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GROUP LITIGATION: PAST, PRESENT AND FUTURE

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INTRODUCTION

In his latest book 'Lawyers and the American Dream'[1], in which he describes this Law School as 'Britain's leading centre of litigation scholarship', Stuart Speiser describes how, 40 years ago in a New York courthouse, he argued the lawsuit arising from the aviation disaster when a Panam flying boat 'Yankee Clipper' crashed on its approach to Lisbon airport. His absorbing book charts how and why disaster law has since then developed in the USA and its influence worldwide. As occupier of his Chair I wish in this address to discuss how, over a shorter period, disaster law has developed in the UK and whether, as part of our tort law, which is part of our common law, its development has kept pace with the legal and social needs of the community. It is a privilege to be able to do so here in my home town in the excellent Law School of Nottingham's new University in this inaugural lecture which I give in honour of Stuart Speiser, the American trial lawyer whose scholarly practise of tort law has educated and inspired many other litigators around the world.

The good news is that in the UK there has been no major disaster involving death and personal injury since the sinking of the 'Marchioness' 3½ years ago but when disaster does strike the legal process is expected to provide full redress. So in the shadow of the dreadful sequence of the disasters of the late 1980s there has developed a new area of jurisprudence, described by some as disaster law, requiring new and imaginative legal procedures and an awareness of the international perspective. The bad news is that, despite the progress that has been made the legal system is not always adequate in providing the remedies the victims reasonably seek.

DISASTERS ALWAYS HAPPEN TO SOMEONE ELSE

What do we mean by a 'disaster'? A conference on disasters at Bradford University produced six different definitions:

1. **Shorter Oxford Dictionary:**
   'Anything ruinous or distressing that befalls; a sudden or great misfortune or mishap; a calamity'.

2. **Chambers 20th Century Dictionary:**
   'A sudden and great misfortune'.

3. **Longman's English Dictionary:**
   'A sudden or great misfortune, especially a sudden calamity bringing great damage, loss or destruction'.

4. **The Cranfield Disaster Preparedness Centre:**
   'Any situation resulting from natural or man made catastrophe demanding total integration of the rescue, emergency services and life support systems available to those responsible for the affected areas together with the communication and transportation resources required to support relief operations'.

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[1] 'Lawyers and the American Dream'. Stuart M. Speiser. Blackstone Press Ltd. 1992.

5. 'A situation arising with or without warning, causing or threatening death, injury or serious disruption to normal life, for numbers of people in excess of those which can be dealt with by the public and social services operating under normal conditions and requiring the special mobilisation and organisation of those services'.

6. 'Any incident where there is one more casualty than the emergency services can cope with'.

Any of these definitions can adequately cover the obvious type of 'instant' disaster, typically a transport disaster which all of us, as we travel, believe will always happen to someone else. On the early evening of 18th November 1987 the eminent lawyer Sir Louis Blom-Cooper QC gave me a lift in his car to King's Cross station, saving me the crush and rush of a journey on the tube. My train home to the North was late so I joined the queue on the forecourt of the main line station. Suddenly I found myself engulfed in a thick cloud of toxic black smoke billowing from the stairway to the underground. Like the other commuters I ran into the Euston Road with choking throat and stinging eyes through which I witnessed the horror as the incredibly courageous firemen tried to rescue the victims of the King's Cross Disaster. In over 20 years of legal practice, obtaining compensation for accidental injury and loss of life, always trying to be a dispassionate lawyer but also trying to understand what the client has really suffered, that 'near miss' may have provided me with an unwelcome but useful insight into the feelings of disaster vicitims. No doubt all of us have our stories of narrow transport escapes but the less obvious arena for disaster is sometimes described as the 'creeping' disaster, namely the onset, often gradual, of a broadly common type of injury, caused by the same or similar product or process, to a sufficiently large number of people that collectively the problem assumes diastrous proportions and requires a legal approach similar to an instant disaster. You will recall that the shorter Oxford Dictionary defined a disaster as 'anything ruinous or distressing that befalls', and thus contemplates the creeping disaster situation, typical examples being the claim of the Thalidomide victims or the haemophiliacs rendered HIV positive following blood transfusions of contaminated Factor 8.

The modern method of managing a disaster case is now described as group litigation or a group action in which, because of the high expense, many plaintiffs band together to share the costs that might be too high for a single plaintiff to bring the case alone. The creeping disaster poses particularly difficult problems in this area. To address these and other issues I have divided this lecture into six parts:

1. **Disaster lawyers — attitudes and perceptions.**
2. **The victims — their expectations.**
3. **The power of the media.**
4. **Funding.**
5. **Managing group litigation.**
6. **Damages.**

1. DISASTER LAWYERS — ATTITUDES AND PERCEPTIONS

Although the clients' interests rightly take priority it makes sense on this occasion to examine the role of the lawyers first, against which background the expectations of the clients can then better be judged. In his new book Stuart Speiser claims that one of the parts of the American dream is 'equal justice' and that lawyers who are prepared to fight for equal justice are legitimately pursuing that dream. In his punchy American prose he refers to such lawyers as 'equalisers', prepared to engage in 'kicking in rotten doors', without which the Civil Rights movement would not have succeeded, Ralph Nader would not have been able to change the attitude of the motor vehicle industry towards passenger safety, the strong American emphasis on accountability for one's actions would be much diminished and a TV programme called LA Law would have no script. I am not aware of any British equivalent of the American dream nor of any door kicking crusade by plaintiff lawyers over here. But what has developed, partly from learning the forensic and case management skills of our American cousins and partly from the need to provide plaintiffs with a level playing field in major litigation, is the willingness of an increasing number of British lawyers to act in complex cases of all kinds, including and perhaps especially disasters.

Although we do not share the American dream, it is certain that attitudes towards plaintiff litigation here are affected by transatlantic influences such as the supercharged fears that we are engaged in visiting the alleged worst excesses of American litigation on this country and throughout Europe. In a speech[2] last year the President of the Zurich Insurance Company said:

> 'The US legal system is out of control. It is grossly unfair to entire classes of defendants and we are exploited by the self interests of large groups ... It is detrimental to the public and I would really vote for a very strong position in changes to the legal and civil law of the US ... I am afraid that with the European Community effort over the next 10 to 15 years to a harmonisation of European law we will see the worst parts being taken over of civil law that exists in the US. I see this as a potential time bomb.'

Such an attack by insurers on lawyers on both sides of the Atlantic is no surprise when the pay outs to victims of creeping disasters like asbestosis and instant disasters like Piper Alpha have apparently far exceeded the risk levels and dented the profits forecast by the troubled insurance market at Lloyd's. However the truth is that these commercial losses are not the fault of the victims who are injured nor of their lawyers who are simply doing their job. And yet the bashing of American lawyers was adopted as a political weapon by former Vice-President Quayle who in the early stages of the recent election campaign[3] claimed that:

> 'In 1989 alone more that 18 million civil suits were filed in this country — one for every 10 adults — making us the most litigious society in the world'.

However, research by the American Bar Association (which represents a wide range of litigators, not just the plaintiff bar) showed that in fact:

> 'The 18 million figure includes every small claims complaint and every divorce. In 1989 the number of tort cases filed in the State Courts (which handle 98% of US litigation) was 447,374 plus 469,494 contract cases and 436,148 property disputes — a total of about 1.4 million cases that could properly be described as "law suits" '.

[2] Speech to the combined annual conference of the American Insurance Association by Rolf Huppi, President and Chief Executive of the Zurich Insurance Co. reported in Lloyd's List 17.1.92.

[3] Prepared remarks by the Vice-President to the Annual Meeting of the American Bar Association, Atlanta, Georgia 13.8.91.

There is little doubt that criticism of lawyers in America has influenced opinions here, as well as the visible damage done by the handful of 'ambulance chasing' American attorneys who flew into town in the aftermath of the 1985 Manchester air disaster, advertised in local papers and engaged local public relations agents to knock on the doors of bereaved relatives, encouraging them to sign up as clients at contingent fee levels which were quite unconscionable. Such behaviour is not typical but it cannot be condoned and is especially objectionable in the immediate aftermath of an instant disaster or in the early stages of a creeping disaster when the legal profession must be particularly sensitive towards its own standards and towards the expectations and feelings of all those involved. However, today, even in this country, encouraged by the general deregulation politics of the 1980s and the relaxation of restrictions on advertising, solicitors are much more aggressive in competing for instructions and use marketing methods which would at one time have been unthinkable. Like other businesses, solicitors now not only mailshot their own clients but also clients of other firms as well as people who are clients of no one at all. After a recent foreign transport disaster involving British citizens one firm of solicitors sent an unsolicited, polite and carefully worded letter offering their services to the victims and their relatives. Further, advertising for clients who may be affected by a creeping disaster is becoming almost common, often in the wake of media reports of a case which has already succeeded and occasionally in imaginative publications. Great care has to be taken not to raise in the minds of the public expectations that cannot be fulfilled. I anticipate that there will be different views about this sensitive and controversial area of the way that solicitors behave and although we do not advertise I do not cling too tightly to the moral high ground because I am aware of one successful publicity campaign in this country involving compensation for many badly injured women who came forward as a result of advertisements.

The Dalkon Shield was an intra-uterine contraceptive device, crudely called 'a coil' manufactured by A. H. Robins of Richmond, Virginia U.S.A. It was worn by millions of women around the world including many thousands of British women. It caused dreadful injuries including infertility. In 1985 following a series of heavy punitive damage awards by juries around the United States the Robins company sought a financial re-organisation under the protection of Chapter 11 Bankruptcy. Under the direction of the Court a deadline was fixed for claims to be filed and a world wide advertising campaign was mounted. Unlike the prime time TV advertisements used in the USA, in this country the news of the right to claim was mainly reported in consumer news articles which many women missed. The Dalkon Shield had been supplied widely by National Health family planning clinics, and one of the 14 Regional Health Authorities, the West Midlands, took the responsible view that because it had supplied and fitted Dalkon Shields to many of its women patients it had a duty also to advise them of their right to file a claim for compensation by the deadline date. Entirely on its own initiative the West Midlands RHA advertised in local Midlands newspapers with a cut-out coupon which to their surprise was completed by hundreds of women many of whom have subsequently received compensation. If there is a distinction to be drawn in that case it is that the advertisement was by a Health Authority concerned for its patients as opposed to a solicitor seeking clients.

If attitudes towards advertising have changed so have the attitudes of plaintiffs' lawyers to each other when they are thrown together to represent a group of clients following a disaster. Most litigators are by nature competitive, (sometimes competing with their own egos quite apart from doing battle with the lawyers on the other side) and they like to run their own cases. The formation of a solicitors Steering Committee to represent a group of other solicitors and their clients has become a common feature of disaster litigation, the

aim being to formulate and prosecute the joint cause with one strong voice on behalf of all the plaintiffs, just one of the benefits being to avoid the cost of duplicated effort. Working alongside other members of the profession, both solicitors and barristers, can be a pleasurable experience but it also has its problems. The co-ordination of sometimes large numbers of other lawyers and, through them, their clients' claims by frequent bulletins and newsletters is not always the most effective method to communicate and engender co-operation. The cost of assembling the group for a meeting to discuss and inform them about the litigation may be prohibitive. A Steering Committee shoulders enormous responsibility and can sometimes be caught in the crossfire of the sheer impossibility of producing answers that consistently meet all the disparate interests and expectations of the many it represents. Moreover, the apparently sensible arrangement of having a Steering Committee, which is not a device that the Court can authorise, may be disputed by the defence, either on the basis that it is not necessary at all or that it is too large. Those who agree to serve on a Steering Committee may not know until the conclusion of the case whether they will ever be properly remunerated for the immense work often required.

The number of firms involved in disaster litigation whether for plaintiffs or defendants is fairly small and they know each other pretty well. Although it may be said that the ability to organise plaintiffs and use the media may have been the initial province of plaintiffs' lawyers the defence firms have been quick to learn. They are pro-active in marketing their ability to deliver a speedy legal response to an instant disaster and whenever necessary they are quick to co-ordinate legal activity on their side, along similar lines to the Steering Committee approach. There is evidence that their current approach is to adopt attack as the best form of defence particularly if they represent wealthy multi-national corporations prepared to finance resources that cannot be matched even by the co-ordinated arrangements of a large group of plaintiffs financed by legal aid. The latest example of aggressive defence is the preemptive strike by the defendants to prevent the plaintiffs from being granted legal aid at the outset of a case. After seeing advertisements by solicitors and reports in the press about the proposed smoking litigation solicitors on behalf of the tobacco manufacturers lodged detailed written representations with the Legal Aid Board giving reasons why legal aid should not be granted and they were successful. Such tactics are new and not against the rules but can there be a fair balance when the defendants who have all the evidence on one side use it to prevent the plaintiffs obtaining legal aid even to investigate and obtain their own evidence on the other side? I worry about a lack of evenness in this area of the playing field.

2. THE VICTIMS AND THEIR EXPECTATIONS

I have already mentioned how important it is to understand what the victims have suffered in the disaster and how they feel about the legal process they have to endure afterwards. In the preface to his book Stuart Speiser refers to the 1911 publication of the 'Devils Dictionary' by Ambrose Bierce who described litigation as:

> 'A machine which you go into as a pig and come out as a sausage'.

My general impression of disaster victims is that they frequently view the legal system as impotent and inefficient in delivering both compensation and the answers to the many questions they have to ask. In the case of an instant disaster, apart from compensation, there are at least five other questions, some or all of which each victim will wish to have answered:

1. A detailed investigation of the facts to establish how the disaster occurred.

2. How each deceased met his or her death.

3. How the disaster could have been avoided and how to improve safety for the future.

4. The assessment and apportionment of blame.

5. The penalising of the culpable.

In November 1990, in an article in the Law Society's Gazette[4], I argued that the nature and sequence of inquiries held in the aftermath of the different disasters of the late 1980s had been so varied that there was no discernible pattern that could be described as a system at all and that, because of this, the trauma of the disaster itself seemed to me to be exacerbated by further trauma to the victims as they battled to obtain answers to these five questions. In the Spring of 1991, in a Radio 4 series 'Shock Waves', psychologists discussed research that actually showed that in some cases the aftermath of a disaster is even more distressing than the first moments and that the most commonly voiced complaint was about the legal and official procedures in the aftermath.

The number and nature of the enquiries that may come into operation vary according to the type of disaster. The possibilities include a public inquiry, an internal inquiry, specialist inquiries into aviation maritime and rail accidents, an inquest, and a criminal investigation that may or may not lead to prosecution. The same radio programme interviewed Sir Patrick Mayhew QC, the then Attorney General, who announced that the Government had set up a working party to look at ways of reforming the legal machinery of post disaster inquiries. He said:

> 'There is a very real understanding that many people think it is terribly inefficient, not to say oppressive, to have so many investigations that sometimes happen one after the other in a series.'

Nearly two years later that working party is still at work and has yet to produce proposals for consultation. Every few months I write to its Secretary in the Home Office enquiring about progress, urging that improvements to the present system are put in place before another disaster happens. I understand that the possibilities being examined include combining the inquest with a public inquiry, a partial solution that found some favour with Sir Patrick Mayhew in interview. A combined hearing could be achieved either by widening the limited scope of the Coroner's inquest or, preferably, by widening the public inquiry to include the inquest at which the inquiry Judge could be given powers of a coroner or could sit with the coroner and with professional assessors to assist on technical matters.

However, it can be argued that such a wide form of inquiry would be unworkable and unjust because it would require the simultaneous examination of evidence to determine issues of both civil and criminal law where the burden of proof is different and the problem of double jeopardy could arise. If the answer to question 5 'how to penalise the culpable' requires application of the criminal burden of proof this is undoubtedly a problem but could perhaps be overcome by introducing into our system a civil fine based on a standard of proof that I have heard described as higher than the civil standard but lower than the criminal standard.

[4] 'Zeebrugge: The Way Forward'. Michael Napier. Law Society's Gazette. 7.11.90.

Perhaps the most worrying case in this vexed area of inquiries is the most recent disaster, the 'Marchioness' where there has *still* been no full and *open* inquiry at all, to the great upset of some of the victims' families. On 23rd January 1993 the Admiralty Judge Mr. Justice Sheen wrote a letter[5] to the Times:

> 'The loss of the Braer had serious consequences. Fortunately these did not include any loss of life. Those who were affected have been promised compensation. In due course life will go on as before. A public inquiry with wide terms of reference has been ordered.
>
> In August 1989 the 'Marchioness' sank in the river Thames with the loss of 51 lives, mostly young. For the bereaved and others affected life will never be the same again. Naturally they wanted a public inquiry but it was not thought appropriate to hold one. Have we got our priorities right?'

My proposal that a High Court Judge should head a wider public inquiry after a disaster is actually in keeping with the current procedure adopted in the handling of group actions. As I will show later the early judicial oversight of the civil aspects of compensation in group actions is now well established particularly in respect of creeping disasters. Although it still has its problems it would perhaps be consistent to extend this procedure to the handling of transport and other instant disasters by placing a Judge or someone equally able to take charge of the entire case at the outset. It is worth noting that the Consumer's Association has called for a permanent Disaster Court that would specially deal with all disaster cases.

One of the consumer words of the moment is 'accountability' which is at the root of some of the questions the victims want answered. The criminal process has been singularly unsuccessful in attempting to hold criminally accountable those who were charged and acquitted following the 'Marchioness' and 'Herald of Free Enterprise' disasters. As a helpful contribution to the debate the Herald Families Association, through it own charitable trust, has just produced an independently authored book entitled 'Zeebrugge: Learning from Disaster; Lessons in Corporate Responsibility[6]'. It is a well researched publication and claims that;

> 'There is a tendency to blame the legal system for failing to deter companies from putting profits before safety or from tolerating sloppy management in situations which unarguably call for the highest standards of care. However, the ineffectiveness of English law in dealing with corporate crimes of violence shows up basic flaws in the governments of both companies and regulatory bodies ... The most important lesson to be learned from Zeebrugge and other disasters is that many organisations lack the leadership structure and environment that encourage people to learn from mistakes. Changes in management attitudes would not only help to prevent disasters like Zeebrugge but would reduce the number of individual deaths or injuries caused each year by either negligent or reckless corporate behaviour'.

In the United States corporate accountability is addressed by the ability of juries to award punitive damages, which I will deal with later but to illustrate the accountability point, I refer again to the Dalkon Shield story described by award winning author Morton Mintz, a Washington Post journalist, in his book 'At any Cost[7]':

[5] Letter from The Honourable Mr. Justice Sheen to the Times 23.1.93.
[6] Zeebrugge: 'Learning from Disasters'. Stuart Crainer. Herald Charitable Trust 1993.
[7] 'At any Cost'. Morton Mintz. Pantheon Books 1987.

'The story of the Dalkon Shield lays bare the perils inherent in a system that allows corporations to profit even if they put human beings at risk. The Dalkon Shield created a disaster of global proportions because a few men with little on their minds but mega bucks made decisions, in the interests of profit, that exposed millions of women to serious infection, sterility and even death. The problem is not simply that corporations have no conscience, but that they are endowed by law with rights beyond those allowed to individuals. Corporations too often act without compassion and, no matter what damage they cause, without remorse. Even worse, they cannot be held accountable, as people can be. You cannot lock up a corporation or sentence it to hard labour or the electric chair. And too often the law fails to look behind the corporate veil, to prosecute the individuals who make decisions and act in the name of the corporation'.

You may regard those as strong words descriptive of American society today, but not so, because Morton Mintz looks back 80 years to the words of the American author Edward Ross who in 1907 wrote in 'Sin & Society':

'The grading of sinners according to badness of character goes on the assumption that the wickedest man is the most dangerous. This would be true if men were abreast in their opportunities to do harm. In that case the blackest of them would be the worst scourge of society. But the fact is that the patent ruffian is confined to the social basement, and enjoys few opportunities. He can assault or molest, to be sure but he cannot betray. Nobody depends on him, so he cannot commit breach of trust — that arch sin of our time. He does not hold in his hand the safety or welfare or money of the public. He is the clinker not the live coal; vermin, not beast of prey. Today the villain most in need of curbing is the respectable, exemplary, trusted personage who, strategically placed at the focus of a spider web of fiduciary relations, is able from his office chair to pick a thousand pockets or imperil a thousand lives. It is the great scale high voltage sinner that needs the shackle'.

Such strong views on morality and corporate accountability may find little favour here but there are some signs of acceptance that effective sanctions are required when a corporation behaves recklessly. David McIntosh of the well known defendant firm Davies Arnold Cooper has produced a draft Corporate Accountability Bill which includes some of our own ideas and contains a number of useful provisions including the power to disqualify directors and the imposition of an annual safety audit. As far as I know it has met a silent response from the Government.

It also has to be acknowledged that when Judges are appointed to a public inquiry they are sometimes prepared to express strong views about responsibility for what happened. Mr. Justice Sheen in the Zeebrugge Inquiry and Lord Justice Taylor (now Lord Chief Justice) in the Hillsborough Inquiry both expressed some highly critical views. But they hardly compare with Judge Miles Lord, presiding over one of the main Dalkon Shield trials in the Minnesota District Court, when he called three of the Robins Corporation directors before him and castigated them for defending rather than recalling the Dalkon Shield[8]:

[8] 'Lord's Justice'. Sheldon Engelmeyer & Robert Wagman. Anchor Press Doubleday 1985.

> 'It is not enough to say 'I did not know, it was not me, look elsewhere'. Time and again, each of you has used this kind of argument in refusing to acknowledge your responsibility and in pretending to the world that the chief officers and directors of your gigantic multi-national corporation have no responsibility for the company's acts and omissions ... Mr. Robins, Mr. Forrest, Dr. Lunsford you have not been rehabilitated. Under your direction, your company has in fact continued to allow women, tens of thousands of them, to wear this device — a deadly depth charge in their wombs, ready to explode at any time. The only conceivable reasons you have not recalled this product are that it would hurt your balance sheet and alert women who have been harmed that you may be liable for their injuries. You have taken the bottom line as your guiding beacon and the low road as your route. This is corporate irresponsibility at its meanest'.

In summary, whether they seek answers to the five suggested questions, or compensation, or both, disaster victims often feel that they receive a raw deal and that they are the last in line of the many considerations that follow a disaster. The overall impact on their lives is significant. In a recently published study of the social work issues after the Hillsborough disaster 'Making a Difference' the National Institute for Social Work said[9]:

> 'The disaster had an impact on people's lives in five main ways — practically, emotionally, on behaviour, on relationships and on work'.

It is partly because of this impact that following an instant disaster it is usual to see the development of a family action group. Today there is also 'Disaster Action' which operates very usefully as the co-ordinating body of several family action groups. It is the self-help benefit of such groups that helps to ease the minds of victims who cannot accept why they have to wait for compensation when, within a week or two of an aviation or maritime disaster, the insurers usually pay out in full the value of the loss of the aircraft or the hull of the ship and the lost cargo. It is hardly surprising that if they feel frustrated in their elusive search for justice, rightly or wrongly, the victims blame the legal system.

