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EDITORIAL

THIS has been a year of major change for Nottingham Law School and its *Journal* and, because of that, we have produced one rather than the usual two issues. We will, of course, return to our normal pattern in 1998. The first change to record is that James Slater, Secretary to the *Journal*, has left for Harvard to undertake its LL.M. He does so with our warmest best wishes and with our thanks for his major contribution to the *Journal* in the last few years. He will remain on our Board as "our man" in the United States.

We also welcome the appointment of our new Dean, Professor Peter Jones, who has taken over from Richard Stone, now the Principal of the Inns of Court School of Law. We wish Richard well and thank him for his contribution as a member of the Board. With Professor Nigel Savage as the Chief Executive of the College of Law, Nottingham Law School is now in the unique position that its two immediate past Deans are leading the two traditional providers of legal professional education. Nottingham Law School will, of course, continue to challenge them by providing high quality, relevant and innovative, professional courses. Indeed, following the Law Society's review of the Legal Practice Course, the Nottingham LPC continues to be recognised for its excellence, its reviewed course being the first to be rated "excellent" by the Law Society (its third "excellent" rating in three years). In addition, the Nottingham Bar Vocational Course is also now running and, with 112 students, is one of the largest outside London.

On the academic side, the School has made a significant new appointment in the recruitment of Professor Michael Gunn as Head of the Department of Academic Legal Studies. He has responsibility, in particular, for the LL.B. courses and the LL.M. in Corporate Law. Michael who, in addition to his many scholarly distinctions, is a Mental Health Commissioner brings a wealth of experience and new ideas to the School. A further major initiative has been the setting up of the School's Centre for Legal Research, which both manages "blue sky" academic research and carries out applied contract research for a range of public bodies, policy makers, law firms and their clients. This is intended to enhance the School's already close relationship with the professions and policy makers and to allow it to help inform debate about legal issues and about the professional changes facing lawyers today. Some of those changes will be fundamental and will no doubt provide material for future contributions to the *Journal*.

In closing, I must thank all contributors to this issue of the *Journal*, especially Peter Riddell, who interrupted his preparation for the then forthcoming General Election to give the *Nottingham Law Journal Lecture*. Thanks also to members of the Board and to the external referees without whom the *Journal* could not thrive. I would also like to put on record our appreciation of the efforts made by Jean Bunn on the I.T. aspects of the Journal's production. We hope that you find the present issue stimulating and we warmly invite further contributions (whether articles, casenotes or book reviews) from lawyers (academics or practitioners) wanting to make a scholarly contribution to the discussion of law or the legal profession.

PETER KUNZLIK, Editor.

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ARTICLES

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THE NEW CHALLENGES TO PARLIAMENT - HOW THE COMMONS HAS YET TO FIND A ROLE FOR THE 1990's

1997 Annual Nottingham Law School Lecture

PETER RIDDELL[*]

PARLIAMENT IS IN TROUBLE. That proposition is almost universally accepted by M.P.'s, political scientists and commentators, whether of left or right. The late John Smith, himself a notable parliamentarian, summed up the common view four years ago at a Charter 88 meeting when he said, "Parliament is weak in this country. I've been in it for twenty-two years and I think it's got weaker every single year. We just don't check the executive properly". All the main parties now have reform proposals of varying degrees of radicalism for making the House of Commons work better, itself an uncertain concept, and to restore its authority. Parliament and politicians have never been less respected by the public, according to opinion polls. M.P.'s recognise and accept this mood and are themselves frustrated about their own role. But what is wrong and what can be done? This evening, I want to argue that much of the familiar discussion about the problems of Parliament, by which is usually meant the House of Commons, is flawed. The traditional focus is on the battle for power and influence between the legislature and the executive. That is exaggerated because it

* M.A. (Cantab.). This article is the perfected text of the *Nottingham Law Journal* Lecture 1997, given on 12 February 1997. The author is Assistant Editor, Politics on *The Times*.

reflects a misunderstanding of the real functions of Parliament. The new challenges to Parliament come not from the executive but from outside institutions. Parliament is increasingly being by-passed on important decisions and in the main political debate.

The decline of Parliament is not, of course, a new theme. Almost every decade for the last 150 years, there have been complaints that Parliament is not what it was and is losing out to the executive. Even in the so-called heyday of parliamentary influence from 1846 until 1867, politicians and commentators looked back to earlier, more glorious days. In 1860, Robert Cecil, the future great late-Victorian Prime Minister, decried "the incompetence and laziness of M.P.'s" His great-great-grandson, the present leader of the House of Lords also does not have a high opinion of the Commons. Ronald Butt in his generally neglected, but still absorbing book, *The Power of Parliament*, noted in 1967 that: "Criticism of Parliament has a long history. In this century it has been almost incessant since parliamentarians were depressed, after the First World War, by a sense of lost independence and by the encroachments of bureaucracy and government action". Roughly every decade there have been complaints: in the 1930's during the depression; in the 1940's as a strong executive emerged from the Second World War to become the driving force of the welfare state; and again in the early 1960's when there was a general sense of malaise about British institutions. When Penguin produced a series of specials on the theme of "What's wrong with . . .", Parliament naturally featured in a volume written anonymously by two clerks of the Commons.

But these complaints over the weakness of Parliament have often been confused about what its proper role should be. Parliament has never governed. Indeed, it cannot govern. That is the role of ministers. Rather, one of the central functions of the House of Commons, and to a lesser extent the House of Lords, is to sustain the Government by the votes of M.P.'s and to provide the personnel for any administration. Arguably, these are its most important functions. Since the Second Reform Bill in 1867, this has meant translating the verdict of the public at general elections into support for the victorious party. Under the tight British party system, the top priority of most M.P.'s is to see their party forming the Government and to keep it there, and as a personal ambition to be on the Government frontbench themselves. That constrains what M.P.'s can do in scrutinising the executive and considering legislation.

Most people when asked what Parliament does will say "make laws". But it is only over the past century that Government legislation has achieved such prominence in the business of the Commons. There is general agreement that governments legislate too much. It is a pious aspiration of all oppositions to legislate less. But when in government, they find they add as much to the statute

book as their predecessors, and generally more. They need legislation to make their mark and there are always pressure groups arguing for this or that amendment to the law. It is a very long time since we had a truly conservative administration willing to leave well alone. The results are often muddled and confused, as businessmen and lawyers can fully testify. Bills are hastily drafted, often substantially amended as they go through Parliament and then a year or so later further amending legislation is brought forward. Four years ago, a Hansard Society commission under the chairmanship of the late Geoffrey Rippon produced an excellent report highlighting the shortcomings in the legislative process. Some improvements have been made. Governments do consult more, draft clauses and indeed whole draft bills are produced. But parliamentary procedures are still too hurried and adversarial. Governments with a majority should be able to obtain their legislation, but the process should allow time for proper debate about the detailed implementation.

The most traditional role of the Commons is raising grievances. Some are collective: protesting at a closure that will create redundancies in a constituency. But an increasing amount of M.P.'s time over the past twenty years has been spent dealing with the individual problems of constituents. The number of letters and phone calls that M.P.'s receive has risen sharply since the late 1970's, partly because of the rise in unemployment and partly because of the increasingly discretionary nature of the social security and housing systems. M.P.'s become individual ombudsmen for their constituents, a court of appeal against local bureaucrats, even though the issues raised are frequently a matter for local rather than central government. But an M.P. can still obtain a response. Most M.P.'s believe that this aspect of their role works well. One indicator may be that, while people are dissatisfied with Parliament as a whole, they are generally satisfied with their own M.P.

The greatest public focus, and criticism, is over Parliament's role in scrutinising the executive, and holding the Government of the day to account. This is what Walter Bagehot called "a great and open council" or what Sir Henry Campbell-Bannerman, not the most quotable of our Prime Ministers, described as the "grand inquest of the nation". Leo Amery, the last of the great imperialists, argued in his fifty year old *Thoughts on the Constitution* that "the main task of Parliament is still what it was when first summoned, not to legislate or to govern, but to secure full discussion and ventilation of all matters". The issues of the moment are raised, since 1989 in the full glare of television cameras, and ministers have to explain themselves. In the formal sense, that works, at least for matters which hit the headlines. The twice weekly Prime Minister's questions may now be noted for its party political points-scoring but at least the Prime Minister has to provide an answer,

however unsatisfactory, as do other ministers in their regular question sessions.

The common, and often repeated, charge is that this is all largely theatre and that the Commons is merely a rubber stamp for the will of the government of the day, at least one that can continue to command the support of a majority of M.P.'s. There is something in this view, but it is greatly exaggerated. The high point of executive dominance was in the late 1940's and 1950's. The Labour and Conservative Governments of the time believed in a strong, active state and could be sure of getting their proposals through the Commons with little trouble, apart from the dying days of the Attlee administration in 1951. But that Chief Whip's paradise disappeared a long time ago. As Professor Philip Norton has amply demonstrated, Government backbenchers started to become more rebellious from the late 1960's onwards. He attributes this primarily to the failures of the Heath Government. I would put more emphasis on the growing numbers of committed, career politicians with clear ideological views who have not been prepared to follow the whips' lead. You can, after all, be a career backbencher once you become disappointed in your hopes of becoming a career frontbencher witness the career of, say, Nicholas Winterton. Talk of the whips dragooning reluctant M.P.'s into the lobby with all kinds of intimidation and threats, as was heard during the passage of the Maastricht legislation, is fantasy. In many respects, the Government has never in the post-war era had to take more notice of the Commons, and in particular of its own backbenchers. This has applied both when Governments have big or small majorities, though the latter concentrates the mind more.

Parliament is now better at holding the executive to account through the expansion of the select committee system in 1979. The key architect of this development was Francis Pym while the Tories were still in opposition, although Norman St John Stevas, now Lord St John of Fawsley, has always been given most credit for their introduction as Leader of the Commons after May 1979. With a typically florid phrase, he said the proposals were "intended to redress the balance of power to enable the House of Commons to do more effectively the job it was elected to do". As Professor Peter Hennessy, a great supporter of select committees, has argued, this phrase "inflated expectations". Select committees have been constrained because they operate within the adversarial party system of Westminster. The loyalty of M.P.'s is, first and foremost, to their parties, either the Government or the Opposition. But this has not prevented some committees producing reports which are highly critical about various policies of Government, though their main impact has been in broadening the public debate; opening up the workings of Government by their evidence taking sessions with ministers and civil servants. The debate about the economy has been advanced by the regular series of hearings which the

Treasury Committee holds with the Chancellor of the Exchequer, the Governor of the Bank of England, and senior officials after the Budget and other economic statements. Similarly, broader questions of Britain's relationship with the European Union are regularly aired by the sessions which the Foreign Affairs Committee holds with the Foreign Secretary and other ministers and officials before the half-yearly European Councils. But their role is limited. They can question, they can occasionally criticise, but they cannot make policy. They cannot govern.

There is scope for improvement in all these areas, particularly the consideration of legislation, to which I will return later. But in a sense this discussion of the main roles of Parliament has become secondary in recent years to a more striking, and I believe under-appreciated, development, the by-passing of Parliament. When I was discussing this lecture recently with a senior minister, he remarked how the current parliament, the one ending in the next few weeks, had become marginal: how, for example, the Opposition had failed to press the Government in the House. On the central issue of the economy, the occasional exchanges between Kenneth Clarke and Gordon Brown have become a knockabout, entertaining to those few M.P.'s and reporters present, but largely ignored. The Budget apart, the Chancellor and Shadow Chancellor make their important announcements outside, what the Victorians called "out of doors", in lectures, in newspaper articles and in broadcasting studios. Any minister or shadow minister making an announcement first does an interview on the Today programme. Any later statement in the Commons is usually an anti-climax. The newspapers have adjusted accordingly, reducing the scale of their coverage of the House of Commons. This is symptomatic of the widespread frustration I noted earlier. M.P.'s know that the action has moved elsewhere.

The most obvious challenge to Parliament is, of course, provided by our membership of the European Union. Since Britain joined the European Community in January 1973, traditional notions of absolute parliamentary sovereignty have been circumscribed by the priority of community law. Of course, the Westminster Parliament still has the power to repeal the 1972 European Communities Act, as an increasing number of Tory M.P.'s would like. So in that sense sovereignty remains. But as long as we remain inside the EU, community law is superior, as was underlined in 1991 when, in the *Factortame* case, the House of Lords ignored a UK act of parliament in deciding how to deal with a case since it was in conflict with the directly enforceable rule of community law. As Community competence has widened, so have the implications of the superiority of Community law and the rulings of the European Court of Justice. Indeed, the Tory Euro-sceptics have been

disingenuous in putting forward proposals for asserting the supremacy of the British Parliament over the rulings of the European Court. This is tantamount to calling for withdrawal since it would then be impossible for Britain to remain a member.

Aside from that legal constraint, the important debates on many matters: external trade, agriculture, fisheries, the single market have moved from the Westminster Parliament to European institutions. Key decisions on, for example, the Uruguay round trade talks and the setting up of the World Trade Organisation were taken in the Council of Ministers and the Commission. The House of Commons was merely an observer of the negotiations. That shift would become more pronounced if Britain ever became part of a single currency where decisions not just on monetary policy but, increasingly also, on fiscal policy would be taken by European institutions.

The position of Parliament has also been challenged by the revival of judicial activism over the past decade and a half. This has been seen, most spectacularly, in the fivefold increase in the number of applications for judicial review granted during the 1980's. High Court rulings have become a far more powerful constraint on the activities of ministers, notably, and repeatedly, the Home Secretary and Social Security Secretary, than the House of Commons is. One might argue that the next powerful constraint is the House of Lords where some of the judges have increasingly criticised the present Government's law and order measures. In some respects, this is a reversion to past days when the judges took the lead in making the law. But the combination of the growth of judicial review and the willingness of judges, and particularly those who are members of the House of Lords, to challenge ministers is a new development.

Parliament has also created challenges to itself. For instance, the series of acts privatising the old nationalised industries created a new semi-independent species of regulator, Oftel, Ofwat, Ofgas, Offer and their many cousins. These regulators were deliberately intended to be an arms-length from the politicians, to prevent interference of the kind seen in the past and to reassure City investors. But, in the process, they have become virtually unaccountable to any elected body. Technically, they are answerable to ministers, who can, on occasions, override them. And via ministers they are accountable to Parliament. Their reports are laid before the Commons and the regulators do give evidence to select committees from time to time. But they offer a wide measure of independence and can, and have, often developed personal styles and views. It is arguable that the single individual who has had most influence on the structure of British industry in the past decade has not been Lord Weinstock or Lord Hanson, but Professor Stephen Littlechild, the director-general of electricity regulation. His decisions on competition in electricity undoubtedly

accelerated the rundown in the coal industry and the dash for gas, as well the many changes in electricity regulation. He is a public figure, but does not appear in any chart of parliamentary accountability. The same points could be applied to a number of other bodies which the Government has created to manage activities such as the Funding Agency for schools, as well as the hybrid of Next Steps executive agencies administering large areas of public sector work. Their heads are civil servants, but are expected to be managerially more independent and to appear and speak in public. Yet they are constrained like other civil servants from expressing their views.

A new challenge has come from the ranks of those most keen to defend Parliament. It was a singular paradox that those most concerned with parliamentary sovereignty during the Maastricht debates of 1992-93 were also the strongest supporters of a referendum. While seeking to protect the integrity of Parliament, they were supporting a means of direct popular participation at odds with the classic model of representative democracy. A similar contradiction was evident at the beginning of this century when Dicey, that great theorist, and mythologist, of parliamentary sovereignty, urged a referendum on Irish Home Rule. The dam has been breached and both the Conservative and Labour parties now support a referendum, or a general election, before Britain could join a single currency: an implicit acceptance that such an important and divisive issue cannot be determined by Parliament but must be resolved by the people. And Labour and the Liberal Democrats have promised referenda on a variety of other constitutional reform proposals, from devolution to electoral reform. By the end of this year, and certainly the next Parliament, we could all be suffering from ballot fatigue.

Indeed, the agenda of the constitutional reformers, now broadly shared by the two main Opposition parties, would circumscribe the role of Parliament. Even though, under Labour plans, the Westminster Parliament would devolve powers to an elected Parliament in Edinburgh and could therefore in theory revoke them, the issue is seen very differently by many north of the border. There, the Scottish people, and not the Westminster Parliament, is seen as sovereign, just as an individual state is in the USA or the Australian federation.

There has been plenty of discussion of these developments individually but little of their overall impact on Parliament. The House of Commons has failed to adjust. M.P.'s complain that their speeches are not reported in the media and about the role of the judges and European institutions. Some sensible reforms have been introduced in the current Parliament: drastically reducing the number of late hours, overhauling the previous cumbersome disciplinary procedures, ending the more flagrant abuses of outside commercial interests and proposing a new code for ministers' accountability to the Commons following the Scott

report. All these are advances, but they fail to address the central problems discussed above.

The House of Commons needs to accept that political power does not just reside in Westminster; that it has and will be shared. That would be necessary if devolution is introduced and if Britain moved further towards a formal written constitution through the incorporation into British law of the European Convention on Human Rights. Incorporation is likely if there is a change of government and the Bill recently introduced in the House of Lords by Lord Lester of Herne Hill specifically addresses the issue of parliamentary sovereignty by not requiring or empowering the courts to strike down provisions of Acts of Parliament that are plainly in conflict with the human rights and fundamental freedoms guaranteed by the conventions.

Moreover, instead of regarding European institutions as alien rivals, the House of Commons should try to develop a more constructive relationship. At present, the European scrutiny committees of the Commons produce solid reports on new proposals coming from Brussels. These are largely ignored and seldom make an impact. The Westminster Parliament not only needs to become involved earlier in the process of discussion of new European laws and regulations, before they are discussed by the council of ministers, but this needs to become a more central activity of the Commons. The frequent response of M.P.'s and clerks to such points is: "who is going to do the work"? M.P.'s are busy and only a few, usually committed Euro-enthusiasts or sceptics, are prepared to spend time on detailed scrutiny work which attracts little notice, either from the press or from fellow members.

The reformers' answer to this issue and others is strengthen the select committees. I agree in principle, but am cautious in practice because of their limitations. I do favour changing the role of select committees from bodies which can roam widely and choose their own subjects. I think they should be required to report to the House on certain issues: for instance, not just on proposed European regulations within their remit but also on expenditure plans, the annual reports of the relevant regulators. These need not involve lengthy investigations and some could be conducted by sub-committees, but, at least, it would become a regular duty of select committees to report on these developments. That would increase the public focus on key European regulations, on the work of the regulators and on spending trends (as, for example, the Defence and Social Security committees already do).

The current select committees could also become more involved in discussion of policy options before legislation is introduced. This might prevent much later heartache. If the Government of the day insists on proposing something like a poll tax, and has a Commons majority to enact the change, so

be it. But some of the practical pitfalls, and vast costs, of the poll tax might have been avoided if the Environment committee had not abdicated its responsibility in the 1987-92 Parliament and declined to examine the issue because it was too controversial. When Bills are then published, it should be automatic, not a rarity, for them to be examined by a special standing committee, temporary versions of select committees, again to highlight possible problems, before a possibly more streamlined consideration by standing committees, in effect a mini-version of the Commons chamber. This would slow down the legislative process, but no bad thing. There might also be virtue in having a two-year parliamentary session, or least making it easier for Bills to be carried over from one session to the next. None of these ideas will guarantee good legislation, but they should improve the statute book, and one hopes reduce the need for judicial review and for the type of confrontation between judges and ministers seen over the past decade.

I would go further and require select committees to report on major public appointments in their area. For example, the main utility regulators, the Governor and deputy Governor of the Bank of England, the chairman and director-general of the BBC and so on. They could only question the person's professional suitability and qualifications, in order to prevent the intrusive straying into private life seen in the "advise and consent" procedures of the US Senate. In most cases, the report would be the end of the matter. But there could be a procedural change, as with some statutory instruments, allowing the Opposition to "pray against" an appointment. This would force a debate and vote on the floor of the House. I am only thinking of a few dozen very senior appointments. Of course, this idea challenges the whole idea of the prerogative powers that are exercised by the Prime Minister on behalf of the crown outside the control of Parliament; not before time. It is highly desirable that these powers, ratification of treaties as well as appointments, should be subject to Parliamentary scrutiny. The power of nomination would still lie with the Prime Minister, but Parliament would at least be able to raise questions, possibly forcing a re-think in the case of some unsuitable appointments.

But none of these ideas would work with the present select committees. They are not staffed by the best and the brightest of Westminster. Frank Field is an exception. The ambitious mostly gravitate to the frontbenches which now provide roughly 180 posts, even ignoring parliamentary private secretaries. Some of the most talented of the Labour 1992 intake readily gave up their select committee posts within two and a half years to become whips. In the current Parliament, four Tory M.P.'s have given up the chairmanships of select committees to take junior or middle ranking ministerial posts. Just before Christmas, Matthew Carrington even moved from being chairman of the

Treasury committee to become a junior whip. That is very revealing about M.P.'s sense of priorities. Some former ministers do serve on select committees and make a major contribution. The presence of David Howell, Michael Jopling, Sir Jim Lester, Peter Shore and Ted Rowlands has undoubtedly strengthened the Foreign Affairs committee. But they are exceptions. Many former ministers retire from the Commons at the next election after they have left the Government.

But this balance of ambitions has to be redressed if committees are to undertake the type of work I suggest. The attractions of committee work should be increased. Paying the chairmen would help, as was suggested by last summer's report of the Review Body on Senior Salaries. But something more radical is needed. The relative size of the executive needs to be reduced. A century ago, only 33 members of a House of Commons of 670 held paid ministerial posts; now roughly 85 out of 651 do. Many junior ministers are not fully-stretched, except when their department has a major Bill going through the Commons. Their existence is partly an exercise in patronage by the Prime Minister and Chief Whip of the day to ensure that as many as possible Government backbenchers are contented. A reduction in the number of ministers, and one hopes in the currently bloated shadow teams, would encourage the ambitious more into select committee work as an alternative career path.

There is also increasing support, notably among M.P.'s who have announced their retirements, for a reduction in the size of the Commons. I agree, though there is a possible conflict with the desire to give backbenchers more to do by expanding the role of select committees. Such a reduction in the size of the Commons could probably only occur as part of a wider constitutional settlement, either if electoral reform and/or devolution were introduced to create a more federal structure.

These reflections have become wide ranging, and many topics, such as reform of the House of Lords, have been excluded. But I believe that if Parliament is to regain public confidence and to restore its proper role at the centre of public debate, radical changes are needed. At present, too many M.P.'s are frustrated and resentful, aware that the focus of attention and decision-making has shifted elsewhere but unable and unwilling to do much about it. Instead, they need to come to terms with a more pluralistic, even perhaps federal, institutional and constitutional framework and seek to influence these other bodies and make them more accountable. Only then, could Parliament truly claim in Sir Sidney Low's words in 1904, to be "the visible centre, the working motor of our constitution".

THE ROLE OF EXPERTS IN ENVIRONMENTAL CONTROVERSIES

Paul Smith*

THIS ARTICLE IS INTENDED TO EXAMINE SOME of the issues with which lawyers must grapple when using experts in environmental controversies, especially in litigation. In doing so it will touch upon general problems which commonly arise. Although they arise in most types of litigation and are by no means limited to environmental litigation, they are often significantly more pronounced in environmental cases, especially those complex cases which involve significant issues which are of international importance. The article will focus on four main areas. First the definition of an expert. Secondly the question as to why the use of experts is such a problem in environmental cases and looking, in particular, at "closure theory" and other problems associated with scientific evidence and proof. Thirdly, there are the tricky issues of risk and risk perception. Finally we must examine the practical problems associated with the use of experts in litigation. In addressing these issues it is intended to touch upon some of the procedural problems identified in the Woolf Report [1] and to make some recommendations for the future.

WHAT IS AN EXPERT?

There is no system of official accreditation of experts, although the academy of experts (amongst others) has been established to provide unofficial accreditation. Accordingly, the weight of an expert's evidence will depend largely upon experience, expertise and authority within his discipline. Nonetheless, it is important to recognise that expert witnesses are not the final arbiters of fact. That is the role of the adjudicator, in the context of litigation the judge. In *Davie* v. *Edinburgh Corporation* [2] the judge said that;

> ...The defenders went so far as to maintain that [the court was] bound to accept the conclusions [of the expert]. This view I must firmly reject

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1 The Woolf Report:*Access to Justice* (H.M.S.O.,1996).

2 [1953] S.C. 34.

> as contrary to the principles in accordance with which expert evidence is admitted. Expert witnesses, however skilled or eminent, can give no more than evidence. They cannot usurp the functions of the jury or judge sitting as jury. [The duty of experts] is to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions so as to enable the judge or jury to form their own independent judgement by the application of these criteria to the facts proved in evidence. The scientific opinion evidence, if intelligible, convincing and tested, becomes a factor (and often an important factor) for consideration along with the whole other evidence in the case, but the decision is for the judge or the jury.

THE ROLE OF THE EXPERT WITNESS

Similarly in *Compania Naviera S.A.* v. *Prudential Assurance Company Ltd. (The Ikarian Reefer),*[3] Cresswell J. summarised the duties and responsibilities of expert witnesses in civil cases in terms of the following propositions:

(1) Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation; *Whitehouse* v. *Jordan,*[4] *per* Lord Wilberforce;

(2) Independent assistance should be provided to the court by way of objective unbiased opinion regarding matters within the expertise of the expert witness; *Polivette Ltd.* v. *Commercial Union Assurance Co. plc,*[5] *per* Garland J. An expert witness should never assume the role of the advocate;

(3) The facts or assumptions upon which the opinion is based should be stated together with material facts which could detract from the concluded opinion;

(4) An expert witness should make it clear when a question or issue falls outside his field of expertise;

(5) If an opinion is not properly researched because it is considered that insufficient data is available then this must be stated and an indication given that

3 [1995] 1 Lloyd's Report 455.

4 [1981] 1 W.L.R. 246.

5 [1987] 1 Lloyd's Report 379.

the opinion is provisional; *Re J.*[6] If the witness cannot assert that his report contains the truth, the whole truth and nothing but the truth then that must be stated in the report; *Derby and Co. Ltd. and Others* v. *Weldon and Others* (No.9),[7] *per* Staughton L.J.;

(6) If, after exchange of reports, an expert witness has changed his mind on a material matter then the change of view should be communicated to the other side through legal representatives without delay and, where appropriate, to the Court; and

(7) Photographs, plans, surveys, reports and other documents referred to in the expert evidence must be provided to the other side at the same time as the exchange of reports.

IS SCIENTIFIC EVIDENCE RELIABLE ENOUGH?

The need for verification and peer review

In many cases, scientific theories are developed over a period, with peer review, analysis and independent verification. The process is undertaken through academic conferences, publication of peer-reviewed articles and discussion. If there are any methodological flaws in the reasoning or the techniques employed by those carrying out the research, they are identified, criticised and further refining work undertaken. This process of independent verification underpins the validity of the research and, arguably, enhances its reliability.

Unfortunately when scientific evidence is translocated into the courtroom, the process of independent verification is carried out by non-technical people such as the Judge, jury and counsel. Although there may be opposing versions of the same opinion evidence there is no objective review of the methodologies, interpretations or results in question.

Certainty and the uses of expert evidence in litigation

Furthermore, non-specialist "expert" witnesses are frequently asked to give opinions on highly specialist scientific questions, without their views having been tested through critical peer appraisal. This lack of scientific under

6 *The Times*, 31 July, 1990.

7 *The Times*, 9 November, 1990.

standing can lead to a failure to subject expert evidence to proper scrutiny. Thus evidence may remain unchallenged and may be accepted by the Court in circumstances in which it would be doubted by other, more qualified, experts. The reverse is, however, also true. Scientific evidence can rarely be stated in terms of absolute certainty. Experts are therefore frequently asked questions about the possibility of alternative theories which might be credible. Furthermore, any apparent lack of certainty on the part of the expert can, in criminal cases, be conveniently translated into a "reasonable doubt". In civil matters, it can be used to support alternative theories. Thus scientific arguments can be used to obfuscate the issues by introducing an element of doubt rather than presenting credible alternatives or attempting to rebut opposing evidence.

Reliance upon scientific expert evidence in the courtroom is often misplaced. Small errors in the application of scientific principles, in the process of gathering hard data, in the analysis of the data or in the interpretation of results can have significant effects upon the conclusions which a Court is being asked to draw. There is, however, a tendency to view scientific data, at best, as infallible; or, at worst, as providing a degree of certainty around which other, more uncertain issues can be debated. Non-technical examination of scientific evidence will often fail to examine some or all of the process of gathering, collating, analysing, and interpreting data as these are difficult for the non-scientific lay man to comprehend. There is, therefore, a tendency to debate more marginal issues which can, however, be more easily understood.

Even in situations where the limitations of scientific evidence are specifically addressed by the expert, the aura of certainty surrounding such evidence can nonetheless lead to assumptions about the reliability of preliminary tests which are used as the basis for further testing. An expert witness may preface his evidence with a warning about assumptions which he has made in interpreting data or preliminary tests the results of which have then been used to provide a foundation for further investigatory work. Nonetheless, over time some of these assumptions or preliminary tests become subliminally accepted and gain general acceptance by exerts in the particular field.[8]

This acceptance of scientific presumptions can occasionally lead to consequential hypotheses which give rise to inaccurate or invalid results. Thus it is important for non-technical participants (such as lawyers and the judiciary) to question the processes which yield test results and the validity and accuracy of the results themselves. It is, however, much more common for the

[8] The U.S. Environmental Protection Agency's approved dispersion model for atmospheric emissions is often used by experts in the U.K. to predict atmospheric environmental effects. This model has been adopted mainly because it is thought to be widely accepted amongst scientists as being one of the most reliable in relation to varying conditions. The model is, however, by no means perfect.

interpretation of test data to be influenced by incorrect assumptions which in turn raise significant questions about the reliability of expert opinion evidence.[9]

The search for consistency

It is quite typical for experts to take a given set of circumstances and try to fit them into a tailor-made theory. The parameters of the theoretical scientific matrix within which the expert locates the facts are essentially pre-defined and once a connection is found between the theory and the facts, the success of the test is assumed and no further attempt is made to experiment with alternative theories or different scientific matrices. One of the main problems is that the scientific expert will often look only for consistency with scientific theory rather than for proof in the legal sense. Thus, the expert interprets test results as being "consistent" with his preferred theory. In doing so, however, he may make little attempt to consider dissimilarities and inconsistencies which might disprove his "interpretation". The expert arrives at a view which is totally in keeping with the scientific community's approach to expressing conclusions. Thus, by accepting principles *a*, *b* and *c* and then applying them to the facts we get result *x* which is consistent with conclusion *y*. The original principles are accepted as being valid and reliable notwithstanding that the expert has not considered whether there might be alternative principles *d*, *e* and *f* which might result in a completely different outcome.[10] This often results in preference being given to established methodologies as against new theories which may themselves signal a paradigm shift in scientific thought.

