then purported to accept the offer, to reach agreement as to costs and sought to adjourn the trial. At first instance it was considered that to allow the offer to be withdrawn flouted the spirit of the CPR. The Court of Appeal disagreed.

## PREVIOUS AUTHORITY AS TO WITHDRAWAL

Given, as has been previously explained, the natural desire of the profession to concentrate on the sanctions and the circumstances in which they will be applied or disappplied, it is not surprising that the majority of the existing case law concentrates in that area.<sup>6</sup> The existing case law as to withdrawal of the offer appeared to consist of a single decision in the Technology and Construction Court: *Pitchmastic plc v. Birse Construction Ltd (No. 2)*.<sup>7</sup> Here, after the trial, but presumably prior to judgment, the claimants purported to accept a defendant’s offer that they had rejected before the trial. Dyson J. held that the ordinary rules of offer and acceptance applied to define whether or not a contract of compromise had been achieved.<sup>8</sup> The offer had expired on its rejection<sup>9</sup> and, unlike a Part 36 payment,<sup>10</sup> no permission was required to withdraw it. This distinction between the Part 36 payment and the Part 36 offer was reinforced by the Court of Appeal in *Scammell v. Dicker* on the following grounds:

<sup>3</sup> See note 1, *supra*.

<sup>4</sup> CPR r. 36.5(6)(a).

<sup>5</sup> CPR r.36.5(6)(b) and r 36.11 (2).

<sup>6</sup> *Little and others v. George Little Sebire & Co.*, note 1, *supra*; *Ford v. GKR Construction Ltd and others* [2000] 1 W.L.R. 1397; *Jones v. Jones*, *The Times*, 11<sup>th</sup> November 1999; *All-in-One Design*, note 2, *supra*; *Petrotrade Inc. v. Texaco Ltd*, *The Times*, 14<sup>th</sup> June 2000; *Amber v. Stacey* [2001] C.P. Rep. 26; *Norwegian Cruise Line Ltd v. Thomson Holidays Ltd*, 2001, Lawtel Doc. C0100729, Ch. D.; *Clark Goldring & Page Ltd v. ANC Ltd*, *The Times*, 27<sup>th</sup> March 2001.

<sup>7</sup> *The Times*, 21<sup>st</sup> June 2000.

<sup>8</sup> There is insufficient scope in this casenote to discuss whether the doctrine of forbearance to sue is adequate to provide consideration in every case in which the use of Part 36 results in a settlement. In many ways it is attractive to consider the offer to be unilateral, provision of the appropriate notice of acceptance being itself the consideration. The decision in *Scammell v. Dicker*, however, that a Part 36 offer can be withdrawn at will causes some theoretical difficulty with a “unilateral contract” analysis. In terms of the latter, once performance has begun – for example the notice of acceptance has been posted but is yet to arrive (the “postal acceptance rule” being ousted by CPR r. 36.8(5)) – it may no longer be possible to withdraw the offer: see *Errington v. Errington* [1952] 1 K.B. 290 and the accumulating comment thereon.

<sup>9</sup> The logical corollary, apparently accepted in this case, is that a Part 36 payment ceases to be effective on rejection even though the intervention of the court is required before it can be withdrawn (CPR r. 36.6(5)).

<sup>10</sup> CPR r. 36.6(5).

- a) Part 36 does not state that an offer cannot be withdrawn;<sup>11</sup>
- b) An offer made not less than 21 days before trial need only be initially “expressed” to remain open for 21 days.<sup>12</sup> There was no requirement that it *remain* open that long and there was no similar requirement for an ostensible validity period for the offer where it was made closer than 21 days to trial;<sup>13</sup>
- c) Nor was it contemplated by the rules that the offeror would be prevented from withdrawing the offer until a “reasonable period” had expired;<sup>14</sup>
- d) CPR r. 36.5(8) only set out the effect of withdrawal but placed no time limit on withdrawal. If the offer could not be withdrawn, that could cause hardship in which case one might expect a similar provision to that governing Part 36 payments in CPR r. 36.6(5) requiring the court’s permission to be obtained.

The Part 36 offer was, ultimately, defined as an offer to enter into a contract and it is axiomatic that an offer to enter into a contract can be withdrawn.<sup>15</sup>

## CONCLUSION

Clearly, if it is a contractual offer, a Part 36 offer or payment is an unusual species of offer. Its format is prescribed, as are many of its terms. In one of its manifestations – the Part 36 payment – withdrawal of the offer is subject to the permission of the court.<sup>16</sup> If its acceptance creates a contract, is the consideration forbearance to sue or is it a unilateral offer?<sup>17</sup> It is an offer, which, if not positively withdrawn or rejected, the offeror can be held to after its ostensible 21-day validity has expired.<sup>18</sup> It is an offer, the failure to accept which can be sanctioned. The reason, it is submitted, that the ordinary law of contract has to be used to define the effect of withdrawal of a Part 36 offer is simply that, as recognised in *Scammell v. Dicker*, neither Part 36 nor Practice

<sup>11</sup> Indeed, the only reference to withdrawal of an offer is in CPR r. 36.5(8) – “If a Part 36 offer is withdrawn it will not have the consequences set out in this part”.

<sup>12</sup> CPR r. 36.5(6).

<sup>13</sup> CPR r. 36.5(7).

<sup>14</sup> Indeed, the contrary has applied where – entirely within the contemplation of the rules, the offer is accepted late: see for example, *R. v. Secretary of State for Transport, ex parte Factortame Ltd and others (No. 6)*, *The Times*, 10<sup>th</sup> January 2001.

<sup>15</sup> *Byrne & Co v. Van Tienhoven* (1880) 5 C.P.D. 344. Clearly, however, additional consideration can be given, creating a contract to keep the offer open for a prescribed period. Simple logistics will normally prevent difficulty in the case of a Part 36 payment where the money is under the supervision of the court and will be paid to the acceptor by the court. Where there is a Part 36 offer, and specifically a claimant’s Part 36 offer to accept a sum of money in settlement of a claim, then what is the effect of a failure to pay? CPR r. 36.15 (5) would seem to suggest that, for enforcement purposes, it is not necessary to regard the acceptance as creating a contract as the court has specific power to enforce the agreement. However, if acceptance of the offer creates a contract, that contract will be enforceable outside the ambit of Part 36. It is suggested that this is particularly necessary in the one circumstance where the separate jurisdiction to enforce does not apparently apply; namely where both offer and acceptance take place prior to issue of proceedings under CPR r. 36.10. In early drafts of Part 36 the pre-issue offer was made explicitly analogous to the post-issue offer. This has not survived into the operational rules. It is in this case, that presumably the parties will have to rely on the doctrine that forbearance to sue can amount to consideration: see *Halsbury’s Laws of England Vol: Contract* at para. 740.

<sup>16</sup> Of course leave was always necessary to withdraw a payment into court (RSC Ord. 22 r. 1(3)), essentially, it can be inferred, on logistical grounds. The existence of the Part 36 offer and the decision that a Part 36 offer can be withdrawn at will creates a discrepancy between the various forms of offer available under CPR Part 36 (in view of the differing penalties on claimants and defendants imposed by CPR rr. 36.20 and 36.21, one might indeed say, a further discrepancy, except that here a defendant’s Part 36 offer in a non-money claim will have the same effect as a claimant’s Part 36 offer in any claim). Pre-CPR case law suggested that there had to be good reason before a payment into court could be withdrawn (*Cumper v. Pothecaray* [1941] 2 All E.R. 516). Current policy will define whether or not a payment can be withdrawn by the principles of CPR Part 1: the overriding objective: *Marsh v. Frenchay Healthcare NHS Trust*, *The Times*, 13<sup>th</sup> March 2001.

<sup>17</sup> See note 8, *supra*.

<sup>18</sup> See CPR r. 36.11(2)(b) and r. 36.12 (2)(b).

Direction 36 regulate *how* such an offer can be withdrawn. Normally, of course, the litigation will be in the hands of solicitors and any withdrawal will be by letter. But for as long as the ordinary law of contract applies to the withdrawal; that withdrawal can be oral, or even notified to the offeree informally by someone other than the offeror.<sup>19</sup> If the principle of CPR r. 1.4(f) is to be followed, it is acceptance, rather than withdrawal, that should be encouraged. A simple but clear mechanism regulating withdrawal of offers should, it is suggested, be added to CPR Part 36 for the benefit of all.

JANE CHING\*

<sup>19</sup> *Dickinson v. Dodds* (1876) 2 Ch. D. 463.

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## BEST INTERESTS AND THE *BOLAM* TEST

*Re S.L. (Adult Patient) (Medical Treatment)*

[2000] 2 F.C.R. 452 (C.A.) (Dame Elizabeth Butler-Sloss P., Thorpe and Mance L.JJ.)

### FACTS

S was a 29 year old woman who had been born with severe learning difficulties. She lived with her mother who found caring for her demanding and it was anticipated that in the near future she would go to live in local authority sheltered accommodation. The mother had two principal concerns. First, that if S were not to be under her strict supervision, she might become pregnant because she was very attractive and might form a relationship or become the victim of a sexual assault. Secondly, S became distressed by her menstrual bleeding, which was described as “heavy”. The contention was that pregnancy would be disastrous for her, and that she was unacceptably distressed during menstruation. The mother made an application to the court for a declaration in respect of the lawfulness of a proposed sterilisation/hysterectomy.

### MEDICAL ISSUES

First, the most drastic option was the laparoscopic sub-total hysterectomy that would eliminate menstruation and the possibility of pregnancy. This was described as major surgery, with the patient being hospitalised for approximately three days. Secondly, there was the possibility of a sterilisation by clipping of the fallopian tubes which would prevent pregnancy but do nothing about menstruation. Finally, there was the option of inserting the Mirena coil, a contraceptive device that would also have the effect of reducing, and even possibly eliminating menstrual bleeding. Clearly the latter option was the least invasive, but a number of medical issues relating to it should be mentioned. It had a shelf life of about 5 years after which it had to be replaced. There was a possibility that it might become dislodged and would have to be reinserted. It also had to be inserted under general anaesthetic.

### EVIDENCE

Evidence was given by the mother and various members of the family in support of the hysterectomy option (the sterilisation option did not seem to find favour with anyone as it was invasive surgery without the benefit of the loss of menstruation). This evidence was largely about the difficulties that S experienced in managing menstruation (she had a horror of being “dirty” which she regarded as her condition when menstruating) and the fact that this would be a single procedure. S had a horror of hospitals and the fact that she would have to undergo a general anaesthetic once every five years (possibly more if the coil became dislodged) at times when her mother was not around to help her was a concern of all the family. There was also the fact that the coil would not necessarily eliminate her periods.

The medical evidence was given by a psychiatrist, Dr E, who stated that there might be adverse psychological consequences following the hysterectomy; Dr K, a consultant in family planning who favoured the use of the Mirena coil as a first attempt to deal

with the situation on the basis that the least invasive procedure should be tried first as a matter of good medical practice, and Professor T, professor emeritus of obstetrics and gynaecology, who agreed with Dr K, but, tellingly for the judge at first instance, thought that the hysterectomy that was proposed was a procedure which could be justified even if undertaken at the outset.

### THE DECISION AT FIRST INSTANCE

The case came before Wall J. The dual purpose of any proposed procedure was such that he had to decide whether it was in S's best interests to lose her fertility to avoid the risk of pregnancy, and, secondly, whether it was in her best interests to lose her fertility to eliminate the distress of her periods. The judge found that there was an identifiable risk of pregnancy (doubted by Dame Elizabeth Butler-Sloss P. in the Court of Appeal), but that it would not be in her best interests to sterilise her for this reason, and by sterilisation he meant the procedure which was contraceptive only and which did nothing to deal with the problem of menstruation.

After the medical evidence had been given, counsel for the mother made a submission that, if the judge were to be against the hysterectomy, he should adjourn in order for the coil to be fitted to assess its effectiveness. Given this compellingly tempting suggestion it is highly surprising that this option was not taken up. Instead, the judge took the bold step of stating that, having heard the evidence it was for the court to decide: "... in my judgment the court is entitled to declare lawful a particular course of treatment if that treatment itself is proper and in the interests of the patient, even if it is not the doctor's first choice".<sup>1</sup> So far, so good. However, he then went on to say that a decision could be made on the basis of the *Bolam* test *i.e.* neither Dr K nor Professor T had said that to move immediately to surgery by means of a laparoscopic subtotal hysterectomy would not be acting in accordance with accepted practices.<sup>2</sup> Accordingly he decided that it would be in S's best interests to undergo this procedure. Thereafter his judgment took another surprising turn when he stated that since both treatments were '*Bolam* lawful' he would make a declaration to that effect and leave the mother to discuss with the doctors as to which treatment be carried out.

### THE COURT OF APPEAL DECISION

The Official Solicitor acting for S appealed on two grounds. First, the decision of the judge was contrary to the expert medical evidence and did not have sufficient regard to the principle of *primum non nocere*, and, secondly, he had erred in law in his application of *Re F*<sup>3</sup> and his approach to the *Bolam* test.

The first ground of appeal gave rise to the usual issue of the extent to which an appellate court can interfere with a decision on evidence, where the trial judge has had the benefit of hearing the witnesses concerned. The first point made by Dame Elizabeth Butler Sloss P. was that the judge had misunderstood the evidence of Dr K when she had said (of a laparoscopic sub-total hysterectomy) that it was "done for heavy periods. . . This is a normal woman and we would not dream of doing it for a normal

<sup>1</sup> *Re S.L. (adult patient) (medical treatment)* [2000] 1 F.C.R. 361 at 376.

<sup>2</sup> *Bolam v. Friern Hospital Management Committee* [1957] 1 W.L.R. 582.

<sup>3</sup> *Re F (Mental Patient: Sterilisation)* [1990] 2 A.C. 1.

woman just because of socially unacceptable periods.”<sup>4</sup> In his judgment Wall J. took this evidence into account, but concluded: “S’s periods, whilst heavy, were not outside normal limits, and that with a woman of normal intelligence no doctor would contemplate a hysterectomy as a means of treating the condition. I accept that evidence without hesitation. The crucial point, of course, is that S is not a woman of normal intelligence.” The President said: “The judge’s failure to appreciate the point of that piece of evidence led him to give significantly less weight to the evidence of Dr K than it deserved.”<sup>5</sup> The judge also failed to give sufficient consideration to the fact that there were continuing developments in this field and that Dr K (supported by Professor T) had been very confident that a new technique would soon be developed. Similarly, he had failed to refer to the evidence of Dr E, the psychiatrist, who had said that the continuance of periods for another twenty years or so would not be psychologically damaging, given that they had been continuing for some fourteen years already.

The President contrasted this case with the case of *Re Z (Medical Treatment: Hysterectomy)*<sup>6</sup> where the 19 year old Down’s syndrome patient suffered from heavy, irregular and painful periods and where four medical experts disagreed. Bennett J. had relied on the judgment of Lord Goff in *Re F* when he said that expert opinion had to be taken into account but had to be weighed up by the court. He had gone on to make a declaration that it would be in Z’s best interests to undergo a laparoscopic sub-total hysterectomy. Seemingly, Wall J. had regarded this case to be on all fours with that of S, on the basis of Lord Goff’s description of the role of the court in such cases. The President stated that Lord Goff’s statement on this point was in the context of pointing out that courts should be able to “rein in excessive medical enthusiasm”, but that “[i]t does not necessarily support the contrary conclusion.”<sup>7</sup> She found that the medical evidence had been weighty and unanimous and that the countervailing evidence of the mother and other family members was not of equal weight: “. . .the understandable concerns of a caring mother and the problems of dealing with S during her menstrual periods do not, on the facts of this case, tilt the balance towards major irreversible surgery for therapeutic reasons when they are unsupported by any gynaecological, psychological or other medical evidence.”<sup>8</sup> It must be stated, however, that she stressed that factors other than medical considerations are encompassed in the best interests test: it includes ethical, social, moral and welfare issues.<sup>9</sup>

Finally, she went on to state that the judge’s decision was inconsistent with the question of proportionality (the remedy being disproportionate to the problem) and that it offended against the principle of *primum non nocere*.

On the second ground of appeal *i.e.* the application of the *Bolam* test, both the President<sup>10</sup> and Thorpe L.J. stated that the obligation under the test *i.e.* to act in accordance with a responsible and competent body of relevant professional opinion, should not be conflated with another duty of the doctor to act in the best interests of a mentally incapacitated patient. Often the *Bolam* test will mean that there are a range of accepted medical practices to choose from, but the best interests test means that the best option must be chosen: “As Mr Munby has pointed out, the best interests test

<sup>4</sup> [2000] 2 F.C.R. 452 at 459.

<sup>5</sup> *Ibid.*

<sup>6</sup> [2000] 1 F.L.R. 523.

<sup>7</sup> *Op. cit.* at 461.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Op. cit.* at 465.

<sup>10</sup> The President’s judgment was following her own earlier judgment in the case of *Re A (Medical Treatment: Male Sterilisation)* [2000] F.C.R. 193 at 200.

ought, logically, to give only one answer.”<sup>11</sup> Wall J. was wrong in his application of the *Bolam* test and also wrong to offer the mother what he considered to be the two lawful alternatives; he should have decided which of the treatments was in S’s best interests. Thorpe L.J. viewed the decision in *Re F* as stating that the *Bolam* test is “relevant (emphasis added) to the judgment of the adult patient’s best interests when dispute arises as to the advisability of medical treatment.”<sup>12</sup> However he went on to say that since then “there has been some divergence of judicial opinion as to the extent of the contribution that the *Bolam* test makes to the determination of best interests.”<sup>13</sup> He went on to say that although the case of *Re F* was about jurisdiction (the *parens patriae* jurisdiction had been removed by the 1959 Mental Health Act and therefore the court was making a declaration as to lawfulness as opposed to treating the mentally incapacitated adult as being the equivalent of a ward of court), the declaratory jurisdiction was very similar to the *parens patriae* jurisdiction as both were concerned with the welfare principle. No declaration would be made in respect of treatment that the welfare of the patient did not require. He too approved of a two stage test in such cases: first, the treatment must satisfy the *Bolam* test which would act as a sort of filter, and secondly, the court must then decide whether it is in the best interests of the patient.

Both Thorpe L.J. and the President referred to the remarks of Lord Brown-Wilkinson in *Airedale NHS Trust v. Bland*<sup>14</sup> where he stated: “whether invasive care is in the best interests of the patient falls to be assessed by reference to the test laid down in *Bolam v. Friern Hospital Management Committee* . . . In my judgment it must follow from this that if there comes a stage where the responsible doctor comes to the reasonable conclusion (which accords with the view of a responsible body of medical opinion) that [treatment] is not in the best interests of the patient, he can no longer continue [that treatment] . . .”<sup>15</sup> However, both went on to say that this did not find general support.

Counsel for the Official Solicitor expressed some reservations about the threefold test set out by Sir Stephen Brown (when President) in the case of *Re G.F. (Medical Treatment)*<sup>16</sup> on the circumstances when no application to the court would be necessary. The three conditions that need to be satisfied are that the operation must be: (1) necessary for therapeutic purposes, (2) in the best interests of the patient, and (3) that there is no practicable, less intrusive means of treating the condition. The President acknowledged that these criteria “ought to be cautiously interpreted and applied”. Thorpe L.J. said the test was “necessarily expressed in broad terms . . . In my opinion any interpretation and application should incline towards the strict and avoid the liberal . . . If a particular case lies anywhere near the boundary line it should be referred to the court by way of application for a declaration of lawfulness.”<sup>17</sup>

## COMMENTARY

It must be said that it is good to see strongly worded judgments that put *Bolam* in its place on issues such as this. The patient’s best interests are now equated with the

<sup>11</sup> *Op. cit.*, at 464 per the President.

<sup>12</sup> *Ibid.*, at 466.

<sup>13</sup> *Ibid.*

<sup>14</sup> [1993] A.C. 789.

<sup>15</sup> *Ibid.*, at 884.

<sup>16</sup> [1992] 1 F.L.R. 293.

<sup>17</sup> *Op. cit.*, at 469.

general welfare principle so as to take into account wider social and emotional factors. Having said that, it is an odd case because although his view of the *Bolam* test was wrong, Wall J. took the correct first step of being willing to give significant weight to the wider social and emotional factors and by not being unduly deferential towards the medical experts. In the event, he went too far by not having sufficient regard to the medical evidence. The oddness and irony of the decision derive from the fact that as a result of this welcome declaration of judicial independence, the judge favoured an excessively invasive medical solution to what was perceived to be the problem.

As far as the views of the family of an incompetent patient are concerned, a comparison might be made with the case of *Re T (A Minor) (Wardship: Medical Treatment)*.<sup>18</sup> In that case, the patient had been born with a serious liver defect. A surgical attempt was made to correct this but it was unsuccessful. The unanimous medical evidence was that the child should receive a liver transplant. The mother refused consent. The child's father (to whom she was not married) agreed with her. Both parents and child had moved out of the country by the time the case came before the Court of Appeal. The mother's reason for refusing consent was that she did not want the child to undergo the pain and distress of invasive surgery. The local authority, at the behest of the consultants concerned, applied to the court for permission to carry out the operation. At first instance, Connell J. granted the application on the basis that it was in the child's best interests for it to be carried out and that the mother was unreasonably refusing consent. The Court of Appeal granted the mother's appeal. The parallel with *Re S.L.* is clear: unanimous medical evidence in respect of a course of treatment but with which the carer of the patient does not agree. However, in *Re T* the mother's view was preferred, and for distinctly suspect reasons. First, both parents were described as "health care professionals" (whatever that meant) and as having experience in caring for young, sick children. It is not clear why this should be relevant. There was no suggestion that the child's post-operative care was a medical problem. On the contrary, if it could be relevant at all (and it is by no means clear that it could), one would have thought that the fact that the child's mother had experience of such care would have been a factor in favour of the treatment, not against it. In any event there was no suggestion that either parent was "expert" in the field: "If the decision in this case was a matter of assessing the clinical opinions of the doctors, the judge was clearly right to prefer their views to the mother who could not be as well qualified to give an opinion".<sup>19</sup> Secondly, the court regarded the welfare of the child as being inextricably tied up with the willingness of his mother to care for him. Interestingly, Dame Elizabeth Butler-Sloss gave one of the judgments (the others were given by Waite and Roch L.J.J.). She stated: "This mother and this child are one for the purpose of this unusual case and the decision of the court to consent to the operation jointly affects the mother and son and it also affects the father."<sup>20</sup> The fact that an order by the court that the treatment take place would result in the mother having to return to this country was also a factor. "... passing back the responsibility for the parental care to the mother and expecting her to provide the commitment to the child after the operation is carried out in the face of her opposition is in itself fraught with danger for the child... Will the father stay in country AB and work or come with her to England, giving up his job and having to seek another job? ... Will she break down? How will the child be affected by the conflict with which the mother may have to

<sup>18</sup> [1997] 1 All ER 906.

<sup>19</sup> *Ibid.*, at 913.

<sup>20</sup> *Ibid.*

cope?"<sup>21</sup> This decision has, quite rightly, been strongly criticised for conflating the interests of the mother and child in this way.<sup>22</sup> Surely the correct approach is for the court to consider the child's best interests independently from the views (which of course must be heard) of the parents. To take the view that the mother's ability to cope after the treatment has taken place should be a relevant consideration is to deny the child's rights and interests which are independent of those of its parents. Fortunately, the courts have generally taken this view.<sup>23</sup> The most glaring cases of parental opposition being overruled can be found in the Jehovah's Witness cases concerning blood transfusions, where there is a fundamental religious belief at the heart of the opposition,<sup>24</sup> and the recently authorised surgery to separate Siamese twins, where there was also religious opposition to the surgery and where there was also concern about the effect of the surgery on the ability of the parents to care for the surviving twin.<sup>25</sup>

Arguably, the approach taken by the Court of Appeal in *Re T* is fundamentally wrong. Fortunately, the views of the mother in *Re S.L.* were not allowed to prevail. However, it is debatable whether this was because of an implicit assertion that the best interests of an incompetent patient cannot be conflated with the interests of her carers. Was it more likely that the reason was because trying the least invasive route first would not rule out the subsequent resort to a hysterectomy (an option that the mother was not, in any event implacably opposed to, given the submission made by her counsel)? Or was it because to have clearly articulated it would have proved a difficult exercise given the judgments in *Re T*?<sup>26</sup>

A final comment should be made on the Court of Appeal's view that there should be a "strict" rather than a "liberal" interpretation of Sir Stephen Brown's three criteria for deciding whether it is necessary to seek a declaration of the court. It might be thought that the first criterion *i.e.* that the procedure be necessary for therapeutic purposes is sufficiently stringent by the use of the word "necessary". However, in the context of the sterilisation of women with severe learning difficulties the concept of what is necessary is fraught with difficulty. Certainly the House of Lords decision in *Re B (A Minor) (Wardship: Sterilisation)*<sup>27</sup> highlights this. In this case a sterilisation was approved as lawful to protect a young woman from the risk of pregnancy. Although this concerned a non-therapeutic operation, the reasoning of court in terms of what was necessary is disturbing. Much of the reasoning centred around the fact that she was vulnerable, that it might be difficult to supervise her and that there was therefore an urgent need to protect her from pregnancy. Did this make *sterilisation necessary*? As commentators have pointed out, if she was so vulnerable how did sterilisation protect her from sexual exploitation, and would not the removal of her fertility increase the likelihood of this?<sup>28</sup>

Similarly, the reference to the procedure being "therapeutic" does not offer sufficient protection for women who are sterilised for reasons relating to the management of menstruation. In *Re S.L.* the procedure was proposed in the case of a young woman with normal periods and the specific purpose of the procedure was to eliminate

<sup>21</sup> *Ibid.*, at 914-915.

<sup>22</sup> See Fox, M and McHale, J, "In whose best interests?" [1997] 60 M.L.R. 700.

<sup>23</sup> See, e.g. *Re B (A Minor) (Wardship: Medical Treatment)* [1981] 1 W.L.R. 1421.

<sup>24</sup> See *Re S (A Minor) (Medical Treatment)* [1993] 1 F.L.R. 376.

<sup>25</sup> *Re A (Children) (Conjoined Twins: Medical Treatment) (No. 1)* [2001] 2 W.L.R. 480.

<sup>26</sup> Although no doubt the old chestnut about *Re T* being 'special on its facts' would have been employed to good effect. [1988] 1 A.C. 199.

<sup>28</sup> See e.g. De Cruz, S.P. 'Sterilisation, wardship and human rights' (1988) 18 Fam. Law 6.

menstruation, despite there being no medical malfunction. In the Canadian case of *Re K*<sup>29</sup> a sterilisation operation was carried out on a child because she had an aversion to blood. La Forest J. subsequently commented on this as follows:

... sterilisation may, on occasion, be necessary as an adjunct to treatment of a serious malady, but I would underline that this, of course, does not allow for subterfuge or for treatment of some marginal medical problem .. The ... case of *Re K* ... is at best dangerously close to the limits of the permissible.<sup>30</sup>

In other words there is a risk that the term “therapeutic” will be applied to cases such as that of S where the elimination of menstruation for social reasons might go unchallenged. Clearly the evidence of Professor T, professor emeritus of obstetrics and gynaecology, that a hysterectomy could be medically justified in such cases is evidence of such a risk. The “strict” approach advocated by the Court of Appeal is, therefore, to be welcomed, as is the rejection of the *Bolam* test as the yardstick by which best interests are measured.

KAY WHEAT\*

<sup>29</sup> (1985) 19 D.L.R. (4<sup>th</sup>) 255.

<sup>30</sup> *Re Eve* (1986) 2 S.C.R. 388.

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# WRONGFUL DISMISSAL – DAMAGES FOR MANNER OF DISMISSAL

*Johnson (AP) v. Unisys Ltd.*

*The Times*, March 23, 2001 (H.L.) (Lords Bingham, Nicholls, Steyn, Hoffmann and Millett)

## FACTS

Mr Johnson had worked for Unisys from 1971 until 1987, when he was made redundant. From 1985 he had suffered from work-related stress resulting in psychiatric illness requiring him to take time off work. In 1990, Mr Johnson was re-employed by the defendants until 1994, when he was dismissed on the grounds of gross misconduct. He then complained of unfair dismissal, alleging that Unisys had failed to operate their own internal disciplinary procedure and that he had been denied an opportunity to defend himself against the allegations made. An employment tribunal upheld his complaint and awarded compensation. Mr Johnson then made a further claim for wrongful dismissal, claiming that the manner of his dismissal had caused a nervous breakdown leaving him unable to work and suffering loss of earnings of some £400,000. At first instance the county court judge had held that an unfair dismissal could not give rise to a breach of the implied term of mutual trust and confidence, and consequently struck out the claim, although granting leave to appeal.

## THE COURT OF APPEAL

Lord Woolf MR, delivering the judgment of the court,<sup>1</sup> dismissed the appeal. The court held that it was bound by the authority of *Addis v. Gramophone Company Ltd*<sup>2</sup> in which the House of Lords had held that damages for wrongful dismissal cannot include compensation for the manner of the dismissal; for injured feelings; or for any loss the employee may suffer from the fact that the manner of the dismissal may make it more difficult for him to obtain new employment: “stigma damages”. Furthermore, the House of Lords’ ruling in *Malik v. BCCI SA*<sup>3</sup> could be distinguished in that both the instant case and *Addis* concerned plaintiffs seeking damages in consequence of their dismissal; whereas in *Malik* damages were sought in respect of breach of contract arising during the continuity of the contract.

## *ADDIS, MALIK ET AL*

In 1909, the House of Lords in *Addis*, which was of course decided long before the advent of statutory employment rights, had held that in cases of wrongful dismissal no damages were recoverable for the manner of the dismissal and there was no entitlement to compensation for

“the injured feelings of the servant, or for the loss he may sustain from the fact that his having been dismissed of itself makes it more difficult for him to obtain fresh employment”.<sup>4</sup>

<sup>1</sup> [1999] I.R.L.R. 90, C.A.

<sup>2</sup> [1909] A.C. 488, H.L.

<sup>3</sup> [1998] A.C. 20, H.L.

<sup>4</sup> *Op. cit. per* Lord Loreburn, I.C. at 491.

Thus, damages are recoverable only for contractual, not moral, obligations. This arguably restrictive approach did not prevent the Court of Appeal, in the case of *Marbe v. George Edwards (Daly's Theatre) Ltd*<sup>5</sup>, from granting damages for loss of reputation to an actress not allowed to appear in a play. The court found that her contract – a fixed-task contract – contained an “express term” that the actress should appear during the run of the play: thus, breach of such a term could give rise to damages for both loss of the reputation which would have been acquired and also loss of reputation already acquired.

An attempt was made by Lord Denning, then Master of the Rolls, in his dissenting judgment in the case of *Laverack v. Woods of Colchester Ltd*,<sup>6</sup> to widen the scope of *Addis* by arguing that damages should be recoverable for both loss of chance and loss of reasonable expectation in cases of wrongful dismissal. The majority of the court, however, were not comfortable with what they saw as a departure from precedent, Diplock L.J. (as he then was) stating:

“The law is concerned with legal obligations only and the law of contract only with legal obligations created by mutual agreement between contractors – not with expectations, however reasonable, of one contractor that the other will do something that he has assumed no legal obligation to do.”<sup>7</sup>

The rise of statutory employment law, particularly in relation to unfair dismissal, tended to complicate the matter somewhat. The Employment Appeal Tribunal in the case of *Robert Cort & Son Ltd v. Charman*<sup>8</sup> held that damages for wrongful dismissal may also include damages for the loss of the right to complain of unfair dismissal, where that right would have been available had the correct notice period been given. This was confirmed the following year by the Court of Appeal in *Stapp v. The Shaftesbury Society*.<sup>9</sup>

The greatest challenge to the restrictive approach of *Addis* came about through the rise of importance of the implied contractual term importing the duty of mutual trust and confidence. The High Court in *Clark v. BET plc*<sup>10</sup> held that the provision of annual salary increases, the amount of which might be paid at the absolute discretion of the employer, amounted to a contractual term. Timothy Walker J. went on to say that if the company were “capriciously or in bad faith” to award a nil increase this would amount to a breach of the term of mutual trust and confidence. Consequently, damages may be claimable either for failure to give a salary increase or for arriving at the level of increase “capriciously or in bad faith”, since both would amount to a breach of contract. Likewise, the judge stated, the setting of an unrealistic bonus target would also amount to a breach of contract, since it would in effect defeat the purpose of the contract.

The most important ruling on the subject of damages for wrongful dismissal was the House of Lords’ decision in *Malik v. BCCI SA*<sup>11</sup>, in which it was held that damages could be awarded for injury to reputation caused by the company running a dishonest and corrupt business. Their Lordships held that losses derived from breach of the term of mutual trust and confidence are recoverable, subject to foreseeability, remoteness and the duty to mitigate. The reasoning of the Court of Appeal in *Marbe* was approved

<sup>5</sup> [1927] 1 K.B. 269, C.A.

<sup>6</sup> [1966] 3 All E.R. 683, C.A.

<sup>7</sup> *Ibid.* at 690.

<sup>8</sup> [1981] I.R.L.R. 437, E.A.T

<sup>9</sup> [1982] I.R.L.R. 326, C.A.

<sup>10</sup> [1997] I.R.L.R. 348, Q.B.

<sup>11</sup> [1998] A.C. 20, H.L.

and the earlier case of *Addis* could be distinguished as not precluding recovery of damages where the manner of the dismissal involved a breach of the implied term of mutual trust and confidence and that breach caused the alleged financial loss. The House also held that positive action by the employer, after the employment relationship has ended, to damage the employee's job prospects might also amount to a breach of trust and confidence. This apparent reappraisal of *Addis* may be explained by the fact that the duty of trust and confidence was not recognised to its present extent at the time that *Addis* was decided, and Lord Steyn observed that, in any case, *Addis* did not say that an employee could never recover damages for loss of job prospects. Obviously, the judgment in *Malik* had great potential for opening the floodgates to claims, and their Lordships were careful to point out that the case was decided on its particular and extreme facts.

Perhaps surprisingly, rather than opening floodgates, the courts in post-*Malik* cases have tended towards restrictive approaches. Thus the Employment Appeal Tribunal in *Janciuk v. Winerite Ltd*<sup>12</sup> held that the failure by an employer to follow a contractually agreed disciplinary and appeal procedure would give rise only to a claim for damages for the time the procedure would have taken, had it been followed; not for damages for loss of opportunity based on the chance of a different decision having been reached had the procedure been followed. Similarly, in *Morran v. Glasgow Council of Tenants Associations*<sup>13</sup> the Court of Session, adopting a strict interpretation of the contract, held that where the contract of employment allows the employer to terminate the contract and pay monies in lieu of notice, the employee may not claim for loss of the right to claim unfair dismissal that would have been available had correct notice been given. Both of these cases follow the restrictive approach of *Laverack* and the reasoning of *Addis*. In a similar vein, the Court of Appeal in the case of *French v. Barclays Bank plc*<sup>14</sup> held that an employee could not recover for stress and anxiety caused by an alleged breach of contract, since the term complained of was not designed to protect the employee from distress and annoyance (*cf Bliss v. South East Thames Regional Health Authority*<sup>15</sup>).

### THE HOUSE OF LORDS IN *JOHNSON V. UNISYS*

The House dismissed the appeal by Mr Johnson, but for divers and, at times, conflicting reasons. Lord Hoffmann stated that he would, if necessary, be prepared to depart from the accepted *ratio* of *Addis*, although he did not believe that such a course of action was necessary since *Johnson*, like *Malik*, concerned loss arising from a breach of a contractual term, rather than from the wrongful dismissal itself. His Lordship did identify difficulty, in a case such as the instant one, in determining whether the injury was caused by the fact of the dismissal or the manner of the dismissal. The main bar to allowing the appeal was, in Lord Hoffmann's opinion, the introduction of the unfair dismissal legislation, apparently formulated with the specific intention of dealing with situations such as Mr Johnson's. Since Parliament had specified a maximum amount of compensation payable for unfair dismissal – at the time of Mr Johnson's claim £11,000<sup>16</sup> – to extend the common law in this area would have the effect of

<sup>12</sup> [1998] I.R.L.R. 63, E.A.T.

<sup>13</sup> [1998] I.R.L.R. 67, C.S.

<sup>14</sup> [1998] I.R.L.R. 646, C.A.

<sup>15</sup> [1985] I.R.L.R. 308, C.A.

<sup>16</sup> The figure is £51,700 for dismissals on or after 1<sup>st</sup> February 2001.

undermining the intention of Parliament, a view which was supported by both Lord Bingham and Lord Nicholls. Lord Millett also supported this conclusion, reasoning that the implied contractual term of mutual trust and confidence is expressed as existing only during the contractual relationship. Therefore, to extend the term beyond the termination of the contract is not only unreasonable, but, in view of the provision of statutory rights, unnecessary.

Lord Steyn, however, took a very different view. He stated that the headnote to *Addis* was wrong, in that it purports to state that an employee may not sue for special damages for loss of employment prospects arising from a harsh and humiliating manner of dismissal, whereas their Lordships in *Addis* appear to have dealt only with non-pecuniary loss, not the actual financial loss arising from the manner of the dismissal. Even if he were wrong, Lord Steyn stated, he would be prepared to depart from *Addis*, as indeed had the House of Lords in *Malik*. In contrast to the other Law Lords, Lord Steyn did not view the introduction of unfair dismissal legislation as a bar to further development of the common law in this area. He argued that, because of the statutory limitation on unfair dismissal compensation, the legislation is only sufficient for lesser cases – for those employees claiming considerably less than the £400,000 claimed by Mr Johnson – thus the extension of the common law would not defeat the intention of Parliament. His Lordship did, however, conclude that the appeal would have no realistic prospect of success due to the major problems of causation and remoteness, and should therefore be dismissed.

#### COMMENT

It may be felt with some justification that this judgment of the House of Lords is, in at least one important aspect, unsatisfactory. Far from clarifying the post-*Malik* position regarding damages and the extent to which *Addis* remains binding law, the House has cast doubt on both the accepted *ratio* of *Addis*, and on its value as precedent, despite *dicta* to the contrary in *Malik*. Considering the significance of this issue, not only to Mr. Johnson, but to employment law generally, it is a pity that a clear statement of the current law was not forthcoming.

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## BOOK REVIEWS

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

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### HUMAN RIGHTS

*The Law of Human Rights*

by RICHARD CLAYTON and HUGH TOMLINSON  
with CAROL GEORGE and VINA SHUKLA  
Oxford, Oxford University Press, 2000, 1800pp.,  
Hardback, £145, ISBN 0 19 826223

This reference work on the law of human rights in England and Wales following the implementation of the Human Rights Act 1998 ("the HRA") considers human rights law from the domestic, European and international perspectives. It is divided into four Parts: The Background to the HRA; General Principles; The Convention Rights; and Remedies and Procedure. The Appendices (which are set out in a separate volume) contain a range of primary materials. The most detailed and lengthy of these Parts is The Convention Rights which deals, chapter by chapter, with each of the major rights under Articles 2 to 14 and Protocol 1 of the European Convention on Human Rights ("ECHR"), with the exception of Article 13 which is dealt with in Part IV on Remedies.

The strength of this book lies in its content. It covers a quite remarkable range of topics in considerable depth. The written style is clear and readable, although there are one or two typographical errors including a reference to the Maastricht Agreement (rather than Treaty), and some mistakes in the format of the Table of Legislation. Although the book states in its introduction that it is a practitioner's text, it would also be useful as a reference text for academics and students. Most of the content is relevant to both potential audiences, and while material of particular interest to practitioners is included (there are Chapters on the Human Rights Act Procedure and the Court of Human Rights Procedure, plus a section on the correct citation of ECHR cases in Chapter 3) so too is material more likely to appeal to the academic community, such as the theory and philosophy of human rights in Chapter 1 on The Constitutional Protection of Human Rights.

The use of authority is thorough, both in quantity and quality. For example, in relation to some of the more important decisions such as *R v. Secretary of State for the Home Department ex parte Brind*<sup>1</sup> (concerning the ban on the broadcasting of the spoken words of representatives of terrorist organisations), the views of different judges (with substantial quotations) are examined and comments on the judgment from other sources provided. There are extensive footnotes, although on number of occasions it

<sup>1</sup> [1991] 1 A.C. 696

is frustrating to find a particular point footnoted only by a reference to another section of book rather than the underlying legal authority. In some instances, the clarity and usefulness of the text would be enhanced by the incorporation of the relevant footnote in the text. This extensive use of footnotes is presumably intended to produce a less cluttered basic text, for the benefit of practitioners, but it could be frustrating for academics and students who must continually jump between the text and the several hundred footnotes which accompany most Chapters. For example, Chapter 15 on Freedom of Expression has almost two thousand footnotes.

