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EDITORIAL

THIS IS THE FIRST issue of the Journal since the establishment of its Advisory Board and it is a great pleasure to thank the eminent judges, practitioners and academics who have so kindly agreed to join the Board. We are sure that their advice will help to keep the Journal rigorous, relevant and lively. There is, after all, much to write about. The coming into force of the Civil Procedure Rules 1999 and the rapid progress through Parliament of the Access to Justice Act challenges this generation of lawyers to adapt to change as almost never before. Judges, practitioners and academics alike are working to meet this challenge and the Nottingham Law School is no exception. As well as ensuring the continuing excellence of the School's degree courses and of the Legal Practice Course and Bar Vocational Course, the School's staff have been in great demand to provide advanced "Woolf training" for law firms and others. This constructive dialogue between the School and the profession, jointly grappling with the implications of reform, reflects the fundamental philosophy of the School - a School which finds excitement in developing new ideas, which underpins all of its activities with scholarship and intellectually rigorous thinking, but which is willing, indeed proud, to learn from the practising lawyers with whom it engages. This philosophy, which has informed the School's reputation as a "lawyers' law school", is one in which we take considerable pride. It does not deny that the study of law at undergraduate level can provide an excellent liberal education equipping law graduates to undertake a wide range of non-legal careers. It does, however, assert a respect for the practice of law – and for practitioners of law- and for the intellectually demanding task of informing policy and practice in the real world. This has not always been the hallmark of the academic lawyer. Indeed, given the new found prominence of procedural law some distinguished scholars have highlighted the lack of attention which academia has, with some honourable exceptions, until recently given to the real world of practical lawyering. The same voices express concern at the "hostility" of the profession to the claims of the older universities to be able to contribute to the development of the profession itself. This is all so sad. Indeed the perceived tension between "research-based" universities and the demands of practising lawyers is really rather curious since more than ever the profession demands lawyers with the very intellectual acuity, toughness and discipline with which University Law Schools ought to be equipping their students. All excellent legal professional education and training therefore needs to be based within an intellectually challenging environment, an environment that a lively research culture should surely sustain. Research means more, however, than merely churning out a full quota of papers for the purpose of the Research Assessment Exercise. It also means carrying out work – such as the projects which John Peysner and others within this Law School's Centre for Legal Research have conducted over the last few years for the Woolf Committee (the Church House Conference), the Lord Chancellor's Department (Piloting the Fast Track) and the Association of British Insurers (Champerty and Conditional Fees) – which informs policy and public debate. It also means creating a climate within which the new ideas developed by such work can inform courses, especially vocational training courses. If the perceived mismatch between the professional ambitions of the older "research-based" universities and the demands and expectations of the profession is far from inevitable, why should it be felt so keenly by at least some distinguished academics? Perhaps the supposed hostility of the profession goes back to the practical lawyer's own view of the quality (or lack of quality) of his or

her own legal education and the extent to which it equipped him/her for the demands of the real and pressurised world of practice. Academics should at least pause to reflect upon that uncomfortable possibility. Equally, however, it is possible that some academic lawyers, with their traditional and perhaps necessary emphasis on doctrinal law, have (notwithstanding the development of academic movements such as socio-legal studies, critical legal studies etc.) lost sight of the fact that the law as a living organism exists primarily through the activities of practising lawyers and of the judges. The preoccupations of such people for whom, for example, procedural law has always been more important than for the academic, can help inform academics and lead them to research into fields where their work can have the dual distinctions of being intellectually excellent *and* practically influential. A concern with the practical world of lawyering can therefore lead to distinguished and important research. For the academic to understand the intellectual problems arising in the world of practical lawyers, however, he/she must first make the effort to understand the practical lawyer. The academic will have no credibility with the profession, and no influence upon it, if he/she demonstrates a failure to comprehend, or a detachment from, the professional world within which practising lawyers function. Such disengagement fatally undermines the academic's claim to influence the profession and, in particular, to be equipped to provide training for its new entrants and established members. For Nottingham Law School, therefore, intellectual distinction combined with an understanding of practising lawyers and of the practical world within which the law operates are essential to its mission. It is therefore a matter of particular pride that the Journal's Advisory Board should have the benefit of the insights both of distinguished judges and practitioners and of eminent legal academics. It is also a matter of pride that in the last few months the School has appointed to fractional Chairs three internationally reputed scholars, both with their feet firmly planted in the practical world. We warmly welcome to the Law School Professor Mark Findlay (who continues to be a Professor at the University of Sydney); Professor Stephen Tromans (a practising member of the Bar and lately Head of the Environmental Law Department of Simmons & Simmons); and Professor Richard Butler (a partner in Norton Rose). The presence of such distinguished scholars and their contribution to our thinking about legal education and research will make a major contribution to the School's growing reputation. We hope that the Journal itself will also contribute in that regard by disseminating stimulating thinking about a wide range of legal issues. Many thanks are due to those who have contributed work to the current issue and to those who have kindly acted as referees. Thanks too to our advertisers and to the members of the Editorial Board without whose efforts the Journal could not exist. So far as future issues are concerned, contributions from colleagues from other Universities or from practitioners are, as ever, most welcome.

PETER KUNZLIK, Editor.

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EVENT-TRIGGERED FINANCING OF CIVIL CLAIMS: LAWYERS, INSURERS AND THE COMMON LAW

ADRIAN WALTERS * *and JOHN PEYSNER* **

INTRODUCTION

ON 18 OCTOBER 1997 the present Lord Chancellor, Lord Irvine of Lairg QC spoke at the Annual Conference of the Law Society in Cardiff on the subject of legal aid. The speech stunned his audience. He announced that the legal aid expenditure train which had picked up speed in the 1960s and raced through the signals in the following three decades was about to hit the buffers. Whilst a review of legal aid had been signalled in opposition,[1] few had anticipated that the Government might be prepared to "think the unthinkable". However, the Lord Chancellor's key announcement was that the Government intended to withdraw legal aid support for all money and damages claims and radically extend the ambit of the conditional fee regime to allow such claims to be supported instead by lawyers offering their services on the basis of "no win, no fee".[2] The withdrawal is to start with personal injury litigation.[3] Thus, the Cardiff announcement marks the beginning of the end of an era which has seen legal aid emerge as the principal means of enabling private citizens of limited resources to bring civil claims and heralds a radical reduction in the scope of state-funded access to justice.[4] In March 1998, the Lord Chancellor's Department followed up the announcement by issuing a consultation paper, *Access*

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1 See Irvine, "The Legal System and Law Reform under Labour", in Bean (ed.), *Law Reform for All* (Blackstone Press, 1997)

2 The Government describes this rhetorically as a "refocusing" of legal aid which will remain available in housing claims, judicial review proceedings and to support eligible defendants in money or damages claims. A system of block contracting at fixed prices is favoured as a means of controlling legal aid expenditure rather than an overall cap. Speaking at the Bar's annual conference in September 1996, Lord Irvine said: "Cost-capping...is unattractive in principle, because legal aid would cease to be a benefit to which a qualifying individual is entitled...". Zander, (1998) 61 M.L.R. 538, 541 describes this "control not cap" rhetoric as disingenuous.

3 Personal injury litigation includes claims arising from clinical negligence. The Government later agreed to continue supporting clinical negligence claims for the short term but remains committed to withdrawing legal aid for such cases: see L.C.D. Consultation Paper, *Access to Justice with Conditional Fees*, March 1998, at 3.16. It is intended that most personal injury cases will be withdrawn from the scheme, an intention reflected in the Access to Justice Act.

4 Personal injury litigation seems, at first blush, to be a bizarre initial target for a public expenditure cut as the net expenditure after recovery of fees has been small or non-existent. However, as we note below in the main text, it was an ideal test bed for creating a market to support insurance products.

to Justice with Conditional Fees, cut of similar cloth. With effect from July 30, 1998, conditional fees were extended to cover all civil claims for money or damages by statutory instrument.[5]

This article does not aim primarily to examine the policy implications of the Government's approach.[6] Our purpose is broadly two-fold. First, we seek to show how the Cardiff announcement has led to the emergence of an environment in which the support of litigation by lawyers and insurers through *event-triggered* funding arrangements is strongly favoured.[7] If this culture-shift in the funding of litigation is to be carried through then it depends on the flowering of insurance support for litigation. Historically, there has been a limited market in legal expenses insurance in the UK. What is needed now is not only an expansion of that existing market but also the development of a flourishing market in innovative insurance products specifically tailored to cover the client's potential liability for his opponent's costs (so-called "after the event" insurance).[8] Secondly, we seek to explore the response of the common law to this shift towards a culture in which greater emphasis is placed on speculative litigation concentrating attention on the prohibitions against maintenance and champerty. These ancient doctrines are broadly antipathetic towards private support of litigation by non-parties. It is contended that maintenance and champerty still operate as a latent and residual legal restraint in the brave new world of event-triggered financing. This is precisely because the new arrangements give non-parties, in the form of lawyers and insurers, a leading role and a greater interest than ever before in litigation outcomes. At the same time, in two important recent cases discussed below,[9] the courts have looked to rationalise maintenance and champerty and embrace event-triggered financing at common law in a way which arguably extends the scope of legitimate fee arrangements beyond the realm of the statutory conditional fee regime.

The article divides into three sections. The first section outlines the basic system of cost recovery in England and Wales and describes briefly the sources of funding available for litigation during the post-war legal aid era. The second section charts the legalisation of conditional fee agreements from their inception to the present day. Also discussed is the accompanying development of "after the event" and other new types of insurance for litigation. The final section [10] charts the response of the courts to shifting patterns of litigation funding and considers the extent to which the doctrines of maintenance and champerty may operate as barriers to the new arrangements. The recent case law developments alluded to above and the likely impact of the Access to Justice Act are also considered.

[5] The Conditional Fee Agreements Order 1998, S.I. 1998/1860.

[6] There has been an avalanche of comment from interest groups, mostly critical. For an appraisal of this and other aspects of the Government's civil justice reforms see Zander (1998) 61 M.L.R. 382 and 538.

[7] A discussion of the financing of litigation is bedevilled by a series of Shavian misunderstandings between English and United States lawyers with the result that terms like "costs" and "contingency fees" have accumulated a variety of different meanings and implications on either side of the Atlantic. The neologism "event-triggered" financing was coined (by Peysner) to cover a range of contingency-type arrangements, including conditional fees, which have developed in a system (like ours, but unlike the US) that incorporates *inter partes* costs as a norm. These arrangements share the characteristic that the lawyer's fee is wholly or partly dependent on the happening of an event, normally winning or successfully defending a case.

[8] It is clear from the March 1998 consultation paper, *Access to Justice with Conditional Fees,* that the Government recognises the need for such a wider insurance market: see *e.g.* paras. 2.13, 4.13.

[9] *Thai Trading* v. *Taylor* [1998] Q.B. 781, [1998] 2 W.L.R. 893, [1998] 3 All E.R. 65; *Bevan Ashford* v. *Geoff Yeandle (Contractors) Ltd* [1998] 3 W.L.R. 172, [1998] 3 All E.R. 238.

[10] Drawing on work undertaken by the authors for the Association of British Insurers in the context of the Government's proposal to extend conditional fees.

THE INDEMNITY PRINCIPLE AND THE FUNDING OF ACCESS IN THE ERA OF LEGAL AID

The "English Rule" of Costs Recovery

The "English rule" of costs recovery rests on two simple and inter-related principles: a successful party in litigation is normally entitled to recover all or a substantial part of his legal costs from the unsuccessful opponent (the "loser pays" principle)[11] but only in circumstances where he is under a contractual obligation to his own lawyer to meet those costs (the "indemnity" principle).[12] Thus, an order for so-called *inter partes* or "party and party" costs wholly or partly indemnifies the payee against his own liability.[13] This offers a stark contrast to the "American rule" where each party bears his own costs irrespective of the outcome of the litigation.[14]

The standard justifications offered for the "loser pays" principle are that it compensates the winner, that it acts as a deterrent against plaintiffs who might otherwise be prepared to bring dubious claims and that it tends to induce the parties to reach settlement rather than face the possibility of losing at trial and an adverse order for costs.[15] It was not always so. Before the Statute of Gloucester 1275 (6 Edw. 1, c. 1) successful parties did not recover their costs.[16] This statute allowed winning plaintiffs, but not defendants to recover and, as has been the experience recently in the case of the failed Benzodiazapan group litigation, defendants were loud in complaining that the system was one-sided.[17] The result, set against a background of rising litigation,[18] was legislation in 1607 (4 Jac. 1, c. 3) to put the defendant on equal terms. [19]

The indemnity principle was developed by the courts. In *Gundry* v. *Sainsbury*,[20] the Court of Appeal held that a successful litigant was not entitled to recover "party and party" costs because his solicitor had agreed to act without payment. He was not entitled to an indemnity

[11] Strictly, costs are at the discretion of the court: The Supreme Court Act 1981, s. 51(1) (High Court), C.C.R. Ord. 38, r. 1(2) (county courts) and see now r. 3 of the costs rules contained in the Civil Procedure Rules (the new unified rules) which were introduced in April 1999. Even so, the current position is that the discretion is generally exercised so that costs "follow the event" (R.S.C. Ord. 62, r. 3(3); C.C.R. Ord. 38, r. 1(3)). A party may, subject to his resources, spend unlimited amounts on mounting his case. However, the usual order, if that party succeeds, is that the loser will pay his costs on the standard basis of taxation (R.S.C. Ord. 62, r. 12(1)) *i.e.* reasonable costs. The effect is that the winner normally only recovers about two-thirds of his total costs on the "party and party" basis, and this forms a discount from the total "solicitor and own client costs" which he is obliged to meet in full (see note 24). As such, the courts have often characterised an order for "party and party" costs as an incomplete indemnity: see *e.g. Gundry* v. *Sainsbury* [1910] 1 K.B. 645, 651. "Costs" in England includes the lawyer's charges for handling the matter from initial instruction to disposal and disbursements. Disbursements are outpayments, *e.g.* court fees, expert witness fees and other expenses. Whilst the practice in the US varies, where "costs" can be recovered they are generally restricted to expenses and attorney's fees at trial.

[12] "Party and party" costs are awarded on the basis that the paying party reimburses the receiving party for costs which he is *liable* to pay to his solicitor i.e. the latter is indemnified *up to* the amount of his own solicitor's charges: see M. Cook, *Cook on Costs*, 2nd ed., (Butterworths, 1995), p. 96. Thus, "the indemnity principle is dependent on the contractual relationship between solicitor and client which creates the obligation to pay the solicitors": *ibid.* The future of the indemnity principle was the subject of a further recent consultation paper issued by the Lord Chancellor's Department entitled *Controlling Costs* (May 1999).

[13] The indemnity principle should not be confused with the indemnity basis of taxation which is one aspect of the taxation regime used by the court to determine the *amount* of costs which can be recovered on a "party and party" basis. Indemnity costs are higher than "party and party" costs taxed on the standard basis and should cover a party's entire "solicitor and own client" bill.

[14] This is often referred to as the "personal liability" rule of costs. Some US jurisdictions have shown interest in adopting the "English rule" as a way of putting a break on litigation. For example, it was adopted in Florida in a failed attempt to limit the escalation of medical malpractice suits: see Pdinsky & Reibinfled (1988) 27 *Journal of Legal Studies* 141. For critical argument suggesting that the personal liability rule fails to offer full compensation to the wronged party and encourages spurious nuisance claims see Cheek, "Attorney's Fees: Where Shall the Ultimate Burden Lie?" (1967) 20 Vanderbilt L.R. 1216. There is a brief, but useful discussion of the US position in the Green Paper *Contingency Fees*, Cm. 571, January 1989.

[15] See *e.g. Ridehalgh* v. *Horsefield* [1994] 3 W.L.R. 462, 471.

[16] Goodhart, "Costs", (1929) 38 Yale L.J. 849, 852.

[17] See generally, Napier, "Group Litigation: Past Present and Future [1993] Nott. L.J. 1.

[18] For a discussion of the litigation "explosion" of the 1600s at a time of developing urbanism and economic activity see Snape, "Sir Thomas Walmesley – An Elizabethan Judge" [1994] Nott L.J. 116. In many respects the pressures on scarce court resources of those times find an echo in the current debate over Lord Woolf's reforms.

[19] What if the losing plaintiff was indigent? The defendant could assuage his temper, if not his pocket, by asking the court to order the plaintiff to be whipped. In a typical example of English pragmatism, this practice fell into disuse and was discontinued in the seventeenth century: see Goodhart, *op. cit.*, at p. 876 citing Holt C.J.'s refusal to countenance the remedy on the footing that "he had no officer for this purpose and never knew it done".

[20] [1910] 1 K.B. 645. See further, *Commissioner of Customs & Excise* v. *Raz* [1994] T.L.R. 623..

because there was no obligation to indemnify him against. If applied without modification, this principle would prevent a party supported by a trade union, mutual association or insurance company from recovering costs from an unsuccessful defendant. Cook suggests that two disbenefits arise from failing to allow recovery in these circumstances:

> (1) The defendant found to be at fault escapes liability for costs because of an accident of funding. As a result, the normal consequences for a defendant who has breached a legal duty do not follow.
>
> (2) Legitimate mutual or commercial support for litigation would be made more expensive to the community's detriment.[21]

A further disbenefit is that the prudent citizen who joins a mutual association or purchases insurance to cover the costs of going to law would save the wrongdoer money in advance!

The courts have grappled with this dilemma and found ways to allow "party and party" costs to be recovered without dislodging the basic principle. The case of *R.* v. *Miller & Glennie* [22] provides a good example of this. The defendant's employers had agreed to finance his defence to a criminal charge. He was acquitted and his solicitors sought to recover the defence costs from central funds. A question arose under the Costs in Criminal Cases Act 1973 as to whether the costs had been "incurred by" the defendant bearing in mind that his employers had undertaken to meet his "solicitor and own client" costs. The court held that this was a case in which both the employer and the defendant shared a dual liability in costs to the solicitor. The fact that the defendant was clearly the client of the solicitors raised a presumption that he was personally liable for their charges. Moreover, there was no express or implied agreement between the solicitors and defendant to the effect that they would not seek to recover their charges under any circumstances. Thus, the court accepted that the solicitors would have been entitled to look to the defendant for payment if the employers had failed to pay and, as such, the costs had been "incurred by" him for the purposes of the indemnity principle. *Miller & Glennie* illustrates how the courts have been willing to adapt the indemnity principle in circumstances where the successful litigant has received legitimate non-party support.[23] Whilst it is now possible to detect a slight move away from the full rigour of the "loser pays" aspect of the "English rule" in the Civil Procedure Rules,[24] the current tendency of the courts is to reassert the indemnity principle and explore ways of refining it further.[25]

[21] Cook, *op. cit.*

[22] [1983] 1 W.L.R. 1056, [1983] 3 All E.R. 186.

[23] For similar reasoning and outcome see *Adams* v. *London Improved Motor Coach Builders Ltd* [1921] 1 K.B. 495 (recovery allowed where action funded by trade union), *Davies* v. *Taylor (No. 2)* [1974] A.C. 225 (recovery allowed where successful defendant's costs were being met by insurers), *Lewis* v. *Averay (No. 2)* [1973] 1 W.L.R. 510 (recovery allowed where successful defendant's costs were being met by a motoring organisation). See also *Bailey* v. *IBC Vehicles Ltd* [1998] 3 All E.R. 570. For a case the other way see *British Waterways Board* v *Norman* (1994) 26 H.L.R. 232 though note that it has now been overruled by the Court of Appeal in *Thai Trading* (see below).

[24] These rules are an attempt, in the context of the Woolf reform process, to produce a single set of procedural rules for the High Court and the county courts. There is a parallel process dealing specifically with rules on costs. The new rules were introduced on 26 April 1999. In deciding how the court should exercise its discretion in relation to "party and party" costs, these rules require the court to have regard to all the circumstances of the case including the conduct of the parties and whether a party has succeeded on part of his case, even if not wholly successful. As such, they represent a modification of the "loser pays" aspect of the "English rule" because they move away from the current position where the court is required to exercise its discretion so that costs "follow the event".

[25] See *General of Berne Insurance Company* v. *Jardine Reinsurance Management Ltd* [1998] 1 W.L.R. 1231, C.A., *Nederlands Reassurantie Groep Holding NV* v. *Bacon & Woodrow*, April 21, 1998, unreported, C.A. The composite effect of these two cases is that the indemnity principle governs individual items in the overall "solicitor and own client" bill not the global sum and this is so whether or not the successful party and his solicitor have entered into a contentious business agreement as defined by the Solicitors Act 1974, s. 59. Thus, the winner is not entitled to recover on taxation an hourly expense rate for certain items of work if it exceeds the rates which he is contractually obliged to pay his solicitor and this applies even where the global sum claimed on taxation (including those items) is less than the total amount of his "solicitor and own client" bill. Certain technical aspects of these decisions have led some, including the Law Society, to argue that the indemnity principle should be abolished leaving the recoverability of "party and party" costs to be determined according to whether the costs were reasonably incurred: see the *Solicitors Journal* of 25 September 1998 at p. 854.

The Funding of Litigation in the Legal Aid Era

It is implicit in our discussion of the indemnity principle that the funding of litigation is generally a matter for the individual private client. At the end of the case the solicitor presents the client with a bill for his charges, normally calculated on the basis of an hourly charging rate, which may be met in full or part by monies recovered "party and party" from the unsuccessful opponent.[26] Thus, in going to law, the client risks picking up two sets of costs if he loses and a liability to meet any costs not recovered from the other side if he wins. Whilst affluent individuals and businesses may be in a position to meet such costs, those in the lower and middle-income brackets have found the costs of litigation, calculated at high hourly rates, to be prohibitive. [27] This difficulty has been ameliorated in varying degrees by the availability of the following alternative forms of support: legal aid, affinity group support and legal expense insurance.

Legal Aid

Since its inception in the late-forties, Civil Legal Aid has offered a unique system of state support enabling private citizens of limited means to gain access to the civil courts.[28] Whilst it has never been available for every conceivable type of civil claim,[29] it has represented an accessible source of funding for the average citizen and a major source of income for solicitors. As a demand-led enterprise it has become unpopular in a society that has witnessed a shift away from state subsidy and in the last decade there has been a sharp decline in the number of citizens who are financially eligible.[30] However, before the Lord Chancellor's fateful announcement, previous rationalisations [31] had not displaced it as a central source of funding for civil claims. Hitherto, the issue had been seen in terms of how we might *supplement* legal aid, not how we might replace it.[32] The scheme operates within the normal "party and party" costs arrangements with one crucial difference: a successful defendant is, in practice, prevented from recovering costs from the plaintiff personally [33] and can only recover from the "supporter", the Legal Aid Board, in very limited circumstances.[34] The *quid pro quo* for this protection is that the defendant must be advised that the proceedings are brought with legal aid.

[26] The hourly rate basis of charging is now ubiquitous in the English speaking world, replacing earlier concepts of bill "by weight", *i.e.* charging the client a global sum based on the perceived value of work assessed at the conclusion of the case.

[27] In Germany, lawyers' fees and the question of recoverability between the parties are fixed by law. This appears to offer clients more predictable and convenient access to the courts and has led to the development of a flourishing market for legal expenses insurance: see Zuckerman, "Lord Woolf's Access to Justice: Plus ca change..." (1996) 59 M.L.R. 773.