WHY IS THE USE OF EXPERTS SUCH A PROBLEM IN ENVIRONMENTAL CASES

The scientist's assessment of risk and public perceptions

Environmental cases, whether they be "toxic tort" claims, or litigation arising out of environmental disasters, provide particularly difficult challenges for the legal system. There are a number of reasons for this. First, science is often viewed as a source of objective "truth" providing an infallible basis upon which individuals and the legal system can make decisions. Environmentalists, on the other hand, mistrust science and sometimes rely on non-rational, emotional and intuitive "knowledge" of nature as being as legitimate as

9 See Pepper, *Modern Environmentalism,* (Routledge,1996), p.261.

10 See generally, Wynne, *Rationality and Ritual: the Windscale Inquiry and Nuclear Decisions in Britain,* (British Society for History, 1996).

scientific knowledge.[11]

Whereas scientific uncertainties are generally debated within the context of a closed community of experts, environmental issues commonly fall into the public arena where economic, social, political and legal factors come into play and where there are non-technical participants. Credibility and reliability become crucial in such circumstances. Scientific experts tend to prefer to present their interpretations in a "value neutral" context. The very nature of environmental disputes however often pitches the scientist against the environmentalist, there being a large gap between their competing ideologies, methodologies and interpretations. More importantly, there can be major conflict between these two "sides" (which is admittedly a rather simplistic portrayal of the situation) because there is frequently a fundamental lack of consensus between them over the acceptability of the situations which the expert is asked to assess. Thus, whereas an expert might view a particular environmental impact as "insignificant" its significance may be seen in an entirely different light by those who will actually be affected by it.

Furthermore, scientists struggle to overcome significant failures from the past. One striking example can be found in the old Department of Transport's failure to understand the basic principle that building roads actually creates more traffic. After many years of rejecting that principle, the Department was finally forced to climb down, a failure which must be viewed in the light of the popular conception of the "precautionary principle" which is notoriously difficult to define but which, in the minds of environmental objectors or campaigners, seems to suggest that unless scientific evidence can give us certainty (which itself begs a question) then it cannot form the basis for informed decision making.

Expert evidence in polycentric controversies

A further characteristic of environmental litigation is that it does not always arise in the context of traditional bi-polar disputes where plaintiff fights defendant or landlord fights tenant. Clearly, some types of environmental litigation fit into this traditional model (particularly where the dispute concerns property rights) but in many cases environmental issues are polycentric in nature. That is to say that they often involve the consideration of many interests

11 See generally: Robinson and Dunkley (eds.), *Public Interests Perspective in Environmental Litigation.* (Wiley. 1996). See also *Bryant et al, Twyford Down Roads, Campaigning and Environmental Law,* (E & FN Spon, 1996).

and issues and do not necessarily fall to be determined purely between two contesting parties.[12] In terms of the wider interests involved in such litigation experts may find themselves in a position where there is no clearly "right answer" and may feel compromised.

THE PROBLEM OF "CLOSURE"

The nature of closure

In addition, there is the significant problem of "closure" amongst the scientific community. Many people will be familiar with the application of the concept of a scientific hypothesis, for example, that a state of affairs x is caused by mechanism y which can be proved by applying test z. In environmental litigation such hypotheses often relate to questions of causation, for example, that pollutant x came from factory y as proved by applying dispersion modelling technique z; or that pollutant x can be shown to have caused the plaintiff to suffer from disease y because the physiological effects of that pollutant have been established by research carried out by *Dr. Z* . Such hypotheses can be reached by a number of different paths but once established within the scientific community they tend to be treated as objectively "true" and they often form the basis for conclusions to be drawn in future studies. The difficulty is that no hypothesis is reached without some form of controversy. Competing ideas are debated on the scientific conference circuit and in learned journals and are subject to peer-review and criticism until such time as one hypothesis gains general acceptance. This acceptance is characteristic of "closure", the conclusion, ending or resolution of the controversy. This is, of course, something of an oversimplification as some forms of closure are not permanent because controversies can reopen after paradigm shifts in scientific thought or because new controversies arise. There are plenty of scientific controversies in the world of the environmental litigator, for example, as to the effects of dioxins, electromagnetic fields and organophosphates to name but three in the sphere of toxic tort.

How Does Closure Affect Environmental Litigation?

Often the purpose of an environmental litigator is to attempt to undermine the closure that has taken place in respect of a particular issue. This involves attempting to overturn or undermine established theories, to establish credible

[12] A typical piece of environmental litigation may have significance for many organisations which do not directly participate. For example, a claim for personal injury arising from exposure to a hazardous substance is bound to affect all of those who manufacture or use the substance. Of course other litigation can have this effect, without, however the involvement of the social, political and technical issues which surround environmental law and policy.

new theories and to convince a court that the new theory should prevail.[13] Cases concerning the BSE crisis, the question of smoking-related disease, and the effect of electro-magnetic fields and of dioxins have all involved attacking some established theory in some way.

The difficulties in attacking closure in environmental cases are particularly severe. Interested and economically powerful groups may wish to control the closure, for example, by funding work aimed at supporting theories favourable to their interests or discrediting those which are unfavourable.[14] Furthermore policy makers do not favour wholesale paradigm shifts as they can disrupt smooth patterns of government and important sectors of the economy. Finally, of course, closure only arises in the first place because a majority of respected academicians endorse the theory in question. Any shift from that position will mean loss of credibility for a large section of the scientific community. In summary, the power of the expert is the power vested in the expert by closure. Not surprisingly therefore the challenge for an environmental litigator facing an established theory is to overcome the weight which is always given to established theory, the weight which is bestowed by closure.

[13] An example, taken from the author's professional experience, can illustrate some of the points considered. The first, concerning odour measurement, arose out of a recent appeal from a refusal by a local authority to grant an authorisation for the continued operation of an animal by-product rendering process. The authority was not satisfied that the plant could comply with conditions in the authorisation requiring it to prevent operation without causing a statutory nuisance and a condition requiring the continuing use of BATNEEC (best available technology not entailing excessive cost) in order to reduce to a minimum the release of odours from the site.To support its case, the authority relied upon olfactometry which is a technique for measuring odours. It relies, however, on statistical probabilities and is not an exact science. Olfactometry is accepted as the only tool for this purpose yet when the expert gave evidence on the basis of the accepted and well-known theories based on the scientific learning to date, it was rejected because the lawyers acting on behalf of the animal renderers produced an expert statistician who challenged the fundamental assumptions of olfactometry, stating that its efficiency could be in error by 80% either way. Thus the authority's case was destroyed by the other side's successful challenge to fundamental and generally accepted assumptions.

[14] In the field of epidemiology, for example, experts are used very much in advance of litigation either to promote new actions linking certain chemicals/products to human injury or, alternatively, to stop or discourage litigation. "Plaintiff lawyers" study epidemiology reports to find new links between chemicals products and disease. They will identify companies who make or made these products and will then find clients who work or worked for these companies and who have contracted the disease in question. In the United States, in fact, the courts can order medical monitoring schemes to be set up to assess possible health affects. On the other side of the coin, however, will be groups (usually manufacturers or producers) who have an interest in preventing the establishment of links between products and diseases. Such groups can use their economic strength to commission scientific studies which might undermine the possibility of a link. Whether or not such efforts will be effective to "close the theory" in a way favourable to the manufacturer/producer depends ultimately upon scientific peer review.

RISK AND THE PERCEPTION OF RISK

A further area in which experts struggle concerns risk (and, in particular, the public perception of risk) and the communication of risk assessment to non-technical people. If, for example, an expert says that there is a one in 10,000 chance that something might happen, some members of the public may assume that it is just a matter of time before it does happen. It therefore greatly assists in getting public acceptance of new or controversial technologies to portray them as completely predictable and controllable. There is then the danger that concern to "reassure" the public can produce artificially purified public accounts of scientific and technological methods and processes, and of their results.

The danger with this approach is that a "sanitised" assessment of the risk is communicated to the public and the technical processes and scientific theories concerned are portrayed as unrealistically rigorous and reliable. Unfortunately, an attempt to "sanitise" risk assessment can backfire if the true nature of the risk is later discovered. Although within the scientific community the degree of risk may be acceptable in comparison to other areas of uncertainty, the public is increasingly sceptical about technical reassurances in the light of their own experience.[15]

This presents experts with something of a dilemma when addressing the question of the communication of risk assessment. They must be able to deal with the inevitable uncertainties which arise as a natural consequence of scientific methodologies whilst maintaining reliability and ensuring that the non-scientific community can have confidence in their assessment of the true nature of the risk in question. Unfortunately, experience has shown that as the complexities of risk assessment grow, the non technical perception of risk has become more tenuous and the lack of confidence in the scientific community has increased. Consequently, the job of communicating assessments of risk has become more difficult. This deterioration in confidence, the change in perception, and the notable examples of public concern over issues of risk mean, ironically, that even where experts and industry carry out objective and reliable risk assessments, and there are high levels of technical competence, the public will choose to concentrate on the possibility that the unforeseeable and unexpected might occur.

There is, of course, no easy answer to this particular dilemma. Communication of the true nature of risk would be a good starting point. This, however, would require that experts have a greater understanding of the non-technical perception of risk as opposed to the scientific statistical analysis which

[15] A prime example is the experience of the communication of risk in the BSE crisis.

is often their resort. Finally, more work needs to be done on the clarification of the role of risk assessment in the political process and in the legal system. The reality is that uncertainty is an fundamental part of human existence and technical infallibility is an unattainable goal.

PROBLEMS WITH EXPERTS IN LITIGATION

Turning to some of the more mundane, yet important, practical issues involved in using experts in litigation, attention naturally focuses on the Woolf Report.[16] The Report seeks to address a umber of problems including:-

(1) The danger that experts tend to act as advocates rather than as independent opinion givers;

(2) The tendency to appoint experts too late in the litigation process to assist in the overall case. This leads to the question as to precisely when an expert should be instructed;

(3) The fact that long delays in producing expert evidence often lead to delays in the process of litigation; and

(4) The problem that it is often difficult to get experts to appear at trial when no fixed appearance date can be guaranteed.

In addition to these issues other practical factors can be critically important. Particularly in the case of heavy weight environmental litigation, it is often very difficult indeed to obtain the services of the leading experts in the world. They are, by their very nature, rare and extremely busy people. The chances of getting the expert you want may be very slim at best. This inability of acknowledged world experts to meet demand for their services has led to the creation of support teams around the leading scientific experts which prepare the reports and background materials for the expert. This can, of course, lead to a major problem; that of the main expert witness who has not verified the figures, calculations or other data himself but who is expected to give evidence as though he had done the background work.

In addition, the nature of environmental litigation is such that there are often many disagreements about the scope of the studies which will have to be carried out to establish a given conclusion.This often leads to an increase

16 *Op. cit.*

in the range of issues which have to be resolved at trial and to a consequent increase in the length and cost of litigation. Furthermore, attention to the detail of unfocused scientific evidence can lead to confusion and can obscure the central issues.

Indeed, in some cases the parties do not even want to narrow the issues. This is because, as we have seen, in many environmental cases the issues do not fit within the narrow confines of the traditional model of two-party litigation. Environmental pressure groups, for example, such as Greenpeace or Friends of the Earth, have their own particular agendas when instituting legal action. Unlike other plaintiffs, such groups may bring such litigation to attract publicity or to establish a broad precedent. They may have no interest in narrowing the legal issues so that they are only applicable to the specific circumstances which are the subject of the litigation. They have the larger picture to consider. On the other side of the coin, businesses or public authorities may themselves become overly defensive so that both parties to the litigation become entrenched in their positions, unwilling to concede even the smallest of scientific points for fear of a "snowball" effect. Experts can, in addition, become entrenched in their own views. This is not surprising since environmental issues are, by their very nature, often controversial and feelings run high. It is not, therefore, unknown for some experts (who may be amongst only a small number of experts in their particular field) to mount their own personal crusade on a particular issue either for personal or professional reasons. In such a situation, of course, the expert loses objectivity and can thereby undermine the credibility of their own evidence.

CONCLUSIONS

What conclusions can be drawn from this admittedly brief consideration of the issues affecting the use of experts in environmental controversies? Perhaps the first is that we need a greater recognition that science does not have all of the answers. It is not omniscient, nor is it claimed to be. It is therefore wise always to retain a healthy scepticism about what science, and scientific expert evidence can and cannot achieve, especially within the process of environmental litigation. This does not, of course mean that experts have no role. Often their evidence is crucial in establishing causation or in other aspects of a case. The danger comes when we accord too much reverence to established theories and bow to the fact of closure. Environmental cases are frequently fought on the boundaries of scientific knowledge and experts and lawyers alike need to come to terms with the notion that the answer may not always be found in traditional, non-controversial theories. The history of science in

environmental matters demonstrates that we are foolish to believe that an established theory is true now and forever. The legal system needs to find a way to acknowledge the importance of unproven theories and to accommodate them in the light of the precautionary principle.

If changes are needed in the fundamental approach of the system to the use of science in environmental controversies, the same is true of the way in which lawyers use experts in litigation. The Woolf Report has highlighted some areas of improvement, though it should not be thought that these are necessarily uncontroversial. There is, of course, the question of neutral or court appointed experts. This would be tremendously beneficial in environmental cases although the nature of expert environmental evidence is not necessarily the easiest to put in neutral fashion because it may not merely involve the interpretation of facts but rather the weighing of competing hypotheses each of which may produce contradictory results. This differs significantly from the more usual role of the expert in weighing competing interpretations of the facts based around common assumptions and a common hypothesis. For this reason, it may be more appropriate to appoint assessors, as in environmental administrative appeals, who could assist the decision maker in weighing up competing expert evidence. Such an assessor would assist the judge to understand the scientific principles involved without making any value judgements. Alternatively, he could make the value judgement from a technical and informed background. This would not, of course, prevent the problem of closure from raising its ugly head. Indeed, to the extent that scientists become part of the tribunal of fact there may be a danger that they will, reflecting their own culture, reinforce closure, and render established theory less open to challenge than ever.

Improvement might be achieved in two other ways. First the pool of experts could be expanded considerably. In certain areas of environmental litigation one becomes accustomed to familiar experts expounding familiar views time and time again. It is difficult indeed for an expert giving evidence in litigation to admit that his view may have changed from the position adopted in an earlier case. His credibility and wider reputation may be thought to be at risk. Having taken a particular stance on an issue he may therefore be reluctant to change it. This inevitably leads to a "ghettoisation" of expert opinion which is unhealthy both for the scientific community and for the legal system. We therefore desperately need to expand the range of scientists willing to act as experts in litigation. Even assuming that a broad range of potential expert witnesses can be found, however, access to them depends upon the financial resources available to the parties. There is an inherent unfairness in the situation which now exists in which one party might succeed in defending a weak case because it can afford the "best" experts and the other party may not even be able to launch a claim

because it cannot do so.

Finally, we could be on the brink of the establishment of an environmental High Court to try all forms of environmental dispute. The Labour Government committed itself to this idea in its main policy statement issued before the general election, "In Trust For Tomorrow". This proposal suggests that the Court would be a division of the High Court and would combine the use of technical assessors with deployment of High Court Judges assigned on rotation. It remains to be seen whether this will work as well as environmental courts in other jurisdictions, but it is unlikely to mean the end of all of the problems concerning expert witnesses in the litigation process.

DO NOT RESUSCITATE ORDERS: GUIDELINES IN PRACTICE

*Judith Hendrick and Carol Brennan**

I. INTRODUCTION

THE DO-NOT-RESUSCITATE ORDER PRECEDES THE DEATHS of many patients in U.K. hospitals. It has been described as "a crucial decision point in the limiting of treatment...a point at which doctors and nurses clarify their therapeutic goals and reconsider the appropriateness of further life-sustaining treatment".[1] The process by which such orders are made is regulated by the common law. It is also the subject of recently published clinical practice guidelines which were drawn up by the British Medical Association and the Royal College of Nursing to indicate best practice in this area. This paper sets out to examine the content of these Guidelines and in particular their accord with the common law in relation to the issue of patient consultation. The extent of their implementation in three Oxfordshire hospitals has been investigated in order that we might speculate upon the legality of current medical practice regarding resuscitation decisions. Despite the growing use of clinical practice guidelines, their influence in peripheral non-technical areas of medical practice appears limited. Symbolic significance may be their predominant justification. The research reveals that the impact of any formal regulation of this process is mediated firstly by the firmly entrenched independent ethos of the medical profession and secondly by the medical "ownership" of the key definitions which inform the decision-making process: namely competence, futility and, questionably, quality of life.

II. RESUSCITATION

A. What is CPR?

Since it was first described in 1960,[2] cardiopulmonary resuscitation (CPR) has become a routine emergency procedure in cases in which a patient's heart or lung function is interrupted. Described as an "everyday practice"[3] it has

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1 N Smidira *et al, "Withholding and Withdrawal of Life Support From the Critically Ill"* (1990) 322*New England Journal of Medicine* 309.

2 W.B. Kuowenhoven, J.R. Jude, G.G Knickerbocker, "Closed Chest Cardiac Massage" (1960) 173 *Journal of the American Medical Association* 94.

3 D. Florin, "Do not resuscitate orders: the need for a policy" (1993) 27 *Journal of the Royal College of Physicians* 135.

been estimated to be applied to 20% of patients who die in UK hospitals.[4] It is hard to generalise about the success rate of CPR because results are so dependent upon the varying physical conditions of the different patient groups upon whom it is practised, however the study which reported 14% surviving until discharge from hospital[5] closely mirrors averages found in similar research in the United States.[6] These statistics tell us that in the large majority of cases, a dramatic and traumatic procedure is employed to no long term effect: "if the expected outcome is death, a procedure less dignified and peaceful could hardly be devised".[7] It has been said that instead of avoiding death, CPR merely prolongs it.

B. Do Not Resuscitate Orders

Indiscriminate or routine use of CPR will not be in the patients' best interests. It also can have detrimental effects on medical staff and relatives, not to mention resource implications. To counteract the assumption that life-sustaining intervention is to be offered in all cases, do-not-resuscitate (DNR) orders are used to indicate that CPR is inappropriate. It is important to note that a DNR order has no implications for a patient's general medical and nursing care but only signifies that CPR is inappropriate. A patient for whom there was a DNR order could, for example, be administered life-saving antibiotics.

Although a DNR order is recorded by doctors responsible for a patient, it is a decision which may have a strong non-medical input. On one hand, this may be because it is in response to a competent patient's own wishes. Ideally these should be considered and informed, but they are legally binding in any event if the patient decides, in anticipation or for spurious reasons, to refuse CPR. How such wishes may be ascertained will be discussed below. On the other hand, the non-medical input may arise in the absence of patient consultation. A doctor's decision to make a DNR order is justified in one of two situations. First, in respect of a non-competent patient, when the doctor judges that resuscitation will not be in his best interests.[8] Such a judgement will involve assessing the possible quality of the patient's life both before and following resuscitation and will thus involve consideration of subjective and non-medical factors. Alternatively, in respect of either a competent or non-competent patient,

4 R.M. Keating, "Exclusion from resuscitation" (1989) 82 *Journal of the Royal Society of Medicine 402.*

5 D.M. Westwood, M.E. Westwood, R.D. Lane, "Cardiopulmonary resuscitation: a panacea or ethical decision?" Discussion Paper (1990) 843 *Journal of the Royal Society of Medicine 713.*

6 D. Tresch, G. Hendebery, D. Kutty, J. Ohlert *et al, "Cardiopulmonary resuscitation in elderly patients hospitalised in the 1990s: a favourable outcome" (1994) 42 Journal of the American Geriatric Society 137.*

7 J. Saunders, "Who's for CPR?" (Editorial) (1992) 26 *Journal of the Royal College of Physicians 254.*

8 *Re F (Mental Patient: Sterilisation)* [1990] 2 A.C. 1 (H.L.)

it may be estimated that the chances of a successful resuscitation are so low that such action can be termed futile. In this event the doctor has no obligation to provide CPR, regardless of the patient's views. It will be seen that an assessment of futility can be made on purely medical terms or have non-medical connotations when quality of life enters the equation.

C. Regulation of DNR orders

In the United States, hospitals began to draw up formal policies regulating when and how DNR orders were to be made in the mid 1970s.[9] In 1988 New York passed complex legislation decreeing that consent for CPR was presumed (and that it should be employed, unless medically futile) unless there was a formally obtained and recorded DNR order for a patient.[10] Early research indicated that, although predictably, the legislation had led to a significant increase in the number of DNR orders made and formally documented, there was no marked change in the frequency of CPR or patient involvement in the decision-making process.[11] A later study, which found a high degree of compliance accompanied by an impressive level of informed consent, attributed this to an intensive programme of staff education which was begun by the hospital ethics committee two years before the new law was enacted.[12] As will be borne out by our research, resuscitation may prove one of the last bastions of paternalism and resistance to patient involvement.

9 In 1974 the American Medical Association suggested that DNR orders be written on a patient's chart and shared with all who care for the patient: National Conference Steering Committee. Standards for cardiopul monary resuscitation and emergency cardiac care. (1974) *227 Journal of the American Medical Association 837.*

10 Article 29-B, Statute 413-A The State of New York Public Health Law, effective April 1, 1988 states that "...if a patient has decision-making capacity, the attending physician must obtain the patient's consent in the presence of two witnesses before issuing a DNR order. If the patient lacks decision-making capacity, two physicians must certify, in writing, their opinions concerning the cause and probable duration of the incapacity. Notice of this determination must be given to the patient and the surrogate decision-maker (legal guardian or next of kin). Then, the surrogate may consent to a DNR order only after the written determination by two physicians that: (1) the patient has a terminal condition; or (2) the patient is irreversibly comatose; or (3) resuscitation is medically futile; or (4) resuscitation would impose an extraordinary burden in light of the expected outcome." Kamer *et al, "Effect of New York State's Do-Not-Resuscitate Legislation on In-Hospital Cardiopulmonary Resuscitation Practice" (1990) 88 The American Journal of Medicine 108.*

11 Kamer, *ibid.; see also T. Quill, N Bennett, "The Effects of a Hospital Policy and State Legislation on Resuscitation Orders for Geriatric Patients" (1992) 152 Archives of Internal Medicine 569.*

12 R. Misbin, "Compliance with New York State's do-not-resuscitate law at Memorial Sloan-Kettering Cancer Centre; a review of patient deaths" (1993) *New York State Journal of Medicine 165.* The authors cited the "highly educated patient population" of the hospital as contributing to the high rate of patient involvement as well as the fact that it may be easier for doctors to deal with resuscitation issues with patient dying of AIDS or cancer than other causes. They request that their results not be "taken as evidence that the law necessarily fosters good, ethical decision-making".

In the UK the typical style of such decision making tended to be informal until the early 1990's. There was little uniformity in the making and recording of DNR orders, even within an institution[13] and resuscitation decisions were often made on the spur of the moment by nurses or junior medical staff.[14] In 1993 it was observed: "While some consultants do apply clear and consistent DNR policies this is probably still the exception rather than the rule".[15] The need for guidelines at this time was apparent. In his report to Parliament in 1991, the Health Service Commissioner drew attention to a complaint which he had upheld concerning the death of an elderly woman for whom a DNR order had been implemented but which had been made in circumstances which revealed inconsistency, confusion and lack of a written hospital policy.

In response to a letter to all consultants in England from the Chief Medical Officer concerning resuscitation policy,[16] the BMA and RCN in consultation with the Resuscitation Council published a Statement containing guidelines on CPR. The Guidelines describe themselves as "...a framework providing basic principles within which decisions regarding local policies on CPR may be formulated".[17]

The letter of the Chief Medical Officer recommended that clear hospital policy on resuscitation be adopted and the BMA/RCN Guidelines were accordingly compiled to provide a "framework" for such policy. It is open to hospitals to adapt the guidelines to fit their own preferred policy and many have done so. The majority have adopted the BMA/RCN guidelines as they stand and this was done in March 1994 by the three Oxfordshire hospitals which were the focus of our research.

They are contained in eleven paragraphs and deal primarily with the way DNR decisions should be made, recorded and reviewed. The tone is a general one, which, while allowing flexibility and adaptation to individual circumstances, also could lead to uncertainty. For instance, "decisions...need to be reviewed regularly in the light of changes in the patient's condition." (para.8). No further guidance is given as to what "regularly" might mean. Another significant omission is a definition of what is meant by "unlikely to be

13 E.J. Aarons and N.J. Beeching, "Survey of 'do not resuscitate' orders in a district general hospital" (1991) 303 *British Journal of Medicine 1504.*

14 *Ibid.*

15 Florin, *op cit.*

16 See letter from the Chief Medical Officer (PL/CMO(91) 22) and subsequent statement issued jointly by the Royal College of Nursing and British Medical Association in March 1993.

successful" in paragraph One's recommendation that consideration of DNR might be appropriate "where the patient's condition indicates that effective CPR is unlikely to be successful." As we will see, the potential scope for subjective interpretation of "success" or its converse "futility" is a topic in itself.

The two most important areas covered by the Guidelines are clinical responsibility and patient involvement in decision-making. Regarding the former, the Guidelines reiterate a point previously made by the Chief Medical Officer: that the overall responsibility for DNR policy and specific decisions rests with the consultant. Though it is appropriate that there be an identifiable point of ultimate responsibility, it is worth noting that in the time of ascendance of multi-disciplinary teams, the automatic assumption of leadership by the medical profession is at least open to question.[18] While the Guidelines highlight the need for good communication within the medical team, it must be noted that our research revealed a level of concern among nurses regarding involvement in DNR decision-making. Nurses may often have a direct insight into the patient's beliefs, wishes and values, giving them a strong case to put when DNR status is under discussion.[19] This may be particularly important in view of the fact that in not calling for the crash team, it is often the nurse who implements the DNR order. Specific comment on the inadequacy of the Guidelines for their specialism was made in our survey by Accident and Emergency staff, who often must deal with patients who arrive with a very uncertain prognosis and with no available medical history or evidence of previously stated wishes. The uncertainty and conflicting views which may emerge cannot be resolved by recourse to the Guidelines.

Although it is referred to in five of the eleven paragraphs of the Guidelines, the legally crucial issue of patient consultation is dealt with in a piecemeal and inconclusive fashion. Para. 1c countenances a DNR order "where successful CPR is likely to be followed by a length and quality of life which would not be acceptable to the patient". The related question of how the quality of life which would be acceptable to the patient is to be determined is not directly addressed at this point. The patient is mentioned elsewhere in the Guidelines, incidentally, as one of the parties who might be consulted in deliberations about

18 In reference to the malpractice system, it has been observed: "While doctors have argued that they should lead clinical teams as a matter of course, this is often inappropriate and the very suggestion of having a single leader is contestable." J. Montgomery, "Medicine Accountability and Professionalism" (1989) 16 *Journal of Law and Society* 319, at 333.

19 P. Marchett et al, "Nurses' perceptions of the support of patient autonomy in do-not-resuscitate (DNR) decisions" (1993) 30 *International Journal of Nursing Studies* 37. "see also A Jones *et al*, "Nurses' knowledge of the resuscitation status of patients and action in the event of cardiorespiratory arrest" (1993).

CPR. This may not be rigorous enough because when a patient is competent, a procedure such as CPR undertaken without consent could be battery. The argument can be made that as an emergency procedure CPR could be exempted from the need for consent.[20] However in many cases the need for CPR is not unanticipated and therefore the concept of emergency is inaccurate. It has been observed, "Presumed consent to CPR was medicine's licence to intervene at will."[21]

Even more complicated questions arise about the relevance of consent to a DNR order, in effect, an omission to treat. In this area there is, for both legal and moral reasons, a crucial distinction to be made between competent and non-competent patients. In the BMA/RCN Guidelines this difference is sometimes ignored or blurred. Paragraph 9 deals with reasons for making a DNR decision: "If the reason is absence of any likely medical benefit, discussion with the patient, or others close to the patient, should aim at securing an understanding and acceptance of the clinical decision that has been reached." This seems reasonable, however it does not indicate clearly how to decide whether such discussions are appropriate, and with whom they should take place. Neither does it specify what is meant by "absence of any likely medical benefit", though this is not surprising in view of the subsequent discussion about futility.[22] Paragraph 9 goes on: "If a DNR decision is based on quality of life considerations, the views of the patient where these can be ascertained are particularly important." If the patient is competent to consent to or refuse treatment, then his or her view on quality of life should be conclusive. This is clearly recognised in its own DNR guidelines by a hospital in London. They state: "...it is the patient's perception of quality of life that is important (not that of the doctor, nurse or family member)". In the American version of DNR guidelines: "Resuscitative efforts should be considered futile if they cannot be expected either to restore cardiac or respiratory function to the patient or to achieve the expressed goals of the informed patient", and further: "...judgements of futility are appropriate only if the patient is the one to determine what is or is not of benefit, in keeping with his or her personal values and priorities".[23]

20 G.R. Scofield, "Is Consent Useful When Resuscitation Isn't?" (1991) *Hastings Centre Report 28.*

21 *Ibid.*

22 L. Doyal and D. Wilsher, "Withholding cardiopulmonary resuscitation: proposals for formal guidelines" (1993) 306 *British Medical Journal 1593. A London hospital's own guidelines describe a probability of living to leave hospital of 1-2%.*

23 Council on Ethical and Judicial Affairs, American Medical Association. *"Guidelines for the Appropriate Use of Do-Not-Resuscitate Orders" (1991) 265 Journal of the American Medical Association 1868.*

III. THE LEGAL FRAMEWORK

DNR orders are no different from all other treatment decisions whether at the end of life or otherwise in that they are subject to the common law and as such must reflect current legal standards of care, in particular those set by the law of negligence. The legal framework within which health professionals must operate and within which DNR orders must be made consists of several well established principles[24] that have long been recognised by the common law and which are now enshrined, albeit broadly, in the BMA Guidelines.

In summary these principles are as follows. Except in a few typical circumstances[25] every mentally competent adult has the absolute legal right to choose whether to accept or reject medical treatment[26] notwithstanding the consequences of his or her decision. This means that a patient can reject treatment for reasons which are rational or irrational or for no reason at all, even if refusal could be followed by permanent injury or premature death.[27] Failure to comply with a competent patient's wishes constitutes an assault which may result in a criminal prosecution although in reality a tort action is much more likely - commonly one based on negligence, i.e. that the patient has consented but that the consent was flawed because certain crucial information, such as that concerning risks or side-effects, was not adequately disclosed. In some circumstances, notably when no consent whatsoever has been obtained, an action for trespass to the person is the more appropriate legal action.

In the context of DNR decision-making this means that competent patients have the right to refuse resuscitation irrespective of the consequences. It also indicates, of course, that such patients should not be resuscitated unless they have given consent. However such consent is only legally valid or "real" if certain criteria are fulfilled. Briefly these are that the consent must be effectively obtained, it must be voluntary,[28] and it must be based on appropriate information.

24 Accurately described by C. Newdick,*Who Should We Treat?,* (Clarendon Press, Oxford, 1995) at p.288 as 'generous' given that the law allows doctors to make choices on the basis of considerations which are not strictly clinical.

25 For example, under the doctrine of necessity and legislation, notably The Mental Health Act 1983.

26 The term 'medical treatment' is used here in its widest sense and covers all forms of treatment including surgical, medical or dental as well as examination, investigation and diagnostic procedures. It also includes para-medical treatments by physiotherapists, chiropractors, hydrotherapists and so on.

27 A patient's absolute right to reject treatment was confirmed by the House of Lords in *Airedale NHS Trust* v. *Bland* [1993] 2 W.L.R. 316. See now also, *Re MB (An Adult: Medical Treatment)* [1997] 2 F.C.R. 541.

28 This aspect of consent was the central issue in *Re T* [1992] 3 W.L.R. 783 in which the Court of Appeal held that the refusal by a 20 year old woman who was thirty four weeks pregnant to a life-saving blood transfusion was invalid because 'her will had been overborne' by the undue pressure and influence exerted by her mother who was a fervent Jehovah's Witness.