The authors address themselves to many of the current debates in human rights law, such as its application to the mentally ill and to issues of sexual orientation, with clarity, authority and interest. Occasionally, somewhat controversial statements are made without the necessary explanation or argument to support them. For example, the arguments in Chapter 1 that “the Convention is *likely* to provide the template for human rights in England and Wales for the *foreseeable* future” (reviewer’s emphasis) and that “[t]here will be many instances when it may be more fruitful to examine the decisions in other jurisdictions [than the ECHR]” are simply stated rather than explained. Similarly, in Chapter 5 on Human Rights and Public Authorities, the authors assert that if the status of a public body is uncertain, it should be regarded as a functional public authority for the purposes of the HRA and that “the fundamental basis” for reviewing public authorities under the HRA will be the principle of proportionality. No justification for these statements is provided. However, since human rights is an area of law where novel arguments are often put forward, controversy is inevitable, and the arguments made in the book are in most cases well explained and authoritative.

A work of this size and scope inevitably gives rise to problems of how the material is ordered, and how the reader is enabled to find material. In this book, the reader is provided with an admirable number of mechanisms to assist in this process. First, there is both a Contents Summary and a detailed Contents list at the start of the book. Second, the Introduction includes a list of topic areas (such as housing, local government and education) which are likely to be affected by the HRA, and provides a guide to the Chapters where each topic is discussed. Third, each Chapter begins with a detailed list of its contents. Fourth, each paragraph is numbered and there are extensive cross references to other paragraphs, although these need to be even more comprehensive. Finally, an extremely thorough index is provided. In short, when researching an issue, it is possible to locate relevant material in this book by reference to these mechanisms.

However, when reading through a particular Chapter rather than simply dipping into the book, the reader is hindered by the lapses in cross-referencing and, in Chapters 3–6, the relative paucity of subheadings given the detail of the text. This may reflect the fact that a practitioner’s book, as this is intended to be, is likely to be used as a source of relatively quick reference, while an academic text is more likely to be read chapter by chapter. However, it means that it is easy to miss relevant material unless the index is used. For example, in Chapter 13 on the right to marry and family life, the first reference to *Fitzpatrick v. Sterling Housing Association*<sup>2</sup> states that same sex relationships were held not to be covered by the reference to “spouse” in the Rent Act 1977. However, neither the text nor the footnotes indicate that such relationships were held to be capable of coming within the definition of “family” in that Act, although this issue is dealt with in two later subsections of the same chapter.

<sup>2</sup> [2001] 1 A.C. 27

Deciding on the order in which to present material in this book must have been a Herculean task. While the broad structure of the book is logical and clear, the detailed structure poses problems for both practitioners, and academics and students. There are a number of instances where material is covered in more than one place and either this hinders clarity or, where it is a necessary approach, the appropriate cross-references are missing. As an example of the former, the explanation of the relationship between proportionality, the margin of appreciation and *Wednesbury* unreasonableness, which is here covered in a number of different sections in Chapters 5 and 6, is not susceptible to a coherent division. It would therefore have better been discussed in a single section. As an example of the latter, material on defamation is included in a subsection in Chapter 12 on The Right to Respect for Privacy and the Home headed (unhelpfully) “False light and related claims”, and in two sections of Chapter 15 on Freedom of Expression, to only one of which is there a cross reference in the Chapter 12 section.

A more general error in the ordering of material is that Chapters 7–20, which deal with each of the substantive ECHR rights, are divided (after a brief introduction) into sections on “The Rights in English Law before the HRA”, “The Law under the “ECHR” and “The Impact of the HRA”, followed by Appendices containing a summary of the relevant law in each of a number of non-European jurisdictions. While an accurate account of English law on human rights now requires analyses of the HRA, of the ECHR which it (largely) incorporates, and of the domestic law of the UK prior to the HRA, the rigid approach of discussing each separately leads to repetition and, more importantly, a lack of clarity.

Material on any given issue is often covered in two or three of these sections without cross references in the text or the footnotes. At best this produces repetition. For example, each section on the Impact of the HRA included a section on pre-HRA cases involving the ECHR (such as the *Spycatcher* litigation), which had inevitably already been discussed in either or both of the sections on pre-HRA law or the ECHR. At worst, it reduces the overall clarity of the book as to the current state of the law, since there is little integration of the assessment of the likely impact of the HRA with the sections on the law in the UK and under the ECHR. The division between pre- and post-HRA law is misleading as it suggests that a clear division can be drawn between the two, whereas this is not the case. In some Chapters (particularly 10, 11, 12 and 15), the section on The Impact of the HRA is extremely detailed, but even in these Chapters there remain aspects of UK law where the impact of the HRA was not explained and aspects of ECHR jurisprudence the relevance of which was not explained. In other Chapters, where the section on The Impact of the HRA was not so thorough, the problem is greater.

This approach is not unique to this book, and since it is such a comprehensive text, its overall usefulness is still greater than most of its competitors. However, whereas those competitors were constrained by the now out of date structure of separate sections on UK law and ECHR law, to which a section on the HRA was simply a bolt-on option, a new book such as this could and should have adopted a more radical and effective approach. Each subsection should have included an explanation of existing UK law followed by an assessment of the potential impact on it of the HRA, taking into account, by way of elaboration or contrast, the Strasbourg jurisprudence. This would have reduced repetition, and integrated the relevant comments on UK law, the ECHR and the HRA on a particular topic, thus enabling the overall position to be assessed more clearly. A different and more integrated approach is in fact adopted in Part IV on Remedies and Procedures, although on occasion the text still fails to

identify clearly whether existing remedies are simply additional to those under the HRA or are amended by them to some extent.

The material from other jurisdictions included in Appendices at the end of each of Chapters 7–20 is interesting, but full use is not made of it, either as a predictor of the likely approach under the HRA, or an exemplar of what approach would be desirable. Given the substantial coverage of the book, it might have been better to deal with the foreign material more succinctly but include more comment on it. In Chapters 15 and 21 comment on the position in other jurisdictions is included as part of the assessment of the potential impact of the HRA. This adds weight to the arguments made about the likely impact of the HRA, and made the inclusion of detailed Chapter Appendices on the other jurisdictions of greater relevance.

Despite these criticisms of the ordering and integration of the material, the basic content of the book is excellent. Chapter 1 (The Constitutional Protection of Human Rights) provides a remarkably clear account of the various rights philosophies, an achievement matched by few of its competitors. The explanation of the effect of the HRA on sovereignty is also given, although the division of the material into separate sections on incorporation of the HRA, sovereignty generally, entrenchment of the HRA and sovereignty under the HRA is not particularly helpful. Chapter 2 on The Impact of Unincorporated Treaties provides a particularly full coverage of the pre-HRA UK law in this area (for example, it includes the impact of the ECHR on administrative decisions), although it is rather brief on Treaties other than the ECHR. Chapter 3 on The HRA: Interpretation and Synopsis provides a clear and succinct introduction to the HRA as well as a valuable discussion of the limits of the HRA and the ECHR itself, although the very detailed section on the interpretation of the HRA would have benefited from the use of examples. Chapter 4 on The HRA and Statute Law discusses the relationship of the HRA with statutory law, an area of great significance both for practitioners, and for academics and students. Chapter 5 on the HRA and Public Authorities makes good use of material from HRA debates in assessing the meaning of “public authorities” for the purposes of the Act. The explanations provided in Chapter 6 on General Principles under the Convention of the phrases “prescribed by law” and “necessary in a democratic society” are excellent. Chapter 8 on the Right not to be Subject to Torture or Inhuman or Degrading Treatment contains an excellent discussion of the topic.

Chapter 10 on The Right to Liberty contains a very full and useful discussion of habeas corpus and police powers of arrest and detention, which are often not covered in such depth in texts on human rights. In fact the content of Chapters 10 and 11 (on Fair Trial Rights) overall are excellent. Chapter 12 on respect for privacy and the home is also particularly good, and includes a detailed discussion on the development of various aspects of privacy. References to and explanations of the Civil Procedure Rules are provided. The Impact of the HRA is dealt with particularly comprehensively in Chapters 10, 11 and 12.

Even in this comprehensive text, Chapter 15 on freedom of expression is outstanding. It runs to almost 150 pages and is particularly good on contempt, criminal law and the ECHR and the impact of the HRA generally. Finally, the more practical Chapters, Chapter 21 on Remedies Under the HRA and Chapter 22 on HRA procedure are also excellent. It is invidious to single out particular aspects of these Chapters for praise, but the clear and detailed discussion of the meaning of the term “victim” for the purposes of bringing an action under the HRA is worthy of mention.

Appendix A, which is helpfully included in both volumes of the book, contains the full text of the HRA and Schedules, which include the ECHR. The other Appendices

include a summary of various national and international sources of law and commentaries on human rights, and a complete (to 30 June 2000) table of admissible cases brought against the United Kingdom in the European Court of Human Rights. The latter makes interesting reading as it summarises briefly the facts and findings in each case and therefore provides record of the British government's response to the ECHR over the last 25 years.

The United Kingdom materials include the text of the HRA, the preceding White Paper and relevant Rules of Court and Practice Directions. It is unfortunate that at the time the book was written, only draft Rules were available, but this problem is one with which practitioners will no doubt be familiar. The European materials include the ECHR (including the full text of Protocols), the Rules of the Court of Human Rights and the European Social Charter. The International section includes key UN documents, such as the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights 1966, and extracts from the constitutions of the United States and a number of Commonwealth countries.

Although this book purports to be a practitioner's textbook and would undoubtedly fulfil that role admirably, it would also be suitable as a reference text for academics and students undertaking a course on human rights law. Not only is it comprehensive in its scope and detail, it is also challenging. The writing of this review was a particularly time-consuming undertaking, not primarily because of the length of the book, but because it was impossible not to be continually drawn into the well written and thought-provoking discussions contained in it.

ELSPETH DEARDS\*

### COMMUNITY CARE

Community Care and the Law: 2nd Edition  
by LUKE CLEMENTS  
London, Legal Action Group, 2000 xlvi + 529 pp.,  
Paperback, £30.00 ISBN 0 905099 94 X

Community care, the way it operates and the legislation behind it, is a minority issue – or so it would seem given the lack of comprehensive, accurate and readable texts that exist. Luke Clements' recently updated text fills this void, but will still only attract minimal interest. Community care, and providing legal advice on it, is not seen as a "sexy" area in which to practise. However given our ageing population certain elements of the current community care regime will rise in prominence and knowledge will inevitably lead to increased client fees. The book covers the whole range of community care provisions, from residential care through to after care for mental health patients and provisions for children, making it the most comprehensive text available on today's market.

The text endeavours to be "an invaluable guide to this particularly convoluted area of law", and it certainly is a clear and easy to read book that takes the reader through a variety of difficult topics. Given that the readership is intended to be wider than legal advisers, and incorporates social workers, charities *etc.*, it is to the credit of the author that he manages to explain issues such as the status of Local Authority Circulars and Department of Health Executive Letters so clearly in Chapter 1. Indeed, even lawyers

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should ensure they do not skip the initial chapters since they lay the foundations for the discussion of the operation of the law which forms the meat of the book.

The structure and layout of the text inevitably involves some jumping around when trying to establish the nature of the duties owed by Local Authorities – this is a difficulty encountered with the majority of texts dealing with multi-faceted legislation. On the whole Clements provides adequate signposts, but it does hinder the speed at which information can be accessed. In addition, when using the text to answer specific queries, the text was found to provide basic information only and the footnotes appeared to require more than a passing knowledge of social services law. Hence, the text may not in truth be the “bible” that its cover credits suggest. In addition, the amount of the book devoted to how decisions in relation to community care can be challenged is somewhat limited for a legal readership. The majority of lawyers who are asked to advise will be seeking to question the Local Authority decision. While they must know the legal basis upon which the Local Authority may be failing in their duties, how best to remedy the situation will be what they want to know in practice. In including the Human Rights Act 1998 in this final chapter on remedies, the author appears to have simply “tacked” it on to the text. There is little consideration of the 1998 Act and the requirements for Local Authorities to act in accordance with the provisions of the European Convention on Human Rights (section 6 of the Human Rights Act 1998). Indeed the author does not make clear within the text that the 1998 Act and the Convention are different. In dealing with the duty to assess (Chapter 3) it is stated:

When the issue of ‘severe physical risk’ arises, the obligation on the local authority stems not so much from the community care legislation as from the Human Rights Act 1998. The duty to protect life (article 2) and prevent degrading treatment (article 3) requires that positive action be taken.

By expressing it this way, and failing to address the duties under the 1998 Act directly, there will be scope for practitioners to ignore the ramifications of the Convention, the more so if the practitioner is a social worker whose legal training may have taken place long before the Convention and the 1998 Act came into force. Although the law is expressed to be that in force at April 2000, the lack of in depth consideration of the European Convention cannot really be excused.

Despite some failings, it would be unfair to conclude on a negative note. This text tries, and succeeds, in clearing the muddy pool of community care legislation and making the plethora of regulations, guidance and other rules understandable which can only benefit the client groups who all rely on knowledgeable practitioners.

M.E. RODGERS \*

## NOTTINGHAM MATTERS

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

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### **SOLON: INTERDISCIPLINARY STUDIES IN BAD BEHAVIOUR AND SOCIALLY VISIBLE CRIME**

*JUDITH ROWBOTHAM and KIM STEVENSON\**

#### ABOUT THE PROJECT

Two and a half years ago, a Law and History collaboration was formed at the Nottingham Trent University, resulting in the setting up of SOLON. Based in the Department of Academic Legal Studies in Nottingham Law School this is a major interdisciplinary project with a primary focus on the socio-cultural contexts within which the legal system operates. This innovative project seeks to promote a greater understanding of the ways in which societies, past and present, utilise the concepts of law and punishment to identify and regulate types of offensive conduct or “bad” behaviour – thereby enabling certain types of socially visible bad conduct to be labelled as “criminal”.

The project has its own website ([www.ntu.ac.uk/solon](http://www.ntu.ac.uk/solon)) linking a contributors’ network which currently consists of some 98 scholars, practitioners and post-graduate students from a broad range of disciplines including law, history, criminology and the social sciences, both from the UK and abroad. Many of these contributors are involved in various research activities related to the project including the preparation of monographs, chapters for edited volumes and conference papers. The website supports a bulletin board to promote dialogue and exchange of views and information. Funding has been secured from an ESRC small grants award to develop a major database giving access to public expressions explaining and defining attitudes towards “bad behaviour”. This will aid research into the role of the media in society and for exploring the impact of media representations of crime and the legal process. SOLON has already developed a number of initiatives and links including the Nottingham Trent University-Galleries of Justice Partnership, managing a link with the Nottingham-based but nationally-orientated law museum. An EU grant for Stimulating Innovation in Small Firms has been awarded to strengthen and develop this collaborative partnership. The

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Nottingham Trent University has also provided funds to support the cataloguing of the previously unexploited Rainer Archive held at the Galleries. This unique archive, spanning the period 1820–1997, comprises the records of various philanthropic societies involved in the administration of justice such as the Society for the Protection of Women and Children, and the London Police Court Mission, in which lies the origins of the modern Probation Service. To promote and support SOLON, a three day conference, *Behaving Badly*, will be held at the Galleries of Justice on 19–21 September 2001, which will result in an edited volume, *Behaving Badly – Socially Visible Crime and Moral Outrage – Victorian and Modern Parallels* (publication 2002).

### PROJECT RATIONALE – THE SIGNIFICANCE OF AN INTER-DISCIPLINARY APPROACH

The intention of SOLON is to use its interdisciplinary focus to locate legal processes and the legal system *firmly within a socio-cultural context*, instead of examining these themes as a discrete area of study. There is a consciousness of the need to highlight the extent to which present understandings of the law and the legal process are enhanced by the development of an essentially historical consciousness. A major thematic link, therefore, is the consideration of the extent to which “crime”, as the legally punishable extreme of “bad” behaviour, is a mutable concept, culturally and legally speaking. Equally, “crime” considered in the context of socially-identified bad behaviour will extend to cover those incidents dealt with in other courts, including the civil and the divorce courts and how all these intermesh in social perceptions of the legal process and its importance. This will encourage wider reflections on the role and function of the “law”, including the shape of legislation past and present, forms and types of punishment imposed by both the legal system and society as a whole, and the ways in which all of this was made socially visible to a mass audience. It is for this reason that firstly, a historical perspective provides a central foundation to this project, and secondly, that the concept of social panic is utilised to define the chosen periods of study.

### HISTORICAL PERSPECTIVES ON LAW AND THE LEGAL PROCESS

Legislation is always a product of a particular socio-cultural context operating at the time of its establishment. Yet until and unless specifically repealed, such legislation may often remain in force for substantial periods of time, with little or no modification. This has substantial implications for the continuities of social attitudes towards certain types of bad behaviour. Historians, though, will insist societies are not immutable in terms of cultural attitudes towards individual and communal behaviour. Why, despite these obvious potential discontinuities, has and does society as a whole, and the legal profession (supported by the political system) seem to support the products of a past age in this area of social management? How far can this be attributed, with any accuracy, to a sense that the law in operation is in some way independent of its origins? How far is there actually subtle change to make legislation respond to changing social needs through the actions of those involved, from judges to juries? It is partly for these reasons that the historical dimension is considered so central to this interdisciplinary study. Yet while different disciplines will recount the historical narrative of those aspects of the legal process which are relevant to them, generally this is undertaken in

ways which emphasise the apparent “inevitability” of the progression of these narrative links. A comparative approach across historical periods has been preferred, in order to highlight both discontinuities and continuities.

### THE SIGNIFICANCE OF SOCIAL PANICS

Periods of social panic, and their associated expressions of moral outrage, have long had the effect of raising the public visibility of crime, criminality and offensive behaviour. This promotes a series of debates – within the legal profession, in Parliament, but also, significantly, in the national arena. In terms of accessibility, such public discourse operates predominantly through the medium of popular reporting, especially that informed by “expert” comment drawn from those areas agreed to have an interest in the topic. But such comment can easily operate in a range of discrete contexts. It is hoped that a truly interdisciplinary approach, looking to a breadth of comment, past and present, tapping into the debate from a range of perspectives, including social policy experts, legal reformers, police, medical professionals and politicians, will promote a greater unity of comprehension across the disciplines of the impacts such social panics may have in this area, and the ways in which they operate. As already stressed, interdisciplinarity constructed in this way has also the further merit of promoting a comparative approach that moves away from a predominantly progressive approach to the historical links between past and present attitudes to behaving badly and the legal process. This helps to avoid the problems of chronological inevitability which too often obscure the actual substance of both the continuities and discontinuities by stressing the narrative links at the expense of a more interdisciplinary and individual examination of the periods involved.

### VICTORIAN AND MODERN PARALLELS

Initially, the decision has been to focus on two periods, the Victorian period (1850–1885) and the present, from around 1970. Both periods are characterised by a contemporary consciousness, of being “modern”, being imbued with a mixture of pride and panic about the impact of new technology; of apparent economic affluence but holding a widespread conviction that the stability of society as a whole, is threatened by the activities of social deviants. Both are ages of “social panic”, distinguished by the associated expressions of moral outrage, where the “euphoria” generated from such relatively widespread wealth and affluence provides the setting for the perfect contrast in which “social panics” can thrive. During such periods of social panic, when “society” was/is seeking to adjust to new practical demands, rapid and/or apparently all-embracing legal responses to perceived crises were/are demanded at levels of considerable intensity which often prove to have unexpected long-term consequences for both individuals and society as a whole. This entails the passage of new legislation, or the establishment of new legal precedents, or utilising established legislation in different ways. Such adjustments were, and are, often undertaken while legislators and judicial figures are pressurised into swift, and “appropriate” retributive public action. This can often prove to have unanticipated long-term effects but there has been little attempt to investigate these issues in respect of statute law and legal practice. For instance, the common law development of the rules of evidence during the Victorian period, and a certain judicial benevolence towards the legal position of certain types of

defendant (defined on class, age and gender grounds) might make an interesting contrast with recent statutory initiatives. These, such as the intrusions on the right to silence, seem reactions born out of social panic, but designed to diminish or undermine the defendant's position on a much more uniform basis, with less opportunity for distinctions made on class, gender or age grounds.

## CONTINUITIES AND DISCONTINUITIES

The issue of continuities is thus clearly central to the project, but not at the expense of highlighting significant discontinuities, since these can cast as much light on the nature and long-term effects of social panics. By taking this comparative and interdisciplinary approach both factors can be highlighted and given due weight. Therefore, this work deliberately eschews the inclusion of a familiar, over-arching chronological narrative, "explaining" the development of the legal processes from the Victorian period to the present. The underlying theme of continuities and discontinuities constitutes an invaluable and challenging framework making this a distinctive and unique study, but also one likely to appeal across subject boundaries. Identification of these factors within the discourse and the underlying contributory elements feeding the discourse, informs and encourages a wider perspective on the legal system, promoting a deeper sense of the socio-cultural context in which legislation is evolved, enforced, and modified. The resultant focus is as much on the way that the legal system, its practitioners and its operations, are viewed by contemporaries as it is on the actual process of trial and punishment, since this has critical implications for the performance and development of the legal system in practice. It is a truism that certain "classes", or "types", of people are, individually and communally, identified as particularly threatening when/if they turn to behaviour identified as socially "offensive". This is reflected, for example, in sentencing practices, where fixed tariffs and certainty are argued alongside the English tradition which prides itself on being able to meet "individual" needs and the demands of "justice" in the abstract.

Above all, there is the issue of the stark positions taken by popular discourses, often inflating the damage done by the guilty parties beyond the immediate impact of their crimes and making them threats to the health of society as a whole. "Crime" is regarded as a social disease; both nineteenth century opinion and modern attitudes support belief in the "medical" model of crime. This is something which has important implications for an understanding of the presentations by the legal system and the popular media of these parties for both periods. Much of the apparent confusion and hypocrisy of Victorian society over moral values may well relate to the difficulties of reconciling similarities of motivation behind the performance of certain activities labelled "socially constructive and desirable" and the performance of others labelled "socially dysfunctional". Similar confusions are apparent today, as with the changing media positions taken towards modern entrepreneurial figures. Thus it can be said that in terms of social attitudes, as well as the exercise of legal discretion, there can be a similarity of response based on the social position of the person on trial, despite the context of very different crimes. Such a perspective could provide interesting insights into similarities between attitudes towards property crimes and crimes against the person during periods of social panic. The prime objective of SOLON is, then, to achieve a direct juxtaposition of these two periods, to enhance understanding of the (lasting) impact of developments emanating from such atmospheres and promote studies of interesting contextual parallels.

## MEDIA PRESENTATIONS OF THE LEGAL PROCESS

The main research resource available to those involved with the project, apart from the obvious ones of legal materials past and present, consists of a range of media references. Relatively little has been undertaken into the media presentation of the legal process, and the links between the legal system and the media – via personalities and their socio-cultural and political networks. It is a significant omission, if only because the majority of those in society have, do and will understand the legal system primarily through various types of media presentation of the processes involved. It is to amplify the media references to bad behaviour and socially visible crime that the ESRC has awarded a grant to SOLON, to enable the setting up of a major, electronically-available thematic database. Initially, the focus is on England and Wales in the Victorian and present periods, and on print (especially newspaper) references, with their accompanying illustrations, though the database will be expandable, in terms of location, time periods and genre of reference. This qualitative database will include popular sources intended for mass audiences as well as those intended for more professional or elite audiences, identifying the experts or key figures involved in the legal process and in the media. It should highlight the public discourse of control via the paradox created between what is demanded by the populace and what the state and/or the legal process can or will do when focusing on the concept of “bad” behaviour. The role played by the media in promoting popular representations of “typical” perpetrators, taking into account issues of race, gender and social hierarchy, and the nature of “offensive” behaviour, will aid a broader comprehension of the processes involved in such identifications. The database will be based on a series of conceptual identifiers with the potential for key-word searches and will draw on largely untapped material to inform resultant debates illuminating questions such as whether it is possible to distinguish between behaviour which is criminal and that which society finds offensive; and whether any such distinctions are helpful in seeking to achieve an understanding of the myths surrounding supposed long term patterns of deviance, and of consequent responses.

## FUTURE DEVELOPMENTS

A major strand in the continuing work of SOLON will be the expansion of the qualitative database, to include both more material from the Victorian and modern periods, and from other periods, especially within the twentieth century. A national seminar series will be established to run from January 2002, examining aspects of crime, gender and their representation in inter-war England and Wales which will provide references to feed into the database. Further conferences, both three-day and one day, are planned, including a one-day conference on Railways as Sites and Opportunities for Crime, and another on Victorian Criminal Debates in Spring 2002. The September 2002 conference will be on the theme of Crime and the Legal Process as Performance. A range of publications will be promoted by SOLON in addition to *Behaving Badly*, (edited by Rowbotham and Stevenson) and a monograph on white collar crime by Sarah Wilson, Leeds Law School (both appearing with Ashgate 2002). In addition, the directors plan to promote the themes of the project through conference papers both in the UK and abroad, and through articles in academic journals. The link with the Galleries of Justice will continue, and SOLON will aid in the further development of their archive resources, including recruitment of more collections

relating to the theme of bad behaviour as well as the papers and oral reminiscences of present legal figures. Interested parties are encouraged to contact the Co-Directors to discuss potential involvement.

# A RESPONSE TO “EC DIRECTIVE 99/44/EC ON CERTAIN ASPECTS OF THE SALE OF CONSUMER GOODS AND ASSOCIATED GUARANTEES -FIRST CONSULTATION OF 2001”

CHRISTIAN TWIGG-FLESNER\*

## INTRODUCTION

Directive 99/44/EC on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees (“the Directive”) was adopted in 1999 and has to be implemented into domestic law by 1st January 2002. The Directive seeks to create a minimum standard of protection for consumers in the European Community (E.C.). Thus, it specifies that goods must be in conformity with the contract of sale, and that the final seller must provide various remedies to the consumer, should goods not be in conformity.

Both the progress of the Directive and its implications for domestic sales law have been monitored closely by several members of staff at Nottingham Law School.<sup>1</sup> It seemed appropriate to produce a joint response to the first consultation document on the implementation of the Directive, which was launched by the Department of Trade and Industry (DTI) in January 2001. This article sets out the issues raised in the Consultation Document and the response submitted by Law School staff. The text of the response itself has not been edited. However, a brief summary of the DTI’s thinking and the text of the questions were added to this particular version.

## GENERAL COMMENTS

This response was prepared by Christian Twigg-Flesner, with the assistance of Elspeth Deards, Martin Millward and Giles Morgan, and is submitted on behalf of Nottingham Law School at the Nottingham Trent University.

Generally, we support the proposals for implementation put forward by the DTI. However, there are some aspects of the proposals put forward in the consultation document which may be based on a misunderstanding of either current domestic law or the Directive. We have sought to highlight these aspects in our response to the specific questions raised.

We note that the DTI does not specify exactly how it plans to implement the Directive. Some of the proposals are phrased such as to indicate that there will be amendments to the current Sale of Goods Act 1979, whereas others suggest that there will be separate implementing legislation. We appreciate that the current time scale does not permit a wider review of the current legislative framework dealing with the sale of goods and accept that implementing the Directive through amendments to the Sale of Goods Act and/or Regulations are the best way forward. However, we take the view that this can only be a short-term measure. Any amendments to the Sale of

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<sup>1</sup> For publications, see E. Deards, “The Proposed Guarantees Directive: Is It Fit For The Purpose?” (1998) 21 *Journal of Consumer Policy* 99–119; C. Twigg-Flesner “The E.C. Directive On Certain Aspects Of The Sale Of Consumer Goods And Associated Guarantees” (1999) 7 *Consumer Law Journal* 177–192; C. Twigg-Flesner, “New Rules for Guarantees: For better or worse?” (2000) 10 (3) *Consumer Policy Review* 100; and C. Twigg-Flesner and R. Bradgate, “The E.C. Directive on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees – All Talk and No Do?” [2000] WebJCLI; <<http://webjcli.ncl.ac.uk/2000/issue2/flesner2.html>>.

Goods Act ("SoGA") would have to be handled very carefully as the Act covers all forms of sales, not just consumer sales. It is therefore very important that the impact of any changes to SoGA on non-consumer sales is carefully assessed. However, in any event, it is necessary for the DTI to be more specific as to the means of implementation. The vagueness in this document has made it more difficult to comment on the specific proposals.

Furthermore, the DTI seems to be of the view that the conformity requirement will take effect as implied terms in the contract of sale between consumer and retailer. This is certainly correct as far as the position under the current SoGA is concerned. However, there is nothing in the Directive which suggests that the conformity requirement also operates as implied terms. Rather, it seems that the conformity requirement will have to be a *statutory* requirement. This would also resolve some of the conceptual difficulties posed by the remedial regime of the Directive. English contract law does not recognise remedies other than rescission or damages. Repair and replacement are therefore not easily fitted into the overall framework of contract law. Adopting the conformity standard as a statutory requirement would similarly permit the introduction of repair and replacement as statutory remedies without disturbing the remedial scheme found in the law of contract.

#### RESPONSES TO THE SPECIFIC QUESTIONS RAISED BY THE CONSULTATION DOCUMENT

We now turn to the specific questions raised by the DTI in the consultation document.

##### *Question One*

*(The DTI emphasises that the definition of "consumer" in the directive differs from the definition of "consumer" in other directives and UK legislation. It therefore proposes that the definition of the implementing legislation should follow the definition of the Unfair Terms In Consumer Contracts Regulations 1999<sup>2</sup> (UTCCR).)*

*Do you agree that we should align the definition of consumer with that in the UTCCR? What benefits would this bring? What would be the cost implications? Please quantify.*

It is to be welcomed that there is a plan to maintain consistency between the various consumer protection measures. It is therefore vital to maintain consistency not just between the UTCCR and the Directive, but also with any other consumer protection measures.

However, the reasoning presented in the Consultation Document seems unclear. Some of us agreed with your analysis, although there was also the view that the definition of "consumer" under the *Directive* is broader than the definition under the UTCCR. In fact, in the example of the self-employed plumber given in the Document, he would be a consumer under both the Directive and the UTCCR. If we are correct in our interpretation of both definitions, it is, in fact, necessary to amend the UTCCR in order to preserve uniformity of application.

There appears some concern that not following the exact definitions given in the Directives in the implementing legislation may give rise to infringement liability under Article 226 EC. This is understandable, but it seems to us that in the present situation, such fears are unfounded. The difference between the two definitions is so slight that it seems doubtful that the Commission would (a) consider bringing infringement

<sup>2</sup> S.I. 1999/2083

proceedings and (b) that the Court of Justice would think this to be a sufficiently serious case.

This question should really be addressed at a different level – the DTI should consult the European Commission with a view to “harmonising” the various definitions of consumer which exist in the various Directives on measures which have an impact on consumer protection. This is something which should be picked up through the SLIM programme.

In conclusion, we agree that the definitions should be aligned, but the DTI should re-consider whether the wider definition is that in the Directive or in the UTCCR. We think the definition in the Directive is the broader definition – although there is very little between the two.

#### *Question 2*

*(The DTI observes that it is a Government objective to introduce a consistent definition of “consumer” in all measures which affect consumers. It therefore considers amending section 12 of the Unfair Contract Terms Act 1977 (UCTA) so as to exclude legal persons from its scope.)*

*Views are invited from consultees on the possibility of limiting section 12 UCTA to natural persons acting outside their trade, business or profession. We would also welcome alternative suggestions as to how section 12 of UCTA might be aligned with the Directive.*

Presumably, this proposal would be a stop-gap measure only in light of the Law Commission project to review the current two-tier system of Unfair Contract Terms legislation. As such, this proposal is perfectly acceptable. It would, of course, affect adversely legal persons which are classed as consumers in some cases under the Unfair Contract Terms Act. However, whereas such “consumers” currently benefit from the outright prohibition on exclusion, they would not be without protection if section 12 were to be amended, as any exclusions would still be subject to the test of reasonableness.

#### *Question 3*

*(The DTI proposes that auction sales should be excluded from the scope of the implementing legislation and notes that this is also the current position in English law.)*

*We intend to make use of this exclusion. Do you agree?*

The DTI’s analysis is not entirely accurate. The SoGA still applies to auction sales, although it is permissible to exclude the implied terms, subject to the application of the reasonableness test. Sales at auction are sufficiently different from ordinary consumer transactions and the goods sold at auctions are sufficiently unique to merit a different standard; however, it is questionable if a full exclusion of the quality terms is acceptable. It seems that this would, in fact, reduce the current level of consumer protection.

#### *Question 4*

*(One of the criteria for assessing “conformity” in the Directive is that goods must be “fit for the purposes for which goods of the same type are normally used”. Under the Sale Of Goods Act 1979 (SoGA), one of the factors to consider if goods are of satisfactory quality is whether the goods are “fit for all the purposes for which the goods of the kind in question are commonly supplied”.)*

*In order to avoid any confusion resulting from the slight differences in these definitions we propose to incorporate both terms in the implementing legislation so that goods would be required to be both fit for the purposes for which they are “commonly supplied” and those for which they are “normally used”. Would you agree that this is the appropriate way forward?*

There is, admittedly, a qualitative difference between the two definitions. However, one has to be very careful about how much weight is given to this “fitness” requirement. Under the SoGA, the question of whether goods are fit for all the purposes for which they are commonly supplied is but one factor to be taken into account, in appropriate circumstances, in determining whether the goods are of satisfactory quality. It is therefore *not* an absolute requirement, and there may be situations where goods are not fit for all the purposes for which they are normally supplied, and yet they are of satisfactory quality.

The requirement in the Directive seems to be a stronger one, but it is still not an absolute one. Conformity is presumed where the product in question is fit for all the purposes for which goods of this kind are normally used.

Presumably, the DTI takes the view that there is no difference between the requirement in the Act that where the buyer makes a particular purpose known, the product must be fit for that purpose unless the seller can show that the buyer did not rely on him, or that it was unreasonable for him to do so, and the requirement in the Directive that the seller must have “accepted” the particular purpose. However, this is not necessarily so. For example, a consumer may indicate that he is buying a particular product for a specific, non-standard purpose and the seller’s response is “I have not tried this myself but it should be no problem.” In that case, it would not be reasonable for the consumer to rely on the seller, but the seller may well have accepted the particular purpose which the buyer has made known to the seller. Furthermore, what would happen if the consumer made his purpose known and the seller did nothing by way of objection – under the current SoGA, the consumer may well be entitled to rely on the seller, but the seller may not have accepted the purpose within the meaning of the Directive.

It is clear that this is an issue which requires further consideration.

#### *Question 5*

*(The SoGA currently requires that price be taken into account in appropriate circumstances in assessing whether goods are of satisfactory quality. The DTI takes the view that retaining this would be in breach of EC law as the Directive does not mention price.)*

*Do you agree with this analysis? Are there associated costs and benefits?*

We do not agree with this analysis. There is no indication in the text of the Directive that it would be inappropriate to refer to price in assessing whether the goods meet the relevant standard. In fact, it may be *beneficial* for the consumer to be able to rely on the price of a particular product, e.g., with expensive luxury items. So not only is there no obvious conflict with the requirements of the Directive, but there is a benefit to consumers if the price can be taken into account. It must, furthermore, be taken into account that price is not considered as a general rule, but only where appropriate. We can therefore see no conflict between the current section 14 (2B) and the Directive and reject the analysis given in the consultation document.

#### *Question 6*

*(The Directive requires that public statements about products can be taken into account in assessing conformity.)*

*This is potentially a significant extension of liability. We would welcome any comments on possible approaches to this extension of liability and the likely benefits, costs and problems.*

It is not at all clear that this would constitute a significant extension of liability. It is already the case that some statements made in advertising could be taken into account under the SoGA in defining the contractual description with reference to which the goods are sold (see section 13). There are sufficient provisos in the Directive to prevent this requirement from becoming unfair on the retailer.

This new requirement also complements the existing UK framework such as the Trade Descriptions Act 1968.

#### *Question 7*

*(The Directive introduces a two-stage hierarchy of remedies: in the first instance, the consumer will be entitled to repair or replacement, and in the second, to price reduction or rescission. At present, UK consumers enjoy a short term right of rejection, but no legal right to repair or replacement).*

*Do you foresee problems in our intention to retain existing remedies along with the other remedies specified in the Directive? If so, please explain the circumstances in which you consider there would be difficulties and the nature of the problem.*

In principle, the decision to retain the initial right of rejection is to be welcomed. The difficulties that may be envisaged are not so much of a legal nature, but rather of practical implementation. If we look at the Directive, it is clear that during the first 6 months of the purchase, there is a “reversed burden of proof”, that is, the consumer can claim that a product is not in conformity with the contract and ask the retailer to repair or replace it. The onus to show that there is not a defect is therefore on the retailer. The “short-term right of rejection”, however, requires the consumer to show that there is something wrong with the product he has bought. In that sense, the two regimes can operate alongside one another without any conceptual difficulties.

The real problem is what may arise in practice. If a product does not work, the consumer can rely on the presumption under the Directive that the fault existed at the time of delivery, and can therefore obtain repair or replacement. However, if he has lost all confidence in the product, he will have to show that there was a problem with the product when he bought it in order to rely on his right of rejection. There is a real danger that this may strengthen further the bargaining position of the retailer, rather than the position of the consumer, particularly in cases where the consumer has lost all confidence in the product.

Of course, it must also be taken into account that in many cases, a consumer will be perfectly happy with repair or replacement, and the rejection issue does not arise.

Perhaps an alternative would be to give better effect to the short-term right of rejection in consumer contracts. A common assumption on the side of business is that this period is to run for 28 days. This is clearly not supported by the SoGA. It may be worthy of consideration to determine a concrete time period during which the consumer will be allowed to exercise his right of rejection. However, it is also clear that the flexible standard may work in favour of consumers. In any event, the consumer should be entitled to rely on the “reversed burden” until 6 months after purchase. If he does wish to reject, the consumer may have to show that the defect existed at the time of purchase.

#### *Question 8*

*(The DTI raises the question of when which remedy will be available.)*

*Your views/solutions on this specific example are welcome but equally your thoughts on other possible problematic scenarios and solutions.*

Clearly, there is danger here of giving the consumer the run-around. It seems that in most cases, if the retailer has failed to rectify all faults after the first complaint, the

consumer should no longer be required to make do with further repairs – it fact, it might then be desirable to allow him to choose whether the retailer should be allowed a further attempt to remedy all faults, to replace the product, or whether the consumer should be allowed to rescind the contract.

*Question 9*

*(The Directive allows Member States to include a provision by which contract rescission would not be available if there was only a minor defect. The DTI takes the view that there is an absolute requirement in English law that goods should be free from minor defects and proposes to retain this.)*

*Do you agree with this approach bearing in mind that the courts would currently look at whether a consumer was acting reasonably in cases of minor cosmetic defects?*

This analysis seems confused. It is true to say that the SoGA lists, as one factor to be taken into account in appropriate circumstances, whether the product in question is free from minor defect. As with fitness for all common purposes, this is not an absolute requirement, but only one of several criteria to be considered.

However, section 15A of the SoGA prevents a *non-consumer* buyer from rejecting goods where there is only a minor lack of conformity. The cases which gave rise to this provision are commercial cases where buyers relied on their right of rejection in situations where there was only a technical shortfall in quality or a minute deviation from the contract description, but where the market price for the contract goods had changed, to escape the contract. So the current law includes a provision very much like that in the Directive, but this applies to *non-consumer* buyers only.

We agree with your proposal that this should remain unchanged.

*Question 10*

*(The Directive extends to bespoke products.)*

*How might the four remedies regime outlined in the Directive impact on such contracts? Do you foresee problems with what are possibly bespoke products of no value to anyone else or with contracts where the consumer had contributed designs or materials (linking in with Article 2(3))? If so, what do you think is the appropriate solution, including amendments to the Supply of Goods and Services Act, and what might the benefits and costs be?*

There can be little difficulty in applying the Directive's remedial scheme to bespoke products. It is fairly obvious that the primary remedy under this scheme, repair, should be available in much the same way in the case of bespoke products. Replacement would be less practical, but may not be available in any event because of the proportionality test. Presumably, replacement would only apply where the product fails to a significant degree to match the consumers specifications.

Some useful clarification could be provided by stating clearly whether contracts for bespoke products are contracts of sale or contracts for work and materials. It is submitted that the lead set by the Directive should be followed.