[28] Only natural persons are eligible for support: Legal Aid Act 1988, ss. 15(1), 2(10). Legal aid is not generally available to companies. The Court of Appeal in *R.* v. *Chester and North Wales Legal Aid Area Office (No. 12) ex. p. Floods of Queensbury,* [1998] BCC 685 scuppered an attempt to circumvent this bar. A company purportedly assigned the benefit of a cause of action in contract to an individual, F, who was financially eligible for legal aid. The assignment was held to be ineffective because of a prohibition on assignment in the contract. The company further claimed to be eligible for legal aid within Legal Aid Act 1988, s. 2(10) on the argument that it was pursuing the litigation in a fiduciary capacity on F's behalf. This contention was rejected as being a mere device. However, if the assignment to F had been effective, he might well have been eligible for legal aid to pursue the company's original claim. The argument that assignments of this nature should be regarded as sham simply because they enable the corporate assignor to benefit indirectly from legal aid and/or avoid an application for security for costs under Companies Act 1985, s. 726 was rejected by the House of Lords in *Norglen Ltd* v. *Reeds Rains Prudential Ltd* [1998] 1 BCLC 176, [1998] BCC 44.

[29] *E.g.* defamation proceedings have always been excluded.

[30] Even so legal aid expenditure has continued to escalate throughout the 1990s: see March 1998 consultation paper, *op. cit.* at para. 3.3. Commentators have sought to explain this apparent paradox by arguing that the expansion of legal aid has been driven more by the economic needs of the legal profession than by those seeking access to justice: see Cousins, "The Politics of Legal Aid" (1994) 13 C.J.Q. 111, Bevan, "Has There Been Supplier-Induced Demand for Legal Aid?" (1996) 15 C.J.Q. 98.

[31] Including *e.g.* withdrawal of legal aid support in undefended divorce proceedings.

[32] See *e.g.* Green Paper, *Contingency Fees, op. cit.*, para. 3.12.

[33] Legal Aid Act 1988, s. 17. The court will usually order the unsuccessful assisted party to pay the winner's costs but with the proviso that the order cannot be enforced without the leave of the court.

[34] *Ibid* s. 18.

Affinity Groups

Groupings such as trade associations, motoring organisations, members' clubs and trade unions routinely provide legal and financial services to their members. The scope of these services is variable. It may be limited to the group's core activities, *e.g.* insurance services provided by a motor racing club to its members enabling them to obtain specialist cover against racing accidents. It may be wider, as in the case of trade unions many of which offer legal support in relation to a variety of matters both in and outside the workplace. Whilst affinity group support for litigation is important, it suffers from two drawbacks: trade union membership is in decline and other affinity groups, as in the example of the motor racing club above, do not offer their members global coverage.

Legal Expense Insurance

Legal expense or "before the event" insurance has a long history and is widely used in continental Europe. Although many have cherished the hope that it might provide a useful means of supplementing legal aid for those just above the eligibility threshold,[35] it has had a relatively limited impact in the United Kingdom.[36] The predictability and relative low level of costs in jurisdictions such as Germany [37] together with the fact that inquisitorial courts carry out functions that would in England be the financial responsibility of the parties (such as the instruction of expert witnesses) makes them more attractive to carriers than the current open-ended arrangements here. "Before the event" insurance is rarely sold as a discrete product; it is normally bundled together with another type of insurance, such as motor or household cover, to offer "added value" to the insured. In 1996 about 3.7 million out of 22.5 million households had personal legal expense insurance added to their household cover with a premium income totalling £26 million. In the same year some 8.5 million motor vehicle insurance policies, out of 23.5 million written, carried additional legal expense cover enabling the insured to fund the pursuit of uninsured losses.[38] Businesses have been more amenable to the buying of "before the event" products to cover commercial cases whether as discrete products or through their affinity groups.[39] However, the level of available cover is relatively low with limits of £100,000 per claim and aggregate yearly limits of £500,000 the norm. As a result, these types of product tend to be purchased by small or medium-sized enterprises with larger companies usually pay their own way.

Cardiff Re-visited

The analysis above suggests that, as legal aid slowly declined, neither affinity groups nor legal expense insurance were likely to fill the gap; particularly for "middle England": too rich to qualify for state support and too poor to pay the hourly rates demanded by lawyers. Certainly, this was the view of the previous Lord Chancellor, Lord Mackay:

> I think legal expenses insurance...is a good thing and would like to see it develop, for example as part of the remuneration package of employees, but this is a matter for the commercial judgement of employers and the insurance industry, not for me, and I do not see it as likely to be of much more than marginal relevance in relation to legal aid in the foreseeable future.[40]

35 See *e.g. Final Report of the Royal Commission on Legal Services,* Cmnd. 7648, 1979 and generally White, "Legal Expenses Insurance" (1984) 3 C.J.Q. 245.

36 For a full discussion see Prais, "Legal Expense Insurance" and Gray & Rickman, "The Role of Legal Expense Insurance in Securing Access to the Market for Legal Services" in Zuckerman & Cranston (eds.), *Reform of Civil Procedure* (Oxford: Clarendon Press, 1995). It is noteworthy that the market is developing so rapidly that these essays contain no hint of the products discussed below in the main text.

37 Zuckerman, *op. cit.*

38 Source: internal L.C.D. briefing paper.

39 In 1996 250,000 policies were sold generating total premiums of about £20 million. Source: *supra* n. 38.

40 Speech to the Social Market Foundation in 1995 quoted by Rickman & Gray at p. 319.

The present Lord Chancellor's Cardiff speech must be viewed against this background. If the overall policy objective of the Lord Chancellor, no doubt influenced by HM Treasury, was and remains to reduce public expenditure and cap demand-led legal aid [41] then the ideal of equal access to justice for all would have to be pursued in a new way. A shock to the system was required to generate a new market for the financing of litigation. This may explain the apparent paradox that the first casualty of Irvine's assault on legal aid was its least expensive element: personal injury litigation.

Medical negligence cases aside, personal injury litigation supported by legal aid has generally been a success story for plaintiffs. The legal environment for this type of litigation is sanguine and most cases are settled. The effect of this is that the plaintiff has recovered costs from the loser, normally met by an insurer, whilst any balance of unrecovered "solicitor and own client" costs has been recovered out of damages through the operation of the statutory charge.[42] Thus, apart from their administrative cost and the financial implications of paying solicitors costs on account to cover work-in-progress, personal injury cases have not represented a major net cost to the taxpayer. However, personal injury litigation's inherent "plaintiff-friendliness" made it an ideal foundation on which to build a new type of event-triggered fee arrangement, the conditional fee agreement, backed by a new form of "after the event" legal expense insurance.

CONDITIONAL FEE AGREEMENTS AND NEW FORMS OF INSURANCE

Contingency Fees and Legal Recognition of Conditional Fees

A contingency fee arrangement is helpfully defined in the 1989 Green Paper on the subject as:

> One whereby a lawyer agrees that he will accept his client's case on the basis that he receives no payment if the case is lost, but that if it is won, he will be paid some percentage or share of the award made by the court.[43]

England and Wales, such arrangements have generally been regarded as illegal (on the ground of champerty) and unenforceable.[44] This historical antipathy towards contingency fees is reflected in the fact that, broadly speaking, solicitors and barristers have not been allowed to enter into full-blown contingency fee arrangements as a matter of professional ethics.[45] There are two standard objections to contingency fees:

> (1) They tend to produce a conflict of interest between lawyer and client. The lawyer's direct financial interest in the outcome of the case is said to affect his ability to give genuinely impartial advice e.g. he may be tempted to encourage early settlement against the client's interests.
>
> (2) They may encourage litigants to pursue unmeritorious claims leading to an explosion of litigation.[46]

Nevertheless, growing support for the idea that contingency fees could plug the gap for those in the middle income bracket who were ineligible for legal aid, could not call upon the support

[41] Despite protestations to the contrary: see the Lord Chancellor's speech to the House of Lords in December 1997 quoted by Zander (1998) 61 M.L.R. at bottom p. 541.

[42] Legal Aid Act 1988, s. 16(6).

[43] *Op. cit.*, para. 1.1.

[44] Main text below and see variously *In re a Solicitor* [1912] 1 K.B. 302, *Wild* v. *Simpson* [1919] 2 K.B. 544, *Haseldine* v. *Hosken* [1933] 1 K.B. 822, *Re Trepca Mines Ltd (No. 2)* [1963] 1 Ch. 199, *Wallersteiner* v. *Moir (No. 2)* [1975] Q.B. 373.

[45] Solicitors Act 1974, s. 59(2), Solicitors Practice Rules 1990, r. 8, Bar Council Rules, para. 211.

[46] Green Paper, *Contingency Fees, op. cit.*, para. 1.2.

of an affinity group and were not covered by legal expense insurance [47] led the Government to propose in the 1989 Green Paper the introduction of a "no win, no fee" arrangement. The proposal met with a favourable response and ultimately led to the enactment of section 58 of the Courts and Legal Services Act 1990. Section 58(3) provides that a conditional fee agreement ("CFA") relating to proceedings of a type specified in regulations made by the Lord Chancellor is not unenforceable.[48] A CFA is defined in section 58(1) as "an agreement in writing between a person providing advocacy or litigation services and his client which...provides for that person's fees and expenses or any part of them, to be payable only in specified circumstances...". The first regulations made under section 58(3) were limited in scope. CFAs were only permitted in three types of litigation: personal injury, insolvency and proceedings under the European Convention on Human Rights.[49] As indicated at the outset, the Lord Chancellor has now widened these categories so that all civil claims for money or damages can now be pursued under a CFA.[50]

CFAs owe something to US-style contingency fees in that they are event-triggered; the plaintiff's lawyer is only paid if the case is won.[51] However, they have two distinctive elements. First, if the client wins, the lawyer is allowed to charge a "success fee". This is calculated as a percentage increase of his normal charges [52] rather than as a percentage of the damages as in the USA.[53] Secondly, CFAs offer no protection against an order for the defendant's costs if the case is lost. In other words, the CFA regime does nothing to dislodge the "loser pays" principle. It has simply been grafted on to the existing system of cost recovery. The fact that under a CFA the plaintiff remains exposed to liability for the other side's costs was the inspiration for insurers to develop new "after the event" products targeted initially at the personal injury plaintiff.

"After The Event" Insurance

The term "after the event" insurance ("AEI") appears to present a paradox. How can insurance cover be obtained after the adverse event, such as an accident, has already occurred? This dilemma, which even created some resistance in the Lloyd's market as these products were being developed, was resolved by separating the consequences of the event from the event itself which is merely the trigger. The relevant consequences, *i.e.* who, if anybody, is legally liable, remain to be determined and the chance of recovering compensation becomes the insurable interest. As discussed above, the motivation for exploring such novel forms of insurance was generated by the introduction of CFAs. A party would derive little comfort from not having to pay his own lawyer if he was then bankrupted by his opponent's costs. The solution was to insure against the plaintiff's risk of having to pay adverse costs and his

[47] See discussion in White, "Contingent Fees: A Supplement to Legal Aid?" (1978) 41 M.L.R. 286, Scott, "The Green Paper on Contingency Fees" (1989) 8 C.J.Q. 97.

[48] For background to CFAs and a more detailed account of the applicable rules see Napier & Bawdon, *Conditional Fees: A Survival Guide* (London: Law Society, 1995), Cook, *op cit* chap. 28. Section 58(3) eliminates any scope for the loser to argue that a successful CFA party is not entitled to recover "party and party" costs on the indemnity principle.

[49] Conditional Fee Agreements Order 1995, S.I. 1995/1674.

[50] Conditional Fees Order 1998, S.I. 1998/1860. Family and criminal proceedings are excluded: Courts and Legal Services Act 1990, s. 58(1)(a), (10).

[51] *I.e.* settled or won at trial.

[52] This is limited by regulation to a 100% uplift on normal fees. To date success fees have not been recoverable from the loser on taxation of costs (although the Government proposes to allow recovery of success fees and any insurance premium under sections 27(6) and 29 of the Access to Justice Act). As such, they fall inevitably to be met out of damages. The Law Society recommends that solicitors should limit the amount of the client's damages that can be eaten up by the success fee to 25%. This cap is not mandatory: see Napier & Bawdon, *op. cit.*

[53] It is understood that US juries, aware of the ubiquity of contingency fees in personal injury litigation, routinely decide the damages award and then increase it by a third to cover the winning lawyer's fees. In any event US damages are higher than those in the UK offering the possibility of fair compensation for the plaintiff notwithstanding the lawyer's cut.

own disbursements using AEI.[54] Virtually all personal injury cases conducted under CFAs are supported in this way.[55]

The Government has adopted this model of CFA coupled with AEI as its model for all civil non-matrimonial claims. However, the problem with this in policy terms is that personal injury cases have their own dynamic which may not exist in other types of litigation. A number of points can be made. The substantive law is fashioned to give rights to individuals injured in the workplace, on the roads or through defective products etc. This makes the task of proving liability and securing a "win" more easy. Moral hazard - the risk of the claimant lying to the lawyer or to the insurer - is limited in personal injury litigation. It is hard to fake a broken leg for example, and requires courage to break one simply to recover compensation.[56] Finally, the Accident Line AEI scheme is a generic scheme requiring solicitors who join to obtain cover for all their CFA personal injury cases. This eliminates the danger of adverse selection whereby insurance is only obtained for riskier cases thus reducing the premium pool. It follows that plaintiffs have a low risk of losing a personal injury case with the result that such claims are attractive to insurers. The shift towards a policy of replacing legal aid with CFAs rather than supplementing it appears to have been mediated by the favourable development of AEI for use with the personal injury CFA.[57] Other types of litigation, such as contract disputes, may however be beset with moral hazard or the law may be uncertain. They are unlikely to attract a generic scheme and so adverse selection may be a factor. This all suggests that carriers will offer AEI to support CFAs if legal aid is withdrawn but the coverage may be patchy, the premiums high and there may be a reluctance to support cases which are less than racing certainties.[58] Some cases that would have been supported by legal aid because they satisfy the merits test [59] may not be pursued under the new system because the risk of having to pay adverse costs will dissuade the plaintiff. However, in global terms, the extension of CFAs should offer an increase in access to justice because most potential plaintiffs would have been ineligible for legal aid and unwilling, or unable, to put up their own funds. Many of these citizens may now be persuaded to bring cases [60] with or without insurance on the view that they must have a half-decent chance of winning because otherwise their lawyer would not be taking the case. Either way, the success of the new system depends heavily on the attitude of lawyers and insurers.[61]

"English Rule" Protection and "Stop Loss" Cover

Two developments need to be mentioned to complete this overview of the current insurance products available to protect parties and their lawyers against the adverse risk of litigation.

[54] Disbursements payable to third parties *e.g.* court and expert witness fees are due irrespective of a CFA arrangement with the solicitor and the client is still liable to meet them if he loses. The same is true of counsel's fees if counsel has not been engaged by the solicitor under a separate CFA.

[55] The main product is Accident Line Protect promoted by the Law Society which has covered about 30,000 CFAs between 1995 and 1998. Most of these cases would not have been conducted under legal aid because of financial eligibility limits.

[56] Even back injuries are susceptible to objective testing using equipment recently developed.

[57] Once the current proposal to withdraw legal aid from all personal injury claimants (save for medical cases and cases involving children) is implemented it appears that a sizeable market will be opened up to AEI in addition to the existing market for claimants ineligible for legal aid in any event. According to Legal Aid Board statistics a gross sum of approximately £55 million was expended on personal injury cases in 1995/96 alone (the net cost, taking into account costs recovered from the other side was much lower). Not all of the 76,500 or so personal injury cases (based on certificates issued) supported over that period would necessarily translate into new cases for the AEI market. Medical cases and child cases will continue to attract legal aid support whilst other cases may be too risky for lawyers to take on. Even so, it is clear that the potential size of the market for personal injury cases backed by CFAs and AEI is far from insignificant.

[58] This appears to have been the experience with CFAs in insolvency proceedings: see *Law Society's Gazette*, September 10, 1997, p. 11 and Milman & Parry, *A Study of the Operation of Transactional Avoidance Mechanisms in Corporate Insolvency* (GTI: Insolvency Lawyers' Association, 1998) which suggest that take up has been limited.

[59] Legal Aid Act 1988, s. 15(2).

[60] CFAs are, in principle, available for bringing or defending a case. For the impact of the Access to Justice Act see p. 21.

[61] AEI is also available to protect the unsuccessful party whose own costs are the subject of a *Thai Trading*-type arrangement (see main text *infra*).

First, AEI is available to a party to cover the adverse costs consequences of normal litigation, that is, where the loser must pay his own lawyer's bill and the bill for the other side. This type of insurance cover is relevant where the party's lawyer is not prepared to take the risk of event-triggered financing and the client will not risk the prospect of paying both his own and the other side's costs. As the potential risk is, in principle, at least twice as high, a premium for this type of cover will inevitably be higher than the premium for a CFA.[62] Some of these products also allow the lawyer to draw down a percentage of his bill as the case proceeds in the form of an interim payment. The money is advanced by a bank and is collateralised by the insurance cover. This helps a firm's cash flow and can encourage lawyers to take on cases which otherwise would be too expensive to finance. Such interim payments are refundable if the case is won out of "party and party" costs and are discounted if the case is lost so that only the balance of any remaining undrawn proceeds of cover is paid over by the insurer.

The second product - "stop loss cover" - appears to offer a magical solution to the problems of risk-managing litigation. When available, "stop loss" allows law firms to insure against the risk of losing cases and the consequent reduction in the firm's income. What could be better! Of course, no insurer will continue to offer reasonable premiums or, indeed any cover at all, to a firm with a history of losses. As such, "stop loss" policies offer limited protection against a one-off disaster.

Summary

There are now a bewildering array of insurance products coming onto the market the development of which has been triggered by the move away from legal aid and towards CFAs. In the new era it is possible, in summary, to identify broadly five means of financing civil litigation:

(1) CFAs coupled with AEI covering the client's "party and party" costs risk.

(2) CFAs without AEI cover.

(3) Conventional hourly rate charges covered by "before the event" insurance.

(4) Conventional hourly rate charges met by the private paying client.

(5) A much-reduced legal aid scheme covering medical malpractise, housing and judicial review claims.[63]

As we shall see in the final section of this article, the common law has now offered us a sixth.

MAINTENANCE, CHAMPERTY AND THE RESPONSE OF THE COMMON LAW TO SHIFTING PATTERNS IN THE FUNDING OF LITIGATION

It has been seen to this point how any consolidation of the shift towards event-triggered financing depends critically on lawyers and insurers: lawyers to incur the risk of "no win, no fee", insurers to provide an expanded range of products whether to cover the client's "party and party" costs risk or to protect the lawyer against a run of losses. In this final section we consider to what extent the doctrines of maintenance and champerty can be expected to provide a structural barrier to event-triggered financing and to the development of the flourishing supporting market for affordable legal expense insurance that the Government is so desperate to see. Maintenance and champerty are not dead [64] and whilst the threat posed is diminishing, they still raise some unre-

[62] As lawyers become more competent at risk-managing their case loads, that is "picking winners", then it may be that this premium difference will narrow.

[63] *Supra*, n. 2.

solved questions in the context of event-triggered financing and non-party costs. At the same time, there are signs in the recent *Thai Trading* and *Bevan Ashford* cases that the common law is starting to rise to the new challenge.

Maintenance and Champerty

Maintenance is defined by *Halsbury's Laws* [65] as:

> The giving of assistance or encouragement to one of the parties to litigation by a person who has neither an interest in the litigation nor any other motive recognised by law as justifying his interference.

The current test for illegal maintenance is to ask whether the non-party supporter of litigation has indulged in:

> Wanton and officious intermeddling with the disputes of others in [which he]...has no interest whatever, and where the assistance he renders to one or the other party is without justification or excuse.[66]

It is important to note from this that non-party support *per se* is not necessarily illegal. The categories of *lawful* support have expanded significantly in this century, a point developed further below.

Champerty has traditionally been regarded as an aggravated form of maintenance. What distinguishes champerty from maintenance is that in a champertous arrangement the maintainer is promised a share in the proceeds of suit in return for funding or supporting the litigation.[67] The existence of statutory protection against maintenance and champerty can be traced back to the reign of Edward I in the thirteenth century.[68] What is clear is that maintenance and champerty were evolved to redress abuses peculiar to medieval government and society. Broadly, they sought to address the contemporary susceptibility of the court system to corruption by the powerful and the tendency for rival feudal lords to intervene in litigation between members of their respective retinues, a form of support that commonly spilled over into private warfare.[69] It is plain that we should not lose sight of these original purposes and the peculiar social and cultural milieu which gave rise to maintenance and champerty when considering the possible applicability of the doctrines in the modern civil justice system. In summary, the doctrines appear to have evolved with the following purposes:

(1) To enhance the impartial administration of justice.

(2) To deter parties who have no interest in the subject matter of the suit from interfering in and fomenting litigation for their own private purposes.

(3) To protect a maintained party from the potential conflict of interest arising between him and the maintainer.

[64] For signs of life, look no further than champerty's recent troublesome revival in the context of insolvency litigation: see Walters, "Foreshortening the Shadow" (1996) 17 Co. Law. 165; "A Modern Doctrine of Champerty?" (1996) 112 L.Q.R. 560; "Champerty: *Re Oasis Merchandising Services Ltd* in the Court of Appeal" (1997) 18 Co. Law. 214, Milman & Parry, *op. cit.* pp. 20-21.

[65] *Halsbury's Laws of England*, 4th ed. vol. 9, para 400.

[66] *Giles* v. *Thompson* [1994] 1 A.C. 142, 164.

[67] See *Ellis* v. *Torrington* [1920] 1 K.B. 399, 412 and the distinction drawn in *Re Trepca Mines Ltd (No. 2)* [1963] 1 Ch. 199, 226 between "simple maintenance" and "champertous maintenance". This distinction, which appears to derive originally from Coke's *Institutes*, is echoed in the leading modern authorities *Trendtex Trading Corporation* v. *Credit Suisse* [1980] Q.B. 629, C.A., [1982] A.C. 679 and *Giles* v. *Thompson* [1993] 3 All E.R. 321, C.A. [1994] 1 A.C. 142. "Champerty" derives from the Latin "campi partitio" meaning "division of the field" reflecting the fact that, in its earliest form, the doctrine applied only in the context of actions for the recovery of the land.

[68] See Winfield, "The History of Maintenance and Champerty" (1919) 35 L.Q.R. 50.

[69] For excellent judicial summaries of the early history and evolution of the doctrines see *Neville* v. *London Express Newspaper* [1919] A.C. 368; *Martell* v. *Consett Iron Co Ltd* [1955] 1 Ch. 363; *Giles* v. *Thompson* [1993] 3 All E.R. 321, C.A., [1994] 1 A.C. 142. See also Capper, "The Heir-Locator's Lost Inheritance" (1997) 60 M.L.R. 286, 289 and Walters *op. cit.*

(4) To protect the non-maintained party to litigation from harassment by the maintainer, using the maintained party as his instrument.