One of the most litigated and controversial aspects of consent centres on the latter issue. Sometimes, albeit misleadingly, known as the, doctrine of "informed consent",[29] the law requires health professionals to disclose the basic nature and effect of the procedures in question, in other words such information as is "obviously necessary to make an informed choice", *per* Lord Bridge in *Sidaway* v. *Governors of Royal Bethlem Hospital.*[30] But much quoted as it is, the *Sidaway* case provides very little clear guidance about what information must actually be disclosed in individual cases other than that the decision about diclosure remains largely, if not entirely, within the discretion of the medical profession. The so-called *Bolam* test, derived from the case of *Bolam* v. *Friern Hospital Management Committee* [31] which states that a doctor is not negligent if "he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art", thus appears to apply to disclosure (as well as diagnosis and treatment).[32] Few would disagree, however, that substantial (sometimes also referred to as "inherent" or "material") risks and likewise "grave adverse consequences" must be revealed.[33] Less clear is the extent of the duty to answer specific questions although again the issue appears to be regulated by the *Bolam* test.[34]

The law presumes that an adult patient has capacity to consent, i.e. is competent, unless there is some good reason to doubt it, for example, because of temporary incapacity caused by factors such as confusion, shock, severe fatigue, pain or drugs. The presumption is rebuttable, but not automatically so, just because a patient suffers from a mental disorder.[35] Notwithstanding the obvious importance of a precise test of capacity it has long remained elusive, which explains why the broad test used in the Mental Health Act 1983 is so often cited. This states that capacity should be determined by whether the

29 It is misleading because even in those countries in which it has been adopted such as Canada and more recently Australia (see for example *Rogers* v. *Whitaker* [1992] 1 Med. L.R. 463), its precise meaning remains unclear. Furthermore English courts have consistently rejected attempts, most notably by Lord Scarman in *Sidaway* v. *Royal Bethlem Hospital Governors* [1985] A.C. 871, to incorporate it into English law.

30 *Ibid.*, at 900.

31 [1957] 2 All E.R. 11.

32 Note recent evidence, in particular *Smith* v. *Tunbridge Wells HA* [1994] 5 Med L.R. 334, that the courts might adopt a more critical, interventionist approach and thereby impose their own standards of disclosure on the medical profession (which some commentators increasingly now refer to as the 'new Bolam' test).

33 This is subject however to the defence of 'therapeutic privilege' which allows the withholding of information which might harm the patient, i.e. damage his or her health.

34 In *Blyth* v. *Bloomsbury HA* [1993] 4 Med. L.R. 151, in which this issue was a central one, the Court of Appeal uncritically applied the *Bolam* test in deciding both if and how specific questions should be answered.

35 See The Law Commission, Consultation Paper No. 129; *Mentally Incapacitated Adults and Decision-Making: Medical Treatment and Research* (HMSO 1993), para. 11, where it is also noted that whether or not a person has capacity is not a question of the degree of his intelligence or education.

patient is able to understand the nature, purpose and likely effects of the treatment.[36] Competence is a complex concept: it can be described as a legal categorisation which is both medically informed and has medical consequences.[37] In practice, assessments of competence (or capacity) are routinely made in the community and hospital settings by doctors and these judgements will have implications for medical decision-making, including resuscitation. It is, therefore, important that doctors inform themselves of the legal requirements of this function-specific concept.

In *Re C (Adult: Refusal of Treatment)*[38] a rather more detailed test of capacity in medical decision-making was applied which introduced a three stage approach. An adult has the capacity to consent to (or refuse) treatment if he or she can:

> (a) understand in simple language what the medical treatment is, its purpose and nature and why it is being proposed;
> (b) believe that information; and
> (c) weigh that information in the balance to arrive at a choice.

Despite introducing some welcome consistency into the law, the definition of competence used in *Re C* is not unproblematic, not least because it fails to clarify the concept of "understanding" and thus leaves open the question as to whether the patient must simply be deemed to have the capacity to understand or must actually understand the information provided.[39] Some guidance on the concept of understanding is provided in the Code of Practice issued under the Mental Health Act 1983[40] and by the British Medical Association[41] which states that to demonstrate capacity individuals should be able to understand in simple language what the medical treatment is, its purpose and nature and why it is being proposed; understand its principal benefits, risks and alternatives; understand in broad terms what will be the consequences of not receiving the proposed treatment; retain the information for long enough to make an effective decision; and make a free choice (that is, free from pressure).

36 S.57(2)(a) and s.58(3)(b).

37 In *Richmond* v. *Richmond* (1914) 111 L.T. 273 *per* Neville J. "It is obvious that an idea obtained that this was a question for the doctors to decide. In my opinion this is not so; it is for the court to decide, although the court must have the evidence of experts in the medical profession who can indicate the meaning of symptoms..."

38 *Re C (Adult:Refusal of Treatment)* [1994] 1 All E.R. 819.

39 The former is the preferred view in English law (contrast Canadian law) as the alternative test, namely that competence depends on the patient's actual understanding, would impose too onerous (and arguably an impossible) burden on the medical profession to ensure that information had in fact been understood.

40 *Code of Practice* (2nd edn.) 1993 Mental Health Act Commission.

41 *Assessment of Mental Capacity: Guidance for Doctors and Lawyers* (1995) BMA, 66.

The concept of understanding is also central to the definition of capacity in the Law Commission's 1995 Report[42] which in its draft Bill states that a person is without capacity if "at the material time he is unable by reason of mental disability to make a decision for himself on the matter in question, or is unable to communicate his decision on that matter because he is unconscious or for any other reason".[43] The Bill further states that a person is unable to make a decision by reason of mental disability if the disability is such that at the time when the decision needs to be made "he is unable to understand or retain the information relevant to the decision, including information about the reasonably foreseeable consequences of deciding one way or another or failing to make the decision". Finally it is worth noting, despite a misconception which is both popular and professional, that the only person who can consent to treatment of an adult patient is the patient himself or herself. No other individual, next of kin or otherwise, can give legally valid consent on behalf of an adult, even when that person lacks capacity. Any consent from a competent patient which fails to comply with the above criteria is thus invalid. Consequently a competent patient who has consented to resuscitation but claims that his or her consent was flawed could pursue a civil claim for negligence. And if no consent at all was obtained, then a claim in battery for trespass to the person could be pursued.

But what if a patient lacks the capacity to consent? In one American hospital a study found that, at the time DNR decisions were made, 76% of such patients were mentally incompetent to participate in decision-making.[44] This could be reduced by seeing that the issue is considered earlier in the patient's treatment; however incapacity will often be the condition of the patient in question. In cases of temporary incapacity treatment can and should be postponed until consent can be obtained. However if medical intervention is necessary to save the patient's life or health, emergency medical treatment can be given without consent.[45] Any emergency treatment would have to be limited to that which is required by the exigencies of the situation and would thus normally include CPR. Similarly if the incapacity is permanent, non-consensual emergency treatment can also be given. But to be lawful such non-

42 Law Commission Report No. 231; *Mental Incapacity*, (HMSO 1995).

43 *Ibid.*, Clause 2 (1).

44 S.Bedell *et al*, "Do-Not-Resuscitate Orders for Critically Ill Patients in Hospital" (1986) 256 *Journal of the American Medical Association* 233.

45 Non-consensual CPR could thus be performed on an unconscious patient (subject to any valid advance directive).

consensual treatment must be in the patient's "best interests"[46] and must not conflict with the known wishes of the patient.[47] Such treatment can range from the routine to life-saving interventions and so would clearly include resuscitation procedures. Whatever procedures are carried out, however, they must comply with the *Bolam* test. Resuscitation of an incompetent patient is therefore only lawful if such treatment complies with a responsible body of medical opinion, i.e. is in accordance with accepted practice. In practice compliance with the *Bolam* standard is likely to absolve health professionals from any legal liability. Nevertheless it is not inconceivable that in future the courts would be prepared to scrutinise clinical decision-making and review it when appropriate.[48] In the context of DNR orders this means that a DNR order in respect of an incompetent patient could be challenged in court even though denying treatment procedure was in accordance with an accepted practice.[49]

Although only rarely likely to arise in the context of DNR decision-making[50] it is clear that any attempt by a patient (competent or otherwise) to force a health authority to provide resuscitation is almost certainly going to fail. Only rarely have aggrieved patients used the courts to question how health authorities allocate resources and none have been successful.[51] The central issue in all such cases turns on the provisions of the National Health Service Act 1977[52] and the extent to which the Act imposes an absolute duty to provide services irrespective of economic decisions taken by the relevant health authority as to how it should allocate scarce resources. In one recent case, *R.* v. *Cambridge DHA, ex parte B* [53] the Court of Appeal made it clear that it would not compel a health authority to make available scarce resources unless it could be shown that it acted unreasonably.[54] However despite the courts' reluctance to

46 Defined by the House of Lords in *Re F (Mental Patient: Sterilisation)* [1990] 2 A.C. 1 as that which is directed towards saving the patient's life, health and well being. As such it includes not only surgical or substantial medical treatment, but also more 'humdrum' matters such as routine medical and dental treatment. Note further that the legality of treatment in this context is sometimes justified under the doctrine of necessity.

47 Expressed, for example, by a legally valid 'advance directive'.

48 See *Bolitho* v. *City & Hackney HA* [1997] 4 All E.R.771 in which despite reservations Lord Browne-Wilkinson acknowledged the role of the Courts in reviewing standards, which would enable them to reject unreasonable clinical practice.

49 *Re R (Adult: Medical Treatment)* [1996] 2 F.L.R. 99.

50 Such a claim would in essence be that a DNR order is against the patient's 'best interests'.

51 See for example, *R* v. *Secretary of State for Social Services and others, ex parte Hincks* [1980] 1 B.L.M.R. 93; *R* v. *Central Birmingham HA, ex parte Walker* [1987] 3 B.M.L.R. 32; *R* v. *Central Birmingham HA, ex parte Collier* (1988) LEXIS 6 January; although cf. *R* v. *Cambridgeshire AHA, ex parte B* at first instance.

52 S.3(1).

53 [1995] 2 All E.R. 129 (CA).

54 The concept of 'unreasonable' is defined according to the 'Wednesbury' principle, see *Associated Provincial Picture Houses* v. *Wednesbury Corporation* [1947] 2 All E.R. 680.

supervise how health authorities determine priorities - the effect of which is to give patients no direct enforceable right to services under the National Health Service Act 1977 - it is possible for the court to exercise a supervisory role by laying down general guidelines as to when and how certain treatment decisions should be made.[55] In the absence of such guidelines the *Bolam* test will be used to determine treatment decisions, such as DNR orders, subject nevertheless to the court's overriding power to scrutinise the "reasonableness" of clinical decisions.[56]

The final aspect of DNR orders which must be considered here concerns the legality of withholding treatment. In other words when is a decision not to treat a patient lawful? This applies regardless of a patient's capacity since it is well-established that the courts will not compel health professionals or a health authority (or NHS Trust) to provide treatment which in the *bona fide* clinical judgement of those concerned is contraindicated as not being in the best interests of the patient.[57] Withholding treatment was one of the central issues in *Airedale NHS Trust* v. *Bland* [58] in which the House of Lords held that there was no absolute legal obligation to prolong life. The case concerned a 21-year-old patient who suffered oxygen starvation after being crushed in the Hillsborough football stadium disaster in 1989. For over three years he had been in a persistent vegetative state but he was able to breath and his heart beat unaided. With constant care he could be kept in his current state for years but there was no prospect of him ever regaining any degree of consciousness. The hospital sought and obtained a declaration that it would be lawful to discontinue artificial feeding, hydration and other medical treatment so that the patient could "end his life and die peacefully with the greatest dignity and the least pain and distress". The importance of the House of Lords' judgment in this case cannot be exaggerated since it establishes beyond doubt that health professionals do not have to preserve life at all costs. This means that in certain circumstances it is lawful to let a person die by withholding resuscitation procedures.[59]

55 See, for example, *Airedale NHS Trust* v. *Bland* [1993] 2 W.L.R. 316 in which the House of Lords approved the British Medical Association Guidelines on the Treatment of Patients in Persistent Vegetative State. These were later incorporated into Practice Note [1996] 2 F.L.R. 375.

56 *Supra,* notes 32 and 48.

57 See *Re J* [1992] 9 B.M.L.R. 10.

58 [1993] 2 W.L.R. 316.

59 See *Re C* [1989] 2 All E.R. 782 and *Re J* [1990] 3 All E.R. 930 (commonly referred to as the baby cases) in which the Court of Appeal also held that there was no absolute legal right to life nor any legal obligation to prolong life.

But what are those circumstances? With little guidance from the courts other than in relation to patients in a persistent vegetative state[60] and the so-called "baby cases" only very broad guidelines have been provided as to when treatment can lawfully be withheld or withdrawn.[61] These are:

1. The duty owed by health professionals to their patients (irrespective of their capacity) requires them to act in accordance with accepted medical practice.[62] In the context of treatment decisions at the end of life, this essentially means assessing the patient's "quality of life",[63] i.e. assessing the medical benefits, risks, and adverse effects of treatment, and the pain and suffering the patient would endure, if treatment were provided (and if it were not).[64]
2. A court can never sanction positive steps to terminate life.
3. Treatment can be withheld (and/or withdrawn) if the patient is dying or will die irrespective of any treatment given, in other words treatment has no therapeutic purpose and death is inevitable.[65]
4. Whilst the patient is not terminally ill, or even near death, the risks of treatment outweigh its benefits bearing in mind the prognosis, the nature and extent of the patient's disabilities, pain and suffering and quality of life (before and after treatment).[66] In such cases death can reasonably be seen as beneficial or at the very least as an improvement for the patient.

These guidelines provide little or no indication of the specific criteria for DNR orders. Nor has case law on the withdrawal of treatment in PVS patients

60 See Practice Note [1996] 2. F.L.R. 375.

61 DNR orders concern withholding treatment; however withdrawing treatment (as in the *Bland case*) raises identical legal issues.

62 As determined by the *'Bolam' test, supra* n.31.

63 How this concept is defined will be explored below.

64 See I. Kennedy and A. Grubb, *Medical Law* (2nd edn. 1994) 1228 who note (albeit in the context of the 'best interests' test for incompetent patients) that when a doctor arrives at the conclusion that it is not in the patient's 'best interests' to continue treatment any longer, his legal licence to treat no longer exists and arguably his legal duty is then to cease treatment.

65 In such cases treatment is said to be 'futile', but see below as to how futility should be judged and by whom.

66 Such treatment is *also* sometimes referred to as 'futile'.

subsequent to the *Bland* case been very helpful,[67] although more recent guidelines to help doctors decide whether patients who seem to be in a vegetative state are beyond recovery have been issued by the Royal College of Physicians.[68]

On what basis, therefore, should DNR orders be made when a patient, although not in PVS has such a poor quality of life that resuscitation is not in his or her best interests or for whom further treatment is thought futile? To date there has only been one case in which a hospital's DNR policy has been challenged in the courts. *Re R (adult: medical treatment)*[69] concerned a 23 year old severely brain-damaged man in respect of whom a DNR Order had been made. He suffered from cerebral palsy and severe epilepsy and was described as "living on the level of a new-born infant". He reacted to pain and distress and smiled when cuddled but it was doubtful whether he could see or hear and there were no signs of his being knowingly aware of his environment. In deciding that the doctors did not have to resuscitate the patient (who weighed only five stone) Sir Stephen Brown agreed that he would only suffer further injury if the violent resuscitation were to be carried out and it would be in his best interests to be allowed to die.

Undoubtedly the decision in *Re R* was a comforting one for the medical profession in that it appeared to leave it firmly in control of DNR decision-making. Given the very limited analysis of the guidelines, which were only very briefly referred to, it also appeared to confirm their legality. Regrettably, however, far from clarifying the law, the latter remains as uncertain as before; in particular, the case (which gave an ideal opportunity for medical practice to be scrutinised by the courts) failed to provide any guidance on how such central concepts as "futility" and "quality of life" should be defined.

IV. FUTILITY/QUALITY OF LIFE

There is a pervasive assumption in the burgeoning literature on DNR orders that consent is not required when treatment is considered medically "futile". This exception[70] to the principle of respect for patient autonomy applies irrespective of capacity and has several important consequences in practice. First, it means that patients (whether competent or otherwise) are almost always

67 See, for example, *Frenchay NHS Trust* v. *S* [1994] 2 All E.R. 403.

68 See (1996) 30 *Journal of the Royal College of Physicians* 119.

69 [1996] 2 F.L.R. 99. See Ian Kennedy's commentary in [1997] 5 Med.L.Rev.104.

70 The other exception to the principle of consent noted in the literature is when there is clinical evidence that a discussion of non-treatment could endanger the patient's health

excluded from the decision-making process because health professionals consider that unilateral decisions by them are then justified. The basis for this widely held view rests on two grounds. One is that patients have no legal right to demand treatment which would accomplish nothing and which is, in the *bona fide* clinical judgement of the doctors concerned, contraindicated as not being in the best interests of the patient. The other related ground is that as a result such patients have no legal right to know that they are being considered for non-treatment.

Whilst there is some case law support for these two grounds,[71] the consequences in relation to assessments of "futility" may well give cause for concern, the implication being that the law's role is limited to rubber stamping clinical judgement because the former concept's identification and diagnosis lies exclusively within the medical profession's province and expertise. In other words only doctors know what "futility" means and when it exists. What this means in practice, therefore, is that decisions to withhold CPR are "lawful" but beyond legal scrutiny. But it is at least arguable that the courts have not relinquished their role in regulating medical practice even if they are rarely, if ever, likely to question, let alone reject so-called "clinical" decisions. This is because, even supposing that "futility" can be defined in rigid clinical terms based on objective scientific criteria (which is questionable, see below), it is, like all other medical treatment, subject to the *Bolam* test. As such, it is suggested, it can be challenged by the courts. This means that a doctor may be found liable for failing to provide "futile" care despite complying with "accepted medical practice". In short the courts can reject medical practice as unreasonable. Moreover if the concept of futility is defined subjectively to take into account patients' expressed goals then not only is clinical practice even more open to judicial challenge but in addition the issue of patient consent or, at the very least patient consultation, resumes its legal significance.

The starting point, however, for any discussion on futility is to define it. Given that this concept is central to DNR policy and hence its legality it is perhaps surprising that it has to date escaped detailed legal analysis, especially since the *Bland* case so poignantly thrust the issue into the public domain. On the other hand it has been argued that the absence of any universally agreed definition is both unexceptional and necessary.[72] The literature reveals several

71 See *Re J (A Minor)* [1992] 4 All E.R. 614 (C.A.) where the Court of Appeal held that, notwithstanding a foster mother's wishes that treatment should be provided, it would not compel doctors to provide prolonged life-support to a profoundly handicapped infant with a very short life expectancy. See also *R.* v. *Cambridge DHA, ex parte B* [1995] 2 All E.R. 129.

72 As is claimed by T. Tomlinson and D. Czlonka in "Futility and Hospital Policy" (1995) *Hastings Center Report* 31.

different definitional approaches.[73] Broadly these can be divided into the quantitative and the qualitative.[74] A quantitative standard measures futility according to the likelihood of CPR succeeding. Thus resuscitation is futile if it carries a very low probability of survival. This approach is one which is apparently based on objective clinical criteria and strongly linked to, if not wholly determined by, narrow biomedical goals. Examples of this approach abound. So treatment is futile when it would provide "no demonstrable benefit", i.e. resuscitation would almost certainly not be successful or would be ineffective,[75] or when there is clear evidence that resuscitation presents an unacceptably high probability of death or severe brain damage if the procedure is successful.[76]

Defining futility quantitatively presupposes some common definition of "success" but this concept too is problematic for several reasons. First, there is little consensus as to what constitutes success. Hence for some doctors treatment is futile only if the possibility of success approaches 0%,[77] whilst for others the success can be as high as 13% and yet still be considered futile. Nor is success conveniently always measured in percentage terms, as, for example when it is suggested that resuscitation should only be attempted in patients "who have a very high chance of successful revival for a comfortable and contented existence".[78] Secondly defining futility quantitatively not only implies, falsely, that success can be (and is) commonly measured accurately, reliably and consistently, but also that it can be identified with certainty.[79] In other words it "creates the illusion of specificity where none is possible".[80] As such the quantitative definition of futility does not have "the ring of clarity" nor the "air of finality"[81] which is so typically claimed on its behalf. The third objection to

73 A useful introduction to the notion of futile therapy can be found in D. Lamb, *Therapy Abatement, Autonomy and Futility: Ethical Decisions at the Edge of Life* (Avebury, 1995) chapter V.

74 G. Landi, "No to DNR Orders in acute stroke." (1996) 347 *The Lancet* 848. See also N.S. Jecker and L.J. Schneiderman, "Stopping futile medical treatment: Ethical issues" in D.C. Thomasma and T. Kushner (eds), *Birth to Death: Science and Bioethics.* Cambridge University Press, 1996.

75 T. Tomlinson and H. Brody, "Ethics and Communication in Do-Not-Resuscitate-Orders" (1988) 318 *New England Journal of Medicine* 43.

76 L. Doyal and D. Wilsher, "Withholding cardiopulmonary resuscitation; proposals for formal guidelines" (1993) 306 *British Medical Journal* 1593.

77 *Ibid.*

78 See P.J.F. Basket, "The Ethics of Resuscitation: A Statement by the Chairman of the European Resuscitation Council" (1994) in T.R. Evans (ed.) *The ABC of Resuscitaion* (1995, 3rd ed.) 55. The Guidelines also consider a DNR decision appropriate when CPR is 'unlikely to be successful'.

79 Especially, as T.E. Miller notes in "Do-Not-Resuscitate Orders: Public Policy and Patient Autonomy" (1989) 17 *Law, Medicine and Health Care* 245 at 251, 'that except for patients at the end-stage of certain illnesses such as cancer, decisions about CPR are a question of probabilities that call for a judgement about whether the risks outweigh the potential benefit'

80 *Supra* n. 72.

81 J. Saunders, "Medical Futility: CPR" in D. Morgan and R. Lee (eds.) *Death Rites: Law and Ethics at the End of Life* (Routledge, 1994) at 85.

defining futility in terms of success is that it excludes non-biomedical goals, i.e. goals that a particular patient may have expressed. To avoid these difficulties, the qualitative approach (which is incorporated in national guidelines in the United States) judges futility relative to the patient's values and recognises that "futility" is not a neutral value-free concept but one that implicitly incorporates non-medical subjective criteria, in particular a patient's *"quality of life"* (both before and after CPR and whether assessed according to the patient's perception or the doctors).

But defining futility qualitatively[82] also fails to provide a workable futility policy, largely because it too remains an elusive concept despite being the central issue in several cases.[83] In these it tends to be linked with the equally imprecise "best interests" test[84] and so is said to be measurable only if a "balancing" exercise is carried out which takes into account the patient's pain and suffering (both if life is prolonged and in the course of proposed treatment), his or her prognosis, medical benefits, risks and adverse effects of treatment and life expectancy. Nor did the *Bland* case - which arguably marked the point when the House of Lords abandoned its commitment to the traditional principle of the sanctity of human life and recognised that life cannot be beneficial irrespective of its quality - clarify how the concept should be assessed let alone defined.[85] In that case several Law Lords accepted unequivocally that treatment can be withheld or withdrawn if it "confers no medical benefit"[86] or "has no therapeutic purpose of any kind, as where it is futile because the patient is unconscious and there is no prospect of any improvement in his condition".[87] This was expressed most forcibly by Lord Mustill who concluded that to withdraw life support was not only legally, but also ethically justified, "since the continued treatment of Anthony Bland can no longer serve to maintain that combination of manifold characteristics which we call a personality".[88]

82 For example, see Tomlinson and Brody, *supra,* n.75; Saunders, *ibid.;* the Guidelines; A.J. Bennet, "When is Medical Treatment Futile?" (1993) *9 Issues in Law & Medicine,* 35; "Council Report: Guidelines for the Appropriate Use of DNR Orders" (1991) 265 *Journal of the American Medical Association* 1868.

83 In particular *Re J (a minor) (wardship: medical treatment)* [1990] 3 All E.R. 930; *Re B (a minor) (wardship: medical treatment)* [1981] 1 W.L.R. 1421; *Re C (a minor) (wardship: medical treatment)* [1989] 2 All E.R. 782; *Airedale NHS Trust* v. *Bland* [1993] 2 W.L.R. 316.

84 As noted in I. Kennedy and A. Grubb, *op. cit.* at 1241.

85 P. Singer, *Rethinking Life and Death* (Oxford University Press, 1995) at 65. See also J.M. Finnis's commentary on *Bland* in (1993) 19 L.Q.R. 29.

86 [1993] 2 W.L.R. 316, at 362 *per* Lord Keith.

87 *ibid.,* at 372 *per* Lord Goff.

88 *ibid.,* at 400.

From the case law quality of life thus emerges as a very broad concept consisting of several "qualities" the relative importance of which remain unspecified. This is perhaps inevitable in that any quality of life judgement makes assumptions about the "proper goals" of medicine which have yet to be publicly ratified and also relies on "dangerous generalisations".[89] However, notwithstanding the uncertainty of the qualitative approach to futility, it is at least arguable that the views of competent patients, (whilst not necessarily determinative), should nevertheless be sought unless there are very cogent reasons not to do so.[90] To argue otherwise is to suggest that, whilst competent patients have the well-established and long recognised legal right to be adequately informed about proposed treatments, risks and so on, they do not have a corresponding right to be informed that no treatment is proposed. This is not only illogical, but probably unlawful and almost certainly contrary to "good" practice.[91]

V. SURVEY RESULTS

The objective of the questionnaire was to reveal doctors and nurses practices, perceptions and views of DNR decision making and to reveal the extent to which these were informed by the Guidelines. The particular focus was involvement of patients in this process.

An anonymous and confidential questionnaire was sent to 320 doctors and nurses in three Oxfordshire hospitals with a covering letter explaining the objectives of the survey. Wards were chosen with specialisms likely to involve DNR decisions: acute general medical, geriatric medicine, and cardiology. The questionnaire was divided into four sections. Part 1 gathered information about the respondents' profiles. Part 2 concerned knowledge of the DNR Guidelines. Part 3 investigated the relative importance of factors considered relevant in determining a patient's DNR status and the extent to which they should be (and were) involved in those decisions. It also explored experiences with DNR orders. Part 4 looked at how DNR decisions were recorded and reviewed.

108 questionnaires were returned, representing a return rate of 33%. The few responses which did not report a level of personal experience of DNR decision-making were deleted. Overall the survey confirmed that a significant

89 See *supra*, n.72, at 32.

90 On the grounds of 'therapeutic privilege' perhaps.

91 As acknowledged by L. Doyal and D. Wilsher in "Withholding and withdrawing life sustaining treatment from elderly people; towards formal guidelines" (1994) 308 *British Medical Journal* 1689.

number of health professionals were unaware of formal resuscitation policies. The Guidelines had been adopted some eighteen months previously in all three hospitals, however only 25% responded that their hospitals had such a policy, the remainder answered in the negative or were uncertain. It is not, of course, necessary for there to be widespread knowledge of the Guidelines for them to be influential. A minority of key staff could inculcate consistent practice without the majority ever being conscious of the underlying authority. In fact, notwithstanding this lack of awareness, practice in the hospitals appeared to be consistent with Paragraph 1 in so far as the lack of likely success of treatment, the patient's quality of life, and the patient's wishes were the most frequently cited reasons for making a DNR order.

In ranking the relevance of factors determining DNR status a significant majority, approximately 83%, identified the patient's wishes as one of the three most important. Even higher (99%) was the proportion who recognised that, in the event of a disagreement between patients and their relatives, the patients' wishes should prevail (irrespective of the likely outcome of CPR). Despite acknowledging the importance of patients' wishes, these were not in practice always accorded the priority the law requires, nor it seems were rigorous efforts always made to ascertain the patients' wishes. This was indicated by the relatively low percentage - only 28% of respondents - who felt that a patient's competence should make "a lot" of difference to a DNR decision, whereas 45% thought it should make "some" difference.

Particular aspects of the questionnaire worth noting are:

1. *Who makes the order?* The Guidelines specify the consultant as the person with the ultimate responsibility for making the DNR decision. The questionnaire, in an attempt to estimate knowledge/impact of the Guidelines, asked who should have this responsibility. Only 30% of respondents answered correctly that it was only the consultant; either indicating again low knowledge/impact of the Guidelines, or possibly that their own views of the preferred position differed from the Guidelines. Another possibility is that the answers reflected existing practice in the hospital. In the London study referred to above,[92] 72% of initial DNR decisions had been made by junior staff. If this trend exists in the hospitals surveyed (the question was not specifically asked) then perhaps staff are not aware of consultant review and responsibility.

2. *Reasons for making DNR orders:* As noted above, 83% of respondents identified the patient's wishes as one of the three most important factors, though

[92] *Supra*, note 22.

whether these are often ascertained in practice is called into doubt by findings below. An identical percentage also identified "likely success of CPR" as one of the three even though, other than a very brief explanation that "success" in this context related to the "patient's medical condition and prognosis", no guidance was given in the questionnaire as to how this concept was to be measured. Nevertheless, given that 72% also identified the patient's quality of life (deliberately not defined in the questionnaire) as one of the three key factors, it seems likely that in determining DNR status a high percentage of respondents acted in accord with the Guidelines (perhaps coincidentally). It will be recalled that Paragraph 1 states that it is appropriate to consider a DNR order: (a) when resuscitation is unlikely to be successful; (b) when CPR is not in accordance with a competent patient's recorded and sustained wishes; and (c) where CPR is likely to be followed by a length and quality of life which would not be acceptable to the patient. Interestingly, however, only a significantly lower percentage, 53% of respondents, mentioned all three "Guideline factors" as the most important, indicating that it may not be the Guideline requirements as such which are being invoked.

3. *Patient involvement in decision-making*: Several questions in Part 3 of the questionnaire focused on patient involvement. In almost all of these the patient's wishes were recognised (at least in theory) as very significant and always more important than relatives' views. Thus 88% of respondents identified the patient as a person who should be involved in making DNR decisions and 85% noted that if a patient's DNR status was inconsistent with his or her wishes some further action was necessary - usually discussion with the medical team and (less frequently) the patient himself or herself. The theoretical nature of these responses is indicated by the fact that only a small number of subjects (6%) reported that in their experience patients are "always" involved in discussion about CPR. The vast majority (82%) perceived that such discussions took place "sometimes", with 12% venturing "never": "We rarely consult the patient directly"; "Patients are rarely consulted".

Whilst it is undoubtedly true that it is not appropriate to discuss CPR with all patients, only a very small number of respondents, (9%) considered such discussion to be "always appropriate": "some consultants frown on the practice of consulting the patient, which I disagree with"; "If his condition allows, I would always want to see a patient involved..." Several reasons were given by the much larger percentage (80%), however, who thought that it was not always appropriate to do so. Of these, by far the largest number (20%) focused on the patient's mental state, mentioning possible distress, anxiety or a detrimental effect on the physical prognosis which could result: "It [discussion] is

appropriate if the patient is alert and oriented"; "It is appropriate where it will not frighten the patient...it would be appropriate where the patient is in a fit state to deal with this kind of decision, although knowing when he is so would be a subjective issue."

But it seems that many respondents (50%) felt that discussion with patients could be made easier. Given the focus in the Guidelines on involving patients - five of its eleven paragraphs refer (albeit some more explicitly than others) to consulting them - the suggestions for improvement, while not new, should be noted. A typical comment was: "Needs to be done more openly and more often *but* with appropriate training - doctors in particular can be very blunt and 'clumsy' in their approach to this subject - need better communication and counselling skills which will make staff more confident and sensitive..."