3. THE POWER OF THE MEDIA

Following a disaster the power of the media has to be used with great sensitivity. Its power can transform a dreadful tragic accident into one perceived as a disaster. When the four school boys were swept to their deaths from the rocks at Land's End in 1985 a nearby helicopter winched a rescued girl to safety and this was remarkably captured live by a TV crew so that the rescue scene became national news on a Bank Holiday Monday and a dreadful tragedy became well known by the public as a disaster.

The media is always quick to look for the legal angle in the aftermath of a disaster, sometimes within hours but usually a day or two afterwards when the main news story of the disaster has been told. The reporters will seek out any difficulties that the victims may have to face, especially in recovering compensation. This happened in the 'Herald of Free Enterprise' when the media very quickly discovered that under International Maritime law compensation was limited to £38,000 per victim. Media comment about that obvious

[9] 'Making a Difference? Social Work after Hillsborough' — Tim Newburn. National Institute for Social Work 1993.

injustice undoubtedly influenced P & O to waive their limitation rights and agree to a compensation package that exceeded their legal liabilities. But the media can also have a negative effect. A day or two after the 'Marchioness' disaster a London evening newspaper, following wholly inaccurate suggestions that the boat trip had been a party for rich 'yuppies', suggested that there would be fewer plastic credit cards and crocodile shoes in evidence on the King's Road. Such unsympathetic reporting may have influenced the public willingness to donate to the 'Marchioness' Disaster Fund which did very poorly for a disaster of its scale. The media duty to behave responsibly was recognised by the Australian Law Reform Commission in its study on grouped proceedings in the Federal Court[10].

> 'Justice for those who have suffered wrong and those who have allegedly committed a wrong should not have to depend on the actions of unions or interest groups or the whims of reporters and editors'.

Other than news reports there are often investigative new documentaries seeking the truth behind a disaster, sometimes very skilfully, but there are signs that the media may sometimes go too far. Let me give you two examples, one from the United States and one from the UK. Following the recent punitive damages award of $105 million by an American jury to the family of a man who died in a fire following a crash in a General Motors truck fitted with allegedly defective fuel tanks, the American News Magazine programme 'Dateline NBC' examined claims that some GM pick-up trucks were likely to explode if struck on the side because the fuel tanks were fixed outside the chassis. In their report they showed a truck being hit and bursting into flames. General Motors launched an investigation and after a search of 22 scrap yards found the actual trucks used in the test. In the back of one of them was a model rocket engine and the test on the fuel tank which had been allegedly punctured showed that it was intact. An expert fireman said that the alleged massive fire ball engulfing the truck was in fact a 15 second blaze started by a toy rocket used as an igniter. The report had apparently been 'staged' and not surprisingly General Motors launched a highly publicised counter-attack as a result of which NBC TV presenters had to make profuse public apologies or as the Americans call it 'eating crow'. It is reported that the case has started to turn the tide against investigative journalism. The Wall Street Journal argued that legal liability cases had created a huge appetite for unbalanced melodramatic television on 'breast implants, whooping cough vaccine, high tension wires, children's pyjamas, computer screens, step ladders, lawn mowers, aspirin bottles, nuclear weapons tests, Christmas toys, contraceptive devices, etc.' and said that this was 'a journalist disaster that had been waiting to happen for 30 years[11]'. In a less dramatic way over here there are early signs of weariness with consumer programmes that focus on unsafe products. Such programmes are valuable but The Sunday Times TV critic Craig Brown described a recent 'Watchdog' programme as 'less a consumer affairs programme than a peak time therapy session in which malcontents and paranoids the world over can air their grumbles while the presenters go 'there, there' and call for immediate Government action'. Facetiously he wrote:

> 'Did your hairbrush catch in your hair this morning? Well a clear warning should be printed on each brush. When you attempted to walk on the ceiling last night did you find that you fell over and hurt your head? Well research shows that this is a growing problem affecting up to 75% of all households and surely it's high time that clear safety guidelines were printed by law on every ceiling in residential properties[12]'.

[10] Grouped Proceedings in the Federal Court. Report No. 46. The Law Reform Commission Commonwealth of Australia. Australian Government Publishing Service 1988.
[11] 'American TV pays heavily for blunder'. James Adams. The Sunday Times 14.2.93.
[12] 'Warning Sickness' Craig Brown. The Sunday Times 14.2.93

The 'Watchdog' programme had investigated the dangers of the breakfast cereal 'pop-tarts' claiming that when a pop-tart pops it is so hot that the bleary eyed breakfasters can burn themselves. Injured breakfasters were in the studio, there was a laboratory testing of the temperature of pop-tarts and calls for compensation. The TV critic thought 'Watchdog' had gone too far and, if his view reflects changing public attitudes, it is a worry because in my view responsible consumer programmes play a valuable role and many of the products complained about by the Wall Street Journal have been proved to be dangerous.

4. FUNDING

As disaster litigation has developed so has the need to provide funding for the potentially considerable expense involved. The Legal Aid Board recognised the need to control the use and allocation of its funds and last year introduced new multi-party regulations that require a firm or firms wishing to pursue a group action to tender for a contract[13]. The Board's stated aims are to:

1. Ensure against the costs of generic work in large actions being duplicated.
2. Ensure that generic work is conducted by firms with appropriate experience, expertise and back-up.
3. Ensure the actions are managed effectively.
4. Ensure claimants are kept informed and understand what to do if they are not satisfied with the service they are receiving from the contracted or local firms.

These new regulations are welcome, although nearly a year after their introduction no contract has yet been issued. In fact the current legal aid news is that the Lord Chancellor is determined to slice the annual legal aid bill by savagely cutting the numbers eligible as well as threatening to reduce the rates paid for work done. And yet the figures show that in 1991 personal injury claims cost only 1.6% of the total legal aid spend of £823 million. The main reason for this is that the Legal Aid Board substantially recovers is outlay when, as usually happens, personal injury cases succeed. If an expensive group action fails there may be a large bill to pay but a grant of legal aid is never a guarantee of success. In the main part of the Opren case the bill for the plaintiffs' preparation of the case was considerable but when settlement was reached the defendants paid the costs and the Legal Aid Board recovered its outlay.

One of the current group actions is the complex Benzodiazepine litigation where 5,000 people with a varying range of value of cases are seeking compensation for injuries caused by alleged addiction and dependency to tranquillizer drugs. The Judge assigned to control the group action is Mr. Justice Ian Kennedy who has queried the economic viability of the litigation. Is the sum total of damages of all claims likely to be recovered, if the case succeeds, large enough to justify the case proceeding when balanced against the overall substantial cost of the litigation when it is being funded by the public purse through legal aid? This cost/benefit balance always has to be measured in litigation but in a group action the problem is that it is impossible to calculate that ratio at the outset and as more plaintiffs join or drop out as the case proceeds the ratio is constantly changing. In this case there is also another example of aggressive defendants using costs as a weapon by applying to recover costs personally from a few firms of solicitors and their barristers for pleading cases where the evidence is said to be weak. There has recently been a two week trial on this point alone which is one of substantial importance to any solicitor or barrister who advises a client to commence litigation.

[13] The Civil Legal Aid (General) Regulations 1.4.92.

As legal aid eligibility becomes harder to obtain more people will fall into the trap described by the Consumers Association as the 'MINELAS' meaning the category of people who are 'middle income not eligible for legal aid services'. This is a rapidly increasing section of society and unless there is expansion of legal expenses insurance or unless we have real contingent fees the MINELAS will be unable to gain access to justice, particularly in disaster litigation where, even on the costs sharing basis of a group action, the costs may be prohibitive. By real contingent fees I mean the American style. When we have been involved with American lawyers in disaster cases the contingent fee system has been of great benefit to our clients who like to be told that they need only pay their lawyers' fees if the case succeeds. The Lord Chancellor's proposals for a watered down version of contingent fees here (known as 'conditional fees', now in the form of draft regulations) is a small step forward but simply will not work as long as we have the costs system which is based on the winner of the case being paid costs by the loser. A plaintiff might be prepared to enter into a contingent fee contract with his or her lawyer in respect of their own legal fees but would not want to risk payment of the defendants' legal fees if the case is lost. Some defendants have even suggested that in that situation, if the case is unsuccessful, the defendants' costs should be paid by the plaintiff's lawyer. If this provision existed in America the contingency fee system would disappear overnight. Reflecting on our experience in the Dalkon Shield litigation it is probable that a very large proportion of the British women we represent would not have qualified for legal aid had it been necessary to bring their claims to Court in this country. They have only been able to recover compensation through the American system as a result of contingency fee arrangements with American lawyers.

To conclude on funding there is one decision that holds out some hope for the plaintiffs who seek legal aid to take on a large defendant. In the later stages of the Opren litigation the Nottingham Legal Aid office was challenged on judicial review. In his decision Mr. Justice Roch said[14]:

> 'Of course the cost of the litigation against the amount which would be recovered in a successful action was one factor and a very important factor for the Secretary of the Legal Aid Committee or the Area Committee on Appeal to take into account under Regulation 78. But in his Lordships Judgment it should not be the sole factor or necessarily the decisive factor. Were that to be so then all the claimants in the Opren litigation should have had their legal aid certificates withdrawn as soon as the probable cost of that litigation was known because it was clear that the estimated costs of pursuing the claims to judgment was many times greater than the global value placed on all the claims of the qualifying plaintiffs. If that were the correct application of Regulation 78C it would place multi-national corporations in the position of advantage vis-a-vis individual claimants which in his Lordship's opinion such commercial concerns ought not to enjoy.'

[14] *R v Legal Aid Area No. 10 (East Midlands) ex parte McKenna.* Times 20.12.89.

5. MANAGING GROUP LITIGATION

Group litigation commonly includes the following features:

1. Appointment of a Judge to control the action.
2. A need to define the group.
3. A trial of common issues.
4. Simplified pleadings.
5. Discovery of documents to be given once.

The appointment of a Judge to control the progress of the case to trial first occurred in the Opren litigation. The Judge's role is not unlike the judicial intervention approach in the American system although a fundamental difference is that there the decision on the outcome at trial is decided by a jury and not by the Judge. The definition of the group is necessary so that the plaintiffs can band together and share the costs between an identified number of litigants. The defendants may also look for a defined group arguing that they cannot defend or even settle the case until all the issues are known. Does this mean that all the individual cases have to be fully pleaded before the main issues of liability can go to trial? This is what has happened in the Benzodiazepine litigation but where large numbers are involved the cost of pleading individual cases can be very substantial when it may be less expensive to try the issues of liability first. It is a difficult chicken and egg problem but one that is so central to the future prospects of grouped plaintiffs that it must be resolved before the costs/benefit equation of the economic viability of a group action has the effect of denying access to justice for plaintiffs who have valid claims.

The trial of common issues and a simplified pleadings approach mean that normally the plaintiffs' Steering Committee will formulate the allegations of liability in one large document known as a Master Statement of Claim making it unnecessary for each plaintiff to plead those allegations but to file a simplified pleading giving the individual details of that plaintiff's injury and its causation.

In complex litigation the discovery of documents, sometimes involving millions of pages, can be a massive task and for reasons of cost and efficiency should be undertaken only once, by the Steering Committee on behalf of the group. Even this level of discovery is expensive and modern case management techniques require that both sides should have fully up to date information technology such as document image processing which copies documents directly into a computerised litigation support system that can reproduce the document on a VDU for inspection.

The development of group action case management techniques has been gradual and, if it is right to suggest that disaster cases have their own body of case law, it is very much in this procedural area that the authorities are to be found. It is really since the problems highlighted by the Opren litigation in 1987 that the Courts have addressed the difficulties of group actions leading to the 1991 publication of the 'Guide for Use in Group Actions[15]'. In the foreword to this guide the Lord Chancellor referred to 'the difficult area of group actions'. His words were based not merely on the fact that, by definition, a group action will be more difficult than a single action but they were also based on research. The Lord Chancellor's Review Body on Civil Justice, after deliberations lasting four years covering the entire scope of civil litigation, reported in June 1988[16]:

[15] 'Guide for use in Group Actions'. Supreme Court Procedure Committee — May 1991.
[16] The Lord Chancellor's Review Body on Civil Justice (CM394).

'During the course of the Review it became apparent that changes might be needed in the arrangements which govern claims by groups of plaintiffs. It was suggested that this might be so in the housing field for cases where a number of tenants had a similar complaint against a particular landlord. Problems can also arise where large numbers of claims arise out of a disaster or out of the use of an allegedly defective product. Such cases are often complex protracted and expensive to deal with. It may well make sense to select one or more individual claims and to proceed on the basis of these, on the understanding that the other claimants join in the risk of the litigation and can hope to enjoy the fruits of the outcome. Formidable problems can however arise in financing those cases which are selected to represent the class.

English procedure already provides for what are called representative actions by or against members of a group. In such cases the members of the group must have the same interest in the same proceedings. The procedure is also subject to the important limitation that it does not apply to claims for damages but only to other forms of relief.

Should the present limits on such proceedings be eased or removed? There appears to be a wide range of overseas experience not all of which suggests that a different system for class actions would be generally advantageous. Nevertheless the time has come when the subject should be looked at in the round as suggested by Donaldson M.R. in *Davies (Joseph Owen) v Eli Lilly & Co. & Others* (1987)[17]. This Review has not had the opportunity to obtain detailed evidence of foreign systems for class actions, nor has it consulted on the matter. It is clear that fundamental problems can arise over funding and the current Legal Aid Bill contains powers to modify legal aid arrangements for such cases.

The Lord Chancellor is invited to institute a separate study by one of the law reform agencies of the case for extending the availability of representative or class actions, or establishing other procedures, to be available in cases where there are large numbers of litigants whose claims or defences have a common basis. The study should extend to the funding of such cases'.

The response to this and other exhortations by the judiciary was the Guide which says in its introduction:

'Procedural difficulties in bringing group actions have caused much concern. Calls for law reform have followed. If any changes are to be made in the law it will take some time for those changes to be formulated and brought into effect ... This guide is in no way concerned with possible changes in the law but is more concerned in ways in which existing procedures can be adapted to new demands, the traditional route for progress in the common law ... It is to be hoped that the ingenuity of practitioners and judges will produce new adaptations of existing procedures not thought of by the authors of this guide'.

The Guide has five chapters:

1. Organising the parties
2. Choice of forum and procedure
3. The forms of procedure
4. Financing the action
5. Judicial control of preparations for trial and of the trial.

[17] Davies v Eli Lilly & Co. & Others (1987), 3 All ER 94 at para. 96(h).

ORGANISATION

As regards the organisation of plaintiffs the Guide says:

> 'Plaintiffs may be able to overcome prohibitive costs problems by organising themselves into groups. The Law Society, in particular, will be ready to help in forming a Solicitors Group. The Solicitors Group may elect a Co-ordinating Committee and a lead solicitor. Their authority should be carefully defined. A lay interest group may also provide valuable help'.

Indeed the lay interest or 'Action' group often has a vital part to play. This is reflected in the Guide which says:

> 'The role of the lay interest group is not to be under-estimated. Such groups are often found by lay people affected by disasters. Lawyers will probably find it helpful both to themselves and to their clients to encourage the continued life of any lay interest group which may be in existence and to encourage the formation of such a group if none already exists. In personal injury cases the lay clients will be able to give each other comfort to help them deal with the original stress of the tragedy which brought them together and with the continuing strain of the litigation. It will also be helpful for most of those concerned if the lay clients can discuss freely amongst each other their respective confidence in and doubts about their lawyers. It is much better that any doubts should be resolved (if necessary by the removal of weak links) rather than that clients should silently harbour possibly unfounded distrust of an adviser'.

The organisation of defendants is also included in the Guide:

> 'Solicitors acting for defendants in Group actions need substantial resources in terms of staff and computers to cope with heavy burdens in speedy collection of factual and technical evidence. It may be necessary to consider potential liability and insurance cover in many jurisdictions. The possibility of co-operation with co-defendants if only in limited areas will need to be explored'.

PROCEDURE AND JUDICIAL CONTROL

The Guide recognises that the special procedures for a 'class action' existing in some States in the USA are not found here because according to the law of England and Wales the 'class action' does not exist, and so the Courts must be flexible, as Lord Donaldson said in Opren[18]:

> *Davies v Eli Lilly & Co. & Others (1987)*
>
> 'This concept of the class action is as yet unknown to the English Courts. In some jurisdictions, notably in the United States where large number of plaintiffs are making related claims against the same defendants there are special procedures laid down enabling all the claims to be disposed of in a single action. Clearly this is something which should be looked at by the appropriate authorities with a view to seeing whether it has anything to offer and if so introducing the necessary procedural rules. Meanwhile the Courts must be as flexible and adaptable as possible in the application of existing procedures with a view to reaching decisions quickly and economically.'

[18] Davies v Eli Lilly & Co. & Others 1987 1 All ER 801
Davies v Eli Lilly & Co. & Others 1987 3 All ER 94.

This decision, alongside the Civil Justice Review, was the precursor for the Guide helped along by a number of other cases from other disasters, for example:

(i) Industrial deafness:
Horrocks v Ford Motor Co. Ltd. and related appeals (February 1990) Lord Donaldson:
'Standard Court procedures were designed for the determination of the general run of claims coming before the Courts. But, if the Courts were presented with large numbers of claims with special features in common they would devise new procedures specially adapted to such cases[19]'.

(ii) The Myodil litigation:
Chrzanowska v Glaxo Laboratories Ltd. (Myodil) March 1990 Steyn J[20]*:*
'At present English law does not permit a class action in the sense in which that expression is used in the United States. Admittedly, our law does recognise, by virtue of Order 15 Rule 12 the notion of a representative action, the objective of which is one binding judgment on common questions of a multiplicity of separate determinations. The procedure is no doubt capable of development but its present limitations are such that it cannot be used where damages have to be separately assessed in respect of different cases. It seems that representative actions for damages are not permitted. In England the parties must use the ordinary procedures, devised for the trial of single actions, to cope with the exigencies of group litigation. Moreover, there is in England nothing like the Manual for Complex Litigation, Second 1985, which gives guidance to practitioners in the United States as to the procedures to be adopted in multi-party litigation. In the Myodil litigation practitioners, and the Courts, will have the benefit of the experience gained in recent examples of group litigation, and notably of the procedures devised by Mr. Justice Hirst in the Opren litigation. If the Courts did not have the power to devise entirely new procedures to deal with such cases the system would break down entirely. That is no doubt why the Master of the Rolls recently emphasised in *Horrocks v Ford Motor Co. Ltd.* (unreported), decided on 12th February 1990, that in such cases the Court are entitled to devise new procedures adapted to the circumstances of the particular group litigation. Subject to the need to bear in mind the essential protection of the adversarial system, I must proceed on the basis that our Courts have a broad and flexible power to adopt new procedures which will promote the ends of justice ... Our system of civil justice ought, for the benefit of parties involved in group litigation, to prescribe at least in outline the procedures to be adopted. The nineties may well witness an increase in group litigation. It is to be hoped, therefore, that this problem will be investigated and addressed ... Possibly, a gradualist approach is the best way forward in this complex area; instead of promoting very complex primary or subordinate legislation a short Guide to Group Litigation, backed by a Practice Direction issued by the Lord Chief Justice, could be published. The aim of such a guide would not be to produce a procedural strait jacket but to set out in outline the alternative procedures which are available, and the range of the Court's powers'.

[19] *Horrocks v Ford Motor Co. Ltd.* Times Law reports 15.2.90.
[20] *Chrzanowska v Glaxo Laboratories Ltd.* Time Law Reports 16.3.90.

(iii) The Hillsborough disaster:
Chapman v Chief Constable of South Yorkshire Police & Others (Hillsborough) March 1990 Steyn J[21]*:*
'It is complex multi-party litigation. In such litigation the sporting theory of justice, or what Professor Wigmore called the 'instinct to give the game fair play' ought to have no place. In such litigation, in the public interest, the concept of a party being *dominus litis* ought, as far as possible, to be subordinated to case management techniques controlled by the Court. Subject to preserving the protection offered by the adversarial system, the Court ought to control the pace of the litigation.'

(iv) The Zeebrugge Disaster:
Crocker v P & O European Ferries (Dover) Ltd. ('Herald of Free Enterprise') December 1990. Mr. J. Peppitt QC[22]*:*
'Mr. Brennan on behalf of the 64 plaintiffs has submitted that a number of issues common to all 64 cases could expediently be resolved under the umbrella of a lead action such as is proposed. In particular, he argues, that in this as in all cases of so called nervous shock the Court will have to determine the question of proximity in two aspects. Firstly, was the particular plaintiff within the category of family relationship entitled to advance such a claim? Secondly, was the plaintiff's perception of the events constituting the disaster sufficiently proximate to their occurrence for a claim to lie? In a lead action, he says, the Court would be able to give broad guidance as to the relationships within which a claim for nervous shock lies and as to the types of perception of the disaster needed to support such a claim. It is not suggested that any such broad guidance would bind those not party to the lead action, but its persuasive effect would be immense and would be likely to deter any plaintiff from proceeding in the face of it ... The practical advantages of such a course would be considerable. To resolve the outstanding claims in this way would be cheaper, quicker and less demanding of the Court's time than would be the case were the 64 claims to be pursued independently. It is thus very much in the public interest that the proposal should receive the endorsement of the Court. But Mr. Mackay for the defendants, rightly reminds me that no Court has ever gone quite so far as Mr. Brennan seeks in regulating the conduct of what is, in effect, a group action. The Opren case, he says, was one in which negligence itself was very much in issue and the plaintiffs numbered 1,500. He does not, however, suggest that I have no power to make the Order sought if it is proper to do so in the interests of justice and convenience. It seems to me, therefore that the advantages of the scheme are so obvious that I should approve it unless I am persuaded that to do so would create injustice to the defendants'.

[21] *Chapman v Chief Constable of South Yorkshire Police & Others* Times Law Reports 20.3.90.
[22] *Crocker v P & O European Ferries (Dover) Ltd.* (unreported) December 1990.

One of the problems discussed in the Guide is the use of a cut-off date to define the group, addressed quite early on in the Benzodiazepine litigation:

> *A.B. & Others v John Wyeth & Brother Limited & Others (Benzodiazepine) January 1991 Ian Kennedy J*[23]*:*
>
> 'It is my intention, and it is recognised by all the parties who have appeared before me, that a time will come within the next few months when a 'shutter' will come down, and lately arriving plaintiffs will be unable to have their cases carried forward until the lead actions have been decided. Solicitors consulted by claimants will, I am sure, bear well in mind that it is strongly in their clients' interests to be numbered among the claimants within the Scheme before that happens, particularly since the relatively small amounts that are likely to be recovered by individual plaintiffs may make it difficult for them to persuade the Legal Aid Board that a small number of claims, even taken collectively, have reasonable prospects of success'.