(5) To prevent "trafficking" in litigation.[70]

Until 1967 maintenance and champerty gave rise to both criminal and civil liability. These forms of liability were abolished by the Criminal Law Act 1967, an enactment which drew on recommendations contained in the Law Commission paper, *Proposals for Reform of the Law Relating to Maintenance and Champerty.*[71] However, section 14(2) of the 1967 Act further provided that the abolition of civil and criminal liability for maintenance and champerty "shall not affect any rule of law [in England and Wales] as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal". Technically, this means that the courts may still hold that a contract tainted by maintenance or champerty is unenforceable as a matter of public policy. It is abundantly clear from the Law Commission's 1966 paper that the main reason for preserving maintenance and champerty was concern over lawyers' contingency fees.[72]

Maintenance and champerty regulate the support of litigation by third parties. As such, they retain the potential to affect litigation in two ways. First, if the successful party has no unenforceable obligation to pay his lawyer because the fee arrangement falls foul of the doctrines, he may be precluded from recovering "party and party" costs under the indemnity principle. Secondly, if the maintained party loses, the court can potentially order the non-party maintainer to pay the winner's costs under section 51(3) of the Supreme Court Act 1981.[73] It follows that lawyers and insurers appear, *at first sight,* to be prejudiced in the following hypothetical situations:

(1) A lawyer takes a case on a speculative basis. The client wins but no costs are recoverable either from the client or the other side because the arrangement is unenforceable on the ground that the lawyer maintained the action. The client loses and the lawyer is ordered to pay "party and party" costs under section 51 on the same ground.

(2) An insurer funds a case covered by "before the event" insurance. The client wins but the insurer cannot recover his outlay because the funding arrangements amount to maintenance and so the client has no enforceable right to indemnity. The client loses. Either the insurer has not agreed to bear the other side's costs or, alternatively, the contractual limit on cover has already been exhausted by "solicitor and own client" costs. The insurer is ordered to pay the costs anyway under section 51 as a non-party maintainer.

(3) A lawyer takes a case on a speculative basis. AEI cover is taken out to cover the "party and party" costs risk. The client wins but costs are irrecoverable because the arrangements between lawyer, insurer and client amount to maintenance. The client loses but the taxed costs exceed the cover limit. The insurer is ordered to pay all the costs under section 51.

On the current state of the law are any of these hypothetical outcomes likely?

[70] The prohibition on "trafficking" manifests itself in champerty's historical objection to the assignment of bare causes of action. This aspect of champerty, which Lord Mustill said in *Giles* v. *Thompson* [1994] 1 A.C. 142 is "best treated as having achieved an independent life of its own", is beyond the scope of this article. For the modern approach see *Trendtex, supra* n. 67; *Brownton Ltd* v. *Edward Moore Incubon Ltd* [1985] 3 All E.R. 499; Y.L. Tan, "Champertous Contracts and Assignments" (1990) 106 L.Q.R. 656; and the discussion in Walters, *op. cit.*

[71] Law Com. No. 7 (1966).

[72] *Ibid,* paras. 16-17, 20.

[73] Note also that the courts have recently stayed two sets of insolvency proceedings which were being funded by commercial sponsors in return for a contingent share of the court's award: *Grovewood Holdings Plc* v. *James Capel & Co Ltd* [1995] Ch. 80, *Re Oasis Merchandising Services Ltd* [1997] 2 W.L.R. 764. However, the Court of Appeal's subsequent decision in *Abraham* v. *Thompson* [1997] 4 All E.R. 362 noted at (1998) 114 L.Q.R. 207 casts doubt on whether it is appropriate to stay proceedings based solely on the manner in which they are funded.

The Flight from Maintenance and Champerty

To paraphrase some words of Oliver L.J., there is no doubt that the shadow cast by the doctrines is foreshortening.[74] Even before 1967, the courts were gradually expanding the categories of *permissible* non-party support for litigation to take account of changes in public policy. With the odd exception, the courts have generally emphasised the need for maintenance and champerty to be kept under constant review in the light of changing practices and circumstances. With a firm eye on the introduction of legal aid and the emergence of litigation backed by affinity groups, Danckwerts J. can be found asking rhetorically in 1954:

> How can such a doctrine founded upon considerations of public policy become at some point frozen into immutable respectability, so as to be no longer capable of alteration...[i]t seems to me that unless the law of maintenance is capable of keeping up with modern thought, it must die in a lingering and discredited old age.[75]

There are several cases decided between the late-nineteenth century and the present day abounding with similar observations.[76]

As such, the courts have accepted that non-party support of the following types is lawful on grounds of mutual protection and community of interest:

(1) Funding of a trader's legal expenses by a trade association where the subject matter of the litigation is trade-related.[77]

(2) Trade union funding of claims pursued by members against their employers[78] or of claims by union officials.[79]

(3) Funding by a mutual protection society.[80]

(4) Insurer support of insured defendants where the subject matter of litigation is covered by liability insurance.[81]

(5) Bank loans to finance litigation pursued by the borrower.[82]

Since 1967 there have been further developments. It is now true to say that non-party support is lawful where the supporter has a genuine pre-existing commercial interest in the litigation being pursued by the supported party.[83]

Even the notion that *champertous* funding arrangements continue to offend modern public policy because of the perception that agreements to share proceeds of suit pose some additional risk to the administration of justice [84] is under increasing strain. *Giles* v. *Thompson*,[85] a case which re-evaluates champerty in the light of contemporary conditions, is the high watermark of the modern approach. Here, the House of Lords upheld a series of litigation support schemes

[74] *Trendtex* [1980] Q.B. 629, 663D, C.A.

[75] *Martell* v. *Consett Iron Co Ltd* [1955] 1 Ch. 363, 382.

[76] See cases cited by Capper, *op. cit.* 289 and Walters, *op. cit.* Note also the Privy Council's refusal to export the doctrines to colonial India in *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee* [1876] 2 A.C. 186.

[77] *Plating Company* v. *Farquharson* (1881) 17 Ch. D. 49.

[78] *Allen* v. *Francis* [1914] 3 K.B. 1065, 1067; *Greig* v. *National Amalgamated Union of Shop Assistants* (1906) 22 T.L.R. 274.

[79] *Hill* v. *Archbold* [1968] 1 Q.B. 683.

[80] *Martell* v. *Consett Iron Co Ltd* [1955] 1 Ch. 363.

[81] *British Cash and Parcel Conveyors Ltd* v. *Lamson Store Service Company Ltd* [1908] 1 K.B. 1006, 1014-1015.

[82] *Re Trepca Mines Ltd (No. 2)* [1963] 1 Ch. 199, 219.

[83] See *Trendtex, Brownton Ltd* v. *Edward Moore*; and *Giles* v. *Thompson* (*supra*).

[84] *E.g. Trendtex* [1980] Q.B. 629 per Oliver L.J. As champerty primarily regulates perceived abuses of the machinery of justice, it appears to have no application to contingency fees outside the context of litigation: see *Savill Brothers Ltd* v. *Langman* (1898) 79 L.T. 44; *Pickering* v. *Sogex Services (UK) Ltd* (1982) Build. L.R. 66; and *Picton Jones* v. *Arcadia Developments Ltd* [1989] 1 E.G.L.R. 43. Note however that champerty does apply to fee arrangements relating to arbitration proceedings: see *Bevan Ashford*, below main text, *Cannonway Consultants Ltd* v. *Kenworth Engineering Ltd* [1997] A.D.R.L.J. 95 (Supreme Court of Hong Kong).

[85] [1994] 1 A.C. 142.

offered by various car hire companies. Under these schemes, the companies supplied the plaintiffs, who had all suffered road accidents caused by the negligence of other drivers, with hire cars without making an initial charge. The terms of hire entitled the companies, at their own expense, to pursue a claim for damages against the other driver in the customer's name on the footing that any damages recovered for loss of use of the customer's original car would go to defray the hire charges. The benefit to the customer was twofold: use of a substitute vehicle whilst his own was off the road and backing for an action to recover damages for personal injury. The defendants' insurers argued unsuccessfully that damages for loss of use were not recoverable because the hire agreements were unenforceable. The main theme of Lord Mustill's leading opinion was that the courts should be slow to conclude that funding agreements are champertous where the party in receipt of support would be denied access to justice as a result.[86] On the facts, Lord Mustill said there was no "wanton and officious intermeddling" despite the apparent sharing of proceeds and the degree of control that the companies enjoyed over the decision to litigate. Of greater significance was the fact that the companies were providing their customers, all of whom had cast-iron cases on liability but were not eligible for legal aid, with the means to bring a claim. Thus, *Giles* v. *Thompson* elevates access to justice to the status of a *right* that should only be denied if there is real prejudice to the interests of the opponent or the proper administration of justice.[87] With this general "flight" from maintenance and champerty in mind, developments of particular relevance to event-triggered financing by lawyers and insurers are now considered.

Event-triggered Financing and Thai Trading

Earlier in the article we sought to demonstrate how the Government came to adopt the CFA coupled with AEI as its model for litigation funding. After a shaky start, there are signs that the common law has begun to track that shift in policy and embrace event-triggered financing more readily, thus reflecting the broader developments discussed immediately above. The shaky start can be attributed to the decision in *Aratra Potato Co Ltd* v. *Taylor Joynson Garrett*.[88] In that case, a general retainer providing that the solicitors would reduce their normal charges by 20% in the event that any cases were lost was held to be champertous and unenforceable. Garland J. reached this conclusion by reasoning that *Giles* v. *Thompson* did not extend to solicitors' contingency fees (which were still contrary to public policy) and that a retainer providing for a differential fee depending on outcome was as much a contingency as an arrangement providing for the sharing of damages. Furthermore, the judge was not persuaded that the introduction of the limited CFA regime marked a decisive shift in public policy in favour of event-triggered fee arrangements. This view would not prevail for long.

Aratra Potato was overruled by the Court of Appeal in *Thai Trading* v. *Taylor*.[89] Here, champerty was raised as an issue during taxation of costs.[90] The successful party, Mrs Taylor, had instructed her solicitor husband to act for her on the understanding that he would forego his fee if she lost and would only charge her at his normal rate if she won. The arrangement could not be a CFA because the claim was contractual in nature and, at the time, CFAs were not available for contract claims. The unsuccessful party disputed liability for "party and party" costs under the indemnity principle on the argument that the "solicitor and own client" arrangement

[86] The Court of Appeal had taken a similar line. Sir Thomas Bingham MR said (at [1993] 3 All E.R. 321, 348), "...denial of access to justice for want of financial resources may fairly be regarded as a more potent threat to the well-being of society than the risks of perverting the administration of justice which rightly exercised our mediaeval forebears".

[87] See also, *Abraham* v. *Thompson* [1997] 4 All E.R. 362 and, on the idea of access to justice as a constitutional principle, *R.* v. *Lord Chancellor, ex. p. Witham* [1997] 2 All E.R. 779 noted by English (1998) 61 M.L.R. 245. Note however that the line taken in the insolvency cases cited at n. 73 is far less liberal.

[88] [1995] 4 All E.R. 695.

[89] [1998] Q.B. 781, [1998] 2 W.L.R. 893, [1998] 3 All E.R. 65.

[90] Under the Civil Procedure Rules, the term "taxation" is replaced by "assessment".

between the Taylors was champertous and unenforceable. The Court of Appeal held that Mrs Taylor's costs were recoverable and in so doing made three key findings:

> (1) The law on maintenance and champerty governing event-triggered fee arrangements falling outside the CFA regime derives from considerations of public policy. It had to be borne in mind that public policy is not static. In this respect, the introduction of CFAs suggested that there is a public policy in making justice accessible to persons of modest means. It was doubtful whether an arrangement whereby a solicitor agrees to waive his fee if the case is lost whilst only charging his normal rate in the event of success was contrary to public policy. The same could be said of differential arrangements like that in *Aratra Potato*. A full-blown contingency fee or an arrangement entitling the solicitor to a reward over and above his normal charges if he wins remains unlawful save to the extent permissible under the CFA regime.
>
> (2) There was nothing in the Solicitors Act 1974 (which prohibits contingency fees) to prevent a solicitor, outside a CFA, foregoing his fee if the case is lost provided that he does not charge more than his normal fee if the case is won.
>
> (3) Whilst it was professional misconduct for a solicitor to enter into any agreement, even for a normal fee, where payment is contingent on success in litigation, the fact that a professional rule prohibits a particular practice does not of itself make the practice illegal.[91]

It follows from *Thai Trading* that both CFAs (with success fees) and event-triggered arrangements (including differential fees) falling outside the CFA regulations are perfectly lawful with the proviso that success fees cannot be charged in a non-CFA.[92] A successful party litigating on either footing should have no difficulty in recovering his costs from the loser under the indemnity principle.[93] It is arguable that *Thai Trading* is not really a champerty case at all. The case simply confirms the principle that a solicitor may act, *pro bono*, for a meritorious client whom he knows cannot afford to pay his normal fee if he loses.[94]

There remained an interesting "gap" in the decision. As we have seen, under *Thai Trading* "normal rates" did not include the success fees that can be used to build up a "war-chest" (*i.e.* sufficient reserves from winning cases to subsidise losing cases which is the rationale behind the success fee in CFAs). However, normal rates are something of a moveable feast. *Thai Trading* thus offered some headroom for solicitors to agree in advance a "winning" normal rate that is higher than their hourly rate in conventional litigation. However, this left open the possibility that the loser could still argue on taxation that "normal costs" had strayed into the area of an unlawful contingency.

The decision of Scott V.-C. in *Bevan Ashford* v. *Geoff Yeandle (Contractors) Ltd*[95] further extended *Thai Trading*. This case concerned the funding of arbitration proceedings. There were two agreements. The first, between the client and solicitors provided that the client would only pay disbursements if the case was lost whereas it would pay the firm's normal charges and

[91] *Picton Jones & Co* v. *Arcadia Developments Ltd* [1989] 1 E.G.L.R. 43. The Solicitors Practice Rules have since been amended to allow *Thai Trading* agreements. *Thai Trading* has been cast into some doubt on this point by the subsequent decision of the Divisional Court in *Hughes* v. *Kingston Upon Hull City Council*, [1999] 2 All E.R. 49. It was suggested there that *Thai Trading* was decided *per incuriam Swain* v. *Law Society* [1983] A.C. 598 and, that if this authority had been before the Court of Appeal, it would have been constrained to hold that the Solicitors' Practice Rules have the force of statute.

[92] The contingency fee bar remains, a point also made in *Giles* v. *Thompson* and *Trendtex*.

[93] *Per* Millett L.J.: "Even if there was an express agreement that Mr Taylor would be paid his profit costs only if Mrs Taylor won her case, she would still be entitled to be indemnified against a legal liability which had been incurred in the events which had happened. The fact that she would have incurred no liability in a different event which had not happened would not affect this."

[94] A principle lost sight of in *British Waterways Board* v. *Norman* (1994) 26 H.L.R. 232 (also overruled in *Thai Trading*) but one of some vintage: see *e.g. Ladd* v. *London Road Car Co* (1900) 110 L.T.J. 80, *Rich* v. *Cook* (1900) 110 L.T.J. 94 (discussed in Levin, "Solicitors Acting Speculatively and *Pro Bono*" (1996) 15 C.J.Q. 44) and *A Ltd* v. *B Ltd* [1996] 1 W.L.R. 665.

[95] [1998] 3 W.L.R. 172, [1998] 3 All E.R. 238.

disbursements in the event of success. The second, between the solicitors and counsel instructed to appear on the arbitration, provided that counsel would receive no fee if the client lost but a full fee, including a success fee calculated as 50% of his normal fee on top, if the client won. Both agreements were outside the scope of the CFA regulations which do not cover arbitrations. The lawyers sought a declaration in advance that these arrangements were lawful to avoid a point being taken under the indemnity principle if the client won and obtained an order for "party and party" costs. Arguments against legality were put by an *amicus curiae*. Scott V.-C. held that the first agreement fell four square within the scope of *Thai Trading* as it did not entitle the solicitors to recover anything over and above their normal charges. More significantly, the second agreement was also upheld even though a success fee was expressly contemplated. The Vice-Chancellor took the view whilst this was not a CFA case, that *the introduction of* CFAs should be taken into account in formulating the appropriate response at common law to such arrangements. Since the 50% uplift contemplated by the second agreement was of an amount which fell within the limits prescribed by the CFA regulations, the judge took this as an indication that the agreement was lawful, although it was not strictly a CFA. Thus, *Bevan Ashford* extended *Thai Trading* by allowing lawyers to enter into "no win, no fee" arrangements *outside CFAs* which contemplated a success fee, as long as the level of the success fee is kept within the current 100% limit in the CFA regulations. The significant point is that the introduction of CFAs was not seen as a limited relaxation of the prohibition on contingency fees (the position in *Aratra Potato*). Indeed, the Vice-Chancellor used CFAs as the excuse for sanctioning event-triggered success fees at common law.[96]

The Common Law Pauses After Thai Trading and Bevan Ashford

The possibility of an appeal to the House of Lords in *Thai Trading* and the decision of the Divisional Court in *Hughes v. Kingston-upon-Hull City Council* [97] led to a period of uncertainty. It was held in *Hughes* that *Thai Trading* had been decided *per incuriam Swain v. Law Society* [98] and was, in effect, wrong on the third finding described above. In other words, the fact that the funding arrangement put the solicitor in breach of rules of professional conduct was, *contra Thai Trading*, regarded as fatal to the enforceability of the relevant arrangement in *Hughes*. However, leave to appeal to the House of Lords in *Thai Trading* was ultimately refused and residual concerns over the standing of the Court of Appeal's decision are now resolved by the Access to Justice Act (see below).

Problems Left by Thai Trading

Thai Trading (as extended by *Bevan Ashford*) largely eliminated any indemnity problems for "winners" financed under event-triggered arrangements whether in or out of a CFA. The bar on full-blown contingency fees remained but that bar did nothing to prevent a lawyer recovering all or part of his success fee out of damages.[99] The only lingering doubt concerned the status of "normal rates" i.e. whether it would be possible for the loser to take the indemnity point on taxation where a lawyer increased his normal rate to reflect the risk of event-triggered financing *and* charged a *Bevan Ashford* success fee on top of the enhanced "normal rate".[100]

96 Thus, *Bevan Ashford* looks like a piece of "judicial legislation". The arrangement sanctioned by the Vice-Chancellor is effectively a common law event-triggered arrangement which has features derived from both the CFA regulations and *Thai Trading* - a curious hybrid indeed! For a similar sort of view expressed against a comparable background of reform in Australia see *dicta* of Bryson J. in *Re William Felton Co Pty Ltd* (1998) 28 A.C.S.R. 228 at 237, Supreme Court of New South Wales.

97 [1999] 2 All E.R. 49.

98 [1983] 1 A.C. 598, [1982] 3 W.L.R. 261, [1982] 2 All E.R. 827, H.L.

99 Subject to the Law Society's recommended limit of 25%.

100 The Access to Justice Act allows winning parties to recover CFA success fees from losing parties on assessment of "party and party" costs. Section 28 introduces "litigation funding agreements" (see *infra*) which may resolve the issue.

Thus, so far as winners are concerned, there is only a marginal risk of the client failing to recover "party and party" costs as per the hypothetical outcomes mentioned above. This remains the position under the Access to Justice Act (see below).[101] However, neither *Thai Trading* nor, arguably, the Access to Justice Act have any obvious impact on the position if the client loses.

Supreme Court Act 1981, section 51

Whilst the problem for "winners" arising under the indemnity principle has progressively receded, the courts still have jurisdiction to impose costs orders on non-parties who have backed "losers". The general position is that a non-party who supports unsuccessful proceedings may be ordered to pay some or all of the successful party's costs pursuant to the Supreme Court Act 1981, section 51.[102] Section 51(3) confers on the court, "full power to determine by whom and to what extent costs are to be paid" and thus brings non-parties, such as lawyers and insurers, within the ambit of the jurisdiction. A theoretical justification for this is that it gives the courts some scope for protecting the winner in circumstances where the loser does not have the means to meet an order for "party and party" costs thus preserving the integrity of the "loser pays" principle.

The Court of Appeal in *Symphony Group Plc* v. *Hodgson* laid down a series of guidelines which constrain the exercise of this non-party costs jurisdiction.[103] It is clear from these guidelines that an order for costs against a non-party will always be exceptional and that any application for such an order should be treated with caution.[104] This is of some comfort to non-parties such as legal expense insurers. However, the problem remains that the discretion in section 51 is widely couched. The principles on which the discretion will be exercised are opaque and, as such, it is difficult to quantify the extent of the risk.[105] In maintenance cases under section 51 much has been made of Lord Denning M.R.'s *dictum* in *Hill* v *Archbold* to the effect that maintenance is normally lawful, "provided always that the one who supports the litigation, if it fails, pays the costs of the other side." [106] Thus, although *Hill* v. *Archbold* was a case concerned with the *legality* of non-party support under the pre-1967 law, Lord Denning's proviso has reared its head frequently in the context of section 51. However, it is far from clear whether the supporter of an unsuccessful litigant who has not agreed to meet the litigant's "party and party" costs liability will always be ordered to pay those costs simply by virtue of a single line from Lord Denning. Two broad approaches have emerged. One we call the "*McFarlane*" approach; the other we call the "interference" approach.

The *McFarlane* approach derives from *McFarlane* v. *EE Caledonia Ltd (No. 2)*,[107] a case in which an order for costs was made against a claims agency that had handled the plaintiff's unsuccessful action for psychiatric injury on a contingency basis. The judge applied the *Hill* v. *Archbold dictum* but added his own gloss by drawing a distinction between commercial and non-commercial support. Thus, on the *McFarlane* approach, it will usually be appropriate for the court to order the loser's supporter to pay the winner's costs where the supporter habitually supports litigation in the ordinary course of its business operations and generally assumes

101 Furthermore, the courts increasingly disapprove of losers who take indemnity points on taxation because of the tendency to generate satellite litigation: *Bailey* v. *IBC Vehicles Ltd* [1998] 3 All E.R. 570.

102 See generally, *Aiden Shipping Co Ltd* v. *Interbulk Ltd (The Vimeira)* [1986] A.C. 965; *Symphony Group Plc* v. *Hodgson* [1994] Q.B. 179. Prior to 1967, where the support was illegal, the supporter could be made liable for the winner's costs on the footing that those costs would not have been incurred but for the supporter's misconduct: *Danzey* v. *Metropolitan Bank of England and Wales* (1912) 28 T.L.R. 327.

103 [1994] Q.B. 179.

104 Although, citing *Singh* v. *Observer Ltd* [1989] 2 All E.R. 751, it was accepted that the court *could* order a person who has maintained or financed an unsuccessful action to pay the winner's costs: *ibid.* 192.

105 On this issue generally, see Scott, "Towards Understanding the Maintainer's Liability for Costs" (1995) 14 C.J.Q. 271 and O'Dair, "Lawyers' Ethics, Settlement Negotiations and the Maintainer's Liability for Costs" [1997] L.M.C.L.Q. 156.

106 [1968] 1 Q.B. 686, 694-695.

107 [1995] 1 W.L.R. 366.

liability for those costs.[108] The same will not necessarily follow for a private supporter, such as a family member. As such, if we accept *McFarlane,* the commercial backer of a losing party will always be liable for the other side's costs *over and above any contractual limit of indemnity* either because he accepts that liability voluntarily or the court imposes it on him under section 51.[109] This approach puts lawyers and insurers in something of a dilemma as they fall into the category of commercial supporters.