*Question 11*

*(The Directive also refers to installation and installation instructions as things which must be in conformity with the contract.)*

*How might the four remedies regime outlined in the Directive impact? Do you foresee problems; if so what do you think the solution should be and what might the benefits/costs be?*

It must be noted that this obligation applies where the seller has installed the goods or where these were installed on his behalf as well as where the installation

instructions (which, presumably, are drafted by the manufacturer) are insufficiently precise.

In the former situation (installation by retailer), there is clear responsibility for the fault on the retailer, and he should be responsible for dealing with the defect. Obviously, price reduction seems an entirely inappropriate remedy in this situation. Where goods have to be installed, what the consumer will want is for the retailer to ensure that the goods are installed properly – so “repair” seems to be the most appropriate remedy in this context.

It is, perhaps, also important to clarify the extent of the retailer’s obligation should the consumer be entitled to exercise his right of rejection. Thus, un-installing a product may require some redecorating or making good of plasterwork. Clearly, the consumer should not be required to bear any such costs him/herself.

The case of inadequate installation instructions is slightly more difficult. Here, the real responsibility for the problem will be with the manufacturer, rather than the retailer, and there is some potential for unfairness. Retailers may not be aware of the nature of the installation instructions included with products (especially in the case of do-it-yourself products). In any event, there will be a need for the DTI to encourage manufacturers to produce better instructions for consumers where consumers are expected to install goods themselves.

#### *Question 12*

*(Under the Directive, as under SoGA, it is only the final seller who is liable to the consumer for qualitative defects. The Directive envisages a right of action for the seller against the distributor or manufacturer. The DTI proposes to maintain the current position which permits the use of exclusion clauses in this context.)*

*Is this the best solution? Is it sufficient? Please specify any preferred alternatives.*

We are not sure whether this complies with the requirements of Article 4. A possible interpretation of this section is that there is a requirement that allows the final seller to have a right of redress against the distributor or producer in all circumstances, but the way his action is to be conducted is to be subject to national law. Thus, it is clear that the retailer could bring an action for breach of contract against the next person up the distribution chain.

However, the Article could also require that there is an independent right of action for the final retailer which is not dependent on the contract with the distributor or producer.

The third possible interpretation of this article is the one which is generally accepted and the one which the Consultation Document puts forward, i.e., that the existing arrangement is sufficient. This may be the correct interpretation of Article 4, but the alternatives suggested above deserve further consideration. The problem with the third interpretation is that the retailer’s right of recourse will often be terminated by the existence of an exclusion clause which satisfies the reasonableness test. It may therefore be necessary to consider if this possibility can be maintained in the future, although we suspect that this question is better dealt with by the Law Commission in its review of Unfair Contract Terms Legislation.

#### *Question 13*

*(The Directive imposes a two-year limitation period. The DTI proposes to retain the existing six year period.)*

*Do you agree with the intention to retain the existing periods of limitation?*

The Directive simply creates a minimum standard. There is no reason why there should be any change to the existing limitation periods, particularly if this matter is

currently being considered by the Law Commission. The best approach is to wait for the Law Commission to report and then approach this field with a new general measure, if this is deemed desirable.

*Question 14*

*(During the first 6 months, there is a presumption that the defect existed at the time of sale. The DTI is concerned over the existence of a short-term right of rejection and the reversed burden of proof here.)*

*To what extent would the benefits/costs be affected if the reversed burden of proof applied to the existing short term right to reject?*

This relates back to our response to Question 7. In order to maintain coherence within the law, it seems appropriate not to allow a reversed burden of proof.

*Question 15*

*(The DTI proposes not to introduce a requirement permitted by the Directive that consumers should be obliged to notify a defect within two months of discovery.)*

*What are your views on this?*

We agree with the position put forward in the consultation paper. Introducing a two month notification period could put a significant burden on consumers. What would happen, for example, if the consumer was ill or away on holiday? One only needs to refer to *Bernstein v. Pamsons Motors*<sup>3</sup> for a scenario where a consumer suffered because he was unable to deal with a defect immediately due to his illness.

Furthermore, with some products, some defects may appear and then disappear again, and a consumer may prefer to wait and see if the defect remains or if it disappears again after a while (e.g., with cars).

*Question 16*

*(The DTI considers the potential for dishonest claims by consumers, but considers that the Directive and current law provide adequately for this eventuality.)*

*Do you see a problem here? If so how should it be dealt with?*

This analysis seems a sensible one and we agree with it.

*Question 17*

*(The Directive requires that guarantees given free of charge should provide basic information about their coverage and how to claim under the guarantee.)*

*Would this pose problems beyond a one-off need to possibly rewrite slightly the guarantee's narrative?*

We cannot identify any specific problems which would result from this provision. However, there is one aspect of the requirement in the Directive which requires more detailed consideration. Article 6 of the Directive states that guarantees are to be legally binding on the conditions laid down in the guarantee document and in the associated advertising. The following aspects need to be considered. What is meant by "conditions"? There are two possible ways of reading this. Firstly, "conditions" could be interpreted as "condition precedent". Thus, guarantees often require that the consumer does something before the guarantee is activated, such as the completion of a guarantee registration card. Sometimes, the retailer has to stamp the guarantee card to confirm the date of purchase, from which the guarantee period begins to run. Presumably, a failure to comply with these conditions may mean that the guarantee is

<sup>3</sup> [1987] 2 All E.R. 220.

not available to the consumer. If this is so, then it might be necessary to supplement this provision with a further provision giving statutory effect to the “red hand” rule in this context, i.e., a provision which makes it essential that these conditions are clearly identifiable at the point of purchase and that the retailer is aware of what he might have to do. Secondly, “conditions” could also cover the terms of the guarantee itself, i.e., those things which the consumer has to do and those which the guarantor promises to do in return. This could be problematic as far as those conditions in the “associated advertising” are concerned.

#### *Question 18*

*(Consumers must be able to see the guarantee document on request.)*

*Does this pose problems? What are the costs and benefits? Please be specific.*

There may well be administrative costs related to this – retailers will have to ensure that they have copies of all the relevant guarantee documents available and that these are kept up-to-date. Furthermore, in the case of catalogue and on-line retailers, this could be quite problematic. Under the Distance Selling Regulations, such sellers are already required to provide basic details of guarantees to consumers when they make their contract. This requirement in the Directive now seems to go one step further – it requires that the consumer is able to consult the complete guarantee document before he commits himself to making a purchase. Web-based retailers therefore need to work on how guarantees can be made accessible to their customers – the simplest solution may be inclusion on a separate web-page, or e-mailing the text of the guarantee to a consumer on request. In any event, it will be necessary for the retailer to have an electronic version of the guarantee document available – and this is where further costs may be incurred. The obligation under this Article is clearly on the retailer, so it would be for the retailer to ensure that there is a version of the guarantee for the web-site.

#### *Question 19*

*(Member States may specify that guarantee documents are drafted in one of the official languages of the E.C. The DTI does not expect this to be a problem in the UK as guarantees are usually written in English.)*

*What are your views?*

We agree with your assessment. This provision is clearly of more significance in member states whose languages are not part of the main-stream languages, such as Finland. Most global companies already produce guarantees in numerous languages, so there should not be a problem in any event.

There is, however, a further problem, which is of particular concern for UK consumers. Many consumer products are manufactured in the United States. If guarantees are offered with products there, they tend to be drafted with reference to the Magnusson-Moss Warranty Act of 1975, and tend to be referred to as “full” or “limited” warranties. For UK consumers, this description is wholly meaningless. The current implementation exercise is perhaps not the most suitable moment of addressing this problem, but it is certainly something which should be picked up sooner rather than later. U.S. businesses have no need to translate their guarantees (warranties) for the English market, but there may be a case for requiring them to change the terminology they employ.

Although guarantees are generally written in English, some of us thought that it might be worthwhile to introduce an express requirement that all products sold in the UK are accompanied by a guarantee in English.

*Question 20*

*(The Directive permits a shorter limitation period for second hand goods. The DTI indicates that it sees no need for implementing this.)*

*What would your preferred outcome be? Please outline any cost and benefit implications.*

We agree with the position taken in the consultation document. The current SoGA is sufficiently flexible to take the different level of quality which can reasonably be expected of second-hand goods into account, and there is no need to introduce a more restrictive provision.

It is always tempting to introduce a specific period in consumer transactions rather than a flexible standard in order to promote certainty. We think that this argument is not appropriate to second-hand goods (nor, indeed, to new goods). There can be a considerable degree of variation in the quality of second-hand goods, depending on their age and the way they have been used. It is therefore crucial to retain a flexible test in this area.

*Question 21*

*(The Directive requires that consumers are informed about their rights under the legislation implementing the Directive.)*

*What appropriate methods should be employed to achieve this in a cost effective and efficient way? Would your organisation be willing to take part in any campaign and, if so, what could you offer?*

The proposed implementation of the Directive does not appear to create an incredibly well structured set of rules on the sale of consumer goods, and there is an inherent difficulty in making this intelligible to the average consumer. It is also clear that consumers are frequently not aware of their rights, and against whom these can be enforced. Nottingham Law School would be more than happy to offer its expertise in this area to provide training events for consumers, as well as assist in the drafting of appropriate consumer advice material. It is important, however, that there are not too many different sources of information available to consumers – a multiplicity of advice leaflets may be more liable to confuse than to clarify. Instead, a government agency should bring together all those able and willing to contribute to such leaflets and co-ordinate the production of one overall leaflet.

However, education should not just focus on the consumer side. There is just as strong a need to provide suitable training for retailers to ensure that they know of their obligations under both the existing framework and the amended rules which will be introduced once the Directive has been implemented.

The DTI will be aware of existing proposals by Nottingham Law School to organise training sessions for retailers and manufacturers, and Christian Twigg-Flesner has already been involved in initial training sessions provided to senior executives of some brown and white goods manufacturers through trade partner seminars organised by Domestic & General plc. At the time of preparing this response, further discussion between the two are planned to consider the provision of training seminars for retailers. These could be organised together with the DTI and other interested organisations to ensure that there is a coherent and professional training programme in place.

*Question 22*

*(The DTI also invites views on extending the implementing legislation to hire purchase contracts and contracts of barter.)*

*We would welcome views on whether we should bring H.P. within the scope of the implementation and how straightforward, or otherwise, this may be.*

It is, in our view, essential that Hire Purchase Transactions are brought within the scope of the implementing legislation. Indeed, applying a different regime to such transactions would be liable to cause significant confusion amongst consumers as there is no functional difference between, say, a purchase made by using a credit card and one made through a hire purchase arrangement (despite the legal differences). The same standard should apply to all forms of transactions which consumers would understand to be sales transactions.

*Question 23*

*It would be particularly useful to have views on how the remedies provided for by the Directive should apply to H.P. agreements.*

It seems that the remedial regime under the Directive, if applied to H.P. transactions, would not be very problematic. The remedies could be provided by the “original” retailer as the Directive does not require the actual retailer to provide the remedy him/herself – it seems sufficient if he or she covers all the costs and arranges for repair to be done by a subcontractor. Thus, the H.P. provider could, in effect, contract with the original supplier to provide the remedy.

*Question 24*

*Views are also welcomed on whether we should attempt to cover contracts for the hire and barter of goods.*

Despite the express exclusion of such contracts from the Directive (there was some discussion about this during the legislative process), it seems to us that extending the implementing legislation to such contracts is to be welcomed. We do not think that this would be a problem under European law because (a) the Directive is a minimum harmonisation measures and (b) there are no conflicting European measures on contracts of barter.

It is desirable to maintain uniformity between transactions which are classed as different types of transactions for legal purposes, but are sufficiently similar in the overall result they achieve. We would therefore welcome the extension proposed by the DTI to all forms of consumer transactions.

## COMMENT

The DTI’s consultation document was not an easy one to which to respond. There were several instances where the authors of the consultation document were, at best, confused about the rules in the Directive or in the current Sale of Goods Act. Some of the analysis by the DTI was plainly incorrect. This is very unfortunate in view of the impact the implementation of the Directive will have on the law relating to the sale of goods in the UK. The DTI is rather vague about how it intends to implement the Directive – some of its questions suggest that there may be separate implementing legislation whereas others suggest that there will be amendments to the Sale of Goods Act. One cannot help but to get the impression that the DTI is still trying to make sense of the Directive. It is hoped that the responses which the DTI will receive will enable it to present a more coherent and focused second consultation document, which is due in the summer.

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## EDITORIAL

*Professor Conor Gearty,  
Professor of Human Rights Law  
at King's College London and  
member of Matrix Chambers has kindly agreed to  
contribute the guest editorial to this edition.*

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### THE HUMAN RIGHTS ACT – ONE YEAR ON

The first large point to make about the Human Rights Act is that its impact on domestic law has been as pervasive as the better-informed commentators anticipated. The great wave that is human rights has washed over the peaks and troughs of domestic law, splashing into every litigious nook and cranny. It has seemed at times as though a case could not be reported without some nod in the direction of the Act. This is not to say, however, that the Human Rights Act has transformed UK law, rendering certain subjects otiose and fundamentally altering others. There have been changes, sometimes quite radical ones, as in public law (where *R. v. Secretary of State ex parte Daly*<sup>1</sup> is particularly important) and in criminal law (where the highlights have been *R v. Offen*<sup>2</sup>, *R v. A*<sup>3</sup> and *R v. Lambert*<sup>4</sup>) but the landscape of our law is still broadly recognisable. The Act's pervasiveness has not (yet?) been translated into revolutionary, human rights based, outcomes.

It is early days yet however and the Human Rights Act has a patient inexorability to it. The measure feeds off case law and needs the right adversarial battles in order to work its revolutionary magic. These cannot always be relied upon to come along everywhere they are needed in the space of a single year. The decision of Michael Douglas and Catherine Zeta-Jones to defray the cost of their wedding by selling their right to privacy provided one such opportunity (*Douglas and others v. Hello! Ltd.*<sup>5</sup>) which, followed quickly by the special case of the Bulger killers' claim to anonymity (*Venables and Thompson v. News Group Newspapers Ltd. and others*<sup>6</sup>), helped to entrench both a right to privacy in domestic law and the (partial) horizontal application of the Act to private disputes. But the judges in *Re W and B (Children)*, *W (Children)*<sup>7</sup>, who used a couple of care proceedings to rewrite the Children Act 1989, may yet be found to have acted over-enthusiastically: the case is under appeal to the Lords. In our adversarial system, the right factual matrix is required before the intrusion of the Human Rights Act will be deemed to be warranted by the judges.

*Re W* illustrates one of the key issues to have emerged in the first year of the Human Rights Act's active life. Where a statute potentially permits the judges to do everything,

<sup>1</sup> [2001] U.K.H.L. 26, [2001] 3 All E.R. 433.

<sup>2</sup> [2001] 2 All E.R. 154.

<sup>3</sup> [2001] U.K.H.L. 257, [2001] 3 All E.R. 1.

<sup>4</sup> [2001] U.K.H.L. 37, [2001] 3 All E.R. 577.

<sup>5</sup> [2001] 2 All E.R. 289.

<sup>6</sup> [2001] 1 All E.R. 908.

<sup>7</sup> [2001] E.W.C.A. Civ. 757, [2001] All E.R. (D) 285 (May).

care needs to be taken about when exactly action should be taken. The courts have emphasised the need to distinguish between “interpretation” and “legislation”. The first is apparently okay while the second is out of the question. (Where this leaves the common law – naked judicial legislation if ever such a thing existed – is best passed over in silence.) Another strand to this theme in the case law has emphasised what has been called “the discretionary area of judgment” in which the courts must permit the legislature to act. In coming years, we can expect both of these rather woolly concepts to be fleshed out into true theories of justiciability and of judicial deference (not quite the same thing). But the case law is as yet some way of achieving an agreeable level of self-deprecating honesty about what the courts can and cannot, and should and should not, do: the issue is still presented as though it were a technical rather than a (broadly) political one, when in fact it can only be resolved by a level of constitutional intelligence that has not previously been required of our judiciary.

Where the courts have been excellent in the first year has been in avoiding arid disputes about technical issues. The Human Rights Act is as yet unsuffocated by absurd side-bar issues of no interest to anyone except the duller class of lawyer and the natural pedant. The only cases that have been ominous in this regard have been *Poplar Housing and Regeneration Community Association Ltd v. Donoghue*<sup>8</sup>) and the Cheshire Homes Case which followed it (*Heather, Ward and Callin v. Leonard Cheshire Foundation and the Attorney General*<sup>9</sup>), where the courts appear to be suggesting that bodies engaged in functions on behalf of public authorities may be able to avoid the obligations in the Human Rights Act that would apply to the authority concerned were it to do such jobs itself. As a result we may well have a deluge of private/public preliminary issue cases in due course. The matter is bound to require resolution at the very highest level, at which point the issue of what is a public function will inevitably involve some discussion of the nature of public service in our social (or is it liberal?) democratic state. One of the pleasures anticipated by lawyers at the time of enactment of the Human Rights Act was that it would put them at the centre of politics: it might also put them (or at least their lordships) at the centre of political philosophy – surely not an attractive position for more than a very few of the former silks that make up our senior judiciary.

What the judges are more confident about, though, is the common law, and the first year of the Human Rights Act has seen a high-class tussle for hegemony between the old and the new. Naturally the old has won hands down: the common law did not get where it is today by surrendering at the first sign of statutory impatience. The majority of Human Rights Act cases have confirmed the consistency of the common law with the Convention, while sounding most of the time as though the test were the other way round, and that it was the Convention that needed to be tested for compatibility with the pre-existing law. The activist cases in the first year have been mainly in the criminal sphere and have involved the use of the Human Rights Act to reassert traditional common law positions which had been rattled by statute. This is particularly the case with *R v. Offen* (where the legislature tried to interfere with the sentencing discretion of the judges), *R v. Lambert* (where old approaches to the burden of proof have been given a new lease of life) and *R v. A* (where Parliament’s view of what a fair trial is in a rape case has been set to nought by the House of Lords). Designed to be the master of the common law, the Human Rights Act has in these cases been turned into a compliant servant in its battle with parliamentary legislation that runs counter to the common law’s spirit.

<sup>8</sup> [2001] E.W.C.A. Civ. 595, [2001] 3 W.L.R. 183.

<sup>9</sup> [2001] E.W.H.C. Admin 429, [2001] All E.R. (D) 156 (June).

## *Editorial*

The final large-scale development since 2 October 2000 to be noted here has been slow burning but promises to continue in the years ahead. The personalities of the judiciary are being scrutinised as never before. Attention is being focused on their gender and ethnicity (there are no women or ethnic minorities among the law lords), on their constitutional position (why are the senior judges in the legislature?), and on their method of appointment. This is inevitable and right: when political power is redirected from elected to un-elected bodies in a political culture that is democratic in spirit, public opinion inevitably follows that power and insists on it being exercised in an accountable fashion. The media naturally are in the van of this movement, and senior politicians like the Home Secretary and the leader of the Conservative Party have jumped aboard after the events of 11 September fundamentally changed the political atmosphere. The interaction between the Human Rights Act and the legislative and executive action judged necessary in light of the New York and Washington attacks on that date may yet prove to be the greatest challenge that the UK judiciary will face in the years ahead.

CONOR GEARTY



## ARTICLES

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

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### THE CONSUMER PROTECTION ACT 1987: PROOF AT LAST THAT IT IS PROTECTING CONSUMERS?

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#### INTRODUCTION

Part I of the Consumer Protection Act 1987 (“the Act”) transposes the Product Liability Directive<sup>1</sup> and imposes strict liability in respect of unsafe products on all those in the production and supply chain. The preamble to Directive 85/374 asserts that such liability is the sole means of fairly apportioning risk in modern consumer transactions. Despite the fact that this avoids the limitations of actions for breach of contract or negligence,<sup>2</sup> jurisprudence on the Directive is scarce across the Member States,<sup>3</sup> although it has been reported that approximately 90% of all cases may be settled out of court.<sup>4</sup>

During the last two years, however, a number of judgments under the Act have been reported. These decisions, one of which was handed down by the Court of Appeal, give some indication of the areas that are likely to be at the centre of future actions under Directive 85/374 and the Act. The purpose of this article is to consider the light that is shed by these decisions on key concepts of the product liability regime, and to assess the value of Part I of the Act to consumers in the light of the principles that have emerged from a number of recent cases.

#### OVERVIEW OF THE ACT

The scheme of Part I of the Act is, by statutory standards, straightforward. It is separate to the general safety requirement in Part II and the provisions on misleading

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<sup>1</sup> Directive 85/374/EEC O.J. 1985 L 210, p.29, amended by Directive 99/3/EC O.J. 1999 L 49, p. 1, transposed by the Consumer Protection Act (Product Liability) (Modification) Order 2000 S.I. 2000/2771.

<sup>2</sup> That is, the need to show that the claimant is in privity of contract with the defendant, or that the defendant owed a duty of care to the claimant.

<sup>3</sup> Commission “First Report on the Application of Council Directive on the approximation of laws, regulations and administrative provisions of the Member States concerning liability for defective products” COM (95) 617 final at p. 2 and “Report from the Commission on the Application of Directive 85/374/EEC on Liability for Defective Products” COM (2000) 893 final 31.1.2002 at 2-1.1.

<sup>4</sup> Commission “Report from the Commission on the Application of Directive 85/374/EEC on Liability for Defective Products”, *op. cit.* note 3.

prices in Part III, and it sets out all the requirements that have to be met for a product liability action to succeed. First, the item in question must be a “product” within the meaning of section 1. “Product” for the purposes of Part I of the Act is given a very broad definition and means “any goods or electricity”.<sup>5</sup> There is, therefore, no requirement that the product in question is a product specifically for use by consumers.

Second, only the persons listed in section 2(2) are liable under this part of the Act; the manufacturer of the product, the importer of the product into the E.C. or a person who puts his or her trademark on a particular product.

Third, an action under this part of the Act requires that there is a defect within the meaning of section 3. A product is defective “if the safety of the product is not such as persons are generally entitled to expect . . .”.<sup>6</sup> Account is to be taken of the way and the purpose for which the product was marketed and to any instructions or warnings given with the product,<sup>7</sup> as well as what might reasonably be expected to be done with the product<sup>8</sup> and the time it was supplied by the producer.<sup>9</sup> This definition seeks to exclude those dangers that are inherent in the particular product (sharp blades on knives, for example) as well as those for which adequate warning has been given (such as labelling on cleaning products warning of their hazardous nature).

Fourth, the damage caused by the defect must be within section 5. This includes death, personal injury or damage to property,<sup>10</sup> provided that the property damage exceeds a value of £275 and is property intended for private use and so used.<sup>11</sup> Fifth, there must be a causal link between the defect and the damage. The action may then be defeated if the defendant can establish one of the defences in section 4. Briefly, these are: (a) the product complies with mandatory Community or national requirements; (b) the defendant never supplied the product; (c) the product was not supplied in the course of a business *and* the defendant did not operate with a view to profit; (d) the product was not defective when it left the producer’s control; (e) the defect was a development risk or (f) the product is a component of another product and the defect lies in the way the component is used in that other product.

Inevitably, some of these requirements make it quite difficult to bring an action. For example, section 3 provides that a product is defective if its “safety . . . is not such as persons generally are entitled to expect”, having regard to a number of factors including the way in which it was marketed and any warnings or instructions provided, what might reasonably be expected to be done with the product, and the time at which it was supplied by its producer. While this is comparable to the general safety requirement in Part II of the Act and the General Product Safety Regulations 1994,<sup>12</sup> it imposes on consumers the difficult task of obtaining expert evidence on the level of safety which consumers are entitled to expect of a particular product. The European Consumers’ Organisation (BEUC) argues that claimants have insufficient expertise and access to information to discharge this burden and cites two Austrian cases where this problem has arisen, in at least one of which the consumer’s claim failed as a result.<sup>13</sup>

<sup>5</sup> Section 1(2).

<sup>6</sup> Section 3(1).

<sup>7</sup> Section 3(2)(a).

<sup>8</sup> Section 3(2)(b).

<sup>9</sup> Section 3(2)(c).

<sup>10</sup> Section 5(1).

<sup>11</sup> Section 5(4). This is the lower threshold of 500 ECU set by Article 9(b) of the Directive. It is interesting to note that, taking account of the present exchange rate of Euro to Sterling, this ceiling could theoretically be raised to £350.

<sup>12</sup> S.I. 1994/2328.

<sup>13</sup> BEUC “BEUC response to the Commission’s Green Paper on Liability for defective products” BEUC/016/2000, at section 12, citing OGH 16-4.97 OB 2414/86t and OGH 16-7.98 OB 157/98a, KRES 4134.

The definition in section 3 also excludes defects in quality or fitness for purpose that do not adversely affect the safety of the product. Thus many consumer claims are automatically excluded from the ambit of the Act.

A second restriction is the defences under section 4. Not only is a wide range of defences provided, it is arguable that the controversial defence under section 4(1)(e) (the so-called development risks defence) is unduly restrictive. Section 4(1)(e) provides that it is a defence for the defendant to show that the state of scientific knowledge at the time the product was supplied was not such as to enable a producer of such products to be aware of the defect. Even though Directive 85/374 made the development risks defence optional, only Finland and Luxembourg exclude it entirely, although certain member states exclude the defence to some extent. For example, Spain excludes use of the defence in respect of medicinal products and foodstuffs for human consumption. Consumer organisations such as the National Consumer Council,<sup>14</sup> BEUC<sup>15</sup> and the European Consumer Law Group (ECLG)<sup>16</sup> oppose its inclusion, on the basis that it passes the risk associated with innovation from the manufacturer to the consumer. However, the Report commissioned by the European Commission on the application of Directive 85/374<sup>17</sup> found no evidence that the defences in general discouraged claims, and the development risks defence is supported by business organisations such as the Confederation of British Industry (CBI)<sup>18</sup> and the EC Committee of the American Chamber of Commerce in Belgium<sup>19</sup> on the grounds that its removal would inhibit innovation and place an unreasonable financial burden on industry.<sup>20</sup>

The Act does not expressly provide for group actions to be brought. Such actions, enabling consumers to pool their resources and add the evidential weight of repeated defects, can potentially assist claimants, and the fact that Directive 85/374 did not provide for them was strongly criticised by the ECLG.<sup>21</sup> However, in the UK group actions are possible generally,<sup>22</sup> and in *A and others v. The National Blood Authority and others*<sup>23</sup> discussed below, a group action was brought under the Act. This was the first time that a group action under the Act proceeded to judgment. Previous group actions under the Act did not get that far; in some cases an acceptable settlement was reached, in others the action collapsed when the claimants lost their legal aid certificates.<sup>24</sup>

The Act contains a longstop time limit of ten years from the date the product was first placed on the market, after which no claim may be brought.<sup>25</sup> This has been

<sup>14</sup> NCC "Product Liability: a response by the NCC to the product liability directive" at section 3.

<sup>15</sup> BEUC, *op. cit.* note 13, at section 3.

<sup>16</sup> ECLG "Liability for Defective Products: Consumer's position on the Green Paper of the European Commission" ECLG/3821/2000 December 2000 at p. 10.

<sup>17</sup> McKenna & Co "Report for the Commission of the European Communities on the Application of Directive 85/374/EEC on Liability for Defective Products" Study Contract No. ETD/93/B5-3000/M1/06 at p. 42.

<sup>18</sup> CBI comments on the European Commission's Green Paper on Liability for Defective Products CCL 137 99.

<sup>19</sup> EC Committee of the American Chamber of Commerce in Belgium "Response to the Green Paper on Liability for Defective Products".

<sup>20</sup> See further C. Hodges, "Reform of the Product Liability Directive 1998-1999" (1999) 7 *Consumer Law Journal* 35 at p. 43.

<sup>21</sup> ECLG, *op. cit.* note 16 at p 10.

<sup>22</sup> See the Practice Direction on Group Litigation supplementing Part 19 of the Civil Procedure Rules 1988.

<sup>23</sup> [2001] 3 All ER 289

<sup>24</sup> The worst example of the latter is the Benzodiazepine (tranquilliser) litigation which collapsed in 1994 after some £35 m in legal and expert costs had been incurred. There were some 17,000 claimants in this action who received no payments after the case collapsed. A similar fate befell the claimants in 17 cases in the Gravigard litigation against Searle, which also collapsed after the Legal Aid Board withdrew funding.

<sup>25</sup> Part 1 of Schedule 1 to the Act.

criticised by both BEUC and the ECLG<sup>26</sup> but is supported by the CBI on the grounds of legal certainty.<sup>27</sup> It is too early to tell whether this time limit will have a significant impact on claims.

Another restriction on the usefulness of the Act lies in the restriction on the damage for which compensation is available. Section 5 excludes property damage valued at £275 or less, or affecting business property. The exclusion of business property is discriminatory, although in fact most other consumer protection Directives (for example, the Directives on unfair terms in consumer contracts,<sup>28</sup> distance selling<sup>29</sup> and the sale of consumer goods and associated guarantees<sup>30</sup>) exclude consumers who are acting in the course of a business, trade or profession, and the discrimination is thus a consistent feature of EU law.<sup>31</sup> The exclusion of the first £275 has been criticised by BEUC<sup>32</sup> on the ground that damage valued at less than £275 may nonetheless be significant to the consumer.

In addition, damage to the product itself is excluded. For claims where damage to business property or the product itself constitute the whole or a significant amount of the compensation required, the Act is therefore insufficient as a cause of action on its own and may be entirely redundant. This issue has been identified by the European Commission as the key factor militating against the use of legislation based on Directive 85/374.<sup>33</sup> Even where this restriction does not preclude a claim, it may impose procedural and practical difficulties. In the UK, a consumer who wishes to recover a remedy for the defective product itself, as well as for any damage caused by the defect, might have to bring two separate claims; one against the retailer under section 14(2) of the Sale of Goods Act 1979 (on the basis that the product was not of satisfactory quality), and another against the manufacturer under the Act. It is inherently undesirable to oblige the consumer to bring two separate claims, one in respect of damage to the product and another in respect of the consequences of the defect. However, it is worth noting that a single claim may be brought where the contractual claim lies against the manufacturer, own brander or importer, or where the claim under the Act is brought against the supplier. For example, the case of *Abouzaid v. Mothercare (UK) Ltd*<sup>34</sup> discussed below, involved a claim under the Act against a manufacturer who was also the supplier. Had there also been a claim under the Sale of Goods Act, no separate action would have been required.

It should also be noted that the Directive originally provided the option of excluding primary agricultural products from its ambit unless they had “undergone an industrial process”. The United Kingdom, and indeed all member states except Sweden, Finland, Luxembourg and Greece, exercised this option, and thus many foodstuffs were outside the ambit of the Act. However, Directive 34/1999 removed the option and the Act has

<sup>26</sup> BEUC, *op. cit.* note 13 at section 5; ECLG *op. cit.* note 16 at p. 11.

<sup>27</sup> CBI, *op. cit.* note 18 at p. 11.

<sup>28</sup> Directive 93/13 OJ 1993 L95/29.

<sup>29</sup> Directive 97/28 OJ 1997 L144/19.

<sup>30</sup> Directive 1999/44 OJ 1999 L171/12. See C. Twigg-Flesner, “The E.C. Directive on Certain Aspects Of The Sale Of Consumer Goods and Associated Guarantees” (1999) 7 *Consumer Law Journal* 177.

<sup>31</sup> English law also provides greater protection to private consumers as compared with business consumers; for example the restrictions in the Unfair Contract Terms Act 1977 on the use of exclusion clauses are greater where the contract is with a non-business consumer.

<sup>32</sup> BEUC, *op. cit.* note 13 at section 4. The £275 threshold is also criticised by the ECLG *op. cit.* note 16 at p. 11.

<sup>33</sup> Commission “Report from the Commission on the Application of Directive 85/374/EEC on Liability for Defective Products”, *op. cit.* note 3 at 2.1.1.

<sup>34</sup> 21 December 2000, *The Times*. 20 February 2001.

now been amended to reflect this.<sup>35</sup> Thus one potential source of difficulty with the Act, namely the determination of what constituted an “industrial process” in connection with agricultural products, has been removed.<sup>36</sup>

Other factors, however, make the Act a useful addition to existing possibilities. First, the Act imposes strict liability, which only requires that a causal link be shown between the product and the damage suffered by the consumer. The state of mind of the producer is irrelevant and a producer may therefore be liable under the Act for damage caused by one of its products although it was neither negligent nor reckless. Second, section 2(2) specifies a wide range of defendants, including the producer, any own brander and the first importer into the Community. A producer is defined by section 1(2) as the manufacturer or, if the product has not been manufactured, the person who won or abstracted it or, if the product has not been won or abstracted, any person who carried out an industrial process to which the essential characteristics of the product are attributable. Where the claimant is not reasonably able to identify any of these characters, the supplier must do so or identify his or her own supplier. If the supplier fails to do this, he or she becomes liable himself or herself to the claimant. This means that a consumer may have a claim in the absence of a contract, for example where the product is a gift, and that the insolvency or untraceability of one potential defendant is unlikely to be fatal to the bringing of a claim. This gives claims under the Act an advantage over claims based on the implied terms in the Sale of Goods Act 1979 and, to a lesser extent, negligence. To claim under the Sale of Goods Act, the claimant has to be in a contractual relationship with the defendant. For a claim in negligence to succeed, the claimant has to show that the defendant owed him or her a duty of care and that the breach of that duty caused the injury. The absence of a requirement to establish some form of relationship between claimant and defendant is therefore of considerable advantage. All five of the claims discussed below were brought against the manufacturer.

A third redeeming factor is that specific provision is made for recovery, albeit limited, of property damage.<sup>37</sup> However, this was not an issue for the claimants in the cases so far brought under the Act in which the claims were for personal injury only.

The preceding discussion has sought to summarise both the legislative framework of the Act itself and the difficulties with that framework. Given these difficulties, it is perhaps not surprising that there were no reported decisions of cases under the Act until late 1999. The sudden influx of cases (four reported judgments and a fifth unreported case) may be due to the introduction of conditional fees for personal injury cases in 1995<sup>38</sup> (extended to most other civil claims by the Conditional Fees Agreements Order 1998<sup>39</sup>). These cases will be examined in some detail, but it is interesting to note at the outset that all the cases centred around the same narrow issues, in particular whether the product in question was “defective” within the meaning of the Act. In the earlier cases, this requirement appeared to represent a significant hurdle for claimants to overcome. In the later cases the courts appear to have taken a more relaxed approach and found that defects existed. In these latter cases, however, the defendants then sought to invoke the “development risks” defence. The following analysis will therefore focus on how the courts have interpreted the term

<sup>35</sup> See C. Twigg-Flesner, “The Inclusion Of Agricultural Produce Within The Scope Of The Product Liability Directive (85/374/EEC)” (1998) 9 *Australian Product Liability Reporter* 71–76 and “Amendments to the EC Product Liability Directive – partial victory for European consumers?” (1999) 10 *Australian Product Liability Reporter* 57.

<sup>36</sup> See further G. D. McLeish, “Hello Dolly” (1997) *NLJ*, 9 May, p. 682.

<sup>37</sup> Section 5(1).

<sup>38</sup> Introduced by the Lord Chancellor pursuant to powers conferred by Courts and Legal Services Act 1990, s. 36.

<sup>39</sup> S.I. 1998/1860.

“defect” in the Act, and how the development risks defence is handled. The facts and outcome in these cases will now be briefly summarised, then a more detailed analysis made of the points of law that arose in those decisions.

## THE CASES

As mentioned above, a number of years passed during which no cases proceeded to judgment. In 1995 it was reported that the recipient of an allegedly defective replacement hip joint was seeking to bring a claim under the Act against the manufacturers.<sup>40</sup> The recipient, Hegarty, claimed that the lining of the artificial hip moved, causing two hip dislocations and severe pain. As a result, he had to undergo two more operations and a new hip had to be fitted. It appears that this claim was subsequently settled out of court. Similarly, in 1997 it was reported that a “number of cases” were being brought by or on behalf of women who had suffered death or personal injury allegedly caused by taking the contraceptive pill.<sup>41</sup> In one of the cases detailed in the report, the claim was brought in negligence; in the other, under the Act. Both cases were brought against the manufacturer and claimed that the defect lay in the manufacture of the products and the advice and warning supplied with them. Again, it appears that the cases were subsequently settled out of court.

It was not until 1999 that a judgment under the Act was reported. In *Worsley v. Tambrands Ltd.*,<sup>42</sup> the claimant, Worsley, alleged that she had suffered toxic shock syndrome (TSS) as a result of the use of a Tampax Regular tampon manufactured by the defendant, Tambrands Ltd. Her claim was not that the tampon was defective in itself, but rather than insufficient warnings had been given and that the product was defective as a result. There was a warning on the box that tampons might cause TSS and reference to an information leaflet inside the box. Worsley argued that the warning on the box was insufficient and that the more detailed leaflet might easily be ignored or thrown away inadvertently. The High Court was not persuaded by this reasoning and held that there had been sufficient warnings and the product was therefore not defective.

In *Richardson v. LRC Products Ltd.*,<sup>43</sup> the claimant, Richardson, claimed damages in respect of losses incurred as a result of an unwanted pregnancy which resulted from the fracture, during sexual intercourse, of a condom manufactured by the defendant, LRC Products Ltd. It was apparent that the fractured condom had cracks, but the parties disagreed as to whether the cracks existed when the condom was used or appeared only subsequently, and as to the existence of any causal link between the fracture which led to the pregnancy and the cracks. The High Court ruled that the product was not defective within the meaning of the Act. It also noted that Richardson had failed to mitigate her loss by seeking the morning after pill. Furthermore, public policy prohibited the award of damages for the cost of raising a child that resulted from an unwanted pregnancy.

In *Foster v. Biosil*<sup>44</sup> the claimant, Foster, alleged that the breast implants manufactured by the defendant, Biosil, were defective. The implants had to be removed

<sup>40</sup> F. Gibb, “Patient sues over spare-part injury” (1995) *The Times*, 12 September.

<sup>41</sup> R. Pearson, “Consumer Protection Act probes the pill” (1997) *The Lawyer*, 7 October, p. 14.

<sup>42</sup> High Court (QBD), Ebsworth J. Judgment of 3 December 1999, [2000] *Personal Injuries and Quantum Reports*, p. 95.

<sup>43</sup> High Court (QBD), Kennedy J., Judgment of 2 February 2000, [2000] *Personal Injuries and Quantum Reports*, p. 164, [2000] *Lloyd’s Rep Med* 280.

<sup>44</sup> 2000, unreported but noted in R. Freeman, “Strict Product Liability laws – Consumer Protection Act provisions fail to assist claimants in three recent cases” (2001) *Journal of Personal Injury Law*, p. 26 and P. Popat, “Defects and the Consumer Protection Act 1987” (2000) *NLJ*, 1 December, p. 1780.

within seven months of insertion because, it was alleged, one had ruptured and the other had started leaking, causing pain and suffering to the claimant and requiring her to undergo a further operation. Recorder Cherie Booth Q.C. ruled in favour of Biosil on the ground that Foster had failed to prove the existence of a defect.

The most authoritative ruling to date is that of the Court of Appeal in *Abouzaid v. Mothercare (UK) Ltd.*<sup>45</sup> The judgment is the first (and so far the only) case on the Act on which full judgment has been given by the Court of Appeal. (*Worsley v. Tambrands Ltd* involved only an appeal on the direction for trial of a preliminary issue). The product at issue was a “Cosytoes” child’s sleeping bag manufactured and sold by Mothercare and was intended to be attached to a pushchair by elasticated straps joined by a metal buckle attached to one of the straps. The claimant, Abouzaid, then aged 12, was assisting his mother in preparing the sleeping bag for use by his younger brother. When he attempted to fasten the buckle of the Cosytoes sleeping bag, one of the straps slipped from his grasp and the buckle hit him in the left eye. As a result of the accident the retina in the left eye was damaged and the claimant was left with no useful central vision in that eye.<sup>46</sup> The judge at first instance held that there had been a breach of the Act. Mothercare appealed. The Court of Appeal ruled that the product was “defective” within the meaning of the Act and that Mothercare could not rely on the development risks defence.

The most recent case, and the first group action involving a claim under the Act, is *A and others v. The National Blood Authority and others.*<sup>47</sup> This case concerned some 114 claimants who had been infected with the Hepatitis C virus as a result of receiving contaminated blood transfusions. The High Court ruled that the product was defective and that the development risks defence did not apply.<sup>48</sup>

It is clear from this brief summary that two issues have dominated the caselaw. First, there has been some confusion as to the meaning of the term “defect”, and the factors to be taken into account in establishing that a product is defective. Secondly, there has been some dispute as to the availability of the development risks defence. The following section will examine these points of law in more detail.