And again, later on in the same litigation:

> *A.B. & Others v John Wyeth & Brothers Limited & Others (Benzodiazepine) May 1991. Ian Kennedy J*[24]*:*
>
> 'Ideally scheme litigation would carry together in one group all complainants making the same or similar cases against a particular manufacturer or, as here, group of manufacturers. In practice that is unattainable, and it certainly is unattainable here. A time must come when doing justice between the parties requires that the doors of the scheme be closed so that an ascertained body of claimants becomes defined, lead cases are chosen to illustrate particular points, and that body of cases goes forward towards trial ... The effect of my imposing a cut-off date is not to bar a claimant's right: I have no power to do that. The effect of a cut-off date is that a claimant may be too late to join the group of claimants to which the scheme applies. It may be that there will be a second group to which late claimants may gain admittance, but of necessity the cases within the present group will be heard and determined first, and so at the very lowest a claimant who does not join the present scheme before the cut-off greatly delays the resolution of his complaint'.

The Benzodiazepine litigation has also demonstrated that there is a learning curve to group litigation:

> *A.B. & Others v John Wyeth & Brothers Ltd. & Others (Benzodiazepine) July 1991. Ian Kennedy J*[25]*:*
>
> 'The notion that the problems of group litigation are in any way finite is wrong. We learn as we go along. There were one or two points which seemed obvious at an early stage which have already been shown to be wrong ... In my judgment, the proposal that the scheme can remain open-ended is impractical. Lead cases must be chosen. They must be drawn from a distinct group of claims and reflect all reasonable permutations within that group'.

[23] *A.B. & Others v John Wyeth & Brothers Limited & Others (Benzodiazepine)* January 1991 (unreported)

[24] *A.B & Others v John Wyeth & Brothers* Times Law Reports 14.5.91

[25] *A.B. & Others v John Wyeth & Brothers 4.7.91 (unreported).*

Further, the scope of the procedural discretion of the appointed Judge has been addressed by the Court of Appeal, also in the Benzodiazepine case:

A.B. & Others v John Wyeth & Brothers Ltd. & Others (Court of Appeal) (Woolf L. J[26]*):*

'The judge in charge of litigation of this sort should be left to control that litigation wherever this is appropriate. Certainly his rulings on procedural matters should not normally be the subject of an appeal. However, as I understand the situation so far as this appeal is concerned the parties and the learned Judge are at one in appreciating that there are difficulties in ascertaining the correct approach, and guidance is required as to how to deal with the problem that the procedure which was adopted in this case creates'.

And again in the Court of Appeal:

A.B. & Others v John Wyeth & Brothers Ltd. & Others (Lord Justice Balcombe[27]*):*

'Multiple claims arising out of some drug alleged to be defective or from some disaster have become a well established feature of litigation in this and other countries in recent decades. The Rules of the Supreme Court made no specific provision for group litigation but a procedure had gradually evolved and in May 1991 the Supreme Court Procedure Committee produced a most helpful guide for use in group actions. Experience showed and the guide recommended that each substantial group of actions should be assigned to one Judge who would supervise the interlocutory conduct of the proceedings as well as hear the trial ... There was no basis upon which the Court of Appeal could interfere with the proper exercise of discretion by Mr. Justice Ian Kennedy. As the guide made clear, group litigation would become impossible if it was open ended'.

Lord Justice Steyn:

'There are no rules of Court or even Practice Directions to provide a procedural framework for complex multi-party litigation. Inevitably High Court Judges assigned to the control of such litigation had to depart from traditional procedures and adopt interventionist case management techniques. If the Judges charged with the control of such actions did not undertake that innovative role the system of justice in respect of such cases would break down entirely. The imposition of a cut-off date was necessary in the interests of the fair and efficient administration of the litigation as a whole. The Court of Appeal ought to be particularly reluctant in group actions to interfere with a trial Judge's procedural directions.

Although these decisions give helpful guidance to the parties involved in group litigation I am not the only one who believes that the time has come for a tighter procedure to be laid down and the Rules of the Supreme Court to include rules which govern group actions. There is in my view a risk that the current flexible approach can go too far and uncertainty can be created by giving the Judge unfettered procedural discretion. Normally in civil litigation the procedural decisions of a Master or a District Judge can be appealed

[26] *A.B. & Others v John Wyeth & Brothers (Court of Appeal)* 1992 3 Med LR.
[27] *A.B. & Others v John Wyeth & Brothers* Times Law Reports 20.10.92.

to a High Court Judge but if in a group action the appointed High Court Judge is effectively immune from appeal on procedural matters, the usual safeguards of the appeal process are missing. Another worry is that in the interlocutory stages the appointed Judge may become so familiar with the issues that he is inhibited in his ability to preside impartially over the trial when the actual evidence is presented. These are developing problems that have not yet been fully addressed but it now seems desirable that the procedural control of group actions should extend beyond the Guide. New Rules of the Supreme Court should be introduced to sit alongside the rest of our civil procedure. Interlocutory procedures could then be handled with greater certainty (but still with flexibility) by a District Judge or a Master, leaving the busy Queen's Bench Judges to return to their normal duties, particularly at a time when we are short of High Court Judges to handle the heavy work load on the judiciary.

6. *DAMAGES*

(a) American misperceptions

I want to conclude with a look at the law of damages, often an emotive area for disaster victims who read of massive awards in the United States and who in some cases, for example the Manchester air disaster and Piper Alpha, have received what have been described as 'mid-atlantic damages' meaning awards much higher than English damages but rather less than a jury would have awarded in the United States. Once again there are some major misperceptions about the level of damages awarded in the United States which may influence thinking in this country and need to be put into perspective. In the speech to which I referred earlier[28] Vice President Quayle also said:

> 'Even a casual observer knows that in the last several decades punitive damages have grown dramatically in both frequency and size. What began as a sanction only for the most reprehensible conduct has now become almost routine. In California, estimates are that one in every 10 jury awards now includes punitive damages in amounts averaging more than $3 million. As these awards become more common so do the instances of their arbitrary even freakish application'.

But here are the facts:

1. A 1990 American Bar Foundation study found that punitive damages awards were made in only 4.9% of over 25,000 verdicts examined.
2. A 1989 US General Accounting Office report found only 23 such verdicts out of 305 product liability cases studied and only 5 that survived appeals intact.
3. A 1987 study by the RAND Institute for Civil Justice found that the average punitive damage verdict in several California jurisdications studied was $743,000 which included large awards that may or may not have actually been paid. The State wide median award was only $78,000.
4. The $3 million cited was an average from one California county in business cases where victims proved intentional misconduct. The median award in those cases was $630,000.

[28] See ante fn.3.

5. The 1991 Rustad/Keonig study[29], found only 355 punitive damage verdicts in the period 1965 to 1990 in product liability cases.
6. Following punitive damage litigation, 82% of the corporations that had punitive damages awarded against them later implemented safety related improvements such as product recalls or improved warnings and instructions.

I will return to punitive damages in a moment but first want to discuss levels of English damages.

(b) English levels

In 1992 the House of Lords held a short debate comparing damages awarded by juries for defamation and by Judges for personal injury[30].

Lord Irvine suggested:

> 'My Lords, is it not the case that awards of damages by juries are generally regarded as fair and reasonable, and that if the jury goes seriously wrong in any case, the Court of Appeal is there to correct this? However, are not damages in personal injury cases regarded as generally far too low, and are they not fixed in accordance with tariffs that are laid down exclusively by Judges who say that the loss of an eye is worth only £20,000, that almost total deafness due to industrial cases is worth £10,000 or less; and with the loss of taste and smell being worth about the same amount? Is it not a fact that it is the Judges' awards that are too low in such cases and that juries are more often right in defamation cases?'

This question was skilfully answered by Lord Mackay who said:

> 'My Lords, it might be a little difficult for me to make an unqualified acceptance of that proposition. I know that when Judges make awards in personal injuries actions they do so after hearing submissions from learned counsel, such as the noble Lord. Therefore they have received help when reaching their conclusion. I have referred the matter of the principle of damages to the Law Commission. It has taken on a study in that area, with particular reference to, but not restricted to, personal injuries actions'.

Springing to the assistance of the Government position the late Lord Havers then suggested:

> 'My Lords, is it not a fact that over the recent few years personal injury claims have resulted in much bigger awards than used to be the case?

Without needing to sidestep this gift of a question Lord Mackay gave his own impression:

> 'My Lords, my impression is that the level of awards has gone up. Part of those awards normally represent loss of earnings. The award reflects the value of earnings lost. Apart from that it would be right to say that the general level of awards has gone up. I have recently increased considerably the award for loss of society under the statute'.

[29] 'Demystifying Punitive Damages in Product Liability Cases'. A survey of a quarter centry of trial verdicts. Professor Michael Rustad, Roscoe Pound Foundation 1991.
[30] HANSARD (Lords) 9.3.92

Loss of society is of course a Scottish term for what we know today in England and Wales as bereavement damages. The Lord Chancellor's use of bereavement damages as an example of a general increase in the level of awards by Judges is not fair. Bereavement damages are a creature of statute having been introduced by the Administration of Justice Act 1982 at the level of £3,500 for a restricted class of bereaved close relatives. It was only after intense media pressure following the disasters in the late 1980s highlighting the inadequacy of the £3,500 figure, that the Government reluctantly increased the statutory sum in 1991 to £7,500 — a figure which actually did no more than to bring it into line with inflation. The increase had nothing to do with an increase in the general level of awards as the Lord Chancellor had claimed.

The fact is that in England and Wales damages for personal injury have failed even to keep pace with inflation. The subject was reviewed in an article by Christopher Carling, a barrister very experienced in personal injury cases[31]. He points out that in *Wise v Kay (1961)*[32] a 29 year old woman suffered brain injuries as a result of which she lay unconscious in hospital 'deprived of every faculty except the bare capacity to breathe and to digest enough food to maintain her body' (Lord Justice Sellers). The Court of Appeal approved an award of £15,000 for pain, suffering and loss of amenity. Updated today,this would amount to £155,000 using the tables in 'Kemp & Kemp', whose author David Kemp QC has agreed with Christopher Carling's research. Indeed David Kemp says it is undeniable that awards for pain, suffering and loss of amenity have failed to keep pace with inflation. He placed much of the blame on the continuing effect of the Court of Appeal decision in *Housecroft v Burnett*[33]. *Wise* was expressly approved by the House of Lords in *West & Son Limited v Shepherd (1964)*[34] where a seriously brain injured 41 year old woman was awarded £17,500 which was upheld by the House of Lords and would now be worth £170,00. In contrast, today there is no reported award for severe brain injury exceeding £100,000. In the rest of his article Christopher Carling shows that the value of awards since *West* in 1961 (which has still not been disapproved) has declined in real terms by 33% to 40%.

(c) Punitive/exemplary or aggravated damages

This is another controversial subject with transatlantic influences. It is one of the areas of damages law currently being considered by the Law Commission.

In their testimony to the Congress Committee on Commerce, Science and Transportation, Professors Rustad and Koenig said[25] that after searching all available computer based statistical sources, regional verdict reports, law reviews, other scholarly sources, State products liability practice guides, generalised case reporting services, Court records, asbestos reports and media reports, and after surveying all attorneys in reported cases, they had located over the past 25 years only 355 punitive damages verdicts in product liability cases. They concluded that:

> 'The impact of punitive damages on competitiveness is minimal ... In more than three quarters of the cases studied the defendant manufacturers took some safety step in the wake of a product injury.'

[31] Butterworth's Personal Injury Litigation Service. Bulletin: No. 9 March 1992.
[32] *Wise v Kay* 1961. QB 638.
[33] *Housecroft v Burnett* 1986. 1 All ER 332.
[34] *H. West & Son Ltd v Shepherd* 1964. AC 326.
[35] See ante fn. 29.

Their study indicated that the typical plaintiff was permanently disabled or killed by a product known by the manufacturer to be unnecessarily hazardous. Few manufacturers were assessed punitive damages unless they had prior knowledge of a known risk or developing danger which they failed to correct. In the great majority of the products cases studied punitive damages were assessed when a manufacturer went well beyond ordinary negligence.

Other conclusions from their research are that:

(a) Between 1965 and 1990 the likelihood that a US manufacturer would be assessed a single punitive damages award was less than one in one thousand. The likelihood that a US manufacturer would actually have to pay a punitive damages award in full was even less.

(b) When asbestos cases are excluded the frequency of punitive damages awards actually decreased from 1986 to 1990.

(c) The median punitive damages award for all cases was $625,000. The median for non-asbestos cases was $750,000. The full amount awarded was collected in less than half the cases and no punitive damages were collected in nearly 40% of cases.

It is therefore fair in my view to suggest that the American experience demonstrates that punitive damages:

(i) are used only in response to extremely serious and egregious conduct;

(ii) successfully deter wrongful conduct and promote safe conduct and the production of safe products;

(iii) are carefully controlled by the Courts, including the US Supreme Court which in *Pacific Mutual v Haslip (1991)* said that no punitive award is permissible unless it passes a complicated 12 point due process test;

(iv) are not demanded solely by personal injury victims but are often sought by business and government when they are involved in tort litigation. For example the State of Alaska demanded punitive damages when it sued Exon and others involved in the Prince William Sound oil spill in 1989.

On what logical basis then can it be argued that, given appropriate safeguards, European countries, including our own could not also benefit from a similar procedure to punish and deter a defendant in a small minority of egregious cases? One inherent safeguard would be that, according to surveys by Davies Arnold Cooper, in none of the European nations do juries award damages for personal injury except for rare occasions in Scotland where the record shows that in any event they actually award less than Judges. So the supposed unbridled excesses of juries would not be a problem nor is it likely that, given such power, the judiciary would fervently and frequently award massive figures. Further, any objection that the injured plaintiff should not profit personally from a punitive award does not defeat the argument. The experience of Rodger Pannone and myself is that in general, accident victims, especially those injured in disasters, seek two remedies, one selfish the other altruistic. They expect full and proper compensatory damages for their injuries and losses but they also want to prevent similar accidents to others. As long as flagrant misconduct is dealt with in a deterrent award against the defendant they would in my view support the money being put to the good use of funding safety research, particularly if it had relevance to the cause of their own injury for which they would receive normal compensatory damages.

Moreover, punitive awards are not usually covered by insurance so any real threat is to the balance sheet of the culpable defendant whose ability to pay an award is always going to be taken into account in any award by a Judge.

The concept of awarding damages over and above simple compensatory damages is at least recognised in the law of England and Wales by the doctrines of exemplary and aggravated damages. This law has recently been clarified unfavourably for plaintiffs in the *Camelford*[36] Water Pollution case. A tanker driver delivering to the local water treatment plant negligently emptied a load of aluminium sulphate into the wrong tank and polluted the water supply of 20,000 people. Liability was admitted but further allegations arose that, after discovering the error, an employee of the water authority had recklessly made a statement to the public that the water was safe to drink and that the water authority, knowing that the water was acid enough to affect pipework, flushed out its own distribution system but failed to tell customers to clean their own. A claim was therefore made for exemplary and aggravated damages.

Prior to the Camelford judgment our research showed that historically exemplary damages are frowned on by the Courts of England and Wales because they confuse the civil and criminal functions of the law. According to the narrow criteria in *Rookes v Barnard (1964)*[37] exemplary damages could be awarded only:

(i) where there is oppressive arbitrary or unconstitutional action by servants of the Government (whose use of their powers must be subordinate to their duty of service to the people);

(ii) where the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff. (The defendant must have acted in a way which is calculated and deliberate).

In the main speech Lord Devlin spelt out the reasoning behind the second criterion:

> 'This category is not confined to money making in the strict sense. It extends to cases in which the defendant is seeking to gain at the expense of the plaintiff some object which he either could not obtain at all or not obtain except at a price greater than he wants to put down ... Where a defendant with a cynical disregard for a plaintiff's rights has calculated that the money to be made out of his wrong doing will probably exceed the damages at risk it is necessary for the law to show that it cannot be broken with impunity ... Exemplary damages can properly be awarded whenever it is necessary to teach a wrongdoer that tort does not pay'.

In *Broome v Cassell (1972)*[38], a libel case, the House of Lords said that the intention in *Rookes* was not to extend the power to award exemplary or aggravated damages to torts for which they had not been awarded before, such as 'negligence' or 'deceit'.

In this narrowly defined area therefore there are reported cases of exemplary awards against Government servants such as the police for unconstitutional arrest or false imprisonment and, recently, an award against an education authority — *City of Bradford v Arora (1991)*[39].

There are also recent exemplary awards in cases of racial discrimination — *Alexander v Home Office (1988)*[40] and for high handed behaviour by an employer — *Wileman v Minilec Engineering (1988)*[41].

[36] *A.B. v South West Water Services Ltd.* Independent Law Reports 15.5.92.
[37] *Rookes v Barnard* 1964 AC 1129.
[38] *Broome v Cassell* 1972 AC 1027.
[39] *City of Bradford v Arora* 1991 2QB 507.
[40] *Alexander v Home Office* 1988 ICR 685.
[41] *Wileman v Minilec Engineering* 1988 ICR 318.

In 1991 in the Court of Appeal in *H v Ministry of Defence*[42] Lord Donaldson gave a glimmer of hope to this extension of the law. The Ministry had admitted liability to compensate a 27 year old soldier for medical negligence which had resulted in the amputation of the major part of his penis. The plaintiff asked for a trial by jury arguing that such an exceptional injury should be be evaluated by jurors and not by a Judge. Reversing the Judge at first instance and denying jury trial because the case was not exceptional enough Lord Donaldson nevertheless contemplated that where a personal injury case is so exceptional that exemplary damages are sought, trial by jury might be appropriate.

By contrast, aggravated damages are intended to be compensatory and are not confined to the limited criteria which currently apply to exemplary damages. Aggravated damages may be awarded where the defendant's conduct has aggravated the injury done to the plaintiff for example by malevolence or spite or where the harm was caused in a way that injured the plaintiff's dignity and pride. As Lord Donaldson said, in a libel action *Sutcliffe v Pressdram (1991)*[43], aggravated damages could be awarded:

> 'precisely because other conduct of the defendants rubs salt in the wound inflicted by the libel sued upon'.

However, there is little authority supporting actual awards of aggravated damages in personal injury cases. Indeed in a case of serious medical negligence *Kralj v McGrath (1986)*[44] Mr. Justice Woolf said:

> 'It is my view that it would be wholly inappropriate to introduce into claims of this sort, for breach of contract and negligence, the concept of aggravated damages ... such a result seems to me to be wholly inconsistent with the general approach to damages in this area which is to compensate the plaintiff for the loss that she has actually suffered, so far as it is possible to do so, by the award of monetary compensation and not to treat those damages as being a matter which reflects the degree of negligence or breach of duty of the defendant.'

In his judgment at first instance on a preliminary point in the *Camelford*[45] case Mr. Justice Michael Wright refused aggravated damages but allowed the claim for exemplary damages:

> 'I have had very considerable hesitation in this matter. There is no doubt that the existence of a punitive sanction is an anomaly in English law but it is too deeply rooted to be dug out by the Court. I am satisfied that the allegations of nuisance based upon the deliberate acts of the defendants if proved are capable of supporting a claim for exemplary damages. The Court has no right to strike them out ... The basis for an award of aggravated damages is much wider and much less defined that the circumstances for which exemplary damages are recoverable.
>
> Aggravated damages cannot be recovered or it is unlikely that they can be recovered in actions for negligence. The damages under such a head relate to the injury of a plaintiff's self esteem. It is doubtful whether paragraph 27 of the Master Statement of Claim could ever give rise to a claim of aggravated damages. I further note the recent decision in the case of *Hicks v Wright*. However, I am only concerned to strike out those claims which cannot (and not those which are not likely to) succeed. This may well turn upon the evidence in individual cases. Accordingly I will not strike out the plaintiff's claim for aggravated damages.'

[42] *H v Ministry of Defence* 1991 2QB 103.
[43] *Sutcliffe v Pressdram* 1991 1AllER 54.
[44] *Kralj v McGrath* 1986 1AllER 54.
[45] See ante fn. 34.

His decision was reversed by the Court of Appeal which held[46] that the limits of exemplary damages could not be extended beyond the criteria laid down by the House of Lords in *Rookes v Barnard* and *Broom v Cassell*. Those decisions did not include exemplary damages for public nuisance or negligence and were binding on the Court of Appeal which also upheld Mr. Justice Wright's decision denying aggravated damages.

(d) Psychiatric injury

Let me conclude this review of damages with an area that is a special feature of disaster cases, namely compensation for psychiatric injury. In the 'Herald of Free Enterprise' case an arbitration was used as a simplified and cheaper method of resolving differences about the scope and level of awards of compensation for the non-physical injuries the victims had suffered. Mental injury is not an easy area. In a two day seminar at the Institute of Psychiatry in April 1991 the following definitions were given for Post Traumatic Stress Disorder:

1. An infant science derived from grizzly natural experiments.
2. A mixture between a dog's breakfast and a pools coupon.
3. The piercing of the mental skin.
4. A biological stress response.

Also Professor John McFarlane a distinguished Australian psychiatrist who was closely involved in the Australian bush fire disasters suggested that — 'Lawyers are often the best diagnosticians'. Indeed it may be the solicitor who has to decide, with care and sensitivity, to refer the client for psychiatric assessment. PTSD is not as new as it sounds. If you are familiar with Shakespeare you will know that at least three of his characters, Hamlet, Hotspur and Macbeth demonstrated manifestations of PTSD and it is also said that Samuel Pepys' account of Dr. Johnson's trauma on witnessing the Great Fire of London is a classic description of the symptoms of PTSD.

The modern history of PTSD starts in the middle of the last century and traces these landmark dates:

1. In the 1860s, in the USA Civil War it was described as 'battle fatigue'.
2. In 1864, non-physical injuries to passengers on the railways were described as 'railway spine' or 'delayed shock'.
3. In 1875, Dr. Ericson, also researching rail injuries described 'railway neurosis, traumatic neurosis and traumatic malingering'.
4. In 1917, Mott in the British Medical Journal described the condition known as 'shell shock'.
5. In 1943, Simons in the BMJ described the trauma of fighter pilots as 'flying stress'.
6. In 1949, Swank in the JNMD described World War II injuries as 'combat exhaustion'.

More recently major research into the veterans of the Vietnam War resulted in the American Psychiatric Association and later the World Health Organisation accepting that PTSD is a medical condition that is one of the family of conditions covered by the umbrella term 'anxiety disorder'. The first UK disaster case to require judicial examination of this area was the 'Herald of Free Enterprise' arbitration in which the arbitrators arrived at eight important decisions:

[46] *Gibbons v South West Water Services Ltd.* Times Law Reports 26.11.92

1. PTSD is a recognised psychiatric illness.
2. Many Zeebrugge victims suffered PTSD.
3. The American Psychiatric Association's Diagnostic and Statistical Manual DSM III R is a useful guide to diagnosis.
4. Pathological grief is a recognised psychiatric illness in excess of normal grief.
5. It is possible to suffer from more than one psychiatric illness.
6. It may be reasonable for survivors to refuse to undergo treatment for psychiatric damage.
7. It is the period until illness ceases which is compensatable.
8. Account should be taken in individual cases of any vulnerability to future psychiatric illness.