On the "interference" approach, it appears that the court will only contemplate a non-party costs order if the supporter exercises direct control over the conduct of the litigation or, in the old language of maintenance, if he is guilty of "wanton and officious intermeddling" (which may overlap with "direct control"). Thus, in *Tharros Shipping Co Ltd* v. *Bias Shipping Ltd,*[110] the *McFarlane* approach was not followed, Rix J. refusing to make an order for costs against an insurer solely on the ground that the insurer had not agreed to meet the winner's costs. Making the general point that mutual protection of the type under consideration in *Tharros* was to be encouraged in the interests of access to justice, the judge went on to suggest that some form of unspecified intermeddling by the supporter would be needed before the court would make a section 51 order against him.[111] The Court of Appeal took a similar sort of approach in *Murphy* v. *Young & Co's Brewery Plc.*[112] This case concerned an unsuccessful action for wrongful dismissal brought with the backing of "before the event" legal expense insurance. The losers were unable to meet their "party and party" costs liability and the winners sought a non-party costs order against the insurer. The insurer argued that it had no such liability since the plaintiffs' own costs had already exhausted their contractual right to indemnity which was limited to £25,000. The court declined to make the order holding that the existence of legal expense insurance is not sufficient to justify an order for costs against the insurer even in circumstances where the limit of cover has been exhausted by the insured's own legal costs. The mere fact that the insurer was a commercial backer was not enough and *Murphy*, like *Tharros*, suggests that there needs to be some interference by the insurer in the litigation before a section 51 order will be appropriate.[113] However, in the subsequent case of *Chapman Ltd* v. *Christopher,*[114] an order for costs made against a liability insurer was upheld by the Court of Appeal. Here the plaintiffs successfully sued the defendant for £1.1m damages arising from his negligence in causing a fire at their business premises. The defendant who was unemployed and lived at home was covered by his mother's household and public liability policy up to a limit of £1m. The defence was conducted by the insurers. It was held that an order was justified because the insurers had decided to fight the claim and conducted a failed defence exclusively with a view to protecting their own interests (namely their liability to pay out £1m under the policy) without any reference to their insured. Any suggestion that an award of costs over the ceiling of a contractual limit on indemnity might discourage liability insurance was rejected. As such, it looks as if an order was made in *Chapman* v. *Christopher Ltd* because the insurer was the *de facto* litigant.

108 *Ibid* at p.373.

109 An approach also favoured in *Eastglen Ltd* v. *Grafton* [1996] 2 B.C.L.C. 279.

110 [1995] 1 Lloyd's Rep. 541.

111 O'Dair, *op. cit.*, identifies a point of distinction between the *Tharros* case and the case of a plaintiff backed by insurance or some other form of mutual protection. He notes that in *Tharros* an additional justification for the court's refusal to make a section 51 order was that the maintained party was the *defendant* and therefore had no choice about whether to be involved. As such, the fact that the defendant was insolvent and unable to pay costs could properly be regarded as the plaintiff's risk.

112 [1997] 1 W.L.R. 1591.

113 Phillips L.J. specifically noted that the insurer had not initiated the litigation or exercised control over its conduct or "wantonly and officiously intermeddled". Indeed, he accepted that legal expense insurance operates in the public interest in that (a) it ensures that early consideration is given to the merits of the claim (in Murphy counsel had advised that the plaintiffs had a strong case) and (b) it provides a potential source of funding for adverse costs although that had proved illusory here. It was also accepted that an insurer who declines to meet "party and party" costs where there is no limit on cover should generally be ordered to pay them.

114 [1998] 1 W.L.R. 12. See also *Pendennis Shipyard Ltd* v. *Magrathea (Pendennis) Ltd* [1998] 1 Lloyd's Rep. 315. It is interesting that Phillips L.J. gave the leading judgments in both the *Murphy* and *Chapman* cases.

O'Dair [115] has criticised both the *McFarlane* and the "interference" approach and urged the courts to adopt the principle that supporters of private plaintiffs who lose cases against self-funding defendants should normally be ordered to pay "party and party" costs. Otherwise, he argues, the costs risk is shifted on to defendants, compromising the integrity of the "loser pays" principle and placing them in a weaker bargaining position in settlement negotiations. O'Dair favours an approach to section 51 which disentangles the court's discretion from the old law of maintenance and concentrates on the impact of cost-shifting in the litigation process. He objects to *McFarlane* because he sees no justification for distinguishing between commercial and non-commercial forms of support given that both have a distorting effect. He objects to *Murphy* on the argument that the court's failure to override the contractual indemnity shifts risk to the unassisted defendant in much the same way that the current legal aid scheme does. The important point to make is that whilst few orders have been made against non-parties, there is *scope* within section 51 for the sort of approach favoured by O'Dair to be adopted.[116] The discretion is broad and the principles unsettled. As the law stands, there is room for the court to adopt approaches which are either friendly to non-parties (e.g. "interference") or unfriendly (*e.g. McFarlane,* O'Dair).[117] It is possible that the exercise of the section 51 discretion may become a straight trade-off between a principle of access to justice and the integrity of "loser pays."

The position under section 51 for lawyers and insurers in event-triggered financing arrangements is unclear. If we take *Murphy* and *Chapman* at face value then the non-party will only be exposed to a section 51 order if he exerts direct control over the conduct of the litigation and proceeds with it effectively in his own interests and without reference to the party in receipt of his support. On its own, this poses only a limited threat to the expansion of event-triggered financing. Certainly, lawyers and insurers will support litigation in their own economic interest. Even so, it is difficult to conceive of them assuming the status of *de facto* litigants which triggered liability in *Chapman.* It is not clear whether any lesser form of interference might give rise to liability.[118]

If the courts are quick to adopt an approach like O'Dair's and impose liability for "party and party" costs automatically on the supporters of losing plaintiffs this is likely to hamper the development of event-triggered financing. Returning to the hypothetical scenarios above, it would mean that the lawyer acting on a speculative basis might have a section 51 exposure although this view may be overstated given the recent decision in *Hodgson* v *Imperial Tobacco Ltd.*[119] More pressingly, the same is true of the insurers (whether cover is "before the event"

115 *Op. cit.*

116 There are hints of it in *Chapman* v. *Christopher Ltd.* One argument put by the insurers was that it was unjust for them to be exposed to a total liability (including non-party costs) that exceeded the policy limit. Phillips L.J. brushed this aside, stating that a costs order would not rewrite the insurance policy because liability under section 51 arises independently of any policy. As this was a case in which the insurer was the effective litigant, it was only right that costs should follow the event. Given that, more often than not, both parties in a *Chapman* scenario will be insured, it is a case of money going around in circles.

117 It should be noted that O'Dair does not advocate the application of his principle to the supporters of unsuccessful defendants because defendants have no choice about whether to be involved in litigation: *op. cit.* p. 160.

118 It cannot be said with any certainty whether either or a combination of the following might amount to "interference" by a legal expense insurer: (a) an insistence that the insured and his advisers accept a settlement of the litigation even if it is unacceptable to the insured or (b) an insistence that the insured and his advisers proceed with litigation even though a proposal for settlement acceptable to the insured is on the table. Note that legal expense insurers must allow their insured to choose his own lawyer by virtue of the Insurance Companies (Legal Expenses Insurance) Regulations 1990. Any policy restriction on lawyer choice may well be frowned on in the immediate context though see *Giles* v. *Thompson* in which their lordships glossed over the issue of insurer-nominated solicitors.

119 [1998] 1 W.L.R. 1056. The issue of whether a lawyer acting under a CFA (and we might add now under a *Thai Trading* arrangement has always been controversial. Some, including the Law Society, have long argued that a lawyer acting under a CFA could not be liable for costs as a non-party: see Napier & Hartley, "Conditional Fees - No Win, No Fee, No Maintenance" [1995] *The Litigator* 256. The better view is that the wide jurisdiction in section 51 can only be ousted or varied by express statutory language. The Courts and Legal Services Act 1990, s. 58 certainly overcomes the indemnity problem by rendering CFAs enforceable. It does not expressly abrogate the power of the court to order the lawyer to pay costs. However, *Hodgson v. Imperial Tobacco* suggests that the non-party jurisdiction cannot arise where a legal representative is acting only in that capacity in the context of legal proceedings. Note generally that lawyers can also be ordered to pay "wasted costs" under section 51(6) but this is a separate jurisdiction with its own rules and its application will not in any way turn on how the loser's case has been funded.

or AEI) where there is insufficient cover in place to meet the full amount of the "party and party" costs. It has been argued that there is scope for such approaches to be taken given the broad nature of the section 51 discretion. The problem is that the development of event-triggered financing may be hampered and that would be inimical to current Government policy. In the context of an emerging market, if insurers face the possibility of paying costs which exceed the limit of the client's cover, then prudence dictates that they will increase premiums beyond the level that might otherwise be necessary. Equally, lawyers may be more reluctant to provide risk-based litigation services if, in the worst scenario, they end up not getting paid *and* facing a liability to pay the other side's costs. Furthermore, they will be reluctant to act as agents and sales people for the new products. The point is that we do not yet have any safe means of predicting how the courts might develop this jurisdiction. It is not beyond the realms of possibility that it *could* be used to "punish" lawyers and insurers who support risky claims which fail. In a *fully-developed* market which routinely provides litigants (both plaintiffs and defendants) with support, the O'Dair principle has the attraction of simplicity and certainty. It would reinforce the "loser pays" principle, encourage good risk management by lawyers and reduce the scope for costly satellite litigation under section 51.[120] With lots of money going around in circles and passing to and from liability insurers and legal expense insurers, premiums might well remain affordable.

In the present undeveloped market, however, the residual uncertainty which surrounds section 51 may simply reinforce existing economic incentives with the effect that lawyers and insurers steer clear of anything too risky. The irony is that you might initially have to encourage "access for anything" to establish a market capable of supporting "access to justice" in the long term. This would need Parliament or the courts to abrogate the exposure of event-triggered funders under section 51 altogether, a point reiterated in our conclusion. Otherwise matters are likely to be left in the hands of the courts for "case by case" analysis and the present residual uncertainty will persist.

The Access to Justice Act

The Access to Justice Act[121] will have two broad effects. First, it will make so-called "litigation funding agreements" (under section 28) as well as CFAs lawful subject to the following conditions:

> (a) The funder must be a person, or person of a description, prescribed by the Lord Chancellor.
>
> (b) The agreement between funder and litigant must be in writing.
>
> (c) The agreement must not relate to proceedings which cannot be the subject of an enforceable CFA or to proceedings of any such description as may be prescribed by the Lord Chancellor.
>
> (d) The agreement must comply with such requirements (if any) as may be so prescribed.
>
> (e) The sum to be paid by the litigant must consist of any costs payable to him in respect of the proceedings to which the agreement relates together with an amount calculated by reference to the funder's anticipated expenditure in funding the provision of the services.
>
> (f) The amount in (e) must not exceed such percentage of that anticipated expenditure

120 Satellite litigation for which the current summary procedure under section 51 is not suited: see Scott, *op. cit.*

121 For the Act the devil will be in the detail and much will depend on the contents of implementing regulations which are currently out for consultation.

as may be prescribed by the Lord Chancellor in relation to proceedings of the description to which the agreement relates.[122]

Litigation funding agreements are intended to allow novel ways for third parties, such as insurers or affinity groups, to fund litigation. However, subject to detailed regulations, they may be available to lawyers in respect of individual clients: section 27 of the Act will allow CFAs which can incorporate "success fees" or which provide for a normal rate with no success fee (sometimes called "speccing"). In substance, the effect is to enact *Thai Trading* and *Bevan Ashford*. Funding agreements of the kind encountered in those cases which provide for a success element but are not CFAs will be enforceable as between client and funder. As such, the indemnity principle will have no impact.

Secondly, successful clients who are represented by their solicitors under the terms of either a CFA or a litigation funding agreement will be entitled to recover both the success fee and any AEI or other insurance premium from the losing party. It is important to stress that this applies to both CFAs and litigation funding agreements. However, the Access to Justice Act does not disturb the court's jurisdiction to award costs against non-parties under the Supreme Court Act.

CONCLUSION

We have sought to sketch the outlines of litigation funding in the post-legal aid era and demonstrate how the courts and the legislature have responded to the shift. Following the decisions in *Thai Trading* and *Bevan Ashford* and the legislative response in the Access to Justice Act, it appears that the indemnity principle is a receding problem. There are now two forms of lawful funding arrangement: CFAs and "litigation funding agreements". Most of the difficulties which remain surround the operation of the non-party costs jurisdiction. It is true to say that the court has not readily exercised its jurisdiction to award costs against non-parties. However, section 51 is something of a conundrum and there is scope for the judges to adopt a variety of differing approaches. Moreover, the Court of Appeal has recently ruled that champerty is best regulated through the mechanism of the non-party costs jurisdiction.[123] This residual uncertainty is inimical to the development of the as yet nascent market for event-triggered finance. At this stage it is arguable that the uncertainty should be removed and the exposure of event-triggered financiers (especially insurers) to non-party costs orders formally abrogated by Parliament if a flourishing market is to emerge. Otherwise, there is a risk that the market will not move far beyond its original theatre of operation, namely the "low risk" personal injury claim. We have reached a crossroads.

Where does our analysis leave maintenance and champerty? Whilst there has been a flight from these medieval doctrines they do still exist. They remain (along with the developing law of unconscionable bargains) as a means of regulating full-blown contingency fee arrangements and so retain some residual relevance (this is particularly true in the context of claims agencies of the type involved in the *McFarlane* case that are not the subject of professional regulation). Champerty also retains relevance in the abstruse but commercially important context of assignments of choses in action.[124] For these reasons, it looks as if champerty, in particular, will linger on for a while yet. To sum up:

(1) Contingency fees are still outlawed. CFAs and litigation funding agreements which

122 See Section 28 of the Access to Justice Act inserting a new section 58B in the Courts and Legal Services Act 1990. Obviously, the provisions of the Act should be checked carefully as the authors are making the assumption that the "litigation funding agreement" as contemplated and defined in the text will emerge from the legislative process in much the same form.

123 *Abraham* v. *Thompson* [1997] 4 All E.R. 362 noted by Walters at (1998) 114 L.Q.R. 207.

124 Walters, *op. cit.*

contemplate success fees calculated as an uplift on "normal rates" will be permitted. Arrangements which contemplate the sharing of damages between funder and client remain champertous.

(2) The jurisdiction in the Supreme Court Act 1981, section 51 remains intact. It may be that the court's discretion will continue to be exercised sparingly against funders. However, residual uncertainty remains.[125]

(3) Throughout, it has been argued that the indemnity principle is a receding problem for "winners" seeking to recover costs from "losers". It remains to be seen whether, in sanctioning recovery of the success fee and insurance premium, the Access to Justice Act, will prove to be a fly in the ointment. It may be that the paying party will be motivated to attack either the amount or lawfulness of the funding arrangement underpinning the success fee (perhaps using variants of the *Thai Trading* "gap" argument referred to above and/or arguments that the arrangement does not satisfy all the requirements of a CFA or a litigation funding agreement). How likely is it that paying parties will try to revive these kind of arguments? In our view, it is quite likely. This is because, more often than not, the paying party will be an institutional funder such as an insurance company, i.e. a "repeat player" in litigation as opposed to a "one-shot" player. There may not appear to be much room for manoeuvre. However, to the extent that there is a gap, it seems reasonable to assume that a "repeat player" will seek to exploit it.[126]

[125] Moreover, the new Civil Procedure Rules do contemplate (perhaps more obviously than the old rules) that orders for costs can be used as a sanctioning device.

[126] Battle lines are already being drawn as to whether there is any justification for charging success fees when clients can buy AEI covering their own solicitor's costs as well as the other side's costs. For a lively exchange on this important issue see "Who needs conditional fees?" in Issue 3 of *Litigation Funding* (July 1999).

THE CRIME AND DISORDER ACT 1998: ISSUES FOR CHILD CARE AND SENTENCING

*M.E. RODGERS * and PAUL SPARROW ***

INTRODUCTION

THE CRIME AND DISORDER ACT 1998 (the Act) was introduced into the House of Lords on 2nd December 1997 and received Royal Assent on 31 July 1998. To date, most attention has been directed to the changes it will make to the criminal law. However within this review and update of the criminal law there are some interesting consequences for the civil law within child care practice in addition to the manner in which children will be dealt with by the criminal justice system. The introduction of new civil child care orders for what will be in effect purely criminal acts, or perceived criminal acts, appears to be contradictory to the principles which underpinned the introduction of the Children Act 1989. In addition it is argued that these orders are representative of a wider change in public attitude to the much publicised problem of troublesome children generally and 'youth crime' in particular. Indeed, it is the authors proposition that the enlarged scope for state intervention into the lives of children and their families through civil proceedings represents a dramatic politicisation of the youth crime problem, characterised by a rejuvenation of individual and familial responsibility and at least a partial rejection of the tradition of minimal intervention. This article will contemplate the nature of the proposed civil law provisions for children who offend and consider their effectiveness. The consequences for child care practitioners will also be evaluated, since there would appear to be a lack of understanding of the civil jurisdiction, and methods of practice implicit within the changes. The implications for sentencing theory shall also be discussed, given that the new orders within the Act illustrate the concept of enmeshing civil and criminal law which is also evident within the Protection from Harassment Act 1997 and currently under consideration by Jack Straw (Home Secretary) in relation to drug dealing.

THE BACKGROUND TO THE CRIME AND DISORDER ACT 1998 – YOUTH OFFENDING AND YOUTH JUSTICE

The Act includes measures to deal with not just the prevention of crime and disorder, but to combat the delays in the justice system and the methods used to work with children and young people who offend. However, the focus is clearly on the prevention of youth crime from the early stages of delinquency, with professionals "nipping offending in the bud".[1] For the most part the necessity of such action derives from the fact that the issue of crime not only ranks high on the political agenda but particular forms of criminality are seen to warrant special attention. Certainly since their ascendancy to power so-called 'New Labour' have singled out the problem of youth crime as one of a number of issues which is apparently deserving of just such special consideration. It seems increasingly likely that aspirations toward the management of

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1 *Per* Jack Straw, Preface, *No More Excuses: A new approach to tackling youth crime in England and Wales* Cm 3809 (1997).

wayward youth may well prove to be at least one the issues by which the current Home Secretary proclaims his credibility.

It is true to say that a disproportionate amount of crime is committed by young people and most especially young males. In 1997 for example "around two-fifths of offenders cautioned or convicted of indictable offences were under the age of 21" and in 1996, 25% of known offenders were under the age of 18.[2] The associated increase in crimes against the person has served to highlight yet further the danger which our communities hold. The Government have been quite correct to point out that the fear of crime is just as destructive as the actuality of crime and its impact can be just as potent in terms of altering our behaviour. Our fear of the criminal however, may not be in proportion to the prospect of victimisation and hence any successful attempt toward increasing community safety demands careful consideration of the nature and source of that threat. It is the authors proposition that in its conceptualisation the legislation has the potential to make a serious error of judgement in terms of identifying so-called threatening or troublesome groups. Ultimately there is critical distinction to be made between *juvenile nuisance* and *juvenile crime*, any merger between the two, intentional or otherwise, holds the prospect of critical consequences for those who find themselves the subject of formal systems of intervention.

The transition from childhood through to adulthood is a period characterised by uncertainty and contradiction in both attitude and behaviour. Decisions made during this time often have profound and yet unforeseen consequences for future prospects and opportunities. It is within this context that any debate concerning the formal response to youth offending ought to be conducted. As Graham and Bowling[3] have pointed out youth crime is not an issue which reduces easily to a simplistic analysis. A concern for the threat to community safety posed by those under ten years of age seems likely to owe more to the potential benefits of political posturing than it does to a review of the evidential base on which it claims to be founded. Indeed, given that between 1986 and 1994 the peak age of offending rose from 15 to 18 years, it could be suggested that younger children pose less of a threat now than at any time previously.[4] Whilst then there is evidence to suggest that actual criminality is inversely correlated to age, there is general agreement that the life experiences of younger children does have a significant impact on their future propensity to commit crime.[5] The distinction here is subtle but crucial; the propensity to commit crime in the future can not be equated with the actuality of committing a criminal offence in the present. As such the nature, purpose and ultimately the justification of any intervention ought to reflect clearly the distinction between future preventative and consequential reactive measures.

The issue of responsibility and its subsequent location as a focus for culpability stands central to the current legislative framework. Whilst the very specific focus of professional involvement in the Child Safety Order (discussed in detail later)is evidence that the child themselves must account for their actions it is also clear that "[p]arents have a crucial role in preventing their children committing criminal and anti-social acts".[6] By emphasising the parental role within youth crime, whether it be from a point of lack of control or simply a lack of interest, the concept of accepting responsibility for crime is clearly being placed not just on the individual, but within the family unit. The issue of responsibility will be returned to later since it signifies a major paradigm shift within youth justice from the tradition of welfarism to a focus on surveillance and control.

The alteration to the theories underpinning youth justice has not materialised overnight, it

2 Office For National Statistics, *Social Trends 29* (Stationery Office, 1999) 157 and *No More Excuses op. cit*

3 Graham and Bowling *Home Office Research Study 145* (Home Office,1995)

4 Audit Commission, *Misspent Youth: Young People and Crime* (Audit Commission,1996)

5 Graham and Bowling (1995) op. *cit.*

6 Introduction, *No More Excuses op. cit.* n. 1.

has been gradual, but has been supported by a variety of other legislative changes. It is suggested that the repeal of the Children and Young Persons Act 1933, s. 1 (2), which permitted a court to make a care order in criminal law proceedings and hence suggested that a child was not 'bad' but 'uncared for' is of particular relevance, and yet this repeal would appear to be contrary to some of the changes to be implemented within the Act which shall now be considered.

THE CRIME AND DISORDER ACT 1998 – PREVENTION OF CRIME BY NON COURT BASED ACTION

Joint Action

Whilst youth justice is covered throughout the Act, the sections of particular relevance to child care and sentencing theory are sections 8 to 16. These sections were brought into force on 30th September 1998 by virtue of SI 1998 No 2327, although it is important to note that the effect and effectiveness of the provisions will be tested initially in pilot areas before being implemented on a national scale (intended to be in 2000/2001). In addition draft guidance has been produced by the Government to coincide with the provisions themselves. These sections will be informed and influenced by section 17 which provides "...it shall be the duty of each authority to which this section applies to exercise its functions with due regard to the likely effect...on, and the need to do all that it reasonably can to prevent, crime and disorder in its area". The bodies referred to being primarily the local authority and the police (sub-section 17 (2)). Joint strategies to prevent crime will be required and will be relevant to the issue of local child curfew schemes under section 14. However, the inclusion of section 17 would seem to add nothing to existing duties held by those bodies. The local authority, by virtue of the Children Act 1989 Schedule 2, paragraph 7, is already required to take steps to reduce the need to bring criminal proceedings against children within its area. Most authorities will have already addressed this issue to some extent within the multi-disciplinary policies produced following the Children Act 1989. The presence of such duties under existing legislation could be the reason why the implementation of this part of the Act is intended to have no resource implications.[7]

Section 14 – Child Curfew Schemes

To enable the relevant local authorities to prevent crime by young people, under section 14 they will be able to implement a 'child curfew scheme', which is permissive rather than mandatory. Section 14 provides:

> (1) A local authority may make a scheme (a "local child curfew scheme") for enabling the authority..
>
> > (a).....
> >
> > (b) if, after such consultation as is required by the scheme, the authority considers it necessary to so for the purpose of maintaining order,
> >
> > to give a notice imposing, for a specified period (not exceeding 90 days) a ban to which subsection (2) applies
>
> (2) This subsection applies to a ban on children of specified ages (under 10) being in a public place within a specified area –
>
> > (a) during specified hours (between 9 p.m. and 6 a.m.); and
> >
> > (b) otherwise than under the effective control of a responsible person aged 18 or over.

7 *Ibid*, chapter 10.