### MEANING OF THE TERM “DEFECT”

The issue whether the product at issue was defective has been at the heart of all of the judgments so far given. According to section 3(1) of the Act, a product is defective if the safety of the product is not of the standard which persons generally are entitled to expect. In determining the standard of safety consumers can expect, regard should be had to any warnings or instructions provided, what might reasonably be expected to be done with the product, the manner in which it was marketed and the time it was supplied by the producer.

In all the first instance decisions prior to *Abouzaid*, the products were found not to be defective. Only in *Abouzaid* and *A and others* were the products found to be defective, and the approach of the courts to the meaning of this term has not been entirely consistent.<sup>49</sup>

<sup>45</sup> Judgment of 21 December 2000, *The Times*, 20 February 2001.

<sup>46</sup> The medical evidence was not disputed at the hearing.

<sup>47</sup> [2001] All E.R. (D) 298 (Mar).

<sup>48</sup> The judgment focuses on the Directive rather than the Act, on the basis that the Act should be applied in the light of the Directive. However, although the attempt to give effect to the legislative intention at European level is commendable, the court should have applied the Act, and picked up on any inconsistencies between it and the Directive separately.

<sup>49</sup> See also R. Freeman, *op. cit.* note 44.

In *Worsley v. Tambrands Ltd*, Worsley argued that the tampon was defective for two reasons: first, Tambrands should have printed details on the packaging rather than on the enclosed leaflet because the leaflet might be lost; and second, the warning in the leaflet was not designed in such a way as to have a sufficient impact upon her. Both contentions were rejected swiftly by the High Court. It ruled that the product was not defective. Tambrands had included on the box a legible warning, directing the user to the leaflet inside the box and suggesting that this leaflet should be kept, and that the leaflet had legibly, literately and unambiguously warned that TSS could result from tampon use, described the symptoms and advised the action to be taken should they occur. The balance between the rarity of TSS and its gravity had been correctly struck by the dual system of a brief warning on the box and a full explanation on the leaflet inside. It was not necessary, as Worsley had argued, for a detailed warning to be provided on the box to guard against loss of the leaflet by the user.

Ebsworth J. concluded that:

The reality of the case is that the claimant had lost the relevant leaflet and, for some inexplicable reason, misremembered its contents as to the onset of the illness. That does not render the box or the leaflet defective, and the claim must fail. The defendant had done what a menstruating woman was, in all the circumstances, entitled to expect.

There was therefore no case to answer and the claim was struck out. This judgment is in line with *Abouzaid*.

It is important to note that, had the court not decided to accept the application to strike out the case, the question of causation in that case would have been a very difficult one with which to deal. Ebsworth J. stated that the issue of causation in this case (and generally) was “highly contentious” and that the expert evidence as to whether the claimant’s TSS was caused or contributed to by the defendant’s product was in conflict. However, in the absence of a defect the issue of causation did not have to be addressed.

The judgment in *Worsley* is sound and to be welcomed for its no-nonsense attitude. Worsley herself admitted that in the past she had read the warnings about TSS in the leaflets, and was aware of the risk and the need to seek prompt medical attention, although she had failed to do so. It is perhaps noteworthy that the fears of the pharmaceutical industry in relation to its obligation under Directive 85/374 to provide adequate information<sup>50</sup> have not so far been borne out. While an absence of warnings could make a finding that there is a defect more likely, their presence could, as here, negate the existence of a defect. A consumer can be expected to take the minimal degree of care to read the instructions which accompany the product.

However, in the following two cases, the courts displayed some discomfort in dealing with the meaning of “defect”. In *Richardson v. LRC Products Ltd*, it was apparent on examination that the fractured condom had ozone cracks, but the parties disagreed whether the cracks existed when the condom was used or appeared only subsequently, and as to any causal link between the fracture that led to the pregnancy and the cracks. The High Court considered two alternative allegations concerning the existence of a defect: that the fracture in the condom resulted from a crack which was present when the condom left the factory, and that the crack constituted a defect; or, if this was not the case, that the fracture must have resulted from the existence of some other defect.

<sup>50</sup> See, for example, McKenna & Co, *op. cit.* note 17, referring to the comment of the Association of the British Pharmaceutical Industry that the Directive “encourages the provision of too much information which can cause confusion and non-compliance with [instructions]”.

The court dismissed the first claim on the ground that that it could not be proved that the cracks were present when the condom was used. It reviewed the complex scientific evidence and concluded that the likelihood was that the cracks actually occurred after the condom had fractured during sexual intercourse. Even if the cracks had been present when the condom was used, it could not be proved that they caused the fracture. The fracture had therefore not been caused by a defect consisting of the cracks. The court also dismissed the alternative claim that the fracture was caused by some other defect, on the ground that the existence of a fracture did not prove the existence of a defect. The product met the standard of safety that consumers were entitled to expect (for the purposes of section 3), and no one would expect a condom to be fully effective in all cases.

The existence of a fracture in the condom was therefore insufficient on its own to render the product defective, and since the product exceeded British Safety Standards and there was an American study that revealed that there were instances of condom failure for which there was no explanation, the condom could not be held to be defective.

It is difficult to sympathise with Richardson. It is well known that condoms are not 100% effective as a method of contraception and indeed Richardson discovered that the condom she had used was defective at a time when she could have, but did not, take remedial action. However, as a matter of law there are two rather worrying aspects to this case.

First, a considerable part of the judgment is devoted to the reasonableness of the precautions taken by LRC at its factory to prevent any damage from occurring during the manufacturing process. It is possible that these comments were *obiter*, but this seems unlikely since the related point that the product exceeded British Safety Standards is contained in the sentence immediately prior to the statement that “For those reasons, I have reached the conclusion that the claimant has not established a breach of [section 3 of the Act]”. If the comments are not *obiter*, the result is that a product which has failed for a reason which is not clearly attributable to events that occurred whilst the product was under the control of the defendant is only then defective if the manufacturer could have taken further steps to prevent this failure from occurring during the manufacturing process. With respect, this cannot be accepted, as it would effectively erode the application of strict liability. Strict liability requires only proof of defect, damage and a causal link between the two. The reasonableness of the defendant’s behaviour in trying to minimise any defects is irrelevant.<sup>51</sup> Compliance with British Safety Standards could only be relevant in so far as this may be a factor to be taken into account in determining the consumer’s expectations as to safety. However, permitting this to be taken into account only seems acceptable if it were proved that consumers generally were aware of the existence of a British Safety Standard (or the European equivalent) for a particular product. It would be reading the section too widely if a presumption existed that the reasonable expectation of persons generally were taken to correspond automatically to the British Safety Standard (or indeed any other similar standard). In any event, this question was not addressed by the court.<sup>52</sup>

Second, it was evident that the condom had failed. Although it was for the claimant to prove that this constituted a defect, and the fact that persons generally were not

<sup>51</sup> See further C. Hodges, “Product liability for old products” (2001) NLJ, 23 March, p. 424.

<sup>52</sup> The scheme under the General Product Safety Directive 92/59/EEC, OJ (1992) L 228/24 utilises such standards in determining whether a particular product is safe. See generally G. Howells, *Consumer Product Safety* (Ashgate, 1998), Ch.2. It seems attractive to suggest that a product which is not “safe” within the meaning of the Directive should automatically be deemed “defective” if a claimant suffers damage as a result of using the product. This question deserves further consideration elsewhere.

entitled to assume that a condom would never fail made this difficult, it should not have been for the claimant to prove *how* the defect occurred. The manufacturer was well placed to produce expert evidence on this issue; the claimant – as is the case for consumers generally – was not. Surely if the product has failed for no ascertainable reason, the product is defective, just as it is defective where the reason can clearly be established. The question whether the manufacturer should be liable for the defect can be dealt with under the “causation” and “defences” headings, but not in determining whether or not there was a “defect” in the product.<sup>53</sup>

A better approach in *Richardson* would have been to accept that the condom was defective but apply a defence. Given the detailed evidence and the emphasis on the defendant’s “reasonable precautions” to avoid the defect, as well as the fact that it could not be established exactly when the damage occurred, relying on the defence in section 4(1)(d) that the product was not defective when it left the defendant’s factory would have had a good chance of success. The condom was defective according to the definition in section 3 of the Act, but the defendant could prove that it was not defective when it supplied it. The onus of proving the latter would therefore be on the defendant, rather than the claimant having to prove not only that the condom was defective but that it was defective when it was supplied by the defendant. This would have been a much more coherent and logical application of the Act, and would undoubtedly have resulted in a different outcome in the next case.

In *Foster v. Biosil Limited*<sup>54</sup> the County Court applied the reasoning in *Richardson* on the issue of whether product failure is evidence of a defect. It accepted that the failed implant, which had ruptured, had become unsafe. However, it did not accept that this meant that the implant was “defective” for the purposes of the Act. Foster had failed to identify the manufacturing defect alleged or indeed the causal link between any defect and the injury. Failure to identify the particular manufacturing or design defect deprived Biosil of the possibility of relying on the development risks defence or the defence that the defect did not exist when the implant left its control. Foster thus had to adduce evidence that established why the product had failed in order to show that the product was defective within the meaning of the Act. Not surprisingly, she – like Richardson – was unable to do so.

This interpretation of “defect” places too heavy a burden on the claimant. The producer is in a much better position to produce expert evidence as to the safety of the product, and it seems contrary to the objective of the Directive to require the claimant to produce specific evidence about a complex product which is, judged by the standard of the reasonable person, defective.

In *Abouzaid v. Mothercare (UK) Ltd* the Court of Appeal found that the Cosytoes sleeping bag was defective. Its design permitted the risk to arise of loss of control of the elastic strap when stretched and when eyes were in the line of recoil. A non-elasticated method of attachment could have been used, or instructions given to the user to position him- or herself so that the risk did not arise, together with a warning. Persons generally were entitled to expect such a warning, given the vulnerability of the eye and the potentially serious consequences of an eye injury. This expectation had not changed over the time since the product had been supplied.

It is unfortunate that the court did not refer to the earlier cases in reaching this conclusion, particularly on the method for establishing that a product is defective advanced in those decisions, in concluding that the product in the present case was

<sup>53</sup> A further distinction may be made on the basis that consumers were aware that there was a likelihood of such freak failures. See *A v. National Blood Authority*, discussed below.

<sup>54</sup> Central London County Court, Booth Q.C., Recorder. For a summary, see P. Popat, *op. cit.* note 44.

defective. As discussed above, *Richardson* and *Foster* both seemed to tamper with the definition of “defect” by commenting on the reasonableness of the defendant’s action. Whilst the Court of Appeal emphasises that any such consideration could, if at all, only be relevant in considering the availability of any of the defences in section 4(1), the Court did not explicitly reject the reasoning in those cases. It is, however, implicit in the Court of Appeal’s reasoning that the approach adopted in *Richardson* is no longer an accurate statement of the law.

The assessment in this case of what persons generally were entitled to expect in terms of safety may be contrasted with the decision of the Pennsylvania District Court in the case of *Epler and Epler v. Jansport Inc.*<sup>55</sup> In that case, the claimant sustained an injury when the elasticated draw cord on the hood of his jacket, manufactured by the defendant, slipped out of his hand and recoiled towards his face. The plastic cord lock at the end of the cord struck his eye, causing injury. The court relied on section 402(A) of the Restatement (Second) of Torts, based on the Pennsylvania Supreme Court in *Erie R. Co. v. Tompkins*,<sup>56</sup> which provided that a seller of products was strictly liable for the physical harm caused by a product sold in a defective condition unreasonably dangerous to the user. The court ruled that the coat was not in such a condition, on the basis of the utility of the product to the user and the public, its safety, the user’s ability to avoid danger by exercising care in using the product, the unfeasibility of the manufacturer spreading the loss through price adjustment or insurance, and the awareness which the user should have had of the inherent dangers of the product. These factors were not outweighed by the availability of a similar but safer product, nor by the manufacturer’s ability to eliminate the lack of safety without impairing the usefulness of the product or raising its price to an unrealistic level.

In assessing the user’s likely awareness of the inherent dangers of the product and their avoidability, the court ruled that “the average ordinary consumer is well acquainted with the propensity of elastic items to recoil after they have been extended and released”.<sup>57</sup> As a result of this general public knowledge, a warning about the recoil effect was not necessary. This contrasts with the ruling in *Abouzaid* that persons generally were entitled to expect either that this effect would not arise or to be warned that it could. In this instance, the analysis of the Pennsylvania court with regard to the particular product (an elastic strap) seems more acceptable than that of the Court of Appeal in *Abouzaid*. The reasonable expectation of an ordinary consumer must be that an elasticated strap will recoil, and that it, and anything attached to it such as a buckle, could strike a nearby person or object. No warning should therefore be required of such an obvious problem. The reasonable standard of safety in section 3 of the Act includes “what might reasonably be expected to be done with or in relation to the product”. Once a consumer is, or could reasonably be expected to be, aware of the properties of the elasticated strap, he should take reasonable care when extending the strap. The stretching of an elasticated strap with a metal buckle close to the face is therefore not reasonable. Although it might be considered so for a child of 12 (*Abouzaid*’s age at the time of the accident), section 3 refers to “persons generally” and therefore a more objective standard applies. The court at first instance stated that the manufacturer ought to have been aware that older children or teenagers might use the product, although the consequence of this expectation was not explained. The Court of Appeal noted that it was unclear whether this reasoning related to

<sup>55</sup> 2001 WL 179862 (E.D.Pa).

<sup>56</sup> 304 U.S. 64 (1938).

<sup>57</sup> At para. 5 of the judgment.

the Act or the claim in negligence, but suggested that it was more appropriate to the latter.

In the final case under consideration, *A and others v. The National Blood Authority and others*, the claimants succeeded in proving the existence of a defect. The High Court drew a distinction between “standard” and “non-standard” products. “Standard” products were those that met the design and standard of safety intended by the manufacturer. A “non-standard” product was a particular unit of the product that did not meet the standard. In *A and others*, the court stated that the infected blood products were non-standard, that is to say, differed from the standard product intended by the manufacturer. The standard blood products were not inherently defective. In the case of blood transfusions, it was only 1% of the product that “failed” in that it had been contaminated with the Hepatitis C virus. The court suggested that it might be easier to prove a defect where the product in question was non-standard, since it would fall to be compared with the standard product. The problem with this argument is that a product is only non-standard if it is in some way defective, but whether it is defective could be affected by whether it is non-standard. Admittedly the court envisaged that a non-standard product was one that was defective in a non-technical, non-Act sense, but there could be cases where even this was disputed, and then a circular argument would result. In respect of non-standard products, the court stated that the consumers’ expectations as to safety depended on whether they accepted the non-standard nature of the product.

The High Court confirmed that the factors for assessing the defectiveness listed in section 3 of the Act were not exclusive, and that all relevant circumstances were to be considered. However, it ruled that the avoidability of the risk of infection was not a relevant factor. The possibility of avoiding the harmful characteristics by taking precautionary measures, the impracticality, cost and difficulty of taking such measures and the benefit to society of the product were therefore not relevant. On the facts, the risk was known by doctors but was not known and accepted by society generally. The risk of infected blood could therefore not have been accepted by consumers unless they were warned, which they had not been. The infected blood products were therefore defective.

The High Court also considered the alternative possibility; that avoidability was in fact relevant to the existence of a defect. If this was so, it should be assessed by reference to the risk (3%) at the relevant time, the foreseeability of the risk (known), whether avoiding it was a priority (as it was here), the seriousness to the claimant and others if precautions were not taken, and the availability, reliability and cost of the precautions. However, if avoidability was relevant, a number of other factors should also be taken into account.<sup>58</sup>

The High Court concluded that if precautions could prevent or materially reduce the incidence of infection of patients, they should be taken unless their advantages were outweighed by their disadvantages, which was not the case on these facts. Surrogate testing should have been introduced from March 1988 (the earliest date on which a claim could be brought under the Act) and anti-Hepatitis C screening from March 1990. In conclusion, taking into account all relevant factors, including the avoidability of the risk of infection, the infected blood was defective.

<sup>58</sup> The Court referred to the position of recipients of the blood who had been disabled by Hepatitis C, the position of donors who might be stigmatised or fail to give blood again leading to a shortage of supplies, the potentially shortened lifespan of the recipients, the interests of patients generally, the prioritising of Hepatitis C by the defendant, the lack of any warnings as to the risk, and the substantial number of donors who were drug addicts and therefore likely to carry Hepatitis C.

The judgment is complex and remarkable for its detailed analysis of the law, particularly of section 3 and section 4(1)(e) of the Act. None of the judges in the previous cases adopted the same rigour in analysing the scope of those sections. Had this been done sooner, perhaps the confusion that arose in the wake of *Richardson* could have been averted. Burton J. in *A and others* methodically analysed the provisions themselves and, with no judgment of the Court of Justice of the European Communities available to assist him in the interpretation of the relevant provisions of the Act/Directive, put great emphasis on the academic commentary in this area. Whether or not one agrees with his conclusions on the law, this approach to interpreting a provision of domestic law which implements an EC Directive is a good example of how the courts should deal with matters that involve aspects of Community law, with the caveat that the judge should not have focused on the Directive, but on the Act instead. Although the Act should, of course, be read in the light of the Directive, it is the Act that should have been applied, with any inconsistencies between it and the Directive dealt with separately.

What, then, can be deduced from this analysis? First, the question whether a product is defective is to be decided without reference to factors that are to be considered in respect of the development risks defence (such as the avoidability of the defect). This was also emphasised by the Court of Appeal in *Abouzaid*. Second, in contrast to the reasoning in *Richardson* and *Foster*, the question of avoidability is not one to be considered in establishing that a product is defective. It is submitted that the view taken by the court in *A and others* is the correct one. If avoidability were to be regarded as relevant, then the distinction between strict liability and negligence liability would become so blurred as to be meaningless.

#### THE “DEVELOPMENT RISKS” DEFENCE

A second issue that arose in a number of the cases under discussion is whether the defendant could rely on any of the defences in section 4(1). Although a range of defences is available, the only defence relied on so far has been the development risks defence. Section 4(1)(e) of the Act provides that it is a defence for the defendant to show that the state of scientific knowledge at the time that the product was supplied by the defendant was not such as that a producer of similar products might be expected to have discovered the defect to be discovered. The defence was put forward unsuccessfully in *Abouzaid v. Mothercare (UK) Ltd* and *A and others v. The National Blood Authority and others*.

In *Richardson v. LRC Products Ltd* the High Court did not consider the development risks defence in detail, since *Richardson* had failed to prove that the product was defective. However, it indicated that it was not apt to cover a defect of a known character merely because there was no test that would reveal its existence in every case. This is in accordance with the more detailed consideration of the defence in *Abouzaid* and *A and others v. The National Blood Authority and others*, to which this analysis now turns.

In *Abouzaid v. Mothercare (UK) Ltd*, the defendants argued that the development risks defence should absolve them from any liability, because there was no research evidence available at the time of manufacture showing that the elastic strap could cause injury, nor had any accidents of this type been reported in the Department of Trade and Industry’s (DTI) Accident Database. The Court of Appeal rejected this argument and held that the defence did not apply. First, the fact that there was no record on the

DTI database of similar accidents involving the product did not mean that the defect was not discoverable. No advance in scientific and technical knowledge since 1990 was required to enable the effect to be discovered.

Pill L. J. also appeared to suggest that the defence failed because the defect was present regardless whether previous accidents had occurred. This seems to misunderstand the defence.<sup>59</sup> The defence is not that the defect did not exist at the time of supply (although this is a separate defence under section 4(1)(d)), but that its existence at that time was not discoverable. This was recognised by Chadwick L. J. who noted that the test for defectiveness did not include any element of fault, so that a product could be defective even though the manufacturer could not reasonably have been expected to have discovered the defect. He stated “but that is to confuse the test for liability under section 3(1), which is not dependant on fault, with the defence under section 4(1)(e), which enables a producer to escape strict liability”.<sup>60</sup> On the facts it was clear that it would not have been difficult, and was certainly not impossible, to discover the potential danger.

The court observed<sup>61</sup> that the wording of section 4(1)(e) was challenged unsuccessfully before the Court of Justice of the European Communities. Both the Directive 85/374 and the Act left open the question of how readily discoverable relevant scientific and technical information must be to negate the defence, and in *Commission v. United Kingdom*<sup>62</sup> the European Court had ruled that section 4(1)(e) did not incorrectly transpose Directive 85/374 because it was capable of being interpreted consistently with the Directive, and English courts were under an obligation to so interpret it. The Advocate-General argued by way of example that scientific knowledge which was published only in Chinese in a regional scientific journal was not discoverable, whereas research published in English in an international journal was. This specific example was not taken up by the European Court, but it held, inter alia, that the accessibility of the relevant scientific information was a factor to be taken into account in determining whether or not the defence could succeed.<sup>63</sup> Thus, the more accessible the information, the less likely it will be that the defence will succeed.<sup>64</sup>

The parties and the court in *A and others* agreed that the scientific and technical knowledge must be “accessible” in order for the defence to apply. In *Commission v. UK*, the Advocate-General had explained that research published in Chinese, in a local scientific journal which did not go outside the boundaries of Manchuria, was not accessible (although it presumably would be to a Manchurian and possibly a Chinese producer). In *A and others*, the court argued that in such an example, the importance of Manchuria in relation to the product was also relevant. If Manchuria were renowned for the particular product, then research published there should be regarded as more accessible than if it was not. The High Court argued for a narrower definition of accessibility, and suggested that only unpublished research or research retained within a particular company was not accessible. However, it did not decide the point since the research at issue was clearly accessible on any definition of that term.

<sup>59</sup> This analysis of the development risks defence is also criticised by R. Freeman, “Strict product liability laws – Consumer Protection Act fails to assist claimants in three recent cases” (2001) *Journal of Personal Injury Law* p. 26.

<sup>60</sup> Para 43.

<sup>61</sup> Para 12.

<sup>62</sup> C-300/95 [1997] E.C.R. I-2649.

<sup>63</sup> At paras. 28 and 29.

<sup>64</sup> For a discussion of this, see C. Hodges, “Development Risks: Unanswered Questions” (1998) 61 *MLR* 560 and G. Howells and M. Mildred, “Is European Products Liability More Protective Than The Restatement (Third) Of Torts: Product Liability?” (1998) 65 *Tennessee Law Review* 985.

It must surely be correct that accessibility is not purely determined by geographical factors. For example, the publication of the research on the Internet might negate the argument that there had been no reference to the risk outside Manchuria. Of course, if the website is in Chinese, then it might still be possible to argue that the information was not “accessible”, and the defence might still apply.

It is submitted that *A and others* ultimately does little to clarify the issue since the High Court’s reference to a particular laboratory or research department of a company is at variance with the Advocate-General’s reference to a region of a country, and it was not required, on the facts, to reach a firm decision on this issue. Information known only to one company or one group of companies might reasonably be considered undiscoverable by anyone else, but the reference to Manchuria made by the Advocate-General in *UK v. Commission* was surely not intended to mean the company or conglomerate which developed the research.

In *A and others* the court ruled that even if the development risks defence was available in respect of known risks, it did not apply on the facts because the existence of the defect in the particular products at issue was discoverable at the relevant time, either by surrogate testing or by screening.

Surrogate testing was introduced in the United States and France and considered in the United Kingdom prior to 1 March 1988, the first date on which claims under the Act could be brought, and was therefore available at all material times. Screening was developed in the United States and was introduced in a number of countries from 1989 onwards. It was difficult to say whether it was discoverable as from the date of first international publication of details (April 1989), symposia in Paris (June 1989) or Rome (September 1989), or from the first introduction of screening (in Japan in November 1989). However, it was appropriate to use the same date as was relevant to the existence of a defect through failure to take precautions, namely March 1990, even though this was generous to the defendant. Since the defendants could not prove that they would not have discovered the defect had they introduced testing in March 1988, and could certainly not prove this in respect of the period from March 1990 when the possibility of screening was to be regarded as discoverable, the development risks defence did not apply.

However, if the reasoning in *A and others* is taken together with Chadwick L. J.’s observations in *Abouzaid*, it appears that the defence in section 4(1)(e) will only operate if either there is no test available to discover the defect at all, or the defect has been discovered but this information was not accessible to the defendant. The fact that no testing has been carried out is therefore insufficient for the defence to succeed. This suggests that the finding of defect should be made more readily. Liability should only be avoided by relying on one of the defences in section 4.

#### PRODUCT LIABILITY LITIGATION IN THE ENGLISH COURTS: THE LESSONS TO BE DRAWN

Neither *Worsley* nor *Richardson* should ever have come before a court, and it is evident in the tone of both judgments that that was the view taken by the courts themselves. Unfortunately, in both cases, the courts’ eagerness to dismiss the claims resulted in a lack of rigour in the reasoning, a rigour urgently needed in this area. This lack of rigour is also true of *Foster v. Biosil. Abouzaid*, with its more systematic reasoning, marked the first case of real assistance as a precedent, and the subsequent detailed analysis of section 3 and section 4(1)(e) of the Act in *A v. National Blood Authority* further helps to clarify the scope and application of the Act.

The cases reveal that a number of potential disadvantages of the Act have so far failed to materialise. The restriction of defectiveness to safety-related features has naturally excluded many consumer claims, but the restriction is perhaps not as great as might have been expected. First, the *Richardson* case indicates that “safety” may be interpreted widely to include products which expose the user to some unwanted consequence, rather than one which threatens their physical safety. Second, *Abouzaid* indicates that a product whose limitations are known to the ordinary person (such as the tendency of elastic to recoil) may nonetheless be regarded as defective in the absence of a warning. Third, *A and others* indicates that any difficulty encountered by the manufacturer in avoiding the defect is irrelevant. Although this latter point should not have been surprising, the apparent importance attached by the court in *Richardson* to the quality control procedures undertaken by the manufacturer had temporarily put the point in some doubt. In this respect, the Act, which does not include an assessment whether the risk has come or ought to have come to the attention of the manufacturer, may be contrasted with a claim in negligence, where such an assessment is essential.

The second potential problem with the Act, the range of defences, has also not proved to be as significant as some had feared. In several of the cases no defence was pleaded, and only one of the six defences, the development risks defence, has been pleaded in the remainder. It was this defence which gave rise to most concern; yet in no case did the defence succeed. It appears that it will be narrowly interpreted. It does not apply to known risks, and the absence of evidence of accidents as a result of the defect is irrelevant to the state of scientific or technical knowledge.

The concern raised at the start of this article, that group actions under the Act may not succeed should finally be allayed by the *A and others v. The National Blood Authority*. This is particularly significant because the number of cases coming to court remains small, and settlements are not always given the publicity that is needed to allow for an evaluation of the application of the Act.

There is no evidence either way whether the time limits under the Act are causing problems, since both the three year time limit (from the date the cause of action accrued or came to the claimant’s knowledge) and the ten year long stop time limit would operate to prevent claims from being brought. In addition, it is early days for the ten year time limit to apply, since the Act only came into force in 1988. Similar comments apply to the final problem noted above, the restrictions on the damage for which compensation may be awarded. All of the claims that have so far been brought have been for personal injury, and it is impossible to know whether more claims would have been brought had there been no restrictions on compensation for damage to the product itself or property damage. Certainly the nature of the products so far at issue is such that the damage likely to have been caused by any defect is personal injury, but this may be coincidental.

Turning to the potential advantages of the Act, the imposition of strict liability is clearly a significant advantage. Although the judgment in *Richardson*, with its stress on the care exercised by the manufacturer, threatened to make inroads on this, the more authoritative judgment in *Abouzaid* and the subsequent judgment in *A and others* make clear the absolute nature of the liability. The second potential advantage, the range of defendants, has proved important not for variety of possible defendants, but for the inclusion of the manufacturer, who has been the defendant in all of the cases discussed above. The third potential advantage, the availability of compensation for property damage, has not so far proved useful. However, as mentioned above, that may simply be because of the nature of the products at issue so far, all of which were intended to be used in or on the human body.

## THE FUTURE?

The cases discussed in this article suggest that the central features of the Act (and the Directive) that are most likely to give rise to difficult questions are the meaning of "defect" and the scope of the "development risks" defence. However, the recent judgment by the European Court in *Henning Vedfeld v. Århus Amtskommune*<sup>65</sup> shows that other issues are also likely to cause difficulties of interpretation and application. In *Vedfeld*, the claimant was to receive a kidney transplant. The kidney had been removed from the (living) donor (the claimant's brother), and was flushed through with a special liquid that had been prepared for this purpose in the hospital's pharmacy. The liquid formed crystals which blocked the arteries through the kidney, and ultimately, the kidney became unusable for the transplant. There was no doubt that the product in question, the liquid, was defective, but the hospital raised two defences. First, it argued that the product had not been put into circulation (Article 7(a) of the Directive, section 4(1)(b) of the Act). Second, it argued that the product had neither been made for an economic purpose nor made in the course of a business (Article 7(c), section 4(1)(c)).

Having decided that the liquid constituted a product for the purposes of the Directive,<sup>66</sup> the European Court observed that the defence in Article 7(b) had been intended to cover situations where the product had left the process of manufacture without the consent of the producer, or where the product had been used before the manufacturing process had been completed.<sup>67</sup> "Putting the product into circulation" should therefore be given a broad interpretation, and so it did not matter whether the product had been made by the service provider itself or by an entity linked to it. The crucial aspect was that the product had been made and was being used.

As for the defence in Article 7(c), the European Court held that it was irrelevant that there was no direct payment by the claimant to the hospital but only an indirect payment through taxpayers' contributions. The activity in question was not charitable, but had economic and business characteristics, and indeed a private hospital would clearly be unable to rely on this defence. The defence therefore did not apply to the supply of a defective product which had been made and used in the course of a medical service financed entirely from public funds.

The European Court refused to rule on a question referred which related to the nature of the damage that had been caused and held that this question was a matter for the national court. However, the European Court did rule that national courts were not entitled to decline the award of damages merely because it was difficult to classify whether the damage cause was personal injury or damage to property.<sup>68</sup>

<sup>65</sup> Case C-203/99 *Henning Vedfeld v. Århus Amtskommune*, judgment of 10 May 2001, not yet reported. Available from <http://www.curia.eu.int>.

<sup>66</sup> Although the Court of Justice held the fact that the liquid was used during the provision of a service was irrelevant, Advocate-General Ruiz-Jarabo Colomer took a different view. He thought that the Directive should not apply at all to the product in question in this case for three reasons. First, the Directive only applied to industrially produced moveables, whereas the liquid in question was prepared afresh for every transplant operation and was therefore not industrially produced. Second, the production of the liquid for a specific operation meant that it had not been put into circulation. Third, the product was produced as part of the provision of a service and the main objective was to provide a service, rather than to manufacture a product.

<sup>67</sup> At para. 16.

<sup>68</sup> In his Opinion, Advocate General Ruiz-Jarabo Colomer argued that the damage in this case should be treated as personal injury rather than property damage, since the latter would require it to have been ordinarily used for private use or consumption.

This most recent judgment is clear evidence that the case law on Directive 85/374, and the variety of issues raised, will continue to expand. It is noteworthy that the most of the cases are broadly linked to medical products or services and it may be expected that further cases under the Act or the Directive will also come from that direction.

## CONCLUSION

This analysis of these recent decisions under Part I of the Consumer Protection Act reveals that the system has finally begun to develop. Initially, the courts appeared acutely aware of the dangers of opening the floodgates to product liability cases which seemed to lead them to dismiss these cases perhaps a little too readily without the rigorous reasoning that is required of product liability cases. This superficiality resulted in interpretations given to core aspects of the Act that were entirely untenable. *Abouzaid* and *A and others* have resolved this difficulty and have given clear guidance on how the Act should be utilised.

What, therefore can be deduced from these cases in terms of the value of the Act to consumers? First, the range of alternative defendants provided by section 2 have so far proved unnecessary, as in all the cases the action was brought against the manufacturer. Second, the alternative claim had the Act not existed (and indeed such claims were made by the claimants in *Abouzaid* and *Worsley*) would have been negligence. In *Worsley* the claimant was no better off by virtue of the Act, but in *Abouzaid*, strict liability afforded a remedy where none existed in negligence. Third, the meaning of the term "defect" has been elucidated a little further. In *Abouzaid* and *A and others* it was given a wide meaning, encompassing dangers of which the ordinary consumer was unaware, rather than dangers of which they should not reasonably have been unaware. However, in *Worsley*, *Richardson* and, apparently, *Foster*, the term was given a narrow meaning, applying only to dangers of which no reasonable consumer could have been expected to be unaware and which the claimant in the case could prove in detail. Indeed, it appears that the interpretation in *Foster* was unreasonably narrow. Fourth, if as was argued by critics of Directive 85/374, the wide range of defences has restricted the utility of implementing legislation, then it has deterred claimants rather than affected the outcome of decided cases. The controversial development risks defence has been the only defence pleaded (in *Abouzaid*, *A and others* and *Richardson*), and it has not yet been successful. It therefore appears that the fears of the consumer organisations in this respect may be unfounded.

The potential strength of the Act as an addition to existing remedies under English law lies in its introduction of strict liability into an area where it had previously been very difficult for an injured party to recover damages. *Abouzaid* indicates that this potential is being realised. In *Abouzaid*, the Court of Appeal also considered the position in negligence. It ruled that, in contrast to the claim under the Act, the extent of the risk of injury caused by the defect was relevant to the existence of a claim in negligence. The absence of comparable accidents in the past meant that the risk was small. In addition, although a serious injury could be foreseen as a result of elastic recoil, in the absence of contrary evidence, the risk of a serious injury occurring could reasonably be expected to be small. There was therefore no negligence.

This indication is particularly welcome given the indication in earlier first instance decisions that a negligence-style analysis might be adopted in relation to claims under the Act. However, following *Abouzaid*, it is now clear that the strict liability regime under the Act can work, and it is anticipated that future decisions will, like *A and*

*others*, follow the *Abouzaid* in their approach to the Act, rather than *Richardson* and *Foster*. Finally, hard evidence exists that that Part 1 of the Consumer Protection Act 1987 is fulfilling its purpose – protecting consumers.

# PROPERTY RIGHTS OF HOMESHARERS: RECENT LEGISLATION IN AUSTRALIA AND NEW ZEALAND

MARK PAWLOWSKI\*

## INTRODUCTION

The English Law Commission is currently examining whether, on the breakdown of non-marital cohabitation, some way can be found to make an adjustment of property rights between de facto partners because of the economic advantage derived by one party from the relationship or any economic disadvantage suffered by the other party. The Centre for Socio-Legal Studies, Oxford, was commissioned some time ago to undertake a study of what happens in practice on the break-up of non-marital home sharing.<sup>1</sup> That research is yet to be published as is the Law Commission's Consultation Paper, which is expected later this year.

In the meantime, a number of options for reform have already been put forward by various bodies. In 1996, for example, a workshop, organised by the Chancery Bar Association, met to discuss possible changes to the law relating to home sharing.<sup>2</sup> It was agreed, in principle, that changes in the law should not be limited to cohabitants but should extend to other relationships involving house-sharing (e.g., a family member looking after an elderly relative). One radical approach canvassed by the group was simply to extend the current matrimonial jurisdiction to reallocate property on divorce to non-marital relationships. An obvious objection to any such far-reaching proposal is that it would involve equating cohabitation with marriage. Apart from the various policy arguments surrounding the role of marriage in our society, it is apparent that many cohabitants do not marry precisely because they wish to avoid the legal consequences of doing so, and it would therefore be inappropriate to create what would in essence be two types of marriage. Apart from this, it is generally accepted that there would be inherent problems in defining what kind of sharing arrangements would come within any such combined statutory regime. Whilst it may be fairly straightforward to define a neo-marital relationship for the purposes of such legislation, the task of determining what other non-sexual domestic relationships should qualify would be immensely difficult. For these reasons, a straightforward extension of the matrimonial legislation was largely ruled out. A more favoured option, therefore, was to introduce a statutory scheme which would permit a claimant to apply for a form of property adjustment order reflecting the parties' reasonable expectations of the claimant acquiring some interest in the property by virtue of his or her contributions both financial and those made in the capacity of homemaker to the welfare of the household. Indeed, such an approach has found support recently with both the Law Society and the Solicitors Family Law Association.

The Law Society's proposals would give cohabitants a statutory right to apply for capital provision on separation independently of the length of the relationship and the presence of minor children. It does not, however, advocate equating cohabitation with marriage for the reasons outlined above. In essence, it favours the approach

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<sup>1</sup> See Law Com. 30th Annual Report 1995, Law Com. No. 239, paras. 6-7-6-12. See also, M. P. Thompson, "Home Sharing – Reforming the Law" [1996] Conv. 154 and the Scottish Law Com. Report on Family Law, (1992) Scot. Law Com. No. 135, Part XVI.

<sup>2</sup> See, M. P. Thompson, *op. cit.*, for a commentary.

recommended by the Scottish Law Commission in 1992<sup>3</sup> that any claim by a cohabitant should be determined according to the principle that “fair account should be taken of any economic advantage derived by either party from contributions by the other, and of any economic disadvantages suffered by either party in the interests of the other party or of the family”.<sup>4</sup> In considering how to apply this principle, the Law Society believes that “contributions” should be defined as a contribution for money or money’s worth and should, therefore, include contributions such as those provided as a parent or in running a home. Moreover, the court’s powers under the proposed statutory scheme should be modelled on those currently available under the Matrimonial Causes Act 1973<sup>5</sup> (as amended) so that, for example, the court would have power to order a lump sum order, property adjustment order, or transfer of property order.

Significantly, the reform proposals of the Solicitors Family Law Association are on similar lines. Like the Law Society, the Association recognises that people choose to marry or cohabit for a variety of different reasons. Thus, while supporting marriage, it believes that the law should be reformed to achieve greater fairness and protect vulnerable cohabitants. It therefore calls for a new statutory scheme dealing with cohabitation which would be separate from the existing matrimonial legislation. In summary, the new legislation would define cohabitation as a “personal relationship (other than legal marriage) between two adults in which one provides personal or financial commitment and support of a domestic nature for the material benefit of the other”. It would enable cohabitants (as defined) to apply to the court for lump sum, property adjustment orders, etc., where cohabitation has continued for a minimum period of two years.<sup>6</sup> Interestingly, the Association also recommends that, in order to preserve individuals’ freedom of choice, cohabitants should be given the statutory right to opt-out of the legislation by means of a cohabitation contract.

In view of the various reform proposals already canvassed in this country, it seems pertinent to consider what has been happening in other Commonwealth jurisdictions, notably in Australia and New Zealand, regarding the property rights of home sharers. As we shall see, a number of statutes have been enacted in the various states and territories giving home sharers a legal right to seek a division of property upon the breakdown of their relationship. Much of the legislation mirrors the principles put forward in this country, in particular, the notion that a separate code (distinct from the current matrimonial legislation) is required to deal with the complexities of the varying domestic relationships likely to be covered by any new statutory scheme.

It will be convenient first to examine the deficiencies of the current English law in this area before considering whether the Australian and New Zealand experiences provide a useful model for legislative reform in this country.

## CURRENT ENGLISH LAW

In most cases, a non-owning cohabitee will seek to rely on constructive trust theory in order to acquire a beneficial share in property in the sole legal ownership of his or her de facto partner. This involves establishing a common intention between the parties (express or inferred) coupled with detrimental reliance on the part of the claimant.

<sup>3</sup> See the Scottish Law Commission Report on Family Law (Scottish Law Commission No. 135, 1992).

<sup>4</sup> See Family Law (Scotland) Act 1985.

<sup>5</sup> Children Act 1989, Schedule 1 and Family Law Act 1996, Schedule 7, which both extend the court’s jurisdiction to make property adjustment orders, in limited circumstances, to unmarried cohabitants, already contain modified guidelines as to the exercise of these powers.

<sup>6</sup> Where there were children, no minimum period would apply.

Whilst in the express common intention category, detriment has been given a wide meaning (so as to include both financial expenditure and personal disadvantage), in the inferred category it has been narrowly defined by the House of Lords<sup>7</sup> to mean only direct financial contributions to the purchase of the property. This has seemingly excluded a claimant, in the absence of common intention, from acquiring beneficial entitlement under a constructive trust based solely on indirect monetary contributions or domestic services.