In deciding whether a person has suffered a mental injury that justifies compensation the words 'psychiatric illness' are all important. Although the House of Lords decision in *Hillsborough* about claims by relatives for PTSD caused by witnessing the injuries to their loved ones on television was unfavourable to the plaintiffs Lord Oliver's analysis of the mental injury for which compensation can be claimed was described thus[47]:

> 'There is nothing unusual or peculiar in the recognition by the law that compensatable injury may be caused just as much by direct assault on the mind or on the nervous system as by direct physical contact with the body. This is no more than the natural and inevitable result of the growing appreciation by modern medical science of recognisable cause or connections between shock to the nervous system and physical or psychiatric illness'.

CONCLUSION

In this review of disaster litigation I hope that I have shown that in a fairly short time in the UK we have come a long way but that there are still some serious problems in the system coping with the funding and management of large group actions. In a number of cases that I have discussed the approach of the American lawyer would be to bring one case only, not a large group, based on a contingent fee and, if successful, then to take on more cases that could come forward with optimism. In some respects the present climate of judicial political and public opinion towards those who suffer in a disaster and the lawyers who try to use the system to provide a remedy is less sympathetic than it was. So, on the basis that any of us could be injured through someone else's fault at any time in an accident or a disaster I urge all of you to remember and to support the first object of the Association of Personal Injury Lawyers[48]:

> **'The promotion of full and prompt compensation for all types of personal injury and access to the legal system by all means including education, the dissemination of information, the advancement of law reform and the administration of justice for the public good'.**

[47] *Alcock & Others v Chief Constable of the South Yorkshire Police* 1992 PIQR 1.
[48] Association of Personal Injury Lawyers — Constitution 1990.

THESE TRUTHS WE HOLD TO BE SELF EVIDENT — THE 1960s ARE DEAD — OK?

Iain S. Goldrein*

Charles de Gaulle, Harold Wilson, Jo Grimond, Danny Cohn Bendit, Rudi Dutchker — all yesterdays men! All 1960s men. And Lord Justice Stamp? A great man. Tomorrow's man. A man of the 90s. Did anyone know he has died — and many years ago? Judicial proof of life after death?

A generation ago, Lord Denning MR was associated with the proposition that a guide to where liability should lie in the law of tort was the location of the pocket best able to pay.

That pocket was in turn associated with liability insurance.

Was sight lost of the fact that the pocket is funded by Jo Public — amongst whom is numbered everyone of us? Do premiums have inexorably to rise? Recent decisions in the law of tort suggest the insurers have the opportunity to seize the initiative and cut cost. The challenge to them (and their shareholders?) is: will they exploit the opportunity which beckons?

We must start with snails in beer bottles. Miss Donoghue was a pauper and a Scot. She changed the face of English law. In so doing she proved that the poor could indeed pass through the eye of a needle.

What made her different? She was given a bottle of ginger beer. She went to drink. She claimed that there was a decomposed snail in the bottom and that she suffered a violent nervous reaction. She could not sue the vendors, because she had not bought it. It was a gift. So she sued the manufacturers with whom she had no contractual link. On a preliminary point of law, it was held that the action was good. Thus is history made.

But what if the bottle, instead of causing her a nervous reaction, had disintegrated in her hands depriving her of the pleasure of imbibing ginger beer? What then? Could she have sued the manufacturer for the loss in value of her gift? What if I give to you a Hoover which falls to pieces in your hands but does you no physical harm? Can you sue the manufacturer for the loss of the Hoover?

The answer seems an obvious *NO!* It is an obvious *NO!* It has taken several decades however to have the courts confirm the obvious.

In *Dutton v Bognor Regis Urban District Council* [1972] QB 373 a house built on a former rubbish tip started to subside and crack. The owners *inter alia* brought action against the local authority alleging negligent inspection during construction. "Damage" held Lord Denning MR and Lord Justice Sachs feeling compassion and sympathy for poor Mr. and Mrs. Dutton. They recovered compensation for the diminution in value of the house. They were thus put in the position of a donee of a defective bottle of ginger beer being held entitled to sue for the diminution in value of the bottle!

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Lord Justice Stamp gave a dissenting judgment. Wrong! — he held, and stated clearly where the demarcation between damage and economic loss lay. In so doing he held out a beacon for lawyers in the future to redress the aberration introduced in the English law of tort. That beacon was taken up by the House of Lords in *Murphy v Brentwood* [1990] 3 WLR 414. That case is authority for the following principle:

> "The principle in *Donoghue v Stevenson* applies to impose a duty on the builder of a house to take reasonable care to avoid injury or damage, through defects in its construction, to the person or property of those whom he ought to have had in contemplation as likely to suffer such injury or damage, that principle extended only to latent defects; that where a defect was discovered before any injury to person or health or damage to property other than the defective house itself had been done, the expense incurred by a subsequent purchaser of the house in putting the defect right was pure economic loss."

In summary the case narrows the legal meaning of "damage" and in so doing limits the duty of the builder and local authority. That ruling was followed by the House of Lords in *Department of the Environment v T. Bates Ltd:* [1990] 2 All ER 943. It will be remembered that in this case the upper floors of a building leased to the Plaintiff were inadequate to take the weight which they sought to impose on the structure. The decision is authority for the following:

> " . . . since the tower block had not been unsafe by reason of the defective construction of the pillars but had merely suffered from a defect of quality making the plaintiff's lease less valuable since the building could not be used to its full design capacity unless it was repaired, the loss suffered by the plaintiffs was pure economic loss, which was not recoverable in tort by them against the Defendants. "

Thus, at long last, a line is being firmly drawn between economic loss on the one hand and damage on the other. And this line is reflected in the case of *James McNaughton Paper Group Ltd. v Hicks Anderson & Co.* [1991] 2 WLR 641. The facts were that while negotiations were taking place for the take-over of a group of companies by the plaintiff company, the group instructed the defendant accountants to prepare accounts for the group. The Plaintiff *inter alia* claimed to have relied on such accounts to their financial loss. It was held that:

> " . . . there was not such a relationship of proximity between the plaintiffs and defendants as to establish a duty of care; that the defendants could not have expected to foresee the damage which the plaintiffs alleged they had suffered in reliance upon the draft accounts and the answer given by the defendants in general terms; and that, accordingly it was not fair, just and reasonable to impose on the defendants a duty of care to the plaintiffs in relation to the accounts and the answer."

Let us put this decision into *"Donoghue v Stevenson"* context. The Plaintiff was seeking to argue that it had suffered damage just in the same way as a pauper in Paisley near Edinburgh suffered damage when allegedly finding a decomposed snail in a beer bottle. The Plaintiff in the *"McNaughton"* case however was a major commercial concern — is it that camels cannot get through the eye of needles? And the lesson to be learnt? Buy in your own accountants — do not seek to rely on those paid for by someone else.

This principle of robust self-reliance — the challenge to protect one's own interests rather than asking the mamby pamby state through its courts to look after one — is the message flowing from *Smoker v London Fire and Civil Defence Authority* [1991] 2 All ER 1052. In that case the Plaintiff was employed as a fireman. He, together with his employers, had contributed to a pension scheme. He was injured in the course of his employment. The injury triggered the payment of the pension.

Held: Pension payments were not deductible from the claim for loss of earnings.

" . . . Insurance companies and employers are at liberty to draft, although not bound to insist on, pension schemes in a way which will negate the effect of *Parry v Cleaver* . . . "

Thus an employer (and behind him, the liability insurer) can provide for the deduction of pension payments from a loss of earnings claim — by contracting for that result.

So there is a further challenge to liability insurers: should a condition precedent to entering into a contract for employer's accident insurance be a review of the contracts of employment and a renegotiation of terms? Should Jo Public pay through the increased premiums or the cost of manufactured goods increased through a rise in premiums? And what if Jo Public elects not to buy shares in the insurer because of the poor return on dividends? And what if the insurer goes bust?

The fact that the threshold of liability is being drawn further back in the field of tort law is reflected in another landmark decision — the *Hillsborough Case* — namely: *Alcock v Chief Constable of South Yorkshire Police* [1991] 3 WLR 1057. This was a claim for damages for psychiatric illness resulting from shock caused by negligence at a football ground. Relatives brought actions against the relevant police force claiming to have suffered nervous shock, e.g. through seeing the tragedy enacted on their television screens. It was held that a claim for such shock can be made without the necessity of the plaintiff establishing that he was himself injured or was in fear of personal injury. But very tight controls were placed on the limits of liability. Such a claim can generally only be made when shock results:

i) from the death or injury to the plaintiff's spouse, child or loved one or the fear of such death or injury and

ii) the shock has come about through the sight or hearing of the event or its immediate aftermath.

Again, the trend in liability is in favour of the liability insurer. And that trend is as much by reference to a definition of the limits of "damage" as it is by reference to the limits of "liability". How else can one interpret the case of *Watts v Morrow:* [1991] 1 WLR 1421. In that case a full structural surveyor's report bespoken by plaintiff stated that a second home to be purchased by plaintiffs would be reasonably trouble free. It was wrong. The issue was the measure of damages. It was held:

" . . . in the absence of any warranty that the condition of the property had been correctly described by the defendant, there was no basis for awarding the cost of repairs; that the proper measure of damages was the sum needed to put the plaintiffs in as good a position as if the contract had been properly performed; and that, accordingly, the financial loss of the plaintiffs was limited to the difference between the value of the property as it was represented to be and its value in its true condition . . . "

"That in the case of the ordinary surveyor's contract general damages were recoverable only for distress and inconvenience caused by physical consequences of the breach of contract; that such damages should be a modest sum for the amount of physical discomfort endured . . . "

Now I hear some of you saying: But does not the case of *McSherry v British Telecommunications* [1992] 2 Med LR 129 damage liability insurers? That decision is authority for the following proposition:

> "The Offices, Shops and Railway Premises Act 1963, s 14 obliges an employer to provide employees who work in a sedentary position with a suitably adjustable seat and separate footrest."

The point is: That decision orientates liability insurers towards where their responsibilities may be said to lie in the future: Insistence with the insured employer that there are reasonably safe facilities for work *AND* that the employee is properly trained to use them.

The proposed health and safety regulations flowing from Europe give enormous opportunity to the liability insurer to go down this road.

The greatest opportunity perhaps however, lies in *"REHABILITATION* — a challenge which no plaintiff or liability insurer can surely ignore and which every shareholder in every insurance company must wholeheartedly welcome. It goes hand-in-hand with "structured settlements."

Thus those theories of yesteryear as to the role of the law of tort — theories born of an era which believed in the bottomless pocket — such theories are as outdated as communism and the Berlin Wall.

We as tort lawyers can raise our heads and say with confidence: "These Truths We Hold To Be Self-Evident — the 1960s are dead: OK?"

FAMILY SUPPORT: A COMPARATIVE ANALYSIS

John Hodgson*

INTRODUCTION

One very substantial but little remarked distinction between English law and the law of our principal European neighbours is in the area of liability of individuals to maintain members of their family. The starkest contrast is between the common law and the French *Code Civile,* the relevant provisions of which are replicated to a very substantial extent in both the German *Bürgerliches Gesetzbuch* (BGB) and the Italian *Codice Civile,* and no doubt in the equivalent legislation of other Western European nations. This common approach is a result of the common civilian heritage, of the imposition of the *Code Civile* during periods of Napoleonic conquest, and of respect for the achievements of the framers of the *Code.*

In this article I assume a full, but not specialist, knowledge of English Family Law, but no knowledge of other systems. It is perhaps appropriate at this stage to point out the prime distinction of approach between Common Law systems and code based systems. In the former the law is assumed to be an immutable entity, aspects of which are from time to time at the request of litigants declared and expounded by the judges in the light of available principles and precedents. The judges take account of any relevant statutory provision, but this is itself interpreted in accordance with judge-made rules and is presumed to alter the common law only if it does so expressly, or can only be rationally construed on that basis.

In the latter, the law is contained in the code itself, together with any suppletive legislation, and the function of the judge is to ascertain the sense of the code and apply this to the facts of the case before him. There is, strictly speaking, no judicial precedent, and academic opinions are equally valid sources of elucidation of the code; however there is a substantial degree of consistency in practice, and judicial respect is given to a prior consistency of interpretation[1]. Because a code is a statement of principle to which the judges will conform, in contrast to a statute which is a direction to the judges to disregard if necessary the prior law where, but only where, it applies[2], the language of the code tends to be terse and general. The whole substantive law of persons, contract, tort, succession and the family will together typically require only a single slim volume.

It should of course be appreciated that this thumbnail sketch is a generalisation, rather than a detailed description, and that it rests on an idealised theory of both common and civil law. If nothing else it will help to explain what to an English lawyer will appear to be a regrettable paucity of case-law authority in the 'foreign' sections of this article.

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[1] In France *jurisprudence constante,* in Germany *ständige Rechtssprechung.*

[2] This is of course a very partial explanation of statutory interpretation, but the English rules are normally narrow and restrictive, whatever the reason.

THE ENGLISH LAW

At common law the only positive duty of maintenance that was recognised was that of a husband to maintain his wife, but not *vice versa.* A parent owed no legal duty in a positive sense to maintain a child, although a moral duty was recognised in the property context, e.g. by refusing to allow the separate property of the child to be used for this purpose where the father had means. In cases of gross neglect criminal liability might attach. It was never even mooted that a child might be obliged to maintain a parent, let alone that this might apply to more remote connections. In addition there was absolute freedom of testamentary disposition. The common law has now been replaced by a series of statutory provisions governing the public and private law aspects of liability to maintain or support members of the family, and is accordingly of historical interest only.

There is now a public law obligation[3] on any person to maintain his/her spouse and also children up to the age of 16. Culpable failure to do so is a criminal offence[4] and there is a summary procedure[5] for recovery of an appropriate contribution at the instance of the DSS, but allowing payment to be directed to the dependant to the extent that it exceeds the amount necessary to reimburse any contribution to the maintenance of the dependant from public funds. Neglect of a child also remains a criminal offence[6].

There are also provisions allowing claims for maintenance to be made by or on behalf of the dependant. The principal provisions are contained in the Matrimonial Causes Act 1973 where maintenance and other forms of financial provision are dealt with as ancillaries to divorce, nullity or judicial separation proceedings or as a separate cause of action,[7] the Domestic Proceedings and Magistrates' Courts Act 1978 where maintenance provision can be made during a period of matrimonial separation and the Guardianship of Minors Act 1971 and the Affiliation Proceedings Act 1957 in relation to children where there is no necessary context of matrimonial proceedings. The only dependants recognised are however spouses, ex-spouses (which includes in certain cases parties to a marriage which has been annulled) and children. This does however extend to children for whom responsibility has been assumed. Liability for children will normally end when they complete their full-time education, but is extended in the case of disabled children.

As from 5th April 1993 the Child Support Act 1991 begins to come into effect. The Act applies only where the parents of the child are living apart, and provides for the collection and calculation of maintenance for the child[8] to be the responsibility of the Child Support Agency[9] rather than the courts[10]. An application cannot be made by the child him/herself[11]. The Act has been criticised on the basis that the real reason for it is to

[3] s26 Social Security Act 1986.
[4] s25 *Ibid.*
[5] s24 *Ibid* As from April 1993 this will be replaced by measures under the Child Support Act 1991; *vide infra.*
[6] s1(1) Children and Young Persons Act 1933.
[7] s27.
[8] The formulae to be used do however, in certain circumstances, in effect mean that the absent parent is partially supporting the parent with the children.
[9] The agency will calculate maintenance according to a series of complex and purely mathematical criteria. Although these do set realistic figures for the cost of bringing up children, they allow no discretion.
[10] s4 Child Support Act. Where the Act applies the court's jurisdiction is ousted.
[11] Except in Scotland.

compel lone parents in receipt of benefit to pursue absent parents for the purpose of reducing the net claim on public funds[12] even though there may be good reason to cut off contact with a violent or abusing ex-partner. The Act has also been criticised because it will calculate maintenance on a formula which will not take account of any earlier clean break settlement or lump-sum payments, thus militating against these and leading to injustice where they are still relevant children of former relationships where such orders have already been made[13].

Further, the Act does not follow the ethos of the Children Act 1989, which stresses the welfare of the child. Compelling an absent parent to pay substantial maintenance may result in unwanted and disruptive contact. As the Act only relates to children as defined for Child Benefit, the Act does not address the major problem of adult children in further or higher education whose parents will not pay an assessed contribution to a student grant. Finally, as the payment is made to the parent with the child (insofar as it does not simply reduce the amount of Income Support being paid), there is no guarantee that it will in fact be applied for the benefit of the child.

Although prima facie freedom of testamentary disposition remains, the same classes of dependant (together with certain persons treated as members of the family) may retrospectively challenge a will under the Inheritance (Provision for Family and Dependants) Act 1974 if it fails to make reasonable provision for them in all the circumstances.

CIVIL LAW — GENERAL OBSERVATIONS

It is well known that the civil law countries do significantly restrict testamentary freedom and impose an obligation to provide for the family by way of succession, and it is not the purpose of this article to discuss this aspect of family provision in detail, merely to point out the very significant difference of approach. It is also reasonably well known that these systems also provide for the regulation of the financial and property affairs of a married couple *ab initio* by reference to a legal matrimonial regime which is commonly supplemented or replaced by a formal marriage contract. Thus in France although *"La loi ne régit l'association conjugale, quant aux biens, qu'à défaut de conventions spéciales*[14]" the legal régime which operates by default is that of the *"communauté des acquêts*[15]."

In England is is usual for the parties to a marriage to give no thought to the legal consequences of the termination of the marriage either by death or divorce until the event supervenes; clearly the law must then do justice in the light of the then existing situation. Under a code régime, the basic financial and property situation has already been established. It may be necessary to rectify inequalities and anomalies, and to provide for maintenance, but there is not usually a need for the far-ranging powers conferred on the English divorce courts. It is outside the scope of this article to undertake a thorough-going comparison of the two matrimonial property regimes, although reference will have to be made from time to time to certain aspects of these, in order to take account of their influence on the actual subject-matter of the article.

[12] If they refuse to do so without good cause their benefit will be reduced: s6 Child Support Act. However many of the absent parents will themselves be on low incomes. The losers in such cases are likely to be any children of second families, who are not protected by the formulae in use.

[13] The clean break principle has underlain family law for a number of years and cannot be abandoned in this way without serious consequences.

[14] Art 1387 CC.

[15] Art 1400-1 CC. i.e. the results of the work of the parties and savings from the income from their respective property.

What is intended is to examine the obligations of maintenance (*aliment* in France and *Unterhalt* in Germany[16]). There does not appear to be the same distinction as at common law between public and private law obligations, merely a series of provisions in the relevant codes which create rights directly enforceable by the dependants in question. However it has been decided in France that the right to maintenance is *"d'ordre public"* (i.e. a public rather than a private right[17]) and it is non-assignable, although is may be renounced or, even when already quantified, postponed to the rights of other creditors.

FRENCH MAINTENANCE LAW

Under French law the financial arrangements of a married couple are regulated by law as from the time of the marriage. The law is primarily concerned with property rights and obligations, but does contain certain provisions relevant to maintenance. Art 212 CC provides "*Les époux se doivent mutuellement fidélité, secours, assistance.*[18]" The expression *assistance* imports a maintenance obligation which subsists during the marriage and may be invoked regardless of fault. The obligation terminates on divorce and thereafter the liability for maintenance is governed by the divorce legislation. If dissolution is on the basis of a "*demande conjointe,*[19]" there must also be an agreed financial settlement approved by the judge, otherwise, in outline, the innocent party (the applicant where a matrimonial offence is alleged, the respondent in cases of "*rupture de la vie commune*[20]") is entitled to financial provision either in the form of "*dommages-intérêts*[21]" or (in the alternative) to a "*prestation compensatoire*[22]" or a "*pension alimentaire*[23]" terminating on death, remarriage or "*concubinage notoire*[24]".

While the French law clearly differs in many ways from the English law, most obviously in the mutual exclusivity of lump sum and periodic provision, and in the emphasis placed on fault, and it must also be borne in mind that French spouses will ordinarily retain their own patrimony, there is nevertheless a broadly comparable underlying principle of readjustment of financial affairs so far as necessary to ensure that a non-guilty spouse is not unduly financially penalised by the divorce itself.

Art 203 CC set out the basic parental obligation of maintenance: *Les époux contractent ensemble, par le seul fait du mariage, l'obligation de nourrir, entretenir et élever leurs enfants*[25]." It is significant that the obligation is seen in terms of a contract, i.e. a legally enforceable obligation. On divorce, this obligation remains unimpaired and may be relied upon by ex-spouse with whom the child is living to obtain an order for maintenance; as in England[26], the matrimonial judge is specifically enjoined to have regard to the interests of any children when approving a divorce settlement or when making orders for financial provision. The obligation does not cease at the majority of the child; parents can be compelled to support a child until s/he has completed his/her education and professional training.

[16] There are similar provisions in Italy: *alimenti* (pl).
[17] As the public interest is concerned the right cannot be dealt with as a purely private matter of obligation.
[18] Spouses owe each other a mutual duty of fidelity, aid and assistance.
[19] Joint application.
[20] Breakdown of matrimonial co-habitation.
[21] Damages for the financial and socio-emotional consequences of divorce.
[22] A lump sum payment to eliminate financial inequalities.
[23] Periodical payment order.
[24] Open cohabitation.
[25] Marriage of itself creates a mutual obligation of the spouses to feed, accommodate and bring up their children.
[26] Pre Child Support Act!

This contrasts sharply with the position in England, where such an order can be made only in the context of proceedings under the Matrimonial Causes Act[27], with the result that the child of divorced parents may be able to compel a reluctant parent to support him/her until qualification, while the child of happily married parents who decline to contribute is left without redress, even though any student grant will be calculated by reference to the appropriate parental contribution. The French law indeed goes on to provide (although this may well be *ex abundanti cautela*) that the child is not entitled, as against the parents, to an establishment[28], whether on marriage or otherwise[29].

So far there is nothing in the French legislation which is likely to surprise a reader who appreciates that there is bound to be diversity of detailed approach among civilised states to common legal issues and problems. However we must now consider three Articles of the Code which are entirely alien to all English experience.