The immediate inconsistency that this provision introduces is that of the ages of children to whom the curfew will apply. The section is intended to prohibit children under the age of 10 from being out on the streets. Whilst this may be consistent with the policy of preventing criminal tendencies from developing, it appears to be a 'sledgehammer to crack a nut' approach. Children under the age of 10 are not, and will not even after the Act's implementation, be considered to be capable of committing criminal offences. In addition, there is little or no credible evidence to suggest that the majority of minors below the age of 10 are viewed as a threat to society – it is the older child that is not only perceived to be a greater threat to others but evidentially seems far more likely to commit a criminal act.[8]

The White Paper provides the example of when the curfew notice would be used thus: "if young children were regularly congregating at night in the public spaces of a housing estate, making residents' lives intolerable through vandalism, pilfering and abusive behaviour, local residents might seek the help of the police." [9] The scenario provided is more suitable to children of above 10, not under this age. As Graham and Bowling (1995) point out

> Among males, the peak age of offending is 14 for expressive property offences, 16 for violent offences, 17 for serious offences, 20 for acquisitive property offences and for drug use. Among females, the peak age of offending is 15 for property, expressive and serious offences, 16 for violent offences and 17 for drug use.[10]

There emerges then, a serious contradiction between the provision of the legislation and the nature of the problem which it seeks to address.

Without a credible evidential base for its justification the introduction of the curfew notice appears little more than deliberate political manoeuvring. In the absence of an effective strategy for tackling crime the presumption of action, ineffectual as it may be, may well become ever more important. Drawing as it does on the key themes of potential victimisation and the prospect of enhanced community safety such an approach has the clear potential to capitalise on the increasingly powerful discourse about crime and punishment in the popular media.[11] In its design therefore such action seeks to contain the majority for the potential behaviour of the minority and in doing so demonstrates a clear disregard the concepts of justice and fairness as key principles governing coercive action.

Section 15 – Local Authority Investigations

Failure to comply with the curfew notice has the potential lead to even greater state intervention within the family unit via the provisions contained in section 15 since the provision introduces further civil powers of investigation for the Local Authority by amending the Children Act 1989, section 47. As currently enacted section 47 requires an Authority to "make such enquiries as they consider necessary to enable them to decide whether they should take any action to safeguard or promote the child's welfare". This so-called *duty* to investigate arises when the authority are told that the child is the subject of an Emergency Protection Order under the Children Act 1989, section 44, or the child is under Police Protection, under section 46 of this Act, or finally where the Authority "have reasonable cause to suspect that a child is suffering, or is likely to suffer, significant harm" under section 47 itself. The implication from the criteria to trigger an investigation is that intervention will only arise where there is a risk of harm to the child. Indeed this is consistent with the philosophy of the Children Act 1989

8 See further Graham and Bowling (1995) *op. cit.* and Home Office *op. cit.* n. 1.

9 Home Office, *op. cit.* n. 1 at para 5.8.

10 *Ibid,* at p. 29.

11 See further Stuart Hall, Chas Critcher, Tony Jefferson, John Clarke & Brian Roberts, *Policing the Crisis: Mugging the State* (MacMillan, 1978) and Simon, "Sentencing Law and the New Penology: Notes on recent developments in the USA", *Criminal Justice Matters* No 25 Autumn (1996) ISTD.

itself – that state intervention in family life should be kept to a minimum, and any action taken should be the least interventionist step possible. The amendment to be introduced by the Act can be argued to compromise the section 47 link to harm, and also is not in line with the least intervention ethos of the 1989 Act.

Section 15 will introduce into section 47 an additional 'trigger' criteria:

> 15 (4) In subsection (1) of section 47...
>
> (a) in paragraph (a),.. there shall be inserted the following sub-paragraph-
>
> *"(iii) has contravened a ban imposed by a curfew notice within the meaning of Chapter I of Part I of the Crime and Disorder Act 1998; and*
>
> (b) at the end there shall be inserted the following paragraph-
>
> "In the case of a child falling within paragraph (a)(iii) above, the enquiries shall be commenced as soon as practicable and, in any event, within 48 hours of the authority receiving the information."

As the above criteria show, there is no attempt to provide any justification for state investigation by reference to the risk of harm that the child will suffer or is suffering by being allowed out onto the public highway after 9 p.m. or before 6 a.m. An implicit link may be present - the provision seems to assume that most "sensible" parents would not let children of that age out without supervision. However, simply because a parent is not "sensible" should not be sufficient cause to involve the Local Authority. The section as implemented would require the investigation of the child's circumstances where a parent had sent it to visit its grandparents 4 doors away, or when the child was out with a 16 or 17 year old sibling – a situation that most individuals would find untenable.

An additional difficulty with the section as it stands is the imposition of a time period within which the enquiries must be commenced. As the Children Act 1989, section 47 currently stands, there is no time frame specified either for commencing enquiries or concluding them. The latter would be difficult to enforce or oversee since the investigation and the consequences arising therefrom are totally within the remit of the Authority. Also, the length needed to conduct enquiries will be dependant upon the nature of the harm the child is suffering or is likely to suffer, and all the other relevant circumstances of the case. Where the commencement of enquiries is concerned, the imposition of a time frame for the investigation when a curfew notice has been breached can also be questioned with regard to enforcement. There are no current means of enforcing such a time limit within the Children Act 1989, and the Act does not seek to amend it further. In this sense, therefore, the 48 hours to commence the enquiries as introduced by the Act is a nonsense insofar as the Children Act 1989 is concerned. The only realistic means to seek a remedy or to enforce the investigation would be to utilise the process of judicial review and to obtain an order of mandamus. This in itself raises the question of who would be the applicant? The child's parent (who will be one of the subjects of investigation) may seek the order. But, would a parent wish to have the investigation carried out, and would they be in a position to fund a high court action? An alternative applicant would be someone who can show sufficient interest in the child to require the investigation – this might be a body such as the NSPCC. However, in this situation it is submitted that this link would be hard to establish, unless the court assumes that a breach of a curfew notice is a sign of a child at risk. Unless a child is at risk, or there are child protection issues, the NSPCC would have little or no *locus* for involvement and hence no ability to enforce the investigative powers.

Questions must be raised therefore as to the purpose of setting these apparently non enforceable time perimeters. Considering the issue of criminal justice more widely then certainly such legislative impositions have become commonplace. The introduction of the Criminal Justice

Act 1991, for example, signalled an end to localised arrangements in probation and placed in their stead a series of national standards governing not only the nature of the task to be undertaken but also the expected time frame within which such tasks ought to be completed. Such impositions have served to blur the distinction between issues of quality of service provision and the quantity of service provision. Quantifiable action; speed of contact taken together with nationally defined numbers of contacts increasingly serve as the indicators by which performance is measured. The debate concerning the nature of practice and the purpose of state sponsored processes of intervention has gradually subsided in favour of a climate within which actuarial considerations predominate. The physical fact of contact however, does not in itself equate to a clearly considered purpose of contact. Whilst the latter defies definite measurement it ought nevertheless to be the central justification by which agents of the state forcibly enter the lives of its citizens.

It must also be of concern to those Local Authority departments charged with the duty to investigate in the case of breach of a curfew notice that the White Paper *No More Excuses* (1997) makes no estimation of costing or resource implications arising from the changes to the Children Act 1989. The introduction of a curfew notice is deemed to be a permissive power and hence should be resourced from existing budgets.[12] It is suggested that the cost of investigation is not part of the child curfew scheme, merely an adjunct to it, and one that may cost dearly. It would also seem inconsistent for the Local Authority to support the imposition of a curfew scheme and yet state they would be unable to assist in the consequences of its introduction. Therefore the question must be whether these schemes will indeed be implemented to any great extent and indeed, early indications are that local authorities will not be in any great rush to do so. Hence, one of the central planks of the Act on prevention of child crime has already been potentially dismissed.

THE CRIME AND DISORDER ACT 1998 – PREVENTION OF CRIME BY COURT ORDERS

Section 11 – The Child Safety Order

The child safety order is designed to "protect children under ten who are at risk of becoming involved in crime or who have already started to behave in an anti-social or criminal manner".[13] The terminology employed both in the order's name and the reasoning for it implies that the children to whom it will be applied are in need of protection. Again, this may be seen as an area of conflict, since it would really appear that the public is the group that needs the protection. The order is only available in civil proceedings and as a civil remedy for criminal activities highlights a potential inconsistency for theory and practice.

Criteria for the order

The Act will enable a child safety order to be made if one or more of four situations specified in sub-section (3) have arisen:

(3) The conditions are-

(a) that the child has committed an act which, if he had been aged 10 or over, would have constituted an offence;

(b) that a child safety order is necessary for the purpose of preventing the commission by the child of such an act as is mentioned in paragraph (a) above;

12 See further Home Office, *op. cit.* n. 1, chapter 10.

13 *Ibid,* para 5.5.

(c) that the child has contravened a ban imposed by a curfew order; and

(d) that the child has acted in a manner that caused or was likely to cause harassment, alarm or distress to two or more persons not of the same household as himself.

It could be argued that the final situation should be taken together with the third, given the inclusion of the word "and" within the clause and yet this would not seem to be the case. To do so would make sense, given that the making of a child safety order for the breach of a curfew notice would seem particularly Draconian. It would also appear harsh that the order can be made before any act of criminality has occurred, if the order is perceived, as the authors believe it to be, as a sentencing regime rather than as a protective mechanism. Whilst the prospect of early intervention has an obvious appeal premature entry into formal systems of supervision has to be treated with caution. The history of juvenile justice has shown clearly the capacity for system expansion and the potential for young offenders to be propelled toward custody via previous contact with the supervisory sanctions.[14] Under current arrangements therefore, sanctions originally imposed in civil proceedings, and for acts not strictly defined as criminal, may well serve as the defining feature of a young persons antecedent history in any subsequent forays into the criminal court jurisdiction.

Consequences of the order

The consequences of the making of the order are outlined in sub-section (1) thus:
"[The magistrates court] may make an order..which (a) places the child, for a period (not exceeding the permitted maximum) specified in the order, under the supervision of the responsible officer; and (b) requires the child to comply with such requirements as are so specified". Hence, the order appears to act in a similar vein to a supervision order under the Children Act 1989, section 31. There are naturally differences, with the major one being that under the child safety order, the duration of the order will be 3 months, unless the circumstances necessitate an extension to a total of 12 months (Crime and Disorder Act 1998, sub-section 11 (3)). By contrast a Children Act 1989 supervision order will last for 12 months with further extensions possible to a maximum of 3 years. The rationale for reducing the duration to 3 months is unclear – if the responsible person is to be a social worker (whether within the youth offender team or not), the success of the order will be in doubt. The ability to allocate a worker and to achieve any meaningful progress with a child, and its parents, in this time scale is questionable. Within the civil law context, the ability to allocate social workers is already under stress and the requirements under the child safety order will merely exacerbate the situation. Under the Draft Guidance, the responsible officer should contact the child and family "as soon as is practicable.., and should do so within 5 working days".[15] The Guidance also suggests that a plan to support the child should be available within 10 days or "if practicable it should be available for the initial meeting for discussion".[16] The reality, it is submitted, will be somewhat different. If the time limits within the guidance are to be complied with the immediate consequence may be for officers to be removed from other child protection work, or the burden to be placed onto Probation officers who may be ill equipped to deal with child protection issues. However, as with all Guidance it is not expressed to be legally binding and hence the Local Authority may breach, not with impunity, but when resources are limited.

With regard to the second element of the order – that the child shall comply with the requirements of the order, it is hard to envisage what sort of requirements will be expected. Any requirements imposed should not conflict with parental religious beliefs or school attendance,

[14] Cohen, *Visions of Social Control,* (Cambridge Polity Press, 1979).

[15] Home Office, *Draft Guidance Document Child Safety Orders* (Home Office,1998) at para 4.6.

[16] *Ibid,* at para 4.7.

and should be designed to provide a child with suitable care, protection and support. The White Paper (1997) refers to the court being able to require the child to "be home at specified times or to stay away from certain people or places. The court could also prohibit certain conduct, such as truanting from school...".[17] The Draft Guidance endorses this response to the requirements within the order and states that requirements which might be imposed might include (inter alia) "avoiding contact with disruptive and possibly older children; not visiting areas, such as shopping centres, unsupervised...".[18]

Although the actuality of such orders are yet to be realised in practice the intention points clearly in the direction of the prevention of specified acts. The supervision of negative conditions has always posed an ethical dilemma for the social work profession, highlighting as they do the necessary reconciliation of care and control functions. Moreover, the oversight of preventative court instructions has serious resource implications since, by their very nature, such conditions require regular, frequent and unannounced visits.

In its imposition, the essential justification of the Child Safety Order rests on the presumption of risk to the individual child, in its construction however, the Order places the responsibility for conduct on the child *him/herself*; it is *they* who are accountable for *their* own behaviour and as such the order demands that *they* comply. Thus in rendering children responsible for their own behaviour they must by implication be held responsible for placing themselves at risk. Given that within the criminal law jurisdiction such a child could not be held criminally liable for their conduct holding a child of the same chronological age accountable for actions within the civil jurisdiction creates a curious anomaly. The allocation of rationality to the behaviour of those under the age of ten years appears incongruous with the normal process of maturation. Indeed, in more recent years, even despite the ascendancy of "just deserts" as the guiding principle for sentencing, we have been witness to measures which seem, in their conceptualisation, to endorse the desirability of construing criminal behaviour within the context of the maturity of the offender. The Criminal Justice Act 1991, for example, saw fit to extend the jurisdiction of the Youth Court to 17 year olds based on the recognition that for the majority of such individuals they ought not yet to be credited with the maturity of an adult offender. Thus by holding such offenders within the auspices of the Youth Court the opportunity to mitigate the nature of the offence by reference to the nature of the offender has been preserved. The provisions of the Child Safety Order, derived as they are, from the civil jurisdiction appear inconsistent with the thinking and provisions applied to young offenders within the criminal sphere. Indeed, in its conceptualisation of the child and the provisions which emanate from such, the provisions of the Child Safety Order seem somewhat inconsistent with conventional penological wisdom.

Failure to comply with requirements

Whilst these may be admirable conditions to prevent children from acting in a criminal manner, and to prevent children placing themselves at risk, the White Paper (1997) and the Act do not address the practicalities of ensuring the requirements are complied with. The only means of enforcement for failure to comply with the requirements of a child safety order are included in sub-sections 12 (6) and (7):

> (6) Where a child safety order is in force and it is proved to the satisfaction of the court...that the child has failed to comply with any requirement included in the order, the court-
>
> > (a) may discharge the order and make in respect of him a care order under sub-section (1)(a) of section 31 of the 1989 Act; or

[17] Home Office, *op. cit.* n. 1 at para 5.5.

[18] *Ibid*, at para 3.15.

(b) may make an order varying the order-

(ii) by cancelling any provision included in it; or

(iii) by inserting in it ..any provision that could have been included in the order if the court had then the power to make it.

(7) Subsection (6)(a) above applies whether or not the court is satisfied that the conditions mentioned in section 31(2) of the 1989 Act are fulfilled.

Variation?

The nature of this system of enforcement, as with much of the Act, would seem to be both harsh and in conflict with existing provisions. To enforce the order by means of a variation of the breached order is a common provision – a similar system applies to supervision orders within the Children Act 1989. However, due to the restrictive time limits placed on child safety orders (normally of three months), this means of enforcement is almost non-existent, unless the variation can result in the time limit being extended to the maximum of 12 months. It is not clear that sub-section 12 (6)(b) is wide enough to permit this. It would clearly depend on the meaning or interpretation to be placed on "provision" within the section. It is suggested that the courts may restrict this to the requirements within the order rather than the duration since a wide interpretation would potentially result in higher numbers of variation applications to the court. The court system is, at present, subject to many delays and any increase in applications would perpetuate this delay. Given that one of the themes of the Act is the reduction of delay within the juvenile justice system this potential knock on effect would appear inconsistent. However, any variation application would have no effect on the statistics since the proceedings would take place in the Family Proceedings Court not the Youth Court due to their civil status. In the light of these difficulties it is suggested that the child safety order, if it does not achieve its objective with regard to an individual child, will not result in variation proceedings. By analogy with the similar Children Act 1989 supervision order, any breach of the child safety order will lead to further, harsher, legal intervention. "[i]f there is a breach of a supervision order...There is no direct way of enforcing the directions made under [it]",[19] and "[t]he nature of a supervision order...does not involve any statutory level of monitoring...Any conditions attached to a supervision order cannot in themselves be enforced by the court...breaches can only be evidence in further proceedings".[20] Those alternative legal proceedings being the more Draconian Care Orders.

Care Orders?

Where the enforcement of the child safety order leads to the making of a care order under the Children Act 1989, section 31, more complex issues arise with the conflicts between the scope of the two legislative provisions. A care order under the Children Act 1989 permits a local authority to remove a child from the care of his/her parents, and place him/her with alternative carers, although in some situations the child may remain with his/her parents under the order. The local authority gains parental responsibility and may exercise this independently of the parents. This clearly provides a stronger means of control than is available under a supervision order. Given the nature of the order itself, and the ability to usurp a parents rights over and for their child, under the Children Act 1989, a care order can only be made by a court if the so-called "threshold criteria" have been met. Meeting the criteria will not guarantee the making of a care order, since the court then has to consider other principles contained within the Children Act 1989. The "threshold" criteria require the court to be satisfied:

[19] *Per* Ewbank J in *Re D (A Minor)(Care or Supervision Order)* [1993] 2 F.L.R. 423 at p. 428.

[20] *Per* Hurst J in *Re T(A Minor)(Care or Supervision Order)* [1994] 1 F.L.R. 103 at p. 106.

(a) that the child concerned is suffering, or is likely to suffer, significant harm; and

(b) that the harm, or likelihood of harm, is attributable to -

(i) the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him; or

(ii) the child's being beyond parental control.[21]

The principles to be considered once the threshold has been reached require the court to establish what is in the best interests of the child having regard to the welfare checklist in the Children Act 1989, section 1(3) and whether there is any benefit to the child in making the order in accordance with the Children Act 1989, section 1(5). The introduction of the threshold test and the welfare considerations in section 1 were part of the drive to reduce state involvement within family life. The emphasis within the 1989 Act being to avoid state intervention unless absolutely necessary and to base it purely on the harm that a child was or is likely to suffer. In addition, the power of the criminal courts to make a civil care order in respect of the criminal activity of a child which had existed under the Children and Young Persons Act 1969 was roundly criticised. Section 90 of the Children Act 1989 repealed the criminal courts powers to make such orders. Whilst the rationale for this repeal may be rooted in the desire to reduce state intervention, it is submitted that it was possibly more due to the ascendancy of punishment within the political sphere. This, together with an awareness of the detrimental consequences of excessive or ill-timed intervention on the part of practitioners has seen the welfare considerations imposed on the criminal courts reduced. That this is only a hypothesis is seen when the parliamentary debates are considered. Clause 64 of the Children Bill (ultimately section 90) was not debated, and nor was the repeal referred to in depth in the consultation papers leading up to the implementation of the 1989 Act. In the Review of Child Care Law (1985) the need to have one body responsible for the initiation of care proceedings was held to be overriding, since that body (the local authority) would be given the obligations to carry out the order once made. Hence:

> ..we consider that the case for allowing the police to continue to bring care proceedings cannot be sustained. In future, where a child commits an offence it should be a matter for the police or Crown Prosecution service to decide whether to prosecute or to approach the local authority and ask them to bring care proceedings.[22]

This statement clearly does not provide a concrete justification for the inclusion of section 90 of the 1989 Act but none is present elsewhere. The fact remains, that for some reason, whether it be a move to punishment rather than welfare, it was believed inappropriate to permit the courts to make civil care orders in connection with criminal acts. It is difficult to imagine what has occurred since the Review of Child Care Law to sustain any logical argument today to justify a reintroduction of this type of response to criminality in children which is precisely what the enforcement of child safety orders will permit. It is doubtful that the criminality of young children has changed in the last decade, albeit that the public perception may have altered. If the change is to deal with public perception – once more the discussion swings to the concept of group responsibility rather than individual responsibility. What is not at issue was the lack of take up of care orders in criminal cases under the previous legislation. It will remain to be seen whether local authorities shall utilise any new powers under the Act or if the "criminal

21 Children Act 1989, s. 31(2).

22 Review of Child Care Law, Department of Health and Social Security (1985) at para 12-20.

care order" will remain a minority sanction for criminal behaviour. Naturally it will always be open for a local authority to apply for a care order where a breach of a child safety order has occurred (even if based on criminality) using the full threshold criteria, and thereby demonstrating the risk or potential risk to the child's future development. It is submitted that this is an acceptable use of the civil care order since this reflects a welfare approach within the correct context and sits more comfortably with the illusive reasoning behind the introduction of section 90 of the Children Act 1989.

CONCLUSION

For at least the last decade the issue of problematic and criminal youth has occupied a position of some importance on the political agenda. During that time we have been witness to the development of the Secure Training Order and more recently the resurrection of shock incarceration, this time in the form of the imported "Boot Camp". Whilst these developments were aimed at the older age group, those of 12 years and above, the Crime and Disorder Act 1998 has now successfully served to broaden attention beyond the troublesome teenager to the potential threat posed by children of ten years and under. Although this range of measures derive their statutory footing from a variety of legislative sources they are nevertheless united by a single inescapable feature; that collectively the evidential foundation on which they are based is at best weak.

Our attention here has been focused around those provisions of the Act which permit the imposition of curfew orders on children as young as ten years of age and in relation to this our concerns are two fold. Firstly, evidence supporting the presumed threat posed by such young children is marked by its absence. State interference and the subsequent imposition of sanctions must rely on evidence of their necessity if they are to be considered legitimate. Thus in that absence of a serious problem to be tackled the essential justification of the curfew order begins to be drawn into question.

Our second concern is essentially consequentialist in nature. The possible repercussions of imposing curfew orders in circumstances which may not warrant such action appear far reaching. The breach of such an order has the potential to begin a train of events which may well lead to even greater control over the lives of children. It is the authors proposition then that in this instance the civil jurisdiction may well have been utilised as a means by which to usurp the standards of criminal law and hence permit state intervention by an alternative, hitherto unavailable, means. Within the traditional realm of the criminal law that behaviour which might now justify a child safety order would fail to warrant any such formal response. Indeed, given the weight of evidence supporting the relative merits of minimal intervention for young offenders such provisions appear to contradict the substantial evidential base upon which contemporary juvenile justice practice is based.

The politicisation of the crime problem however, has demanded a range of responses, some of which appear to be based on the presumption of threat rather than the actuality of threat. As two of the authors have argued elsewhere[23] the fear of crime can be as debilitating as being a victim of crime. Thus, the appearance of action in the fight against crime may well be as important as tackling the reality of crime. The political benefits to be derived from the appearance of effective action however, must be measured against the consequences for those who find themselves the target of such measures. In the absence of a problem, and in this instance a known threat to community safety, intervention into the lives of those presumed to pose such a threat cannot be considered a legitimate use of State authority.

[23] Griffiths, Rodgers and Sparrow "Crime and IT, Stalking the Net" *Probation Journal* Vol. 45 Number 3, September 1998.