It has been held<sup>8</sup> recently, however, albeit at first instance, that indirect financial contributions (i.e. contributions to household expenses which release the legal owner's income to pay the mortgage instalments) are capable of supporting a claim to a beneficial share under a constructive trust. A number of cases prior to *Lloyds Bank plc v. Rosset*<sup>9</sup> support this view, including strong *dicta* in the House of Lords in *Gissing v. Gissing*<sup>10</sup> and the Court of Appeal in *Burns v. Burns*.<sup>11</sup> Indeed, several Court of Appeal authorities<sup>12</sup> decided prior to *Rosset* make no distinction between direct and indirect contributions. None of these cases, however, was referred to in Lord Bridge's opinion in *Rosset* and most commentators have agreed that the exclusion of indirect contributions from beneficial entitlement is unduly restrictive and likely to cause injustice. Interestingly, in *Springette v. Defoe*,<sup>13</sup> a case decided *post-Rosset*, Dillon L.J. was clearly of the view that joint purchasers would hold the property on a resulting trust for themselves in the proportions in which they each contributed directly or *indirectly* to the purchase price unless there was sufficient evidence of their common intention that they should be entitled in other proportions (e.g., in equal shares notwithstanding unequal contributions) to rebut the presumption of a resulting trust. As a matter of principle also, there is no reason why, in the absence of an express common intention giving rise to a constructive trust, an indirect contribution (which relieves the legal owner from paying the mortgage instalments which he would otherwise have had to pay) should not give rise to a beneficial interest under a constructive trust provided it is substantial and is referable to the acquisition of the property. So long as the claimant has financially contributed towards the acquisition of the house, the requisite inference of an intention to share the property should apply, especially if the contribution is *essential* to the purchase in the sense that it has released the legal owner's income to pay the mortgage instalments. Unfortunately, this does not seem to represent English law after *Rosset* which, as we have seen, apparently limits contributions to those of a direct financial nature.

Although there has been some welcome relaxation of the *Rosset* ruling by the Court of Appeal in *Midland Bank plc v. Cooke*,<sup>14</sup> it is submitted that this does not go far enough. The essence of *Cooke* is that, once a claimant's interest is established by means of a financial contribution to the purchase price of property, the court is not bound to award an equitable interest strictly in proportion to it. On the contrary, the court is permitted to "undertake a survey of the whole course of dealing between the parties" relevant to their ownership and occupation of the house and "their sharing of its

<sup>7</sup> *Lloyds Bank plc v. Rosset* [1991] A.C. 107, H.L.

<sup>8</sup> *Le Foe v. Le Foe* (2001) 2 F.L.R. 970.

<sup>9</sup> [1991] A.C. 107, H.L.

<sup>10</sup> [1971] A.C. 886, H.L., *per* Lords Reid, Diplock and Pearson.

<sup>11</sup> [1984] Ch. 317, *per* Fox and May L.JJ.

<sup>12</sup> *Falconer v. Falconer* [1970] 1 W.L.R. 1333, C.A.; *Hargreave v. Newton* [1971] 1 W.L.R. 1611, C.A. and *Wachtel v. Wachtel* [1973] Fam. 72, C.A.

<sup>13</sup> (1992) 24 H.L.R. 552, C.A.

<sup>14</sup> [1995] 4 All E.R. 562, C.A.

burdens and advantages” in assessing beneficial entitlement.<sup>15</sup> On the facts, therefore, although the couple had never discussed the question of ownership of the house, the court presumed that their intention was to own it beneficially in equal shares based on a combination of direct financial contributions and contributions of a non-financial nature representing domestic and spousal services.<sup>16</sup> This line of authority represents a marked shift away from a strict application of the *Rosset* criteria and is largely inconsistent with the earlier Court of Appeal decision in *Springette v. Defoe*,<sup>17</sup> referred to above, where the amount of the claimant’s share, in the absence of a common intention, was based on a purely mathematical calculation of the proportion which the parties’ respective financial contributions bore to the total purchase price of the property. There are two further points to make here. First, on a strict reading of *Cooke*, the more robust approach to beneficial entitlement only applies in cases where the claimant is able to point to some *direct* monetary contribution towards the purchase price of the property. Until recently, there has been no suggestion in the case law that it may apply to *indirect* financial contributions. In *Le Foe v. Le Foe*,<sup>18</sup> however, Mr. Nicholas Mostyn QC (sitting as a deputy judge of the High Court) held that the wife’s indirect contributions to the mortgage enabled the court to “open the door” and undertake a survey of the whole course of dealing between the parties relevant to their ownership and occupation of the property. On this basis, the deputy judge awarded the wife a 50% share in the property.

Secondly, the decision in *Cooke* will not avail a claimant who seeks to rely purely on domestic contributions in the absence of any express discussions between the parties as to their beneficial entitlement (express common intention constructive trust) or any unilateral assurance of title by the legal owner (proprietary estoppel). This type of situation is vividly illustrated by the well-known case in *Burns v. Burns*,<sup>19</sup> where the female cohabitee’s claim rested purely on her bringing up the children, performing domestic duties and using her earnings to contribute towards housekeeping expenses and appliances during the period of cohabitation. None of these activities was held sufficient to support a resulting or constructive trust.

Another difficulty with the *Rosset* decision is its apparent assimilation of constructive theory with proprietary estoppel doctrine. There are, clearly, fundamental differences between the two concepts, not least that, under the latter doctrine, detriment can take a variety of forms and is not limited to financial contributions. In particular, personal disadvantage (*e.g.*, performing unpaid domestic services, giving up a job or home, etc.) has been held to qualify.<sup>20</sup> Moreover, in *Hussey v. Palmer*,<sup>21</sup> Lord Denning M.R. alluded to the possibility of using the constructive trust as a mechanism for satisfying the estoppel-based equity. The significance of this is that it may lead to a general widening of the circumstances in which it would be possible for the court to grant an equitable interest in the quasi-matrimonial home. However, this “remedial” form of constructive trust falls to be distinguished from the “substantive” (common/inferred intention) constructive trust exemplified by the *Rosset* decision in that being remedial, imposed in order to satisfy the estoppel equity, it would have only *prospective* effect

<sup>15</sup> *Ibid*, at 926, *per* Waite L.J.

<sup>16</sup> See also, *McHardy and Sons (A Firm) v. Warren and Another* [1994] 2 F.L.R. 338, C.A. and *Drake v. Whipp* [1996] 1 F.L.R. 826, C.A.

<sup>17</sup> (1992) 24 H.L.R. 552, C.A.

<sup>18</sup> (2001) 2 F.L.R. 970.

<sup>19</sup> [1984] F.L.R. 216, C.A.

<sup>20</sup> *Re Basham, Deceased* [1986] 1 W.L.R. 1498; *Greasley v. Cooke* [1980] 1 W.L.R. 1306, C.A.; *Jones (A.E.) v. Jones (F.W.)* [1977] 1 W.L.R. 438, C.A. and *Maharaj v. Chand* [1986] A.C. 898, P.C.

<sup>21</sup> [1972] 1 W.L.R. 1286, C.A.

from the date of the order creating it. In *Rosset* itself, for example, the claimant was obliged to rely on constructive trust theory (as opposed to proprietary estoppel doctrine) in order to raise an equitable interest capable of overriding the bank's claim under Land Registration Act 1925, section 70(1)(g). Such interest (had the claim succeeded on the facts) would have arisen by virtue of an "institutional" (not remedial) form of constructive trust which would have bound the bank regardless of the court's intervention. What is apparent, therefore, is that proprietary estoppel doctrine will provide little assistance to a claimant seeking to establish an equitable claim against a third party.

A recent case, however, has highlighted the possibility of a claimant acquiring a beneficial share in personal property without proof of any detriment or contributions (financial or otherwise) to its acquisition by the simple mechanism of a declaration of trust. In *Rowe v. Prance*,<sup>22</sup> the court held, applying *Paul v. Constance*,<sup>23</sup> that the legal owner's repeated use of the word "our" when referring to a yacht and his repeated assurances that the claimant's "security" was her interest in the yacht showed that he intended the claimant to understand that she had a beneficial interest in it. It remains to be seen, however, to what extent the courts will be prepared to uphold claims involving personal property (*e.g.*, cars, caravans, jewellery, stocks and shares, money in a deposit account, *etc.*) based on oral declarations of trust. So far, there have been only two reported cases (*Paul* and *Rowe*) where a claimant has argued for a beneficial share in property in this way. Moreover, whilst an express declaration of trust of personalty does not have to be evidenced in writing, the same is not true of land.<sup>24</sup> In the majority of cases involving a cohabitee's claim to the quasi-matrimonial home itself, the requirement of legal formality will be an insurmountable obstacle to the establishment of an informal declaration of trust. In relation to claims to land, therefore, the more conventional routes to equitable entitlement (based on constructive and resulting trust theory and proprietary estoppel doctrine) will continue to dominate.

What is apparent from this brief overview is that current English law affords little or no judicial recognition to domestic and spousal services in assessing beneficial entitlement, save in circumstances where the claimant can point to (1) an express assurance by the legal owner that he or she has or will acquire an interest in property (*i.e.*, estoppel doctrine); or (2) an express common intention to share beneficially (*i.e.*, constructive trust theory); or (3) an inferred common intention to share beneficially arising from direct financial contributions (*i.e.*, constructive and resulting trust theory). In this latter category, the *Cooke* decision has allowed non-financial contributions to be taken into account in determining beneficial entitlement under both a purchase-money resulting trust and, more significantly, *Rosset's* inferred (common intention) constructive trust. In this connection, the stated requirements for a constructive trust under *Rosset*, where there is no express agreement, are essentially indistinguishable from those of a resulting trust. In the absence, however, of any express discussions between the parties as to their equitable entitlement, or any unilateral assurance of title by the legal owner, or at least some (direct) financial contribution to the initial purchase price, the claimant will not succeed in obtaining equitable relief under current English law.

The reasons for the English courts' restrained approach to domestic and spousal services are several. First, it may be impossible to say whether or not the claimant would have done the acts relied on as detriment even if he or she thought he or she

<sup>22</sup> [1999] 2 F.L.R. 787.

<sup>23</sup> [1977] 1 W.L.R. 527.

<sup>24</sup> See Law of Property Act 1925, s. 53(1)(b).

had no interest in the house. Conduct such as setting up house together, having a baby, making payments to general household expenses (which are not strictly necessary to enable the mortgage to be repaid) and looking after the family are all treated as potentially referable to the mutual love and affection of the parties and not specifically referable to the claimant's belief that she has an interest in the property. Such reasoning, however, overlooks the inherently valuable nature of spousal and domestic services both to the family and, more importantly, to the other partner whose earning capacity and ability to acquire assets may be greatly enhanced as a result. In the words of McLachlin J. in the celebrated case of *Peter v. Beblow*:<sup>25</sup>

The notion that household and child care services are not worthy of recognition by the court fails to recognise the fact that these services are of great value, not only to the family, but to the other spouse . . . The notion, moreover, is a pernicious one that systematically devalues the contributions which women tend to make to the family economy. It has contributed to the phenomenon of the feminisation of poverty.

There is, it is submitted, much logic in assimilating domestic services with other forms of contribution in the family context. Thus, according to Cory J.,<sup>26</sup> who gave the other leading judgment in *Beblow*, it was not unreasonable for the party providing the domestic labour required to create a home to expect to share in the property when the relationship came to an end. Secondly, the assertion that spousal and domestic services can alter property rights is seen as reverting to the idea of the "family asset", which has been consistently rejected by the English courts, including the House of Lords in *Pettit v. Pettit*<sup>27</sup> and *Gissing v. Gissing*.<sup>28</sup> Thirdly, it is apparent that the English judiciary is mindful of the fact that the wide powers conferred by the Matrimonial Causes Act 1973, in relation to the property of married persons, do not apply to unmarried couples – hence, the courts' reluctance to take on a broader-based jurisdiction to reallocate property rights of de facto partners in the absence of specific statutory intervention.

An English claimant may, however, find some solace in the provisions of Children Act 1989, section 15 and Schedule 1,<sup>29</sup> which enables the court to make financial provision for children, particularly in cases where the parents of the children are not married and the powers of the court under the 1973 Act are not available. The effect of these provisions, in the context of an unmarried couple, is that the court is empowered to make either an order requiring a settlement to be made for the benefit of children of property to which either parent is entitled or, alternatively, to make an order requiring either or both parents of a child to transfer to the applicant (*e.g.*, the female cohabitant) for the benefit of the child (or to the child directly) property to which the parent is, or the parents are, entitled. The practical effect of such a settlement/transfer order is that, during a limited period (*e.g.*, until the children attain majority), the house may be held on trust for the female cohabitee to the exclusion of her male partner for the purpose of providing a home for herself and the children. In effect, the applicant is given the beneficial interest by way of a limited right of occupation for the benefit of her children, but subject to a reverter of the property to the legal owner upon the child (or children) attaining the age of 21 or completing full-time education. In this way, therefore, the courts do have power to make a limited

<sup>25</sup> (1993) 101 D.L.R. (4th) 621 (Supreme Court of Canada).

<sup>26</sup> L'Heureux-Dube and Gonthier JJ. concurring.

<sup>27</sup> [1970] A.C. 777, H.L.

<sup>28</sup> [1971] A.C. 886.

<sup>29</sup> Reference should also be made to Family Law Act 1996, Schedule 7, which allows for a property adjustment order to be made in respect of rented family homes in favour of heterosexual cohabitants.

adjustment of property rights between non-spouses along lines similar to those under Matrimonial Causes Act 1973, section 24(1). There is, however, no direct case in point where a sole legal owner has been ordered to make a transfer under Schedule 1 to his or her non-owning partner.

### BASIS FOR REFORM

It is apparent from the previous section that current English law operates unfairly against the cohabitee in not recognising spousal and domestic services as providing the basis for acquiring a beneficial interest in the home. Apart from the law being in a chaotic state, it is also illogical in a significant respect. As Thompson has noted, “a cohabitee has a better chance of obtaining some financial settlement when her partner dies than if the relationship terminates while they are still alive”.<sup>30</sup> This is because the Inheritance (Provision for Family and Dependants) Act 1975, as amended by the Law Reform (Succession) Act 1995, allows a person, who has lived as man or wife with the deceased during the two years immediately preceding the deceased’s death, to claim under the Act. In deciding whether to make an order, the court is entitled to have regard to any contribution made by the claimant to the welfare of the family of the deceased, including any contribution made by looking after the house or caring for the family. Significantly, of course, these are the very same criteria which the court considers irrelevant when determining whether the claimant has acquired a beneficial interest in the home against a living partner.

Most commentators<sup>31</sup> agree that reform in this area is long overdue and that our law should now acknowledge diverse family relationships and deal with them justly by taking into account the broader contributions of the parties to the home and to the family in allocating property rights. But how far should any new legislation go in recognising the various categories of home sharers? Should reform be limited to cohabitation between a man and a woman or extend to a wider range of relationships including same-sex partners and those not involving sexual cohabitation, for example, relatives of the owner of the house? It is submitted that, as a matter of policy, marriage should not be seen as the only indicator of a family or domestic relationship. To privilege one group in society over other groups can only be justified if there are valid differences which objectively justify such differentiation. In the words of Lord Browne-Wilkinson in *Barclays Bank plc v. O'Brien*.<sup>32</sup>

The ‘tenderness’ shown by the law to married women is not based on the marriage ceremony but reflects the underlying risk of one cohabitee exploiting the emotional involvement and trust of the other. Now that unmarried cohabitation, whether heterosexual or homosexual, is widespread in our society, the law should recognise this. Legal wives are not the only group which are now exposed to the emotional pressure of cohabitation.

As has been cogently argued elsewhere, a “fundamental flaw in the legal regulation of family property is the insistence on maintaining legal boundaries separating similar family relationships”.<sup>33</sup> Significantly, judicial attitudes towards unmarried cohabitants,

<sup>30</sup> M. P. Thompson, “Home Sharing – Reforming the Law”, [1996] Conv. 154, at p. 155.

<sup>31</sup> See, for example, R. Bailey-Harris, “Law and the Unmarried Couple – Oppression or Liberation?” [1996] 8 CFLQ 137.

<sup>32</sup> [1993] 4 All E.R. 417, at 431, H.L.

<sup>33</sup> A. Barlow and C. Lind, “A Matter of Trust; The Allocation of Rights in the Family Home”, (1999) 19 L.S. 468, at p. 473.

in particular same-sex couples, has changed over the last few years. Most notably, in *Fitzpatrick v. Stirling Housing Association Ltd.*,<sup>34</sup> a case dealing with the right of a homosexual to claim succession rights in relation to a protected tenancy under the Rent Act 1977, the majority of the House of Lords recognised that the word “family” had to be applied flexibly so as to include a variety of de facto relationships involving familial nexus short of marriage or blood tie, provided the relationship was stable and permanent. According to the majority, the hallmarks of a family relationship were essentially that “there should be a degree of mutual inter-dependence, of the sharing of lives, of caring and loving, of commitment and support”.<sup>35</sup> In the words of Lord Nicholls:<sup>36</sup>

Where sexual partners are involved, whether heterosexual or homosexual, there is scope for the intimate mutual love and affection and long-term commitment that typically characterise the relationship of husband and wife . . . In sexual terms a homosexual relationship is different from a heterosexual relationship, but I am unable to see that difference is material for present purposes . . . the concept underlying membership of a family for present purposes is the sharing of lives together in a single family unit in one house.

Having regard to changing social attitudes, therefore, the majority of the House of Lords held that it was now open to a same-sex partner of a deceased tenant to establish, as a matter of fact, that their relationship had the requisite de facto “familial link” provided that the couple lived together broadly as they would if they were married and the relationship was not of a transient or superficial nature. This, of course, paves the way for accepting that other non-sexual familial relationships between two adults, in which there is an element of personal commitment and domestic support, should also qualify for protection under any new statutory scheme allowing for adjustment of property rights between home sharers. Indeed, as we shall see, several of the Australian codes define a de facto relationship as including such personal (non-cohabiting) relationships provided the domestic service is not offered for reward.

The underlying rationale, therefore, for introducing a new statutory scheme would be the need to provide some measure of consistency in the way in which our law recognises the family home where the parties’ relationship involves close emotional ties and the sharing of personal commitment, care and support. Such a rationale would enable a broad range of personal relationships to benefit from the new code, not limited merely to sexual cohabitation between a man and a woman. At the same time, it is submitted, such an approach would not undermine the institution of marriage since cohabitation would remain a distinct form of legal status, thereby giving couples the continued choice of opting out of married union. Equally, the feminist argument, which rejects the imposition of the legal consequences of marriage upon unmarried cohabitants would also be met in so far as the effect of recognising cohabitation relationships would be to allow women to escape from the home (and the economic dominance of men) by a recognised system of allocation of property rights on the termination of the relationship. Thus, women (usually the weaker parties in relationships) who did not consider their position when they entered into the relationship would have better legal protection. On the other hand, those independent women with free choice would have the option to remain outside marriage and, at the same time, agree to exclude the operation of the legislation with their partners. In this connection,

<sup>34</sup> [1999] 4 All E.R. 705, H.L. See also, *Re W (Adoption: Homosexuals)* [1997] 2 F.L.R. 406.

<sup>35</sup> *Ibid.*, 714, per Lord Slynn.

<sup>36</sup> *Ibid.*, at 720.

both the Law Society and the Solicitors Family Law Association advocate the preservation of the individuals' freedom of choice of opting out of the new legal framework by means of a cohabitation contract entered into at the beginning of the relationship, provided that both parties received independent legal advice before signing it.

It will now be convenient to review legislative developments in Australia and New Zealand. As we shall see, these support the idea that a distinct statutory code is appropriate to deal with the property rights of various types of home sharers.

### AUSTRALIAN APPROACH

There are five<sup>37</sup> states in Australia that currently have legislation governing de facto relationships. Two other states<sup>38</sup> have De Facto Relationships Bills which, at the time of writing, have not yet become law. By far the most far-reaching legislation is to be found in the New South Wales Property (Relationships) Act 1984, which comprises a re-enactment of the New South Wales De Facto Relationships Act 1984 as amended by the Property (Relationships) Legislation Amendment Act 1999. As originally drafted, the 1984 Act applied only to heterosexual couples who had lived together for more than two years, but the renamed Act now extends to a variety of people who are in a domestic relationship including gay men, lesbians, and, in some instances, other kinds of close personal (platonic) relationships. Interestingly, the New South Wales Law Reform Commission has been asked to review the operation of the 1984 Act (as amended), focusing at the range of interdependent personal relationships currently covered by the Act. The Commission is due to publish its final report later this year. As we shall see, the Australian Capital Territory Domestic Relationships Act 1994 also includes heterosexual and same-sex relationships within its scope, as well as personal relationships of a non-sexual (domestic) nature. It will be convenient to consider the legislation in Australia under a number of separate headings.

#### *What relationships qualify?*

The various statutory codes differ in their definition of a de facto relationship. The Northern Territory De Facto Relationships Act 1991 defines the relationship as being that of "living together as husband and wife on a bona fide domestic basis although not married to each other".<sup>39</sup> A two-year period<sup>40</sup> of cohabitation is required to qualify for the making of an application under the Act, unless (1) there is a child of the de facto partners or (2) the partner applying for an order has made substantial contributions for which (s)he would otherwise not be adequately compensated or (s)he has the care and control of a child of the other partner and a failure to make an order would result in serious injustice.<sup>41</sup> The definition in the South Australian De Facto

<sup>37</sup> New South Wales, Northern Territory, Australian Capital Territory, South Australia and Victoria.

<sup>38</sup> See Queensland De Facto Relationships Bill 1993 and the Tasmania De Facto Relationships Bill. In 1993, the Queensland Law Reform Commission proposed legislative reform to assist de facto couples resolve property and maintenance disputes. The draft bill defined the expression "de facto relationship" to mean the relationship between two people (whether of different or the same gender) who, although they are not legally married to each other, live in a relationship like the relationship between a married couple. In Tasmania, on the other hand, the 1999 bill provides for recognition of heterosexual relationships only.

<sup>39</sup> Section 3.

<sup>40</sup> Section 16(1).

<sup>41</sup> Section 16(2). The Victoria Property Law Act 1958 is to the same effect. However, the 1958 Act only applies to a de facto relationship which ended after 1 June 1988.

Relationships Act 1996 is broadly similar, namely, a “relationship between a man and a woman, who although not legally married to each other, live together on a genuine domestic basis as husband and wife”.<sup>42</sup> However, there is a three-year (as opposed to two-year) qualifying period of cohabitation.<sup>43</sup> Both definitions, of course, exclude homosexual and lesbian partners. The Australian Capital Territory De Facto Relationships Act 1994, on the other hand, is considerably wider in scope in so far as it defines a “domestic relationship” as meaning “a personal relationship (other than a legal marriage) between two adults in which one provides personal or financial commitment and support of a domestic nature for the material benefit of the other”.<sup>44</sup> Apart from including a heterosexual (de facto) marriage, this formulation also allows same-sex partners to apply under the Act as well as those persons who are in a close non-sexual relationship involving domestic support and care (e.g., a family member looking after an elderly relative). For these purposes, a personal relationship may exist between persons although they are not members of the same household. However, such a relationship will not exist if the domestic service is provided for a fee or reward or on behalf of a government agency or charitable body.<sup>45</sup> Like the Northern Territory legislation, the domestic relationship must have existed between the parties for not less than two years,<sup>46</sup> unless there is a child of the parties (defined to include a child adopted by both parties or one for whose long-term welfare both parents accept responsibility<sup>47</sup>), or the other two exceptions provided for by the 1991 Act apply. The New South Wales Property (Relationships) Act 1984, mentioned earlier, provides a similar broad (gender-neutral) definition. It defines a de facto relationship as being one between “two adult persons<sup>48</sup> who live together as a couple and who are not married to one another or related by family”.<sup>49</sup> In determining whether two persons are in such a relationship, a wide range of factors is to be taken into account including (1) its duration; (2) the nature and extent of the common residence; (3) whether or not a sexual relationship exists; (4) the degree of financial dependence or interdependence between the parties; (5) the ownership, use and acquisition of property; (6) the degree of mutual commitment to a shared life; (6) care and support of children; (7) the performance of household duties and (8) the reputation and public aspects of the relationship.<sup>50</sup> This list of factors is intended only as guidance for the courts so that it is not necessary for all of them to exist and it is possible to consider other factors. The 1984 Act also gives a separate definition of “domestic relationship” to mean either a de facto relationship (as defined above) or a “close personal relationship (other than a marriage or a de facto relationship) between two adult persons, whether or not related by family, who are living together, one or each of whom provides the other with domestic support and personal care”.<sup>51</sup> As with the Australian Territory code, a close personal relationship will not exist between two persons where one of them provides the other with domestic support and personal care for fee or reward or on behalf of a government agency, body corporate or a charitable organisation. An example of a

<sup>42</sup> Section 3.

<sup>43</sup> Section 9(2).

<sup>44</sup> Section 3(1).

<sup>45</sup> Section 3(2).

<sup>46</sup> Section 12(1).

<sup>47</sup> Section 3(4).

<sup>48</sup> An adult person is defined as a person of or above the age of 18: s. 3.

<sup>49</sup> Section 4(1).

<sup>50</sup> Section 4(2). See also, *Roy v. Sturgeon* (1986) 11 Fam. L.R. 271, at 274, *per* Powell J., from which much of the wording of section 4(2) of the Act was taken by the draftsman.

<sup>51</sup> Section 5(1).

relationship falling within the category of a “domestic relationship” would be an unpaid carer where a relative or friend provides long term support to a person during illness or incapacity. It is not necessary, however, for one of the persons in the relationship to be incapacitated. The legislation recognises that, in close personal relationships, people often provide domestic support to each other in the form of shopping, cleaning, washing and personal care. The legislation does, however, require a relationship in which two people actually live together, even if there is financial or economic interdependency. In other words, the legislation is aimed only at *cohabiting de facto* couples and domestic relationships.

Under the 1984 Act, *de facto* couples (heterosexual, gay or lesbian) and carers can apply for a property settlement if (1) they have lived together for two years; (2) there would be hardship by excluding them or (3) they have a child together. In the latter category, a child includes one that is born as a result of sexual relations between the parties, is adopted by both parties, or for whose long-term welfare both parties have parental responsibility.<sup>52</sup> This is, once again, a particularly important provision for gay and lesbian couples who cannot have children of their own.

#### *When must the application be made?*

The time limit for the making of an application for property adjustment differs slightly between the various codes. Under the Northern Territory 1991 Act, where the *de facto* partners have ended their relationship, the application must be made before the expiry of two years beginning with the date from which their relationship ended.<sup>53</sup> An application after this period may also be made but only if the court is satisfied that greater hardship would be caused to the claimant by refusing leave than would be caused to the other partner by granting it.<sup>54</sup> The legislation also provides for a minimum period of residence within the jurisdiction as a prerequisite to bringing a property adjustment claim (*i.e.*, both partners must have lived together in the territory for not less than one third of the period of their *de facto* relationship).<sup>55</sup>

Under the South Australian code, the qualifying period is only one year after the end of the relationship, unless the court (after considering the interests of the *de facto* partners) is satisfied that extension of this period of limitation is necessary to avoid serious injustice to the applicant.<sup>56</sup> Here again, there is a requirement that the applicant or respondent is resident in the State when the application is made and that both partners were resident for the whole (or a substantial part) of the period of the relationship.<sup>57</sup>

The Australian Capital Territory code also provides that an application for a property adjustment order must be made not more than two years after the day on which the *de facto* relationship ended.<sup>58</sup> Here again, the time-limit can be extended by the court if it is satisfied that greater hardship would be caused to the applicant if leave were refused than if it were granted.<sup>59</sup> Similarly, under the current New South Wales legislation, an application for property adjustment must be made within two years of the relationship ending with a discretionary power to extend the time-period in appropriate cases of hardship or injustice. The Property (Relationships) Act 1984 came

<sup>52</sup> Section 5(3).

<sup>53</sup> Northern Territory De Facto Relationships Act 1991, s. 14(1). See also, the Victoria Property Law Act 1958.

<sup>54</sup> Section 14(2).

<sup>55</sup> Section 15(1). See also Victoria Property Law Act 1958, s. 280.

<sup>56</sup> South Australian De Facto Relationships Act 1996, s. 9(3).

<sup>57</sup> Section 9(2).

<sup>58</sup> Australian Capital Territory Domestic Relationships Act 1994, s. 13(1).

<sup>59</sup> Section 13(2).

into force on 28 June 1999 and does not have retrospective effect so that persons in gay or lesbian relationships which broke up before this date are not covered by the legislation. Moreover, in order for the court to make a property order under the Act, it is necessary for at least one party to live within the State on the day the application is made and both parties to have lived in it for at least one third of the time they lived together, or for the person making the application to have made substantial contributions (financial or non-financial) to the family or property in the State unless, in the view of the court, it would be unfair not to make an order.<sup>60</sup>

#### *What property is covered?*

The Northern Territory Act defines property, in relation to de facto partners, as including (1) real and personal property and any estate or interest (whether present, future or contingent) in real or personal property; (2) money; (3) any debt or cause of action for damages; and (4) any other chose in action or right with respect to property.<sup>61</sup> In the South Australian statute, property is given a more extended (and specific) meaning to include a prospective entitlement or benefit under a superannuation or retirement benefit scheme, rights under a discretionary trust and any other valuable benefit.<sup>62</sup> The Australian Capital Territories code defines property as meaning both real and personal property in any form to which either or both parties to a domestic relationship is, or are, entitled.<sup>63</sup> In New South Wales, the Property (Relationships) Act 1984 uses the same definition for property as that used under its matrimonial legislation. This means that all property and financial resources, whether in individual or joint names and regardless of how (or when) it was obtained (including gifts and inheritance) is considered by the court.

#### *What contributions are considered?*

All the relevant Australian statutes use the same basic definition as to what contributions by either partner may be taken into account in determining an application for a property adjustment order. In each state or territory, the court is empowered to make such order adjusting the interests of the partners in the property as the court considers just and equitable having regard to: (1) the financial and non-financial contributions made directly or indirectly by or on behalf of the partners to the acquisition, conservation improvement of any of the property or to the financial resources of the partners or either of them; and (2) the contributions (including any made in the capacity of homemaker or parent) made by either of the partners to the welfare of the other partner, or to the welfare of the family constituted by the partners and one or more of the following, namely, (a) a child of the partners; (b) a child accepted by the partners or other of them into the household of the partners, whether or not the child is a child of either of the partners; or (c) any person dependent on the partners who has been accepted by the partners or either of them into the household of the partners.<sup>64</sup>

<sup>60</sup> Property (Relationships) Act 1984, s. 15.

<sup>61</sup> De Facto Relationships Act 1991, s. 3.

<sup>62</sup> De Facto Relationships Act 1996, s. 3.

<sup>63</sup> Domestic Relationships Act 1994, s. 3. The Victoria Property Law Act 1958 also covers all types of property including furniture, inheritances, shares, gifts, etc. If, however, the relationship ended before 29 June 1998, property is limited to real property.

<sup>64</sup> Northern Territory De Facto Relationships Act 1991, s. 18(1). See also South Australian De Facto Relationships Act 1996, s. 11(1); Australian Capital Territories Domestic Relationships Act 1994, s. 15(1); New South Wales Property (Relationships) Act 1984, s. 20(1) and Victoria Property Law Act 1958, s. 285.

It is evident that such a statutory formulation gives claimants of the English *Burns*<sup>65</sup> type (whose contribution to the relationship is that of essentially “homemaker”) a right to claim a beneficial share in the quasi-matrimonial home.

*What orders can be made?*

The various Australian statutory codes provide broadly similar provisions regarding the court’s powers to make property adjustment orders. The Northern Territory legislation is typical in this respect in so far as it gives the court, in any proceedings between de facto partners with respect to existing title or rights in respect of property, jurisdiction to declare the title or rights (if any) that a de facto partner has in respect of the property.<sup>66</sup> In addition, the court may make an order adjusting the interests of the partners in the property as it considers just and equitable having regard to the parties’ respective contributions.<sup>67</sup> A property adjustment order may be made regardless whether or not the court has made a declaratory order in respect of the parties’ rights or title to the property.<sup>68</sup> There is also specific provision, if either party to an application dies before the application is determined, for the application to be continued by or against the legal representative of the deceased party.<sup>69</sup> Moreover, a property adjustment order may be enforced on behalf of, or against the estate of the deceased party.<sup>70</sup> Even if the respondent to the application dies after an order is made against him or her, the order may be enforced against the estate of the deceased party.<sup>71</sup> The statute also makes provision for the variation and setting aside of orders in special cases, namely, where there has been a miscarriage of justice because of fraud, duress, suppression of evidence, the giving of false evidence or any other circumstance, or where it would be impracticable for the order to be carried out because of changed circumstances or because the respondent has defaulted in carrying out the order and where, in the circumstances, it would be just and equitable to vary or substitute the order.<sup>72</sup>

The South Australian De Facto Relationships Act 1996 provides more specifically that the court, on an application for the division of property, may “make orders it considers necessary to divide the property of either or both the de facto partners between them in a way that is just and equitable”, for example, by a transfer of property from one partner to the other; the sale of the property and the division of the net proceeds between them in proportions decided by the court, or the payment by one partner of a lump sum to the other.<sup>73</sup> The Victoria Property Law Act 1958 also provides comprehensive provisions for the making of appropriate orders adjusting the interests of de facto partners in the property. By virtue of section 291, the court may do any one or more of the following: (1) order the transfer of property; (2) order the sale of property and the distribution of the proceeds of sale in any proportions that the court thinks fit; (3) order payment of a lump sum (whether in one amount or by instalments); (4) appoint or remove trustees; (5) grant an injunction for the protection of or otherwise relating to the property of one or both parties; (6) impose any terms and conditions; and (7) make any other order or grant an injunction to do justice.

<sup>65</sup> *Burns v. Burns* [1984] Ch. 317, C.A.

<sup>66</sup> De Facto Relationships Act 1991, s. 12.

<sup>67</sup> Section 18(1).

<sup>68</sup> Section 18(2).

<sup>69</sup> Section 22(1).

<sup>70</sup> Section 22(3).

<sup>71</sup> Section 23.

<sup>72</sup> Section 40.

<sup>73</sup> De Facto Relationships Act 1996, s. 10.

The Australian Capital Territory legislation, on the other hand, is not as comprehensive and mirrors the Northern Territory statute in so far as it gives the court power to make declaratory and possession orders<sup>74</sup> as well as an order adjusting the interests in the property of either or both partners as seems just and equitable having regard to the nature and duration of the relationship, the parties' contributions and any other relevant factors.<sup>75</sup> There are also similar provisions regarding the effect of the death of a party on the proceedings,<sup>76</sup> and the variation and setting aside of orders in certain defined circumstances.<sup>77</sup> The New South Wales legislation<sup>78</sup> is also drafted along very similar lines.

In all the above legislation, the claimant is given a right to claim property adjustment under a three-stage process. First, the court must identify and assess the value of the property of the parties. Secondly, it must identify the relevant contributions of each party and, thirdly, determine what order (if any) seems just and equitable having regard to those contributions (and to what the parties have respectively received).

## DEVELOPMENTS IN NEW ZEALAND

Legislative proposals in New Zealand regarding the rights of de facto partners and home sharers have taken a more radical form than those in the various Australian states and territories discussed above. The road to reform began with the introduction of a De Facto Relationships (Property) Bill in 1998, which was designed to recognise the equal contribution of both partners to a de facto relationship and to provide for a just division of their property when the relationship ended based on the premise that a de facto relationship is akin to a partnership like marriage. Under the Bill, a de facto relationship is defined as one "where a man and a woman are living together in a relationship in the nature of marriage, although not married to each other".<sup>79</sup> It is apparent that neither homosexual nor lesbian couples would come within this definition. Moreover, the relationship must have lasted for at least three years before the parties separated (or one of them died).<sup>80</sup> By way of exception, however, the court would have jurisdiction in respect of shorter relationships if (1) the parties have had a child or if the applicant had made a substantial contribution to the relationship and (2) if the failure to make an order would result in serious injustice. It was envisaged that the property of such short relationships would be divided simply according to the parties' contributions.

The Bill defined a contribution to a de facto relationship in typically broad terms to include both financial and non-financial contributions. Significantly also, it contemplated an equal division of the house and chattels (defined as "relationship property") of most de facto partners,<sup>81</sup> but with no such presumption of equality for other types of property (*i.e.*, "balance of relationship property") which would fall to be divided according to the parties' respective contributions. This latter category of property would cover assets acquired during the relationship or which were in some way linked

<sup>74</sup> Domestic Relationships Act 1994, s. 40.

<sup>75</sup> Section 15(1).

<sup>76</sup> Section 17.

<sup>77</sup> Section 28.

<sup>78</sup> See Property (Relationships) Act 1984, ss. 20, 24, 25 and 41.

<sup>79</sup> Clause 17.

<sup>80</sup> Clause 29(5).

<sup>81</sup> The presumption of equal sharing of home and chattels may be displaced by division according to contributions only if the court considers equal sharing would cause serious injustice: Clause 57.

to the relationship, but not property acquired by gift from a third party, under a trust, by succession or survivorship unless mingled with other relationship property. Interestingly, the Bill also specifically provided for the situation where a person moves through a succession of relationships or maintains an association with more than one partner at the same time (*e.g.*, a *ménage à trois*). Here, the Bill set out priorities where competing claims are made on property either by way of chronology (in case of successive relationships) or by division in accordance with the contribution of each relationship (in case of contemporaneous relationships).<sup>82</sup>

At the same time as the introduction of the De Facto Relationships (Property) Bill, the New Zealand government also proposed minor amendments to the law relating to matrimonial property under the Matrimonial Property Amendment Bill 1998. The rationale of introducing a separate statute dealing with de facto relationships was to maintain the essential distinction between married and unmarried couples, given that de facto relationships differ considerably in terms of their quality and extent of commitment. At that time, it was considered inappropriate to subsume such diverse relationships within the single umbrella of matrimonial legislation.

The notion, however, that married and unmarried couples should have broadly similar rights gained greater support in New Zealand with the introduction (in May 2000) of various far-reaching amendments to the Matrimonial Property Amendment Bill 1998. The essence of this new legislative initiative (brought in by the government halfway through the legislative process of the original Matrimonial Property Amendment Bill) was to extend the existing matrimonial legislation (*i.e.*, the New Zealand Matrimonial Property Act 1976) to include de facto relationships and to rename it as the Property (Relationships) Act 1976. The effect of the Bill, therefore, would be to treat de facto partners in a very similar way as married couples. For these purposes, a de facto relationship is defined as two persons living together in a relationship “in the nature of marriage” of at least three years’ duration. This would now, therefore, include same-sex relationships. It would be possible, however, for couples to contract out of the statute but any such agreements could still be overturned on grounds of serious injustice. As with other legislation already in existence in Australia, the court would have a discretion to make a property order for shorter relationships where there was a child of the relationship, or one partner had made a significant contribution to the relationship and failure to make an order would cause serious injustice.

There is no doubt that this latest legislative proposal (in effect, combining marital, de facto and same-sex relationships under one piece of legislation) is novel and thought-provoking. It is proposed, for example, that a family court would have sole originating jurisdiction to hear cases brought by both marital and non-marital claimants. In respect of de facto partners, the rules governing distribution of property on the breakdown of the relationship would be broadly similar to those already in existence for married couples. Thus, as envisaged under the original De Facto Relationships (Property) Bill 1998, there would be an equal division of “core” relationship property (*i.e.*, the house and chattels) just as if the parties were married. This would mirror the equal sharing provisions of the Matrimonial Property Act 1976, currently relating to married couples only. In respect of other “non-core” property, however, this would be divided on the basis of contributions (*i.e.*, both financial and non-financial) to the relationship. Moreover, on the death of one de facto partner, the surviving partner would be entitled to the same share of the relationship property had the relationship ended by separation. The result, therefore, is that a large part of the

<sup>82</sup> Clauses 194 and 195.

proposed new de facto legislation would be a replica of the existing matrimonial property laws in New Zealand. A strong underlying rationale for this assimilation is that unmarried cohabitation is now widespread in the country and the legislature should recognise this by providing a statutory framework for the division of property following separation or death.

## CONCLUSION

Judging by the current proposals of the Law Society and the Solicitors Family Law Association, the most likely approach in England to the reform of property rights of home sharers will be by means of a separate statutory scheme, distinct from the existing matrimonial legislation affecting married couples.