4. *Professional consultation and cooperation:* A high degree of importance was accorded to this issue by the Guidelines (it is referred to in Paras. 3, 5, 6, 7, and 10) and it is gratifying that it also emerged as a priority in the survey. Nurses as well as doctors were noted in the majority of the questionnaires as parties who should be involved in DNR decision-making. Only 6% did not name the patient similarly. More specifically, aspects of professional consultation were the second most frequently cited ways in which it was thought that DNR decision-making might be improved. Comments written on some 20% of the questionnaires reflected a feeling that nurses' views were either not sought or, alternatively, not given sufficient weight in the making of DNR decisions. Unclear recording of such decisions was an inconvenience and concern to nurses, as was lack of sufficient speed in making and infrequent review of decisions. "DNR policy should be made available to all qualified nursing staff and such decisions should always involve nurses, not only doctors and their patients"; "More discussion with nurses, i.e. the named nurse who has played a large part in the care of the patient... [Need to] increase the attention paid to nurses' views on this matter."

VI. CONCLUSION

A summary of the findings of this research project might fittingly begin with one comment from a questionnaire: "Medical staff often behave as if they have the overall right of say even above the patient... Do they have enough ethical training to assume this right?... Patients often [are] unaware that such a decision exists". The Guidelines were badly needed but are limited in their effect for two main reasons. First, their content is lacking. They are not well organised into discrete issues - instead aspects such as patient involvement and

the place of relatives appear variously in a number of different paragraphs. Their lack of specificity, (for instance over procedure or definitions) which can have some justification, must make them either difficult to apply in practice or leave so much space for medical discretion that they are, if not redundant, at least unchallengeable. There are areas, such as patient consultation, in which it is possible that actions taken in accordance with the Guidelines may be of doubtful legality. The second reason is more fundamental. Our findings lead us to question whether it is possible to have any significant effect on an area of medical practice such as DNR decision-making. Doyal has observed: "The production of formal guidelines will not in itself lead to changes in clinical behaviour. This will happen only when the guidelines are understood and accepted by those who would use them."[93] It is the understanding and acceptance which is the problem. It may be that the medical professional ethos combined with the working conditions and practices in hospitals are not conducive to formal or pseudo-legal control. Whether or not this is even desirable is another question. Approaching the issue from the other side may be more effective. Raising of patient awareness - that such decisions are being made and of the patient's legal position in respect of them - could slowly create a patient demand for involvement. This would mean overcoming the huge hurdles of the taboo against considering and discussing death and of pervasive deference to the medical profession. It may not be until the doctor/patient relationship begins to evolve into one of "collaborative autonomy"[94] that the process of DNR decision-making will change.

93 L. Doyal and D. Wilsher *op. cit.*, at 1596.

94 H. Teff, *Reasonable Care: Legal Perspectives on the Doctor/Patient Relationship* (Clarendon Press, 1994). Here a model of the doctor/patient relationship is hypothesised in which the valid therapeutic concerns of the medical profession and the patient's needs for self-determination are mediated by dialogue and understanding.

COMPETITION, COMPETITIVENESS AND RE-REGULATING THE LABOUR MARKET: THE WORKING TIME DIRECTIVE

*Graham Moffat**

INTRODUCTION

ON 12 NOVEMBER 1996 THE COURT OF JUSTICE of the European Communities rejected, with one minor reservation, the application from the UK to annul Council Directive (93/104/EC) "Concerning *certain* [emphasis added] aspects of the organisation of working time" (the Working Time Directive).[1] The Court concluded, *inter alia*, that Article 118a of the EC Treaty constituted the appropriate legal basis for the measure, in the process rejecting the UK submission that the concept of "working environment" in 118a should be restricted to a concern only with physical conditions and risks at the workplace. In the view of the Court there was therefore no reason to exclude matters such as weekly working time, rest periods and paid annual leave from the material scope of the Directive.

The conclusion that the matters covered by the Working Time Directive fall within the rubric of health and safety should not be allowed to obscure the fact that there is a policy dimension to the evolution and final adoption of the Directive that goes beyond considerations of health and safety, however broadly defined. That policy dimension potentially touches on a number of highly contentious questions concerning variously notions of competitiveness and cost of employment protection, of subsidiarity, of the scope of legal competence of the Commission, and more specifically of the roles to be attributed to the social partners both in formulating and in implementing regulation at Community level.

The robust response of the then UK government to the judgment cannot therefore be dismissed as having been just lively rhetoric for domestic political consumption or even as a bad case of sour legal grapes.[2] On the contrary the response reflected a continuing perception that regulation such as that in the Working Time Directive will have deleterious consequences for labour flexibility and labour costs and the overall competitiveness of European economies. To that extent the Directive has attracted an almost symbolic status in contemporary debate about the evolution of a social dimension to the Single European Market (SEM).

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1 Case C-84/94, *United Kingdom* v. *Council of the European Union* [1997] I.R.L.R.30. The UK was successful in its application only to the extent that the court agreed that Sunday should not be specified as part of the minimum rest period under Article 5. See B. Fitzpatrick, 'Straining the Definition of Health and Safety?' (1997) 26 I.L.J. 115 for a review of the ECJ judgment.

2 See *e.g. Financial Times,* 13 November 1996, p.10.

Yet it would be a mistake to interpret the evolution of initiatives on working time solely in the context of the dynamic of the SEM. Historically attempts to reduce working time and thereby counter unemployment have accompanied all the major economic crises of this century.[3] Similarly at European Community level, the antecedents of the Working Time Directive, as with several other measures contained within the 1989 Social Action Programme (SAP), can be traced back much further.[4] Indeed in the core element of attempting to restrict working hours it was the subject of controversy even prior to the signing of the Treaty of Rome.

Notwithstanding shifts in the underlying socio-economic rationale, it is possible to detect a strong thread of historical continuity in attempts to secure some degree of European level regulation over the organisation of working time. Indeed it can be argued that achieving that regulatory objective in some form itself acquired a symbolic dimension for some Member States and ultimately perhaps within the Commission itself. This article therefore seeks first to integrate an outline of these historical dimensions with contemporary analyses of the Working Time Directive, and then to explore some of the implications of the Directive for legal and social regulation of working time, and labour markets more generally, in the Member States.

A BRIEF HISTORY OF WORKING TIME INITIATIVES

From the Treaty of Rome to the Second Social Action Programme

The limited scope accorded in the Treaty of Rome to social provisions in general is well known.[5] Yet as Holloway has pointed out, in a sense it is remarkable that there should be any reference to social policy at all.[6] The phrase 'common market' aptly conveys the sense at least of the initial objective of the progenitors of the Treaty of Rome. Economic union was the aim and therefore the only rationale for regulation of the social domain would be to counter factors which might lead to distortion of competition - what in

3 See V. Di Martino, 'Megatrends in Working Time' (1995) 5 *Journal of European Social Policy* 235.

4 See *e.g.* on the background to the draft European Works Council Directive, M. Hall, 'Behind the European Works Councils Directives: The European Commission's Legislative Strategy' (1992) 30 B.J.I.R. 547 at pp. 554-6.

5 The Title of the Treaty devoted to social policy contains only 12 of the 248 articles of the Treaty (Articles 117-128), although it may be argued that Articles 48-51 (free movement of workers) should be incorporated within the scope of a social policy dimension.

6 J. Holloway, *Social Policy Harmonisation in the European Community* (Gower, 1981), Ch. 3.

contemporary parlance we would term 'guaranteeing a level playing field'.[7] It was from this standpoint that controversy over working hours and overtime first arose.

The French government of the day, simultaneously directly reflecting the economic interests of French employers yet also indirectly seeking to protect the level of formal social protection afforded to French workers, favoured, in today's language, a pro-regulatory stance. It argued that some elements of labour costs exemplified the type of artificial distortions of competition referred to above and should be removed by adopting a policy of harmonisation towards them.[8]

In particular it sought to have the policy of harmonisation adopted with regard to hours of work, equal pay between men and women and the financing of social security. But this stance was supported neither by the other negotiating states nor, significantly, by the report of the International Labour Organisation's (ILO) Committee of Experts commissioned by the prospective Member States of the European Economic Community.[9] The broad conclusion drawn by the majority authors of the Report, closely reflecting a neo-classical analysis of the consequences of international trade and of the international division of labour, was that, with the notable exception of equal pay, harmonisation was not necessary for the creation of a common market.[10] Thus as regards working hours, the Report concluded that "there is...no economic case for harmonisation in this field".[11]

7 In practice the EC Treaty contains two types of measure for pursuing the single market objective. One type seeks to ensure free movement by prohibiting Member States from operating tariff and non-tariff measures which place restrictions on the free movement of goods and services between Member States. A second type seeks to prevent distortion of competition in ways other than through restrictions on free movement.

8 See Holloway *op cit.* n 6, at p. 41 (citing J.J. Dupeyroux *Securite Sociale* (1971)), and C. Hoskyns, *Integrating Gender* (Verso, 1996).

9 Social Aspects of European Economic Co-operation. Report by a Group of Experts, New Series No 46 (Geneva I.L.O., 1956) summarised in (1956) 74 *International Labour Review* 99. P.L. Davies provides an accessible and concise summary of the analysis and conclusions of the Report in 'The Emergence of European Labour Law' in W. McCarthy (ed.), *Legal Intervention in Industrial Relations: Gains and Losses* (Blackwell, 1992) at pp. 318-325.

10 The exception for equal pay is explained in the Experts' report on the basis that "[c]ountries in which there are large wage differentials by sex will pay relatively low wages in industries employing a large proportion of female labour and these industries will enjoy what might be considered a special advantage over their competitors abroad where differentials according to sex are smaller or non-existent" (*ibid.* n. 9, para. 162). The apparent purity of the economic rationale is slightly misleading in that it was premised upon prior acceptance of the principle of equal pay for equal work as set out in the draft European Social Charter (Article 2) drawn up by the Council of Europe.

11 (1956) 74 *International Labour Review* 99 at p.110 citing paras. 74 and 178 of the Report. In fact a Protocol to the Treaty of Rome enabled the Commission to authorise France to adopt protective trade measures if other Member States had not approximated their working weeks and aspects of overtime pay to the then (1956) prevailing French standards. The provision was never invoked.

It is scarcely surprising therefore that during the first 'phase' of Community social policy - very broadly 1958-1972[12] no initiatives with regard to working time were undertaken. Towards the end of that period, however, the minimalist approach to social policy initiatives which had characterised the first decade of the Community began to come under pressure. An emerging sense of disenchantment provided one source of pressure. As Michael Shanks, then Director-General for Social affairs in the Commission, put it: "The Community had to be seen to be more than a device to enable capitalists to exploit the Common Market; otherwise it might not be possible to persuade the peoples of the Community to continue to accept the disciplines of the market".[13] Whatever the reasons for the shift in policy and opinion may be - and the economic, the political and the social are interwoven in complex fashion here[14] - in October 1972 the Member States accepted the proposition that economic and social policy should be placed on an equal footing and invited the Commission in concert with other Community institutions to draw up a social action programme. The outcome was the First Social Action Programme, endorsed by the Council of Ministers in January 1974.[15]

It was against this background that during the following decade the Commission sought to make progress with several initiatives relating to working time. Two initiatives were undertaken in the 1970s, which to some degree paved the way for a more significant measure, a draft recommendation proposed by the Commission in 1983. The first of the initiatives in effect resurrected in formal terms the original French concern over working hours. The Council in 1975 adopted the Commission proposal for a Recommendation to Member States on the application of the principle of a 40-hour week and four weeks' annual paid holiday.[16] It should be noted that whereas the subject matter of concern remained the same, the context in which the proposal was presented had changed. The emphasis had shifted from a predominant concern about distortions of competition to the context referred to above wherein, at least formally in the first Social Action Programme, the realisation of the social aims of European Union could be accorded comparable weight.

12 See M. Gold in M. Gold (ed.), *The Social Dimension* (Macmillan Press, 1993) p. 39 at fn. 4 on the categorisation of EC social policy into different historical phases.

13 M. Shanks, 'The Social Policy of the European Communities' (1977) 14 C.M.L.R 373 at p.378.

14 See M. Shanks, *ibid.;* M. Shanks, *European Social Policy Today and Tomorrow* (Pergamon, 1977) and M. Gold, *op cit.* n. 12.

15 Council Resolution concerning a Social Action Programme O.J. 1974 C 13/1, 12.2.74.

16 Although not reaching the stage of being a formal proposal, the idea of proposing a directive on this topic was mooted within the Commission at the time.

Yet almost at the very moment of the adoption of the Social Action Programme, the economic context within which issues of working time were being addressed was to change. The inflationary OPEC oil supply shocks of the mid and late 1970's had a sharp impact. There occurred rapid rises both in unemployment - most industrial countries experiencing by far their highest post-1945 unemployment rates - and in its duration for many of those out of work. There was also a perception that these trends would be exacerbated by the gradual introduction of new technologies. The consequence was that within many Member States and within the European institutions themselves, attention turned to the possibility of introducing structured changes to patterns of working-time and of encouraging work-sharing as one item on the menu of alternatives for tackling the unemployment problem.[17]

The issue of the aims and effects of work-sharing was addressed at two Tripartite conferences held on 27 June 1977 and 9 November 1978.[18] The latter conference, which was mainly concerned with discussion of the redistribution of available work, closed without any definite decisions being made.[19] Nevertheless, in May 1979, following a prior communication from the Commission, the Council instructed the Commission to prepare proposals for establishing a Community framework regarding, *inter alia,* annual duration of work, overtime and shiftwork.[20] Following discussions with unions and employers' organisations and further work in the Standing Committee on employment, the Commission submitted a draft resolution on the adaptation of working time to the Council. The Resolution was adopted on 18 December 1979.[21] In effect it gave the Commission the green light to continue its efforts to formulate a Community approach with an emphasis on "overall coherence and fostering consensus" (para. B2).

For present purposes two points need to be emphasised about this second initiative of the Commission. First, the content of the Resolution indicates that development of policy about adaptation of working time was clearly to take

17 The enthusiasm in Europe for worksharing as an alternative to mass unemployment was particularly prominent within trade union organisations by the end of the 1970s. See *e.g.* S.G. Jones, 'The Worksharing Debate in Western Europe' [1985] *National Westminster Bank Quarterly Review,* February, 30.

18 The conferences were designed to promote consultation between the Council, the trade unions (ETUC) and the employers' organisations (UNICE) in co-operation with the Commission.

19 It is understood that the ETUC threatened to reconsider its participation in any future meetings unless greater impetus could be given to the conference's activities. In fact, consistent with the priority attached to the social dimension during the 1980s, no further conferences were held between 1978 and the adoption of the Social Action Programme in 1989.

20 See EC Bull. 3-1978, 3-1979 and 5-1979.

21 O.J. 1980 C2/1, 5.1.80.

place within a framework emphasising labour market considerations, and which was to incorporate recognition of the role and incidence of atypical forms of working, of flexible retirement and of training. Second, as may be inferred from the various references in the preamble to matters of social protection but also to labour costs, consensus particularly on the economic consequences of adaptation of working time was a scarce commodity. Whereas support for a policy of work-sharing and a reduction in working time reflected an institutional labour movement view, a widespread scepticism existed among representatives of employers and within the governments of several Member States as to the weight to be attached to such a policy and perhaps even as to its viability.[22]

In the event Commission efforts to formulate a common position between representatives of employers and workers at Community level, as envisaged by the Resolution, proved unsuccessful. Therefore in 1982, in the light of continuing concern within the Community to counter rising levels of unemployment and to restore economic growth,[23] the Commission reiterated its conviction to the Council that a positive approach to working time as an instrument of economic policy was essential.[24] The outcome of the usual Community institutional policy process that ensued was that on 23 September 1983 the Commission submitted a draft recommendation to the Council on "the reduction and reorganisation of working time".[25] The subtle shift in wording specifically to emphasise both reduction and reorganisation is significant. As the Commission made clear the initiative was seen as very much part and parcel of a broader strategy to facilitate a more flexible and intensive use of production facilities while simultaneously seeking to reduce unemployment levels.[26] Thus whilst the draft Recommendation refers, for instance, to the lengthening of production times and the avoidance of increases in production costs, it also emphasises that "the recognised need for flexibility...is no justification for systematic overtime" (Article B 14). In short the labour

22 See generally R.A. Hart, *Working Time and Employment* (Allen & Unwin, 1987) and P. Blyton, 'Working Time Reduction and the European Work-Sharing Debate' in A. Gladstone (ed.), *Current Issues in Labour Relations* (I.L.O., 1989). Compare in particular European Trade Union Institute (E.T.U.I.) *Reduction of Working Hours in Western Europe, Part I: The Present Situation* (1979) and *Part II: Analysis of the Social and Economic Consequences* (1980) *Working Time: Economic and Employment Implications* (1982).

23 See *e.g.* Council Resolution of 13 July 1982 on Community action to combat unemployment O.J.1982 C186/1, 21.7.82.

24 European Commission Memorandum on the reduction and reorganisation of working time, COM(82)809 final.

25 COM(83)943 final,O.J.1983 C290/4, 26.10.1983. In light of contemporary attitudes it is noteworthy that the Commission's approach was endorsed by the European Parliament which specifically rejected a recommendation from its Social Affairs and Employment Committee that a binding Community Directive be adopted as the appropriate measure. (see EC Bull. 4-1983, paras. 1.1.1 - 1.1.21.

26 The Commission Memorandum is quite explicit on this point of strategy: "Under-utilized manpower and capital resources could be put to more economically productive purposes by combining reorganization with reduction in working hours, with both economically and socially beneficial results" (para. 11).

market objective was to create a European working-time model under which plant operating hours and working time would become decoupled.

Notwithstanding its espousal of a flexible approach, the draft Recommendation was vetoed, against Commission expectations, by the UK at the Labour and Social Affairs Council meeting on 7 June 1984.[27] The draft Recommendation was but one of several measures opposed by the UK Government during the early 1980's, others being companion proposals brought forward by the Commission to enact minimum protections for temporary and part-time workers.[28] There were aspects of these measures that ran contrary both to the UK perspective on how flexibility in the operation of labour markets should be achieved and to its policy towards the role of collectivism in shaping standards. Moreover there was a clear view that these were all matters more appropriate for national regulation as opposed to 'European busybodying'.[29]

The Social Charter and the Second Social Action Programme

The appropriateness of Community involvement in the regulation of working time re-emerged as a legal and political issue with the adoption by the Member States (except the UK) in December 1989 of a Community Charter of the Fundamental Social Rights of Workers ('the Social Charter') and the accompanying Social Action Programme (SAP).[30] There was one particularly significant modification from previous initiatives on working time: a directive rather than a "soft law" instrument such as a recommendation was to become the preferred legislative option.

The change in legal instrument did not at first glance involve any modification of policy. Emphasis continued to be placed on the part that "the adaptation, flexibility and organization of working time" could play in achieving competitiveness and stimulating employment growth.[31] More

27 See EC Bull. 6-1984, para. 2.1.42, and P. Teague, 'European Community Labour Market Harmonisation' (1989) 9 *Journal of Public Policy* 1. Warning bells should have been rung by the hostile response of employer representatives in ECOSOC to the measure and by the failure of the Commission to obtain "an agreed basis for discussion" between the social partners prior to the 1982 Memorandum; see EC Bull. 11-1983, para. 2.4.25. The draft Recommendation was explicitly approved by the other nine delegations.

28 See proposals (i) for a draft Directive on temporary work (O.J. 1982 C128/2) which had the objective of securing rights for temporary workers equivalent to those of full-time workers, and (ii) for a draft Directive on voluntary part-time work (O.J. 1983 C62) intended to eliminate discrimination between part-time and full-time workers and to promote wider opportunities for part-time employment.

29 Department of Employment Press Notice, 15 November 1984.

30 Communication from the Commission concerning its Action Programme COM (89) 568 final, 29 November 1989.

31 *Ibid.* at pp. 18-19.

specifically reference to the adaptation of working time in the SAP appeared only in the context of a section concerned with the "improvement of living and working conditions" (Section 3). By way of contrast a separate section (section 10) of the SAP was devoted exclusively to health and safety and prescribed an extensive programme of legislative measures, yet lacked any reference to working time.[32]

A hint of a possible adjustment in policy could, however, be detected in the explanatory commentary in the SAP regarding changes towards more flexible working arrangements. There a linkage, if a somewhat tenuous one, was established between Sections 3 and 10 by incorporating the specific statement that "care should be taken to ensure that these practices do not have an adverse effect on the well-being and health of workers". Moreover the proposal about what was to be the subject of regulation adopted a narrow compass: it was proposed simply to set certain minimum requirements at Community level as regards "the maximum duration of work, rest periods, holidays, night work, week-end work and systematic overtime". It was from this less than substantial platform that the Commission resolved to adopt Article 118a of the EC Treaty as the legal base for the proposal.

The contentious matter of the appropriate legal base came not only to shape the terms in which the proposal on adaptation of working time was formulated - hence the significance of the reference in the SAP proposal to the well-being and health of workers - but also much of the subsequent debate, culminating in the legal challenge by the UK government to the legal base of the Directive.

The extent to which concepts such as "working environment" in Article 118a might potentially be exploited by Member States or by a committed or opportunist Commission so as to venture into issues concerning general rights and interests of workers had long been a cause of concern to the UK government.[33] It had pointedly opposed the application of qualified majority voting to Article 118a during negotiations in 1986 on the Single European Act.[34] Indeed, subsequently in 1989, R. F. Eberlie, then Director of the Brussels office

32 It should be noted, however, that neither was any mention made in Section 10 of the proposed Directive on the protection of pregnant women at work. This measure too was subsequently introduced and adopted under Article 118a (see Directive 92/85/EEC, OJ 1992 L348, 28.11.92).

33 The availability of the alternative legal base of Article 100a and its associated qualified majority voting provisions was generally believed to be circumscribed by the proviso in Article 100a(2) that they "shall not apply...to those [provisions]...relating to the rights and interests of employed persons". Cf. the argument of Vogel-Polsky that the proviso should be narrowly interpreted 'What Future is there for a Social Europe following the Strasbourg Summit?' (1990) 19 I.L.J. 65 at pp. 70-73.

34 See comment in Department of Trade and Industry, *Review of the Implementation and Enforcement of EC Law in the UK* (H.M.S.O.,1993) at p. 88. It would, however, have been perverse in the extreme to allow concern over QMV for Article 118a to put at risk the passage of a statute, the Single European Act, which tallied so closely with a UK commitment to a deregulated framework for business.

CBI, suggested that most Member States underestimated the implications and potential of the Commission's proposals "quite simply because provision for safety and health has not been prominent on national agendas".[35]

It is important, however, not to ignore two significant constraints associated with the use of Article 118a. First, any attempt on the part of the Commission to employ excessive sophistry in delineating the boundaries of what constitutes "health and safety" under Article 118a would have constituted a considerable gamble. It would have run the risk politically of alienating a majority of Member States, thereby imperilling any prospect of legislative progress. In addition there was the legal danger of the Directive eventually falling at the judicial hurdle should the ECJ look to Member States to identify some existing consensual legislative basis as to where the outer boundaries of the concept of "health and safety" should lie.

The second constraint has a specific textual origin. The exhortation in Article 118a that "Member States shall pay particular attention to encouraging improvements, especially in the working environment, as regards the health and safety of workers..." needs to be interpreted in the light of the following qualification in paragraph 2: "...the Council shall adopt...minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States". The reference to "minimum requirements" indicates that Article 118a is not a vehicle for upward harmonisation. On the contrary it can be interpreted as allowing the Community to specify a standard below those applicable in some Member States.[36] In short, Article 118a provided scope for an innovative approach to the interpretation of health and safety, albeit subject to limitations of an uncertain ambit on the level of protection acceptable as a Community standard. Both these considerations were to play a part in shaping the Directive in its final form.

It is important to emphasise here, in the light of the subsequent debate and litigation, that the Commission adopted a cautious not to say confining approach. A full-blown measure to address all the elements inherent in analyses of the organisation of working time and the operation of labour markets would have had a more ambitious agenda. Compared, for instance, with the 1983 stalled draft Recommendation, the absence of any reference to such matters as protection of the low-paid, training and retraining of workers and even sharing of parental responsibilities is striking.

35 'The New Health and Safety Legislation of the European Community' (1990) 19 I.L.J. 81 at p. 90.

36 The notion of "minimum" needs does not imply that a lowest common denominator approach be adopted. It is to be interpreted in the light of the language of Article 118A(3) which specifically refers to "encouraging...and maintaining the improvements made". Barnard suggests that this sub-section was introduced at the behest of Denmark in an attempt to avoid downward harmonisation and to enable Member States to maintain or introduce more stringent conditions (*EC Employment Law (Wiley, 1995) at p. 254).*

It is nevertheless still difficult to escape the conclusion that the motivations for legislating on working time went beyond a commitment to protect the health and safety of workers. Aside from previously mentioned concerns about unemployment, competitiveness and unfair competitive advantage one can also point to a more abstract consideration about humanisation of work and quality of life.[37] However, motivation is one thing, specific legal purpose is another. The simple point is that whatever the breadth and depth of motivations may be, they are arguably irrelevant to interpretation of the legal instrument if on the face of that instrument its contents are consistent with and in furtherance of a valid legislative purpose. It is on the basis of that proposition that the Commission appeared to proceed.

THE WORKING TIME DIRECTIVE

From Social Action Programme to Draft Directive

Whereas there is little doubt that Article 118a presented an opportunity to make progress, those in Directorate-General (DG) V concerned with formulating the detail of the proposal were nevertheless operating to a strict guide-line: every element of the proposal had to be capable of being defended within the terms of Article 118a.[38] Thus there did not appear to any attempt to use the Article as a Trojan Horse in quite the overt fashion feared, for instance, by the UK Government and the Health and Safety Executive. Instead, by being cautious in the choice of measures to be included in the proposal,[39] the Commission was attempting to achieve a subtle shift in the ground of debate from one of general legal competence - can the regulation of working time ever be a health and safety issue? - to one of specific social fact - does, for instance, night work or shift work have the potential to be intrinsically harmful? The caution also had a political dimension in that nothing in the measures proposed would have seemed exceptional to most Member States and was therefore unlikely to excite opposition on that ground.[40]

37 If, as can be argued, concern with Community level regulation of working time has been a continuing focus of French interests, then the possible influence of writers such as Gorz should not be overlooked. See for instance *Paths To Paradise* (Pluto Press,1985 tr. by M. Imrie) in particular Section III "Automation and the politics of time" at pp. 101-110.

38 This point was strongly emphasised in interviews with Commission officials.

39 See e.g. the ambiguous wording on paid holidays in the first draft of the Directive which reflected concern within DG V as to the advisability of including this within a health and safety directive. It is noteworthy that this was one issue on which no prior consultation with the social partners took place.

40 Suspicion as to the motives of the Commission was aroused by what was widely perceived to be inadequate consultation on the detail of the proposal prior to its adoption by the Commission. This view was strongly expressed in interviews with representatives of UK employer organisations (G. Moffat), *The Regulation of Working Time: A European Odyssey, Warwick Papers in Industrial Relations 1997 (forthcoming)).* See also the evidence of the CBI to the House of Lords Select Committee on the European Communities, 4th Report Session 1990-91, Working Time, HL Paper 12, (H.M.S.O.1990, at p. 40).

If the standards proposed can be characterised as reflecting legal and political sensitivities, the cautionary approach was most exemplified by the absence of any proposal regarding maximum weekly working hours. The formal explanation for this departure from previous Commission initiatives on working time rested, at least publicly, on a rather strained not to say confused, interpretation of the reference in Article 118a to the adoption of "minimum requirements". The notion seemed to be that a "minimum requirement" was incompatible with setting a "maximum hours" limit.[41] However confusing it may be linguistically, there is no necessary conceptual contradiction between, on the one hand, the terms of Article 118a permitting only a minimum level of protection and, on the other hand, establishing a maximum hours limit as that minimum level. Of course opinion may differ both as to what constitutes the maximum hours limit as a minimum standard spills over into upward harmonisation.

At all events, on a literalist if improbable interpretation of the Directive as drafted, there would have been no specific legislative constraint against a worker being required to work a 78 hour week.[42] Indeed it was this omission of any maximum working hours limit that attracted comment from majority opinion in ECOSOC,[43] and criticism and extensive amending proposals from the European Parliament.

The general tenor of the Parliament's proposed amendments, however, went a good deal further in the direction of regulation than was either acceptable to the Commission or likely to prove politically attainable in Council. Therefore, whereas the Commission felt able to incorporate in a revised text[44] amendments regarding, for instance, daily rest periods (12 hours rather than 11), annual paid holidays (a minimum of four weeks) and compulsory participation and consultation rights,[45] no concession was made on the maximum working hours issue nor on the Parliament's demand that "workers be in principle entitled to a free weekend".[46]

41 See for example the comments of Commissioner Papandreou to the European Parliament: "The legal basis carries with it certain limitations... We can deal only with matters relating to minimum periods of rest, and not to the maximum number of hours worked..." (Debates of the European Parliament, No. 3-401/38, 18.2.91).

42 Workers were to be required to have only one rest day per week and a minimum of 11 hours rest per day, leaving them free to work 13 hours per day for six days.

43 See ECOSOC opinion, O.J 1991 C60/26, 8.3.91.

44 COM(91)130 final, O.J 1991 C124, 14.5.91

45 Arguably this merely made explicit what was implicitly required by virtue of Article 11 of the Framework Directive (89/391/EEC) concerning consultation and participation of workers.

46 In both instances the argument that there existed no connection between health and safety and the proposed amendments was proffered as a reason for rejection. See Debates of the European Parliament No. 3 401/38, 18.2.91.

Negotiating a Common Position

The negotiations on the revised proposal, from date of submission by the Commission to final adoption by the Council, were to occupy some two and one half years.[47] It would be incorrect to attribute the apparent tardiness of the process solely to the difficulty of securing agreement on the detail of the proposal. The occurrence within this period of the inter-governmental conference at Maastricht in December 1991 and subsequent processes of ratification of the Treaty of European Union (TEU) in various Member States meant that negotiations took place in a difficult political environment.

Whether the eventual outcome in terms of the material scope of the Directive as opposed to the speed of the process was affected by negotiation and ratification of the TEU remains a matter for conjecture.[48] What is clear is that in the context of a process involving qualified majority voting, the UK managed to sustain an enviable negotiating position, that of saying "no" in principle whilst obtaining significant concessions during the negotiations.[49] As a consequence there are important differences between the 1991 draft of the Directive and the common position achieved under the Danish Presidency on 30 June 1993, differences which are relevant to understanding the social policy and regulatory implications of the Working Time Directive as finally adopted in November 1993.

Some of the changes involved clarification of matters such as the definitions of night worker and of working time itself (Article 2) and of the scope for rest breaks (Article 4).[50] Other changes from the previous draft introduced specific amendments to the detail of otherwise agreed matters. Thus the minimum daily rest period reverted from 12 hours to the 11 hours proposed in the first draft (Article 3), and Article 5 decreed that the weekly rest period "shall in principle include Sunday", the latter simultaneously retaining flexibility and satisfying a demand, particularly of Germany.[51]

47 The revised proposal was submitted to the Council on 23 April 1991 and finally adopted on 23 November 1993 (Council Directive 93/104/EC, O.J. 1993 L307, 13.12.93).

48 See generally G. Moffat, *op. cit.*, n. 40.

49 This is the very stance that the DTI Report, *op. cit.*, n. 34, suggested was likely to lead to the marginalisation of the UK in negotiations. See *e.g.* p.30 of the Report where it is noted that "[u]nder QMV [EC Commission officials] concentrate their attentions on meeting the difficulties of those who support the proposal in principle. If they can secure this without the doubters, they will".