SENDING THE RIGHT MESSAGE: THE RACIAL ATTACK PROVISIONS OF THE CRIME AND DISORDER ACT 1998

*Nick Allen**

IN A MEMORABLY DISDAINFUL EDITORIAL comment published nearly 25 years ago, the *Sunday Telegraph* offered the opinion that "[t]he less we fuss and legislate about race, the better".[1]

A lot of water has flowed under the bridge since then, of course, but the arguments questioning the value of "race relations law" (or at least, the race laws enacted in this country) have never disappeared, and a recent piece of legislative reform, sponsored by the new Labour Government, has served to bring these arguments back to centre stage, albeit in an attenuated form. The particular focus of this rekindled debate is racial violence and harassment.

Most people agree that the law should seek to eradicate racially motivated attacks.[2] Should, however, the law – and in particular, the criminal law – make separate and special provision for such attacks? It is evident that this question is not as easy to answer. We certainly know what the Labour Government's view is because its flagship Crime and Disorder Act has introduced, with effect from September 1998, a series of rules making separate and special provision.[3] But this significant piece of law reform has emerged only after an agonisingly long debate, and if that debate is anything to go by, the new provisions face a potentially awkward future. This article seeks to explore the background to, and effect of, the new statutory code. It will be seen that beneath the often-heated debates about the terms of the legislation there lies a fundamental difference of opinion concerning the symbolic role of the law in the sensitive field of ethnic relations. This difference of opinion is in turn simply one aspect of a wider, long-standing conflict over race policy between the Conservative and Labour parties. It will be suggested that, while the new provisions are undoubtedly well-intentioned and do in certain respects represent a real advance in our law, they are not free from problems. These problems, which are conceptual rather than practical, arise out of the nature and scope of new criminal offences. It will also be suggested that the practical impact of the provisions will be blunted so long as the sustained scepticism on the part of key law enforcement agencies persists.

DEVELOPMENTS UNDER THE CONSERVATIVE GOVERNMENTS

The racial attack provisions of the 1998 Act have a long and troubled history. During the period 1981-1994, three private member's Bills on the subject were introduced into the House of Commons.[4] None of them made substantial progress. In the same period, the House of Commons Home Affairs Select Committee produced four reports, the first three of which made

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1 14th September 1975. The comment was inspired by the publication by the then Labour Government of the White Paper *Racial Discrimination* (Cmnd. 6234).

2 I use the term "attacks" to refer loosely to acts of violence and harassment. It should be noted that the expressions "racial" and "racially motivated" have been described by the Macpherson Report on the Stephen Lawrence case as inaccurate and confusing on the grounds that "we all belong to one human race, regardless of our colour, culture or ethnic origin". (Cm 4262, para 45.17). The Inquiry team believed "racist" to be the appropriate adjective. This approach has not been adopted in the present article (nor, it must be said, has it been adopted in the official literature over the years).

3 Other areas covered by the Act include sex offenders, sentencing and youth crime. Legal developments in the USA in the field of racial violence are described by Hare in 'Legislating Against Hate – The Legal Response to Bias Crimes'. (1997) 17 O.J.L.S. 415.

4 These were the Racial Harassment Bill of 1985 (Bill 195 [1984-85]), the Racial Violence Bill of 1992 (Bill 100 [1992-93]) and the Racial Hatred and Violence Bill of 1994 (Bill 23 [1993-94]). As the titles suggest, the contents of these Bills were not identical. The last Bill – unusually, given the subject matter – was co-sponsored by a Conservative MP (Hartley Booth). The need for special legislation was also debated during the passage of the Public Order Act 1986 and the Criminal Justice and Public Order Act 1994.

no recommendation for legislative change.[5] The reason why none of the Bills made progress, and the reason why the Select Committee veered away from proposing law reform, was opposition from the Conservative Government.[6] Successive Home Secretaries argued, again and again, that making racial attacks a specific crime was neither necessary nor desirable, an argument that was once more deployed (though this time unsuccessfully) during the debates on the 1998 Act. The following statement is typical of the Conservative Party's approach during the 1980s and 1990s:

> The Government has considered whether it would be helpful to introduce a new criminal offence of racial harassment. It has concluded, however, that such an offence would cover behaviour already penalised by the law and could make convictions more difficult to obtain by requiring the prosecution to prove an additional racial element. If, for perfectly proper reasons, the prosecution authorities preferred to rely on other provisions, the declaratory impact of an offence of racial harassment would quickly be lost, and any, erroneous, impression that the authorities were unwilling to tackle these incidents might even be reinforced. The Government believes that progress is more likely to come from the effective use of existing offences.[7]

This insistence by Conservative Governments on adopting an ultra-cautious approach to racial problems was observed on other fronts. By way of example, one may cite their inertia in the face of demands by the Commission for Racial Equality for reform of the Race Relations Act 1976[8] and their determination to emasculate contract compliance schemes devised by (Labour-controlled) local authorities.[9]

In fairness, it should be noted that there were powerful professional voices supporting a sceptical stance towards racial attack legislation. Neither the Association of Chief Police Officers, nor the Metropolitan Police nor the Crown Prosecution Service demonstrated any enthusiasm for new criminal law measures during the period now under consideration. As recently as 1994, the then Director of Public Prosecutions, Barbara Mills QC,[10] told the Select Committee:

> I share the views, and the Crown Prosecution Service shares the views, of the Home Secretary. Of course, we very much want to do all that we can to diminish and indeed try to eradicate any form of racial attack, insult or anything that falls within that category – that goes, I hope, without saying from the CPS; but we are concerned that it may be, if you do have another offence, you will put it on the statute book and find it to be ineffective and, frankly, we do not think that that is a satisfactory state of affairs. I am sure you know that the main difficulties we have with offences which are categorised as being offences with a racial overtone, or sometimes undertone, is the whole question of proving them at all. I do not believe that having another offence will actually help, so I share the views of the Home Secretary.[11]

The general approach of the criminal justice establishment at this time may be summarised in the following way:

> (1) The criminal law already regulates acts of violence and harassment (via such measures as the Offences Against the Person Act 1861 and the Criminal Damage Act 1971).

5 These were HC (1981-82) 106, HC (1985-86) 409, HC (1989-90) 17 and HC (1993-94) 71.

6 Select Committees of the House of Commons reflect the balance of parties in the House as a whole and consequently are liable to split along party lines on contentious issues. When the Home Affairs Committee did finally decide to recommend the creation of a new offence of racially-motivated violence in 1994, the decision was taken by a 5-4 majority, one Conservative MP (David Ashby) voting with four Labour members: HC (1993-94) 71, p. xliii.

7 *Racial Attacks and Harassment* ,Cm 45, (Home Office, 1986), para 6.

8 The CRE published its first Review of the Race Relations Act in 1985. In its second Review, published in 1992, the Commission stated that it remained disappointed by the Government's failure to respond to the earlier proposals.

9 See in particular section 18 of the Local Government Act 1988. Reeves argued in 1983 that the Race Relations Acts were regarded 'as a socialist measure aimed at reducing what, in Conservative eyes, are legitimate or inevitable differences of treatment, in an effort to achieve an unwarranted equality': *British Racial Discourse*, p. 131.

10 Barbara Mills was replaced as DPP by David Calvert-Smith QC on 1 November 1998.

11 HC (1993-94) 71-II, Q 457.

(2) The police already treat racial incidents as a priority.

(3) The Crown Prosecution Service already regards racial motivation as a factor pointing towards prosecution.

(4) The courts already regard racial motivation as an aggravating factor when sentencing offenders.

(5) Proving racial motivation (in addition to proving an act of violence or harassment) would impose an additional and difficult burden on the prosecution. It would also require police officers to make difficult judgments.

(6) If the prosecution authorities decided to drop a case on the grounds of evidential weakness, or if a jury decided to acquit for the same reason, the wrong message could be sent to ethnic minority communities.

As we shall see, these arguments surfaced again in 1998. At this stage, however, it may be worth pointing out that potential problems of proof (for prosecutors) and potential problems of judgment (for individual police officers dealing with incidents on the street) had not inhibited Parliament when it came to penalising incitement to racial hatred. Ever since the Race Relations Act 1965 was implemented,[12] the police and prosecuting authorities have been obliged to make judgments about, *inter alia*, the likelihood of written material or words stirring up hatred on grounds of colour, race or ethnic or national origins.

THE LABOUR GOVERNMENT'S CONSULTATION DOCUMENT

In September 1997, the Home Office published *Racial Violence and Harassment: A Consultation Document.* Written necessarily from a Labour Party perspective, it flatly rejected previous official thinking by announcing the creation of "a new set of racially aggravated offences for England and Wales". These, it was said, "will send a strong message to society at large that such crime is unacceptable and that it will be dealt with very seriously by the police and the courts".[13] The Home Office was, of course, well aware of the practical problems of proving racial motivation and it came up with what it saw as a solution: the new offences would cover not simply cases where there was clear evidence of motivation but also cases in which the defendant had demonstrated racial hostility at or around the time of the incident.[14] This device of attaching significance to words spoken or conduct exhibited at or around the time of an attack was to appear in the Crime and Disorder Bill. So was the idea of replicating a number of "basic offences" (such as assault) and mixing in an additional racial ingredient, in order to produce "racially aggravated offences".

The expectation that special legislation on racial attacks was about to be introduced into Parliament provoked some adverse media comment. According to an article in the *Daily Telegraph*:

> Is it any worse to mug someone because they are Asian, rather than simply for the sake of stealing their watch? Are not both crimes equally vile? Apparently not, in the view of the Home Secretary... The creation of a special category of racial violence will inevitably signal to victims of 'unbiased' crime that their suffering is somehow less horrific and therefore less worthy of punishment than that of victims of 'hate crimes'. All assaults are, in a sense, hate crimes. Justice

[12] Section 6. The relevant provisions are now contained in Part III of the Public Order Act 1986, a statute enacted under a Conservative Government.

[13] Para 2.4. The creation of new criminal offences was a manifesto commitment of the Labour Party.

[14] See para 8.4.

> is supposed to be blind. Introducing racial considerations into court would make a mockery of the concept of equality before the law.[15]

The Times weighed in similarly:

> The figure of Justice is blindfold for a reason. Using the criminal justice system to make symbolic genuflection to political causes, however noble, only undermines the effective operation of the rule of law and fetters proper judicial discretion. Punishment should not depend on creating a statutory hierarchy of wickedness which elevates racial prejudice over any of the other ugly impulses towards criminality with which society must deal.[16]

Given the consistently sceptical attitude of the political right towards race relations legislation generally, and Conservative Governments' sustained opposition to the notion of separate racial crimes of violence, these comments could scarcely be considered surprising. Nor was it any surprise that they came to be cited during the Parliamentary debates on the Crime and Disorder Bill. They did, after all, raise an issue – the relative gravity of racial motivation – of considerable importance. The burden of these press comments essentially reflected the view which had been rather baldly expressed by Dame Jill Knight MP[17] during the examination of the then Home Secretary, Michael Howard, by the House of Commons Home Affairs Select Committee in 1994: "[A] crime is a crime is a crime... whatever is the motivation behind it."[18] The way in which the Labour Government sought to refute this line of argument is explained below. It is first necessary, however, to consider what the 1998 Act actually provides.

THE PROVISIONS OF THE 1998 ACT

The Labour Government's legislation on racial attacks is contained in sections 28-32 of the Crime and Disorder Act and section 82.[19] The earlier sections create the new 'racially aggravated offences' while section 82 provides for a new statutory sentencing principle to cover other offences where there is evidence of racial motivation.

Racially Aggravated Offences

The scheme of the Act is straightforward. Nine new criminal offences are created. These are, in fact, existing offences, created by earlier legislation (or, in the case of assault, the common law), with the added element of racial aggravation. In each case a higher maximum sentence than is available for the "ordinary" offence (i.e. the offence without racial aggravation) is laid down. A definition of "racially aggravated", which applies across the board to all nine offences, is set out in section 28. The nine offences are as follows:

(1) Malicious wounding or grievous bodily harm.[20]

(2) Actual bodily harm.[21]

(3) Common assault.[22]

(4) Destroying or damaging property belonging to another.[23]

15 25 July 1997.

16 3 October 1997.

17 Conservative MP for Birmingham Edgbaston from 1966 until 1997.

18 HC (1993-94) 71-II, p. 66.

19 Section 33 deals with offences in Scotland.

20 Based on section 20 of the Offences Against the Person Act 1861.

21 Based on section 47 of the 1861 Act.

22 Based on the common law.

23 Based on section 1 of the Criminal Damage Act 1971. This offence was not provided for in the original text of the Crime and Disorder Bill but was added after debate in the House of Lords.

(5) Fear or provocation of violence.[24]

(6) Intentional harassment, alarm or distress.[25]

(7) Harassment, alarm or distress.[26]

(8) Harassment.[27]

(9) Putting people in fear of violence.[28]

The crucial element of racial aggravation is defined in section 28(1). According to this, the prosecution have to prove (or, in the case of a police officer effecting an arrest, the officer has to reasonably suspect):

> *either* (1) that at the time of committing the offence, or immediately before or after doing so, the offender demonstrated towards the victim hostility based on the victim's membership (or presumed membership) of a racial group;
>
> *or* (2) that the offence was motivated (wholly or partly) by hostility towards members of a racial group based on their membership of that group.

For the purposes of this definition, "membership" includes association with members of a racial group and "racial group" means a group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins.[29] As is usually the case with statutory crimes, several questions of interpretation arise. For example, what do the expressions "immediately before" and "immediately after" mean? What is meant by "hostility"? How loose can an association with a racial group be to fall within the notion of "membership"? The definition of "racial group" has been taken from the Race Relations Act 1976 and so we know from existing case law that Sikhs, Jews and Gypsies are covered (and that Rastafarians are not).[30] As for the other expressions, magistrates and juries are likely to be told to use their common sense in deciding guilt or innocence. Many cases can be expected to turn on what was said (or, more accurately, what the court thinks was said) during the incident in question.[31]

It can be seen from the terms of section 28(1) that racial motivation does not actually need to be present for a racially aggravated offence to be committed. Such a motivation is only one of two possible racial elements recognised by the Act. The other element means that if the prosecution can prove that the defendant demonstrated hostility based on the victim's racial group, he is guilty of an aggravated offence *even if the offence was not inspired by racial factors*. So, for example, X may assault Y solely because X recognised from Y's clothing that Y is a supporter of a particular football team. If X adds insult to injury by directing racial abuse at Y as X runs off, X will be guilty of racially aggravated assault.[32] In this respect, the 1998 Act goes beyond

24 Based on section 4 of the Public Order Act 1986.

25 Based on section 4A of the 1986 Act.

26 Based on section 5 of the 1986 Act.

27 Based on section 2 of the Protection from Harassment Act 1997.

28 Based on section 4 of the 1997 Act.

29 Section 28(2) and (4).

30 See *Mandla* v. *Dowell Lee* [1983] 2 A.C. 548; *Commission for Racial Equality* v. *Dutton* [1989] Q.B. 783; *Crown Suppliers* v. *Dawkins* [1993] I.C.R. 517. The adoption of the formula employed by the Race Relations Act does mean, of course, that hostile references to a victim's nationality or national origins can result in the commission of a racially aggravated offence. The prospect of the Act being used in the context of incidents involving English people, Scots, the Welsh and the Irish was specifically adverted to during the Parliamentary debates on the Crime and Disorder Bill (and, indeed, generated a degree of mirth). This dimension is, however, of marginal significance in practice. The provisions of the Act, and the whole debate about racial crime, have been inspired by concern about attacks on black and Asian people.

31 According to recent Home Office research, by far the most common reason given by Asian victims for believing offences to have been racially motivated is the language used: Fitzgerald and Hale, *Ethnic minorities: victimisation and racial harassment* (1996), p. 20.

32 This type of outcome has been expressly acknowledged by the Home Office in its *Guidance on the Crime and Disorder Act* issued in September 1998 (see para 3.6).

the definition of 'racial incident' used by the Association of Chief Police Officers since 1985. That definition is restricted to "any incident in which it appears to the reporting or investigating officer that the complaint involves an element of racial motivation; or any incident which includes an allegation of racial motivation made by any person". Given the Government's statement in its 1997 Consultation Document that it was determined that "the criminal law should be adequate to protect victims of crime which is motivated by intentions amounting to racial hatred"[33] and other similar descriptions of the statutory objective, this expansive approach might seem surprising. Would most people refer to the football incident mentioned above as a racial attack or a racist crime? The reason, however, is disclosed in the same 1997 Document:

> Ministers recognise that the creation of offences which required the prosecution to prove that the offence was motivated on racial grounds would create a difficult hurdle to be overcome by the prosecutors... The Government intends that the new offences should cover cases where the prosecution is able to show racial motivation but it believes that for most racial incidents of violence and harassment a much more realistic test will be necessary.[34]

Hence the "demonstration of racial hostility" element in section 28(1). The Government's approach, it is suggested, is eminently sensible but it has introduced further complexity into an area already bedevilled by terminological confusion and it can be expected to cause difficulties for some jurors who may be reluctant to convict on the basis of what they see as a passing comment.

The New Sentencing Principle

Section 82 of the 1998 Act applies to offences other than those mentioned in sections 29-32. It requires the magistrates (or the judge in a Crown Court prosecution) to treat racial aggravation as a factor that increases the seriousness of the offence. This should result in a more severe penalty being imposed. "Racial aggravation" bears the same meaning as in section 28, so that the demonstration of hostility *or* racial motivation has to be shown. Because section 82 applies only to the sentencing stage of a case, the jury in a Crown Court prosecution is not involved in deciding whether the aggravating factor is present. This is a matter exclusively for the judge and if necessary evidence on it can be taken at a separate hearing. Unlike the earlier sections of the Act, section 82 was not designed to change the law. The Court of Appeal made clear in 1995[35] that racial motivation should be regarded as an aggravating factor for sentencing purposes. Nevertheless, the Home Office thought that 'for the sake of clarity' the court's ruling should be given statutory expression.[36]

The significant distinction between the two sets of provisions in the 1998 Act in terms of the allocation of functions to judges and juries does not mean that the provisions are unworkable in practice. However, it does arguably undermine the conceptual coherence of the overall package. The problem was rapidly picked up during the Parliamentary debates and it led inexorably to other questions and criticisms, not all of which the Government found easy to answer.

33 Para 2.1

34 Paras 8.2 and 8.3. This "more realistic" test does, of course, require proof of hostility towards the victim around the time of the incident. Past demonstrations of hostility towards the victim will not, therefore, be relevant. However, as the Home Office Guidance on the Act points out, statements made in the past may provide evidence of racial motivation and so bring the case within the other type of racial aggravation prescribed by section 28(1)(b) of the Act (see para 3.8). In an article written before the publication of the Crime and Disorder Bill (see n. 3 *supra*), Hare argued that any formulation of a hate crime law should address itself to the extent to which past statements will be admissible. This suggestion has not been taken up.

35 In the case of *R.* v. *Ribbans, Duggan and Ridley* (1995) 16 Cr. App. R. (S) 698.

36 *Racial Violence and Harassment: A Consultation Document* (Home Office, 1997), para 7.4.

PERCEIVED PROBLEMS ARISING OUT OF THE 1998 ACT

The Rationale Of The New Criminal Offences

Given that the courts already punished racially motivated attacks more severely than attacks not so motivated – a practice endorsed by section 82 of the 1998 Act – one is bound to ask why the completely new offences of racially aggravated assault, etc. were thought necessary. The obvious answer is that the establishment of these new crimes is designed to send a strong message to the ethnic minority communities (who bear the brunt of such attacks), police officers (who have to investigate them) and the Crown Prosecution Service (which has the job of bringing cases to court). It is also designed to send a strong message to the public as a whole. Such an approach reflects the symbolic function of the law, a function which has a very respectable history in many different areas of public concern.[37] On this view, it would be no objection to say that the outcome of prosecutions would not be significantly different (in the sense of bringing more perpetrators of racial attacks before the criminal courts).[38] This particular rationale was expressly adopted by the Commission for Racial Equality when it submitted evidence to the House of Commons Home Affairs Select Committee in 1993.[39] It was, as we have already seen, given prominence in the Labour Government's Consultation Document of 1997[40] and was relied upon by Ministers during the Parliamentary debates on the Crime and Disorder Bill.[41] The problem with the Act as it stands, however, is this: if, in order to send a message to the world, it is right specifically and separately to criminalise racially motivated assaults, acts of vandalism and harassment, why stop there? Why not go further and apply the same treatment to all other crimes which are capable of being committed with a racial motive? Why not, for example, criminalise racially motivated theft, robbery or arson?[42] This very point was put to the Government in Parliament:

> If one wishes to indicate by the conviction the gravity of the offence by having a special offence why not have an offence of causing serious bodily harm with intent by racial aggravation? If it is to mark the nature of the offence by a particular offence *the logic is to apply to all types of offence not merely those limited by the Bill.*[43]

37 Another current example of this symbolic aspect of law may be found in the Labour Government's proposals to reform family law by giving some unmarried fathers automatic parental responsibility (*viz.* "parental rights") under the Children Act 1989. In its Consultation Paper *The Law on Parental Responsibility for Unmarried Fathers* (March 1998), the Lord Chancellor's Department argues that parental responsibility "may be important to people as a symbol of the legal status of parenthood" (p. 2).

38 This is not to say, of course, that no convictions will be secured under the 1998 Act. Such a proposition is plainly absurd. The point being made here is that any successful prosecutions could have, and might have, been prosecutions for the pre-existing "basic" offences on which the racially aggravated offences are built. The 1998 Act is not needed to make these perpetrators criminally liable for their conduct.

39 HC (1993-94) 71-II, Appendix 6, para 4.3. The then Home Office Minister, Peter Lloyd MP, responded by saying: "I am not sure the law should be used for symbolism". (Q 88).

40 See n. 13 *supra* and accompanying text.

41 See, for example, the statements made by the Solicitor General on 12 February 1998 (House of Lords debates, cols. 1272, 1289 and 1293). The importance of sending messages had been emphasised by the sponsors of the Racial Violence Bill of 1992 (see House of Commons debates, 9 December 1992, cols. 850-2) and by the Labour Party during the debates on the Criminal Justice and Public Order Bill of 1994 (see House of Lords debates, 16 June 1994, col. 1910, *per* Lord Irvine).

42 The Racial Harassment Bill of 1985 (n. 4 *supra*) made express provision for racially motivated arson. In introducing this Bill, Harry Cohen MP referred to the cases of Shamira Kassam and her three children, who had died after an arson attack on their home in Ilford a few days earlier: see House of Commons debates, 17 July 1985, col 343. An amendment to the Criminal Justice and Public Order Bill of 1994 promoted by the House of Commons Home Affairs Committee and the Labour Party would have created the offence of racially motivated manslaughter: see House of Commons debates, 12 April 1994, cols. 35-64; House of Lords debates, 16 June 1994, cols 1909-1916.

43 Lord Carlisle, House of Lords debates, 12 February 1998, col. 1289 (emphasis added). See also the comments of Lord Desai at col. 1295: "To create some offences in order to increase punishment and not to create others because punishment already exists seems to me to be a confusion of motives. Even if it was, so to speak, a matter of duplication, and even if it was true that under certain sections you already have life imprisonment and you cannot go further, I still think that creating such offences of racial motivation would send out a very good signal that such matters are taken more seriously".