In the face of continued judicial reluctance to adopt a broader-based philosophy to the resolution of property disputes arising upon the breakdown of de facto relationships (whether it be in the form of an extension of constructive/resulting trust theory or proprietary estoppel doctrine), there is growing force in the argument that a statutory code along the lines of the Australian experience should be enacted in this country which would provide a clear set of principles (based on considerations of policy) for allocating property interests between de facto and domestic partners. But what precise form should this new legislation take? There will certainly be considerable controversy over the appropriate definition of a de facto relationship falling within the new law. It has been argued that the statute should not be limited to heterosexual relationships, but should cover also homosexual and lesbian partners. The new Act, it has been submitted, should also extend to other personal relationships of a domestic and caring nature so as to include, for example, a young daughter who comes to stay with her elderly mother to nurse and look after her in her old age. Whilst there may be some opposition to including gay couples, there seems little reason to ignore "carer" relationships from the new legislation provided, of course, that paid and corporate/charitable services are excluded. What should be the minimum duration of the relationship so as to attract the court's intervention? Ultimately, the period is going to be largely arbitrary, intended primarily to exclude casual associations which lack the requisite elements of commitment and care and support. There is no reason why a two-year qualifying period should not be adopted as provided for by most of the Australian statutes. Thought should be given, however, to providing a limited discretionary jurisdiction in cases of shorter relationships on grounds of hardship, substantial contribution or where the parties have had a child together. What property should be covered? Here again, by analogy with the Australian experience, property should include all real and personal property in any form to which either or both parties to the relationship is (or are) entitled, regardless of how (or when) it was obtained. This would include gifts and inheritance acquired by a partner during the relationship. What contributions should be considered? There is no doubt that both financial and non-financial contributions (*i.e.*, domestic and spousal) should be considered by the courts in determining whether or not to make a property adjustment order. These should include contributions made in the capacity of homemaker (or parent) both to the welfare of the other partner and to the family and any children of the parties. The courts should also be given a broad range of powers, including declaring the rights of the parties, making possession orders, ordering lump sum payments and the granting of injunctions in appropriate cases. Should the new legislation be retrospective or not? The Law Society canvasses three options. First the

legislation could be genuinely retrospective. Secondly, the legislation could affect all relationships in being as at the date on which it is implemented and, thirdly, it could only affect relationships entered into after implementation. Despite the fact that this last option would mean couples already in a relationship would not be able to take advantage of the new law, the Law Society considers this to be the best option since it would ensure that people knew on what basis any arrangements were being made. Finally, it seems appropriate that the parties should be entitled, upon receiving independent legal advice, to opt out of the statutory regime by entering into an enforceable cohabitation contract governing the parties' financial matters. Hopefully, the opportunity will not be missed to enact new legislation along these lines in the foreseeable future.

#### POSTSCRIPT

Since the submission of this article for publication, the New Zealand Parliament has passed the Property (Relationships) Amendment Act 2001 which gives the same property rights to persons in de facto relationships (including same sex partners) as those who are married. The Act was passed in March 2001 and is due to come into force on 1<sup>st</sup> February 2002. As with the proposed amendments to the Matrimonial Property Amendment Bill (discussed in the text), the new legislation applies to de facto relationships where the parties have lived together for three years or more. In such cases (and exceptionally where the relationship is shorter), an equal division of relationship property will apply. It will still be possible, however, for the parties to contract out of the statute subject to appropriate safeguards.

## CASE NOTES

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

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### POLICE INFORMANT'S RIGHT TO PAYMENT VERSUS PUBLIC INTEREST

*Carnduff v. Rock and Another*

[2001] EWCA Civ 680 (C.A.); [2001] 1 W.L.R. 1786 (Waller, Laws, and Parker L.JJ.)

#### FACTS

From 1984 John Carnduff had a relationship with West Midlands Police as a registered paid informer. During this period, the police paid him varying amounts of money in return for information concerning the investigation of criminal activities.

Carnduff alleged that in 1996 he had been instrumental in police investigations relating to the activities of Zafar Ali Mirza, a suspected drug dealer. Carnduff issued proceedings claiming that he was contractually entitled to reasonable remuneration for the assistance he had provided in the successful prosecution of Mirza and others. West Midlands Police said Carnduff had not earned any remuneration in respect of that investigation. When Carnduff applied for disclosure of documents, West Midlands Police applied to strike out Carnduff's entire claim, arguing that to determine the value of Carnduff's assistance was likely to reveal material contrary to the public interest. Nonetheless, Judge Nicholl sitting as a High Court Judge in the Birmingham District Registry dismissed the application by West Midlands Police and refused permission to appeal.

Carnduff did not proceed with his disclosure application pending a second application for permission to appeal by West Midlands Police, which was granted by Hale LJ.

#### DECISION

It was held that it would be against the public interest to allow John Carnduff to sue for payment under the terms of a supposed oral contract for information allegedly supplied to Inspector Rock and the Chief Constable of West Midlands Police. By a majority, the Court of Appeal allowed an interlocutory appeal by Inspector Rock and the Chief Constable of West Midlands Police from the refusal of Judge Nicholl to strike out Carnduff's claim. Waller LJ gave a dissenting judgment.

Lord Justice Laws referred to the material terms of Carnduff's Statement of Claim as set out by Mr Richard Perks, for the West Midlands Police. First that he had supplied information and assistance to the police since 1984. Second, that he had discussed with various officers matters related to the criminal activities of Mirza. Third, the information he had supplied was instrumental in bringing Mirza and others to justice. Finally, Carnduff invited the court to assess the information's utility and then to place a financial value upon his claim.

There was no dispute that Carnduff had supplied information to the police on this or the other occasions claimed. Neither was it disputed that he had discussed certain activities involving Mirza. The police argued that the information supplied had been of no use in bringing Mirza and others to justice. However it was the final point on which they made their substantive objection. How could the court determine the value of the information supplied by Carnduff without disclosing sensitive material contrary to the public interest?

Accordingly, the court's purpose was to establish whether the disputed issues in the pleadings could be tried without injury to the public interest. A balance needed to be struck between protecting that interest and the need to provide a fair trial. However, this was an appeal seeking to strike out Carnduff's claim, which would ordinarily proceed on the basis that both parties' pleadings could be established. This had reduced the issue to that stated by Laws LJ:

... the very business of trying this claim would transfer the difficult and delicate business of tracking and catching serious professional criminals from the specialist and confidential context of police operations to the glare of the public arena of a court of justice.<sup>1</sup>

His Lordship considered that the matter could only be pursued if the defendants made comprehensive admissions, thereby absolving the court from the examination of sensitive issues.<sup>2</sup> The difficulty was how to condone the protection of the public interest where the circumstances encouraged one party to hold their hands up in acknowledgement of the other party's assertions. This he considered contrary to the notions of a just trial.<sup>3</sup>

In allowing the appeal, Laws LJ did not rule out the possibility of a relationship between informer and police being established under the rules and principles of contract law.<sup>4</sup>

Jonathan Parker LJ also allowed the appeal and clarified three points in the exercise of establishing where the overall public interest lay:

... there is a fundamental public interest in ensuring that justice is done and is seen to be done. Further, and more specifically, there is a public interest in the enforcement of contractual obligations. Equally, however, it is in the public interest that the effectiveness of the law enforcement agencies in investigating and preventing crime should not be adversely affected by an obligation to make public information or material of a sensitive or confidential nature.<sup>5</sup>

Mr Paul, for Carnduff, recognised this potential conflict,<sup>6</sup> but claimed it might never be reached and invited the Court to avoid the assumption that it would be. On the

<sup>1</sup> [2001] EWCA Civ. 680 at 1795.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*, at 1796: "The basis on which either party's case pleaded is subject to pressures which should be irrelevant, and there will be pressures to compromise of a kind which ought not to be brought to bear. All this, in my judgement, tends to compromise the business of doing justice."

<sup>4</sup> *Ibid.*, at 1797.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*, at 1798.

other hand, Parker L.J. set Mr Paul's submission against paragraph 2 of the Statement of Claim. This contained a number of factors that the court might wish to consider in assessing the amount to be paid:

... the seriousness of the criminal activity to which his information and assistance related; the financial rewards likely to accrue to criminals from the relevant criminal activity; the value to the police of his information and assistance; and the personal danger to which the Plaintiff and his family would be exposed as a result of his providing information and assistance as aforesaid.<sup>7</sup>

Thus Parker LJ considered there was little to support the view that the point of conflict might never be reached, stating that "the court's investigation will inevitably cover sensitive areas which should, in the public interest, remain confidential to the police".<sup>8</sup> He was opposed to allowing the case to proceed to the trial of a preliminary issue to establish that the agreement existed in the manner claimed. He believed that this would merely delay the inevitable outcome of the action failing to pass the public interest objection.<sup>9</sup> In reaching that conclusion he distinguished this case from that of *Savage v. Chief Constable of Hampshire*.<sup>10</sup> There the court was invited to determine quantum by reference to percentage calculations against recovered property. When that became indeterminable, the court found itself at the same juncture as in the present matter. In that case it was thought conceivable that quantum could have been calculated without disclosing sensitive police information, whereas here, the contrary was thought to be the case. Indeed, paragraph 2 of the Statement of Claim appeared to affirm that quantum could only be assessed by disclosing police information, and in view of this, he allowed the appeal and ordered the claim to be struck out.

Waller LJ, in his dissenting judgment, considered two points. What was the court asked to do? Under what rule was the court being asked to exercise its power? In examining the police's submission that the Court of Appeal should invoke its power under either CPR r. 3.4,<sup>11</sup> or CPR r. 24.2,<sup>12</sup> he considered:

It would seem as though the judge (at first instance) thought he was being asked to exercise the court's power under CPR 24.2. I have to say that I am doubtful whether in truth that is so. What is more, the jurisdiction that the court is being asked to exercise does not seem to me to fall clearly within CPR 3.4.<sup>13</sup>

He continued that it would be "a draconian step to take to say that at this stage, despite being able to establish all that, the claimant should still not be entitled to

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

<sup>9</sup> *Op. cit.*

<sup>10</sup> [1997] 1 W.L.R. 1061.

<sup>11</sup> Civil Procedure Rules 1998, rule 3.4: POWER TO STRIKE OUT A STATEMENT OF CASE

(2) The court may strike out a statement of case if it appears to the court –

(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;  
 (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or  
 (c) that there has been a failure to comply with a rule, practice direction or court order.

<sup>12</sup> Civil Procedure Rules 1998, rule 24.2 (as amended): GROUNDS FOR SUMMARY JUDGMENT

The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if –

(a) it considers that –  
 (i) that claimant has no real prospect of succeeding on the claim or issue; or  
 (ii) that defendant has no real prospect of successfully defending the claim or issue  
 (b) there is no other compelling reason why the case or issue should be disposed of at a trial.

<sup>13</sup> *Op. cit.*, at 1068.

pursue his claim”.<sup>14</sup> Essentially, he found it difficult to establish the jurisdiction of the court within the parameters of the rules cited by the appellant. He aligned his rationale with that of Potter LJ in *Savage* who commented:

... where new law may have to be made, it seems to me quite wrong to consider issues of possible privilege in advance and in vacuo rather than on the basis of the particular facts and consequent claims for privilege which are asserted in the light of the issues as crystallised at the discovery stage.<sup>15</sup>

Thus, Waller LJ considered the Court of Appeal should not exercise its jurisdiction upon matters of public interest before they had rightly arisen. Only in this way could the court be seen to provide a fair trial. In recommending that the appeal be dismissed, he concluded the police authority should not be able to avoid its liability under contract where it had entered into it with its eyes wide open.<sup>16</sup>

### COMMENTARY

This is not the most complex of judgments to be given by the Court of Appeal, although it does identify the difficulties involved in bringing the covert business of modern policing into the open. This decision, and that of *Savage*,<sup>17</sup> has the potential to influence future policing policies, particularly as the paid informer relationship as a cost effective crime detection method is likely to become more frequent. More importantly, their lordships considered that it was possible to formulate a contractual arrangement between a paid informant and the police. However, it may be unrealistic to utilise the law of contract in the sensitive business of intelligence-led policing methods. Therefore, in an attempt to provide a more certain environment of co-operation between informant and police, it is suggested this is an area that might benefit from Parliament’s legislative intervention.

JONATHAN AUSTIN-JONES\*

<sup>14</sup> *Op. cit.* at 1792: “... being able to establish all that ...” Waller L.J. considered the court must assume the claimant will establish what he has pleaded, that is the police made a binding contract to pay for information that was intended to be enforceable in court.

<sup>15</sup> [1997] 1 W.L.R. 1061 at 1068.

<sup>16</sup> This was an application to strike out the claimant’s action, and it was necessary to proceed on the basis that the parties could establish what they had pleaded.

<sup>17</sup> *Op. cit.*

\*Barrister, L.L.B., L.L.M.

# PROTECTING SPORTING EVENTS FOR FREE-TO-AIR BROADCAST

*R. v. Independent Television Commission, ex parte TVDanmark Ltd.*

[2001] 1 W.L.R. 1604 (H.L.) (Lords Slynn of Hadley, Nolan, Hoffmann, Hutton, Hobhouse of Woodborough)

## INTRODUCTION

The last decade has seen an increase in subscription based “pay-TV” services. As a result, concerns have grown that important sporting and other cultural events have been, or may be, lost to the general public. Increasingly public service free-to-air broadcasters find themselves outbid in their attempts to screen such events, as rights to the exclusive broadcast of events are acquired by these subscription-based services. Members of the viewing public, unable or unwilling to pay the costs associated with satellite and other forms of pay television, can find themselves unable to obtain access to events that may be of national or international significance. Concerns have been raised that “foreign” broadcasters might obtain and exercise exclusive rights to deny access to a substantial proportion of the domestic population. The recent dispute between the German company, Kirch and the BBC and ITV is an example. Kirch bought the rights to the 2002 and 2006 football World Cup finals and until recently was in dispute with BBC and ITV over their purchase of the UK broadcast rights.<sup>1</sup> These concerns should now have been allayed, as a result of the House of Lords’ decision in *TVDanmark*. The result of the case has been to reassert the strong protection of these events both at a domestic and European level.

## THE LEGISLATIVE BACKGROUND

UK legislation protects the ability of the public to access such important sporting events.<sup>2</sup> The Broadcasting Act 1996, section 97, provides for the listing of “sporting or other events of national interest”. This restricts the exclusive acquisition and exploitation of rights by broadcasters, particularly those reaching less than 95 per cent of the population. These restrictions are managed by the Independent Television Commission (the ITC) which is required by the Broadcasting Act 1996 to maintain a Code of practice giving guidance on the regulation of listed events.<sup>3</sup> The protected events include: the Olympic Games; FIFA World Cup Finals; FA Cup Final; Scottish FA Cup Final; the Grand National; the Derby; Wimbledon Finals and non-Finals play; European Football Finals; Rugby League Challenge Cup Final; Rugby Union World Cup Final; Home Test Matches; the Cricket World Cup Final; Six Nations Rugby Championship; the Commonwealth Games; World Athletics Championships; Ryder Cup; and Open Golf.

The implementation of this scheme at a domestic level has parallels at an international level across Europe and is supported by a number of international measures. The Council of Europe Convention on Transfrontier Television 1989 underlines the basic principle that televised coverage of events of high public interest

<sup>1</sup> “Inside Sport: BBC and ITV closer to securing World Cup Rights” *The Telegraph*, 12 October 2001.

<sup>2</sup> First found in the Television Act 1954.

<sup>3</sup> *ITC Code on Sports and other Listed Events* (Revised January 2000), available from [www.itc.org.uk](http://www.itc.org.uk).

should have the widest availability and that signatory states should take steps to ensure that actors within their jurisdiction do not infringe upon those rights in other countries. Article Nine of the Convention compels signatory states to:

Avoid the right of the public to information being undermined due to the exercise by a broadcaster of exclusive rights for the transmission of an event of high public interest and which has the effect of depriving a large part of the public in one or more other parties of the opportunity to follow that event on television.

Similar provision has been made at European Community level. On 22 May 1996 the European Parliament passed a general resolution on the broadcasting of sporting events, emphasising the need for viewers to have access to major sporting events and expressing the view that such events should, as much as possible, be available on free-to-air television, for the population as a whole.<sup>4</sup> The European Parliament was able to realise this objective when it proposed amendments to the “Television Without Frontiers” Directive.<sup>5</sup> These amendments, initially rejected by the Council of Ministers of the EC, were approved in an amending Directive<sup>6</sup> creating a coherent framework of control.

Article 2 of the Directive commits each Member State to control the activities of the broadcasters based within their jurisdictions and prevents them from imposing restrictions upon broadcasters based in other Member States. Article 3a(3) stipulates that Member States shall ensure that broadcasters under their jurisdiction do not exercise the exclusive rights “in such a way that a substantial proportion of the public in another Member State is deprived of the possibility of following events, which are designated by that other Member State”, on free-to-air television. The UK took steps to meet its obligations under the Directive through amendments to the Broadcasting Act 1996, by the Television Broadcasting Regulations 2000.<sup>7</sup> The regulations insert new sections 101A and 101B into the Act requiring the ITC to give its consent before a broadcaster can exercise rights in an event that has been designated by another European Economic Area (EEA)<sup>8</sup> State:

Restriction on televising of an event designated by other EEA State.

101 B – (1) A television programme provider shall not, without the previous consent of the Commission, exercise rights to televise the whole or part of an event which is a designated event, in relation to an EEA State other than the UK, for reception in that EEA State or any area of that EEA State, where a substantial proportion of the public in that EEA State is deprived of the possibility of following that event by live or deferred coverage on free television as determined by that State in accordance with Article 3a(1) of Council Directive 89/552/EEC.

## THE CASE

TVDanmark is a broadcaster established in the UK that acquired the exclusive rights to televise five away matches of the Danish national football team in the 2002 World Cup. The rights were obtained from UFA Sports GmbH (UFA), a German television rights distributor. The Danish public service broadcasters, DR and TV2, who reached

<sup>4</sup> O.J. C166, 10/6/96 p. 109.

<sup>5</sup> Directive 89/552/EEC.

<sup>6</sup> Directive 97/36/EC.

<sup>7</sup> S.I. 2000/54.

<sup>8</sup> The EEA includes the Members States of the EU plus Norway, Iceland and Liechtenstein.

a much higher percentage of the population than TVDanmark, had also sought to buy the television rights. Their joint offer had been only sixty per cent of the value of TVDanmark's. As TVDanmark is UK based the Broadcasting Act 1996 section 101B(1) required the Independent Television Commission to grant its consent before the exercise of the rights. In making this determination the ITC was compelled to consider its Code, set out under section 104. Consent could be given if other broadcasters had a fair opportunity to bid for the rights on their own and if the successful bidder did not pay an unfair or unreasonable price. Although satisfied that those conditions had been met, the ITC refused to give consent. It took the view that it must take into consideration European legislation and that Denmark had designated the away matches under Article 3a(3) of the "Television Without Frontiers" Directive. The Danish Ministerial Order establishing the listing system provided that a substantial proportion of the public would be deprived, if the coverage was less than ninety per cent. If this were the case, the non-qualifying broadcaster should make arrangements to share the rights with other broadcasters to fulfil the ninety per cent coverage requirement. Only if the broadcaster was unable to find a second broadcaster "prepared to enter into an agreement on reasonable market terms" could it exercise the rights on an exclusive basis. TVDanmark had not approached DR and TV2 about the sharing of the rights to the football matches. When the ITC asked whether TVDanmark would be prepared to offer these other broadcasters a share of the rights, it replied that it would not. The ITC therefore took the view that the UK's obligations under Article 3a(3) of the "Television Without Frontiers" Directive would prevent it from giving consent to the broadcast of the matches. As a result of domestic Danish provisions the ITC was compelled to ensure that TVDanmark did not exercise rights where coverage was less than ninety per cent of the population. In such circumstances the rights could be exercised *only* where TVDanmark had given a reasonable opportunity to other broadcasters to share the rights, in order to cross the coverage threshold. TVDanmark applied for judicial review of the ITC's decision not to give its consent. The primary reason was the ITC's own Code stipulating that the ITC would have to be satisfied *only* that broadcasters had "a genuine opportunity to acquire the rights on fair and reasonable terms".<sup>9</sup> Thus the ITC was not entitled to take the Danish provisions into account. Secondly, TVDanmark argued that it had a legitimate expectation, based on paragraph 13 of the ITC Code,<sup>10</sup> that it would receive consent for the exercise of the rights where they were acquired on fair and reasonable terms.

At first instance the application was dismissed. TVDanmark appealed, contending that the 1996 Act, together with the Code, constituted a proper and sufficient implementation of the UK's obligations under the Directive.

The Court of Appeal allowed TVDanmark's appeal for these reasons: the provision of maximum coverage for an event was not an objective to be achieved at any cost; Article 3a(3) should be considered alongside the broader aims of the Directive: the need to sustain competition and prevent public service broadcasters becoming over-dominant; and the need to have regard to ordinary commercial realities such as the binding nature of a contract. The court judged that there was no need for the ITC to consider the Danish provisions. The law implemented by the Broadcasting Act 1996, sections 101B and 104, in conjunction with the ITC Code was sufficient to meet the

<sup>9</sup> Paragraph 13.

<sup>10</sup> "In deciding whether to give its consent it may be sufficient for the ITC to establish that the availability of the rights was generally known and no broadcaster providing a service in the other category had expressed an interest in their acquisition to the rights holder, or had not bid for the rights. However, the ITC will wish to be satisfied that broadcasters have had a genuine opportunity to acquire rights on fair and reasonable terms . . .".

UK's obligations under the Directive. Therefore the ITC was wrong to take account of anything other than the fairness of the bidding process and the reasonableness of the price paid.

The House of Lords allowed the ITC's appeal. The leading judgment was given by Lord Nolan who, decided that if the Court of Appeal were correct, and the role of the ITC was merely to ensure that rights were acquired in a fair and free bidding process, this would render the legislation governing such events useless. His Lordship disagreed with the view taken by the Court of Appeal that the ITC should not take Danish law into account in making its decision:

The system of reciprocal enforcement created by Art 3a requires that regulation should as far as possible be harmonised, so that the rights of the public to watch an event of national importance in a member state should not be affected by whether the broadcaster is in that or another member state . . . Any broadcaster in any member state who is considering the purchase of exclusive rights to broadcast in Denmark must, as it seems to me, take into account the Danish system of regulation. That system of regulation will influence the market for such rights in Denmark and prima facie it seems to me right that broadcasters in other member state should have to play by the same rules. That was in my opinion the object which Art 3a(3) was intended to achieve.<sup>11</sup>

## ANALYSIS

From the UK perspective, the *TVDanmark* case has three primary strands of significance. The first and third strands of which relate to the success of the "Television Without Frontiers" Directive, and the second to Part IV of the Broadcasting Act 1996, in protecting coverage of events of national significance.

First, *TVDanmark* demonstrates the usefulness of the Directive in shielding domestically protected cultural and sporting events from unreasonable exploitation by external actors. In this case the Directive, as implemented in domestic law, offered effective protection within the UK to the public in a second country – Denmark – through the obligation placed on the ITC by section 101B of the Broadcasting Act 1996.

Secondly, the case also gives some indication of the effectiveness of the domestic protections under the Broadcasting Act 1996. The Act remains largely untested in terms of its internal domestic protections. This judgment provides confidence that it will be effective in maintaining broad public access to events listed by the Minister for Culture, Media and Sport. The unwillingness of the House of Lords to allow the spirit of Article 3 of the "Television Without Frontiers" Directive to be encroached upon by a UK based broadcaster in relation to Denmark's legislative protections, suggests that it would be equally likely to outlaw any attempt to ride roughshod over the UK's more demanding listing provisions.

Thirdly, the case is significant in the protection that it gives to the UK list from exploitation by those broadcasters operating outside of the UK. The dispute between Kirch Gruppe and the BBC and ITV, vividly illustrates this. Kirch, a German media group, bought the global television rights from FIFA, football's world governing body for SFr1.3bn (£549 m). Kirch had demanded £170 m for the rights to the 2002 finals. The BBC and ITV combined first offer was £50 m. This led to fears that the rights to the World Cup finals (other than those protected by FIFA) would be sold to a subscription-based service restricting the UK public's access to television broadcasts of

<sup>11</sup> At 1615–1616, paragraph 44, *per* Nolan L.J.

the games.<sup>12</sup> Indeed some commentators feared that, rather than accept a figure significantly less than its asking price, Kirch might simply refuse to sell the rights for the UK.<sup>13</sup> All 64 games of the World Cup finals are listed under Part IV of the Broadcasting Act 1996. In contrast, FIFA regulations require free-to-air screening for games featuring national team matches, the opening fixture, semi-finals and final. Kirch claimed that it had bought the rights before the decision to list the events under the Broadcasting Act 1996. The UK government maintained that the World Cup had been a listed event since 1985 and that it was irrelevant that the protection was now contained in the 1996 Act. The threatened legal action has now been avoided. The BBC and ITV have concluded a deal for the rights to both the 2002 and 2006 finals for an estimated £160 m<sup>14</sup> – £10 m less than Kirch had initially demanded for the rights to the 2002 finals alone. The *TVDanmark* judgment may well have been significant in securing what appears to be an extremely good deal for the UK's public service broadcasters.<sup>15</sup> Not only does it indicate that any UK based broadcaster would be likely to fall foul of the listing requirements, but it also suggests that Germany would be similarly obliged to ensure that its law did not allow Kirch to operate in such a way as to circumvent the UK's domestic provisions. Indeed, following the Court of Appeal judgment in *TVDanmark* the Secretary of State for Culture, Media and Sport was granted leave to intervene in the case. The concern that the Court of Appeal's judgment had left the UK exposed to action in the Court of Justice of the European Communities (the ECJ) by either the European Commission or Denmark was the primary reason.

## CONCLUSIONS

The *TVDanmark* case and the related events demonstrate the precarious balance between owners of sports-rights obtaining market value and the public's access to broadcasts of events of national significance. In *TVDanmark* the House of Lords appear to have struck a blow for the public, not only in relation to the activities of domestic broadcasters but also regarding the activities of broadcasters outside of the UK, but within the EEA, who affect UK viewers. The judgment may already have had a significant impact upon the acquisition by the BBC and ITV of the 2002 and 2006 World Cup television rights. At least in the short term, the House of Lords appears to have guaranteed the continued availability of the listed "Crown Jewels" events on free-to-air broadcasts in the UK. The qualification that free-to-air broadcasters acquire the rights on "fair and reasonable" terms acknowledges the need for rights-holders to achieve a fair price for the coverage of their events. Nevertheless, it seems clear that the BBC and ITV will continue to see coverage of these events as a key objective and so they will continue to be available to the public at large. And the ITC has indicated that it is likely to make significant alterations to the challenged parts of the Code. The consultation process has begun . . .

SIMON BOYES\*

<sup>12</sup> "World cup soccer games could go to pay TV" *The Guardian*, 12 February 2001.

<sup>13</sup> "BBC and ITV sign World Cup TV deal" *The Independent*, 19 October 2001.

<sup>14</sup> "BBC and ITV win battle for World Cup rights" *The Times*, 19 October 2001.

<sup>15</sup> *Ibid*. The cost of the UK rights to the two tournaments equates to a cost of £1.25 m per game, less than a quarter of the price BSkyB pays for each Premiership game under the current broadcasting deal.

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# ARE MPs BOUND TO FOLLOW THEIR CONSTITUENTS' VIEWS?

*Cook v. Gralike*

(2001) 149 L. Ed. 2d 44 (U.S. Supreme Court) (Stevens, Scalia, Kennedy, Ginsburg, Breyer, Souter, Thomas, O'Connor JJ. and Rehnquist Ch.J.)

## INTRODUCTION

This decision of the U.S. Supreme Court raised the question as to whether the members of a legislative body are bound by the views of their constituents or by their own judgment. In his classic speech to the electors of Bristol, Edmund Burke answered the question for the British Constitution in the following terms:

To deliver an opinion is the right of all men; that of constituents is a weighty and respectable opinion, which a representative ought always to rejoice to hear, and which he ought always most seriously to consider. But authoritative instructions, mandates issued, which the member is bound blindly and implicitly to obey, to vote, and to argue for, though contrary to the clearest conviction of his judgment and conscience, these are things utterly unknown to the laws of this land, which arise from a fundamental mistake of the whole order and tenor of our constitution.<sup>1</sup>

In *U.S. Term Limits Inc. v. Thornton*<sup>2</sup> the US Supreme Court held that an Arkansas law prohibiting otherwise eligible congressional candidates from appearing on the general election ballot if they had already served two Senate terms or three House of Representative terms was an impermissible attempt to add qualifications to congressional office rather than a permissible exercise of the State's Election Clause power to regulate the "Times, Places and Manner of holding elections for Senators and Representatives".<sup>3</sup> In response, Missouri voters adopted an amendment to Article VIII of their State Constitution designed to bring about a specified "Congressional Term Limits Amendment" to the Federal Constitution. Amongst other things, Article VIII instructed Missouri Congress Members to use all their powers to pass the federal amendment. It also prescribed that "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" be printed on ballots by the names of the Members failing to take certain legislative acts in support of the proposed amendment. Similarly it provided that "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" be printed by the names of the non-incumbent candidates refusing to take a "Term Limit" pledge to perform those acts if elected; and directed the Missouri Secretary of State to determine and declare whether either statement should be printed by candidates' names. Gralike, a nominated candidate for the House of Representatives, sued to enjoin the Missouri Secretary of State from implementing Article VIII on the ground that it violated the Federal Constitution. The action succeeded before the lower federal courts. The Missouri Secretary of State petitioned the US Supreme Court for certiorari to quash the decision. The Supreme Court held that Article VIII was unconstitutional.

## REASONS FOR THE RULING

First, the petitioner for certiorari had argued that Article VIII was a valid exercise of the Tenth Amendment to the Federal Constitution. This states: "The powers not

<sup>1</sup> J. Burke (ed.), *The Speeches of the Rt. Hon. Edmund Burke* (James Duffy, 1867) at p. 130.

<sup>2</sup> (1995) 514 US 779.

<sup>3</sup> US Const. Art. 1, section 4, clause 1.

delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people". However, the Supreme Court took the view that such an argument would have to overcome three hurdles in order to prevail. First, the historical precedents on which the petitioner relied for the proposition that the States have such a reserved power (*i.e.* those concerning the part instructions played in the Second Continental Congress, the early Congress, the selection of the United States Senators before the passage of the Seventeenth Amendment and the ratification of certain federal constitutional amendments) were distinguishable because unlike Article VIII, none of the examples cited by the petitioner was coupled with an express legal sanction for disobedience. Secondly, countervailing historical evidence is provided by the fact that the First Congress rejected a proposal to insert a right of the people "to instruct their representatives" into what would become the First Amendment to the Federal Constitution. However, Kennedy J. said: "The fact that the Members of the First Congress decided not to codify a right to instruct legislative representatives does not, in my view, prove that they intended to prohibit non binding petitions or memorials by the State as an entity".<sup>4</sup> The position with regard to non-binding petitions to legislative bodies is addressed below. Thirdly, and of decisive significance, the means employed to issue the instructions, ballots for congressional elections, are unacceptable unless Article VIII is a permissible exercise of the State's power to regulate the manner of holding elections for Senators and Representatives.

The Court explained the significance of the Tenth Amendment stating that powers neither delegated to the federation, nor prohibited to the States are reserved to the States and to the people as follows. The Constitution draws a distinction between the powers of the newly created Federal Government and the powers retained by the pre-existing States.<sup>5</sup> These powers proceed not from the people of America but from the people of the States and remain as before after the adoption of the Constitution, except so far as they may be abridged by that instrument. On the other hand, "the States can exercise no powers whatsoever which exclusively spring out of the existence of the National Government which the Constitution does not delegate to them" or to put it precisely, "no State can say, that it has reserved, what it never possessed".<sup>6</sup>

The Supreme Court took the view that binding instructions would undermine an essential attribute of Congress *i.e.* the deliberative nature of that "National Assembly". Stevens J., delivering the opinion of the Court, said:

When the people have chosen a representative, it is his duty to meet others from the different parts of the Union, and consult, and agree with them to such acts as are for the general benefit of the whole community. If they are to be guided by instructions there would be no use in deliberation; all that a man would have to do, would be to produce his instructions, and lay them on the table, and let them speak for him.<sup>7</sup>

A second argument in support of the constitutional validity of Article VIII was that it was a permissible regulation of the "manner" of electing federal legislators under the Election Clause of the Federal Constitution. It was argued that Article VIII merely regulated the manner in which elections are held by disclosing information about congressional candidates. Through the Election Clause the Federal Constitution

<sup>4</sup> *Cook v. Gralike* (2001) 149 L. Ed. 2d 44, at 60.

<sup>5</sup> Citing the previous decision of the Supreme Court in *U.S. Term Limits Inc.*, *ibid.*, at 801.

<sup>6</sup> Quoting from Justice Story's Commentaries on the Constitution of the United States, (Boston: Little, Brown, 3rd ed. 1858) at s. 627.

<sup>7</sup> *Op. cit.* n. 4 at 55, quoting Rep. Sherman from the proceedings of the First Congress: 1 Annals of Cong. 735 (Washington: Gales and Seaton, 1834-1856).

delegates to the States the power to regulate the “Times, Places and Manner of holding Elections for Senators and Representatives” subject to a grant of authority to Congress to “make or alter such Regulations”.<sup>8</sup> The question of constitutional distribution of powers between the federal authorities and the States over the election of the President of the United States arose recently in *Bush v. Gore*.<sup>9</sup> As far as congressional elections are concerned the Election Clause did not support the constitutional validity of Article VIII. In this case the Supreme Court followed its earlier opinion in *U.S. Term Limits* which stated that: “Framers [of the Constitution] understood the Election Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favour or disfavour a class of candidates, or, to evade important constitutional restrictions”.<sup>10</sup> In the opinion of the Court, Article VIII was not a procedural regulation. It did not regulate the time of elections, nor place of elections, or the manner of elections. It bore no relation to the “manner” of elections. The term “manner” encompasses matters like notices, registration, supervision of voting and other requirements as to procedure.

Finally, Rehnquist C.J. and O’Connor J. expressed the view that Article VIII also violated the First Amendment to the Federal Constitution (providing for freedom of speech *etc.*) in that, once lawfully on the ballot, a political candidate has a right to have his name appear unaccompanied by pejorative language required by the State. In their view that Article was not only not content-neutral but it actually discriminated on the basis of viewpoint, because only those candidates who failed to conform to the state’s position received derogatory labels.

## COMMENTARY

The first comment is that this decision was dictated by the need to preserve the delicate balance of powers between the federal government and the constituent States of the Federation. Thus Kennedy J. stated that the dispositive principle in this case is fundamental to the Constitution, to the idea of federalism and to the theory of representative government. The principle is that Senators and Representatives in the Federal Government are responsible to the people who elect them, not to the States in which they reside. The idea of federalism is that a National Legislature enacts laws which bind the people as individuals, not as citizens of a State; and it follows, freedom is most secure if the people themselves, not the States as intermediaries, hold their federal legislators to account for the conduct of their office. The Supreme Court expressed the same view as in *U.S. Term Limits* by saying that “nothing in the Constitution or the Federalist Papers . . . supports the idea of State interference with most basic relation between the National Government and its citizens, the selection of legislative representatives”.<sup>11</sup>

Secondly, *Cook v. Gralike* does not rule that the States cannot request or exhort Congress by passing a resolution or otherwise to pay heed to certain State concerns. Under the First Amendment to the US Constitution the individuals have such a right. The German Constitution permits the constituent units (*Länder*) of the federation to exert more direct pressure on the upper House of the federal legislature (*Bundesrat*). The judgment of Kennedy J. is explicit on this point.

<sup>8</sup> U.S. Const. Art. 1, s. 4, cl. 1.

<sup>9</sup> (2000) 148 L.Ed. 2d 388 (SC).

<sup>10</sup> *Op. cit.* n. 2 at 833–834.

<sup>11</sup> *Op. cit.* n. 2, at 842.

Thirdly, it is not entirely clear whether a verdict of the citizens of the federation as a whole (as opposed to that of the specific States) expressed in a recognised form such as a referendum would or would not be binding on Congress. There are passages in *Cook v. Gralike* (such as those quoted above) suggesting to the contrary but the Supreme Court's judgment in its entirety does not rule it out. In Britain public petitions are a recognised method of moral pressure (falling short of binding instructions) that can be exerted on Parliament.<sup>12</sup>

This decision of the American Supreme Court has raised issues that are somewhat dormant in Britain at the present time. However, with the devolution bandwagon rolling they could become live issues here as well.

ABUL FAZAL\*

<sup>12</sup> It is one of the liberties of the citizen as old as Parliament itself to petition Parliament to remedy some grievance: *Chaffers v. Goldsmid* (1894) 1 Q.B. 186.

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## ANYTHING GOES

*R v. Smith (Morgan)*

[2000] 3 W.L.R. 654 (H.L.) (Lords Slynn of Hadley, Hoffman, Clyde, Hobhouse of Woodborough, Millett)

### INTRODUCTION

The House of Lords has got itself into another fine mess. Coming hard on the heels of its emasculation of the *actus reus* of theft in *Hinks*,<sup>1</sup> the decision in *Smith (Morgan)*<sup>2</sup> continues the House's indifferent record in criminal cases. Misinterpretation of previous case law, whether deliberate or otherwise, is not unusual but the majority's cavalier despatch of statutory provision takes the breath away. Perhaps the new powers under the Human Rights Act 1998 have irrevocably changed judicial attitudes and forever banished Lord Denning's "timorous souls" from the Bench. Perhaps their Lordships succumbed to the political pressures of our pluralist society so well orchestrated by the feminist lobby. Whatever the reasons, the result is aptly summarised by Professor Sir John Smith's verdict on the decision: "What a muddle!"<sup>3</sup>

The facts of the case were simple. Both the accused and the victim, who were long-standing friends, were alcoholics. In the course of a drinking session, an argument developed about the victim's alleged theft and sale, for drink, of the defendant's carpentry tools some months previously. The accused claimed that the victim's continual 'lying' in denying the theft caused him to become angrier and angrier and eventually provoked him to lose his self-control. As a result, the defendant stabbed the victim five times with a kitchen knife causing his death. At his trial, the defendant adduced evidence that, at the time of the incident, he was suffering from severe depressive illness which reduced his powers of self-control below their normal level. Nonetheless, the jury rejected alternative pleas of diminished responsibility and provocation and convicted him of murder. The accused appealed, *inter alia*, on the ground of provocation, claiming that the trial judge had misdirected on the relevance to that defence of the severe depression.

The judge had ruled, in accordance with *Luc Thiet Thuan v. R.*,<sup>4</sup> that, when applying the objective limb of the test for the provocation defence, the depression could be relevant in assessing the gravity of the provocation<sup>5</sup> but was irrelevant in deciding the level of self-control to be ascribed to "the reasonable man". Any reduction in the accused's normal powers of self-control caused by his depressive illness was "neither here nor there" because the reasonable man always had normal or average powers of self-control.

The Court of Appeal<sup>6</sup> quashed the conviction on the basis that the defendant's depression could be relevant to judge not only the gravity of the provocation but also the standard of self-control to be expected. The Court certified the following question

<sup>1</sup> [2000] 4 All E.R. 833.

<sup>2</sup> [2000] 3 W.L.R. 654.

<sup>3</sup> [2000] Crim. L.R. 1004.

<sup>4</sup> [1997] A.C. 131 P.C.

<sup>5</sup> In fact, there was no evidence in this particular case that the depression had increased the seriousness of the provocation – see Lord Hobhouse at 690C.

<sup>6</sup> [1999] Q.B. 1079.

which formed the basis of the appeal to the House of Lords: “Are characteristics other than age and sex, attributable to a reasonable man, for the purpose of section 3 of the Homicide Act 1957 relevant not only to the gravity of the provocation to him but also to the standard of control to be expected?”<sup>7</sup> By a three to two majority,<sup>8</sup> the House gave an affirmative answer to the question thus agreeing with the Court of Appeal. The leading judgment was given by Lord Hoffman but the powerful dissent by Lord Hobhouse is far more convincing.

The issue had been a festering sore in recent years with the Court of Appeal in a string of cases<sup>9</sup> adopting the view that ultimately commended itself to the House of Lords in *Smith*. This was in direct opposition to the Privy Council’s opinion in *Luc Thiet Thuan v. R.*<sup>10</sup> Though the two previous House of Lords’ decisions on the issue, *Camplin*<sup>11</sup> and *Morhall*,<sup>12</sup> seemed firmly in support of the Privy Council’s reasoning, the Court of Appeal was determined to stick to its guns necessitating a resolution of the conflict by the House of Lords.