50 Article 4, for instance, provides that where the working day exceeds six hours every worker is entitled to a rest break, whereas previously Article 11 was less specific in imposing an obligation on employers "to take account, according to the type of activity, of health and safety requirements, especially as regards breaks during working hours".

51 The mandatory tone of this statement, now annulled by the judgment of the ECJ, needed to be read in the light of the Preamble which states that "it is ultimately for each Member State to decide whether Sunday should be included in the weekly rest period, and if so to what extent".

As adopted the Directive also contained two additional and potentially significant initiatives. Article 6 introduced the concept of the 48 hour maximum working week, whilst Article 13, revising and strengthening the previous Article 11, has been interpreted as incorporating the principle of "humanisation of work".[52] Indeed Bercusson has suggested that Article 13, with its prescription that where work is organised to a certain pattern it "takes account of the general principle of adapting work to the worker" is potentially revolutionary in its implications for the well-being of workers.[53] Whether Article 13 can carry that weight is very much a matter of interpretation. To the common law mind the language can seem largely aspirational, an interpretation lent plausibility by the omission of any derogation from the principle as elaborated in Article 13, and by the apparent absence of controversy over its incorporation in the Directive.[54] On the other hand, as Barnard has pointed out, the principle of humanisation of work is "entirely consistent with the broader duty imposed on employers by some continental systems".[55]

In a different vein altogether, the maximum working week obligation in Article 6 is more specific both as to its own scope and to that of the permitted derogation in Article 17 from the application of the relevant reference period over which the permitted maximum weekly hours are to be calculated (Article 16(2)). However, the specificity of the obligation can be wholly avoided by virtue of a general derogation under Article 18(1)(b). The latter, the so-called "opt out" included at the behest of the UK, provides that Member States need not apply Article 6 at all for a seven year period commencing with the end of the implementation period i.e. 23 November 1996. The derogation is subject to the proviso that Member States must still respect the general principles of the protection of the safety and health of workers and, more specifically, "take the necessary measures to ensure that" no employer requires a worker to work more than the 48 hour maximum without the worker's prior consent.[56] The option of

52 See B. Bercusson, *Working Time in Britain: Towards a European Model: Part I The European Directive* (Institute of Employment Rights,1994) at pp. 8-9 and n. 41 therein.

53 See B. Bercusson, *European Labour Law* (Butterworths,1996) where he argues that the organisation of working time "is no longer the exclusive managerial prerogative of the employer, but is a process of mutual accommodation, subject ultimately to adjudication" (at p. 332).

54 The DTI has commented that "the expression of the article appears to be so unclear as to make sensible interpretation almost impossible" (Consultation Document (H.M.S.O.,1996) at para. 10.3).

55 *Op. cit.* at n. 36, at p. 310 citing Article 1087 of the Italian Civil Code. But see G. Majone, 'The European Community Between Social Policy and Social Regulation' (1993) 31 *Journal of Common Market Studies* 2, 153 who argues that the comparable language in Article 6(2)(d) of the Health and Safety Framework Directive "goes beyond the regulatory philosophy and practice even of advanced Member States like Germany" (at pp. 166/7).

56 It appears that it is the agreement of the individual worker only that must be obtained, not that of the representative. An amendment proposed by the Parliament to include representatives in the agreement procedure was not accepted by the Commission; see O.J. 1993 C315/129, 22.11.93.

taking the derogation route is possibly rendered less attractive by a raft of bureaucratic requirements specified in Article 18(1)(b) that must accompany its exercise.

The derogation in article 18(1)(b) is just one of the derogations and exemptions that were introduced as a result of the negotiations. Because much of the controversy about the potential impact of the Directive on labour costs and employment centres around the scope of the derogations, a brief outline of them is necessary here. The derogations fall broadly into four categories, or five if one includes the Article 18 opt-out provision just described.

The first, the exemption category, excludes certain activities from the scope of the Directive altogether. It does not apply to air, rail, road,[57] sea, inland waterway and lake transport, sea fishing, other work at sea and the activities of doctors in training.[58] There then follow three categories of derogations, all elaborated in Article 17 in ascending order of generality. The first enables Member States to derogate from all the specific obligations imposed by the Directive, save for the annual holiday with pay entitlement, for workers for whom "the duration of the working time is not measured and/or predetermined or can be determined by the workers themselves" (Article 17(1)).[59] The second category, although more restricted in its material scope in that it does not allow derogation from the maximum working week,[60] covers a wide and diverse range of work, whose principal though not exclusive element is that the work involves continuity of production or service (Article 17 (2)(1)).[61] One point to note here is that as the breadth of the activities covered by the availability of the derogation increases so do the means of implementing it. Thus the derogation can be adopted by a Member State by means of collective agreements as well as by statutory or administrative means.

The final category of permitted derogations again applies to Articles 3, 4, 5, 8 and 16 (daily and weekly rest periods, night work and reference period limits) but here with no occupational restriction. However, the derogation can

57 Prior to the passage of the Working Time Directive, the European Community had already introduced Regulations (Regulations (EEC) No 3820/85 (O.J 1985 L370) and No 3821/85 (O.J 1985 L370/8)) limiting the working hours of drivers of large passenger vehicles and most goods vehicles over 3.5 tonnes.

58 The last-named two activities were late additions to the list of exemptions, primarily it is believed at the behest of the UK.

59 Examples cited in the Directive, and which point in the direction of a narrow category, are managing executives, family workers and religious workers.

60 Article 17(4) does allow a Member State, by means of a derogation from Article 16(2), to adopt a reference period of "not exceeding six months" rather than the otherwise applicable maximum of four months over which the average maximum working week can be calculated.

61 An exhaustive list of such work is given in Article 17(2).

be implemented only by collective agreement and even then subject to the provision of equivalent compensating rest periods or other appropriate protection, if the former is not objectively possible (Article 17(3)).

Last, although not strictly speaking a further derogation, it should not be overlooked that Member States can allow, "for objective or technical reasons or reasons concerning the organisation of work", reference periods of up to 12 months to be adopted for the application of the maximum working week, but, again, only by collective agreement (Article 17(4)).

With the exception of one contentious and, in the writer's view, potentially significant disagreement the Common Position text agreed on 1 June 1993 passed relatively straightforwardly through Second Reading to adoption by the Council of Ministers in November 1993. The exception concerned the wording of the non-regression clause. During the Second Reading procedures in the European Parliament, the rapporteur for the Social Affairs Committee expressed a clear concern, widely reflected in the debate, that the non-regression clause as drafted would be ineffective to prevent Member States from using the Directive as an excuse to reduce existing levels of protection.[62] The compromise wording finally adopted in Article 18(3) affirms that the implementation of the Directive "shall not constitute valid grounds for reducing the general level of protection..." but subject to the following proviso: "Without prejudice to the right of Member States to develop, *in the light of changing circumstances* [emphasis added], different legislative, regulatory or contractual provisions in the field of working time...". It is difficult to see in this wording anything other than the most formalistic recognition of non-regression. The opening clause, with its reference to "in the light of changing circumstances", seems to provide a mere fig-leaf of protection against the decision of any Member State to reduce its level of protection in the field of working time regulation towards the standard adopted in the Directive should it choose to do so.[63]

Whether the Directive as finally adopted in Council in November 1993 with its incorporation of the apparently broad sweep of derogations and exemptions, all allied to an ambiguous non-regression clause, represented a weakening or a strengthening of the Directive from its original form is open to debate.[64] It would, however, be a mistake to assess the significance of the

62 See, for instance the views of MEPs Reding and Van Velzen (Debates of the European Parliament, No. 3 -437/34 and 36 respectively, 25.10.93).

63 It is understood that Spain in particular, supported by the UK, firmly resisted the adoption of a more strongly-worded mandatory non-regression clause.

64 F. Von Prondzynski, (1994) 23 I.L.J. 95 suggests that the large number of derogations render most of the provisions "of doubtful value"; see also S. Milne in *The Guardian*, 1 June 1993, and D. Goodhart in the *Financial Times*, 22 November 1993. Bercusson, op. cit., n. 52 and 53, adopts a more positive perspective. See Moffat, *op. cit.*, n. 48 for a review of the contrasting interpretations.

Directive solely in terms of the substantive standards of protection specified in it. Bercusson, for instance, sees the Directive as potentially providing in the contexts of both standard-setting and implementation a major stimulus to collective bargaining.[65] However, whilst it is correct to state that the Directive can in many respects be implemented through agreement between the social partners, the relevant provisions are essentially facilitative. The Member State retains a discretion to opt for a more prescriptive statutory framework should it so choose. The image of the Directive as providing a wide scope for collective bargaining could turn out in practice to be a chimera.

LABOUR MARKETS, LABOUR LAW AND RE-REGULATION OF WORKING TIME

The contrasting expectations and fears expressed about the impact of the Working Time Directive reflect to some degree the difficulty of locating the Directive within a taxonomy of labour market regulation. The Directive certainly does not fit into any simple dichotomy between regulatory and deregulatory approaches. Such a dichotomy in any event lacks explanatory value, not least because, as the history of change in the UK labour market shows, attempts to restructure the legal framework of industrial relations are not necessarily accompanied by a reduction in state regulation. For purposes of positioning the Directive within a framework of regulation it is therefore necessary to focus on modes of classification which take account of those types of regulation which are not exclusively restrictive or prohibitive in their nature.

Bosch, in a report on Flexibility and Work Organisation for the European Commission, draws on the analysis of Sengenberger to divide regulations into three categories: (a) *participation* of social actors in effective social dialogue; (b) *protection* of employees from various risks; (c) *promotion* of labour productivity and of adjustments in the labour market.[66] Bosch concludes that flexible deployment of labour - in particular numerical flexibility within the

65 *Working Time in Britain: Towards a European Model, Part II: Collective Bargaining In Europe and the UK* (Institute of Employment Rights,1994) It is partly for that very reason that there has been widespread concern about the Working Time Directive amongst UK employers.

66 G.Bosch, 'Flexibility and Work Organisation' *Social Europe Supplement 1/95* (1995) at p.3, citing W. Sengenberger 'Protection - Participation - Promotion' in W. Sengenberger and D. Campbell (eds.), *Creating Economic Opportunities: The Role of Labour Standards in Industrial Restructuring* (International Institute for Labour Studies, 1994).

67 In line with the model developed by J.M. Atkinson, *Flexibility, Uncertainty and Manpower Management* IMS Report No 89 (Institute of Management Studies, 1984), numerical flexibility refers to a firm's ability to adjust its use of labour in line with fluctuations in output. This could involve greater use of atypical working arrangements as well as flexibility in working time patterns of existing employees.

firm[67] - "frequently requires less strict and definitive regulations and more social dialogue and negotiated solutions".[68] This conclusion is accompanied by the injunction that it remains the duty of the state to lay down minimum standards so as to protect vulnerable workers and prevent an alleged decline in social solidarity. The prescriptive nature of this proposition reflects assumptions underpinning the 1994 Commission White Paper, *Growth, Competitiveness and Employment* and is therefore not value free. Indeed it is almost tautologous in nature. The categorisation nevertheless itself provides a convenient starting point for analysis of the regulatory implications of the Working Time Directive.

In practical terms the effect of the Directive on regulatory regimes in Member States is likely to differ.[69] In the UK, for example, the Directive requires an extension of statutory regulation into an area of regulatory space almost exclusively governed by individual contract, the terms of which at present may or may not be structured by collective agreement. At the time of writing it is not known how or when the Directive will be implemented.[70] It would therefore be premature to speculate as to the form of regulation to be adopted or whether the Directive will provide a stimulus to collective bargaining.

Elsewhere in the Community several Member States have taken the opportunity presented by the obligation to implement the Directive by 23 November 1996 to restructure their regulatory frameworks to enhance flexibility. In so doing they appear broadly to be adopting a pattern consistent with that envisaged by Bosch (*supra*). In Spain, a Member State with an historically rigid regulation of working hours, the 1994 changes to the Workers' Statute provide significant scope for flexible working time arrangements to be developed by collective negotiation.[71] In Germany also, 1994 finally saw the introduction of a new law on working time (Arbeitszeitgesetz). Although reform of working time legislation had been in the offing for over a decade, it is evident that the final shape of the legislation, both as regards substantive standards and scope for modification via collective agreement, was influenced by the Working Time Directive.[72] Similar moves towards legislating for greater

68 *Op. cit.*, n. 66 at p. 7.

69 See *Employment Europe* No. 407, November 1995, at pp. 11-19 and M. Hall and K. Sisson, *Time for a Change?* (Industrial Relations Services, 1997) for an overview of developments.

70 The UK government issued a Consultation Paper with a closing date for responses of 6 March 1997. The mode and timing of implementation has yet to be determined by the new Labour Government. See generally B.Fitzpatrick *op. cit.*, n. 1, for an analysis of the legal implications of the delay in implementation of the Directive by the UK.

71 The evidence is mixed as to how far the new-found freedom is overcoming the legacy of the rigid Francoist labour ordinances. See *e.g. European Industrial Relations Review* (E.I.R.R.) 252, January 1995 at pp. 15-17; E.I.R.R. 262, November 1995, at pp. 28-30 and *Employment Europe* 416, August 1996, at pp. 13-20.

72 See *European Report* 393, September 1994 at pp. 19-20; E.I.R.R. 268, May 1996, at pp. 27-29; and Bosch, *op. cit.*, n. 66 for a review of the labour market background to the changes.

flexibility in the organisation of working time are also under way in, for instance Finland, France and the Netherlands.[73]

In short, in many Member States, the Working Time Directive is being interpreted and implemented in a fashion directed at diminishing the previously more central role of statutory protection whilst enhancing a "participatory" mode of regulation. All this is taking place within a framework of political and economic discourse emphasising flexibilisation. In this respect the Directive may have served an important political function for some Member States in helping to deflect potential domestic opposition to regulatory change. As Emerson has argued, in the different but equally contentious area of pension reform, "at the very least Member States will surely want...to seek solidarity in numbers in promoting difficult policy changes and to avoid possible beggar-thy-neighbor effects".[74]

The somewhat ambiguous picture that emerges of the regulatory effect of the implementation of the Working Time Directive becomes equally evident if we attempt to analyse the Directive in terms of a conceptual framework of labour law. The Directive occupies an equivocal status between two polar interpretations of labour law, one conceptualising the subject in terms of labour market regulation and the economy whereas the other emphasises the traditional values of employment protection and enhancement of collective bargaining.[75] Formally, both in terms of its material scope and Treaty legal base the Working Time Directive fits the second model. But, as has been argued in this paper, an important driving force behind the Directive, perhaps even its raison d'être, is to be found in labour market flexibility, a concern commonly equated with a labour market regulation model of labour law.

These apparent tensions between different models of labour law and between alternative interpretations of the regulatory nature of a measure such as the Working Time Directive are largely elided in current labour market discourse emanating from the Commission, most specifically from DG V. In what was to some degree a reiteration of well-established positions, the Commission in a 1994 paper on European social policy, stated that Member States generally recognise that greater labour market efficiency and long-run

73 See *Employment Europe* 414, June 1996, at pp.18-19 (Finland), 22 (Netherlands); E.I.R.R. 267, April 1996, at pp.13-17, and 273, October 1996, at pp.12-15, and *Employment Europe* 423, March 1997 at pp. 21-22 (France). For an overview of developments See *Employment Europe* 407, November 1995, at pp. 11-19; DTI *Consultation Document* (H.M.S.O., 1996) Annex D and M. Hall and K. Sisson, *op. cit.*, n. 69.

74 M. Emerson, 'Europe after 1992' in T. Padoa Schipoa (ed.), *Europe after 1992: Three Essays (Princeton, 1991).*

75 See, for instance, B. Bercusson 'The Conceptualisation of European Labour Law' (1995) 24 I.L.J. at pp. 3-18.

competitiveness is to be sought "through the adaptation, rationalisation and simplification of regulations, so as to establish a better balance between social protection, competitiveness and employment creation".[76]

Given this general line of reasoning it is not so surprising, though still contentious, to find the Commission proposing further measures to extend the coverage of the existing Directive to many of the groups of employees not currently within its remit.[77] The stated rationale is again to encourage flexibility in working time arrangements "as part of developing new patterns of work and in order to improve competitiveness and increase employment opportunities".[78] But this does not involve the abandonment of the protection function of regulation. Instead the Commission seeks to emphasise a commitment to a "social cohesion" model of economic progress, under which a framework of basic minimum standards "provides a bulwark against using low social standards as an instrument of unfair economic competition and protection against reducing social standards to gain competitiveness...".[79] What is being espoused is a different, and by inference a better, balance between "regulation" and "competition". Thus flexibilisation of the labour market, regulation through labour law and social and economic progress all march hand in hand.[80]

This comfortable portrayal understates the extent of an unresolved social policy dilemma, a dilemma which harks back to original French concern in 1957 over the regulation of working time. What constitutes unfair economic competition? Some forms of comparative labour market advantage, such as that offered by low wage rates, are well-established between Member States. But what if the Member State consciously seeks to accentuate that advantage by

76 *European Social Policy: A Way Forward for the Union* COM(94)333, at p.11 para.12. Similar sentiments have been expressed in Commission documents relating to social protection measures in general: *The Future of Social Protection: A Framework for a European Debate* COM(95)466 at pp.1 and 11; Social Protection V/6931/95-EN at p.8.

77 The political sensitivity of this step is reflected in the fact that the proposals were not tabled by the date originally expected, 31 March 1997. Even aside from anxiety about the proposals becoming an issue in the UK general election, there are believed to have been disagreements within the Commission as to the scope of any further measure (see *e.g. Financial Times 1/2 February 1997).* It is therefore noteworthy that the White Paper eventually issued in mid-July proposed four different regulatory options for extending the scope of the Directive (see Employment Europe 429, September 1997, at pp.17-18).

78 *European Social Policy: A Way Forward for the Union* (COM(94)333, at p.22. The proposal is restated and elaborated in the Commission Communication Medium Term Rolling Social Action Programme 4 April 1995, at pp.13-16. See also the approval by the European Parliament in September 1996 of the Rocard Report on the relationship between reductions in unemployment and reduction and reorganisation of working time (E.I.R.R. 274 at p. 3).

79 *European Social Policy: A Way Forward for the Union, ibid. at p.5, para.19.*

80 See also G. Schmid, 'Flexibilisation of the Labour Market Through Law?' in R. Rogowski and T. Wilthagen (eds.), *Reflexive Labour Law* (Kluwer, 1995) who argues that flexibilization of the labour market through what he terms the positive coordination functions of law is to set up a positive-sum not a zero-sum game.

reducing wage levels further or by deregulating the processes of "hiring and firing"? Even if one accepts the validity of the distinction between legitimate and illegitimate labour market competition, drawing a borderline between the two is not straightforward. Moreover, whatever stance may be taken to intra-Community competition on labour standards, there are broader regional and international dimensions to consider.

Here, the Commission appears to accept that in certain economic circumstances, those of developing countries for instance, low labour costs and a "willingness to work longer, harder or under more difficult conditions" can constitute a legitimate natural comparative advantage.[81] This is a potentially significant concession. One unresolved question therefore is whether even the type of compromise exemplified by the Working Time Directive, incorporating flexible minimum levels of protection as a Community standard, can be sustained if wholesale flexibility of working hours becomes a key factor in regional and global competition.[82] The nature of the interaction between nation states and a global economy remains contentious,[83] but it would be premature to assume that any labour market impact will be limited, for instance, to unskilled or semi-skilled blue collar workers in the manufacturing sector. The emphasis placed on the development of human capital in many newly industrialising countries suggests a more pervasive influence of international competition.

CONCLUSION

The judgment of the European Court of Justice on 12 November 1996 set the seal on a rule-making process, the outcome of which - the adoption of the Directive - represented the culmination of a long-term and continuing policy objective within DG V. That objective was to bring aspects of working time within the boundaries of Community legal and social regulation.[84] It is even possible to see in the outcome of the legislative and litigation processes described here a successful illustration of the Commission adopting

81 *European Social Policy: Options for the Union* COM(93)551, at p.69.

82 For a discussion in the context of working time, see V. Di Martino, *op. cit.*, n. 3, and more generally Lord Wedderburn 'Labour Standards, Global Markets and Labour Laws in Europe' in W. Sengenberger and D. Campbell, *op. cit.* n 66.

83 See, for instance, the wide ranging review by M. Rhodes, "Globalization and West European Welfare States" (1996) 6 *Journal of European Social Policy* 305.

84 It is a matter for further research to determine just how far it is appropriate to attribute the policy commitment to attaining some form of supra-national regulation on working time to a Commission institutional imperative or to the influence on Commission policy of one or more Member States particularly committed to that objective.

what Cram has characterised as the role of a "purposeful opportunist".[85] Indeed in the context of working time initiatives, this characterisation may underplay the way in which the exercise of discretion over aims and methods incorporates a long-term strategic and creative dimension. Labels here are arbitrary but perhaps "enterprising strategist" could be added to the lexicon.[86]

Yet, satisfactory though the immediate legal outcome may be for the Commission, the broader and more long-term policy implications for a Community social policy agenda are less easy to discern. On the one hand, the judgment of the Court validated the initial decision of the Commission, supported by ECOSOC and the Parliament, to adopt under Article 118a a broad definition of Health and Safety, one that incorporated a concept of working environment into which could be subsumed psychological elements such as stress and mental fatigue.[87] The breadth of that now judicially endorsed definition suggests that, whatever political obstacles may exist, an extension of the Working Time Directive to cover activities and workers currently excluded or exempted will not founder on the rocks of legal interpretation. On the other hand, any perception that the Commission will feel able to exploit the broad definition of the material scope of Article 118a so as to push more social policy measures through this route seems ill-founded.[88] It would ignore the existence of significant legal and political hurdles. The 'blue pencilling' of the Sunday rest-day provision in Article 5 is evidence of the former. This suggests that the Court will require a clear connection to be established, even if not conclusively proven, between the language of Article 118a and the specific content of any legal instrument based on that Article.[89]

As regards political hurdles, it is doubtful how far there exists the necessary commitment within the Commission, let alone within the necessary majority of Member States, to pursue a social policy agenda committed to supra-national regulation based on an employment protection model.[90] Indeed it is evident that the Commission itself is increasingly placing emphasis "on the future measures that should be taken to make social protection systems more employment

88 But cf. Fitzpatrick, *op. cit.* n.1, who suggests that under the WHO definition of "health" a wide range of social protection measures could in theory be brought forward under Article 118a.

89 The Court, in an almost insouciant fashion, did confirm the Advocate-General's opinion that the justification for every measure did not need to be scientifically demonstrated (Case C-84/94, para. 39). This statement falls some way short, however, of endorsing mere assertion of a link to Article 118a as constituting adequate justification for a measure. It is noteworthy that the Commission produced "scientific evidence" to counter that relied upon by the UK government.

90 See, for instance, reports of the controversy within the Commission about documents purporting to establish links between labour market rigidities and high rates of unemployment: *Financial Times*, 25 October 1996 and 8 November 1996.

friendly and more efficient".[91] But does this mean, as some have argued, that the Working Time Directive is a historical hangover from a more regulatory inclined era and largely irrelevant to the new agenda?[92] The contrary may be the case if social solidarity remains even as a subordinate objective. Then the Directive is closer to being symbolic, almost an exemplar, of a measure that emphasises efficiency whilst seeking to retain some modicum of social cohesion.

Yet it is this attempt to combine the social protection and economic efficiency objectives that lays the Working Time Directive open to contrasting and competing interpretations. From one standpoint the Directive can be seen as one of the main achievements, perhaps even the zenith, of the Social Action Programme, in creating a flexible, decentralised regulatory model combining the elements of "participation" and "protection". However, the danger of a flexible decentralised approach is that too many and too extensive derogations from a universal standard, whether or not under the guise of "participation", will undermine the very notion of a standard *per se*. From another standpoint, therefore, it is equally plausible to identify the Directive with what Streeck has characterised as an emerging neo-voluntarist social policy regime notable for its limited capacity "to impose binding obligations on market participants".[93] Judgment is perhaps best deferred until more evidence becomes available as to the influence of the Directive on the re-regulation of working time arrangements that is taking place in Member States. At a bare minimum, however, the Directive does constitute an attempt to tilt, however marginally, the regulatory outcome away from that which might be arrived at by private social actors in self-regulating markets.

There is a further dimension, a more fundamental and symbolic one, from which emphasis on the regulatory implications of the Working Time Directive tends to distract attention. A key issue of social and economic discourse continues to be how we should define work, what its future is and who will do the work.[94] This is, as Meadows has sought to emphasise, a matter of making choices and not simply a matter of technical economics. In this broader discourse, regulation of the organisation of working time would take its place,

91 The Future of Social Protection (1995) COM(95)466, para. 3.1.

92 See *e.g.* Ian Davidson *Financial Times*, 13 November 1996, and Hugo Young *Guardian*, 12 November 1996.

93 Streeck, *op.cit.*, n. 86 at p. 45.

94 See *e.g.* Henrietta L. Moore, 'The Future of Work' (1995) 33 B.J.I.R. 657, and commentaries by R. Milkman and U. Jurgens in (1995) 33 B.J.I.R. at pp. 679-683 and 685-687 respectively. See more generally the collected papers in P. Meadows (ed.), *Work out - or Work in?: Contributions to the debate on the future of work* (Joseph Rowntree Foundation, 1996).

as it did in the 1983 draft Recommendation, alongside positive policies directed at such issues as child care provision, parental leave and training. For the present, the Working Time Directive stands however tentatively as a reassertion of the role of the state and of social actors against an unquestioning acceptance of deterministic arguments based on economic and technological inevitability.

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CASENOTES

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

MEMBER STATE LIABILITY: ONE TEST OR TWO?

Joined Cases C-178 - 179/94 and C-188 - 190/94
Dillenkofer and others v. *Germany* [1996] 3 C.M.L.R. 469

The relatively short judgment given by the Court in *Dillenkofer* nonetheless makes interesting reading both for its substantive law interest and its place in the jurisprudence of the Court of Justice as to the liability in damages of Member States for breaches of Community law. The judgment can be read as both a summary and a reconciliation of its previous judgments in, on the one hand, *Francovich*[1] and, on the other, *Factortame III*,[2] *BT*[3] and *Hedley Lomas*.[4]

The facts

The dispute in *Dillenkofer* arose out of Germany's failure to transpose the Package Travel Directive[5] by the deadline date of 31 December 1992. This Directive was intended to harmonise across the Member States the financial guarantees provided to holidaymakers in the event of the insolvency of their tour operator. The German government later passed implementing legislation, but this only applied to contracts concluded after 1 July 1994 which related to travel commencing after 31 October 1994. A number of applicants whose claims related to the period after the deadline for implementation but before the implementing legislation came into force, sought damages from the German government in respect of its failure to transpose the Directive by the deadline date. The damages claimed were either the cost of the holiday or the costs incurred in returning home from the holiday, according to whether the

[1] Cases C-6/90 and C-9/90 *Francovich* v. *Italy* [1991] E.C.R. I-5357.

[2] Cases C- 46/93 and C-48/93 *Brasserie du Pêcheur* v. *Germany* and *R.* v. *Secretary of State for Transport, ex parte Factortame* [1996] 1 C.M.L.R. 889.

[3] Case C-392/93 *R.* v. *HM Treasury, ex parte British Telecommunications plc* [1996] 2 C.M.L.R. 217.

[4] Case C-5/94 *R.* v. *MAFF, ex parte Hedley Lomas (Ireland) Ltd* [1996] 2 C.M.L.R. 391.

[5] Directive 90/314 O.J. L158/59.

applicants had been unable to take their holiday as a result of the operator's insolvency or had been left stranded at their destination.

The essential facts in this case were effectively similar to those in *Francovich I*, which concerned the failure of the Italian government to implement a Directive aimed at providing employees of insolvent businesses with certain financial guarantees. In that case the Court of Justice had ruled that a Member State could be liable in damages in such circumstances if:

> (i) the Directive was intended to confer rights on individuals;
> (ii) the content of those rights was clear from the terms of the Directive; and
> (iii) there was a direct causal link between the breach of the Member State's obligation and the loss to the applicant.

The conditions for liability

Although in *Dillenkofer* the Court applied the Francovich conditions, it also reviewed its case law on Member State liability for other breaches of Community law and drew some interesting conclusions.

The Court referred to its judgments in *Factortame III*, *BT* and *Hedley Lomas*. In each case the breach of Community law had been of a different nature (the enactment of legislation which was contrary to Community law; the incorrect implementation of a Directive; and a decision to refuse licences) but the Court ruled that a Member State could be liable in damages in all these circumstances if:

> (i) the rule of law infringed was for the protection of individuals;
> (ii) the breach was sufficiently serious; and
> (iii) there was a direct causal link between the breach of the Member State's obligation and the loss to the applicant.

In *Hedley Lomas* (a judgment which has been widely criticised[6]) the Court's reasoning was essentially that although the *Factortame III* test was applicable, the lack of any significant discretion on the part of the UK government meant that any infringement of Community law was, *per se*, a sufficiently serious breach and would incur liability.

From the judgments in these cases it had appeared that there were at least two distinct tests for liability; the *Francovich* test, applicable where a Member

[6] See, for example, J. Steiner and L. Woods, *Textbook on EC Law*, (Blackstone Press, 1996) at p59; D. Wyatt, 'Remedies against the State, in particular Damages and Injunctions', paper given at the conference on "Community Law in National Courts" at the Centre of European Law, 6 July 1996.

State had failed completely to transpose a Directive, and the *Factortame III* test, applicable in other circumstances. It also seemed possible that the application of the latter test in *Hedley Lomas* in fact amounted to a separate, third test (similar to the Factortame III test but omitting any detailed consideration of whether the breach was sufficiently serious), applicable where the state had had little or no legislative discretion.

In *Dillenkofer*, the Court referred to its statement in *Francovich*,[7] a statement which it also quoted in *Factortame III*[8] and *Hedley Lomas*,[9] that the conditions under which State liability gives rise to a right to reparation depend on the breach of Community law causing the damage. This statement on the face of it appeared to indicate that the conditions laid down in *Francovich* and *Factortame III* were in fact different, and justifiably so.

However, in *Dillenkofer* the Court stated that it had simply meant that the conditions for liability were to be *applied* differently according to the situation. The conditions themselves laid down in these judgments were "[i]n substance...the same" since under both tests the Community law breached must have conferred clear rights on the applicants (the first and second conditions in *Francovich* and first condition in *Factortame III*). Under both the breach must have caused the applicant's loss (third condition under both tests).

The one condition which appears to distinguish the two tests is the second *Factortame III* condition; that the breach be sufficiently serious. The Court of Justice argued in *Dillenkofer*, however, that a sufficiently serious breach was nevertheless required under the *Francovich I* test. It had simply not been specified as one of the conditions for liability because it had been self-evidently fulfilled on the facts, as the Member State had failed to implement any of the measures clearly prescribed by the Directive. In *Factortame III* and *BT*, where the breach was not so self-evidently serious, the Court had had to undertake a more thorough investigation into whether the Member State, in exercising its legislative discretion, had manifestly and gravely disregarded the limits on its powers. In *Hedley Lomas*, although the Court referred to the "sufficiently serious breach" condition, it simply asserted that a breach would also be sufficiently serious if a Member State with little or no legislative discretion infringed Community law, as in *Hedley Lomas*. This is very close to *Francovich*, since in both cases a particular kind of breach of Community law was simply assumed to be sufficiently serious without further enquiry.

[7] *Supra*, note 1, at 5415.

[8] *Supra*, note 2, at 987.

[9] *Supra*, note 4, at 447.