> Art 205 *"Les enfants doivent les aliments à leurs père et mère ou autres ascendants qui sont dans le besoin.*[30]*"*
>
> Art 206 *"Les gendres et belles-filles doivent également, et dans les mêmes circonstances, des aliments à leurs beau-père et belle-mère, mais cette obligation cesse lorsque celui des époux qui produisait l'affinité et les enfants issus de son union avec l'autre époux sont décédés.*[31]*"*
>
> Art 207 *"Les obligations resultant de ces dispositions sont réciproques.*
> *Néanmoins, quand le créancier aura lui-même manqué gravement à ses obligations envers le débiteur, le juge pourra décharger celui-ci de toute ou partie de la dette alimentaire.*[32]*"*

The obligation will only arise if the dependant is in want. A relative who is in full time employment, or in receipt of an adequate sickness, invalidity or old age pension will accordingly not qualify. In general terms *"Les aliments ne sont accordés que dans la proportion du besoin de celui qui les reclame, et de la fortune de celui qui les doit.*[33]*"* Where there is more than one person liable there is a right of contribution. The liability may be enforced by the public authorities, for example where the dependant is accommodated in a hospital, nursing home or old peoples home at public expense, or claims a non-contributory social security benefit[34]. It is also recoverable by the claimant directly (e.g. by an attachment of earnings order) or through public channels (e.g. by attachment of benefits or tax allowances).

[27] Once the child is outside the Child Support Act definition.
[28] i.e. to a lump sum to provide a "start in life."
[29] Art 204 CC.
[30] Children must maintain their parents and other ancestors who are in want.
[31] Similarly and in the same circumstances children in law must maintain their parents in law; this obligation ceases however with the death of the last survivor of the spouse through whom the affinity is established and the children of the union.
[32] These obligations are reciprocal. Provided however that when a maintenance claimant has grossly breached his own obligations to the liable person, the latter may be relieved by a judge wholly or partly from his maintenance obligations
[33] Maintenance will only be awarded in proportion to the needs of the claimant and the resources of the liable person (Art 208).
[34] The howls of rage that arose across the length and breadth of the UK when it was realised that a parent's home was an asset to be realised and applied to defray the cost of a sojourn in a rest home rather than "cascading down" to the children were fearsome to hear. Considerable ingenuity was devoted to rescuing this patrimony from the clutches of the state. Imagine the reaction if the children were not merely "disinherited by expropriation" but actually obliged to stump up personally. *O tempera, o mores!*

However the obligation does not attach to adoptive relationships or in relation to step-children; Art 206 is also applied strictly, and thus does not apply to anyone other than the specified parties. Although maintenance will ordinarily be in money the court may order that the claimant accommodated and maintained in specie[35] and where the claimant is a child whose parent has offered board and lodging the court may, if that proposal was appropriate, refuse to award money maintenance if it is rejected[36]. Even with these limitations it is clear that the Frenchman in want has substantially greater recourse against any well-to-do member of his family than a similarly-situated Englishman.

THE GERMAN MAINTENANCE LAW

German law also operates on the basis of a pre-determined matrimonial property regime, that of the community of acquisitions[37] although this may be excluded by a marriage contract[38]. There is also fairly detailed provision for maintenance of ex-spouses on divorce[39] which is generally based on need and ability to pay, but proceeds on the expectation that maintenance is due while the spouse is responsible for children of the family[40] or is otherwise incapable of self-support. This again equates to traditional English arrangements. The basic assumptions about family support are however separately articulated. In other words, as in France, they are not regarded as ancillary to marriage breakdown.

A further feature of the German system is the insistence on equalisation of social security and pension entitlements on divorce. Indeed no divorce can be granted until the equalisation has been effected.[41] The object of the exercise is to transfer credits as appropriate to secure equality of entitlement for the period of the marriage. It is interesting to note that there are now proposals for a similar equalisation on divorce in England, although the prevalence of private pensions will mean that the mechanics of any scheme will be extremely complex.

[35] Art 210 CC.

[36] Art 211 CC. It is possible that this provision goes some way to explaining why French students tend to study in their home town. They may be consciously or sub-consciously aware that they will have a roof over their head by law, but cannot insist on cash support.

[37] *Zugewinnsausgleich.*

[38] §1363 BGB.

[39] §1569-1586b BGB

[40] §1570 BGB

[41] Much as in England no divorce can be finalised until the court has considered and approved the arrangements for the minor children.

The principal provision relating to maintenance or support is §1601 BGB: *"Verwandte in gerade Linie sind verpflichtet, einander Unterhalt zu gewähren.*[42] The major distinction between the German and the French system is therefore that there is no extension of the obligation to relatives by marriage. It is also clear that the right to maintenance depends on need[43]. There are significantly more detailed provisions than in the *Code Civile* regulating such matters as the order of liability (spouse first, then issue, then ancestors[44]), what is covered by maintenance[45] and imposing a duty to supply details of one's financial position to a relative in relation to maintenance[46].

There are provisions disentitling a claimant from pursuing a claim if he has become indigent through his own wilfully culpable behaviour, or has grossly neglected his own obligations to the payer[47]. In general payment will not be required from a relative who is unable to maintain himself, but again there is special provision for minor children, who must be treated *pari passu* with their parents[48]. Maintenance is in the form of a periodical payment[49] which, in the case of a court order in favour of a minor, may be index linked[50].

While it would be wrong to suggest that the German and French systems are equivalent they do share many similar features, including a liability to support indigent relatives enforceable by public authorities. The writer can confirm that these are actually enforced. While he was in practice he advised several UK residents who had received demands from French or German social security organs for reimbursement of sums paid to maintain relatives.[51] As a matter of interest, French offices appeared to accept an argument that this was in the nature of a demand for taxes which could not be pursued outside their own jurisdiction. The German offices did not accept this argument, but accepted with little enquiry that the means of the party allegedly liable were such as to qualify her for exemption from contribution[52].

The argument has some validity in relation to these facts, since the courts have always jealously guarded the prerogatives of national sovereignty, and there is some analogy between a claim of this kind and a demand for a tax or social security contribution. It would not be an answer to a claim brought by the indigent relative in her home court and transferred to England for enforcement, or to a claim brought in the English courts by the relative.

[42] Relatives in the direct line are obliged to afford maintenance to one another.
[43] *Unterhaltsberechtigt ist nur, wer außerstande ist, sich selber zu unterhalten.* Only one who is unable to support himself is entitled to maintenance: §1602 BGB.
[44] §1606ff BGB.
[45] Living training and educational expenses. §1610 BGB.
[46] §1605 BGB.
[47] §1611 BGB. A parent cannot rely on the gross neglect of obligations so far as the maintenance of his minor children is concerned.
[48] §1603 BGB.
[49] *Geldrente.* §1612a BGB.
[50] *Ibid.*
[51] These were aged parents or grand-parents, for whom there would be no liability in England.
[52] Under §1603 BGB *ante.*

CONCLUSION

It might be argued that the adoption of the whole of the Franco-German system in England would be beneficial. It could certainly help the state by transferring responsibility for the care of the indigent to their families, but might well simply result in the poorest becoming a charge on the poor, since those who are well off probably have parents who are well provided for anyway. A simple adoption of the liability provisions would be politically unacceptable. The Prime Minister has stated as a policy goal the creation of a society where wealth is to cascade down the generations: this will be threatened if wealth is applied to support the indigent and aged. It would also falsify the whole basis of the UK welfare state, which is that contributions and taxes are levied on the basis that the state rather than the family will provide. Some recognition of the fact that obligations arise out of the creation of the family relationship rather than its collapse would be welcome in relation to children, although there are serious problems of enforcement in relation to functioning families as opposed to the pursuit of absent parents.

PREGNANCY, SEX DISCRIMINATION AND DISMISSAL

Kay Wheat*

The House of Lords decision in *Webb v EMO Air Cargo (UK) Ltd*[1] was to approve the decision of the Court of Appeal that the dismissal of a woman because she was pregnant was not **always** discriminatory. However, the final judgment has been deferred pending a referral to the European Court for a preliminary ruling. At the same time, the Trade Union and Employment Rights Bill removes some of the obstacles that the pregnant woman faces at work. It may be that this domestic enactment together with whatever the European Court decides, will finally clarify the law in this area, but the case raises other matters of both statute and common law which this article will examine.

THE LEGAL POSITION AT THE TIME OF THE DECISION IN WEBB V EMO

Prior to the amendment introduced by the Trade Union and Employment Rights Bill, the legal position as to pregnancy and dismissal was that a woman needed two years continuous employment before she could avail herself of the protection offered by s.60 EPCA, which makes it an automatically unfair dismissal if the dismissal is 'for pregnancy or any other reason connected with pregnancy'. If she did not have sufficient service, then she had to rely on a claim of sex discrimination.

Section 1 (1) (a) of the Sex Discrimination Act defines direct discrimination as discrimination **on the ground of sex (or marital status)** (my emphasis). The test is to ask 'would the discrimination have occurred but for the applicant's sex?[2]' There is no defence available to the employer that direct discrimination is justified. Under s.1 (1) (a) indirect discrimination occurs when a mandatory requirement or condition is imposed upon persons of both sexes but which in practice a considerably smaller proportion of women can comply with than men[3]. It is possible for the employer to defend a claim on the basis that the requirement or condition is justified irrespective of sex.

There has been some judicial prevarication on the lawfulness or otherwise of pregnancy dismissals in terms of discrimination. The early case of *Turley v Allders Department Stores*[4] stated that since a man could not become pregnant, then pregnancy was not an issue of discrimination at all. This view has not prevailed and the later cases have tended to compare a pregnant woman with a man taking time off because of illness[5], the reasoning being that if a man needing the same amount of time off due to illness would not have been dismissed, then the dismissal of the woman would be discriminatory.

In the case of *Dekker v VJV Centrum*[6] the European Court took the view that discrimination on the ground of pregnancy must be **direct** discrimination since pregnancy is indisputably confined to one sex, and there can be no consideration of how a man would have been treated, because no man could ever be in that position. It was against this background, with the binding decision of the European Court to comply with, that the House of Lords considered the case of *Webb v Emo* in November 1992.

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1 [1992] 4 All ER.

2 James v Eastleigh Borough Council [1989] ICR 423 CA.

3 Both direct and indirect discrimination do, or course, apply equally to men: s.2 SDA, see below.

4 [1980] ICR 66.

5 See Hayes v Malleable WMC [1985] ICR 703 EAT.

6 [1991] IRLR 27.

WEBB V EMO AIR CARGO (UK) LTD

The facts of the case were that Mrs Webb had been employed by Emo Air Cargo to provide cover for the job of a Mrs Stewart who was due to go on maternity leave at the end of 1987. Mrs Webb was employed from 1st July 1987. The intention was that, during the first six months, she would be trained by Mrs Stewart as an Import Operations Clerk so that she would be able to take over when Mrs Stewart was on leave. It was said in the judgment that the return of Mrs Stewart from leave would not mean that Mrs Webb would then lose her job, but no further details were given as to what would happen to her. The company was small, having a total of 16 employees. It was undisputed that, prior to taking the job, Mrs Webb knew that she was to cover for Mrs Stewart and that she knew when the period of cover would start. Some two weeks after starting work, Mrs Webb suspected that she herself was pregnant (her suspicions were later confirmed) and when she told the managing director he said that he had no alternative but to dismiss her. Mrs. Webb's baby was due on 8th March 1988; Mrs Stewart's was due on 16th February 1988.

In the *Webb* case it is clear that the announcement of her pregnancy prompted the managing director to dismiss her. In the light of *Dekker,* how could it not have been discriminatory? The argument of the House of Lords was to say that her dismissal was not actually on the ground of pregnancy: the 'real' reason was that she would not be available for the precise period for which her services were required. The fact that this was because she would be away having a baby rather than doing something else which she could not avoid doing, was irrelevant.

> 'The appellant was not dismissed simply because she was pregnant but because her pregnancy had the consequence that she would not be available for work at the critical period. It is true that but for her sex she would not have been pregnant, and but for her pregnancy she would not have been unavailable then. If the 'but for' test applies to that situation, it must equally apply where the reason for the woman's being unavailable at the critical time is that she is then due to have an operation of a peculiarly gynaecological nature . . . The cirumstances in the case of a woman due to have a hysterectomy are different from the circumstances in the case of a man due to have a prostate operation. The questions is whether they are materially different, and the answer must be that they are not because both sets of circumstances have the result that the person concerned is not going to be available at the critical time[6].'

Lord Keith goes on to say that support for this view comes from s.2 of the 1975 Act[7], inasmuch as if comparison between a man and a pregnant woman were impossible in any circumstances, then the subsection would be pointless. The Law Lords said that the decision in *Dekker* did not deal with this sort of situation and, hence, the reference to the European Court for a decision.

The conclusion therefore was that there was no direct discrimination. Indirect discrimination was not really a live issue because in the case of indirect discrimination the employer has a defence of justification. There seemed little doubt that the employer in this case could show that the act was justified irrespective of the sex of Mrs Webb because the employer needed to replace her with someone who would be able to work for the required period.

[6] Per Lord Keith at 935.

[7] s.2(1) Section 1, and the provisions of Parts II and III relating to sex discrimination against women, are to be read as applying equally to the treatment of men, and for that purpose shall have effect with such modifications as are requisite.
s.2.(2) In the application of subsection (1) no account shall be taken of special treatment afforded to women in connection with pregnancy or childbirth.

TRADE UNION AND EMLOYMENT RIGHTS BILL

What impact, if any, would the Trade Union Reform and Employment Rights Bill have had if it had been law at the time? Clause 23 (amending s.60 EPCA), makes it automatically unfair to dismiss a woman if the reason or principal reason is her pregnancy or any other reason connected with pregnancy regardless of her length of service. Mrs Webb would not therefore have been relying on sex discrimination but upon s.60[8].

Would there have been any argument that Mrs Webb was dismissed **for a reason connected with pregnancy,** as opposed to **on the ground of sex?**

In the case of *Clayton v Vigers*[9], the EAT held that s.60 (1) should be construed widely. The facts concerned a dental nurse who went on maternity leave from 11th April 1986, informing her employer that she intended to return to work within six weeks of the birth. On 22nd May, the employer wrote to the employee to say that he had been unable to employ a temporary assistant and had engaged a permanent replacement. Although the employee had failed to say when the baby was due and therefore lost her statutory right to return to work, she was found to have been unfairly dismissed. The EAT said that the background of the dismissal was the pregnancy or its after-effects and the requirements of s.60 were satisfied.

Clearly, a causative link between pregnancy and dismissal must be established, but it is hard to see how an argument could have been sustained that the reason, i.e. that she would not have been available at the critical time, could be said not to be connected with her pregnancy. If the proposed amendments to s.60 become law, then it is hard to see how a future Mrs Webb would fail to establish that her dismissal had been for an automatically unfair reason.

Throughout its judicial journey from the industrial tribunal to the House of Lords, Mrs Webb's dismissal was found to be lawful. Some may argue that this is typical of judicial antipathy to social reform, particularly if it has European origins. However, on the facts of this case, is there justification for taking the view that anti-discrimination legislation was not intended to apply in situations such as this?

[8] s.60 (1) EPCA 1978 An employee shall be treated for the purposes of this Part as unfairly dismissed if the reason or principal reason for her dismissal is that she is pregnant or there is any other reason connected with her pregnancy, except one of the following reasons:
(a) that at the effective date of termination she is or will have become, because of her pregnancy, incapable of adequately doing the work which she is employed to do;
(b) that, because of her pregnancy, she cannot or will not be able to continue after that date to do that work without contravention (either by her or her employer) of a duty or restriction imposed by or under any enactment.

[9] [1989] ICR 713.

Suppose the Trade Union and Employment Rights Bill had been law, and EMO had been advised that they could not dismiss Mrs Webb. If dismissal was not an option, then the employer may feel that some internal reorganisation should take place so that another employee carried out the cover for Mrs Stewart, and Mrs Webb be placed elsewhere. However, if this happened and Mrs Webb did not like the change, it is possible that she would be able to successfully claim that she had been subjected to sex discrimination, and, if the discrimination was direct, then there would be no defence of justification. To establish direct discrimination it would be up to her to prove that the treatment she had been subjected to was less favourable than that which a man would have been subjected to, and that the treatment was on the ground of sex. If it can be shown that the reason for the treatment was that she was pregnant, and therefore no man could be subjected to **any** form of treatment for this reason, then she will succeed as long as the treatment is less favourable, which it may well be given the limited number of job options which the employer may have been able to offer her.

The employer may ask whether it would be possible for him to dismiss someone else within the company so that he can keep Mrs Webb. Let us suppose that the employer does that, can that person argue that **she** has been dismissed because of a reason connected with pregnancy? The wording of s.60 is such that the same 'she' is referred to throughout: 'an employee shall be treated for the purposes of this Part as unfairly dismissed if the reason or principal reason for **her** dismissal is that **she** is pregnant or there is any other reason connected with **her** pregnancy . . .' (my emphasis). The second employee cannot therefore argue that her dismissal is caught by s.60, and then, as long as the employee had sufficient service, she would be ineligible to bring a claim for unfair dismissal. If she was eligible to bring a claim, the employer would have to establish that the employee was dismissed fairly i.e. for some other substantial reason[10]. The so-called 'rubber-band' quality of this category has meant that the economic needs of the employer's undertaking (exemplified here by the need to avoid paying wages for a surplus employee) have justified dismissals of employees who, for example, have refused to comply with detrimental changes in their pay and duties[11]. It may well be that the employer in this case would succeed in establishing this as some other substantial reason, and a fair dismissal as long as the residual requirements of reasonableness were complied with e.g. the employer did not unfairly choose the employee who would have to be dismissed or fall foul of procedural requirements. Of course, the dismissed employee may not be too delighted with this solution.

Under the existing s.60 an employer can lawfully dismiss a pregnant employee if "because of her pregnancy she will be incapable of adequately doing the work she is employed to do." This exception has been removed by Clause 23. In any event it is highly unlikely that the courts would have interpreted "incapable" as meaning "incapable of undergoing a period of training for a task because she would be incapable of doing the task when the time came." It would not have been an issue, but it does raise the point that there would be a certain futility in Mrs Webb undergoing the training period. The whole point of taking her on had been destroyed; dare it be argued that the contract had become frustrated?

[10] 'Some other substantial reason' being a potentially fair reason for dismissal — s.57 (1)(b) Employment Protection (Consolidation) Act 1978.
[11] See, for example, *Hollister v NFU [1979] ICR 542.*

FRUSTRATION

The doctrine of frustration has been applied sparingly to contracts of employment. It has been used mainly in long-term ill-health cases, and the imposition of prison sentences. In particular it has been said that where an employee's contract is readily determinable by notice, the courts should rarely use the concept of frustration[12]. On the face of it Mrs Webb's contract was readily determinable by notice. However, given the fact that dismissal would be unlawful it could be argued that this meant that the contract was not lawfully determinable by notice at all whilst the reason for the determination was connected with her pregnancy. In any case, even if the contract is readily determinable by notice, if the requirements of the doctrine of frustration are satisfied then it can be frustrated anyway: see *Nottcutt v Universal Equipment* below. Does the doctrine fit the facts of this case? The doctrine states that there are two essential factors: a) there must be some event capable of rendering performance of the contract impossible or something radically different from what the parties contemplated when they entered into it; and b) the event must occur without the fault of either party *(Paal Wilson & Co v Partenreederei*[14]*)*.

In *Chakki v United Yeast Co Ltd*[15] the employee had been sentenced to 11 months imprisonment, but had appealed and been granted bail pending the determination of the appeal. The employer, however, had terminated the contract. The employee was subsequently successful in his appeal and was placed on probation. The EAT said that imprisonment was a potentially frustrating event, and in order to ascertain whether the contract had actually become frustrated, it was essential to decide **precisely when** it became commercially necessary for the employer to decide whether or not to employ a replacement. If it was necessary at the time that the sentence was passed, the fact that it was subsequently replaced by a non-custodial sentence was irrelevant. However, in this case, the Employment Appeal Tribunal upheld the employee's appeal, as it had not been shown by the employer that it was commercially necessary at the time they decided to treat the contract as frustrated.

In Mrs Webb's case, if the contract was frustrated then **when** was it frustrated: when the pregnancy was first discovered, or only when Mrs Webb left to have her baby? It seems that on the tests in *Paal Wilson v Partenreederei*[16] and *Chakki v United Yeast*[17] the fact of the pregnancy would be enough, given the predictability of the fact that Mrs Webb would be away at the time of Mrs Stewart's maternity leave.

[12] Harman v Flexible Lamps Ltd [1980] IRLR 418 EAT.
[13] [1986] 1 WLR 641.
[14] [1983] 1 AC 854.
[15] [1982] ICR 140.
[16] [1983] 1 AC 854.
[17] [1982] ICR 140.

In *Marshall v Harland & Wolff Ltd & Anor*[18], a case of long-term ill-health, the National Industrial Relations Court put forward a number of factors which should be considered in deciding whether a contract had become frustrated. These included the terms of the contract; the likely duration of the illness; how long the employment had lasted when the so-called frustrating event occurred; how long it was likely to last afterwards; whether the employee was in a key post and the need of the company to find a replacement.

In Mrs Webb's case the terms of her contract were that she be available for a particular and unalterable period of time. What the House of Lords referred to as the critical period of time was the **whole purpose** of the contract. The employer would have no difficulty in establishing the commercial needs to find a replacement; Mrs Webb had been in post for some two weeks only when the pregnancy was discovered; and, although it had been indicated to her that she would not be dismissed when Mrs Stewart returned what exactly was to happen to her was not clear. Both *Chakki* and *Marshall* stress the 'key post' aspect of frustration, as did the case of *The Egg Stores (Stamford Hill) Ltd v Leibovici*[19].

Further, the fact that the employer expressly dismissed Mrs Webb does not undermine the frustration doctrine. The Court of Appeal in *Notcutt v Universal Equipment*[20], another ill-health case, held that the doctrine of frustration applied to terminate the contract **before** the employee received notice of its termination, and the employee was not entitled to notice pay for the period of statutory notice.

Of course, these may be very unattractive arguments for industrial tribunals to consider. Would it be an attempt to circumvent the whole point of anti-discrimination legislation, both domestic and European? On the contrary, far from trying to do this, I would argue that by using the doctrine in these very limited sorts of cases, the law which is designed to protect and advance the rights of women is untainted. The doctrine of frustration has been used with remarkable moderation in cases of ill-health, and quite rightly so, lest it undermine an employee's right to claim unfair dismissal: there is no reason to believe therefore, that its extension to such a case as Mrs Webb's would have an adverse effect on the general protection of women in employment.

There is also some oblique support for this from statute. Section 61 EPCA 1978 — an employer has a substantial reason under s.57 (1) (b) to justify dismissal if on engaging a replacement he tells the replacement that his or her employment will be terminated on the return to work of the pregnant employee. This is acknowledging that the recruitment of an employee to cover for a woman on maternity leave is taken on for a specific period, and whose services can be fairly disposed of when the particular contract has been carried out. It could be argued that it is essentially a 'task contract' inasmuch as it is discharged by performance, and that on the return to work of the original job-holder the performance is completed.

[18] [1972] ICR 101.
[19] [1976] IRLR 376.
[20] [1986] 1 WLR 641.