### THE EFFECT OF SECTION 3 ON THE COMMON LAW

Section 3 of the Homicide Act 1957 reads:

Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man.

This clearly preserves the necessity for the defendant to have *actually* lost his self-control as a result of something said or done – a purely factual question where mental or other abnormalities of the accused altering his capacity for self-control would be highly relevant. Equally clearly it preserves the objective standard of self-control based on how a “reasonable man” might react to the provocation – a largely evaluative question measuring the defendant’s conduct against a normative standard set by the law.

Section 3 explicitly changed the common law defence in two ways – it allowed words of abuse to potentially count as provocative conduct<sup>13</sup> and it made the jury the sole arbiters of the *objective* question: might a reasonable man have done what the accused did in the circumstances. The House of Lords in the leading case of *Camplin*<sup>14</sup> recognised that words of abuse would often be directed at some particular attribute of the accused and the provocativeness of the words could only be appreciated in the context of that attribute. Taunts of impotence are likely to be much more provocative to a man who is impotent than to a man who knows he is not. In order to give practical content to the inclusion of words alone as a possible foundation for the

<sup>7</sup> The punctuation as it appears in the Law Reports certainly leaves something to be desired.

<sup>8</sup> Lords Slynn, Hoffman and Clyde formed the majority. Lords Hobhouse and Millett dissented.

<sup>9</sup> *Ahluwalia* [1992] 4 All E.R. 889; *Dryden* [1995] 4 All E.R. 987; *Humphreys* [1995] 4 All E.R. 1008; *Thornton (No.2)* [1996] 2 All E.R. 1023; *Parker* [1997] Crim. L.R. 760; *Campbell* [1997] 1 Cr. App. R. 199. The first four cases do not clearly and unambiguously support the view (*cp.* Lord Hoffman’s interpretation at 675D, Lord Hobhouse’s at 705A and the dissenting Lord Steyn’s in *Luc Thiet Thuan v. R.*) but the last two unequivocally do.

<sup>10</sup> [1997] A.C. 654.

<sup>11</sup> [1978] A.C. 705.

<sup>12</sup> [1996] A.C. 90.

<sup>13</sup> Overturning *Holmes v. D.P.P.* [1946] A.C. 588.

<sup>14</sup> [1978] A.C. 705.

defence, the House decided that any attributes (or special circumstances or history) of the defendant which increased the seriousness of the provocative conduct must be taken into account. Whilst it is true that there were certain ambiguities in Lord Diplock's speech<sup>15</sup> which were eagerly seized on by the majority in *Smith*, the same cannot be said of the unanimous House of Lords' judgment in *Morhall*.<sup>16</sup> That decision clearly and unambiguously emphasised that matters special to the accused which affected the gravity of the provocation must be attributed to the reasonable man but not matters which simply affected his general level of self-control *i.e.* his susceptibility to provocation in general. The reasonable man must always be given "the ordinary person's powers of self-control."<sup>17</sup>

### THE DECISION IN *SMITH*

The majority in *Smith* rejected this distinction and held that the jury should take into account any attribute, history or circumstances of the accused in judging not only the gravity of the provocation but also the level of self-control it was reasonable to expect of him in the situation.<sup>18</sup> Because section 3 had left the objective question entirely to the jury, "it would not be consistent with section 3 for the judge to tell the jury as a matter of law that they should ignore any factor or characteristic of the accused in deciding whether the objective element of provocation had been satisfied."<sup>19</sup> That would embrace factors excluded because they did not affect the gravity of the provocation. According to Lord Clyde:<sup>20</sup>

... the standard of reasonableness in this context should refer to a person exercising the ordinary power of self-control over his passion which someone in his position is able to exercise and is expected by society to exercise. By position I mean to include all the characteristics which the particular individual possesses and which may in the circumstances bear on his power of control other than those which have been self-induced.

Furthermore "the question of whether such behaviour fell below the standard which should reasonably have been expected of the accused was entirely a matter for them [the jury]."<sup>21</sup> Thus the law lays down no *fixed* standard of self-control to measure the accused against – it apparently varies with the defendant's ability to exercise control – and leaves it entirely to the jury's discretion to set their own standard in each individual case. Does this eliminate the objective yardstick and, in addition, abdicate all responsibility to the jury? Lord Hoffman was adamant that the principle of objectivity should be "expounded in clear language . . . The general principle is that the same standards of behaviour are expected of everyone, regardless of their individual make-up." However:

the jury should in an appropriate case be told, in whatever language will best convey the distinction, that this is a principle and not a rigid rule. It may sometimes have to yield to a more important principle, which is to do justice in the particular case. So the jury may

<sup>15</sup> Discussed later in this note.

<sup>16</sup> [1996] A.C. 90.

<sup>17</sup> *Ibid.* Lord Goff.

<sup>18</sup> Lord Slynn's judgment engenders suspicion that his eye was not entirely on the ball. At times it is not clear whether he is adverting to the gravity of provocation/self-control distinction or the subjective limb/objective limb distinction. His review of authority to support his decision often proceeds as though the gravity/self-control distinction was not an issue!

<sup>19</sup> Lord Hoffman in *Smith* at 668C.

<sup>20</sup> At 684 G.

<sup>21</sup> Lord Hoffman at 676H.

think that there was some characteristic of the accused, whether temporary or permanent, which affected the degree of control which society could reasonably have expected of *him* and which it would be unjust not to take into account. If the jury take this view, they are at liberty to give effect to it.<sup>22</sup>

It will be recalled that, earlier in his judgment, Lord Hoffman had indicated that section 3 forbade judges “to exclude from consideration any of the circumstances or characteristics of the accused”.<sup>23</sup> Rather inconsistently, he asserts:

The law expects people to exercise control over their emotions. A tendency to violent rages or childish tantrums is a defect in character rather than an excuse. . . In deciding what should count as a sufficient excuse, they [the jury] have to apply what they consider to be appropriate standards of behaviour; on the one hand making allowance for human nature and the power of the emotions but, on the other hand, not allowing someone to rely upon his own violent disposition. In applying these standards of behaviour, the jury represent the community and decide, as Lord Diplock said in *Camplin* [1978] A.C. 705, 717, what degree of self-control “everyone is entitled to expect that his fellow citizens will exercise in society as it is today”.<sup>24</sup>

In similar vein, characteristics such as “obsession and jealousy” should be ignored.<sup>25</sup> And Lord Clyde adds “influences which have been self-induced.”<sup>26</sup>

The question which the majority failed to answer is how section 3 excludes innate traits such as exceptional pugnacity or excitability but not exceptional pugnacity caused by some identifiable condition such as, say, depression or a severely irritating skin condition. And, if it is entirely a matter for the jury as asserted, how can the trial judge direct them that exceptional irascibility is not in itself an excuse? No criteria are laid down for distinguishing which attributes are legally relevant apart from the vague and practically useless appeal to those which justice requires to be taken into account. The end result is that the jury can please themselves.

In Lord Hoffman’s words, the ultimate question is whether the jury thought “the behaviour of the accused had measured up to the standard of self-control which ought reasonably to have been expected of him”.<sup>27</sup> The remarkable thing about this formulation is that the “reasonable man”, a concept expressly preserved by section 3, does not feature in it and, indeed, there is no longer any need for trial judges to explain the objective test in terms of the reasonable man.<sup>28</sup> Lord Hoffman saw the invocation of “the reasonable man equipped with an array of unreasonable ‘eligible characteristics’ ” as a major source of confusion for juries.<sup>29</sup>

To summarise the majority’s decision:<sup>30</sup> the jury must decide whether or not the accused exercised the degree of control that “society could reasonably expect of *him*”<sup>31</sup>

<sup>22</sup> At 678.

<sup>23</sup> See 671H and 668E.

<sup>24</sup> At 678E.

<sup>25</sup> See 674C to 674H.

<sup>26</sup> At 684 G. The obvious such “influence” would be voluntary intoxication but the notion is open-ended and capable of being stretched e.g. a depressive who deliberately ignores proper medical advice, which would have alleviated his condition.

<sup>27</sup> At 679E.

<sup>28</sup> Lord Hoffman at 678D and 679A and Lord Clyde at 685A.

<sup>29</sup> At 679B. This was a view shared by the dissenting Lords Hobhouse at 693E and Millett at 719B, though their proposed resolutions of the difficulty were quite different.

<sup>30</sup> Lords Hoffman and Clyde agreed with Lord Slynn’s judgment and each other’s. Lord Slynn agreed with “the *conclusion* of both my noble and learned friends, Lord Hoffman and Lord Clyde, that the appeal should be dismissed and because of their detailed analysis of the issues involved . . . I state my own reasons more briefly.” (At 657 G. Emphasis added). This ambiguity as to whether he is to be regarded as having agreed with all the reasoning of the others or simply those reasons he himself gave, might give succour to any future challenge to *Smith*.

<sup>31</sup> Lord Hoffman at 678H.

in the situation and, in assessing this, they have complete freedom to take into account or *not* to take into account any characteristics, history and circumstances of the accused whether relevant to the gravity of the provocation or to his general capacity for self-control or both. Whether they do so is up to them.

## CRITICISMS

### *Misinterpretation of the statute*

Section 3 requires that “the question whether the provocation was enough to make a reasonable man do as he [the accused] did shall be left to be determined by the jury.” The majority of the House of Lords read this as giving virtual *carte blanche* to the jury on the objective question especially as section 3 requires them “to take into account everything both done and said according to the effect which, in their [the jury’s] opinion, it would have on a reasonable man.” It is not for judges to pick and choose what factors are to be relevant and what to be ignored. That would trespass on the function which the legislature has handed to the jury. However, this overlooks the fact that section 3 does preserve a standard based on the effect of everything *done and said* on the reasonable man. What has been said or done has to be serious enough to cause a “reasonable person” *i.e.* an ordinary or average person to react in the same way. The statute does not say “everything” must be taken into account but only “everything done and said”. The retention of the “reasonable person” concept surely indicates the intention to preserve a fixed standard of self-control imposed by the law and defined in *Camplin* by reference to the ordinary person’s powers of self-control. There is nothing to suggest an intention to allow the jury to set its own objective yardstick varying according to the nature of the accused.<sup>32</sup> The likely intention of the framers of the legislation was simply to remove the trial judge’s ability to stop the jury *considering* the question by withdrawing it because *he or she* did not think there was any possibility of a reasonable person acting in that way. That does not imply that the law has abdicated its role in defining the standard of control that the jury has to apply.

Such limited legislative intention is further supported by the existence of the separate defence of diminished responsibility in section 2. The section puts the onus of proving the necessary abnormality of mind on the defendant and it is unlikely that it was intended that a defendant whose abnormality failed that test should be given a second bite at the cherry by claiming that his abnormality caused him to be provoked. Everything points to Ashworth’s view that “[T]he defence of provocation is for those who are in a broad sense mentally normal”.<sup>33</sup> Diminished responsibility is the excuse for internal dysfunctions that are the prime cause of the accused’s violence; provocation focuses on things done or said that are the prime cause of the violence.

The final surprise is that the House felt free to ignore the express reference in the statute to the standard of the “reasonable man” and to encourage judges to avoid reference to that concept. Whilst one can sympathise with the desire to avoid the confusions generated by the concept in the past, a statute is a statute and it is not for the judges to re-write it. In any event the minority demonstrate how it can be explained to a jury without too much difficulty.<sup>34</sup> Finally it is arguable that a jury would find it easier to understand a standard based on how the ordinary, reasonable person might react rather than one based on what society reasonably expects.

<sup>32</sup> Indeed the majority attempts to have its cake and eat it by on the one hand suggesting everything is up to the jury and on the other that the judge should tell the jury that certain characteristics such as jealousy and violent disposition should be excluded.

<sup>33</sup> See the discussion around n. 40 & 41 below.

<sup>34</sup> *E.g.* Lord Millett at 715E.

*Misinterpretation of previous House of Lords' decisions*

The majority's claim that their stance is supported by the previously leading case of *Camplin* rings hollow. The key passage in *Camplin* is Lord Diplock's instruction to trial judges on how they should direct the jury:

The judge should state what the question is, using the very terms of the section. He should then explain to them that the reasonable man referred to in the question is a person having the power of self-control to be expected of an ordinary person of the sex and age of the accused, but *in other respects* sharing such of the accused's characteristics as they think would affect the gravity of the provocation to him ...<sup>35</sup>

What could be clearer? The statutory wording must be followed. The reasonable person has to be given the ordinary person's self-control. The only slight departure from that fixed standard of self-control is that the ordinary person takes on the age and sex of the accused. Otherwise characteristics of the accused are relevant only in assessing the gravity of the provocation. The strength of the provocation has to be appreciated to judge its effect on the ordinary person.

The majority view is based on other, admittedly equivocal, passages in Lord Diplock's speech and on the fact that two factors, the age and sex of the accused, are specifically admitted to change the standard of self-control required. The contention is that Lord Diplock did not intend these factors to be exhaustive.<sup>36</sup> But the quoted passage does suggest exactly that. Sex and age were picked out as the only factors affecting the standard of self-control because they were simply aspects of normality or ordinariness.<sup>37</sup> Why else did Lord Diplock limit the relevance of other characteristics to those that affected the gravity of the provocation?

If the ambiguities and inconsistencies in *Camplin* gave some tenable argument in favour of the majority's view, the same cannot be said of the later House of Lords' decision in *Morhall*.<sup>38</sup> The only sensible interpretation of the unanimous opinion in that case<sup>39</sup> is that the standard of self-control required is unaffected by characteristics (other than age and sex) of the defendant. The accused's glue sniffing addiction was relevant only because it enhanced the gravity of the provocative conduct, which included taunts about that addiction. Amazingly none of the majority in *Smith* analysed the case and all three made only the briefest and peripheral of references to it, even though it appears to be in direct opposition to their view. One way round it might be to argue that, since the characteristic in issue did affect the gravity of the provocation, any pronouncements on characteristics merely going to self-control were technically *obiter dicta*.

*Policy*

The provocation excuse should be a concession to extraordinary external circumstances not to the extraordinary internal make-up of the accused.<sup>40</sup> The moral foundation for the extenuation is the necessity for very serious provocation. The more trivial the provocation, the more the defendant's reaction is attributable to his or her own personality and make-up and not to the provocative conduct. The more serious the provocative conduct, the more his or her retaliation is attributable to the provocation

<sup>35</sup> [1978] A.C. 705, 718. Emphasis added.

<sup>36</sup> Lord Slynn at 659H, Lord Hoffman at 670F and Lord Clyde at 686D.

<sup>37</sup> See the explanation by the High Court of Australia in *Stingel v. The Queen* (1990) 171 C.L.R. 312.

<sup>38</sup> [1996] A.C. 90.

<sup>39</sup> Which included Lord Slynn!

<sup>40</sup> Wechsler & Michael, "A Rationale of the Law of Homicide" (1937) 37 Columbia L.R. 1281; Ashworth, "The Doctrine of Provocation" [1976] C.L.J. 292, 312.

rather than his or her own deficiencies. That is why a distinction should be made between assessing the gravity of the provocation and assessing the standard of self-control required. If the reaction is essentially due to the internal character of the accused, his or her excusatory claim, if any, should sound in diminished responsibility. That is the proper defence for the abnormal. "The defence of provocation is for those who are in a broad sense mentally normal"<sup>41</sup> but who snap under the weight of very grave provocation.

The majority eschewed this obvious division in favour of a jury free-for-all where there are no obvious rules. The reasonable person has gone. The ordinary powers of self-control have gone. What is left of the objective standard? What remains of the yardstick by which the accused is supposed to be measured? The answer seems to be that each jury imposes their own standard which can vary up or down at their discretion. As Lord Hoffman opines:<sup>42</sup>

It is not acceptable to leave the jury without definitive guidance as to the objective criterion to be applied. The function of the criminal law is to identify and define the relevant legal criteria. It is not proper to leave the decision to the essentially subjective judgment of the individual jurors who happen to be deciding the case. Such an approach is apt to lead to idiosyncratic and inconsistent decisions.

It is true that the majority inconsistently tried to salvage something of the objective test by suggesting that certain traits are not relevant – exceptional excitability, tendency to violence, jealousy and possessiveness – but ultimately the standard is entirely a matter for the jury. In any event, has the innately violent person any more control over his rages than the person made temporarily pugnacious by depression? What criteria are to be used to distinguish those characteristics that are ruled out? The self-control/gravity distinction offers a much more secure and coherent division and the majority's concerns about whether juries could understand it are much over-played. Lord Millett effectively dispels such concerns.<sup>43</sup>

## CONCLUSION

It is submitted that the majority's decision flies in the face of the statute, misinterprets one opposing House of Lords' case, ignores another and abdicates to the jury the law's responsibility to set the requisite standard of self-control. Furthermore it is internally inconsistent and undermines the moral basis of the defence. Is it too cynical to see the decision as an attempt to insulate judges from future political controversy stirred by cases arising from prolonged violent abuse by deceased partners or difficult issues concerning racial characteristics? Let the jury take the flak.

RUSSELL HEATON\*

<sup>41</sup> Ashworth, *ibid.*

<sup>42</sup> At 710C.

<sup>43</sup> 715D to 717G.

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# MISTAKEN IDENTITY IN CONTRACT LAW: A RE-EXAMINATION

*Norman Hudson v. Shogun Finance Limited*

*The Times* 4th July 2001 (C.A.) (Brooke, Sedley, Dyson L.JJ.)

## INTRODUCTION

This case revisits an old problem – that of the fraudster who uses a false identity to acquire a car and then sells it on to an innocent third party. In these cases the court is asked to decide which innocent party, the initial vendor or ultimate purchaser, should suffer. In the present case the familiar problem of unilateral mistake as to identity was made more complex by the statutory context of the Hire Purchase Act 1964, as amended. A satisfactory solution to this legal issue is made all the more urgent by the fact that “false identity fraud” is one of the fastest growing crimes in Britain. This note considers whether, in *Norman Hudson v. Shogun Finance Limited*, the Court of Appeal has achieved a satisfactory solution.

## THE BACKGROUND

The case concerned a fraudster who approached a garage sales manager about the possibility of obtaining possession of a motor vehicle under a hire purchase contract. The garage habitually dealt with the respondent finance company. An application form, applying for hire purchase from the respondents, was completed and signed by the rogue at the garage. Within the application form, the rogue used an assumed name, Mr Patel, and assumed address. He supported his application by providing the sales manager with a driving licence which was made out in that name and address. Although genuine, this driving licence had been unlawfully obtained. In order to make the application for hire purchase finance, the sales manager faxed copies of the driving licence and the application form to the respondents. The respondent carried out a credit check against the licence holder and compared the signatures on the licence and application form. Having done so, they then notified the sales manager of their acceptance of the application and of their agreement to purchase the vehicle for £22,500. The sales manager notified the rogue that the application had been successful. He accepted a ten percent deposit from the rogue, paid partially in cash and partially by a cheque which was subsequently dishonoured, and allowed him to drive off with the vehicle. The rogue subsequently sold the vehicle to the appellant for £17,000. This sale occurred before the respondent had made any attempt to set aside the hire purchase contract or to recover possession of the vehicle. The appellant, a car breaker and operator of a courtesy car service, purchased the vehicle in good faith, unaware of the fraud that had previously been committed.

On 13th January 2000, at Leicester County Court, the respondent was successful in a claim against the appellant for £18,374.52 in damages for conversion of the vehicle. The appellant now appealed against that judgment.

## THE LEGAL ISSUES

The essential issue which the Court of Appeal had to address was whether the appellant could claim the benefit of the Hire Purchase Act 1964, section 27, as amended by the Consumer Credit Act 1974. Section 27 states:

(1) This section applies where a motor vehicle has been bailed under a hire purchase agreement and, before the property in the vehicle has become vested in the debtor, he disposes of the vehicle to another person.

(2) Where the disposition referred to in subsection (1) above is to a private purchaser, and he is a purchaser of a motor vehicle in good faith, without notice of the hire purchase agreement, that disposition shall have effect as if the creditor's title to the vehicle had been vested in the debtor immediately before that disposition.

It was not disputed that the applicant had indeed been a private purchaser who had purchased the car in good faith. The court, however, had to decide whether, under section 27(2), title to the vehicle had vested in the rogue immediately prior to the sale to the appellant. If that were the case then the appellant had acquired good title to the vehicle and could defeat the respondent's claim. The issue turned on whether the rogue was indeed "the debtor" as required by section 27(1).<sup>1</sup> Ultimately this depended upon whether a valid contract existed between the hire purchase company and the rogue. In addressing this issue, the appellant argued that the sales manager had acted as an agent of the respondent in initiating the transaction between the respondent and the rogue.<sup>2</sup> In its submission, this meant that the transaction had been completed face to face between the respondent and the rogue, with the sales manager representing the respondent. In making this submission the appellants accepted that the House of Lords had ruled in *Branwaite v. Worcester Works Finance Limited*<sup>3</sup> that no general relationship of agency existed between a car dealer and a finance company.<sup>4</sup> However, they pointed out that the House of Lords had also accepted, in that case, that such an agency relationship could arise upon an ad hoc basis in the course of a transaction. It was their submission that this is what had occurred in the present case. In particular they pointed to such a relationship existing through the role of the garage sales manager in receiving information from the customer and in passing that information on to the hire purchase company.

The significance of their argument was that it had previously been held, in cases such as *Phillips v. Brooks Limited*<sup>5</sup> and *Lewis v. Averay*,<sup>6</sup> that vendors in face to face contracts were generally to be presumed to have intended to contract with the customer who was physically present before them and not merely with the person that that customer was fraudulently representing themselves to be.<sup>7</sup> In this situation it has been said that the vendor's mistake is not as to the identity of the purchaser but as to his creditworthiness.<sup>8</sup> Equally the courts in the cases cited also affirmed that the presumption created could be rebutted, if clear evidence was adduced that the vendor intended to deal only with a particular person. In the present case the appellants argued that this presumption had not been rebutted and that the respondents, acting through

<sup>1</sup> The Hire Purchase Act 1964, s. 29(4) provides that "the debtor" in hire purchase contracts means: "the person who at the material time . . . is either (a) the person to whom the vehicle is bailed or hired under that agreement or [b] is in relation to the agreement the buyer".

<sup>2</sup> In relation to the general position of a dealer, such as a garage, in a consumer credit transaction see F. M. B. Reynolds, *Bowstead and Reynolds on Agency*, 16th Edition, (Sweet and Maxwell: London, 1996) para. 2-033

<sup>3</sup> [1969] 1 A.C. 552.

<sup>4</sup> In contrast, under sections 56, 57, 69 and 102 of the Consumer Credit Act 1974 the dealer is deemed to be the agent of the finance company for specific purposes such as in relation to statements made in the conduct of negotiations leading up to the making of the hire purchase agreement and also for the service by the hirer of notice of intention to withdraw from the agreement or of intention to cancel or rescind the agreement.

<sup>5</sup> [1919] 2 K.B. 243.

<sup>6</sup> [1971] 3 W.L.R. 603.

<sup>7</sup> These cases should be contrasted with the decision of the Court of Appeal in *Ingram v. Little* [1961] 1 Q.B. 31 which is generally discredited and was not followed by that court in *Lewis v. Averay*. See L. Koffman and E. MacDonald, *The Law of Contract*, 4th edn (Tolley: London, 2001) at p. 256.

<sup>8</sup> See G. H. Treitel, *The Law of Contract*, 10th edn. (Sweet & Maxwell: London, 1998) at p. 277-78.

the garage manager, had intended to contract with the customer who was physically present in the garage and not merely with Mr Patel. Therefore a valid hire purchase contract existed between the respondent and the rogue. This contract would have been voidable at the respondent's request, on grounds of the fraudulent misrepresentation made by the rogue. However, the respondent had not acted to rescind the hire purchase contract at the time of the rogue's disposal of the vehicle to the appellant. Therefore, since a valid hire purchase contract still existed at that point the rogue should then be regarded as being "the debtor" referred to in the Hire Purchase Act, section 27, with the result that the appellant had acquired good title to the vehicle under this section.

In contrast, the respondent argued that the decision of the Court of Appeal in *Hector v. Lyons*<sup>9</sup> should be applied. In that case a father in negotiating the purchase of a house had led the vendor to believe that he was purchasing the house. However, the father had then instructed solicitors on the basis that his son was the purchaser and the contract of sale was drawn up in the son's name. The father subsequently brought an action for specific performance to enforce the transaction. The Court of Appeal, however, held that the principles established in relation to situations of unilateral mistake where the parties contracted in the presence of each other, should not be applied to written contracts. Instead, in such circumstances the identity of the contractual parties was to be established by the names of the parties set out in the written contract. On that basis the respondent pointed to the fact that the written contract in the present case was between the respondent and Mr Patel. As a result only Mr Patel, and not the rogue, could be described as being the "debtor" under the Hire Purchase Act, section 27 and the appellant would therefore be unable to establish title to the vehicle.

Additionally, the respondent argued that although the case was one of unilateral mistake, it had not been a unilateral mistake of the type alleged by the appellant. In this regard, the respondents, relying upon the decision of the House of Lords in *Branwhite v. Worcester Works Finance Limited*,<sup>10</sup> disputed the appellant's claim that the sales manager had acted as the respondent's agent. If the sales manager had not acted in this capacity then the respondents and the rogue had not been face to face when the hire purchase contract had been entered. In this situation, cases such as *Phillips v. Brooks Limited* and *Lewis v. Averay* would not apply. Instead, the respondents argued that the court should apply either the decision of the House of Lords in *Cundy v. Lindsay*<sup>11</sup> or that of the Court of Appeal in *Kings Norton Metal Co. Ltd. v. Edridge, Merrett & Co. Ltd.*<sup>12</sup> In *Cundy v. Lindsay*, the House of Lords dealt with a situation in which two parties had, by post, contracted at a distance from each other. In that case a rogue had ordered goods, fraudulently misrepresenting that he was writing on behalf of an existing, reputable company. In entering into a contract to supply the goods the seller had known of this company and had regarded their identity, as the purchaser, to be important. In a situation in which the rogue had then sold the goods on to an innocent third party without having paid for those goods, the court held that the contract between the initial seller and the rogue was void on grounds of unilateral mistake. This decision was based upon the finding that the seller had never contemplated dealing with anyone other than the reputable company. Consequentially the initial seller was able to recover the goods from the innocent third party purchaser, who had never acquired any title to them. In *Kings Norton Metal Co. Ltd. v. Edridge*,

<sup>9</sup> [1988] 58 P. & C.R. 156.

<sup>10</sup> Op.cit.

<sup>11</sup> [1878] 3 App Cas. 459.

<sup>12</sup> [1897] 14 T.L.R. 98.

*Merrett & Co. Ltd.* a rogue wrote to a company to order goods and in doing so fraudulently represented that he was ordering the goods on behalf of a large company. Unlike in *Cundy v. Lindsay* however, this large company did not actually exist. The goods ordered were again supplied on the basis of this order. The Court of Appeal held that in this case the seller had intended to contract with the person who had written the letter ordering the goods, namely, the rogue and not merely with the fictitious company. As a result the contract between the seller of the goods and the rogue was not void on grounds of unilateral mistake, but was voidable on grounds of fraudulent misrepresentation. The seller could then only recover the goods from an innocent third party who had bought them from the rogue, if that latter sale had occurred after the initial seller had acted to rescind their contract with the rogue.

In relation to the present case, the respondents argued that Mr Patel was a person in actual existence. Furthermore, they argued that the identity of an applicant for finance under a hire purchase agreement was of crucial importance to the respondent. Therefore on the basis of these considerations the respondent asserted that the present case came within the ambit of the decision in *Cundy v. Lindsay*. Consequently, the contract between the respondent and the rogue should be regarded as being void, on grounds of unilateral mistake. Accordingly, the rogue could not then be regarded as being “the debtor” in the Hire Purchase Act, section 27 and equally the appellant could obtain no title to the vehicle under the operation of that section.

#### THE DECISION OF THE COURT OF APPEAL

The Court of Appeal, by a majority verdict, dismissed the appeal. Both Dyson L.J. and Brooke L.J. supported this decision, whilst Lord Justice Sedley delivered a dissenting judgment. Both Dyson L.J. and Brooke L.J. applied the decision of the Court of Appeal in *Hector v. Lyons*.<sup>13</sup> They held that since the rogue was not named as a party to the hire purchase agreement, he could not be regarded as being “the debtor” under the Hire Purchase Act 1964, section 27. As a result the appellant had not acquired any title to the vehicle under that section and the respondent was entitled to succeed in its claim. Additionally Dyson L.J. went on to examine the position that would apply if he were wrong in reaching this conclusion. In so doing Dyson L.J. accepted that the respondent had delegated certain tasks to the sales manager, including ascertaining the identity of hirers and forwarding copies of their driving licences and hire purchase application forms. However, particularly since the respondent had never given any authority to the sales manager to actually conclude contracts upon their behalf, Dyson L.J. felt that this was insufficient to give rise to any relationship of agency. His Lordship therefore rejected the appellant’s argument that the transaction be viewed as having been conducted on a face to face basis between the respondent and the rogue and instead accepted the respondent’s contention that the present case was akin to the facts in *Cundy v. Lindsay*. In this regard, Dyson L.J. accepted both that Mr Patel did exist and that the respondents had regarded the identity of their customer as being very important. In particular, on this latter point, his Lordship noted that the respondent had particular obligations under the Consumer Credit Act 1974. For example, this Act would prevent the respondent from recovering possession of a vehicle unless they had served a default notice on the hirer. In order to serve such a notice, the respondent would need to be aware of that person’s identity and location. For that reason, the

<sup>13</sup> *Op. cit.*

identity of the hirer was to be regarded as being of fundamental importance to the respondent. Therefore, following *Cundy v. Lindsay*, the contract between the respondent and the rogue was void and the rogue could not be regarded as the 'debtor' under the Hire Purchase Act, section 27.

Finally, Dyson L.J. also expressed the opinion that even if he had concluded that the respondent and the rogue had contracted on a face to face basis, the fact that the identity of the hirer was of fundamental importance to the respondent would have been sufficient to rebut any presumption that the respondent had intended to contract with the rogue. Therefore on this basis he would also have concluded that no contract existed between the respondent and the rogue.

#### THE MINORITY JUDGMENT OF LORD JUSTICE SEDLEY

In delivering a dissenting judgment, Sedley L.J. drew attention to three situations in which contractual documentation did not act as the final arbitrator of a party's identity. In the first place, a person whose name was inserted as a party to a written contract was entitled to establish that the contract was void, on grounds that his name had been inserted without his knowledge or consent.<sup>14</sup> Equally Sedley L.J. stated that the decision in *Cundy v. Lindsay* showed that a vendor was entitled to establish that a written contract was void on the basis that the purchaser's identity was false. Thirdly he pointed out that the decision in *King's Norton Metal Ltd. v. Edridge, Merrett & Co. Ltd.* also revealed that the court would be prepared to look beyond the identity of a fictitious purchaser in a written contract, in order to find that the contract actually existed between the vendor and a rogue. Sedley L.J. observed that the decision in *Hector v. Lyons*, if it were not to conflict with these established legal principles, should be read in the context of its own facts. The case involved a person who had not been named as a party to a written contract, but who sought to enforce that contract.<sup>15</sup> Limited to this context, Sedley L.J. concluded that the decision in *Hector v. Lyons* could be understood and applied in a manner that was consistent with the existing law. Consequently, however, Sedley L.J. concluded that the case could be distinguished from the facts of the present case. Instead he considered the present case in relation to the principles of unilateral mistake.

In considering the issue of unilateral mistake, Sedley L.J. asserted that the respondent had adopted a cavalier approach in relation to the establishment of the identity of hire purchasers. In his view this approach stemmed from their having reasonable confidence that they could repossess the vehicle if it transpired that the hirer was a rogue. Sedley L.J. noted that this created strong reasons for favouring the appellant, as an innocent purchaser, rather than the respondent. Equally, he acknowledged that in deciding the issue he was bound by precedent, in particular the decision in *Cundy v. Lindsay*. However, Sedley L.J. felt able to distinguish that case by concluding that the sales manager had acted as the respondent's agent, on the basis that the tasks delegated to the garage sales manager had been central to the conclusion of the hire purchase contract. Therefore he held that the respondent, through the sales manager, had contracted with the rogue on a face-to-face basis. In this situation Sedley

<sup>14</sup> This conclusion is based upon the contractual principle of *non est factum*. See L. Koffman and E. MacDonald, *op. cit.* n. 7 at p. 271.

<sup>15</sup> Additionally, the case concerned a contract for the sale of land. The Law of Property (Miscellaneous Provisions) Act 1989, section 2(1), today provides that in relation to such contracts: "A contract for the sale or other disposition of an interest in land can only be made in writing and only by incorporating *all* the terms which the parties have expressly agreed in one document, or where contracts are exchanged, in each" (emphasis added).

L.J. found that there was insufficient evidence to rebut the presumption that the respondent had intended to contract with the rogue. Therefore he stated that the rogue should be regarded as “the debtor” under the Hire Purchase Act 1964, section 27, with the result that the appellant would have no liability towards the respondent.

### COMMENTARY

The facts of this case are somewhat unusual, in that the principles of unilateral mistake are being used as an aid to statutory interpretation. However, it is submitted that the case illustrates requirements for reform in two areas of the law. Firstly the case amply draws attention to the inadequate state of the current law concerning unilateral mistake. The decision of the majority in this case largely sidestepped the issue of unilateral mistake. However, in the course of their judgments Brooke L.J. and Sedley L.J. both called for amendment of the law in this area. Previously Devlin L.J., in *Ingram v. Little*, had also criticised the operation of the law.<sup>16</sup> In particular Devlin L.J. called for courts to be given a power to apportion loss between the original seller and ultimate buyer.<sup>17</sup> In 1966 the Law Reform Committee rejected this proposal on the grounds, *inter alia*, that a judicial power to apportion loss in this way would introduce too much uncertainty into the law.<sup>18</sup> However, the Law Reform Committee did recommend that “contracts which are at present void because the owner of the goods was deceived or mistaken as to the identity of the person with whom he dealt should in future be treated as voidable so far as third parties are concerned”.<sup>19</sup> These comments were never acted upon by parliament.

The comments of the Law Reform Committee, concerning the need to avoid uncertainty in the law, appear somewhat ironic in the light of the Court of Appeal’s judgment in the present case. Legal certainty has not been promoted by a case in which Court of Appeal judges so fundamentally disagree in applying the principles of unilateral mistake. In that regard, the present case illustrates the narrowness of the distinction between contracts that are void on grounds of unilateral mistake and those that are voidable on grounds of fraudulent misrepresentation. Yet equally, the present case also illustrates that these narrow distinctions have vital consequences for contractual parties. Invariably cases of unilateral mistake involve a rogue who obtains goods on credit from a vendor and then sells them to an innocent third party. It is submitted that Sedley L.J. is correct and that the innocent third party is often more worthy of legal protection than a seller who ought to have been on guard before relinquishing possession of goods on credit. Indeed this viewpoint appears generally to underpin judicial reasoning on unilateral mistake.

Adoption of the Law Reform Committee’s suggestion, that mistake as to identity should render all contracts merely voidable, would certainly increase the protection given to innocent third party purchasers. However, this would be a somewhat arbitrary remedy, since the position of the third party purchaser would still depend upon both the speed with which the original seller became aware of the fraudulent misrepresentation and acted to rescind the sale contract and also how quickly the rogue acted to sell on the goods.

<sup>16</sup> [1960] 3 W.L.R. 504 at 531.

<sup>17</sup> *Ibid.* Devlin L.J. pointed out that the Law Reform Acts of 1935, 1943 and 1945 had each granted similar powers to the courts in respect of joint tortfeasors, frustrated contracts and contributory negligence.

<sup>18</sup> Law Reform Committee, 12th Report: *Transfer of Title to Chattels*, (Cmnd. 2958, 1966) para. 9.

<sup>19</sup> *Ibid.*, para.15

Ultimately the question of the blameworthiness of each party, in allowing themselves to be drawn into a contract with the rogue, will be a question of fact in each case. It would therefore appear more satisfactory for courts to be given statutory powers to assess the facts and to apportion loss between the parties in accordance with their culpability in causing that loss. *The Times* has reported that “false identity fraud” is one of the fast growing crimes in Britain.<sup>20</sup> It is submitted that this further points to an urgent need to reform the present law.

Secondly the present case also highlights a need to reconsider the role of unilateral mistake in relation to hire purchase contracts. Although this was the main issue before the court, it is submitted that the outcome of the case did not achieve justice. In this case the hire purchase company relied upon a faxed copy of a driving licence to confirm the hirer’s identity. In reality, however, the licence merely established that a Mr Patel held a driving licence, whilst the credit check revealed that Mr Patel also had a good credit record. All that was done to seek to establish that Mr Patel was actually the person in the showroom was a comparison of the signatures on the faxed copies of the licence and the credit application. This should not be sufficient to enable a hire purchase company to establish title to a vehicle in preference to a bona fide third party purchaser.<sup>21</sup> The onus must be on the hire purchase company to show that they took reasonable steps to establish the identity of the hirer. In this situation the law must entitle bona fide third party purchasers to introduce oral evidence to prove the real identity of the hirer. In the absence of a power to apportion damages, courts would then have to decide whether the hire purchase company had contracted with the rogue or the person that the rogue was pretending to be. In this situation it would also be unjust to adopt the suggestion made by Dyson L.J., that the provisions of the Consumer Credit Act 1974 enabled hire purchase companies to assert that the identity of the hirer is always of fundamental importance to them. Where it subsequently transpired that the hirer was a rogue, this would generally enable hire purchase companies to establish that the hire purchase contract was void on grounds of unilateral mistake. Given that the Consumer Credit Act 1974 was enacted to protect consumers, its drafters can never have foreseen such a use for the act. Ultimately, hire purchase companies must be assessed by their deeds, not by their rhetoric.

Hire purchase companies may argue that the adoption of the reforms suggested above would promote uncertainty as to the ownership of goods that are subject to hire purchase contracts. However, it should be observed that in this respect hire purchase companies are masters of their own fate. The onus would be upon them to adopt stricter measures to establish the true identity of their customers. Equally, in so doing, they would help to halt the increase use of identity fraud.

BRIAN JACK\*

<sup>20</sup> *The Times*, 13 August 2001, at p. 18.

<sup>21</sup> On this point see also the verdict of Colchester County Court in *Cawston v. Chartered Trust Plc* [2000] C.L.Y.2602.

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## TURNING INTO TROUBLE

*Imran Sarwar v. Muhammad Alam*

[2001] EWCA Civ. 1401; [2001] 4 All E.R. 541 (Phillips MR, Brooke, Longmore LJJ)

### INTRODUCTION

Matters of little apparent consequence – snails in bottles and so on – have often affected the law to a greater extent than their inherent importance. This case concerned the most minor of road accidents and yet it draws into sharp focus the complexities and messiness following the replacement of the statutory and regulatory system of legal aid by a market-based scheme connecting lawyers looking for work to clients with cases. This new market for legal investment opportunities, like all markets, has begun to throw up unexpected results which makes prediction as to the future shape of the market and the nature of legal provision to the public very uncertain.

### BACKGROUND

Legal Aid was removed by the present government in a range of cases including personal injury, non-tribunal based employment, housing disrepair and road traffic matters. This provision was replaced by a system of financing that has two aspects.<sup>1</sup> Lawyers were given an incentive to take on cases by being rewarded for success by an increase in their basic fee (a success fee). This was to be matched by a reduction or elimination of their fee in the event that they were unable to win or settle a case. The remaining liability of an unsuccessful claimant to pay costs to a winning defendant was eliminated by the creation of after-the-event insurance which, it was contemplated, would be available at a modest charge. Further, the claimant's position would be protected by ensuring that the premium for that insurance, and the additional success fee, would be recoverable from the loser. At one stroke, it appeared that the government had produced that rarest of solutions: a system that would please both lawyers and clients. However, as the system has begun to be developed by the competing interests in this new market, the shape of the provision was very different from that anticipated by government policy. The original intention was to mirror the long-standing basis of civil legal aid in the United Kingdom which contemplates financial support of an independent relationship between a solicitor and client. This mirrors, to some extent, the relationship between a patient and general practitioner rather than between patient and a hospital doctor (individual and institution). However, the opening up of this legal market offered opportunities to enterprising lawyers and other entrepreneurs to exploit the situation to their advantage as it can be assumed that individual actors in a market would wish to do. This has produced effects which disturbed, in particular, the insurance companies that provide cover to the employers' liability, road traffic and general public liability markets.