The Government's defence of the legislation was to argue that it was only creating new criminal offences where the "basic" offence (*e.g.* assault) carried an inadequate maximum sentence:

> If the conclusion reached by the Government, exercising their judgment... is that the existing maximum sentence for an existing crime is sufficiently high even to encompass a racially aggravated crime, then there is no basis either for increasing that maximum or for creating a new crime.[44]

There are, unfortunately, two flaws in this argument. First, there was no suggestion during the years preceding the Bill that maximum sentences were too low to accommodate racial attacks. This issue was not seen as problematic. Secondly, it does not explain why criminal damage – whose maximum sentence was considered adequate by the Government – was added to the list of racially aggravated crimes during the Bill's passage by Parliament. The reality seems to be that the Government, having decided to create the concept of a racially aggravated offence for legitimate symbolic reasons, chose to be selective in its application of the concept for pragmatic reasons. This selectivity does not mean that the legislation will not work in practice.[45] Furthermore, the all-important message has been sent. But a price has been paid in terms of conceptual coherence and consistency.

Singling Out Racial Crime

The notion of the aggravating factor in English criminal law is very well established. It plays a part in all stages of the criminal justice process, from initial investigation by the police through to sentencing by the court.[46] The Crown Prosecution Service occupies a pivotal role in this process and according to its Code for Prosecutors, common public interest factors in favour of prosecution include the fact that "the offence was motivated by any form of discrimination against the victim's ethnic or national origin, sex, religious beliefs, political views or sexual preference".[47] That special treatment is given to cases whose circumstances fall within these guidelines gives the lie to the claim advanced by some (and referred to earlier in this article),[48] that "a crime is a crime is a crime". Such an argument is far too crude and fails properly to acknowledge the perceived gravity of these cases. However, it is to be observed that the CPS Code is careful not to seek to prioritise *within* them, no doubt because of the difficult and contentious nature of such an exercise. This brings forth another problem with the Crime and Disorder Act. By accentuating racially motivated crime while remaining silent about other evil motives, Parliament could be understood by some to be playing down the significance of the latter. The question may be simply put: if race, why not religion or age or disability? Far from the legislature sending the right message, a failure to acknowledge these other types of attack could be said to be sending exactly the wrong message. It could be portrayed as a prioritising exercise, the very thing the CPS Code steers away from.

Criticisms along these lines were made as the Crime and Disorder Bill proceeded through Parliament. The following statement (made in the House of Lords) is typical:

> We know, of course, that people are frequently harassed and bullied because of their clothes, their lifestyle or because they are fat, thin or disabled. Not so long ago some people in wheelchairs in Oxford were attacked by thugs who said that they did not like crippled people. People

44 Lord Falconer, House of Lords debates, 12 February 1998, col. 1293.

45 Fears have been expressed, however, about the complexities (and consequent confusion) arising from the need to include both racially aggravated and 'ordinary' offences in some indictments. See Part 4 of the Home Office *Guidance* and House of Commons debates, Standing Committee B, 12 May 1998, cols. 321-330.

46 See, for example, section 10 of the Theft Act 1968, establishing the offence of aggravated burglary. It is clear from the case law that the offence of rape can be committed with aggravating features (so affecting sentence): *Archbold* (1998), para 20-18.

47 Para 6.4.

48 See n. 18 *supra* and accompanying text.

> are attacked because of their accents, whether they be regional accents or so-called "class" accents... Students at northern universities who have been to public school – there are tested cases here – have been head-butted by locals in pubs because they do not like their accents. The victims have ended up with broken noses, broken cheekbones, chipped teeth and so on. However, none of these categories receives special protection although all suffer equally.[49]

The question was pursued in the House of Commons, where the Conservative Party (having for years opposed special race crimes) went so far as to propose amending the Bill so that it would embrace attacks motivated solely by religion.[50] Referring once again to the symbolic effect of the law, it argued that a failure by the Government to deal with violent conflicts generated by religious divisions (involving, for example, Muslims and Sikhs or Catholics and Protestants) would send the wrong message: "They should be sending the message that religious discrimination and intolerance are every bit as bad as racial discrimination and intolerance".[51]

The Government offered a variety of replies to this argument. Its spokesman in the House of Lords stated that:

> [O]ne cannot protect everybody in one Bill. In this Bill we have focused on racially aggravating features. We believe that is a priority and it is important... I think that other sorts of discrimination are just as bad, but I certainly do not think that is a reason for not doing anything about racial discrimination.[52]

In the House of Commons the Home Secretary was faced only with the narrower issue of religion. He dealt with this by stating that, while the Government was as wholly opposed to religiously motivated violence and harassment as it was to racially motivated violence and harassment, the question of religion required careful consideration. "It is", he argued, "obviously much more difficult to define whether someone is a member of a religious group, which involves a subjective as well as an objective test. That does not mean that it may not be a candidate for future legislation, but it makes the matter more complicated".[53]

These arguments are essentially based on practicalities rather than principle, and as such they are not wholly convincing. However, there are – as the Government was quick to point out – plenty of precedents to fall back on if one wishes to justify the singling out of racial wrongs. In the field of criminal law there is incitement to racial hatred, mentioned earlier.[54] There is also the offence of racialist chanting at football matches, created by the Football (Offences) Act 1991.[55] As for the civil law, one need only cite the three Race Relations Acts of 1965, 1968 and 1976 to see how the UK legislature (propelled, admittedly, by a Labour Government on each occasion) has committed itself to a clear stand on racial discrimination and victimisation.

49 Lord Monson, House of Lords debates, 12 February 1998, col. 1265.

50 Attacks motivated partly by religion and partly by ethnicity are already covered by the legislation.

51 Eleanor Laing MP, House of Commons debates, 23 June 1998, col. 902.

52 Lord Falconer, House of Lords debates, 12 February 1998, cols. 1273 and 1276. The statement by Lord Falconer that "other sorts of discrimination are just as bad" is not easy to reconcile with the statement made 15 minutes later by Home Office Minister Lord Williams, to the effect that "racial motivation and violence is vile and foul in a way that other motives are not". (col. 1281) Cf. the view expressed in 1994 by Opposition spokesman Gerald Kaufman MP: "The House of Commons should send a message to the members of ethnic minority communities... that Parliament considers crimes with a racial element as even more intolerable than other crimes". (House of Commons debates, 12 April 1994, col. 39).

53 House of Commons debates, 23 June 1998, col. 895.

54 The current provisions relating to this criminal offence are contained in the Public Order Act 1986, a measure sponsored by the Conservative Government. When that Government resisted an amendment to the Public Order Bill creating racial harassment offences, the Labour Opposition, not surprisingly, cited the Government's own incitement to racial hatred provisions as a supporting precedent: see House of Commons debates, Standing Committee G, 10 April 1986, cols. 993-1005.

55 According to section 3(1) of the 1991 Act, it is an offence to take part at a designated football match in chanting of an indecent or racialist nature. The expression "of a racialist nature" means consisting of or including matter which is threatening, abusive or insulting to a person by reason of his colour, race, nationality (including citizenship) or ethnic or national origins: section 3(2)(b).

The racial attack provisions of the 1998 Act may be viewed as a natural extension to all these measures.[56] Critics who focus on their selectivity are consequently faced with the uncomfortable task of tackling the entire *corpus* of our race laws. In the words of Lord Irvine:

> To declare through the criminal law that there is a distinct category of racially motivated offences against the person is not an affront to victims of non-racist crime, whatever their colour or creed. It is no more than a legislative signal to a mature society of the threat from racism and a determination to deter it.[57]

There is another dimension to the selectivity argument which needs to be exposed. Since most racial attacks are committed by white people against non-white people, critics sometimes assert that special legislation is liable to prove divisive. The argument is that such a law confers superior rights on black and Asian people. The following statement encapsulates this approach:

> Legislation should not make matters worse. It should not provoke where provocation does not exist... If special legislation were introduced to protect ethnic groups [sic] against racial harassment, it could isolate an offence and possibly invite wretched and devious people to have a go. More important, it might prove divisive. It must remain a cardinal point of legislation that it is designed to make harmonious the way in which citizens live and relate to each other. We must try to achieve citizenship with no let or hindrance. The rights of protection should be available to all. No citizens should have special rights of protection that are not afforded to others.[58]

This approach to racial crime is wholly misconceived. While it is true that attacks on black and Asian people have been at the heart of official concerns, the provisions of the 1998 Act – like the earlier Bills which fell by the wayside – apply to, and protect, everybody. The selectivity permeating the Act reflects an emphasis on *racial* attacks, not attacks by whites on non-whites. It therefore follows that acts of violence or harassment perpetrated by black or Asian people on white victims are capable of falling within the legislation, just as discrimination against white people can result in liability under the Race Relations Act. Similarly, attacks carried out by members of one ethnic minority group on members of another ethnic minority group are capable of falling within the legislation.[59]

CONCLUSION

Although there are no reliable statistics relating to the nature and frequency of racial attacks,[60] it is agreed on all sides that such attacks constitute a very serious social problem. Given this agreement, and given the Labour Party's consistent faith in the law as a useful instrument in

56 Compare the claim that racial attacks are "a logical (that is to say, predictable) expression of underlying racism in society at large": Sibbitt, *The perpetrators of racial harassment and racial violence* (Home Office Research Study 176) (1997), p. 11. It is, of course, true that the provisions relating to incitement to racial hatred, racialist chanting and racial discrimination created new legal wrongs where there were none before, whereas the 1998 Act renders existing wrongs more serious. This distinction, however, is not relevant for present purposes.

57 House of Lords debates, 16 June 1994, col. 1910.

58 Giles Shaw, Minister of State at the Home Office, House of Commons debates (Standing Committee G), 10 April 1986, cols. 1003-4. Much the same argument was deployed by a subsequent Minister of State (Peter Lloyd) eight years later: "We do not want to bring about circumstances in which a mugged pensioner could say, however unfairly, that if he had been black, his assailant would have had to receive a much heavier sentence, or in which a victimised family, suffering regular harassment from neighbours, could say, 'Of course, if we had been a different colour, the police would have had to do something'" (House of Commons debates, 12 April 1994, col. 53).

59 In its sceptical leading article of 3 October 1997 (n. 16 *supra*), *The Times* argued that the Government's legislation could play into the hands of those determined to poison race relations: "In cases where black criminals assault white victims and no racial motivation is attributed, those determined to inflame ethnic tensions will allege that the Government's legislation discriminates against the majority population". The acceptance of such an argument seems to point towards the repeal of the Race Relations Act, for that Act too can be wilfully misconstrued as favouring non-white people.

60 Much time has been spent (and arguably wasted) on this matter over the years, particularly by the House of Commons Home Affairs Select Committee.

the fight against discrimination,[61] the provisions of the Crime and Disorder Act 1998 examined in this article are not really surprising. At a time when virtually the entire nation is being invited to come to terms with the contents of the Macpherson Report on the Stephen Lawrence case, it is not particularly easy to sustain an argument against the strengthening of our race relations law. The fact that the Lawrence case itself involved a racial attack makes it even more difficult to question the terms of the 1998 Act.[62] It has to be said, however, that in certain respects it is vulnerable to criticism from a purely logical perspective. And it may be that its language will generate problems of interpretation for police officers, the Crown Prosecution Service, magistrates, judges and juries. Some defendants will undoubtedly be acquitted of racially aggravated crimes in dubious circumstances, just as some apparently strong prosecutions will be dropped by the CPS. Legislation of this sort has to be judged in the round, however. Perfect logic is not necessarily the hallmark of effective law reform. In this particular instance, it is the message which is arguably most important, and judged by that criterion the 1998 Act scores heavily. The promotion and enactment of the provisions in question can indeed be viewed as an act of political leadership, a matter which is widely acknowledged as crucial in the field of race relations.[63]

What remains to be seen is the way in which the message is received and applied by the law enforcement agencies. The track records of the police and the Crown Prosecution Service in this field are mixed, to say the least,[64] and of course they are both on record as doubting the need for new criminal law measures. The result of the 1997 general election has meant that these agencies have had to swallow their doubts and take on board a new range of offences. The onus is now on them to review and refine policies and procedures on racial matters, a process that will be given added impetus in the aftermath of the Macpherson Report. Many localised problems can be expected here and both the Home Office and the Director of Public Prosecutions will need to remain vigilant if the challenging provisions of the 1998 Act are to be put into practice fully and consistently.[65]

61 Every major piece of race relations legislation in the UK has been sponsored by a Labour Government.

62 The report was published on 24 February 1999. Not too much should be read into the fact that the racial attack provisions of the Crime and Disorder Act were enacted while the Macpherson Inquiry was underway. As has been seen, it has long been Labour Party policy to reform the criminal law along these lines. It may well be, however, that the rather muted criticism offered by the Conservative Party in the House of Commons during the Parliamentary proceedings on the Bill in the summer of 1998 was partly attributable to the evidence emerging simultaneously at the Inquiry hearings.

63 See, for example, the comments of Herman Ouseley, Chairman of the Commission for Racial Equality, when giving oral evidence to the House of Commons Home Affairs Select Committee in 1993: HC (1993-94) 71-II, Q 222.

64 Cf. the conclusions drawn from a study of racial harassment in two London boroughs: "The police appeared to put little effort into identifying suspects. It is possible that the involvement of so many children and young people in racial incidents contributed to police officers' sense that racial harassment was not really a police problem". (Sibbitt, *op. cit.* n. 56, at p. 95). The section of the Macpherson Report on the Stephen Lawrence case which is devoted to the investigation and prosecution of racially motivated crimes paints a similar picture: "Wherever we went we met with inescapable evidence which highlighted the lack of trust which exists between the police and the minority ethnic communities. At every location there was a striking difference between the positive descriptions of policy initiatives by senior police officers, and the negative expressions of the minority communities, who clearly felt themselves to be discriminated against by the police and others". (Cm 4262, para 45.6). See also para 45.11 of the Report. As far as the CPS is concerned, the then Director of Public Prosecutions was forced to admit to the House of Commons Home Affairs Select Committee in 1994 that it had taken the Service three years to implement a system for tracking cases marked by the police as racially motivated: HC (1993-94) 71-II, Q 482.

65 Many other factors are, of course, bound to affect the operation of the 1998 Act. These include: the racial composition of police forces and other judicial and executive bodies, the level of determination and resourcing demonstrated by police authorities, and the nature and style of relevant media comment. Racism within police forces (which has a knock-on effect on the level of reporting of racial incidents by victims) is also a key factor. Nor should it be thought that the "effectiveness" of the Act will necessarily bring about a significant reduction in the number of racial attacks. According to a recent Home Office research study, agencies need to adopt a holistic approach in their attempts to prevent racial harassment in the long term. Such an approach consists of three strategies: (1) the identification of and effective action against perpetrators; (2) the identification of potential perpetrators and the development of strategies to divert them from actually becoming perpetrators; and (3) the development of a range of strategies for consistently addressing the perpetrator community's general attitudes towards ethnic minorities. See Sibbitt, *op. cit.* n. 56, pp. 106 *et seq.*

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CASE NOTES

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

PUBLIC POLICY IMMUNITY AND COMPETING INTERESTS

Costello v. *Chief Constable of Northumbria Police* [1999] 1 All ER 550

One of the strengths of the law of tort, especially negligence, is said to be that it rests on a series of principles elaborated pragmatically through the cases by the judges. One of the weaknesses of the law of tort, especially negligence, is that it rests on a series of uncoordinated principles with no coherent rationale laid out in code or statute, but whose interaction is subject to the vagaries of judicial interpretation. In other words the difficulty comes when two or more of these principles are in tension or conflict in relation to the facts of a given case. This is precisely what happened in *Costello.*

The facts are simple. The plaintiff, a woman police constable, had, with a male sergeant, arrested two female absconders, and brought them to a police station where there were two other male officers on duty, Inspector Bell and a custody sergeant. The absconders were behaving in a fractious and aggressive manner. The plaintiff was instructed by her sergeant to place one of the absconders in a cell and remove her belt and shoes. The sergeant followed the plaintiff and the prisoner to the cell block, but when he saw that the inspector was in the foyer of the cell block he returned to the custody desk to assist the custody sergeant with the second prisoner. Inspector Bell agreed that he had gone to the cell block because he realised that the plaintiff might require assistance which he had a "police duty" to provide and in order to provide it. In the cell the prisoner turned on the plaintiff and attacked her. This was heard by the sergeant, who hastened back and saw Inspector Bell standing outside the cell. He had not come to the plaintiff's assistance. He claimed that he had not heard the disturbance and did not realise the plaintiff needed assistance. This part of his evidence was rejected. The plaintiff suffered personal injury.

The relationship between a constable and the Chief Constable is *sui generis.* It is not that of employer and employee at common law, although some statutory aspects of employment law apply. The Chief Constable is by statute[1] vicariously liable for torts committed by constables in the line of duty. The plaintiff alleged that the Chief Constable owed her a personal duty of care, analogous to that of an employer, to provide a safe system of work.[2] She also alleged that Inspector Bell owed her a similar duty and that the Chief Constable was vicariously liable. She also alleged that but for breach of these duties she would have suffered no, or lesser, injury. She succeeded at first instance and the Chief Constable appealed.

The two principles at work here were :

> (1) The 'health and safety at work' principle, that a worker should not be exposed to unnecessary and avoidable risk. Since the end of the nineteenth century this has been

1 Police Act 1996, s. 88 (formerly Police Act 1964, s. 48).

2 Cf. *Wilsons & Clyde Coal Co* v. *English* [1938] A.C. 57.

> judicially accepted and applied in the three overlapping contexts of the personal common law duty, actionable statutory duty and vicarious liability for the negligence of fellow employees; and
>
> (2) the principle that, on grounds of public policy, the police and other public services should not be liable in tort to those harmed as a result of operational and policy decisions.

Unsurprisingly, counsel for the plaintiff stressed the former principle and counsel for the Chief Constable the latter to the extent that, as Hirst L.J. observed in the course of argument "the two submissions run on parallel lines which do not often converge". The question for the court was how to resolve the conflict.

May L.J., who gave the principal judgment[3], started from the proposition that the law readily imposes a duty not to cause physical harm to person or property, but is less ready to impose a duty to protect against the infliction of harm by a third party or the infliction of pure economic loss. The health and safety at work principle, even extended by analogy to the police context, is simply a well-known instance of this. The only interesting point in an otherwise entirely orthodox analysis is the suggestion that the assumption of responsibility, which is now the key test in pure economic loss cases,[4] is also of general relevance in orthodox physical damage and injury cases. (The driver 'assumes responsibility' to other road users.) This echoes a dictum of Lord Nolan in *White v Jones,*[5] which, at the time, seemed to be blurring the distinction between pure economic loss cases and 'ordinary' negligence, by conflating assumption of responsibility and proximity.

May L.J. found that there was

> ...only one point of difficulty in the present appeal. It is plain that the [plaintiff's] injuries were foreseeable. There was an obvious close relationship between her and Inspector Bell. Inspector Bell may readily be said to have assumed a responsibility to help the [plaintiff] if she needed help... The difficult question is whether, in a novel situation, it is just and reasonable to impose incrementally the duties contended for, or whether as a matter of public policy no duty should be imposed.[6]

In other words the general duty (represented by our first principle) is primary, but our second principle may operate to qualify it.

May L.J. proceeded to consider the cases concerning the 'public interest immunity' of the police and other public services. The starting point is *Hill* v. *Chief Constable of West Yorkshire*[7] which May L.J. regarded as stating a general policy reason for immunity, although in the case itself it was primarily held that the deceased, as merely one of some two million women potentially at risk from the Yorkshire Ripper, was not in any relationship of proximity. However policy has been restated as the basis for immunity, either together with proximity,[8] or as the sole *ratio*,[9] in a number of later police cases, and similar decisions have been made in relation to other emergency services.[10] It can indeed be argued that the same principle is at work in cases such as *X* v. *Bedfordshire County Council* [11] in relation to public authorities generally,

3 Sitting with Sir Christopher Slade and Hirst L.J.

4 *Henderson* v. *Merrett* [1995] 2 A.C. 145; and *Hamble Fisheries* v. *L. Gardner & Sons Ltd* (1999) *The Times*, 5 January 1999.

5 [1995] 1 All E.R. 691.

6 *Op.cit.* at p. 557.

7 [1989] A.C. 53.

8 *Alexandrou* v. *Oxford* [1993]; *Ancell* v. *McDermott* [1993] 4 All E.R. 355.

9 *Osman* v. *Ferguson* [1993] 4 All E.R. 344.

10 *E.g. Capital & Counties plc* v. *Hampshire County Council* [1997] Q.B. 1004.

11 [1995] 2 A.C. 633.

although the House of Lords appears to be having second thoughts about the scope of this immunity.[12]

The immunity is not absolute. It does not extend to specific acts of negligence in relation to defined persons [13] and, perhaps surprisingly, was not an issue in the Hillsborough litigation.[14] It does extend to the organisation of policing [15] and May L.J. considered that if the plaintiff had been injured simply because she was ordered to take charge of the prisoner alone, because there was no second officer to cover her, this would have been as the result of an operational decision which would have been 'hard to impugn'. The immunity may also be defeated by a competing public interest. So there will be a duty owed to an informer not to disclose their identity when the informer has stipulated for this.[16]

In essence, there can be no liability to the public at large, or in relation to operational and resource decisions. There may be a liability for specific negligent acts where there is a specific victim clearly in view. The novelty in this case was that it was said that Inspector Bell had omitted to act. Could there be liability on the basis of a positive duty to act. May L.J. thought this was a matter of first impression, but *Kirkham* v. *Chief Constable of Greater Manchester*[17] where police officers were held liable for a negligent omission to advise the prison authorities that a prisoner was a suicide risk, was not cited. This case seems to be a direct precedent. Nevertheless May L.J. regarded the present case as being very close to *Knightley* v. *Johns*; "the duty is a duty to comply with a specific or acknowledged police duty where failure to do so will expose a fellow officer to unnecessary risk of injury".[18] In *Knightley* v. *Johns* one component of the senior officer's negligence was an omission, namely to order the closing of the tunnel. This operated in conjunction with the positive order to ride against the traffic flow. The presence of the 'negative' element of omission was not fatal to the claim. In *Swinney* what was complained of was an omission to keep papers secure. Again, this was not fatal; where there is a positive duty, it can be breached by omission. There was therefore no overriding public policy reason to give immunity, although the close relationship between the two officers meant that the reasoning would not apply to a claim by a member of the public in similar circumstances (*e.g.* a kidnapping). In this type of case the orthodox reasoning based on *Hill* would prevail. However, in *Costello*, it was unanimously held that the close relationship between Inspector Bell and the plaintiff was such that, in what were described by May L.J. and Hirst L.J. respectively, as "extraordinary" and "exceptional" circumstances, he was in breach of duty in failing to try and help her, and the Chief Constable was vicariously liable for that breach.

The scope of the immunity, and the manner in which it is applied, were the subject of criticism in *Osman* v. *United Kingdom* [19] before the European Court of Human Rights. The main complaint sustained was that in that case the plea of public policy had been allowed as a blanket plea, which the court considered had deprived the plaintiff of a hearing on the merits, and thus of the right to have her claim considered by a court, in the sense of an impartial judicial tribunal free to consider the merits of the case including the plaintiff's substantive rights under

12 *Barrett* v. *Enfield London Borough Council* [1999] 3 W.L.R. 79. Leave to appeal to the Lords has also been granted in *Phelps* v. *Hillingdon Borough Council* [1999] 1 All E.R. 421 where there was held to be no liability on the part of a local authority educational psychologist because she had not 'assumed responsibility' for a pupil referred to her by teaching staff.

13 *Knightley* v. *Johns* [1982] 1 All E.R. 851.