Of course, it may just be that the use of the doctrine would smack of such political incorrectness that the courts would steer clear of it at any price. Perhaps another reason that the doctrine of frustration has been treated so circumspectly may be that it is at odds with the statutory concept of reasonableness which was introduced into the employment relationship over 20 years ago[21]. However it is a mistake to assume that there is always a requirement upon a dismissing employer to have behaved reasonably. Leaving aside the fact that an employee normally requires a certain period of service in order to claim that she have been unfairly dismissed, and that not all classes of employees are eligible, the reasonableness of the employer will only be relevant where the employee has been dismissed for a potentially fair reason. There are reasons which are automatically unfair, such as the reason of pregnancy or connected with pregnancy. Similarly, there is no concept of reasonableness in a discriminatory dismissal. The employer may show it was justified if it was indirect, but no such option is available in direct discrimination.

Were the Law Lords influenced by the idea of the reasonableness of the dismissal in their judgment in Mrs Webb's case? It may have been eminently reasonable for EMO Air Cargo to want to get rid of Mrs Webb: that is irrelevant[22]. Automatically unfair reasons for dismissal and direct discrimination are outlawed for social reasons. In the case of *Brown v Stockton-on-Tees Borough Council*[23] the House of Lords took a more robust view of a pregnancy dismissal. The employee, Mrs Brown, was employed as a care supervisor on a scheme established under the Youth Training Scheme. When the scheme was terminated, she, together with three other employees in the same circumstances, was invited to apply for one of three 12 month contracts on a revised scheme. She was the one who was not employed because she was pregnant and would require maternity leave soon after starting on the 12 month contract. She was, therefore, made redundant. The Law Lords, reversing the Court of Appeal's decision, found that as the reason she was made redundant was that she was pregnant, she was therefore dismissed because she was pregnant and it was, therefore, automatically unfair. The real point of the case in the House of Lords, however, was that it was specifically acknowledged that this may make it highly inconvenient for employers.

> 'I have no doubt that it is often a considerable inconvenience to an employer to have to make the necessary arrangement to keep a woman's job open for her whilst she is absent from work in order to have a baby, but it is a price that has to be paid as a part of the social and legal recognition of the equal status of women in the work place[24].'

[21] First appearing in the Industrial Relations Act 1971, the right not to be unfairly dismissed is now governed by the Employment Protection (Consolidation) Act 1978, and once a potentially fair reason for dismissal has been shown (s.57 (2)), then the employer still has to show that it was reasonable to dismiss (s.57(3)).

[22] Whilst not pertinent to the argument here, it should perhaps be noted that there are suggestions of **unreasonableness** on the part of EMO e.g. there seemed to be no discussion about when exactly the baby was due, how the company's business would be affected etc. and the employer was dismissed without even waiting for medical confirmation of the pregnancy.

[23] [1988] 2 WLR 935.

[24] per Lord Griffiths at 940f.

Perhaps, after all, Mrs Webb's case should be viewed like Mrs Brown's: highly inconvenient for the employer, but a price to be paid for reforming social legislation?

Finally, if it will be unlawful to dismiss future Mrs Webbs, it is pertinent to point out, that just as it was thought to be ineffective to bring into force the Equal Pay Act on its own (without the force of the Sex Discrimination Act, the result may have been that employers would have preferred to employ men rather than women), there is no point in insisting the companies such as EMO keep on the likes of Mrs Webb without providing some form of provision for extra costs involved, whether by way of insurance or state support, otherwise women of child-bearing age will be disadvantaged at the point of job entry. Or, as cynics may like to say: next time EMO should be advised to employ a man with a healthy prostate gland.

CHILD WITNESSES — WHAT IS THE PSYCHOLOGICAL EVIDENCE OF THEIR COMPETENCE AND CREDIBILITY?

Brian S. Ward*

Important changes affecting the admissibility of children's evidence in criminal proceedings came into force in October 1992 as a result of the Criminal Justice Act 1991. Amongst other things the Act changes the competency requirement for child witnesses and, in certain specified circumstances, allows a video recording of an interview conducted between a child witness and an adult to be used as the child's evidence in chief. These reforms follow on from the changes introduced by the Criminal Justice Act 1988 such as the relaxation of the rules regarding corroboration of children's evidence and the introduction of the video link which has enabled children to give their evidence away from the main body of the court.

BACKGROUND TO THE REFORMS

In the 1980s there had been a wave of public feeling that the obstacles to conviction of those charged with offences against children were too great and that participating in the legal process was having a harmful effect on many children[1] [2] [3] [4]. One Member of Parliament spoke of "the emotion, anger and disgust expressed by so many people about the abuse of young children" and "a public outcry on the need to change the law"[5]. Many other countries experienced the same heightened public debate and concern and introduced similar reforms. In Australia and New Zealand there was, in the words of one academic "an explosion of inquiries and a rash of reports addressing the issue"[6]. In turn these reports led to changes being made to the rules of competence and corroboration, reform of the hearsay rule and the introduction of video recorded interviews and closed circuit television for children's evidence[7]. In the United States changes were made by a number of state legislatures and by the federal government which liberalised the rules of evidence that apply to children. Many states amended the competency requirement[8]. Some now permit video depositions in place of testimony in court and some made new hearsay exceptions which assist child witnesses[9]. In Canada changes were made to the corroboration requirement and the courts now allow children to give their evidence by means of video recorded interview and close circuit television [10] [11]. The Scandinavian

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1 Samuels, Alec *Child Abuse and the Criminal Trial.* Justice of the Peace, Vol. 131, 1987, p603.

2 Williams, G. Criminal Law: Essays in Honour of J. C. Smith. ed Smith, P. London, Butterworths, 1987. p.191.

3 Mackay, J. (Lord Mackay of Clashfern) Opening Address to the International Conference on Children's Evidence in Legal Proceedings: Selwyn College, Cambridge, June 1989.

4 Scottish Law Commission, Discussion Paper No. 75 *The Evidence of Children and Other Potentially Vulnerable Witnesses* 1988 pl.

5 Mrs Llin Golding MP. House of Commons Hansard 18th January 1988 Col. 727.

6 Warner, Kate. *Child Witnesses: Developments in Australia and New Zealand.* Paper presented to the International Conference on Children's Evidence in Legal Proceedings: Cambridge, June 1989. pl.

7 Warner, Kate *Child Witnesses in Sexual Assault Cases.*Criminal Law Journal, Vol. 12, 1988 pp.286-302.

8 Haugaard, Jeffrey, *Judicial Determination of Children's Competency to Testify: Should it be Abandoned?* Professional Psychology: Research and Practice, Vol. 19, 1988, pp. 102-107.

9 Goodman, Gail S. and Reed, Rebecca S. *Age Differences in Eyewitnesses Testimony.* Law and Human Behavior, Vol. 10, 1986. pp.317-332 at p.318.

10 Yuille, John C. *The Systematic Assessment of Children's Testimony.* Canadian Psychology, Vol. 29, 1988, pp.247-262 at p247.

11 Wilson, Jeffery. *Chidren's Evidence: A Perspective on the Canadian Position.* Paper presented to the International Conference on Children's Evidence in Legal Proceedings: Cambridge, June 1989.

countries found it relatively easy to introduce reforms since they have few formal rules of evidence and no hearsay rule. It is up to the court to assess the weight of any relevant evidence. In Norway, the Norwegian Code of Criminal Practice authorises an examining magistrate to interview a child out of court. A report of the interview together with the magistrate's assessment of the child's competence and credibility is read out at trial. Since 1981 such interviews have been tape recorded, and in Oslo they are now video recorded[12]. In Denmark and Sweden specially trained policewomen are used to interview child witnesses. Tape recordings of the interview may now be used in evidence at a subsequent trial[13].

A NOTE OF CAUTION

The public reaction in this country and in jurisdictions around the world led some commentators to sound a note of caution. One barrister wrote that "quick reform based on emotion rather than reason can be very dangerous"[14]. One Australian writer stated that reform is politically appealing to governments in that there is perceived to be public support for doing something to protect children and in cracking down on criminals. However, it was argued that a combination of moral outrage and political advantage can be an extremely dangerous one when viewed from a perspective emphasising the need for criminal justice[15].

A frequently raised concern is whether children are capable of being competent and credible witnesses. During the 17th and early 18th century there was some confusion in the courts about whether or not they should accept a child's evidence but in general they were prepared to do so[16]. The 18th Century jurist Sir William Blackstone wrote that "infants of very tender years often give the clearest and truest testimony"[17]. However, starting with the case of R v. Brasier in 1779[18] a number of judgements placed restriction on the admissibility of children's evidence or, in circumstances where such evidence was held to be admissible, on the weight that could be attached to that evidence[19]. This trend can be traced up to and including the case of R v. Wright and Ormerod[20], where Ognall J expressed the view that children under 8 years of age should never be called as witnesses. The justification for the restrictive rules on children's evidence has in general been a fear that such evidence is inherently unreliable in that children are highly suggestible and can easily be influenced by adults, that they have poor memory, that they confuse fact with fantasy and that they do not understand the importance of telling the truth in court.

[12] Andenaes, J. *The Scandinavian Countries.* Paper presented to the International Conference on Children's Evidence in Legal Proceedings: Cambridge, June 1989.
[13] Scottish Law Commission, Discussion Paper 75 *The Evidence of Children and Other Potentially Vulnerable Witnesses,* 1988. p31.
[14] Samuels, A. op cit., p603.
[15] Goode, M. *The Politics of Child Sexual Abuse and the Role of the Criminal Law.* Criminal Law Journal, 1989 p32.
[16] Holdsworth. W. S. *A History of English Law,* Methuen, 1926.
[17] Blackstone, William. *Commentaries on the Laws of England.* 9. W Strathran, 1783. It is interesting to note that by the time the ninth edition of the Commentaries was published in 1783 this passage had been amended to warn of the dangers of receiving children's evidence.
[18] (1779) 1 Leach. 199.
[19] See, for example, D.P.P. v. Hester [1973] A.C. 296.
[20] (1987) [1990] Cr.App.R.91.

However, it has been asserted that the changes to the rules governing the admissibility of chilren's evidence are justified in the light of modern psychological research into children's abilities. When in 1987 Parliament was considering the abolition of the requirement that children's unsworn evidence must be corroborated, the Government's spokesman in the Lords told the House, "we have come to the conclusion that the little amount of research that has taken place indicates that children are as good witnesses as adults"[21]. A similar view has been expressed by the Lord Chancellor. Speaking about the caution with which child witnesses have been treated by the courts he said, "more modern attitudes and some psychological research suggests that this caution may have been ill-founded and that children can be as reliable and trustworthy as other witnesses"[22]. Conversely, the psychologist John Yuille has written "We have witnessed in less than a decade a change from a denial of the value of children's testimony to giving it disproportionate weight. Neither the rejection nor the admission of a child's testimony has been based upon a careful examination of the eyewitness abilities of children, instead both responses to children's testimony have reflected the prevailing social milieu"[23].

WHAT IS THE PSCYHOLOGICAL EVIDENCE?

Psychological research on children's abilities conducted during the first half of this century certainly tended to show that children suffered from poor memory and that they were highly suggestible[24] [25] [26]. One of the most frequently quoted series of experiments which looked at the question of children's suggestibility are those conducted by the Belgian psychologist J Varendonck[27]. Varendonck was called in to give evidence in defence of a man named Van Puyenbroeck. In 1911 the population of the small town in Flanders, where Van Puyenbroeck lived, had been outraged by the murder of three young children. When a fourth child was killed the police were especially keen to apprehend the murderer. The police questioned two of the child's playmates, aged 8 and 10. These children, who had been with the girl just before she went missing, initially told the police they did not know who had taken the child. However, after repeated suggestive questioning by police and local magistrates, they eventually agreed with a police suggestion that Van Puyenbroeck had approached the child and walked off with her. As a result of their concern over the way the children had been questioned, the defence called in the psychologist Varendonck to give expert evidence. In order to show just how easily children could be led into giving false testimony, Varendonck designed a number of simple experiments. As part of these he visited a local school where, in one class, eighteen seven year old children were asked to write down the colour of the beard of one of their teachers who, in fact, had no beard. Sixteen students wrote "black" and two did not write anything. Similar questions presented to children aged 8 to 12 brought forth a similar response. Varendonck exclaimed "When are we going to give up, in all civilised nations, listening to children in courts of law?" and on the basis of his findings Van Puyenbroeck was acquitted.

[21] Earl of Caithness — House of Lords Hansard Vol. 490 No. 36 17th November 1987 Col. 172.
[22] Mackay, J. (Lord Mackay of Clashfern) op. cit.
[23] Yuille, J. *The Systematic Assessment of Children's Testimony.* Canadian Psychology, Vol. 29, 1988 p.247.
[24] Binet, A. *La Suggestible.* Schleccher-Feres, 1900.
[25] Stern, W. *Abstracts of Lectures on the Psychology of Testimony and on the Study of Individuality.* American Journal of Psychology. Vol. 21 1910, pp273-82.
[26] Stern, W. *The Psychology of Testimony.* Journal of Abnormal and Social Psychology, Vol. 21 1939, pp.273-83.
[27] Verondonck, P. M. *Les Temoignages D'Enfants* Arch De Psychol No. 42 July, 1911 p9.

Varendonck's experiments served as a dramatic illustration of the way children can be misled and he was, perhaps, correct to cast doubt on the way the children had been questioned by the police. However, what is not so clear, is whether on the basis of his work he was right to cast doubt on the generally admissibility of children's evidence. Adults are also hightly suggestible. In 1974 the pscyhologists Elizabeth Loftus and John Palmer conducted what has become one of the best known psychology experiments on adult witnesses[28]. They showed 47 adults seven short films depicting traffic accidents. After seeing each film, subjects were given a questionnaire which included the question, "How fast were the cars going when they hit each other?" For equal numbers of the remaining subjects the verbs smashed, collided, bumped or contacted were used in place of the word hit. It was found that, whilst the witnesses' response bore little relationship to the actual speed of the cars, the form of the question markedly and systematically affected their answer. The group who were asked the question with the verb "hit" gave an average estimate of 34mph, whereas using the word "smashed" produced an average estimate of 40mph. Loftus and Palmer wondered if the question used might actually affect witnesses' memory of the original event. To determine this they carried out a similar experiment to that outlined above on one hundred and fifty adults. Once again they found that the form of the question significantly affected the estimate of average speed. One week later subjects were invited back to complete a second questionnaire about the accident which contained the question, "Did you see any broken glass?" In fact there was no broken glass in the accident. It was found that subjects who had been interrogated with the verb "smashed" were significantly more likely to reply "yes" to this question than those who had been interrogated with the verb "hit" or a control group who had not been asked about the speed of the car.

Most psychological research into children's ability to perform as witnesses have had common methodological features. Subjects have been presented with a staged event[29], a film show[30], a series of pictures[31], a tape recording[32], or perhaps even just a list of words[33]. Then, possibly after some delay, the subjects have been tested on what they had observed. They have then been asked to freely recall what happened. They may have been asked a series of general or specific questions. In addition, many studies have involved asking those taking part questions or showing them events that have contained misleading information. In these studies the subjects have been tested again, perhaps after a further delay, to see if they have incorporated the misleading information into their account of what took place.

[28] Loftus, E. and Palmer, J. *Reconstruction of Automobile Destruction: An Example of the Interaction between Language and Memory* Journal of Verbal Learning and Verbal Behaviour. Vol. 13, 1974 pp. 585-589.

[29] Pear, T. and Wyatt, S. *The Testimony of Normal and Mentally Defective Children.* British Journal of Psychology, Vol. 3. P.387-419.

[30] Cohen, R. and Harnick, M. *The Susceptibility of Child Witnesses to Suggestion* Law and Human Behavior. Vol. 4 No. 3, 1980 pp201-210

[31] Binet, A. *op.cit.*

[32] Saywitz, Karen J. *Children's Testimony: Age Related Patterns of Memory Errors* in Ceci, Stephen J., Toglia, Michael P. and Ross, David F. Children's Eyewitness Memory. Springer-Verlag, 1987 pp.36-52.

[33] Eysenck, Michael and Baron, Cynthia *Effects of Cuing on Recall from Categorised Word Lists.* Developmental Psychology, Vol 10. 1974, pp.665-666.

However, much of this psychological research has been criticised for using stimuli unconnected with real life events[34]. The events witnessed in many studies have not had personal significance for the children tested. Often when children are giving evidence it is about crimes where they have been the victim and the events have been highly significant and traumatic for them. In the typical psychology experiment the child will be witnessing an event for just a few minutes whereas in real life a child may be called upon to give evidence about events that took place over a period of months or even years. In the psychology experiments the child's memory for the event may be tested immediately after the event or perhaps a few days or a week later whereas in real life the child may be questioned about events that took place months or even years before. Clearly, there are ethical considerations which have prevented psychologists from recreating the conditions children experience as victims of crime. Nevertheless, they have been able to carry out experiments in which children have been active participants[35] and they have taken advantage of naturally occurring stressful situations such as a child's visit to a clinic to have an injection or medical examination[36] and visits to the dentist[37].

During the past decade an increasing number of psychological studies have shown that the reliability of a witness is dependent not simply on age but arises from a complex interaction of factors including the witness' interest in the alleged incident[38] [39] [40], the stress the witness is under[41], the witness, existing knowledge base[42], the witness' linguistic fluency, the witness' desire to conform to the perceived view of the questioner[43] and perhaps most important of all how the witness is subsequently questioned[43] [44] [45] [46] [47] [48] [49].

[34] see, for example, Goodman, G., Aman, C. and Hirschman, J. *Child Sexual and Physical Abuse: Children's Testimony.* in Ceci, Stephen J., Toglia, Michael P. and Ross, David F. Children's Eyewitness Memory. Springer-Verlag, 1987 pp.4-11.

[35] Goodman, G. and Reed, R. *Age Differences in Eyewitness Testimony.* Law and Human Behavior. Vol. 10 No. 4, 1986 pp317-332.

[36] Goodman, G., Aman, C. and Hirschman, J. *op.cit.,* pp.11-23.

[37] Peters, *op.cit.,* pp.122-141.

[38] Lindberg, M. *Is Knowledge Base Development a Necessary and Sufficient Condition for Memory Development.* Journal of Experimental Child Psychology, Vol. 30 pp401-410.

[39] Powers, P., Andrikis, J. and Loftus, E. *Eyewitness accounts of females and males,* Journal of Applied Psychology, Vol. 64 pp.339-347.

[40] Renninger, K. A. and Wozniak, R. H. *Effects of interest on attentional shift, recognition, and recall in young children.* Developmental Psychology, Vol. 21 1985 p.624-632.

[41] Dent, H. *Stress as a Factor Influencing Person Recognition in Identification Parades.* Bulletin of British Psychological Society. Vol. 30 1977 pp.339-340.

[42] Chi, M. *Knowledge structures and memory development.* in Seigler, R. ed. Children's Thinking: What Develops, Hillsdale, Erlbaum, 1978.

[43] Baxter, J. *Developmental Trends in Compliance.* Paper presented to British Psychological Society Conference: Bridge of Allen, 1986.

[44] Dale, P., Loftus, E. and Rathbun, L. *The Influence of the form of the question on the eyewitness testimony of pre-school children.* Journal of Psycholinguistic Research. No. 7 pp.269-277.

[45] Davies, G. and Brown, L. *Recall and Organisation in Five Year Old Children.* British Journal of Psychology, Vol. 69. 1978 pp.343-349.

[46] Dent, H. and Stephenson, G. *An Experimental Study of the Effectiveness of Different Techniques of Questioning Child Witnesses.* Brtitish Journal of Social Clinical Psychology. Vol. 18 1979 pp.41-51.

[47] Loftus, E. and Palmer, J. *Reconstruction of an Automobile Destruction: An Example of an Interaction between Language and Memory.* Journal of Verbal Learning and Verbal Behaviour, Vol. 40. 1984 pp.51-67.

[48] Muscio, B. *The Influence of the Form of a Question* British Journal of Psychology, Vol. 8 1915 pp.351-389.

[49] For a review of Home Office guidance on interviewing child witnesses see Ward, B. *Interviewing Child Witnesses.* New Law Journal 6th November 1992 pp.1547-1548.

It seems that even quite young children can, if properly questioned, provide evidence that is as reliable as that provided by adults. It is not that these studies have always shown children to be more reliable than previously assumed but that there has been a growing realisation that adult witnesses are prone to many of the failings frequently used in the past as a justification for excluding children's evidence. Adults can forget, adults can make false identifications [50] [51] and adults are prone to suggestibility[52]. Adults can also, if they are so minded, tell lies.

ARE CHILDREN SEEN AS BEING COMPETENT AND CREDIBLE?

The fact that children are capable of being competent and credible witnesses does not necessarily mean they will be perceived as such by the tribunal of fact. Psychological research has provided us with insight into the way jurors view child witnesses. Observing jury deliberations or questioning juries directly on the decision they have reached would be a contempt of court[53]. As a consequence it has been necessary to turn to research of an indirect and, therefore, less than ideal nature. Psychologists have carried out studies using mock juries who see or read about a fictitious trial and who are then asked to reach their decision or shadow juries who deliberate about a real trial but who take no part in the actual trial verdict[54] [55] [56]. Clearly, since those taking part in such experiments are normally aware that their decision will not have a bearing on the defendant's future we cannot be certain that a real jury would behave in the same way. Nevertheless, bearing in mind the limitations of the research, some interesting findings have emerged.

Research that has looked specifically at the way jurors react to child witnesses has produced a complex picture. The psychologist Gail Goodman and her colleagues carried out a series of experiments in which mock jurors saw a video or read a story about a trial[57]. The trial concerned a road accident or, in a later experiment, a murder. For all subjects the information presented was the same except for one detail and that was the age of the witness who provided the crucial testimony. Subjects would see or read about this evidence being given by a thirty year old, a ten year old or a six year old. The mock jurors, who were asked to rate the witness in terms of their credibility, consistently judged the six year old to be less credible that the ten year old and in two out of the three experiments the ten year old was judged to be less credible than the adult. Thus, despite the fact that the children provided exactly the same information as the adult, they were seen as being significantly less credible witnesses. In the third experiment the researchers recorded the mock jury deliberations. The statements the jurors made about the witnesses were then transcribed and classified as either positive, neutral or negative. The most negative statements were made about the six year old with many jurors expressing concern about her possible suggestibility and poor memory.

[50] Deffenbacher, K. and Horney, J. *Psycho-legal aspects of face identification.* in Davies, G., Ellis, J., and Shepherd, J. (editors) Perceiving and Remembering Faces. London. Academic Press.

[51] Yuille, J. C. and Cutshall, J. L. *A Case Study of Eyewitness Memory of a Crime.* Journal of Applied Psychology, 1986. Vol. 71 No. 2 pp.291-301.

[52] Loftus, E. and Palmer, J. *op.cit.*

[53] s.8 Contempt of Court Act 1981.