The application of the law to the facts

Having recognised that a right to reparation arose from the non-implementation of the Package Travel Directive if the result prescribed by the Directive entails the grant to individuals of rights whose content is identifiable and a causal link exists between the breach of the State's obligation and the loss and the damage, the Court went on to apply this test to the facts. It interpreted the obligation on package holiday organisers, under Article 7 of the Directive, to have sufficient financial resources to refund money paid or repatriate the consumer in the event of insolvency, as meaning that package travellers were thereby granted the right to such repayment or repatriation.

The Court considered that the content of these rights was identifiable on the basis of the Directive alone since the beneficiaries were identified as consumers and the nature of the guarantee was also clear. It was, however, for the national court to consider whether, on the facts, the condition of causation was fulfilled, that is to say, whether the applicants in this case were amongst those who should have received rights under the Directive and could therefore claim damages against the State.

The interpretation of the directive

So far as the interpretation of the Directive itself was concerned, the Court was asked to consider the measures necessary to transpose the Directive properly. It referred to *Commission* v. *Germany* [10] as authority for the principle that the provisions of a Directive must be implemented with legally binding force and in such clear and precise terms that the requirements of legal certainty were met.[11] The Court rejected the argument put forward by the German government, that the period of time allowed for implementation was too short and stated that the relevant measures should have been in place before the deadline date. It explained that the proper response by a Member State to a disputed deadline was not to refuse to implement a measure on this ground, but to take the appropriate steps to gain an extension of the deadline.[12]

The Court also ruled that the implementing legislation must provide the consumer with the right to a guaranteed refund of any deposit paid and must

[10] Case C-59/89 [1991] E.C.R. I-2607.

[11] The Court appears to have departed slightly from this approach in Case C-300/96 *Commission* v. *UK, The Times* 23 June 1997. In that case it ruled that the implementation by the UK of one of the defences permitted by Directive 85/374 on Product Liability was not defective simply because it was ambiguous, since the UK courts were under a duty to interpret it in line with the Directive. There was as yet no evidence that the courts had not so interpreted the Directive and therefore no evidence that the implementation was wrongful.

[12] See also Case 52/75 *Commission* v. *Italy* [1976] E.C.R. 277.

ensure that package holiday operators could not avoid the obligation to put up security for their obligations in the case of customers possessing travel documents of value. The Court confirmed that the Directive did not require measures to be taken to protect consumers against their own negligence, but it also noted that a consumer who paid the whole amount rather than a deposit was not to be regarded as having acted negligently.

Conclusion

The judgment in *Dillenkofer* provides an interesting commentary on the Court's jurisprudence in the area of Member state liability. It appears that an all purpose test for such liability may now be formulated as follows:

> (i) The Community law breached gives clear rights to individuals;
> (ii) The breach of that law must be sufficiently serious which may either be:
> (a) assumed if the State has failed to implement a Directive or has otherwise acted where it has little or no discretion; or
> (b) proved by an examination of the factors set out in *Factortame III* (clarity and precision of the rule breached, the position taken by Community institutions, and so on); and
> (iii) There is a direct causal link between the sufficiently serious breach and the damage suffered.

A single test applicable in all circumstances has the theoretical merit of simplicity and, it is submitted, a test such as that formulated above would also be relatively simple to apply in practice. It would therefore allow for the more effective enforcement of Community law rights which, after all, should one of the objectives of this area of law. It is interesting to note that in the most recent judgment in the *Factortame* saga,[13] the Divisional Court appeared to support such a test. It stated that the "sufficiently serious" test applied in *Factortame III* was derived from *Francovich* and argued that, whereas in *Factortame III* it was necessary to ascertain whether the breach of law was manifest and grave since the Member State was exercising a discretion, in *Francovich* the failure to implement a Directive was a sufficiently serious breach in itself. It remains to be seen whether the Court of Justice itself builds on its judgment in *Dillenkofer* in later cases, so as to utilise such a test.

ELSPETH DEARDS*

13 *R.v. Secretary of State for Transport, ex parte Factortame Ltd, The Times* September 11 1997.

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COURT-AUTHORISED CAESARIANS AND THE PRINCIPLE OF PATIENT AUTONOMY

Re MB (An Adult: Medical Treatment) [1997] 2 F.C.R. 541; 2 F.L.R. 426 (CA) (Butler-Sloss, Saville and Ward L.JJ.)

Background

This most interesting and important case arose out of the refusal by a pregnant woman, Miss MB, to submit to an anaesthetic needed for a caesarian section without which her foetus would be at high risk of suffering death or serious handicap. Although Miss MB desired a healthy child, and had no objection to the caesarian operation itself, her 'needle-phobia' caused her to panic in the Operating Theatre. On these facts, the Court of Appeal upheld the decision of Hollis J. (given earlier the same evening) that the patient was temporarily incompetent and, in accordance with the well-established principle in *Re F (Mental Patient: Sterilization)*,[1] could be provided with the treatment in her own best interests. However, in a detailed reserved judgment,[2] their Lordships took the opportunity not only to elaborate upon what was meant by 'incompetence', but also to add a substantial *obiter* as to what the legal position would have been had Miss MB in fact been competent. In this regard, Butler-Sloss L.J., delivering the judgment of the Court, concluded that:

> A competent woman who has the capacity to decide may, for religious reasons, other reasons, rational or irrational reasons or for no reason at all, choose not to have medical intervention even though the consequence may be the death or serious handicap of the child she bears or her own death.[3]

As her Lordship went on to note:

> We recognise that the effect of these conclusions is that there will be situations in which the child may die or may be seriously handicapped because the mother said no and the obstetrician was not able to take the necessary steps to avoid the death or handicap. The mother may indeed later regret the outcome, but the alternative would be an unwarranted invasion of the right of the woman to make the decision.[4]

1 [1990] 2 A.C. 1

2 The Judgment was handed down on 26 March 1997, five weeks after the treatment was authorised.

3 [1997] 2 F.C.R. 541, at 553.

4 *Ibid.* at 554-5.

Comment

The Court of Appeal no doubt felt impelled to try and clarify the law in the wake of a spate of recent first instance decisions in which judges have authorised obstetric interventions on pregnant women, insofar as doctors deemed them necessary to prevent serious injury or death to the foetus (and in some cases to the woman herself).[5] These cases have caused considerable disquiet, not only because of the belief that the foetus's interests are being allowed to prevail over those of the pregnant woman, but also due to the manner in which proceedings have frequently been brought without the woman enjoying adequate legal representation.[6] Even so, the Court's conclusion in *Re MB* may strike some as excessively robust, and it has indeed already drawn the criticism, expressed extra-judicially by another Lord Justice of Appeal, that it embodies "the obvious risk [of] restatements of principle by appellate judges which trial judges simply find impossible to follow".[7]

It will be suggested here that the unpalatability of the Court of Appeal's judgment in fact stems from two quite distinct errors in its reasoning. The first, which is of significance well beyond the frontiers of obstetric medicine, was inherited by it from *dicta* in previous authorities which discuss refusals of medical intervention. The second error pertains more directly to the peculiar difficulties raised by refusals of obstetric interventions, designed in part to assist the woman's foetus. Here the Court of Appeal fell into a jurisdictional confusion of its own making. At a profound level, both errors carry implications for our understanding of the nature and scope of the principle of patient autonomy.

Refusals of medical treatment

The central principle that the Court of Appeal sought to uphold in *Re MB* was the autonomy of the pregnant woman, i.e. the latter's right to decide for herself what kinds of medical intervention, if any, she is willing to accept. Nevertheless, as the Court recognised, this is not a right enjoyed by every patient, pregnant or otherwise, for its exercise requires that he or she is 'competent' (has the capacity) to make the decision. In this context, their Lordships quoted with approval from the judgment of Lord Donaldson M.R. in *Re T (Adult: Medical Treatment)*[8] in which he stated:

5 *Tameside and Glossop Acute Services Trust* v. *CH* [1996] 1 F.C.R. 753; *Norfolk and Norwich Health Care NHS Trust* v. *W* [1997] 1 F.C.R. 269; *Rochdale Health Care NHS Trust* v. *C* [1997] 1 F.C.R. 274; *Re L (An Adult: Non-consensual Treatment)* [1997] 1 F.C.R. 609. See also *R.* v. *Collins and Pathfinder Mental Health Services NHS Trust, ex parte S* (1997) (discussed *infra*).

6 See Clare Dyer 'Birth of a Dilemma', *The Guardian* 11 March 1997.

7 Lord Justice Thorpe, as reported by Barbara Hewson, 'A woman's freedom under attack', *The Times* 8 July 1997.

8 [1992] 4 All E.R. 649.

> Doctors faced with a refusal of consent have to give very careful and detailed consideration to the patient's capacity to decide at the time when the decision was made. It may not be the simple case of the patient having no capacity because, for example, at the time he had hal lucinations. It may be the more difficult case of a temporarily reduced capacity at the time when his decision was made. What matters is that the doctors should consider whether at that time he had a capacity which was commensurate with the decision he purported to make. The more serious the decision, the greater the capacity required. If the patient had the requisite capacity, they are bound by his decision. If not, they are free to treat him in what they believe to be his best interests. [9]

As the Court in *Re MB* noted, the courts' current approach to capacity has crystallised into a three stage test, used for the first time by Thorpe J. in the case of *Re C (Adult: Refusal of Treatment)*.[10] According to the test, to be adjudged competent, the patient must be capable of (a) comprehending and retaining information about the proposed treatment; (b) believing it; and (c) weighing it in the balance to arrive at choice.

In nearly all of the recent High Court decisions in which caesarian sections have been authorised, the woman's competence to refuse intervention has in fact been denied.[11] In some cases, such a finding appears to have been justified. For example, in *Norfolk and Norwich Healthcare NHS Trust* v. *W*,[12] Ms W was admitted to hospital in a state of arrested labour but denying that she was pregnant. She had a history of psychiatric illness and had had three previous deliveries by caesarian section. On this occasion, too, her doctors were concerned that unless a caesarian were performed, there was a risk that the foetus would die, either through suffocation or by the rupturing of Ms W's old caesarian scars. After hearing psychiatric evidence that she failed the third element of the *Re C* test, Johnson J. authorised the treatment. However, in other cases a finding of incompetence, on the basis of this approach, has appeared rather more strained. Indeed, while Johnson J. was hearing the case involving Ms W, another emergency *ex parte* application was brought in front of him by Rochdale Healthcare NHS Trust in respect of Mrs C, a pregnant woman in

9 Cited at [1997] 2 F.C.R. 541, 549.

10 [1994] 2 F.C.R 151.

11 See note 5, *supra.* (The solitary exception was the decision of Hogg J., now the subject of judicial review in the *ex parte* S case: see *infra.)*

12 [1997] 1 F.C.R. 269.

labour who was similarly refusing a caesarian against the advice of doctors.[13] She had previously endured a painful caesarian and, on this occasion, was adamant that she would "rather die" than undergo another one. Though she was not represented, Johnson J. heard the view of Mrs C's obstetrician that she was, in the latter's opinion, competent. The judge, in the course of a two minute hearing, disagreed, holding her unable "to make any valid decision about anything of even the most trivial kind" due to the stress and pain of labour.

In response,[14] the Court of Appeal in *Re MB* set about refining the *Re C* test: in particular, it distinguished panic, indecisiveness and irrationality from the state of incompetence:

> Irrationality is here used to connote a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it... Although it might be thought that irrationality sits uneasily with competence to decide, panic, indecisiveness and irra tionality in themselves do not as such amount to incompetence but may be symptoms or evidence of incompetence...[15]

However, even assuming that in principle one may distinguish between true incompetence and mere 'evidence' of it, in practice this will not be easy to do. In fact, all of the elements in the *Re C* test are vague and open to interpretation. Its third requirement, especially, that the patient be able to "weigh treatment information in the balance" suffers, despite the use of metaphor to disguise the fact, from an inherent subjectivity: it is hard to see how one could ever be sure that it had been satisfied. The suspicion is that, notwithstanding pronouncements to the contrary which endorse the patient's right to make irrational choices, this third element functions to filter out precisely these kind of choices: an undue attachment on a patient's part to a factor deemed by others of little import is readily translated into a conclusion that the patient cannot weigh up information and is therefore incompetent.

It is unsurprising in the light of this, and the fact that the determination of competence is left by the courts to doctors, that some commentators have

13 *Rochdale NHS Healthcare Trust* v. *C* [1997] 1 F.C.R. 274. The view of the doctors involved was that both Mrs C and her foetus would die unless a caesarian were carried out immediately.

14 In a brief comment on the *Rochdale* case, their Lordships noted that "[o]ne may question whether there was evidence before the court which enabled the Judge to come to a conclusion contrary to the opinion of the obstetrician that [Mrs C] was competent": [1997] 2 F.C.R. 541, at 551.

15 *Ibid.* at 553.

expressed scepticism over the true extent of judicial commitment to the value of patient autonomy.[16] However, resisting this path, it can be argued that the courts *are* committed, at an intuitive level, to this value: their difficulty is that they are hamstrung by the inadequacies of the *Re C* test, notably its complete failure to address the substantive grounds a patient may have for refusing medical intervention. The serious nature of this failing (and the way it has arguably led to the need for a certain subterfuge on the part of judges) is apparent if we look more closely at the principle of autonomy itself.

Autonomy

Whilst autonomy, as it figures in the writings of jurists and philosophers, lacks a single fixed meaning, it broadly amounts to a right of self-determination; the ability to choose one's own life plan and the values that will inform it, and to shape one's destiny, so far as possible, in accordance with those values.[17] Essentially, it appears to be a medium to long-term concept and is thus to be contrasted with 'liberty', which is used here to denote the freedom to act upon impulses of a more transient nature.[18] Gerald Dworkin links the existence of such short-term and long-term perspectives to our possession of both first and second order desires, and uses the example of Odysseus to point up the contrast:

> Consider the classic case of Odysseus. Not wanting to be lured onto the rocks of the sirens, he commands his men to tie him to the mast and to refuse all later orders he will give to be set free. He wants to have his freedom limited so that he can survive. Although his behaviour at the time he hears the sirens may not be voluntary - he struggles against his bonds and orders his men to free him - there is another dimension to his conduct that must be understood. He has a preference about his preferences, a desire not to have or act upon various desires. He views the desire to move his ship closer to the sirens as something that is no part of him, but alien to him. In limiting his liberty, in accordance with his wishes, we promote, not hinder, his efforts to define the contours of his life.[19]

16 See John Harrington, 'Privileging the medical norm: liberalism, self-determination and the refusal of medical treatment' (1996) 16 *Legal Studies* 348.

17 See, generally, Beauchamp and Childress, *Principles of Biomedical Ethics, 4th edn.* (OUP, 1994), Chapter 3.

18 Liberty, in the sense mentioned, involves in its extreme form, the ability of a person to remake himself at each instant on a whim. Such a possibilty, though celebrated by Existentialist Philosophers (especially in the works of Sartre) sits uneasily with the concept of law, which depends upon a large measure of predictability and capacity for rational restraint on the part of human agents.

19 G. Dworkin, *The Theory and Practice of Autonomy* (CUP, 1988), at pp.14-15.

Of course, in this case the sailors who refuse to free Odysseus are abiding by a previous decision of his. However, suppose that, having expressed no prior wish, he were not tied to the mast and, on hearing the sirens, began to steer the ship towards the rocks. The sailors who laid hands on him and bound him at this point would be acting paternalistically in Odysseus's best interests; nevertheless, on the facts, they would also be promoting his autonomy. This is because it can be assumed that long-term survival is part of Odysseus's life plan and is what he, in his collected state, would prefer.

Given this understanding of autonomy, it is more apparent why, in the case of refusals of medical treatment with serious consequences for the patient's future, there is often a temptation towards intervention on the part of doctors and courts. This is especially so, given that a person's interests in life and somatic well-being, which treatment aims to preserve, are, in the terminology of Joel Feinberg, 'welfare interests' "in the sense that, when they are set back, no other interests in a person's interest-network can advance".[20]

Of course, that is not to deny that there will be situations in which refusals of medical treatment *are* consonant with autonomy: this is true where treatment, if given, will at best secure the patient a quality of life insufficient for him to continue to pursue the goals and values central to his conception of himself. It may also be so where the nature of the treatment itself would radically infringe those values (an example here is of a Jehovah's Witness who refuses a blood transfusion because receiving blood is inconsistent with a core value governing the lives of members of that faith). On the other hand, the refusal of treatment on a whim cannot be regarded as falling within such a category.

Unfortunately, *Re MB* is only the latest in a line of recent cases in which the English courts appear to have lost sight of the underlying logic of patient autonomy as it relates to refusals of treatment.[21] To say that an irrational choice may be upheld is ambiguous, so far as giving effect to patient autonomy is concerned, for such a choice may or may not be autonomous. What should instead be required is that the choice 'fits' in the general scheme of the patient's life, (though there is no need for the scheme itself to be 'rational', whatever that might mean). Clearly, this is a question which cannot be resolved without some inquiry into the patient's reasons for making the choice. Rather than relying on the vagaries of the *Re C* test, it would thus be preferable if the courts, when faced with a choice which is *prima facie* grossly autonomy-limiting (such as the refusal of important medical treatment), amended the test of competence

20 J. Feinberg, *Freedom & Fulfillment - philosophical essays* (Princeton University Press, 1992) at p4.

21 See *Sidaway* v. *Governors of Bethlem Royal Hospital* [1985] 1 All E.R. 643, *per* Lord Templeman at 666; *Re T* [1992] 4 All E.R.649, *per* Lord Donaldson M.R. at 653; *Airedale NHS Trust* v. *Bland* [1993] 1 All E.R. *821, per* Lord Goff at 866.

accordingly. In fairness to the Court of Appeal in *Re MB*, however, this would, in the light of the problematic *dicta* found in *Sidaway* and *Bland*,[22] ultimately appear to be a matter for the House of Lords.

The foetus and the problem of obstetric intervention

The above argument, if accepted, suggests *a fortiori* that we should reject the Court of Appeal's view that a woman may refuse obstetric intervention (with, very likely, serious consequences for her future) for "no reason at all". However, the working assumption in the rest of this note will be, in respect of such a woman, that her refusal *is* in fact an autonomous one (e.g. one founded on deep religious convictions). For the issue which then arises is whether the presence of the foetus should make any difference to her right to refuse in such a case.

In *Re T*, Lord Donaldson M.R. famously left this question open.[23] Then, in *Re S (An Adult: Medical Treatment)*,[24] the matter came squarely before Sir Stephen Brown P. in the High Court. That case concerned the refusal by Mrs S, a Born-Again Christian, to submit to a caesarian for religious reasons. The foetus was in a position of 'transverse lie' and without the operation was practically certain to rupture Mrs S's womb, causing its own death and a high risk of death to Mrs S. In a twenty minute *ex parte* hearing the President authorised the operation "in the vital interests of the mother and child".[25]

In *Re MB*, the Court of Appeal was clearly concerned to repudiate this line of authority.[26] However, its main ground for doing so, namely that the courts lacked any jurisdiction to intervene, is, it is suggested, unconvincing.

Jurisdictional issues

As their Lordships noted, it is a well-established principle of English law that the foetus, until born, lacks legal personality.[27] One reason, quite simply, is that the foetus's physical location within the pregnant woman would, if such

22 *Ibid.*

23 [1992] 4 All ER 649, at 653: "An adult patient who, like Miss T, suffers from no mental incapacity has an absolute right to choose whether to consent to medical treatment, to refuse it or to choose one rather than another of the treatments being offered. The only possible qualification is where the choice may lead to the death of a viable foetus. That is not the case here and, if and when it arises, the court will be presented with a novel problem of considerable legal and ethical complexity."

24 [1992] 4 All ER 671.

25 The decision, especially the way the declaration was couched, has been criticised: see, e.g., K. Stern 'Court-ordered Caesarean Sections: In Whose Interests?' (1993) 56 *M.L.R. 238;* and M. Thomson, 'After *Re S*' (1994) 2(2) *Med.L.Rev. 127.*

26 See its remarks at [1997] 2 F.C.R. 541, 560-1. In fact, as already noted, the recent decisions involving non-consensual caesarians have scarcely mentioned *Re S*, the courts instead preferring to find the women in question incompetent: see notes 5 and 11, *supra.*

27 *Paton* v. *BPAS Trustees* [1978] 3 W.L.R. 687.

personality were granted, lead to insoluble conflicts in cases where the interests of the woman and foetus were opposed. In this regard, the Court referred, *inter alia*, to its own previous judgment in *Re F (In Utero)*,[28] which concerned the attempt by a local authority to ward the foetus of a mentally unstable woman who had absconded from her place of care. It endorsed the concern of Balcombe L.J. in that case, that "[s]ince an unborn child has, *ex hypothesi*, no existence independent of its mother, the only purpose of extending the [Wardship] jurisdiction to include a foetus is to enable the mother's actions to be controlled". This, he felt, should, if appropriate at all, be a matter for Parliament.[29]

After considering statutes which deal with the protection of unborn life, together with a number of ECHR and US authorities, the Court of Appeal in *Re MB* concluded:

> The foetus up to the moment of birth does not have any separate interests capable of being taken into account when a court has to consider an application for a declaration in respect of a Caesarian section operation. The court does not have the jurisdiction to declare that such medical intervention is lawful *to protect the interests of the unborn child* even at the point of birth. [Emphasis added][30]

This, it is submitted, is correct so far as it goes. However, at most, it follows that the interests of the foetus *per se* are not a sufficient warrant for intervention. Where the Court appears, with respect, to have erred is in assuming that a court will therefore *never* have jurisdiction to declare treatment lawful in such a case, i.e. on other grounds.[31] Such a narrow reading of its own powers is contrary to other recent authorities in which doubts over medical treatment have been at issue. In fact, as a judicial tool, declaratory relief has been developed precisely to provide assistance to those, such as doctors, who are faced with urgent ethical dilemmas in situations of legal uncertainty. As Sir Stephen Brown (sitting in the Court of Appeal) noted in *Riverside NHS Trust* v. *Fox*:[32]

> This court appreciates, as do all the Divisions of the High Court, that the position of doctors treating patients in certain circumstances is exceptionally difficult. The dilemmas which confront them are very

28 [1988] F.C.R. 529.

29 *Ibid.* at 538-9.

30 [1997] 2 F.C.R. 541, at 561.

31 A possible ground in this regard is explored below: see text at notes 42-43, *infra*.

32 [1994] 1 F.L.R. 614.

> real. They are aware of the fact that there are legal restraints in relation to certain aspects of possible treatment. They therefore seek on occasions to avail themselves of the declaratory jurisdiction of the High Court.[33]

This approach also guided the Court of Appeal in *Re S (Hospital Order: Court's Jurisdiction)*[34] in which Sir Thomas Bingham M.R. suggested that for such relief to be invoked, it was enough that there was "a serious justiciable issue" before the court. As his Lordship commented, "[t]his is pre-eminently an area in which the common law should respond to social needs as they are manifested, case by case".[35]

Overriding an autonomous refusal?

Assuming that a court does, in principle, have the requisite jurisdiction to authorise treatment, should it do so against the competent and autonomous refusal of a pregnant woman to permit obstetric intervention? One might think the answer should always be in the negative. After all, an autonomous choice represents a considered value-ordering by the woman of her interests, and recognition of her integrity as an individual implies that we should not second-guess them. This is the more so, given that imposing intervention, while advancing some of her interests, will inevitably set back others.

A good illustration is provided by the case of Tabita Bricci, which was recently the subject of a ruling by the US Supreme Court on the legitimacy of court-authorised caesarian sections.[36] Mrs Bricci was a Pentecostal Christian, whose faith forbade surgical intervention which would bring her pregnancy to an end before full term. In fact, a few weeks prior to birth, doctors determined that her foetus was receiving an inadequate oxygen supply and advised her that, unless delivery were carried out by immediate caesarian section, her foetus would almost certainly die or suffer severe brain damage. In upholding Mrs Bricci's right to refuse the operation, the Supreme Court endorsed the ruling of the Illinois Supreme Court in a previous case, where it had held:

> Even though we may consider appellant's beliefs unwise, foolish or ridiculous, in the absence of an overriding danger to society we may not permit interference therewith...for the sole purpose of compelling her to accept medical treatment forbidden by her religious principles

33 *Ibid.* at 621.

34 [1995] 3 All E.R. 290.

35 *Ibid.* at 302-3. See also *Re T* [1992] 4 All E.R. 649, *per* Lord Donaldson M.R. at 663.

36 *Baby Boy Doe (a fetus)* v. *Mother Doe* (1993) 510 U.S. 1032; 114 S.Ct. 652.

> and previously refused by her with full knowledge of the probable consequences.[37]

Here, if compulsory intervention had been authorised, it would have advanced the patient's interests in having a healthy live birth (which she clearly desired).[38] On the other hand, it would clearly have damaged both her relationship with her faith and her general sense of herself as an autonomous agent. Moreover, forced surgical intervention would also have exposed her to attendant physical harm and risk of harm.[39]

It is important to note, however, that in this last case the patient's refusal did not carry implications for her *own* somatic well-being. What of a situation where the refusal of intervention will lead not only to death or serious harm to the foetus but also to the pregnant woman? That, after all, was the situation confronting the English High Court in *Re S.* In general, the courts, while recognising the force of the sanctity of life principle, which is directly implicated here,[40] have given the impression that it is ultimately subordinate to the principle of patient autonomy. For example, in *Re T* Lord Donaldson M.R. stated:

> [A refusal of treatment] gives rise to a conflict between two interests, that of the patient and that of the society in which he lives. The patient's interest consists of his right to self-determination -his right to live his own life how he wishes, even if it will damage his health or lead to his premature death. Society's interest is in upholding the con cept that all human life is sacred and that it should be preserved if at all possible. It is well established that in the ultimate the right of the individual is paramount.[41]

37 *In re Estate of Brooks* (1965) 32 Ill. 2d 361, at 373.

38 As it happened, despite the dim prognosis, Mrs Bricci gave birth normally to an apparently healthy child. Even so, it is suggested that we may still regard a hypothetical intervention as serving such an interest *at the time it would have taken place,* insofar as it would have reduced the risk of not achieving such an outcome.

39 For the record, the US Supreme Court noted the following medical facts in relation to caesarians: "8. The chances of the mother dying in a C-section delivery are about 1 in 10,000.In normal birth the odds of a mother's death are 1 in 20,000 to 1 in 50,000.
9. The mother will have much more pain due to a C-section delivery than birth from the laboring process.There are or could be other complicating factors such as damage to other organs.
10.The mother will also have to recuperate for about 6 weeks after a C-section, which is major surgery."

40 This is not to say that the sanctity of life principle is absent in cases of foetal death alone, especially where the foetus is at term. However, not only is it qualified here by legislation (see the Abortion Act 1967 (as amended)), but, as Aurora Plomer points out, "[t]here is no legal precedent for extending parental duties by appeal to the principle of the sanctity of life so as to require parents to submit to an unconsented invasion of their own body in order to save the life of their child" (see A. Plomer, 'Judicially Enforced Caesarians and the Sanctity of Life' (1997) 26 *Anglo-American Law Review* 235, at 249).

41 [1992] 4 All E.R. 649, at 661.

Furthermore, there have been a number of instances where patients have indeed been allowed to refuse medical treatment, even though the result has been (or was expected to be) their death.[42]

Nevertheless, it does not follow that a person enjoys an unlimited choice over the *manner* of their death, insofar as additional insult to the sanctity of life principle will be entailed. It is, for instance, generally accepted (albeit seldom articulated) that a doctor is entitled to override a patient's refusal of treatment following a suicide attempt.[43] Although this rule is often justified on the basis of uncertainty as to the would-be suicide's state of mind, there may also be a feeling that public policy militates against requiring a doctor to acquiesce in another's act of self-destruction. Arguably, a case where a pregnant woman will die without obstetric intervention, also possesses features which set it apart from other cases in which life-saving treatment is refused. Most obviously, not only the woman but also her foetus, which (whatever its other attributes) is a potent symbol of life, stands to die. (Indeed, in cases where, without intervention, the woman's womb will rupture there is a sense in which the foetus operates as the instrument of death.) There is, perhaps, also the consideration that such deaths, if allowed, would take place in the maternity wards of hospitals.

Admittedly, the issues here, touching as they do upon the relationship between the most fundamental values in our society, stand in need of much more analysis than is possible here. Indeed it may be that they defy ultimate resolution. Nevertheless, given its failure even to begin the task, the Court of Appeal's decision in *Re MB* (effectively) to overrule *Re S* must, at the very least, be open to question.

Procedural concerns

As noted earlier, one reason that cases involving non-consensual obstetric interventions have aroused controversy, is because of the manner in which many have been brought without the pregnant woman being properly represented. In this regard, the Court of Appeal in *Re MB* was keen to evolve procedural guidelines, which doctors and other professionals concerned with such women's care should observe as a matter of good practice.[44] These include the need for potential problems to be identified as soon as possible; ensuring the woman's representation in all cases (unless she refuses it); and, where her competence is

42 See, e.g., *R.* v. *Blaue* [1975] 1 W.L.R. 1411; *Re C (Adult: Refusal of Treatment)* [1994] 2 F.C.R. 151; *Secretary of State* v. *Robb* [1995] 2 W.L.R. 722.

43 This seems to be implicit in Thorpe J.'s ruling in the *Robb* case where, having noted the state's interest in the prevention of suicide, he went on to hold that the refusal of medical treatment, or even nutrition, did not in itself amount to suicide (*ibid.* at 727).

44 [1997] 2 F.C.R. 541 at 561-2.

issue, bringing appropriate evidence before the court, preferably from a psychiatrist. Their Lordships added that the Official Solicitor should be notified of every application and, ideally, would participate in proceedings as *amicus curiae*.

These guidelines have already been incorporated in a Department of Health Circular[45] and, while not addressing the fundamental areas of concern identified in this commentary, seem eminently reasonable. It seems certain that there have been a number of instances in which infringements of the procedural rights of pregnant women have occurred. In one case from April 1996, which is currently the subject of judicial review proceedings, a 'Ms S' was forced to submit to a caesarian after being sectioned under the Mental Health Act.[46] She was, herself, a trained healthcare worker and was apparently committed to the principle of home-birth despite the risk that the pre-eclampsia from which she suffered would cause her own and her foetus's death. Allegedly, the Judge in the case, Hogg J., made her ruling (on the basis of Sir Stephen Brown P.'s decision in *Re S*) after being misinformed that S was already in labour and would die without immediate treatment.

However, the undoubted need for procedural regularity in these cases (most people would agree that coercive medical treatment should only ever be countenanced as a matter of last resort) arises quite independently of the substantive arguments for and against the treatment in question. In *Re MB*, the Court of Appeal's plausible approach to this issue should not, therefore, serve to divert attention from the defects in its analysis of the substantive questions.

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45 EL(97)32, issued on 27 June 1997.

46 See *R.* v. *Collins and Pathfinder Mental Health Services NHS Trust, ex parte S* (CA) *The Independent*, 10 July 1997.

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THE RETURN OF MRS OUGHTRED'S ARGUMENT

Neville and Another v. *Wilson and Others*
[1996] 3 W.L.R. 460

Background

The judgment of the Court of Appeal in this case provides a possible solution to a problem that has been outstanding since the House of Lords' decision in *Oughtred* v. *Inland Revenue Commissioners*.[1] The problem is how to effect the disposition of a subsisting equitable interest without the need to comply with the requirement of formal writing laid down in s. 53(1)(c) of the Law of Property Act 1925. The seeds of the solution are, of course, contained within s.53 itself. Section 53(2) providing that the formality requirements do not "affect the creation or operation of resulting, implied or constructive trusts".