These unintended consequences fell into two areas. Firstly, solicitors doing work on a conditional fee basis, with a success fee, were perceived to be charging success fees

<sup>1</sup> See A. Walters and J. Peysner "Event-triggered Financing of Civil Claims: Lawyers, Insurers and the Common Law" [1999] 8(1) Nott.L.J. at p. 1. and M. Spencer "The Common Law Legacy and Access to Justice: Contingency Fees and the Birth of Civil Legal Aid" (2000) 9(2) Nott.L.J. at p. 32.

that were too high to represent the actual risk they were taking. For example, a case where the likelihood of success was very high (where the claimant is a passenger in a vehicle which is hit by a third party vehicle) should mean a success fee much lower than the maximum 100% increase in basic fees. In fact, high success fees were often charged. Secondly, and more worryingly to the insurance market, was the emergence into the market of claims management companies. These are businesses, distinct from solicitors' firms, who advertise and solicit for claims and then farm them out to solicitors. Their normal business strategy is to create panels of solicitors that are attracted to the idea of receiving a stream of cases for which they are paid *in any event* rather than on a conditional fee basis. In general the solicitors' profession is of a conservative bent and warmed to the idea of an outside organisation sending them work for which they did not have to take the risk (nor indeed receive the reward) of doing conditional fee litigation. The effect of this burgeoning arrangement was to generate an increased frequency of claims (through the aggressive promotion by claims management companies) that meant more costs falling on the general liability insurers. (These costs included premiums for after-the-event insurance which, in some cases, appeared to be excessive). This has produced a plethora of satellite litigation on these costs and recovery issues of which the instant case is the latest manifestation.

### THE FACTS

Mr. Sarwar and Mr. Alam shared a house together. They were mates. Mr. Sarwar was the passenger in a car driven by Mr. Alam, which turned out of a side road hitting another car and causing injury to Mr. Sarwar. Mr. Alam's insurers admitted liability. Mr. Alam suggested that Mr. Sarwar instructed his own firm of solicitors, which he did. They took his case on a conditional fee arrangement with a success fee and indemnified him against any contingent liability for costs by taking out a modest after-the-event insurance premium. The case was settled, without the need to issue proceedings, for £2,250. Costs could not be agreed and so Mr. Sarwar's solicitors issued costs only proceedings.<sup>2</sup> At the costs hearing Mr. Alam's insurers produced a rabbit out of a hat: a legal expenses insurance policy attached to Mr. Alam's car insurance policy which covered his legal costs of bringing or defending claims and, very surprisingly, also covered the legal costs of any passenger. Unsurprisingly this was not known to Mr. Sarwar and his solicitors had not made enquiries as to such cover. At first instance the judge held that Mr. Sarwar's solicitors could not recover the after-the-event premium because he was already insured. The fact that he did not know that he was insured could have been remedied by the solicitors making enquiries.

### THE DECISION

The Court of Appeal noted that in 1999 around 40% of all motor policies carried, as an additional benefit, legal expenses cover and that this normally extended to passengers. In the last two years the market had grown significantly. The court decided that although solicitors need not embark on a "treasure hunt" to find all the potential

<sup>2</sup> Under the Civil Procedure Rules 1998 (r. 44.12A) it is now possible, in the interests of encouraging settlement and discouraging litigation, to issue proceedings for costs only, where everything else is agreed. Formally, this could only be done by issuing proceedings to construe the contract of settlement either by implying into it that there was an agreement to pay costs, or if such a term was expressed or implied allowing the court to determine what the right level was.

sources of legal expenses cover that might be available to a client (for example through credit cards) it was not unreasonable for solicitors to ask clients to produce their house insurance policies and to make enquiries with drivers where the client was a passenger to see whether there was an existing policy. In cases where the claim was likely to be less than £5,000 and there were no other unusual or complex features the solicitor should refer the client to the legal expenses insurance policy rather than buy new insurance. In the instant case, for reasons which will be explained below, the solicitors were able to recover the after-the-event premium but, as will be further explained, this will become increasingly unusual.

### COMMENT

The implications of the case are profound. In Europe legal expenses insurance is widely bought as an independent product. In Britain it has achieved very little market penetration, possibly because individuals, often wrongly, believe that they were covered by Legal Aid. Over the last two to three years, as a matter of deliberate policy, liability insurers and legal expenses insurers have created joint ventures to bolt on legal expenses cover, at limited or no extra charge, to house and motor insurance policies. This was not done out of kindness but in the expectation that these could be used to defeat the recoverability of both after-the-event insurance premiums (which by their nature are not pre-bought and which can be expensive) and the success fees charged by solicitors operating on a conditional fee basis. The method is as follows. Solicitors on the panels of legal expenses insurers will charge very modest rates without success fees (rather like solicitors acting for claims management companies they benefit from the volume of work rather than high fees on individual cases). By manoeuvring to replace the client's own lawyer by an insurer's panel lawyer the liability insurers who subsidise the relatively modest expense of legal expenses insurance will gain the downstream benefits of avoiding high legal costs (including success fees) and after-the-event insurance premiums from claimant's lawyers. Cheap lawyers replace expensive ones.

The implication is that the market for this type of work will alter its profile from provision by a range of independent solicitors buying after-the-event premiums on the open market who are approached by individual clients to a relatively small number of panel solicitors (possibly no more than 200 firms in the country) who will corner the market for modest claims. Their work will be controlled by legal expenses insurers who are closely linked to the insurers' for the defendants. This apparent conflict of interest was very clear in the instant case because legal expense cover contained the clause giving the insurers "full conduct and control of any claim". Whilst these conflicts are dealt with by the Insurance Companies (Legal Expenses Insurance) Regulations 1990 so that an insured has freedom to choose a lawyer, this is restricted under Regulation 6 to "any inquiry or proceedings". The Insurance Ombudsman has interpreted this to mean proceedings only, that is, cases where a claim form has been issued in court. As most cases are now concluded pre-proceedings through the pre-action protocols for exchange of information introduced by the new Civil Procedure Rules, this conflict of interest protection is illusory.

In the instant case the court disliked two aspects of the cover available to Mr. Sarwar through Mr. Alam's policy. Their Lordships were concerned about the perceived conflict where the "guilty" driver's insurer forces a passenger to use a lawyer appointed by a legal expenses insurer involved in a joint venture with the driver's

insurer. Secondly, the court was concerned the legal expenses insurer in the joint venture had ultimate control over the conduct of the matter. For these reasons the court decided that the choice by Mr. Sarwar of his own lawyer and their choice of an after-the-event insurance premium was reasonable and the premium was recoverable. However, the court stated that such conflicts of interest could be removed if legal expenses insurers set up organisations to handle claims that were transparently independent of liability insurers. Further, the court would want, as was not the case for Mr. Alam's policy, the ultimate conduct of the matter to be in the hands of the client, subject to the usual insurance arrangements that, in the event of a deadlock over settlement, the matter could be decided by an independent arbiter. No doubt at this moment insurance policies are being redrafted and arrangements changed to satisfy the court and, in effect, to inoculate large areas of the market from the independent solicitor acting for clients under a conditional fee and buying after-the-event insurance.

Issues of proportionality ultimately decided the court's approach to the matter; the effect of its decision being to reduce the costs of modest claims and to suppress inflationary pressures on motor and household policies. The government may be content on the basis that individuals will still have insurance cover and access to solicitors, albeit not through the much trumpeted conditional fee schemes. Whether the public interest is really preserved by this case is more doubtful. Legal expenses insurer panels of solicitors are small in number and likely to be reduced. Is it in the public interest for lawyers to be increasingly concentrated in larger units beholden to two or three major legal expenses insurers? Is it in the public interest for those lawyers not to be able to do conditional fee cases and earn success fees which can be used to subsidise more risky cases? Do we really want only inevitably successful cases to be brought in the courts? Modest cases can be important to persons of modest means and not all worthwhile cases are "dead certs".

The Legal Aid scheme had many faults but at least it was open to influence by the courts and public pressure. The original conditional fee scheme had the benefits of a vigorous market with competing lawyers and after-the-event insurers. A scheme where access to legal help is concentrated in a few hands, in the absence of an effective regulator, is a matter of serious concern.

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## BOOK REVIEWS

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

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### THE RULE OF LAW REVISITED

*Constitutional Justice: A Liberal Theory of the Rule of Law,*

by T. R. S. ALLAN

Oxford, Oxford University Press, 2001, 342 pp.,  
Hardback, £40, ISBN 0-19-829830-7

Mr Allan, Reader in Legal and Constitutional Theory, University of Cambridge, has revisited one of the most important, yet strangely neglected areas of constitutional scholarship, with this wide-ranging study of the rule of law.

The constitutional principle of the rule of law is based upon the practice of liberal democracies of the Western world. At its simplest it means that what is done officially must be done in accordance with law. In Europe, where an entrenched Constitution is the touchstone for legitimacy of government, there might be a general grant of power to the executive, and a bill of rights to protect the individual. In the British tradition public authorities must point to a specific authority to act as they do. Much of the legitimacy of a political system derives from the impartiality and objectivity with which it is administered. Thus the very exercise of authority legitimates that authority.

Dicey defined rule of law to encompass the liberty of the individual, equality before the law, and freedom from arbitrary government. The scope of the concept is however rather fluid. It includes such meanings as government according to law; the adjudicative ideal of common law jurisdictions; and a minimum of State intervention and administrative power. It also includes the need for fixed and predictable rules of law controlling government action; and standards of common decency and fair play in public life. It also includes the principles of freedom, equality, and democracy.

As Allan freely acknowledges in his introduction, the concept of rule of law may appear to lack a denominated meaning. That is however no reason to dispense with the notion, which has a value as a governing principle for constitutional theory and analysis. He seeks to give a coherent, unified, and (in his own words) attractive account of some of the principal questions of legal authority and personal freedom. The emphasis is upon procedural fairness, but Allan rejects any rigid distinction between procedure and substance as artificial and unworkable. The rule of law is explained as a set of closely interrelated principles that together make up the core of the doctrine or theory of constitutionalism. This is explained within a framework of liberalism, which is here utilised to comprise any modern democratic regime that protects a range of familiar civil and political liberties and in which governmental action is constrained by law, interpreted and applied by independent judges.

If a criticism might be made of the thesis of the book, it is that it is infused with the spirit of the common law. Yet, in the face of increasing pressure to allow the reception of Roman law-based laws, which the common lawyers successfully resisted in the sixteenth century, it is well to be reminded of our own legal heritage and the part it has played in preserving our freedoms. This is illustrated in Allan's assertion that a general commitment to certain foundational values that underlie and inform the purpose and character of constitutional government imposes a natural unity on the relevant jurisdictions and is ultimately more important than the presence or absence of a "written" constitution with formally entrenched provisions. It is the spirit of the law, rather than its form, which is the embodiment of the concept of the rule of law.

The rule of law is symbolic. It is a transcendent phenomenon in that it is almost always shorthand for some interpretation of the inner meaning of a polity. It is also highly connotative. In the fifteenth century it meant that the king was always subordinate to a higher law of somewhat uncertain provenance. After the 1688 Revolution, it became clearly associated with the idea of a Lockean ideal State. The old idea of the unity of the State dominated until the classical liberal tradition overtook the older habit of mind in the eighteenth and nineteenth centuries.

The post-Lockean version of the rule of law was associated with the views of the classical liberal theorists, who combined the concepts of legitimacy, legality and legal autonomy. The rule of law was used by the Whigs to confer legitimacy upon their dominance of politics during the eighteenth and nineteenth centuries.

In the course of his book Allan travels through the principles of constitutional law, from the Rule of Law and separation of powers, to dissent and disobedience, and equal justice and due process of law. These principles are rarely litigated. Yet several have come to the fore in recent times. Justiciability and the reviewability of political decisions was examined in *Black v. Chrétien*, an unreported judgment of the Court of Appeal for Ontario.<sup>1</sup>

Conrad Black, a prominent publisher and businessman in both Canada and United Kingdom, submitted his name for one of the peerages to be created for the new-model House of Lords following the House of Lords Act 1999. His ennoblement was approved by the relevant British authorities and Tony Blair, the Prime Minister, advised The Queen to confer the title upon Mr Black. However, Jean Chrétien, Prime Minister of Canada, intervened, and advised The Queen to not confer the peerage on Mr Black. Ultimately the action was bound to fail, as the honours prerogative, and by extension the other "political" prerogatives of the Crown, is non-justiciable. But it is now rare for any governmental action to be beyond the review of the courts.

NOEL COX\*

## ADMINISTRATIVE LAW

### *Administrative Law*

by H. W. R WADE and C. F. FORSYTH

Oxford University Press, Eighth Edition, 2000, xc and 1027 pp.,

Paperback, £29.99, ISBN 0-19-876525-8

This is the eighth edition of H. W. R. Wade's *Administrative Law*, first published in 1961. Through its successive editions it has emerged as the most authoritative work on

<sup>1</sup> Laskin, Goudge and Feldman J.J.A., 18 May 2001, C33887.

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the subject cited by legal practitioners and judges alike throughout the common law world. The work has been translated into several foreign languages outside the Commonwealth. The current edition is dedicated to Lord Denning (who died in 1999 aged 100) who is complimented as “a great judge, an architect of administrative law and friend of this book”. Devolution of power to Scotland and Wales, partial reform of the House of Lords, The Freedom of Information Act 2000 and the Human Rights Act 1998 are perceived by the authors as “as a group of new constitutional monuments of unprecedented magnitude” and of relevance and importance to administrative law. The impact of the European Convention on Human Rights (ECHR) and that of European Union law on English administrative law is also noted.

Since Dicey’s denial of its existence in England and his condemnation of it, administrative law has been resurrected, rehabilitated and recognized as an integral and important part of common law. However, unlike various branches of private law, the content of administrative law, so far, has been very much a matter of the authors’ own perception. Although the traditional areas are covered by this book, judicial review of governmental action occupies the centre ground, embracing both the substantive law and procedural remedies. Notwithstanding its focus of attention on judicial review, crown proceedings, delegated legislation and statutory tribunals and enquiries also receive proper and adequate treatment. Local government law as such is not seen by these authors as falling within the scope of administrative law. The view taken by the authors of Garner’s *Administrative Law* of the place of local government law is different.<sup>1</sup>

On judicial review there are two schools of thought. These might be labelled as the traditional school and the reformist school. For the former the jurisdictional principle (*i.e.* the *ultra vires* rule) is the main basis of judicial review. This does not permit the review court to examine the merits of an impugned decision/action, the court’s role being confined to an examination of the legality of the matter. Wade and Forsyth subscribe to this view. On this approach, the distinction between “appeal” and “review” and the *Wednesbury* principle are the twin pillars of judicial control at common law. In their view the judges cross these frontiers of judicial review at their peril. If they were to do so they would be transgressing beyond their legitimate sphere of action into areas that belong in constitutional terms to the jurisdiction of government and Parliament. Any such transgression is likely put at risk judicial independence and impartiality. The reformist view, on the other hand, is that the doctrine of *ultra vires* to the extent that it implies that all administrative power is derived from specific statutory sources can no longer be considered the sole justification for review.<sup>2</sup> With regard to the traditional school of thought which represents the orthodox approach of the English court, it is submitted that things have moved on. This reviewer has stated elsewhere,<sup>3</sup> referring to the ruling of the European Court of Human Rights in *Smith and Grady v. United Kingdom*,<sup>4</sup> that the European Convention on Human Rights would require that the court in the proceedings of judicial review examine the merits of an impugned decision or action. This would mean that (a) the distinction between the legality and merits and (b) the *Wednesbury* test as the yardstick of judicial review would have to go, to be replaced by the proportionality principle. “The twin pillars of judicial review at common law – (i) the *Wednesbury* principle and

<sup>1</sup> B. L. Jones and K. Thompson, *Garner’s Administrative Law*, 8th ed. (Butterworths: London, 1996).

<sup>2</sup> Dawn Oliver, “Is the *Ultra Vires* Rule the Basis of Judicial Review?” (1987) P.L. 543; De Smith, Woolf and Jowell, *Principles of Judicial Review* (Sweet and Maxwell: London, 1999) pp 112–113.

<sup>3</sup> M. A. Fazal, *Judicial Control of Administrative Action in India, Pakistan and Bangladesh* (Butterworths India, 2000) at pp. vii–ix, 157–163, 258–260, 280–282.

<sup>4</sup> (1999) 29 EHRR 493.

(ii) the distinction between judicial control of ‘legality’ and ‘merits’ . . . have stood in the way of developing an ‘intensive’ judicial control of administrative action”.<sup>5</sup>

That view of this reviewer has now been confirmed by the House of Lords in *R v. Secretary of State for the Home Department ex p. Daly*.<sup>6</sup> The All England Legal Opinion<sup>7</sup> carried the headline “The demise of the ‘Wednesbury’ test?” Lord Steyn’s speech (with which the other Law Lords agreed) was devoted almost entirely to the question of the approach the court should adopt when deciding on an application for judicial review in cases in which Convention rights are engaged. This was the issue that was first raised in *Smith and Grady* where the European Court of Human Rights ruled that the orthodox approach of the English court had not provided the applicants with an effective remedy (under Article 13) for breach of their rights under Article 8 of the ECHR because the threshold of judicial review had been set too high. Lord Steyn addressed the question whether the formulation of Lord Philips M.R. in *R (Mahmood) v. Secretary of State for the Home Department*<sup>8</sup> was correct. Lord Phillips had stated that:

when anxiously scrutinizing an executive decision that interferes with human rights, the court will ask the question, applying an objective test, whether the decision maker could reasonably have concluded that the interference was necessary to achieve one or more of the legitimate aims recognized by the Convention.

Lord Steyn said that the approach was couched in language of the traditional *Wednesbury* grounds of review. He contrasted the *Wednesbury* approach with the Convention concept of proportionality and identified three differences between the two tests:

The doctrine of proportionality may require the reviewing court to assess the balance which the decision-maker has struck, not merely whether it is within the range of rational or reasonable decisions;

The proportionality test may go further than the traditional grounds of review, in as much as it may require attention to be directed to the relative weight to be attached to interests and conditions;

Even the ‘heightened scrutiny’ test (adopted in *R v. Ministry of Defence, ex p Smith*,<sup>9</sup> the decision of which was successfully appealed in Europe in *Smith and Grady*) is not necessarily appropriate to the protection of human rights.

Lord Steyn’s approach seems to allow for a much closer examination of the merits of a governmental action than had hitherto been permitted. In *Daly*, Lord Cooke spelt out the significance of this new approach when he said (at [32]):

I think the day will come when it will more widely recognized that *Associated Picture Houses v. Wednesbury* was an unfortunately regressive decision in English administrative law, insofar as it suggested that there are degrees of unreasonableness and that only a very extreme degree can bring an administrative decision within the legitimate scope of judicial invalidation.

The House of Lords decision in *Daly* made it clear that henceforth it is the proportionality principle and not the *Wednesbury* test that must be applied to

<sup>5</sup> Fazal, *op. cit.*, at p. viii.

<sup>6</sup> [2001] 3 All E.R. 433, H.L.

<sup>7</sup> September 2001, Issue No. 11.

<sup>8</sup> [2000] All E.R. (D) 2191.

<sup>9</sup> [1996] 1 All E.R. 257

determine the validity of the interference with human rights. In *Alconbury*<sup>10</sup> Lord Slynn suggested that proportionality should not be confined to human rights cases, but should be recognized as a ground for review in all domestic cases.

These developments in the law of judicial control were clearly foreseen by the ruling of the European Court of Human Rights in *Smith and Grady v. UK* (1999). Yet, they did not receive sufficient recognition in the current edition of this book. Notwithstanding the above comment, Wade & Forsyth's *Administrative Law* remains the most outstanding work in this field. Although it has become a book for practitioners and researchers rather than undergraduates, it still stands out as the most authoritative and ultimate source of reference for all readers.

ABUL FAZAL\*

<sup>10</sup> *R v Secretary of State for the Environment, Transport and Regions, ex p. Holding and Barnes and others (Alconbury)* [2001] U.K.H.L. 23 (para 51).

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## NOTTINGHAM MATTERS

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

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### BEHAVING BADLY: A CONFERENCE REPORT

*JUDITH ROWBOTHAM and KIM STEVENSON\**

The first SOLON conference, held at the Galleries of Justice in Nottingham, 19–21 September 2001, brought together academics from a wide range of disciplines, plus some practitioners, from throughout the UK and overseas, all with an interest in exploring the dimensions of the concept of ‘bad’ behaviour. Over 75 people attended the conference. The keynote speaker was Geoffrey Robertson QC, who delivered a brilliant and stimulating paper on issues of Censorship and the Media. A range of stimulating papers was delivered, and the abstracts of these are now available on the SOLON website ([www.ntu.ac.uk/solon](http://www.ntu.ac.uk/solon)). These included a plenary session from Howard Taylor, reflecting on the integrity of statistics for recorded crime in England and Wales between 1857 and 2000, and issuing a challenge to scholars relying on crime statistics as a major plank in their analyses. According to Howard Taylor, because of long-standing problems associated with recording practices at *central* rather than local levels, the so-called “dark figure” of unrecorded crime is compounded by a further “dark figure” caused by this statistical bad behaviour. It was complemented by a paper, “Crime Statistics: Fiddling While Bradford Burns” delivered by Tom Williamson, formerly Deputy Chief Constable of Nottinghamshire and now based at the Institute of Criminal Justice Studies at the University of Portsmouth. Tom Williamson concentrated on the issues of “cuffing” crime, or reducing the number of crimes recorded, and “coughing”, where encouragement is given to admit to generally trivial offences in the interests of statistically improved police performance league tables. He argued that alternative methodologies, such as those employed by the British Crime Survey, which would take into account community tension indicators, would be able to provide more honest descriptors of crime levels, including giving an index of the seriousness of crime. Both speakers aimed their messages at practitioners as well as at academics, providing a sobering reflection on current certainties and securities about the basis of policy decisions and subsequent research analyses of these decisions.

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## GENDERED PERCEPTIONS

The evening plenary session was given by Judith Knelman of Western Ontario, examining, in her paper “Why Can’t a Woman Be More Like a Man?”, attitudes towards husband-murder by comparing the reporting of the 1889 Florence Maybrick case with two late twentieth century *causes célèbres*, Sara Thornton and Kiranjit Ahluwalia, and arguing for a significant shift in attitudes. She was one of a number of speakers exploring the impact of gendered perceptions on legal practice and on people’s willingness to resort to formal legal measures to seek redress for different kinds of “bad” behaviour. Louise Jackson, from Leeds Metropolitan University, examined the ways in which women police officers were, before the Sex Discrimination Act 1975, most closely associated with “specialist” welfare and preventative work concentrating on women and children as “victims” of violence, abuse and neglect. She highlighted the extent to which “welfare” needed to be seen as a strategic – though unequal – relationship between women police officers and their “clients”, with considerable implications for the ways in which individual cases were presented to courts. Shani Cassady, the Nottingham Trent University funded researcher working on the Rainer Archive lodged at the Galleries of Justice, drew on the records of the London Female Preventive and Reformatory Institution to examine the extent to which, in the case of offences against women and children, it was commonplace to resort not to courts, but to more unofficial “social” methods for enforcing some kind of justice.

## MADNESS OR BADNESS?

Another significant strand of debate running through the conference was consideration of the encounters between the legal process and concepts of “madness” and how that conflates with “badness”. Thus Michael Teague, University of Hertfordshire, examined the case of the 1999 Brixton Bomber, David Copeland, in “Madness, Badness, Punishment and Retribution”, where the court concluded that Copeland was not mentally ill but personality disordered and consequently not “treatable”. It was argued that defining him in this way hardly enlightens us as to the wider social context of his behaviour, a matter of genuine concern given that his mental health problems gained violent expression in the context of extreme racist and homophobic views. Michael Teague asked if the present climate of opinion was inimical to understanding mental health issues in the way that it promotes a retributive rather than a medical response.

## THE “OTHERNESS” OF BEHAVING BADLY

Issues of different races and cultures also featured in the conference proceedings. Len Findlay from the University of Saskatchewan explored the cultural concomitants and residues of moral panic in North American contexts, historically and currently, in “Seeing ‘Red’ Indians, Commies and Moral Panic in North America”. In a highly timely paper, given the events of 11 September 2001, he examined the panic rooted in racial and political differences. He explained how fears over diversity have given rise to the identification of “bad” behaviour in respect of people who are simply outside the so-called “mainstream” either by not just being of different race but being so in the “wrong” place or adhering to a different or “wrong” political belief system. North American “Red Indians” were feared because they stood in the way of white

expansion. “Commies” were feared because they stood in the way of capitalism. Both expansion and capitalism were seen as essential to the stability and future prosperity of the North American nations. Len Findlay examined how those identified as “Other” are readily susceptible to the identification of being “bad” because of the perceived need to remove them in some way from the “onwards” path of the community. However, since such excision is never complete, there are always survivors. The implications of this for legal systems forced to deal with this residue are considerable. Such survivors, economically excluded and socially ostracised, are likely to provide a significant proportion of those appearing before courts accused of more traditional offences as much because of their “otherness”, as for any actual committing of crime. This was something underlined in the paper given by Isabel Findlay, also from Saskatchewan, entitled “Framing Criminality: Of Legal Discourse, Academic Experts, Media Pundits and Aboriginal Experience in the Case of *R v Marshall* [1999]”.

### PRACTITIONER PERSPECTIVES

One of SOLON’s objectives is to engage more directly with practitioners and so the participation in the conference of a number of legal and other professionals provided a particularly insightful and practical perspective. In addition to the contribution made by Geoffrey Robertson QC, His Honour Judge David Bentley from Sheffield Combined Courts gave an entertaining paper on judges “behaving badly”. Diana Temperley, Chair of the Bench, and Graham Hooper, Chief Executive, both from Nottingham City Magistrates Court gave an illuminating joint paper on the purposes underlying design aspects of this recently constructed and acclaimed court building, with the intention of making justice delivered there more accessible and “humane” in the perspective of those charged to appear in it, while retaining the necessary elements of dignity. Tim Desmond, from the Galleries of Justice, outlined the educational work undertaken by the Galleries and their newly-established National Centre for Citizenship and Law, with a focus on the work done with Youth Offending Teams and the RED programme. His paper was usefully amplified by Simon Rix of Barnet Play Association, who discussed the ways in which play has a major role in the socialisation of the young. Richard Bullock, solicitor and Under-Sheriff of Nottinghamshire and Derbyshire and Douglas Robertson, Sheriff and national chair of Crimebeat gave an interesting twist to the Robin Hood/Sheriff of Nottingham fable in highlighting the role of modern sheriffs in helping children to beat crime. That these practitioners expressed their sense of the value of the experience in participating in the conference and their desire to continue involvement with the SOLON project is evidence that this objective is being achieved.

### BEHAVING BADLY AS A MODEL FOR AN INTERDISCIPLINARY APPROACH

One of the most useful sessions, in respect of which it is hoped to continue the debate via the Bulletin Board on the SOLON website, was the round-table discussion on interdisciplinary research, chaired by Mark Findlay (University of Sydney and Visiting Professor Nottingham Trent University), with Peter Bartlett (Nottingham University), Shani D’Cruze (Manchester Metropolitan University), Susan Edwards (University of Buckingham) and Clive Emsley (Open University) as discussants, thus featuring three

lawyers (including the chair) and two historians. Discussants were asked to consider how far they thought it possible to research, apply research, and/or to work within two or more contexts within a culture (*i.e.* practitioner/different disciplines); to comment on problems of doing such work usefully across time and space; and how far discussion of “bad” behaviour was creating an artificial “new” culture which has little practical relevance to practitioners. Another consideration was how far such work should reach out to the general public, begging the question of how far it is possible to do useful “interdisciplinary” work that is accessible not just to other academics or practitioners but also to a concerned wider audience – and consequently, who should determine the rules and boundaries in such research: academics, practitioners or “public opinion”?

All the discussants agreed that interdisciplinary work is valuable and, with certain caveats about difficulties encountered, “do-able”. On the whole, that perception was also shared by the floor in the subsequent debate. Indeed Clive Emsley argued that the barriers between academics and academics and practitioners are often specious. At its best, it seemed to Peter Bartlett that interdisciplinary work is extraordinarily interesting – indeed inspiring. He commented that when one approaches a subject from a different discipline (or indeed from a different culture, to foreshadow one of the later questions), there really is a chance that the researcher will see something that others have missed, which may in turn tremendously affect the field. Thus, while some historians of psychiatry may have mixed views of the influences of sociology in the last twenty years, there can be little doubt that the field has changed dramatically as a result of that intervention, which he identified as a thoroughly “healthy” development. Shani D’Cruze commented that one of the benefits of interdisciplinary work is in helping to unravel the alchemy of practice and – its institutionalised and often unexamined assumptions, arguing that academic research interrogates how power works in shaping definitions of different concepts such as bad behaviour and devising institutional responses. The day-to-day realities of professional situations help temper the more self-indulgent abstractions of the academic.

A need for awareness of the demands of different disciplines is important, however. Peter Bartlett commented that lawyers and medics who write in an historical context are obvious offenders here. The illusion is that if something is written that refers to something old, it is enough to make it good history. It is not. History has its own set of debates and methodological parameters. Those parameters have to enlighten the work, if it is to be interdisciplinary. Similarly, as Clive Emsley pointed out, historians can be remarkably sloppy when tackling the precisions of legal distinctions and legal practice. The need is to determine what the actual project was, rather than turning oneself into a “poor historian” and “good lawyer” or *vice versa*. Equally, as Shani D’Cruze stated, comparative work across time and space is both possible and helpful, as long as crude assumptions about continuity and equivalence are avoided by understanding evidence in social and cultural contexts. According to Peter Bartlett and Clive Emsley, there is a need to avoid compromise in the interests of neat or easy answers. Clive Emsley’s comments on the concept of bad behaviour are worth reproducing at greater length, since they underline the concerns that were shared by all the participants in the conference, and by the members of the SOLON network more widely:

First, we live in a sound-bite culture. “Behaving badly” is a sound-bite phrase that can be used to label a range of activity. It is slightly softer than ‘crime’ (which has implications of legal sanctions), but is open to the same problems – Who defines the “badly”? In what context? And so on. Unpicking “behaving badly” is difficult. While we might agree about much (probably most) bad behaviour, there are no easy answers to what bad behaviour

is – it can be generational (young men getting drunk, fighting; senior citizens driving invalid carriages the wrong way up one-way streets *etc.*), cultural (loud Afro-Caribbean music; “honour” violence among Pakistanis, Roma and Sinti; insider-trading; institutional racism, sexism, homophobia), or entrepreneurial (prostitutes touting for business). Both political discourse and tabloid discourse (painfully similar in contemporary Britain) deny complexity, and want quick, easy solutions. I think it possible to detect a significant change in the second half of the 20th century when crime got to, and stayed at the top of the political agenda and when, in the Anglo-Saxon world (notably the UK and the USA) both the political left and the political right set out to outdo each other in dealing with crime and punishing offenders. The complexities identified by and explored by academic research tends to run counter to the aspirations of public voices in the media and in politics.

Academic research in this area needs to be more public, and needs to engage in public discourse on these issues – though it is not easy, as anyone who has had recent dealings with much of the BBC or the commercial media will know. But to my mind we might as well pack up and go home if we don't want to reach out to the general public. Second, I would argue that we ought also to be reaching out to practitioners. There is often resistance here, especially to the work of historians, in cultures, like for example that of the police or of politicians, which in the context of handling crime and disorder tend to look back no further than the last decade at most. There are also the assumptions about individuals in ivory towers, far removed from “the real world”, problems which I think academics have partly brought on themselves. But again it is important for academics to reach out – and it is surprising how much of the results of our research, or even matters that we take for granted, are unknown to, but sometimes very useful to, practitioners.

From the start, SOLON has concerned itself with the issue of developing deeper comprehensions of the mutable nature of crime, criminals and criminality and of the fluid boundaries between “crime” and the broader concept of “bad” or offensive behaviour across cultures, locations and times.

### FUTURE CONFERENCES

Fourteen of the papers given at the conference will be included in a volume edited by Judith Rowbotham and Kim Stevenson, *Behaving Badly: Socially Visible Crime and Moral Outrage – Victorian and Modern Parallels*, to be published by Ashgate in 2002. This will, it is hoped, take the debate wider not only in terms of extending the examination of the concept of bad behaviour into other time frames, but from a wider range of perspectives and disciplines. Because of the extremely positive feedback and interest which the conference generated it has now been determined that the SOLON conference, and the Behaving Badly theme, as well as the Galleries of Justice location, should become an annual event. The conference theme for 11–13 September 2002 is “Who Dunit? Detections and Representations of Bad Behaviour, Past and Present”. The aim is to examine, from a range of interdisciplinary perspectives, time periods and locales, the processes and realities involved in presenting bad behaviour to a wider public, including the importance of fictional representations and the stereotyping of types of conduct, dress and appearance. The call for papers is now available on the SOLON website.

# REGULATING PRODUCT QUALITY – A CONFERENCE REPORT

*CHRISTIAN TWIGG-FLESNER\**

On 7th July 2001, the Consumer Law Section of the Society of Public Teachers of Law (SPTL) and Nottingham Law School, with the support of Domestic and General Group plc., held a one-day conference to discuss the consumer and competition law aspects that arise in the context of product quality regulation. This is a topical issue in the wake of the recent E.C. Directive on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees<sup>1</sup> which is due to be implemented into domestic law by the end of this year.<sup>2</sup> Thirty delegates from around the U.K and Europe had travelled to Nottingham to listen to ten papers and to participate in the discussion that followed the papers.

Professors Chris Willett and David Oughton of De Montfort University discussed the concept of conformity and the remedies under the E.C. Directive. They considered the similarities between the Directive and the U.N Convention on the International Sale of Goods (CISG) and highlighted the definitional gaps in the Directive which gave rise to some uncertainty with regard to its exact scope, especially the meaning of the term “delivery”, which was central to the Directive.<sup>3</sup> They then considered the relationship between the Directive and the current UK framework in the Sale of Goods Act 1979 (SoGA). Particular concern was expressed about the vagueness of the legal quality standard imposed both by the SoGA and the Directive. Willett and Oughton argued that greater use should be made of codes of practice to give consumers a better idea of the standard of quality to be expected from a particular type of product, as well the way in which the various remedies could be made available in the context of a specific product category. They generally lamented the lack of consumers’ awareness of their rights and suggested that the changes about to be introduced should give the impetus for a wide-ranging education campaign.

Christian Twigg-Flesner of Nottingham Law School then focused on the allocation of liability for quality defects. Both under the SoGA and the Directive, the consumer only has a legal right against the seller who sold the faulty product to the consumer.<sup>4</sup> The seller is then in turn expected to pursue a claim against the distributor or the manufacturer in order to pass back the claim to the party that is ultimately responsible. Twigg-Flesner argued that this system was hopelessly out-of-date both with consumer expectations and business practice. He outlined a different system of liability that would transform the position of the seller. The seller would still be one port-of-call for the consumer, but the consumer could also take action directly against the manufacturer. Furthermore, where goods were marketed through distribution systems, Twigg-Flesner argued that all the members of such a system should be potential targets for a consumer. However, although the retailers would be responsible for dealing with consumers, they would then be able to obtain a full indemnity for their costs directly from the manufacturer. This system would recognise that the vast majority of quality problems are caused by the manufacturer and would therefore

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<sup>1</sup> Directive 99/44/EC (1999) O.J. L 171/12.

<sup>2</sup> See Issue 1 of the current volume of this journal for Nottingham Law School’s response to the first consultation document on the implementation of the Directive, issued by the Department of Trade and Industry.

<sup>3</sup> For a discussion of the Directive, see C. Twigg-Flesner, “The E.C. Directive on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees” (1999) 7 *Consumer Law Journal* 177.

<sup>4</sup> In addition, the consumer may have a claim under a separate manufacturer’s guarantee. However, such guarantees are voluntary and are only available on the conditions defined in the guarantee document itself.

ensure greater fairness as between retailer and manufacturer, whilst also making it easier for consumers to obtain redress by increasing the number of potential targets. This was particularly crucial now that consumers are encouraged to shop abroad and over the Internet.

Martin Taylor and Andre Naidoo, also of De Montfort University, then focused on the concept of delivery in the E.C. Directive. Their particular focus was on the meaning of delivery where goods are sent to the consumer by a third-party carrier. They observed that under the current system in the SoGA, both risk and property usually pass to the consumer once the seller has despatched the goods, and any damage after that point will not be within the responsibility of the seller. Taylor and Naidoo argued that the link of risk with property should be abandoned in the context of consumer transactions in order to ensure that consumers are not unduly prejudiced against.

In the second session, Professor John Huntley from Glasgow Caledonian University and James Tunney from Abertay University focused on the competition law aspects of product quality. Huntley observed that the crucial element in the assessment of product quality was the information available to consumers. Huntley noted that the Directive did not provide for circumstances in which a seller or producer failed to disclose information that could be crucial to the consumer's assessment of product quality. Some member states of the European Community had unfair competition rules which would make such a failure to disclose an infringement of the relevant statute, but English law had no such rules. This diversity could therefore lead to further problems once the Directive is implemented into the domestic laws of the member states because of the context within which the new rules would operate in each member state.

James Tunney focused on the tensions that existed between consumer and competition law, particularly in the field of product quality, but also more generally. It became apparent that few consumer lawyers had also studied competition law and few competition lawyers are familiar with consumer law. Competition law usually assumed that improvements to competition would inevitably be of benefit to the consumer, but this assertion was rarely tested and substantiated. Furthermore, lawyers had a very specific conception of product quality without taking account of the quality concept as used in industry. Tunney emphasised that there was a bizarre attitude to information: for consumer lawyers, the more information is available to consumers, the better. However, competition lawyers were concerned about the flow of information, particularly between competitors. This tension was especially pertinent in the context of product quality where greater information could help consumers, yet be a major concern for competition lawyers.

The third session then took an international perspective. Professor Geraint Howells of Sheffield University reported on the findings of a comparative study of Central and Eastern European countries. He observed that in those countries, product quality regulation had been of much greater concern for the state, with standardisation bodies taking a much more pro-active role in enforcing product quality. The move to a market economy had largely eroded this system, but it remained to be seen whether consumers in those countries were now in a better position.

Professor Hans Micklitz of Bamberg Universität then reported on the implications of the Directive for German law. The Directive had provided the impetus for a major overhaul of the German law of obligations contained in the *Bürgerliches Gesetzbuch*. It would introduce new remedies and significantly improve the position of the consumer compared to the current position. Micklitz observed that despite these changes, the new German law is unlikely to reflect fully the philosophy that underlies the Directive.

John Dickie of Utrecht Universiteit then reported on the Principles of European Sales Law project, which is part of a European network on private law. Dickie introduced the aims and objectives of the project, which was ongoing, to the audience.

The final session then focused on criminal law aspects and dispute resolution. Deborah Parry of Hull University presented an overview of the different provisions of domestic criminal law which are of relevance in the context of product quality regulation. This included a discussion of the Trade Descriptions Act 1968 and related case-law. Parry also commented on the Consumer Transactions (Restrictions on Statements) Order 1976. She concluded by observing that criminal proceedings can be useful, particularly where traders have repeatedly acted to the detriment of consumers, and that the court may be able to make a compensation order for the benefit of such consumers without the need for a separate civil action.

In the final paper, Cowan Ervine of Dundee University focused on the resolution of consumer disputes. Ervine remarked that the vast majority of all complaints are not pursued through any formal structures, but rather informally by the consumer him- or herself. Ervine identified a number of reasons for consumers' reluctance to utilise such procedures: there was the stigma attached to the use of court or other formalised procedures, the fear of cost and, more significantly, the lack of information about the procedures that are available. Ervine expressed the wish that the implementation of the E.C. Directive might herald a change to the current difficulties of resolving consumer disputes.

#### COMMENT

This conference marked an important contribution to the current debate about consumer protection in the field of product quality. It also served to bring together consumer and competition lawyers for the first time to discuss these issues. Professor Chris Willett, the conference chair, expressed his delight with the discussions that followed each of the sessions and commented that this conference had offered many fresh insights into this area. Positive comments were also received from conference delegates, including the sponsor's representative, Martin Dye of Domestic & General Group plc., and non-lawyers who had also attended the conference.

The papers presented at this conference will be published in early 2002 in a special edition of the *Journal of Consumer Policy*, which will open this debate to a wider audience. It is hoped that there will be a follow-up conference to consider the significance of the relationship between competition and consumer law.

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