[54] Goodman, G., Golding, J., Hegleson, V., Haith, M. and Michelli, J. *When a Child takes the Stand* Law and Human Behavior, Vol. 11 No. 1. 1987 pp27-40.

[55] Leippe, M. R. and Romanczyk, A. *Children on the Witness Stand: A communication/persuasion analysis of jurors' reactions to child witnesses.* in Ceci, Stephen J., Toglia, Michael P., and Ross, David F., Children's Eyewitness Memory. Springer-Verlag, 1987 pp.155-177.

[56] Ross, D. F. , Miller, B. S. and Moran, P. B. *The Child in the Eyes of the Jury: Assessing Mock Jurors' Perceptions of Child Witnesses.* in Ceci, Stephen J., Toglia, Michael P. and Ross, David F. Children's Eyewitness Memory. Springer-Verlag, 1987 pp.142-154.

[57] Goodman, G., Golding, J., Helgeson, V., Haith, M., Michelli, J. *When a Child Takes the Stand* Law and Human Behavior, Vol. 11 No. 1 1987 pp.27-40.

Surprisingly, the researchers found that the level of credibility associated with the principal witness did not affect the degree of guilt attributed to the defendant. The researchers suggest two possible explanations for this[58]. One explanation is that evidence has a sleeper effect in that it becomes disassociated from its original source. The jurors remember what was said but do not relate this directly to the credibility of the witness who said it. This suggestion is supported by other research[59]. However, the researchers feel that a different interpretation is more likely. When an adult was the principal witness, the credibility of supporting witnesses did not correlate with the finding of guilt attributed to the defendant. When the children gave their evidence the jurors seemed to be looking for corroborating evidence from these other witnesses and their credibility did correlate with the finding of guilt. The researchers state that it appears that jurors were hesitant to judge a person's guilt or innocence solely on the basis of a child's statements and looked for supporting or disconfirming evidence in the testimony of others[60].

The psychologists Michael Leippe and Anne Romanczyk have conducted five studies examining adults' reaction to child witnesses[61]. Their work indicates that whilst adults may enter the courtroom with an unduly negative view of children's ability they will be particularly impressed if a child gives a competent performance. This view is supported by an experiment conducted by the psychologist David Ross and colleagues[62]. In this study subjects watched a fifty minute video of a complicated narcotics trial that was based on an actual court transcript. All details remained the same across all conditions except the age of a principal eyewitness who appeared as either a 21 year old, an 8 year old or a 74 year old. After viewing the video subjects were asked to rate the witness on a variety of dimensions, such as accuracy, confidence, forcefulness, credibility, objectivity, consistency, truthfulness, intelligence and the extent to which they could be manipulated by the prosecution or defence lawyers. In general, the 8 year old was rated more highly than the 21 year old. The researchers suggest that this may have been because jurors apply different standards to different witnesses. They expect a 21 year old to be capable of giving details of a fairly complex event but when a child does so they see that child as being highly intelligent and reliable.

Any tendency of jurors to view child witnesses as unreliable may be reversed in some cases. It seems, for example, that jurors may be more willing to believe a young child who is giving evidence about sexual abuse than they would an older child or adult because they would not expect a young child to have the relevant knowledge to fabricate a believable story. Evidence to support this hypothesis comes from a study in which mock jurors read a summary of a trial in which a teacher had been accused of sexual abuse. Depending upon the experimental condition that they had been assigned to, the jurors were led to believe that the accuser was a 6 year old, a 14 year old or a 22 year old student of the teacher. The defence argument was that the student had made up the story as revenge for receiving poor marks. It was found that the defendant was significantly more likely to be found

[58] Goodman, G., Golding, J. and Haith, M. *Jurors' Reactions to Child Witnesses.* Journal of Social Issues Vo. 40 No. 2 1984 p.139-156.
[59] Cook, T. and Fry, B. *The Persistence of Experimentally Induced Attitude Change* in Berkowovitz, L, Advances in Experimental Psychology. Academic Press, 1978.
[60] Goodman, G., Golding, J. and Haith, M. *op.cit.* at p.151.
[61] Leippe, M. and Romanczyk, A. *Reactions to Child (Versus Adult) Eyewitnesses* Law and Human Behavior, Vol. 13 No. 2 1989 pp.103-132.
[62] Ross, D., Miller, B. and Moran, P. *op.cit.*

guilty and the accuser was seen as being significantly more credible when the accusation came from a 6 year old than when it came from a 14 or 22 year old. In turn, the jurors were more ready to believe the 14 year old than the 22 year old.

Researchers have looked at the speech styles and non verbal behaviour used by child and adult witnesses and have examined the effect that different styles have on jurors' judgements of credibility. It has been pointed out that the non-verbal behaviour stereotypically associated with lying such as nervousness, lack of eye contact and lack of verbal fluency are also characteristic of someone reacting to a situation they find stressful[63]. Thus a truthful child witness, or indeed an adult witness, who is nervous about appearing in court may appear less credible to a jury than a deceitful but more confident witness.

In addition, it has been observed that children have a tendency to use a less assertive style of speech than adults[64]. They will often speak in a soft voice, hesitate before speaking and use unnecessary words and phrases. A study conducted by the psychologist Georgia Nigro and colleagues showed that jurors have a tendency to disregard the speech style of adult witnesses but are particularly vigilant in their scrutiny of child witnesses. They will be very impressed by a child who speaks confidently and very dismissive of a child witness who speaks in an unassertive style that is probably more typical of children. The researchers found that whether an adult witness spoke assertively or non assertively had no effect on the extent to which mock jurors saw the defendant as being guilty but manipulating the speech style of the child witness had an especially strong impact[65].

CONCLUSION

In conclusion it can be said that recent changes to the rules governing the evidence of children do seem to be supported by modern psychological research. However, the research also shows that with all witnesses, both children and adults, there is a constant need to be aware of the dangers of contaminating the evidence the witness has to give. In addition, it is one matter for a witness to be capable of giving competent evidence but another for that witnesses to be seen as being competent. It appears that adults have an unduly negative view of the capabilities of child witnesses but paradoxically may give disproportionate weight to such evidence in some cases.

[63] Miller, G. and Fontes, N. Videotape on Trial: A View from the Jury Box. Sage Publications, 1979 at p.176.

[64] Moston, S. *If Children's Testimony is Reliable, Why Don't We Rely on it?* Paper presented to the British Psychological Society Annual Conference, University of St. Andrews. April 1989.

[65] Nigro, G., Buckley, M., Hill, D. and Nelson J. *When Juries "Hear" Children Testify: The Effects of Eyewitness Age and Speech Style on Jurors' Perceptions of Testimony.* in Ceci S. J., Ross, D. F. and Toglia, M. P. (editors) Perspectives on Children's Testimony. Springer-Verlag. 1989 pp.57-70.

COMMERCIAL LAW

END OF A VICTORIAN INHERITANCE

Tim Howard*

Our Victorian forefathers were great builders. Among their creations which still grace (or disgrace?) the landscape are the Forth Bridge, the Houses of Parliament and St. Pancras Station.

The legal landscape still contains great Victorian legacies, such as the Offences against the Person Act 1861, the Bills of Exchange Act 1882 and the Partnership Act 1890. One of the earliest Victorian legal monuments, which was of daily concern to all those involved in the international carriage of goods by sea, was the Bills of Lading Act 1855. Like many Victorian monuments, this Act had outlived its usefulness. On September 16th 1992 it was repealed and replaced by the Carriage of Goods by Sea Act 1992.

A bill of lading starts its life (in almost all cases) containing or evidencing the contract of carriage between the carrier and the shipper, under which the carrier promises that the goods will be carried from the port of loading and safely delivered at the port of discharge.

During the voyage the ownership of the goods will normally be transferred from the original seller to the ultimate receiver, who will take delivery of the goods from the ship. There may be a hundred or more buyers who (or whose banks) will pay for the goods and then receive payment from the next buyer in the chain. During this process the goods are, of course, not in the possession of any of the parties. They are, or should be, safely on board the ship, steadily crossing the ocean.

By the almost immemorial custom of the law merchant, long engrafted into the common law, the bill of lading is treated as a document of title, negotiable by endorsement, entitling the holder to the goods upon presentation to the ship at the discharge port. However, the perfection of the system is sometimes disturbed by the realities of life.

Ships sink; cargoes arrive damaged; cargoes are short delivered; cargoes are delivered somewhere other than at the intended port, perhaps in error, perhaps because the port has become unsafe, strikebound or congested, perhaps because the voyage was abandoned; the cargo may be subject to a carrier's lien for unpaid freight, or a claimed lien by an earlier unpaid seller or by salvors.

Against some of these events there may be insurance, but all will affect the value of the goods, for which millions of dollars may have been paid by a merchant — or his bank.

Those to whom the bill of lading passes are, therefore, vitally interested in the proper performance of the contract of carriage in the bill of lading. The bill of lading contract was, however, made between the carrier and the shipper; later traders (and their banks) were not parties to it.

* The author is a partner in Norton Rose, solicitors, and this article first appeared in Lloyd's List International of 25th September 1992: it is reproduced with the kind permission of the Law Editor.

How could they sue on the contract? The Bills of Lading Act 1855 cured this difficulty. It provided that the rights of suit against the carrier were transferred to the indorsee of the bill of lading to whom the property in the goods passed "upon or by reason of such indorsement."

Innumerable millions of tons of cargo were carried under the regime created by the 1855 Act; innumerable rights of action were transferred and, when necessary, enforced. However, recent changes in the pattern of shipping made the 1855 Act obsolete. In particular, ships and their bulk cargoes increased in size by more than a factor of ten and chains of buyers became many times longer than hitherto (particularly in mineral oil, a commodity hardly traded in until the last few years).

Property in unascertained parts of a bulk cannot pass until apportionment; indorsement of the bill of lading after discharge of the ship, it was recently held, did not pass the right of suit, yet bills were frequently indorsed long after discharge, payment being made against a letter of indemnity. Neither the buyer of an unascertained portion of a bulk nor an indorsee after discharge had the rights of suit against the carrier.

The difficulties with the 1855 Act were passed to the Law Commission which, after extensive consultation with everyone who might conceivably be concerned, recommended the repeal of the 1855 Act and its replacement by what is now the Carriage of Goods by Sea Act 1992.

Largely because of the complex functions played by a bill of lading, the Act has had to be densely and precisely drafted: the legislative scalpel had to be inserted at just the right position, the 1855 Act removed and new law inserted in its place. The defect at the heart of the old law was considered to be the linkage between property in the goods and the right to sue on the bill of lading contract. Under the 1992 Act this is removed.

The Act provides that any lawful holder of the bill of lading has the right of suit but that only he has the right (thus preventing more than one claimant for the same breach of contract). If, as can happen, the actual loss has been sustained by someone other than the holder of the bill of lading, the holder must account for the damages to the person who has suffered the actual loss.

The Act also recognises the rights of suit to someone who became holder of the bill of lading after discharge of the cargo, provided that he did so under arrangements made before that date (thereby preventing trading in bills relating to goods known to be damaged — in effect, trading in causes of action).

Finally, the Act recognises the rights of parties interested in two forms of shipping documents which are commonly used today but were not within the 1855 Act. The consignee under a sea waybill and the holder of a ship's delivery order will both have the right to sue on the contract in question.

Who are most affected by the Act? At the simplest level cargo insurers should find that Protection and Indemnity clubs (who are after all paid for by the members) can no longer take unmeritorious defences based on lack of title to sue.

Those involved in the bulk commodity trades will gain rights they did not previously have, as will the consignees named in a waybill. Some commodity and other sale forms may need slight revision.

Less obvious is the new feature that banks which finance international trade will now be able to enforce the bill of lading rights in their own name. They will probably need to revise their security documentation, especially their customers' letters of indemnity which they back and which are the documents against which payment is frequently made in practice, and their forms of trust receipts.

Although the obvious beneficiaries of the new Act seem to be cargo interests and those who insure them and finance them, the real beneficiaries are the far wider range of all those concerned in any way with international trade.

English law, the law chosen throughout the world to govern contracts of all types, has shown itself once again to be responsive to the needs of its users. This has long been the strength of a legal system under which such fundamantal concepts as the CIF contract, the FOB contract and the letter of credit were created.

The Carriage of Goods by Sea Act 1992, replacing the Bills of Lading Act 1855, continues this long tradition.

ENVIRONMENTAL LAW

CAMBRIDGE WATER COMPANY V EASTERN COUNTIES LEATHER PLC [1993] ENV.L.R. 287

Sandra Morton*

This recent decision of the Court of Appeal has aroused the interest and concern of environmental lawyers, industrialists and insurers, as it imposes strict liability in nuisance for historical groundwater pollution. The facts are as follows:

The appellant is a statutory water company responsible for providing a public water supply to approximately 275,000 customers. In 1976 it bought the site of a previous papermaking business, Sawston Mill, in order to use a borehole on site (with the benefit of an existing abstraction licence), to abstract water for the public supply. Before purchase the appellant ensured through testing, that the water obtained from the borehole complied with the then current standards of "wholesome" drinking water quality.

EC Directive 80/778 relating to the quality of water intended for human consumption, was issued on 15th July 1980 with a compliance date of 18th July 1985. The Directive required member states to fix values applicable to such water by reference to specified parameters. One of the parameters related to the maximum admissible concentration of organo-chlorine compounds. On 19th August 1982 the Department of the Environment informed the water industry of the Directive's guide figure of 1 microgramme per litre, and on 10th November 1983, of the UK's maximum admissible concentration of 10 microgrammes per litre. This latter figure is the standard now included in the Water Supply (Water Quality) Regulations 1989. Two such organo-chlorines are the solvents perchloroethane ("PCE") and Trichloroethane ("TCE").

When Sawston Mill was purchased in 1976, the water was not tested for the presence of PCE. In fact, no method of so testing had yet been formulated. In 1983 a method of detecting the presence of PCE was devised to ensure compliance with the legal requirements and investigations carried out for the appellant showed that concentrations of PCE of between 70 and 170 microgrammes per litre had entered the distribution system through water pumped from Sawston. Pumping ceased and inquiries indicated the respondent's premises as the source of contamination.

The respondent has operated a tannery business for over 100 years at its premises in Sawston and used TCE as a de-greasing solvent for pelts until about 1973, and thereafter used PCE. Until about 1976, TCE and then PCE, were delivered to the site in 40 gallon drums. At any one time up to 138 drums were stored on site. When required, the drums were carried by forklift truck from the storage area to the de-greasing machine where the drum would then be tilted and the contents allowed to flow into the machine supply reservoir. Kennedy J. at first instance, found that major pollution of the underground aquifer was caused before the end of 1976, by accidental spillages both during the drum emptying process and afterwards at the point of storage of supposedly emptied drums. After 1976 PCE was delivered in bulk and stored in a tank from where it was piped to the de-greasing machine and there was no evidence as to spillage after that time.

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The appellant's claim was based in nuisance, negligence and the rule in *Rylands v Fletcher.* It sought an injunction and damages for the cost of a replacement borehole and pumping station; the complex investigations carried out; and the costs of pumping to waste the polluted groundwater. So far these costs exceed £1 million and continue, due to the long term and complex characteristics of the solvent concerned. With regard to the claims in nuisance and negligence, Kennedy, J considered what consequences were reasonably foreseeable as a result of the spillages. Applying *Hughes v Lord Advocate* [1963] AC 837 he held that there must be some relationship between the harm to be foreseen and the harm occurring; that the careless spillage of perhaps a gallon or two of solvent was foreseeably dangerous if the circumstances were such that someone might have been overcome by the fumes. However, he considered that "pollution" was too wide a category and that the correct test to be applied was: What would the reasonable supervisor overseeing the operation of the plant in the period up to 1976 have foreseen as the possible consequence of repeated spillages over perhaps 10 years? He believed that the reasonable supervisor, aware of the pattern of regular small spillages would not have foreseen any environmental hazard. Further, he did not believe that in the event of such a reasonable supervisor being aware the solvent was entering the aquifer, that he would have expected the solvent's effect to be material or amount to the term "pollution".

Additionally, actual damage being necessary to the cause of action in such a nuisance and in negligence, he was of the opinion that provable damage only arose upon the introduction of the regulations (and subsequent identification of the solvent levels) which post dated the spillage by many years.

Regarding, the claim in *Rylands v Fletcher,* by application of the more liberal interpretation of the words "natural user" developed in *Rickards v Lothian* [1912] AC 263 and following the decision in *British Celanese Ltd v A H Hunt (Capacitors) Ltd* [1969] 1WLR 959, Kennedy J concluded that the storage of organochlorines as an adjunct to a manufacturing process did not amount to a non natural user of land. His decision took into account the fact that Sawston is properly described as an industrial village (the respondent itself had been established on its present site since 1879) and the benefit of employment to the community. Inevitably such storage presented some hazard but in a manufacturing society such hazards are part of the life of every citizen.

Indeed, he held that some damage was foreseeable from the escape of the stored quantity of organochlorine but that the natural and anticipated consquences of the escape would be direct damage to neighbouring land.

Judgment was therefore given in favour of the respondent.

The appellant's appeal was limited to that against the finding in *Rylands v Fletcher.* No appeal was made against the findings in nuisance or negligence. Nevertheless, the Court of Appeal (Sir Stephen Brown, Mann and Nolan L.JJ.) held it was unnecessary to consider *Rylands v Fletcher* since the case should be decided in nuisance. It held (per Mann L.J.) that the present case was not distinguishable from the nineteenth century case *Ballard v Tomlinson* (1885) 29 Ch D 115 and that the court at first instance was wrong not to apply it.

The facts in that case were that the plaintiff and the defendant were adjacent landowners who each owned a well sunk into a chalk aquifer. The plaintiff pumped water from his well for the purposes of his brewery but the defendant used his well to store sewage and refuse from his printing house. The sewage and refuse contaminated the water in the chalk

aquifer to the extent that the water pumped by the plaintiff became unusable in the brewing process.

The Court of Appeal allowed the plaintiff's claim for an injunction and damages. Per Brett M R "although nobody has any property in the common source [i.e. the aquifer], yet everybody has a right to appropriate it, and to appropriate it in its natural state, and no one of these who have a right to appropriate it has a right to contaminate that source so as to prevent his neighbour from having the full value of his right of appropriation".

Per Cotton L J ". . . as soon as the act of the defendant interferes with the beneficial use by the plaintiff of that right, incident to the ownership of land, in my opinion [the plaintiff] has the right of action. Of course, if what the defendant was doing was a natural use of their land — that is to say, an exercise of a natural right incident to ownership — the plaintiff could not complain. But the defendants are not doing that. No one can say that putting filth on your land in such a position and with the stratum where the water is common to you and your neighbour, or to any other owner of land, is a natural use of the land".

So, applying *Ballard v Tomlinson,* the Court of Appeal held that liability in nuisance is strict where there is an interference with a natural right incident to ownership of land. Further, no importance was attached to the fact that the appellant suffered damage only when quality standards were raised three years after it commenced water abstraction from Sawston Mill, and many years after the respondent had ceased to spill PCE. Interestingly, the Court of Appeal did not refer at all to *Overseas Tankship (UK) Ltd v The Miller Steamship Co Ppty* [1967] AC 617 ("Wagon Mound No. 2") and the stated requirement of foreseeability as a necessary element in all cases of nuisance (per Lord Reid), even though it has always been accepted since that decision as a limitation on a defendant's liability in nuisance.

Additionally, since the case was decided in nuisance, the court stated (per Mann L.J.) that "non-natural" user and foresight of the kind of damage caused by an "escape" under the rule in *Rylands v Fletcher,* would have to await a future occasion for further consideration.

Leave to appeal to the House of Lords was refused by the Court of Appeal but has recently been granted by the House of Lords on petition by the respondent. The appeal has been provisionally set down for hearing in the autumn.

It is to be hoped that the House of Lords will take this opportunity to clarify certain legal issues including:

* The position regarding industrial activities retrospectively considered to be polluting, due to later emerging legal requirements and obligations;
* The requirement (or not), of foreseeability as a necessary element in all cases of nuisance;
* The precise definition of a natural right incident to the ownership of land and in particular in relation to the right of a landowner to obtain percolating underground water through a well or borehole, in an uncontaminated condition;
* The present scope of the rule in *Rylands v Fletcher.*

Their Lordships undoubtedly will also have regard to the policy issues inherent in this case, not least those policies emanating from the European Community, especially in the range of environmental liability. The European Commission has recently issued its Green Paper on remedying environmental damage, which suggests a combination of strict civil liability

and joint compensation systems, to be used where the party liable may not be identifiable or alternatively unable to pay compensation. Such joint compensation systems would be financed by contributions by all members of specific economic sectors.

As mentioned above, industrialists and their insurers, in particular, anxiously await their Lordships' decision in this case. The implications for both these groups are potentially very serious and wide ranging. Industrialists are concerned because of the problems in attributing responsibility many years after damage has occurred, especially where it has been caused by the cumulative effects of many (changing) industrial activities over a period of time. Additionally, because the long term effects of operations (perhaps lawfully undertaken at that time), have only become apparent with the passage of time.

Insurers have reacted to these emerging problems by withdrawing insurance cover or alternatively, only agreeing to new highly specialised policies for "sudden and accidental" damage on a "claims made and reported" and site specific basis and at accordingly high premiums to reflect the risk undertaken.

There remains the risk however, that they will still be called upon to pay clean up costs under existing public liability policies where the terms of cover were not sufficiently or specifically limited at the time of issue and no site surveys were carried out beforehand. Environmental damage often takes many years to become apparent, hence environmental liabilities are aptly termed "long tailed liabilities".

However, ultimately no doubt, one way or the other, the public at large will have to pay for the past polluting activities of our industrialised society.

MEDICAL LAW

CASE NOTE: THE HOUSE OF LORDS DECISION IN AIREDALE NHS TRUST V BLAND [1993] 1 ALL ER 821

Kay Wheat*

On 4th February 1993, the House of Lords gave judgment in the above case, which concerned Tony Bland, a victim of the Hillsborough football disaster on 15th April, 1989, who had suffered brain damage as a result of a severe chest injury, and who had remained in a 'persistent vegetative state' ever since. The effect of the judgment was that it became lawful for the medical staff treating Mr Bland to discontinue feeding him, as a result of which he subsequently died. The day after the judgment, Melanie Phillips, writing in The Guardian said: 'The Rubicon has been crossed.....Death is now a legitimate therapeutic process for doctors to administer to the living.' The doctor responsible for treating Mr Bland, Dr Jim Howe, subsequently wrote to The Guardian (Letters, 10th February 1993) pointing out that doctors decided 'every day' as to whether treatment should be continued, the decisions being made in consultation with the patient 'when it is no longer in their interests to go on with life-sustaining treatment' and that the differences here were that Mr Bland was not suffering from a progressive fatal illness, the treatments which it was proposed to withdraw included tube feeding, and Tony Bland could not be consulted. On the day Dr. Howe's letter was published, the Guardian ran a front-page report on the letter, under the headline 'patients "left to die daily" ', which, not surprisingly, provoked another, somewhat defensive response from Dr Howe a day or so later. There are fundamental issues of morality which lie behind the emotional response of Melanie Phillips, the matter-of-fact description of medical reality of Dr Howe, and a quality newspaper's horrified reaction to this medical reality, but the Law Lords in their decision fight shy of the issues of morality and, some may say, abdicate judicial responsibility in favour of reliance on the judgment of the medical profession.