The Oughtred Case

To understand the potential impact of *Neville* v. *Wilson* it is first of all necessary to write a case note within a case note. We must return to *Oughtred* itself. In that case 200,000 shares in a private company were held upon trust for Mrs Oughtred for life, thereafter for her son absolutely. Mrs Oughtred also owned 72,700 shares absolutely. In order to avoid estate duty payable on the latter shares in the event of Mrs Oughtred's death, the parties determined by an oral agreement to exchange their interests. Mrs Oughtred promised to transfer the 72,200 shares to her son, and he in turn promised to transfer his remainder interest in the 200,000 shares to Mrs Oughtred. Two documents of transfer were executed at a later date. The first recorded the transfer of legal title in the 200,000 shares from the trustees to Mrs Oughtred in consideration of the sum of 10 shillings. The second transfer recorded the transfer of Mrs Oughtred's 72,700 shares to her son's nominees, again in consideration of ten shillings. The Inland Revenue subsequently brought an action claiming *ad valorem* stamp duty on the document recording the transfer of the legal title in the 200,000 shares. Mrs Oughtred argued that no value had passed by virtue of that document, the equitable interest having been transferred by the earlier oral agreement, and accordingly that there was no basis on which to charge *ad valorem* stamp duty against the document.

The gist of Mrs Oughtred's argument ran something like this: because the shares were shares in a private company, they were unique (it could not be guaranteed that replacement shares would be obtainable on the open market). It followed from the uniqueness of the shares that common law damages would

[1] [1960] A.C. 206.

not be an adequate remedy for failure to fulfill the oral agreement, equity would therefore grant specific performance of the contract, on the basis that "equity sees as done that which ought to be done" (provided, of course, that she had come to equity with clean hands by adhering to her side of the agreement). Because of the availability of specific performance, equity regarded the oral agreement as binding. Consequently, according to equity Mrs Oughtred was, from the date of the oral agreement, no longer the beneficial owner of the shares in her possession. The necessary conclusion was that Mrs Oughtred held those shares, not for her own benefit, but upon trust for her son, with whom the oral agreement had been made. This was not an expressly created trust, but a constructive or implied trust. Therefore, even if the oral agreement had, strictly speaking, amounted to a "disposition" within s.53(1)(c), nevertheless it would be valid without writing because s.53(2) disapplies s.53(1)(c) where the disposition operates by virtue of a constructive or implied trust.

At first instance, Upjohn J. accepted this line of reasoning, as did Lord Radcliffe in the House of Lords.[2] Nevertheless, a bare majority of the House of Lords held against Mrs Oughtred, without actually deciding whether or not they accepted her sophisticated argument. They were in fact able to sidestep the issue entirely. By analogy with "the simple case of a contract for the sale of land"[3] they pointed out that the deed which comes after the contract and completes the sale has never been regarded as not stampable *ad valorem.* It followed on this reasoning that, *even if Mrs Oughtred's argument were correct,* the later instrument of transfer to Mrs Oughtred would still be stampable *ad valorem..*[4]

Lord Radcliffe, who (together with Lord Cohen) dissented from the majority view, observed that Mrs Oughtred need never have called for the subsequent written instrument of transfer, on the basis that an agreement of sale and purchase of an equitable interest in personalty may be made orally. She could have simply called upon the trustees of the settlement of the 200,000 shares to transfer the bare legal title to her. For Lord Radcliffe the disputed document of transfer did nothing more than transfer the bare legal title to Mrs Oughtred, it did not transfer any equitable interest at all, it did not pass any

2 There is, of course, high authority for the proposition that a specifically enforceable agreement to assign an interest in property creates an equitable interest in the *assignee (London and South Western Railway* v. *Gomm* (1882) 20 Ch.D 562 at 582 *per* Sir George Jessel M.R.)

3 *Per* Lord Jenkins [1960] A.C. 206, at 240.

4 In accordance with s.54 of the Stamp Act 1891, which requires a transfer on sale of property to be stamped. Incidentally, if the facts of *Oughtred* were repeated today the Inland Revenue would probably attempt to achieve success by another route. It would be open to it to rely upon the decision of the House of Lords in *Craven* v. *White* [1989] A.C. 398, where Lord Oliver held that where a series of transactions are designed to avoid taxation, and do in fact achieve that result, the court is able to treat the series of transactions as a single composite whole.

value and therefore should not have been assessed to *ad valorem* stamp duty.

Neville v. *Wilson*

The question left unresolved by *Oughtred* is what their Lordships would have decided if the disputed document of transfer had not in fact been executed. On those facts, would Mrs Oughtred's argument have persuaded their Lordships that she had effected a valid informal disposition of a subsisting equitable interest? To this question the Court of Appeal in *Neville* v. *Wilson* appears to have provided an answer.

The facts of the case were as follows. Neville carried on business through a private company, which we shall call 'N Ltd'. Shortly before his death N Ltd acquired all the issued share capital in 'U Ltd', 120 shares in U Ltd being held by nominees of N Ltd, the remaining shares in U Ltd being held by N Ltd as registered owner. In 1969 N Ltd was informally liquidated by shareholder agreement, its liabilities discharged and its assets divided between the shareholders. N Ltd was later struck off the register and formally dissolved. Some years later, after profitable business and after U Ltd's assets had been reduced to cash, Neville's children (who had been shareholders in N Ltd) commenced proceedings against ex-shareholders in N Ltd to determine, *interalia*, the beneficial ownership of the 120 shares in U Ltd held by nominees of N Ltd. The judge at first instance, Moritt J. held that the beneficial ownership of those shares had vested in the Crown as *bona vacantia* on the dissolution of N Ltd.

On appeal, it was held that the informal 1969 agreement had divided N Ltd's equitable interest in the 120 shares among the shareholders of N Ltd, the equitable interest of each shareholder being of a size proportional to his shareholding in N Ltd. As Nourse L.J. put it:

> the effect of the agreement, more closely analysed, was that each shareholder agreed to assign his interest in the...shares of [N Ltd's] equitable interest in exchange for the assignment by the other shareholders of their interests in his own aliquot share. Each individual agreement having been a disposition of a subsisting equitable interest not made in writing, there then arises the question whether it was rendered ineffectual by [s.53(1)(c)].[5]

In answer to that question Nourse L.J. adopted a line of reasoning similar to that put forward by Mrs Oughtred's counsel almost thirty years earlier. He held that the consequence of the informal agreement to assign the equitable interest was

[5] [1996] 3 W.L.R. 460, at 469D-E.

to constitute the shareholders in N Ltd implied or constructive trustees for each other of the assets of N Ltd. The result of this was that the agreement fell within s.53(2) and was effective without the need to comply with the formality of writing contained within s.53(1)(c).

Conclusions

Does this mean that Mrs Oughtred would have avoided stamp duty had she omitted to execute the later documentation in confirmation of her oral agreement? The answer to that question must be a cautious "yes". Cautious, because there are still some potential objections of principle against the line of reasoning approved by Nourse L.J. in *Neville* v. *Wilson.* When his Lordship asked himself "[w]hy then should subsection (2) not apply?" he concluded that "[n]o convincing reason was suggested in argument and none has occurred to us since".[6] *One* potential reason against the application of s.53(2) to a case like *Neville* v. *Wilson* is the argument that s.53(2) was designed to prevent fraudulent reliance upon another's failure to comply with formalities,[7] *not* to sanction consensual arrangements to avoid the formality requirements laid down in s.53(1), (with commensurate stamp duty savings). In 1984 Brian Green made the following observation:

> It is a common practice amongst those intent on avoiding *ad valorem* stamp duty to enter into a specifically enforceable agreement to transfer property which is left uncompleted: the promisee relying on his equitable proprietary right behind the bare trust thus established by his vendor. The documentary disadvantages of "leaving the matter in contract" in this way are regularly seen as outweighed by the stamp duty saving; and the purchaser always has the safety net of having a right to call for a conveyance if such becomes necessary at a later date.[8]

It is to be hoped that when next a case like *Neville* v. *Wilson* comes to the House of Lords, their lordships take the opportunity to air more fully the argument against the employment of s.53(2) as a tax-planning device. In the meantime there is no doubt that full use will continue to be made of Mrs Oughtred's argument.

GARY WATT*

6 *Ibid., at* 472 B-C.

7 For an illustration of this type of fraudulent reliance see *Rochefoucauld* v. *Boustead* [1897] 1 Ch. 196. See, generally, *Hanbury & Martin, Modern Equity,* 15th Edn. (Sweet & Maxwell, 1997) at p.87.

8 (1984) 47 M.L.R. 385 at 402.

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MISDIRECTED FUNDS AND PROFITS

Trustee of the Property of F.C. Jones & Sons v. *Jones*
[1997] Ch. 159 (CA) (Millett, Nourse and Beldam L.J.)

Introduction

Derivatives can be profitable. In *Trustee of the Property of F. C. Jones & Sons* v. *Jones*[1] this led to a number of interesting issues straddling the borders between the law of property and the law of restitution. Using cheques totalling £11,700, Mrs Anne Jones opened an account on 7 September 1984 with commodity brokers for the purpose of dealing on the London Potato Futures market. These speculations yielded a total of £50,760 which was placed in an account in Mrs Jones' name at R. Raphael & Sons plc. However, the initial sums invested had been diverted from the business account of Mrs Jones' husband's firm of potato-growers. That firm had committed an act of bankruptcy on 14 August 1984 and a receiving order was made against the partners on 19 October. Mr Jones, with his wife's permission withdrew £900 from the Raphael's account on 7 November. Two days later the Official Receiver informed Raphaels of its interest in the fund, so Raphaels interpleaded. The disputed sum broke down into two components. First, the initial amount of £11,700 misdirected from the bankrupt firm (in the language of Professor Birks, the "value received" by Mrs Jones). Secondly, the profits derived from that sum (less the small withdrawal) left in the account (the "value surviving").[2] Initially, Mrs Jones claimed the whole sum on the basis that the initial sum represented wages and other sums owed to her by the firm. However, at the trial, which followed an unexplained eleven year delay, that contention was abandoned and it was conceded that Mrs Jones had no defence to a claim for £11,700. Eventually the dispute resolved itself into one about the profits.

At first instance, John Cherryman Q.C., sitting as a Deputy High Court Judge in the Chancery Division, held the trustee-in-bankruptcy was entitled to the whole of the £49,860 remaining. He accepted the submission of counsel for the trustee that the money in court "could be identified as directly representing the £11,700 Mrs Jones received.... [therefore] the trustee must have a rightful claim to the entire sum by tracing".[3] He held that where A pays B's money to C (and due to the bankruptcy doctrine of relation-back), B retains beneficial title to the money, C becomes a trustee of the money.[4] This was to satisfy the

1 [1997] Ch. 159.

2 For the distinction between the first measure ("value received") and second measure ("value surviving") of restitution see Birks, *An Introduction to the Law of Restitution,* Oxford: Clarendon Press, 1989, revised paperback edition, pp. 75-77.

3 Transcript, Judgment of 22 March 1995, p.5.

4 Transcript, p.10

insistence of the Court of Appeal in *Re Diplock*[5] that it was an essential precondition to the exercise of tracing in equity that the funds must pass through the prism of a fiduciary relationship. The deputy judge here relied upon *Chase Manhattan Bank N.A.* v. *Israel-British Bank (London) Ltd.*[6] to reinforce this conclusion. This no longer seems safe after the decision of the House of Lords in *Westdeutsche*.[7] In any event the Court of Appeal (in a judgment also predating the speeches in *Westdeutsche*) dismissed an appeal from Mrs Jones and held that the trustee was entitled to the profits but not by reason of equitable tracing.[8]

Comment

Much of the argument in the case was concerned with somewhat recondite (and now obsolete) questions as to the nature and location of title to the money under pre-1986 personal bankruptcy law. Counsel for the trustee-in-bankruptcy argued that under section 37 of the Bankruptcy Act 1914 the balance in the joint account had already vested in him before the moneys were misdirected under the doctrine of relation back. Therefore Mrs Jones never had any title to the money at all.[9] In reply, counsel for Mrs Jones accepted that the £11,700 was recoverable by way of action for money had and received, but insisted any claim to profits required the vehicle of a constructive trust or fiduciary relationship. Millet L.J., citing his own judgment in *Re Dennis*,[10] stated that the position of the bankrupt and those who claimed under this in the intermediate period between the act of bankruptcy and adjudication was *sui generis*: "They did not possess a defeasible title, but either an indefeasible title, if the act of bankruptcy was not followed by adjudication or no title at all if it was. Out

5 [1984] Ch.465; aff'd. [1951] A.C. 251 (H.L.).

6 [1981] Ch.105, 119.

7 *Westdeutsche Landesbank Girozentrale* v. *Islington London Borough Council* [1996] A.C. 669 where in the leading majority speech Lord Browne-Wilkinson cast doubt upon the reasoning in *Chase Manhattan* (although by that process of retrospective reinterpretation of authority so prevalent in this area he justified the result by reference to the fact that the bank recipient of a mistaken payment discovered the error almost immediately, but did not act to rectify the position before their insolvency) at pp. 714-715; further, despite over-ruling the much-criticised *Sinclair* v. *Brougham* [1914] A.C. 398 the majority also stated that they cast no doubt on the principles of tracing enunciated in *Re Diplock:* see pp. 713-714.

8 [1997] Ch.159. Mrs Jones' petition for leave to appeal to the House of Lords was refused by the Appeal Committee (Lord Browne-Wilkinson, Lord Steyn and Lord Hoffman), 12 December 1996: [1997] Ch.159, 172. The case is noted by Andrews and Beatson (1997) 11 L.Q.R. 21, Birks (1997) 11 *Trusts Law International* 2 and Fox [1997] C.L.J. 30.

9 See Williams and Muir, *The Law and Practice of Bankruptcy,* London: Stevens & Sons, 1979, 19th Edition, pp. 235-242.

10 [1996] Ch. 80, which was intended as a summary of the earlier Court of Appeal authority of *In re Gunsbourg* [1920] 2 K.B. 426.

side the law of bankruptcy no similar ambulatory title was known to the law".[11] The honouring of the cheques simply put Mrs Jones in possession of funds to which she had no title. The consequence was that if Mrs Jones became bankrupt the money would not vest in her trustee-in-bankruptcy. Not because it was trust property: but because it was not her property at all.[12]

The Nature of the Claim

It is necessary to distinguish claims against a person, and claims against a thing (a claim to a particular asset *in specie*). Claims under the law of restitution may be either *in personam* or *in rem*. More commonly, they are the former category, but proprietary claims have been recognised.[13] Both Goff and Jones and Birks[14] draw a distinction between *restitutionary* proprietary claims and *pure* proprietary claims. A pure proprietary claim is one where no interest passes to the defendant and therefore there is no enrichment requiring reversal. In contrast, a restitutionary proprietary claim arises upon or after the receipt of wealth by a defendant and operates to reverse the resulting unjust enrichment. Whether it is the circumstances surrounding receipt which generate the claim or whether there is a judicial discretion to award a proprietary remedy is more controversial.[15] In contrast Burrows rejects any analytical distinction between restitutionary and pure proprietary claims[16] Assuming the distinction does exist, how can we characterise the claim in this case?

The answer is not easy, Millett L.J. stated: "The trustee must bring his claim at common law. It follows that, if he has to trace his money, he must rely on common law tracing rules, and that he has no proprietary *remedy*. But it does not follow he has no proprietary *claim*. His claim is exclusively proprietary."[17] This seems to favour the pure proprietary route, but the reference to common law tracing is puzzling. Later his lordship says that the concession that the trustee could trace the money at common law was rightly made.[18] Due to the

11 [1996] Ch 80, at 104 cited at [1997] Ch. 159, at 165.

12 [1997] Ch. 159, at 168

13 Most recently at appellate level in *Lord Napier and Ettrick* v. *Hunter* [1993] A.C. 713 and *Attorney General for Hong Kong* v. *Reid* [1994] 1 A.C. 324. Contrast I*n re Goldcorp Exchange Ltd (in receivership)* [1995] 1 A.C. 74 and *Westdeutsche Landersbank Girozentrale* v. *Islington London Borough Council* 2 W.L.R. 802.

14 Goff and Jones, *The Law of Restitution,* (London: Sweet and Maxwell, 1993) 4th Edition. pp. 73-74. Birks *supra,* n. *1,* pp. 15-16, 49-73.

15 Goff and Jones favour a judicial discretion, whereas Birks is hostile to discretion here and would prefer to analyse more closely the events which generate restitutionary proprietary claims: se Birks 'Proprietary Rights as Remedies' in Birks, (ed) *The Frontiers of Liability, Volume 1,* Oxford: Oxford University Press, 1994, pp. 214-223.

16 Burrows, *The Law of Restitution,* (London: Butterworths, 1993) pp. 370-371.

17 [1997] Ch. 159, at 168.

18 *Ibid.* at 168.

more liberal approach of its equitable counterpart, common law tracing suffers from a paucity of authority and is accordingly conceptually underdeveloped.[19] The classic case is where money is subtracted from a plaintiff who can then recover that precise sum from any recipient, direct or indirect, who is not a bona fide purchaser in an action for money had and received.[20] Millett L.J. did not accept the argument for Mrs Jones that the only possible cause of action here was one for money had and received.[21] The reason is obvious: the action for money had and received is a personal restitutionary cause of action which would be constituted upon receipt of the money by Mrs Jones and would lead to a judgment debt of £11,700 against Mrs Jones. Subsequent events would be "irrelevant".[22] However not all the cases which appear on their face to be concerned with common law tracing have been so limited: some have inquired into post-receipt events. In *Taylor* v. *Plumer*[23] the Court of King's Bench allowed Plumer to assert title to the American stock and bullion which his absconding and dishonest stockbroker had invested his funds in. This case was used as traditional authority for the ability of common law of tracing to cope with substitution of wealth (the "exchange-product theory"), but it has recently been argued that the common law court was in fact applying *equitable* proprietary reasoning against a recalcitrant fiduciary.[24] This reinterpretation of authority wins the approval of Millett L.J.[25] Similarly, the case of *Banque Belge pour l'Etranger* v. *Hambrouck*[26] has long puzzled commentators. A rogue transferred moneys from his firm's account to his Belgian mistress. The firm's bank sought judgment for the value surviving in her account (a lesser sum than the value received). The Court of Appeal ordered that the sum paid by the defendant's bank into court, should be paid to the plaintiff bank. It is unclear from the judgments whether this was recovery as money had and received or upon the basis of equitable tracing.[27] It seem clear that Millett L.J. did not regard the instant case as resulting in an action for money had and received, although

19 For common law tracing see Goff and Jones, *supra* fn. 13, pp. 75-83, and Paul Matthews, 'The Legal and Moral Limits of Common Law Tracing' in Birks (ed.), *Laundering and Tracing*, (Oxford: Clarendon Press, 1995) pp. 23-71.

20 *Clarke* v. *Shee and Johnson* (1774) 1 Cowp. 197, 98 E.R. 1041; *Lipkin Gorman* v. *Karpnale Ltd*[1991] 2 A.C. 548. Goff and Jones, *supra* fn. 13, at p. 79, fn. 39.

21 [1997] Ch. 159, at 164.

22 *Ibid.*, at 168.

23 (1815) 3 M. & S. 562; 105 E.R. 721.

24 See Lionel Smith. 'Tracing in *Taylor* v. *Plumer:* Equity in the Court of King's Bench' [1995] L.M.C.L.Q. 240.

25 [1997] Ch. 159, 169.

26 [1921] 1 K.B. 321.

27 For discussion see Birks, *supra.* fn 1, pp. 361-2; Khurshid and Matthews, 'Tracing and Confusion' (1979) 95 L.Q.R. 78 at 91-4.

common law tracing. In contrast, in a short supposedly concurring speech Nourse L.J. said explicitly that the whole sum was recoverable in an action for money had and received.[28]

Mixing and Substitution

It was the claim to profits which required discussion of tracing. Two obstacles usually impede the identification of the plaintiff's wealth in the defendant's hands: *mixing* and *substitutions*.[29] The common law is traditionally supposed to have inhibitions about the mixing of the plaintiff's money with other money, but where all that is sought is a personal judgment for money had and received, this can be confined to the proposition that only mixing *prior* to receipt by the defendant defeats the claim. In contrast, the common law, like equity can cope with the substitution of assets.[30] In the instant case, Millett L.J. held that mixing was no obstacle. Mrs Jones did not mix the money with her own moneys. As his Lordship noted:

> There are no factual difficulties of the kind which proved fatal in this court to the common law claim in *Agip (Africa) Ltd* v. *Jackson* [1991] Ch. 547. It is not necessary to trace the passage of the money through the clearing system or the London potato futures market. The money which the defendant paid into her account with the commodity brokers represented the proceeds of cheques which she received from her husband. Those cheques represented money in the bankrupt's joint account at Midland Bank which belonged to the trustee.[31]

With respect, this does not seem to follow. If the common law claimant seeks to reach beyond the 'veil of receipt', post-receipt mixing could still be relevant. It is difficult to deny that the money must have lost its identify once it was invested as part of a common pool in potato futures. Millett L.J. side-stepped this difficulty by an elision which treats the investment and the proceeds of investment as a straight substitution. His lordship observed that the money deposited with the brokers was governed by the broking contract which authorised the dealings in futures and concluded:

28 [1997] Ch. 159, 172.

29 For discussion see Birks, 'Mixing and Tracing: Property and Restitution' (1992) 45 C.L.P. 69.

30 *Taylor* v. *Plumer; Lipkin Gorman* v. *Karpnale Ltd;* [1997] Ch. 159, 169 *per* Millett L.J., and at 171 *per* Beldam L.J.

31 [1997] Ch. 159, at 169.

> The chose in action, which was vested in Mrs Jones' name but which in reality belonged to the trustee, was not a right to payment from the brokers of the original amount deposited but a right to claim the balance, whether greater or less than the amount deposited; and it is to that chose in action that the trustee now lays claim.[32]

Therefore, having elected to claim that substituted asset, the trustee had to accept the state of the account, for better or worse.

The Claim to Profits

The concentration on the chose in action and the analysis of the case of one of clean substitution of assets neatly avoided the difficulties of the profits question. The characterisation of the claim as a pure proprietary one also reinforced the simple solution the court adopted. Profits follow property. For example, under an agreement to sell a cow, where the cow calves before property passes the calf belongs to the seller. In contrast, where there is a sale, calving coming after contract and conveyance, the offspring belongs to the buyer. However, where the asset in question was money the solution did not always strike judges as obvious. In the well-known and recently-doubted case of *Lister & Co* v. *Stubbs*[33] where a firm sought an injunction to prevent one of its employees from dealing with investments which were the fruits of the bribes, the learned Lindley L.J. did not think it at all obvious either that the principal was entitled to the profits derived by the agent from bribes, or that the principal should have priority on insolvency. Of course, *Attorney-General for Hong Kong* v. *Reid* [34] now casts doubts on both these concerns. However a claim to profits was also resisted in the leading case of *Re Tilley's Will Trusts, Burgin* v. *Croad,*[35] which was not cited in *Jones*. There a widow thoroughly confused trust moneys with her own private funds over a long period. During that time she speculated successfully on the property market. One of the beneficiaries under the will trusts sought a share by way of equitable lien of those profits. Ungoed-Thomas J. concluded that the widow was not deliberately using the trust moneys in her speculations and relied on the fact that she had substantial funds and bank facilities to finance her investments, and so there was no direct proof of

32 *Ibid.*, at 170.

33 (1890) 45 Ch.D. 1.

34 [1994] 1 A.C. 324. However Scott V-C has recently suggested that *Lister* v. *Stubbs* is still binding on the English lower courts: *Attorney General* v. *Blake* [1997] Ch. 84; also citing *Halifax Building Society* v. *Thomas* [1996] Ch. 217.

35 [1967] Ch. 1179.

any link between trust moneys and profits. However, Ungoed-Thomas J. insisted that where a causal link could be shown between trust moneys and profits such a claim would succeed irrespective of intention. On the facts the beneficiary was therefore only entitled to her share of the value received. This was the most explicit judicial discussion of profits to date, and although the contrary result was reached on the facts, its reasoning supports the result in *Jones*. Indeed for Birks *Tilley* is *the* case which supports the proposition that second measure claims may be of greater value than first measure claims.[36]

Perhaps an explanation as to why *Tilley* was not cited is that it concerned a *restitutionary* proprietary claim (and one brought in equity, and not at common law), whereas in *Jones* we were supposedly concerned with a *pure* proprietary claim. However in cases such as the present, Burrows' scepticism about the analytical basis of the distinction may seem justified. At the very least there seems no reason why the question of profits should not be decided on the same principles for both. Here the conclusion of the Court of Appeal that Mrs Jones could not retain the profits, either because it would be an unjust enrichment or unconscionable for her to retain it, seem intuitively correct, but the language is that of restitution, not property.[37] However it is wrong to suppose the same conclusion should follow in every case. The key case is where the defendant is insolvent. Should the claimant get priority not just to the value received, but also to profits? Goff and Jones think not and this limitation seems sensible.[38] The concern is that the plaintiff received a windfall (owing nothing to his own efforts) at the expense of the defendant's general creditors. For this reason, and also because of its artificiality, Millett L.J.'s reliance upon a pure proprietary claim was misconceived. Various problems of identification were glossed over. Rather the claim should be characterised as a restitutionary one to the value surviving. This will include a claim to profits, except where the defendant is personally insolvent. The restitutionary claim could be either personal or proprietary. Where, as here, the defendant is not insolvent, a personal claim will suffice. As Birks has convincingly argued, whereas restitutionary proprietary claims are inextricably tied to the value surviving, there is no analytical reason

[36] Birks, *supra.* n 1, pp. 76, 366-370. Reliance could also be placed on *In re Oatway, Hertslet* v. *Oatway* [1903] 2 Ch. 356 where the Oceana shares purchased by the trustee increased in value from £2,138 to £2,475, although this was still less than the £3,000 received in breach of trust.

[37] [1997] Ch. 159, at 168 per Millett L.J. and at 172 *per* Nourse L.J.

[38] For discussion, Goff and Jones, *supra,* n. 13, pp. 93-102, esp. at 95-98. See also Paciocco, 'The Remedial Constructive Trust: A Principled Basis for Priorities Over Trusts in Bankruptcy' (1989) Can. Bar Rev. 315.

why a personal claim should not be in either the first or second measure.[39] Such a personal claim to the value surviving wins support from the judgment of Nourse L.J. who acknowledged that in his view the court was developing the action for money had and received to include a claim for profits.

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39 Birks, *supra.* n. 1, pp. 77.

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NOTTINGHAM LAW JOURNAL

BOOK REVIEWS

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

ECONOMIC ANALYSIS OF COMPANY LAW AND THE DECLINE OF THE STAKEHOLDER

Company Law: Theory, Structure and Operation, by BRIAN R. CHEFFINS, Oxford, Clarendon Press, 1997, li and 727 pp., Paperback, £25.00, ISBN 0-19-876469-3

At the height of what is often perjoratively referred to as the "Lawson" boom of the mid nineteen-eighties, an article by Mary Stokes entitled "Company Law and Legal Theory" appeared. It signalled a shift away from a "rules-first" approach to English company law towards a deeper theoretical approach.[1] Stokes argued that much of company law should be seen as an attempt to legitimate the power of corporate managers. The law's quest for legitimacy is understandable because the economic power of managers, especially in large corporations, has a public as well as a private dimension. Stokes rejected existing legitimising strategies derived from either contractarian or "real-entity" theories of corporate form as inadequate and was equally dismissive of market-based justifications. In conclusion, she offered a corporatist vision in which directors and managers, released from the narrow constraints of private accountability to shareholders, would be free to act as quasi-public servants wielding power for the benefit of society generally. The fashionable notion that modern corporations (and by implication company law) should take notice of a wide constituency of "stakeholder" interests derives from the corporatism favoured by Stokes and developed by Parkinson.[2] Although it does not engage in direct

[1] See W. Twining (ed.), *Legal Theory and Common Law* (Basil Blackwell, 1986), pp. 155-183. Stokes's article is also reproduced in Wheeler (ed.), *The Law of the Business Enterprise* (Oxford, 1994), pp. 80-116.

[2] J.E. Parkinson, *Corporate Power and Responsibility: Issues in the Theory of Company Law* (Oxford, 1993). For a critique of "stakeholderism" from a radical, anti-capitalist perspective see P. Ireland, "*Corporate Governance, Stakeholding and the Company: Towards a Less Degenerate Capitalism?*" (1996) 23 Journal of Law and Society 287.

conflict with corporatism, Professor Cheffins's important book, which draws for the most part on economic analysis, offers a rather different theoretical perspective.

The first point of interest to note is that, while Cheffins currently teaches company law in this country, he comes originally from Canada. Thus, this is a book about English company law written very much in the North American tradition of legal scholarship and one which draws both its inspiration and much of its source material from the seemingly endless supply of North American writing on law and economics. The book's claim to be the first comprehensive survey of United Kingdom company law from an economic perspective cannot be questioned. It is a monumental work of research and writing which explains the workings of economic analysis with a depth and clarity which non-economists will welcome. Furthermore, Cheffins has skilfully synthesised the ideas of many writers (including, to name a few, Coase, Easterbrook, Fischel and Romano) and presented them to a British audience in an accessible fashion. In this regard, the table of abbreviations, which contains full references to several unfamiliar overseas journals, is especially helpful. It is difficult to do justice to a work of this scope in the space available. Thus, for the most part, I address my specific comments to the view which Cheffins offers concerning the proper role of company law in the regulation of business enterprises and seek to illustrate how his position differs from that of Stokes.

The theoretical foundations of the book are contained in Part I, entitled "Company Law Theory", and are predicated on neoclassical economic theory. As such, one might expect Cheffins to adopt a deregulatory tone and argue for the law to intervene only in circumstances where private ordering fails to produce efficient outcomes. While I think it is fair to say that Cheffins has an instinctive faith in the capacity of markets to yield allocatively efficient outcomes most of the time, he accepts nevertheless that markets can undermine cooperative values and encourage inefficient, self-serving behaviour, particularly on the part of corporate managers (see chapter 3).[3]

Equally, however, as he shows in chapter 4, we should not necessarily conclude that state intervention will provide a panacea for the imperfection of markets. There are two main reasons for this. The first reason is that any form of regulatory intervention gives rise itself to costs and possible inefficiencies as well as benefits. It is on this basis that Cheffins criticises mandatory disclosure rules requiring companies which make public share offers to provide equity investors with significant quantities of information about their businesses and

[3] This positive yet cautious attitude to markets is reflected also in his qualified acceptance of the efficient capital market hypothesis in chapter 2.

financial prospects. His point is that companies already have market-driven incentives to provide potential investors with credible evidence of the quality of their businesses because the more convinced investors are about the soundness of a company's prospects, the more they will be prepared to pay for its equity. These incentives should maximise efficiency by channelling resources to the most highly-valued uses while producing the desired legal outcome (properly-informed investors and investment decision-making) in the absence of mandatory disclosure. As such, disclosure rules are arguably inefficient because they simply mimic the operational dynamics of the equity market so that the costs associated with regulation exceed the benefits.[4]

The second reason we should be wary about state intervention is because of defects in the law-making process and problems of enforcement. It is in relation to this point that Cheffins demonstrates a healthy pragmatism and an awareness of *realpolitik* all too lacking in corporatist "stakeholder" analyses. Drawing on public choice theory, he attempts to show how effective state intervention is often hampered by strong interest groups. Like Sealy (his immediate predecessor as S. J. Berwin Professor of Corporate Law at the University of Cambridge), he is extremely critical of the state of United Kingdom companies legislation, the Department of Trade and Industry's consultation processes and the failure of government officials to formulate a systematic plan for legislative reform. Cheffins is right when he describes this country's approach to company law reform as "*ad hoc*, reactive and incremental".[5] He accounts for this in part by arguing that government bureaucrats lack both the incentive and the expertise to put forward sweeping reforms. His analysis on this point carries considerable explanatory force when combined with the self-evident truths that reform of company law is not an obvious vote-winner and that, even if there were sufficient political will within the executive, any substantial reform of a technical nature is liable to become bogged down in the legislative process. It will be interesting to see how the Department of Trade and Industry responds to Commission's recently-published report on shareholder remedies[6] may prove to be an early litmus test. While betraying some sympathy for the idea that law should play only a limited role in the field of business regulation, Cheffins has done justice to the complexity of this difficult question.