Firstly, the court had to decide whether it was appropriate for the declaration sought to be made. There is no power for the judiciary to make decisions on the part of mentally incompetent adults. It was held in the case of *F v West Berkshire Health Authority [1990] 2 AC 1 HL* that the *parens patriae* jurisdiction of the courts had been abolished. That is the Crown's ancient prerogative jurisdiction over those of unsound mind, and which would enable the court to take over the affairs of Mr Bland, including his decisions as to medical treatment. The court was, therefore, left with giving declaratory relief as to the lawfulness of the proposed action to discontinue feeding, whilst at the same time, in accordance with *Imperial Tobacco Ltd v A-G [1981] AC 718,* confirming that this would not be binding on the criminal courts. The Law Lords confirmed that, given the absence of the *parens patriae* jurisdiction, this was the appropriate procedure to follow.

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Medical evidence was given as to the meaning of a state of PVS. It was a complete absence of activity within the cerebral cortex, which is the grey matter responsible for consciousness, thinking, feeling and responding to surroundings other than through reflex action. One of the reflex actions which remains is that of breathing. The brain stem continued to function and therefore the definition of death was not satisfied. The PVS patient was incapable of feeling anything including, of course, pain. In the case of Mr Bland, there was no dispute in the medical evidence that he would not recover from this state, and indeed one witness had said that the cerebral cortex had degenerated into a 'watery mass'. By feeding through a naso-gastric tube, nursing assistance with the elimination of waste from the body and through the administration of antibiotics to counter any infections which may develop, however, Mr Bland could remain in that condition for many years.

The crux of the question before the courts was, if this treatment was discontinued, would it amount to an unlawful killing of Mr Bland?

IS FEEDING A FORM OF MEDICAL TREATMENT?

Whilst the status of the administration of antibiotics was doubtless that of medical treatment, the court had to decide whether the definition of treatment could be expanded to include artificial feeding. Certainly feeding cannot be said to be undertaken as a cure for illness. However, their Lordships appeared to have little difficulty with this aspect of the case, particularly because the feeding procedure took place through a naso-gastric tube. Both Lords Goff and Lowry stressed the fact that large bodies of medical opinion regarded artificial feeding as a form of medical treatment. Lord Goff goes on to say that even if it is not medical treatment, it must form part of the medical care of the patient. In the medical evidence it was said that PVS patients cannot usually swallow but a few patients can swallow reflexly. It may be possible, therefore to feed such a patient by mouth. However, Lord Lowry said also that it is fallacious to assume that feeding is *necessarily* for the benefit of a patient. This seems to be the better view, rather than trying to argue that because a tube is inserted, and there may be infections which would need the use of antibiotics etc. it was in some way 'medical'. It strikes at the heart of the problem, rather than concentrating on the semantical point as to whether the physical procedure involved is strictly 'medical treatment'. However, because the majority of their Lordships decided that artificial feeding is medical treatment, the startling implication of Lord Lowry's statement was not considered, i.e. that there is not always a duty on the part of a carer to feed a person.

IS THIS A CASE WHERE TREATMENT CAN BE WITHDRAWN?

On their assumption that artificial feeding is medical treatment, then their Lordships had to consider whether there was always a duty to dispense available medical treatment. There is no duty to continue to treat a patient where a large body of informed and responsible medical opinion says that no benefit would be conferred by continuance. This test was first propounded in the case of *Bolam v Friern Hospital Management Committee [1957] 1 WLR 582.* It is regarded as a matter of clinical judgment as to whether the patient would continue to benefit from the treatment. The judgment in this case confirms this position:

> 'The decision whether or not the continued treatment and care of a PVS patient confers any benefit on him is essentially one for the practitioners in charge of the case.' Per Lord Keith at 862b.

Lord Keith went on to say that 'for the time being at least' if the decision is that the treatment does *not* confer any benefit and should therefore be withdrawn, then the matter should be brought before the court, as in the instance case, and the court will decide in accordance with the applicable principles of law. Lord Goff said that the fundamental principle is the principle of the sanctity of life. This is modified by the principle of self-determination i.e. a patient of sound mind has the right to refuse treatment even if the consequence is that he will die. In the case of an incompetent patient, Lord Goff said that it was accepted in *F v West Berkshire Health Authority [1990] 2 AC 1* that such a patient may be treated if the doctor treating him is acting in his best interests.

> 'If the justification for treating a patient who lacks the capacity to consent lies in the fact that the treatment is provided in his best interests, it must follow that the treatment may, and indeed ultimately should, be discontinued where it is no longer in his best interests to provide it.' Per Lord Goff at 869c.

He goes on to say that there are two types of cases where this situation may arise. The first is one where a decision has to be made as to whether to treat a patient when the factors against treatment weigh more heavily than those for, and the second, such as the case of Tony Bland, where there is *no* balancing exercise, i.e. when the patient *cannot benefit from treatment.* Lord Goff has, of course, here made the assumption that because Mr Bland's cognitive functions had ceased to operate, he could not benefit from the treatment, which is simply another way of saying that his life, such as he had, was not worth sustaining. It is the decision as to whether a life such as Anthony Bland's was worth sustaining which, in accordance with the *Bolam* test, is made by the doctors concerned. Hence the Law Lords continue to leave such decisions in the hands of the medical profession, which the judiciary have done since the *Bolam* decision in 1957.

If a responsible body of medical opinion support a course of action then the *Bolam* test is satisfied. Lord Goff cited with approval the discussion paper on PVS patients issued by the medical ethics committee of the British Medical Association, which outlines a detailed procedure to be followed before discontinuing life support for such patients. Lord Goff said at 872c:

> 'Study of this document left me in no doubt that if a doctor treating a PVS patient acts in accordance with the medical practice now being evolved by the medical ethics committee of the British Medical Association he will be acting with the benefit of guidance from a responsible and competent body of relevant professional opinion, as required by the *Bolam* test'.

Lord Mustill considered whether the best interests of the community were to be considered, having been hinted at from time to time, but never specifically employed in argument. The death of Tony Bland would mean that the family would be relieved of the distress of seeing him in his hapless condition, the medical staff would be relieved of the strain of caring for him, and the resources employed to keep him alive would be freed to be better used elsewhere. His Lordship dismissed this as being outside the scope of the court's power, and such 'cost-benefit analysis' and 'mercy killing' arguments were to be decided by Parliament.

It is interesting to note that, when considering the hypothetical question of a doctor who wished to continue treatment because of his own view of the sanctity of human life, Lord Goff said that 'it is enough to state that the best interests test is broad and flexible in the sense that room must be allowed for the exercise of judgement by the doctor as to whether

the **relevant conditions** (my emphasis) exist which justify the discontinuance of life support.' This is an extraordinary statement to be made in the context of such an important issue, as it is implying that one of the relevant conditions which justify the discontinuance of life support is the doctor's own view of the sanctity of life.

Their Lordships looked briefly at the 'substituted judgment' criteria, which state that where decisions are being made about incompetent patients, the decision should, if possible, reflect what that person would have wished for themselves. Goff dismisses this as having no part in English law. However, if there was clear, incontrovertible evidence that a patient had strong religious views on the sanctity of life, and would have wished to be continued to be fed etc. would it have been wrong to discontinue feeding him? Their Lordships give no guidance on this point. The Court of Appeal had referred to Tony Bland's personal dignity and the way in which he would have liked to have been remembered. In the House of Lords, Lord Browne-Wilkinson, whilst not overtly criticising the CA, refers to spiritual views which, for example, a Roman Catholic would have thought of as being relevant, but which were not cited by the CA:

> 'The judges' function in this area of the law should be to apply those principles which society, through the democratic process, adopts, not to impose their standards on society.' (at 879j).

However, given the nature of their Lordships' judgment in this case, are not the principles of the medical profession being imposed on society?

IS THERE ANY REAL DIFFERENCE BETWEEN DISCONTINUING TREATMENT AND ADMINISTERING A FATAL DRUG?

On the assumption that it *is* in the best interests of Tony Bland to die, or as their Lordships prefer to say, to no longer receive life-sustaining treatment, would it be lawful for the doctor concerned to administer a legal drug? The judgment answers a very clear 'no' to this, but the artificiality of the distinction is acknowledged. Lord Goff says at 867b:

> 'the law draws a crucial distinction between cases in which a doctor decides not to provide, or to continue to provide for his patient treatment or care which could or might prolong his life, and those in which he decides, for example by administering a lethal drug, actively to bring his patient's life to an end.'

He acknowledges the hypocrisy of this distinction, and says:

> 'the law does not feel able to authorise euthanasia, even in circumstances such as these, for, once euthanasia is recognised as lawful in these circumstances, it is difficult to see any logical basis for excluding it in others.' (867f)

Lord Goff goes on to look at the general distinction between acts and omissions, and quotes Professor Glanville Williams approvingly (Textbook of Criminal Law, 2nd edn, 1983) who says that an apparently positive act of discontinuing treatment is really 'an omission to struggle'. He goes on to employ the time-honoured, if somewhat simplistic, explanation, that the difference between this and the positive act of administering a lethal injection is that in the former case the patient dies of his pre-existing condition i.e. in this case, injuries sustained at Hillsborough, in the latter case it is the doctor who has caused the death.

There is some detailed consideration of the removal of the naso-gastric tube, particularly by Lord Browne-Wilkinson, and whether it is possible to see this as anything other than

a positive act of killing, but it is concluded that this is, in reality, an omission to feed, and if there is not a duty to feed because feeding is medical treatment and feeding in this case is not benefiting the patient, then the doctors are entitled to decide to omit to feed. Their Lordships conclude that the actus reus of murder is not therefore present. However, as far as the mens rea of murder is concerned, Lord Browne-Wilkinson is frank in his admission that it is clear that the whole purpose of stopping the feeding is to bring about the death of Tony Bland.

Their Lordships said that the cases should continue to come before the courts, but Lord Keith said that he agreed with the Court of Appeal that this should take place, 'at least for the time being and until a body of experience and practice has been built up which might obviate the need for application in every case' (at 862b). Lord Goff even said there was much to be said for the view that an application to the court will not be needed in every case, but only in particular circumstances (at 874f). It is hardly surprising that their Lordships concluded this given the pre-eminence accorded by them to medical opinion. Clearly Lords Brown-Wilkinson and Mustill were uneasy about this stressing the need for Parliament to clarify the law in this area.

This note has not attempted to give a detailed analysis of this case, but to summarise its main elements. It is hoped, however, that the summary gives some indication of the complex issues of morality and law which this case presented and to which their Lordships failed to respond with sufficient clarity and confidence.

STATUTORY INTERPRETATION

PEPPER (INSPECTOR OF TAXES) v HART HL (E) 26.11.92 [1993] 1 ALL ER 42

John Hodgson*

The underlying issue in this case was the tax treatment of a fringe benefit, namely the right of public school masters to have their children educated cheaply at the school where they taught. Prior to the introduction of the Finance Act 1976 it was clear that such benefits were not taxable, because there was a specific provision to that effect in the earlier legislation. Problems had arisen with the taxation of concessionary travel for railway and airline workers. These had been resolved by a decision of the Special Commissioner of Income Taxes in favour of the taxpayers' argument that the value of the benefit was the marginal cost of providing the concessionary travel, which was in practice nil, since the train or plane in question would have operated in any event. The Revenue had unsuccessfully argued that the value was a proportional share of the cost of the operation. This ruling was accepted as applying by analogy to the provision of education, although there was a marginal cost for accommodation, books etc.

S.61(1) of the Finance Act 1976 charged to tax in the case of a director or higher paid employee the cost of any benefit provided to him or members of his household by reason of his employment. S.63(2) provided that "the cost of a benefit is the amount of any expense incurred in or in connection with its provision, and ... includes a proper proportion of any expense relating partly to the benefit and partly to other matters."

For some years the Revenue continued to deal with fringe benefits in the form of free or concessionary access to services provided by the employer as they had done under the earlier legislation, namely by assessing only the marginal cost. They then decided that the change in statutory wording justified them in reasserting the average cost argument. The taxpayers contended for the marginal cost. It was common ground that the contribution actually made (20% of the usual fees) more than covered the actual marginal cost of food, laundry, stationery etc. It was also common ground that, as the school in question was non profit making, the proportional cost was roughly equivalent to the full fee. The issue was therefore the interpretation of the relevant provisions, especially s.63(2).

This issue (which clearly had very substantial ramifications for other similar fringe benefits) ultimately came before the House of Lords and was argued in the usual way before a committee of five Law Lords. They were, it appears, divided on the question of interpretation of s.61 and s.63 by the application of orthodox principles. The majority accepted that the breadth of the statutory language, especially the last clause of s.63(2), justified the Revenue's interpretation. It would however be unfair to examine the basis of these decisions in depth because they are not fully articulated in the speeches. Before giving judgement "it came to [their] Lordships' attention that an examination of the proceedings in Parliament which led to the enactment of sections 61 and 63 might give a clear indication which of the two rival contentions represented the intention of Parliament in using the statutory words.[1]"

In order to do this it would be necessary to allow reference to Hansard as an aid to construction of a statute. This was not currently permitted[2] but the present practice could be abandoned within the terms of the 1966 Practice Statement regulating the conditions

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[1] *per* Lord Browne-Wilkinson.

[2] Lord Browne-Wilkinson traced the rule back to *Millar v Taylor* (1769) 4 Burr. 2303 *per* Willes J. It is most recently stated in *Davis v Johnson* [1979] AC 264 and *Hadmor Productions Ltd v Hamilton* [1983] AC 191.

under which the House could decline to follow its previous rulings. In recognition of the importance of the new issue, two further Law Lords, including the Law Chancellor, were added to the committee, and there was a further hearing.

The Attorney General argued that reference to Hansard could amount to impeaching or questioning proceedings in Parliament in breach of article 9 of the Bill of Rights 1689, or alternatively the breach of some wider but unspecific privilege of Parliament. These arguments were fairly summarily and unanimously dismissed. Article 9 related to freedom of debate and speech. Examining the record to ascertain what was said did not amount to an infringement of either. It was for the courts to determine the extent of privilege, and none was or should be recognised in this area. There was thus no constitutional reason why the courts should not take Hansard into account.

The House therefore had to consider whether it was right in principle to do so, and whether there were any countervailing practical considerations. Six of their Lordships unequivocally accepted both that it was right in principle in certain cases, and that there were no countervailing arguments. Lord Mackay dissented on the practicalities, suggesting that the cost of research in Hansard in every case would be grossly wasteful. He was agnostic on the issue of principle, noting that earlier enquiries[3] had not recommended any change in practice, but indicating that he would not have opposed a change on grounds of principle alone.

Lord Browne-Wilkinson summed up the objections to change as follows:

> "Thus the reasons put forward for the present rule are first, that it preserves the constitutional proprieties leaving Parliament to legislate in words and the courts (not Parliamentary speakers) to construe the meaning of the words finally enacted;[4] second, the practical difficulty of the expense of researching parliamentary material which would arise if the material could be looked at;[5] third, the need for the citizen to have access to a known defined text which regulates his legal rights;[6] fourth, the improbability of finding helpful guidance from Hansard."[7]

His Lordship pointed out that it is permissible to have recourse to White Papers, official reports and to the work of the Law Commission to identify the "mischief" at which a statute is aimed, and that the statements of the sponsor of the Bill will be an equally valid aid. Following *Pickstone v Freemans*[8] it is permissible to refer to Hansard in relation to secondary legislation. The "mischief rule" only operates where the statutory words are ambiguous or obscure. In such cases, it may be observed, the court is already seeking to repair the damage done by inadequate drafting rather than giving effect to the legislative intention. Why should it not have access to a full repair kit? His Lordships' conclusion was that:

[3] Law Commission and Scottish Law Commission Joint Report on the Interpretation of Statutes (1969) No. 21, and the Renton Committee Report on the Preparation of Legislation ((1975) Cmnd. 6053).

[4] *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg* [1975] AC 591 *per* Lord Reid at 613-5, Lord Wilberforce at 629.

[5] *Beswick v Beswick* [1968] AC 58 *per* Lord Reid at 74.

[6] *Fothergill v Monarch Airlines* [1981] AC 251 *per* Lord Diplock at 279.

[7] *Davis v Johnson* [1979] AC 264 *per* Lord Scarman at 350.

[8] [1989] AC 66.

> "[R]eference to Parliamentary material should be permitted as an aid to the construction of legislation which is ambiguous or obscure or the literal meaning of which leads to absurdity. Even in such cases references in court to Parliamentary material should only be permitted where such material clearly discloses the mischief being aimed at or the legislative intention lying behind the ambiguous or obscure words. In the case of statements made in Parliament, as at present advised I cannot see that any statement other than the statement of the Minister or other promoter of the Bill is likely to meet these criteria."

It was recognised that there might be an increase in the cost of litigation occasioned by the need to research Hansard. Argument had been presented on the experience in Commonwealth countries where there was now recourse to legislative debates. This indicated that there were no serious problems of expense or access to materials. The majority view was that the cost was likely to be small, as it would be quickly clear whether there was any relevant statement or not, and that in some cases costs would be saved, because Hansard would give an answer which foreclosed the litigation. In any event this issue of costs would weigh only if very heavy against the interests of justice which required access to all relevant material.

In the case of s.63 it was clear on examining Hansard that the original intention had been to tax free or concessionary services on the value to the recipient (i.e. market value), but that that intention had been abandoned. The Secretary to the Treasury stressed on many occasions when answering questions in relation to various groups, including teachers, that the intention was to tax the marginal cost only. In the light of this unambiguous material the whole House, including those who had earlier taken a different view on the textual analysis, allowed the taxpayers' appeals on the substantive issue.

In none of the speeches is there an express reference to the maxim that there is no equity in a taxing statute; in other words that there can only be a charge to tax if it is imposed by clear words. Lord Mackay comes close to it in saying that he regards the taxpayers' construction as being possible and that "any ambiguity should be resolved in favour of the taxpayer." The Lord Chancellor was clearly speaking *obiter* since he was not part of the original panel. Clearly Lords Bridge, Oliver and Browne-Wilkinson saw no operative ambiguity; the Revenue's construction was, to them, the right one from a textual analysis. Otherwise there must have been an ambiguity which would have brought the maxim into play. The textual analysis equally clearly gave the wrong answer. The rule enunciated is not limited to taxing statutes, or penal statutes, where a similar presumption of construction applies, but there is clearly a distinction to be drawn between the type or degree of ambiguity etc. which will allow the invocation of Hansard and that which will entail the application of the maxim.

Will it for instance be possible for the Revenue (or for the Crown in criminal proceedings) to refer to Hansard to seek a construction adverse to the subject, or will this be ruled improper as an attack on the liberty of the subject?

Many examples of contentious drafting do not involve ambiguity, but use of incorrect expressions, e.g. the provisions which sought unsuccessfully to criminalise shopkeepers and others who "offered" prohibited items for sale: *Fisher v Bell,*[9] *Partridge v Crittendon*[10]. No doubt the intention was to catch those who exposed these items for sale. Will the new ruling allow the investigation of the antecedents of flawed as opposed to osbcure legislation?

[9] [1961] 1 QB 394.
[10] [1968] 1 WLR 1204.

In the present case the legislative history was explicit and unambiguous. How far will the court go in pursuing the sponsor's intention if there are answers in debate which put a new spin on the original statement? Something like this appears to have happened in relation to s.29 of the Criminal Justice Act 1991. The initial statement in the House of Lords[11] was that sentencing was to be purely on the basis of the offence, not the record of the offender[12]. This was tempered to ward off a right wing revolt, and also objections from Law Lords[13]. Most commentators agree that the actual statutory provision is at best ambiguous, but it would seem that it will be difficult to isolate the relevant official intent[14]. In such circumstances the court will be wise not to get involved, as this is clearly a long stride into the political area.

The case has already been followed at least twice by the House itself. In *Warwickshire County Council v Johnson*[15] the relevant passage was a comment by the sponsoring Minister on a proposed amendment which was not enacted, and which directly bore on the words with which the courts had had difficulty. The aim of the amendment was to delete certain words to make it clear that only the owner of a business could be liable. The ministerial response confirmed that that was the intention behind the existing wording, and on that footing the amendment was withdrawn. In *Stubbings v Webb*[16] Lord Griffiths took account of the legislative history of the relevant provisions of the Limitation Act 1980 when overruling in part *Letang v Cooper*[17]. The evidence showed that the provisions of s2(1) of the Limitation Act 1954 were introduced to give effect to the recommendations of the Tucker Committee on limitation periods for accident cases, excluding trespass to the person. The 1954 Act resulted from a private member's bill, albeit one with government support, and the report is not fully specific as to how the intention was manifested.

In the latter two cases, although not in *Pepper v Hart* itself, the relevant debate was in the Lords, and the contributors included Law Lords[18]. Presumably there will need to be a rule prohibiting Lords of Appeal in Ordinary from sitting in a judicial capacity when they have already participated in the legislative debate. Certainly if the Law Lord in question had spoken or voted on the provision it would surely be improper for him to adjudicate on it[19]. This point was however not discussed in any of the speeches in *Pepper v Hart,* or in the later cases which have applied it.

[11] By Earl Ferrers, a Home Office Minister.

[12] "I do not believe that the mere fact of the offender having previous convictions should lead necessarily to a heavier sentence. The circumstances of previous offences may point to aggravating features."

[13] In particular Lord Ackner. Earl Ferrers went on to say, "If we asked the courts to ignore completely the offender's past conduct ... this would quite artificially prevent them from considering information which can in some cases be highly relevant to the judgment about the seriousness of the [current offence]."

[14] See generally *Current Law: Statutes Annotated* [1991] Vol. 3 pp 53-34 & 35.

[15] [1993] 1 All ER 299.

[16] [1993] 1 All ER 322. *Pepper v Hart* was not expressly mentioned. Is this a speed record for a proposition becoming trite law?

[17] [1965] 1 QB 232. That case involved an accident which the plaintiff sought to treat as a trespass rather than negligence in the hope of benefiting from a longer limitation period. She failed, but in dismissing her action the Court of Appeal went too far in saying that the limitation period for trespass to the person was only three years.

[18] There are a number of examples of intervention in such areas recently, e.g. Lord Ackner in the Criminal Justice Bill debate, and various contributors to the Asylum and Immigration Appeals Bill debate.

[19] In the same way as a judge may not hear an appeal from his own decision.