[4] This efficiency criterion is known as "Kaldor-Hicks" efficiency and can be contrasted with the more rigorous "Pareto" standard of efficiency which, when applied to state intervention, holds that a change in the law is only efficient if it produces increases in societal welfare while at the same time causing no one individual to lose out as a result.

[5] Cheffins, B.R., *op.cit.*, at p.193.

[6] Law Commission Consultation Paper No. 142, 1996.

Chapter 2 arguably forms the centrepiece of the book. Using the "nexus of contracts" model developed in North America by scholars such as Easterbrook and Fischel,[7] Cheffins deconstructs the corporate entity and examines the underlying relationships between what he describes as the "key participants". He is quite happy to concede the point (made by Stokes and others) that a contractarian view does not sit comfortably with the prevailing judicial view of the company as a fictional legal entity.[8] Nevertheless, he claims that thinking about the company as a network of explicit and implicit bargains made by voluntary actors is a valuable analytical exercise. For Cheffins, there are five classes of company participant namely, shareholders, creditors, employees, directors and managers. He justifies this selection (and the exclusion of other "stakeholders" such as consumers or society as a whole) on the basis that the chosen participants play the lead role in financing or implementing the economic activities of companies and, as such, can be expected to have considerable influence on corporate decision-making.

The relationship between the company and each participant is analysed by breaking it down into a series of elements which Cheffins claims are common to bargaining exchanges generally.[9] The great strength of this type of contextual analysis is that it portrays the company as a dynamic and substantial business enterprise in which the expectations and aspirations of the various participants are mediated. To give just a couple of concrete examples, Cheffins uses the analysis to take issue with those who bemoan shareholder passivity in listed public companies and to explore questions of control and conflict in relation to corporate credit. He describes the phenomenon of shareholder passivity first identified by Berle and Means[10] as a form of "rational apathy" given that a properly-diversified (and therefore "rational") investor will not wish to participate actively in the affairs of any one company when the resulting increase in the overall value of his portfolio is likely to be marginal. His work also demonstrates that there are natural limitations to the scope of trade creditor representation in corporate decision-making. This is because a trade creditor who deals with several customers is effectively diversifying the risk of default by one of those customers. Many of the ideas in chapter 2

7 See Frank H. Easterbrook and Daniel R. Fischel, *The Economic Structure of Corporate Law (Harvard, 1991).*

8 *Salomon* v. *Salomon & Co Ltd* [1897] A.C. 22. For a recent exposition of this view, see *Meridian Global Funds Management Asia Ltd* v. *Securities Commission* [1995] 2 A.C. 500.

9 These elements are the duration of the bargain, the economic return to the parties accruing from bargaining relationships, the element of risk, the issue of control within bargaining relationships, the impact of conflicts of interest between the parties and the role of explicit bargaining in the form of express contractual arrangements.

10 A.A. Berle and G.C. Means,*The Modern Corporation and Private Property* (revised ed., New York, Harcourt, Brace and World Inc.,1967). The authors argued that control of public corporations tends to be vested in their managers rather than their shareholders with a resulting separation of ownership and control.

are developed in Part III of the book which looks at the operation of specific aspects of company law in the UK context with particular reference to shareholders (chapter 10), creditors (chapter 11), employees (chapter 12) and non-executive directors (chapter 13). Notably (and perhaps unsurprisingly) Cheffins doubts whether legislation providing for worker-participation in corporate policy-making would have much effect on employee attitudes and motivation.

The other key chapters are chapter 5, which considers the classification of company law rules and chapter 6 on the use of the hypothetical bargaining model to formulate such rules. These chapters provide much of the impetus in Part II, entitled "The Structure of Company Law". He identifies and discusses the merits and demerits of three basic categories of company law rules which he describes as permissive rules, presumptive rules and mandatory rules. Permissive rules are "opt-in" rules which have no automatic application and govern only those who take active steps to participate in a particular permissive scheme. An obvious example of this type of scheme is the Companies Act 1985 which provides for the formation of limited companies. Shareholders can only enjoy the benefits of limited liability if they opt in. By contrast, presumptive rules apply generally until such time as those governed by them elect to opt out. Presumptive rules are thus default rules which play a back up role in circumstances where the parties have not made their own contractual arrangements. Examples from company law include the standard form articles of association known as Table A[11] and the rule in *Birch* v. *Cropper* [12] that all shares rank equally unless special class rights are formally created. Mandatory rules apply automatically but unlike presumptive rules there is no opt-out (although it may be possible to find ways around the effects of mandatory rules as examplified by the use of extensive objects clauses to ameliorate the negative effects of the *ultra vires* rule).

Cheffins's general view is that a mandatory format of company law rules should be eschewed on efficiency grounds. However, he accepts that mandatory rules may be justified in circumstances where corporate conduct produces negative third-party effects or where the state wishes to pursue objectives which are not predicated solely on considerations of efficiency. He favours a system of flexible presumptive rules and argues that the hypothetical bargaining model provides a useful means to formulate such rules and ensure efficient outcomes. The basic objective of hypothetical bargaining analysis is to ascertain how the parties in question would have dealt with specific issues had they

[11] Companies (Tables A to F) Regulations 1985 (S.I. 1985 No. 805).

[12] (1889) 14 App. Cas 525.

addressed their minds to them at the outset of their relationship. Cheffins explores the possibility of applying a generalised version of the model to determine on what terms the various categories of company participant would contract with one another under ideal bargaining conditions.[13] He uses this analysis to criticise the Takeover Code's emphasis on equal treatment of target shareholders, arguing that to allow discriminatory bids would benefit both investors and shareholders by reducing bid costs. Recognising that some target shareholders would inevitably lose out in a discriminatory bid, Cheffins wheels out the diversified shareholder who, by virtue of his shareholdings in several potential target companies, ought to win as often as he loses.

Thus, the takeover example only works if we assume that our hypothetical shareholders all hold well-diversified portfolios. This may well not be far from the truth in a market-place dominated by fund managers and institutional investors. However, care is required in using the model as it tends to endow each hypothetical category of actors with a set of homogenous characteristics (a point conceded by Cheffins) and, while it is a useful source of general propositions, it provides little or no guidance to those charged with the task of formulating detailed rules. Furthermore, the underlying assumption that takeover activity is a "good thing" in both a general and an economic sense is not something which is easily susceptible to empirical proof. Even so, there is some thought-provoking material on the relationship between hypothetical bargaining and express contractual terms (in, for example, articles of association and shareholders' agreements) and, in particular, on the question of whether the judiciary should defer to customised arrangements.[14]

His adoption of the hypothetical bargaining model suggests that, for Cheffins, company law should be concerned primarily with providing default rules which replicate hypothetical bargains and thereby reduce transaction costs. Such a system of flexible presumptive rules should maximise efficient outcomes. Those parties who still believe that there is more to be gained from private ordering should find it less costly to opt out of presumptive rules than to contract around mandatory rules. So, in contrast to the view that company law involves a quest to legitimise managerial power, the basic position taken is that company law should play a limited, facilitative role in which the efficacy of or justification for individual rules is evaluated according to efficiency criteria. Like Easterbrook and Fischel, Cheffins seeks to promote the utility of econom

[13] Bargaining conditions are said to be ideal if the contracting parties possess perfect pre-contract information, face low or no transaction costs and can safely assume that their contracts will be performed.

[14] This question is currently of considerable relevance in relation to shareholder petitions under the Companies Act 1985, s. 459. See, for example, *Re Saul D. Harrison & Sons plc.* [1995] 1 B.C.L.C. 14.

ic analysis. However, it is apparent that he does not share their fundamentalist zeal.

Cheffins has presented a complex analysis of the inner workings of companies and the part which company law can or should play in their regulation. His work can be used to buttress an effective critique of the corporatist view which sees company law as a narrow legitimising device concerned exclusively with the large public corporation. It should be required reading for regulators, in particular. In the epilogue to the book, Cheffins goes on the defensive, showing us that he is well aware of the limits of economic analysis. In particular, he admits that economic concepts suffer from problems of empirical verification and measurement. One might also criticise the ahistoricity of the neoclassical economics from which much of the analysis derives. Thus, neoclassical economics may itself need refining in the light of developments such as chaos theory and behavioural financial economics (the latter has serious implications for the efficient capital market hypothesis). A more general criticism is that some of the chapters read as if they were self-contained articles. Chapter 9, which explores whether the United Kingdom could put itself forward as the Delaware of Europe, is a case in point. There is also (to be expected in a book of its size) the odd glitch.[15] Writing from the perspective of someone who teaches company law to undergraduates and postgraduates, I do not envisage the book displacing standard texts like *Gower's Principles of Modern Company Law.* Nevertheless, one would like to think that, at the very least, chapters 2 and 5 will become required background reading. In terms of the wider academic and political debate about the nature of, and the justification for, corporate regulation, Cheffins's work looks set to prove very influential. The next problem for company lawyers is to work out how company law should respond to the challenges of a single global economy.

ADRIAN WALTERS*

[15] e.g. the misspelling of "Estmanco" (p. 337) and the misrepresentation of the power in section 4 of the Company Directors' Disqualification Act 1986 which is concerned with fraud during the winding up of companies rather than fraud in relation to their promotion or management as stated (p. 549).

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CRIMINAL LAW AND PRACTICE

Archbold: Criminal Pleading, Evidence and Practice (1997 edition), edited by P. J. RICHARDSON, London, Sweet & Maxwell, 1996, 3328 pp., Hardback, £165.00, ISBN 0-421-56670-1

This is the 49th edition of *Archbold*, published on the 175th anniversary of the first edition. The durability of the work, and the fact that it is an indispensable part of the library of all those with a serious interest in criminal law, means that the task of a reviewer is primarily to comment on significant changes in presentation and coverage rather than to indicate to potential purchasers whether this is a book worth buying. In this respect, the most noticeable change between this edition and its immediate predecessors is that it is published in a single volume. The previous six editions (since 1988) were in two main volumes (plus separate tables and index) and therefore were considerably bulkier. The reduction has been achieved by using thinner paper, reducing margins on each page, reorganising some material and omitting the treatment of some specialised and regulatory offences (such as those under the Trade Descriptions Act 1968). The reason for the change back to a single volume is not made explicit in the Preface, though there is reference to the objective of John Archbold himself "to compress the whole into the smallest possible compass consistent with perspicuity". Presumably, the intention is to make the work more portable, so that the itinerant practitioner can take it with him or her rather than having to leave it on the office or library shelf. This may well also be a response to the fact that *Archbold*'s main rival (*Blackstone's Criminal Practice*) is a single volume work.

The book which results from these changes is, however, still weighty in all senses of the word. It runs to over 3000 pages and weighs in at about two kilograms. As a portable reference work, it is therefore still of arm-stretching proportions. Nevertheless, it is now feasible for it to be carried in a briefcase or bag, which was not true of the previous six editions. Any concern, about the book's ability to stand up to heavy use, given the thinness of the paper, and the number of pages squeezed between the bindings, can be dispelled. Several months of heavy use have not resulted in any torn or dog-eared pages and the binding remains as solid as ever. The production is certainly of high quality.

Let us now turn from the outward appearance to the content. First, a minor gripe as to presentation. Is it really necessary to continue the convention that references to the Criminal Appeal Reports and the Criminal Appeal Reports (Sentencing) do not include the year of the case or the year in which it was reported? This is a long standing aspect of the house style but it is infuriating in

the extreme. The editor and publishers clearly recognise that the information is useful, since the book is supplied with a separate laminated card listing the volume numbers of these reports and the year of publication. Why not include it in the text? To do so would, of course, make the work longer. A prime target for excision to make space would be Appendix F, which devotes over thirty pages to the Channel Tunnel. The offences and jurisdictional issues which arise in relation to the Tunnel are no doubt interesting and complex but the material must be of dubious utility to the general run of criminal law practitioners. It seems surprising that this appendix has survived the "compression" process when, for example, the Trade Descriptions Act 1968 has been discarded as "too specialised".

An interesting addition to the appendices in this edition is a short treatment of some relevant articles of the European Convention on Human Rights (Appendix E). The main focus is on the "due process" aspects of Articles 5 and 6; the discussion being supported by a full range of references to decisions of both the Commission and the Court. This is useful and is likely to become more so once the Convention has been incorporated into English law. It would be helpful, however, if space could be found in later editions to take some account of other Articles which may have the potential to provide defences to substantive criminal law charges (eg Article 8 on "privacy", and Article 10 on "freedom of expression").

As to the substance of the main text, in its treatment of the major areas of criminal liability (offences against the person, offences against property, and the general principles and procedures applying to both), it remains comprehensive and authoritative. The draft indictments and the guidance on sentencing are particularly helpful, not generally being contained in standard criminal law texts (such as *Smith & Hogan*).[1] The book can be used as the first, and in many cases the last, port of call in checking points on specific legal issues. It is not, however, infallible, as the result of the following test shows.

Imagine that a practitioner is faced with the topical issue of indecent material being transmitted over the Internet and wishes to explore the criminal offences that might be committed by engaging in this activity. This might be with a view to deciding what charges, if any, should be pursued, or what advice to give to a client who is under investigation. What help does *Archbold* give? The index, perhaps not surprisingly, contains no reference to the Internet. The only mention of computers is in relation to the Computer Misuse Act 1990. Looking up "indecency" leads to "obscene libel" and to "obscene publications" generally. Again, however, the index does not, under "obscene articles" or

[1] Smith and Hogan, *Criminal Law*, 8th ed., J. C. Smith (Butterworths, 1996).

"obscenity", contain any reference to electronic publication of such material. Both "radio" and "television" receive a mention, but no later technology. The most promising entry looks to be "forms of publication" under "obscenity". This directs the reader to paragraph 31-73. This paragraph, however, turns out to be concerned mainly with the issue of consecutive publications. The previous paragraph sets out s.1(3)(b) of the Obscene Publications Act 1959 which, following amendment by the Criminal Justice and Public Order Act 1994, provides that the transmitting of electronically stored data constitutes a publication. This development in the law is not, however, commented on in the text.

It may be that, in future editions, a reference to the decision in *R* v *Fellows*[2] (which came too late for inclusion in this edition), will alert the reader to the possibilities in this area. At the moment, however, there is no guarantee that the practitioner will find the relevant bit of the Obscene Publications Act and it is even less likely that he or she will discover the Protection of Children Act 1978 which is relevant to the electronic transmission of indecent photographs (including computer images appearing to be photographs) of children. The conclusion must be that *Archbold* is of limited assistance to the practitioner seeking help on the issue of "Internet indecency". This conclusion is not, however, intended to be a criticism of the indexer. She can only provide links to what is in the text and it is the text that is lacking material in this area. It should also be noted that *Blackstone's Criminal Practice* does no better on the above test (though it does have a brief reference to *Fellows*).

The unhelpfulness of *Archbold* in relation to the specific issue outlined in the previous paragraph is not intended to be a major criticism. Anyone seeking guidance and reassurance in relation to the main areas of criminal liability, and an indication of the relevant case law, will generally find what they are looking for. It is in the nature of the work not to suggest solutions to novel problems but rather to deal with issues that have arisen and, in particular, those which have received consideration in the appellate courts. This it does very well. Both old friends and new acquaintances of the book will find it reliable and helpful in these areas.

Overall, then, this edition of *Archbold*, in its revised one-volume version, can be warmly welcomed. The fact that this work is now published simultaneously on paper and in CD-ROM format is a very important bonus. Electronic publication is the best long-term answer to providing inevitably bulky books in a manageable format. Such a development should ensure that *Archbold* survives for at least another 175 years.

2 [1997] 2 All E.R. 548

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DAMAGES FOR PERSONAL INJURY

The Damages Lottery, by P. S. ATIYAH, Oxford, Hart Publishing, 1997, 193 pp., Paperback, £7.99, ISBN 1-901362-05-1

Patrick Atiyah is a distinguished academic who has written extensively on the law of contract and tort. However, this book is of a different kind. Rhetorical in style and aimed at the lay reader, it requires no prior knowledge of the law.

Although there are brief excursions into "pure economic loss" and the law of contract, the main aim of the book is to question the way in which damages for personal injury claims are awarded within the present tort system. Atiyah's basic thesis is that the tort system is wasteful and a burden upon the public purse. He sees the recovery of compensation as unwelcome paternalism, encouraging what he refers to as "the blame culture".[1] This flavour emerges at the outset: "In recent years actions for damages for injuries, real or imagined, appear to have become far more common".[2] When he uses the word "imagined", it is doubtful whether Atiyah is referring to those occasional cases where people suffer from pain or other symptoms which have no organic cause (these "factitious disorders" are well-documented in the medical literature). The more likely interpretation is that "imagined" means at best "exaggerated" or at worst "faked". Such inflammatory assertions, made without more, can only damage the serious point at the heart of this book.

It may be thought that Atiyah's argument sits most comfortably at the right of the political spectrum. However, he is at pains to point out that the present system favours the well-off. An example of this is the way in which pecuniary loss is calculated in personal injury claims. In fatal accident claims, for example, there will be no reduction in damages to take account of life insurance or pension benefits. A deceased's spouse may recover twice over and the spouses of the very wealthy may recover a lot of money twice over.[3] Atiyah also stresses the point that many of those claims which are not met by insurance companies will be met out of public funds.

The first part of the book examines what Atiyah describes as the "stretching" of the law by judges when faced with cases not falling within the confines of previous case law. This stretching has taken place, he argues, because of judicial sympathy for plaintiffs and knowledge that, usually, it will

1 P.S. Atiyah, *The Damages Lottery* (Hart Publishing, 1997), at p. 47, for example.

2 *Ibid.*, at p. 2.

3 *Ibid.*, at p. 19.

not be the defendant, but an insurance company, who will pick up the tab. Two of the examples he gives are of the "egg-shell skull rule" (why, should the defendant be responsible for the unforeseen vulnerability of the plaintiff?) and liability for omissions (the failure of local authorities to repair roads imposes an extra financial burden, with the result that expenditure on such things as schools is inevitably reduced).

Atiyah also cites examples of statutory provisions which have stretched the law: the law relating to contributory negligence (someone substantially to blame for his own injuries can still recover damages from elsewhere),[4] contribution amongst tortfeasors (all the damages can be recovered from one tortfeasor - "*cherchez l'argent*" says Atiyah[5]) and the right to recover damages from one's spouse. In the last case, he says that all that is necessary is for a spouse to say he was driving carelessly and, in Atiyah's words, "the trick is done". Both spouses can "laugh all the way to the bank".[6] As an afterthought, he adds, somewhat incongruously, that some injuries are so serious that there can be no cause for rejoicing.

By the time Atiyah comes to consider mental injury claims, it comes as no surprise to find that he has serious reservations. Whilst not denying the existence of severe mental disorder, he is suspicious of the process of psychiatric diagnosis. He claims that giving perfectly natural conditions such as depression, inability to sleep and so on, fancy names like "post-traumatic stress" does not actually demonstrate that they have a real, objective existence. He notes, however, that judges, striving not to appear old-fashioned fuddy duddies, are naturally persuaded by the doctors to the contrary.[7]

Atiyah points out that judges have steadily increased the ambit of tortious liability within the field of negligence. Whilst it is accepted that up until the 1980s there was an expansion of liability, Atiyah does not tell the lay reader that the trend has not continued unabated.[8] Furthermore, the sympathy of judges has not persuaded them to remove some of the most arbitrary distinctions in tort law in the area of nervous shock.[9]

Atiyah contrasts the award of damages when tortious liability can be established with the many cases of injury and disease which are not compensatable. Clearly it is difficult to reconcile the tort system with the goal of adequate provision for victims of all disease and accidents howsoever

[4] *Ibid.*, at p. 38.

[5] *Ibid.*, at p. 42.

[6] *Ibid.*, at p. 2.

[7] *Ibid.*, at p. 61.

[8] See for example, *Caparo Industries plc* v. *Dickman* [1990] 2 A. C. 605, *Murphy* v. *Brentwood District Council* [1991] A. C. 398, *Alcock* v.*Chief Constable of South Yorkshire Police* [1992] 1 A. C. 310.

[9] *Alcock* v. *Chief Constable of South Yorkshire Police, ibid.*

caused. However, the traditional justification for a system largely based on fault has rested on a variety of arguments relating to, amongst other things, accountability, good practice and deterrence.

As to accountability, Atiyah acknowledges that there is a public interest, for example, in discovering the cause of a medical accident but maintains that a negligence action is a poor vehicle for investigation. He points out that a timely payment into court can remove the matter from judicial scrutiny unless the plaintiff is willing to risk incurring substantial costs.[10] This is an accurate observation but it is by no means clear that it undermines the principle of accountability (as opposed to weakening its effect) and it may underestimate the effectiveness of creative litigation in bringing actions before the court in the first place. Linked to accountability is good practice. One underlying assumption of the tort system is that, by a finding of negligence, the tortfeasor will learn from the experience and take steps to avoid future mistakes, thereby avoiding future injuries. Atiyah's response to this is to propose the introduction of a new criminal offence of recklessly endangering the life of others.[11] Presumably the presence of recklessness would be decided in accordance with general principles[12] and the majority of wrongdoing falling short of recklessness would, therefore, go unprosecuted.

Given that he favours the abolition of vicarious liability (it gives rise to laxity in the attribution of blame as the employee knows that the employer's insurers will pay),[13] it must be assumed that either employer or employee would be prosecuted depending upon who was primarily liable. It must be asked whether this would give rise to conflicts between employer and employee. Also, given the (usual) inequality in the balance of power in the employment relationship, it could give rise to scapegoating. For example, witness the alacrity with which consideration was given to a prosecution for manslaughter of the train driver in the recent Southall crash.[14]

Whilst it is clear that the tort system has shortcomings as far as good practice is concerned, it is, at least in part, due to the uncritical regard that judicial opinion has for the prevalent standards of care within the professions and other bodies. This is evidenced by the application of the notorious "*Bolam*

[10] *Op. cit.*, n. 1, at p. 170.

[11] *Ibid.*, at p. 174.

[12] *R.* v. *Adomako* [1993] 3 W. L. R. 927 and *R* v. *Caldwell* [1982] A. C. 341.

[13] *Op. cit.*, n. 1, *at p. 77.*

[14] *The Times*, 20 September 1997.

test",[15] which favours a "standard-reflecting", rather than a "standard-setting" approach by the courts.

As to deterrence, Atiyah makes two germane, but not entirely consistent, observations. First, the way in which insurance premiums are calculated means that they are not increased significantly in relation to claims made, therefore undermining the principle of deterrence. Secondly, he states that the tort system may "over deter" and lead to the practice of, for example, defensive medicine.

Atiyah examines a number of options for reform[16] (e.g. a national accident compensation plan, which he rejects on the grounds of cost and bureaucracy) and finally favours the introduction of a scheme of first party insurance. This, he states, would be left to the free market. People would choose the risks against which they wish to guard and the level of compensation which they require. This proposal is dealt with in the last five pages of the book with little consideration of its potential flaws. For example, the effect upon poor people is dealt with by the assertion that their motor insurance would be cheaper and the statement that "some state social security safety net will still be needed for those who are not otherwise insured at all". The underclass who are losing out in an increasingly privatised world of health insurance and pension provision would, it seems, lose the protection of the common law too.

There are also a few minor points which could be made. Although it is not a book aimed at lawyers, it would have been useful if names and citations has been given for the cases to which reference is made. Secondly, there are some statements which are misleading. For example, Atiyah, referring to conditional fees, writes that "given how easy it is to get legal aid for most damages claims, it is only too likely that the ones taken on the 'no win, no fee' basis, will be the least promising cases where legal aid is refused".[17] Here, Atiyah fails to appreciate that legal aid is frequently unavailable, not because the case fails the "merits" test, but because legal aid is only available to those on very low incomes. He also talks about the high level of damages in the United States[18] without pointing out that this is due, at least in part, to the fact that, in the United States, punitive damages are awarded much more frequently.[19]

The book is highly readable, written without pretension or pomposity, and contains many incisive and pertinent observations. Furthermore, it is to be

15 *Bolam* v *Friern Hospital Management Committee* [1957] 1 W.L.R. 582.

16 *Op. cit.*, n. 1, Chapter 8.

17 *Ibid.*, at p. 27.

18 *Ibid.*, Chapter 1, for example.

19 See e.g. Fleming, *The American Tort Process*, (Clarendon Press, 1988).

welcomed as a breath of fresh air amongst the smog of academic legal literature. If more academics of Atiyah's stature could be persuaded to write for a wider audience, serious debate might be moved into the public forum currently occupied by spindoctors and journalists rather than confined to the closeted specialisms of academic journals. It makes a provocative read for the lawyer as well as the lay person and would serve as a stimulating introduction to tort law for the student, as long as an appropriate caveat were issued. It is clear that there is much that is arbitrary and inconsistent within the tort system. Perhaps a potboiler such as this is needed to open up debate.

KAY WHEAT *

OFFSHORE BUSINESS CENTRES

Offshore Business Centres: A World Survey, by MILTON GRUNDY, London, Sweet & Maxwell, Seventh Edition, 1997, xxvii and 222 pp., Hardback, £69.95, ISBN 0-421-58590-0

A major characteristic of the twentieth century has been the gradual breakdown of barriers to international trade and investment. As individuals have seen the shopping lists of their national governments get more expensive, demanding greater levels of expenditure on sophisticated weaponry, medical techniques and social care for a growing number of elderly people, so too have they observed a significant increase in levels of personal taxation. This position has undoubtedly resulted in a shift in investment to the offshore world. On this topic, anything resembling a statistic is exceedingly hard to find. Nevertheless, it is evident, even to the most casual of observers, that within the last thirty years there has been a significant increase in the number of jurisdictions offering mechanisms for tax saving. This trend has been evidenced in the evolution of this text.

When first published in 1969, Grundy's text gave basic information about fourteen jurisdictions in which zero tax entities could be established. Five further editions have been published within the last twenty-five years, each describing an increasing number of jurisdictions offering estate-planning services. This latest edition contains information on fifty-eight jurisdictions. It

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includes places which would certainly not have been regarded as tax havens ten or fifteen years ago. Bermuda and the Cayman Islands now have to compete with the Russian Federation, Lebanon and the "tiger economies" of Malaysia, Singapore and Hong Kong. As the number of offshore jurisdictions offering estate-planning services has increased, so too have the services available. For the practitioner, the reality of this explosion is that he or she will be required continuously to stay abreast of developments so as to keep pace with clients' demands.

Concisely and clearly written, my initial impression of Mr Grundy's book was that it represented a suitable medium of entertainment for my long journey home on the train to London each weekend. I was wrong. The book contains a deluge of information that requires careful analysis. While it is not an authoritative practitioners' text, as a handbook or source of instant reference, it is beyond criticism. Divided into five parts, the book's introduction contains a clearly tabulated outline of the characteristics of zero-tax, low tax, and European holding companies. This opening outline also offers a similarly comprehensive analysis of trust and tax treaties and jurisdictions for special purposes. The tables complement the more detailed description and analysis to be found later in the book.

Chapter One is an interesting and comprehensive review of the commercial facilities offered by each jurisdiction. Information on transport and communication links is presented in addition to an exposition of the history of each jurisdiction's legal system and details of its tax structure and exchange rate mechanism. Reference is made to the nature of a particular society, the political stability and even the weather of a jurisdiction.

The most successful aspect of the book is its description, in Chapters Two and Three, of the two most commonly used legal mechanisms for international estate planning, the offshore company and the offshore trust. The former can be used as a trading entity or as an instrument for holding shares and assets. The company is, as an almost universally accepted legal form, far less contentious as a medium of property management than the trust. As such, Mr Grundy's approach is to focus on some of the more difficult tax issues. Included within Chapter Two is an examination of investment within Mainland Europe (concentrating in particular on problems associated with investment in Switzerland), an investigation of methods used to resolve problems associated with non-capital depleting ventures and an analysis of models of corporate taxation adopted within the United Kingdom and in certain jurisdictions in South East Asia. Overall, the examination of these issues is clear and precise and offers a number of alternative solutions to the problems at hand. It enables a reader to approach more comprehensive texts with a basic understanding of

the concerns of an international estate planner.

The second legal instrument described is the offshore trust. This is analysed in Chapter Three. The author adopts the assumption that the reader has no prior knowledge of the trust as an institution. As a primarily Anglo Saxon creation, it is only within the last few years that civil law jurisdictions have passed legislation introducing the trust. Despite the existence of an international convention on the recognition and enforcement of trusts, this process has inevitably been flawed. The recent introduction of legislation legitimising purpose trusts within several of these jurisdictions represents a prime example and has intensified the debate as to whether this legislation, in fact, introduces trusts in the true sense. In addition, controversy has surrounded some of the non-fiscal functions for which the trust can be utilised.[1] Certain jurisdictions have rules that prevent a settlor from divesting more than three quarters of his or her estate beyond the family unit and provide mechanisms to retrieve property divested in this way. The trust, as a device that is particularly flexible, has been regarded in some quarters as a significant threat to the *ordre publique* of jurisdictions with such rules. Such problems created a major stumbling block in the debate that preceded the Hague Convention of the Recognition and Enforcement of Trusts and resulted ultimately in the inclusion of Article 15 within the Convention. This provision seeks to ensure that one jurisdiction's trust law does not override another's mandatory rules of succession. Its effect is to place a greater legal emphasis upon the capacity of an individual to effect a specific disposition. This subject receives thorough analysis in Grundy's chapter.

Thereafter, the author proceeds to examine, in detail, many of the unique features of the offshore trust. These include the function of the protector, the use of vacuum trusts, the ability of trustees to add additional beneficiaries to the trust, the migration of trusts, and the practical value of other related property holding devices found in civil law jurisdictions. The analysis is comprehensive, clear and unambiguous.

Chapters Four and Five deal with some of the more complex aspects of international estate planning, focusing in particular upon methods of circumventing the two primary criteria for taxability, residence and income. The discussion of the residence criterion is directed towards making the lawyer aware of the dangers which clients may face when conducting business, and spending time in a second jurisdiction, although the benefits of temporary residence are also examined. The section examining the manipulation of an

[1] Asset protection is a non-fiscal function of the trust that has resulted in concern in both common law and civil law jurisdictions. Briefly mentioned by the author, debate has mainly centred upon insolvency aspects of this problem.

individual's source of income focuses upon strategic transaction structures which are throughout described in generalised terms so as to take into account diverging rules within this area.

Overall, the text was a pleasure to read. As a general guide, it will certainly be of interest to anybody involved in offshore finance. It presents complex information but does not overwhelm. It is a shame that the book's structure, with its emphasis upon unpalatable tabulated information, may distance it a little from the general audience that it seems intended to serve. To some extent, it is left in "no mans land", the space between the academic text and the volume of general interest.

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