14 *Alcock* v. *Chief Constable of South Yorkshire* [1992] 1 A.C. 310; *Hicks* v. *Chief Constable of South Yorkshire* [1992] 1 All E.R. 65 and *White* v. *Chief Constable of South Yorkshire* [1998] 3 W.L.R. 1509.

15 *Hughes* v. *NUM* [1991] 4 All E.R. 278.

16 *Swinney* v. *Chief Constable of Northumbria* [1997] Q.B. 464. The claim failed on the facts: *Swinney* v. *Chief Constable of Northumbria (No. 2)* (1999) *The Times*, 25 May 1999.

17 [1990] 2 Q.B. 253; [1990] 3 All E.R. 246.

18 *Op. cit.* n. 12 at p. 563.

19 [1999] 1 F.L.R. 193.

the Convention.[20] This case was decided a day or two before *Costello* was argued, but was not cited. It is however suggested that an analysis of the kind which May L.J. undertook would meet the requirements of the European Convention on Human Rights.

All in all this is an interestingly reasoned case which throws considerable light on the proper scope of the public policy immunity, and seems to balance the competing interests properly.

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20 Art. 6 relates to the right to a hearing, arts. 2 and 8 to the substantive rights.

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RIGHTS OF PASSAGE: HIGHWAYS, DEMONSTRATIONS AND THE HOUSE OF LORDS

Director of Public Prosecutions v. *Jones and another* [1999] 2 All E.R. 257 (H.L.) (Lords Irvine LC, Slynn, Hope, Clyde and Hutton)

It has been said that in English law "cars and horses have more legal rights than people".[1] Traditionally precedence has been accorded to the right to travel on the highway at the expense of any right to assemble peaceably and non-obstructively upon it. This has been in contrast to other jurisdictions in which it has been accepted that if the right of peaceful assembly and protest is to mean anything at all there must be secured to the public some space in which they can exercise it.[2] No such position has, until now, been adopted in the UK. Indeed the very existence of any *right* of assembly, in the absence of a Bill of Rights, has been in doubt. [3]

On 4th March 1999 the House of Lords, in a case which the Lord Chancellor said raised an issue of fundamental constitutional importance, held that the public do, after all, have a right to assemble on the highway as long as their use of it is reasonable and is consistent with the public's primary right of passage.

THE FACTS

The events in question took place on 1 June 1995 on the grass verge by the side of the A344 adjacent to the perimeter fence of Stonehenge. A group had gathered there to protest about the lack of public access to the monument on the tenth anniversary of the "Battle of the Beanfield", a violent clash between "new age travellers" and the police. It was found as a matter of fact by the Crown Court (and accepted for the purposes of subsequent appeals) that the appellants and their group were behaving peacefully and were not obstructing the highway.

A police inspector present on the scene counted 21 people and concluded that they constituted a "trespassory assembly" under the Public Order Act 1986.[4] He informed them of this and asked them to leave. Many did so but some, including the appellants, Dr. Jones and Mr Lloyd, refused. They were then arrested for taking part in a trespassory assembly.[5]

THE OFFENCE OF TRESPASSORY ASSEMBLY

The offence of trespassory assembly was created by section 70 of the Criminal Justice and Public Order Act 1994 which inserted section 14A into the Public Order Act 1986. It provides that the chief officer of police can apply to the local council for a banning order if he reasonably believes that an assembly is likely to be trespassory and may result in serious disruption to the life of the community or damage to historical or other important buildings or monuments.[6] The order can last for four days and can only operate within a radius of up to five miles

1 G. Robertson, *Freedom the Individual and the Law* (Penguin, 1993), at p. 66.

2 See, for example, *Hague* v. *Committee for Industrial Organization*, 307 US (1939) *per* Justice Roberts.

3 See, for example, *Duncan* v. *Jones* [1936] 1 K.B. 218 in which Lord Hewart C.J. stated that "...English law does not recognise any special right of public meeting...the right of assembly , as Professor Dicey puts it...is nothing more than a view taken by the Court of the individual liberty of the subject".

4 Public Order Act 1986, s. 14A.

5 *Ibid*, section 14B(2).

6 *Ibid*, section 14A(1).

of a specified point.[7] An assembly is trespassory, and thus section 14A order operates to ban it, if it is held on land to which the public has "no or only a limited right of access" and takes place "without the permission of the occupier...or so as to exceed the limits of the permission...or of the public's right of access".[8] Section 14A(9) states that "limited" means that the use of the land is restricted to use for a "particular purpose".

In this case a section 14A order was in place. It covered the part of the A344 upon which the appellants were assembled. The central question then was, in holding a peaceful and non-obstructive demonstration on the highway, were the appellants exceeding their limited right to be there? The primary purpose of the highway is passage and repassage, but how far did the public's right extend beyond this? Did it only include activities merely "incidental or ancillary" to this primary purpose or did it include such activities as the holding of assemblies, that have nothing to do with the right of passage?

The appellants were convicted by the Justices but their conviction was overturned on appeal to the Crown Court because their demonstration was not obstructive or violent and was a *reasonable* use of the highway.

The Director of Public Prosecutions appealed by way of case stated to the Divisional Court which overturned the Crown Court's decision.[9] McCowan L.J. stated that the issue of reasonableness did not arise and the Crown Court's implication that any assembly on the highway is lawful as long as it is peaceful and non-obstructive was "mistaken", for "it [left] out of the account the existence of the [s.14 A order] and its operation...which occurs to restrict the limited right of access to the highway by the public".[10] Collins J. agreed, stating that "[t]he holding of a meeting, a demonstration or a vigil on the highway, however peaceable...may...be tolerated but there is no legal right to pursue [such activities]".[11]

THE DECISION OF THE HOUSE OF LORDS

The House of Lords, by a majority of three to two (Lord Slynn and Lord Hope dissenting) overturned the decision of the Divisional Court and allowed the appeal of the protesters. A peaceful, non-obstructive assembly *could* (and in this case did) come within the limits of the public's right of access to the highway. In reaching this decision the Law Lords reviewed and relied on several late nineteenth and early twentieth century cases which consider the nature and extent of the public's right of access to the highway.[12] The majority interpreted these authorities widely and relied on the most liberal constructions of the law within them.[13]

Lord Irvine went the furthest, stating that the public highway was a place which the public might enjoy for *any reasonable purpose*, provided the activity did not amount to a public or private nuisance and did not obstruct the highway by unreasonably impeding the primary right of the public to pass and repass. Subject to these qualifications there was "a public right of peaceful assembly on the highway".[14] Any fears that the rights of private landowners might be prejudiced and that this test would allow *carte blanche* to "squatters and other uninvited visitors" were unfounded, for the law of trespass would continue to protect private

7 *Ibid*, section 14A(6).

8 Public Order Act 1986, s. 14A(5).

9 [1997] 2 All E.R. 119.

10 *Ibid*, at p. 124.

11 *Ibid*, at p. 125.

12 See in particular *Lewis, Ex parte* (1888) 21 Q.B.D. 191; *Harrison* v. *Duke of Rutland* [1893] 1 Q.B. 142; *Hickman* v. *Maisey* [1900] 1 Q.B. 752.

13 See in particular the judgements of Lord Esher in *Harrison*, at pp. 146-7; and Collins L.J. in *Hickman*, at pp. 757-8.

14 [1999] 2 All E.R. 257, at p. 265.

landowners against "unreasonably large, unreasonably prolonged or unreasonably obstructive assemblies".[15]

Lords Clyde and Hutton, accepted that what is a "reasonable or usual [mode of using the highway] may develop and change from one period of history to another".[16] Critically they also held that the common law does now recognise a right of public assembly and that in some circumstances this right could be exercised on the highway, as indeed was the case here.[17]

They were more cautious than the Lord Chancellor however and fell short of issuing general guidance. They stressed that every case must depend on its own facts. Lord Clyde said that the appellants and the Crown Court had gone further than was necessary in suggesting that *any* reasonable use of the highway, as long as it was peaceful and non-obstructive was lawful, and so a matter of public right. This approach would open a "door of uncertain dimensions into an ill-defined area of uses which might erode the basic predominance of the essential use of a highway as a highway". A test could not be defined in general terms but must depend upon the particular circumstances of each case. [18]

Further support for the majority decision was derived from the argument that it was desirable that there be harmony between the law of trespass and the law relating to wilful obstruction of the highway. Section 137 of the Highways Act 1980 makes it an offence to wilfully obstruct the highway without lawful authority or excuse. In *Hirst* v. *Chief Constable of West Yorkshire* it was held that the question of whether the highway was being obstructed without lawful excuse must be "answered by deciding whether the activity in which the defendant was engaged was or was not a *reasonable user* of the highway". [19] In the present case Lord Irvine stated it to be "satisfactory that there is a symmetry in the law between the activities on the public highway which may be trespassory and those which may amount to unlawful obstruction of the highway".[20] It was therefore appropriate that the test of reasonableness should be applied to both, a view with which Lord Hutton agreed.[21]

In their dissenting judgements Lord Slynn and Lord Hope adopted a considerably more conservative approach both in their construction of the authorities and in their statutory interpretation. With regard to the former they employed a much more restrictive interpretation than did the majority. Both held that the authorities clearly supported the proposition that the public's right to use the highway was limited to passage and repassage and anything incidental or ancillary to that right. The test of what was "ordinary and reasonable" user of the highway was not to be applied in the abstract but rather in the context of the exercise of the right of passage, which was the only right which members of the public were entitled to exercise when "using the highway *as a highway*".[22]

Perhaps more interesting is the fact that it was only the dissenting judges who actually considered the *intention of Parliament* in passing section 70 of the Criminal Justice and Public Order Act in the first place. In passing this section Parliament deliberately imported the private law device of trespass into the public law sphere. As Lord Hope stated, "section 14...brings into the arena of the criminal law the rights if any which the public have as against the occupier of the land in private law".[23] Parliament may have chosen to take out of the hands of the occupier the

15 *Ibid*, at p. 265.

16 *Ibid*, at p. 285 *per* Lord Clyde and, at p. 292, *per* Lord Hutton. Both of their Lordships cited the *dicta* of Collins L.J. in *Hickman* v. *Maisey* [1900] 1 Q.B. 752, at p. 758.

17 *Ibid*, at p. 291 *per* Lord Hutton.

18 *Ibid*, at p. 287.

19 (1987) 85 Cr. App. Rep. 143, at p. 150 *per* Glidewell L.J.

20 [1999] All E.R., at p. 266.

21 *Ibid*, at p. 294-5.

22 *Ibid*, at p. 279.

23 *Ibid*, at p. 274.

right to complain of a trespass and place it at the disposal of the police (which thus gives it a public law dimension in that it concerns the relationship between the citizen and the state) but nevertheless the extent of these limits must be found in the *relationship in private law* between the public and the occupier - this is what Parliament clearly intended.[24] If the approach of the majority were to be adopted, argued Lord Hope, this would result in a "fundamental rearrangement of the respective rights of the public and of those of public and private landowners" and this in a situation in which no landowner was present to defend their interests.[25]

Also with regard to the intention of Parliament Lord Slynn commented that *but for the section in question* no action would have been taken against a peaceful, non-obstructive assembly like the one the appellants took part in. Parliament did not pass the section for nothing:

> Parliament in 1994 has enabled action *over and above existing remedies* to deal with trespass on the highway...to be taken to deal with what was seen as a growing problem. If Parliament wants to take away that form of control, it can obviously do so. I do not consider that disapproval of this power justifies a change in the law as to the public's rights over the highway, which is what at times seems to be one of the bases of the defendants' arguments. [emphasis added][26]

As regards the "lack of symmetry" argument, Lord Hope considered that "like it or not" the intention of Parliament as disclosed by the language used in the section made this inevitable.[27]

COMMENT

Of the majority, only Lord Irvine placed any reliance on the European Convention on Human Rights and Fundamental Freedoms, Article 11(1) of which guarantees the right to freedom of assembly subject to the exceptions listed in paragraph 2. He considered that unless the common law recognised that assembly on the public highway may be lawful then the Article 11(1) right would be denied. He stressed that *mere toleration* of assemblies on the highway does not secure a fundamental right to hold them. Lord Slynn and Lord Hope, finding neither the common law uncertain nor the Statute ambiguous, did not feel the need to resort to the Convention.

Notwithstanding this reluctance to place reliance on it however, it is tempting to see the Convention as forming a heavy backdrop to the decision in this case, especially given the recent passage of the Human Rights Act 1998. It is at least arguable that the interpretation of section 14A by the Divisional Court would have been in breach of Article 11 in that it failed to have sufficient regard to the principle of proportionality.[28] Perhaps it was the imminence of incorporation that, in part and obliquely, fuelled the reasoning of the majority. There are certainly hints in their speeches that indicate that this was the case. The very recognition of a common law *right* of public assembly is in itself a major departure from the traditional Diceyan position that there exist only residual liberties as opposed to positive rights in the UK. Also their Lordships were willing to stretch their construction of the authorities (resulting in a progressive interpretation of the Act which was probably not intended by the Parliament of 1994) in a way which is reminiscent of the dynamic method of interpretation employed by the European Convention organs.[29] There is also evidence of a willingness to look outside the UK for guid-

[24] *Ibid*, at p. 275.

[25] *Ibid*, at p. 283.

[26] *Ibid*, at p. 272.

[27] *Ibid*, at p. 283.

[28] See B. Fitzpatrick and N. Taylor, "Trespassers Might be Prosecuted: The European Convention and Restrictions on the Right to Assemble" [1998] E.H.R.L.R. Issue 3: 292.

[29] See for example *Tyrer* v.*UK* [1978] 2 E.H.R.R. 1 in which the European Court of Human Rights stated that the "Convention is a living instrument which...must be interpreted in the light of present day conditions".

ance on human rights issues. Lord Hutton derived support for his argument that the common law recognises the right of public assembly from the judgement of Lamer C.J.C. in *Committee for the Commonwealth of Canada* v. *Canada*.[30] In contrast the minority appeared reluctant to see this as a human rights case at all but rather as one which, due to the intention of Parliament as evidenced by the language it used, had to be answered by applying the principles of the "law of real property and land-ownership".[31]

It could be argued that the 1994 Parliament's use of the private law device of trespass in the realm of public law to control the exercise of a fundamental right was always going to be problematic. The nature of these problems has been examined by Kevin Gray who has persuasively argued that there necessarily exist moral limitations on private property rights, especially where such property is given over to public use as, for example, in the case of the highway. Gray argues that the very notion of property has a moral component, and private property rights should not necessarily be allowed to trump or override basic rights such as freedom of speech or assembly.[32] It may be possible to read *DPP* v. *Jones* as an example of this kind of limitation exercise.

On a more practical level it would seem that the decision in *DPP* v. *Jones* will result in the public being able to participate in a whole range of activities on the highway as long as they are reasonable and do not interfere with the primary purpose of passage. The question of what constitutes reasonable user will itself no doubt cause much confusion. How for example will the police officer on the scene of a demonstration on the highway where a section 14A order is in place be able to judge whether or not it is a reasonable user? However, despite the anticipated difficulties, it is submitted that the progressive and bold approach of the majority of the House of Lords is to be applauded and reflects an increasing awareness of the importance of positive human rights amongst the higher judiciary prior to the coming into force of the Human Rights Act 1998.

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30 (1991) 77 D.L.R (4^{th}) 385: "...the freedom of expression cannot exist in a vacuum...it necessarily implies the use of physical space in order to meet its underlying objectives. No one could agree that the exercise of the freedom of expression can be limited solely to places owned by the person wishing to communicate: such an approach would certainly deny the very foundation of the freedom of expression".

31 [1999] 2 All E.R 257, *per* Lord Hope at p. 274.

32 K .Gray, 'Property in Thin Air' (1991) 50 C.L.J., particularly at pp. 290-292.

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FAIR DEALING IN THE LAW OF COPYRIGHT

Pro Sieben Media AG v. *Carlton UK Television Ltd and another* [1999] 1 W.L.R. 605 (C.A.)

The law of copyright seeks to preserve a balance between the protection of the interests of creative authors and the wider public interest. The defences to copyright infringement in section 30 of the Copyright, Designs and Patents Act 1988 ("the 1988 Act") have an important role in maintaining this balance. In particular, they ensure that a copyright interest cannot be exploited in a manner which interferes unduly with the public interest in the free flow of information for the purpose of criticism, review or reporting current events. Section 30 provides that:

> (1) Fair dealing with a work for the purpose of criticism or review, of that or another work or of a performance of a work, does not infringe any copyright in the work provided that it is accompanied by a sufficient acknowledgement.
>
> (2) Fair dealing with a work (other than a photograph) for the purpose of reporting current events does not infringe any copyright in the work provided that (subject to subsection (3)) it is accompanied by a sufficient acknowledgement.[1]

These section 30 defences (or their statutory predecessors)[2] have previously been considered by the Court of Appeal.[3] However, in *Pro Sieben Media AG* v. *Carlton UK Television Ltd and another*, the Court of Appeal has provided further clarification on a number of points concerning their interpretation.

THE FACTS

Pro Sieben, the respondent in the Court of Appeal, is a German television company producing a daily "magazine programme" called "TAFF". One such programme, broadcast in August 1996, featured an interview with Ms Mandy Allwood who, at the time of the interview, had received fertility treatment and, as a consequence, was pregnant with eight live embryos. The interview was conducted in a toy shop while Ms Allwood and her boyfriend were shopping for eight teddybears. Pro Sieben had paid Ms Allwood, through her publicity agent, Mr Max Clifford, for the opportunity to interview her and to broadcast the interview.

Twenty Twenty Television Limited and Carlton UK Television Limited, the appellants, were responsible for the production and broadcast of a television programme called "The Big Story – Selling Babies". This programme was produced in response to the well-known situation of Ms Allwood but took the form of a wider-ranging analysis of the effects of "chequebook journalism". The programme contained, amongst other things, a number of interviews with individuals who had sold their stories to the media and an interview with Mr Max Clifford. In addition, the appellants included a thirty-second extract from the respondent's broadcast interview with Ms Allwood. The respondent sued for infringement of its copyright interest in the television programme.[4] The appellants claimed that its use of the copyright broadcast consti-

1 Section 30(3) provides that:
"No acknowledgement is required in connection with the reporting of current events by means of a sound recording, film, broadcast or cable programme."

2 Copyright Act 1911, s. 2 and Copyright Act 1956, s. 6.

3 For example, in *Hubbard* v. *Vosper* [1972] 2 Q.B. 84 and *Time Warner Entertainment Company LP* v. *Channel Four Television Corporation plc* [1994] E.M.L.R. 1.

4 The respondents would have possessed copyright interests in the programme as a "film" (Copyright, Designs and Patents Act 1988, s. 5B) and as a "broadcast" (Copyright, Designs and Patents Act 1988, s. 6).

tuted fair dealing for the purpose of criticism or review[5] and/or fair dealing for the purpose of reporting current events.[6]

DECISION APPEALED

In a strongly worded decision in the Chancery Division, Laddie J. had rejected the appellants' arguments and awarded damages for copyright infringement. The judge had found that there had not been a "sufficient acknowledgement" of the television programme's author as required under section 30(1) (the "criticism or review" defence). In the 1988 Act, a "sufficient acknowledgement" is defined as "an acknowledgement identifying the work in question by its title or other description, and identifying the author...".[7] On the appellant's programme, the extract from the interview with Ms Allwood had been shown with the name "TAFF" appearing prominently in the bottom right hand corner of the picture. This satisfied the requirement that the work in question had to be identified by its title.

Less prominently, Pro Sieben's logo (a "stylised figure seven") appeared in the top right hand corner of the screen. The appellants had claimed that this was "sufficient acknowledgement" because it identified the work's *author*. Laddie J., however, had described the logo as "very pale grey and largely transparent" and, having heard evidence from viewers of the programme, had found that;

> ...Pro Sieben is not mentioned by name at any point during "Selling Babies" nor was it suggested that Pro Sieben as a company is known to anyone in this country save for a small-number of German-speaking viewers who have access to this on satellite channels. Therefore for the average viewer of "Selling Babies" this logo is meaningless...the defendants have failed to show that the use of Pro Sieben's logo in "Selling Babies" would be understood by a reasonably alert members of the relevant audience to indicate who the author of the TAFF extract was. Indeed, they have failed to show that the logo would be understood as referring to any particular person at all, let alone his connection with the TAFF extract...[8]

Formally, this had disposed of any defence under section 30(1). Nevertheless, the judge had also given his opinion on the other necessary components of the defence. He had found that, when considering whether activities had been conducted "for the purpose of criticism or review", it was necessary to consider the actual purpose of the user of the copyright work in question (a "subjective" approach).[9] In this instance, he had been strongly of the opinion that the appellants' purpose in including the extract had not been to include the extract "for the purpose of criticism or review" of the respondent's programme. Rather, he had found that the primary purpose of the respondents' programme makers had been "to proclaim that the [appellants] were above chequebook journalism and to scoff at an anonymous German broadcaster for having paid money for an interview".[10] Such a purpose was not within section 30(1). In those circumstances, Laddie J. had found it unnecessary to consider the final question of whether the appellant's activities constituted "fair dealing".[11]

5 Copyright, Designs and Patents Act, s. 30(1).

6 Copyright, Designs and Patents Act, s. 30(2).

7 Copyright, Designs and Patents Act 1988, s. 178.

8 *Pro Sieben Media AG* v. *Carlton UK Television Ltd and another* [1998] F.S.R. 43, at p. 55.

9 *Ibid*, at pp. 49-50.

10 *Ibid*, at p. 60.

11 It is important to note that, in order to satisfy section 30(1), a defendant is required to establish that a work has been used for the permitted purpose ("criticism or review"), that "sufficient acknowledgement" has been given *and* that, overall, the use of the work constitutes "fair dealing".

With regard to section 30(2),[12] Laddie J. had again stressed the significance of the programme makers' intentions. He had concluded that the use of the extract was not for the purpose of reporting the "minor" current event of Pro Sieben's interview for German television. He had also concluded that, in any event, the use of the extract was not proportionate to the purpose of reporting this current event and, accordingly, was not "fair dealing".[13] The appellants appealed.

THE DECISION OF THE COURT OF APPEAL

Robert Walker L.J., in giving the unanimous decision of the Court of Appeal,[14] reversed Laddie J. on all of the above points. First, he found that the phrase, "for the purpose of....", in subsections 30(1) and 30(2), was to be construed as a "composite" phrase and was therefore synonymous with such phrases as "in the context of" or "as part of an exercise in". Accordingly, it was found to be unnecessary "for the court to put itself in the shoes of the infringer of the copyright" in assessing whether or not a particular use of a copyright was for one of the protected purposes.[15] Instead, this issue was to be approached objectively.

On the facts before him, Robert Walker L.J. formed a quite different view of the purpose of the defendants' programme from Laddie J. He considered that the programme was indeed made for the purpose of criticising and reviewing the TAFF report and other newspaper material which, taken generally, constituted the "genre of the fruits of chequebook journalism". The appellants' programme as a whole was made "for the purpose of criticism of works of chequebook journalism in general, and in particular the ...treatment by the media of Ms Allwood's multiple pregnancy".[16] Thus, because the defence under section 30(1) permits not only criticism or review of the work from which a "quotation" is made but also criticism or review of "*another work* or of a performance of a work", the appellant's work fell within its scope. In addition, the Court of Appeal concluded that the use of the extract constituted "fair dealing" within section 30(1).[17] The extract was "quite short" and the appellants' programme was not, in any real sense, produced in the course of unfair competition with the respondent.

However, the appellants also had to establish that they had made "sufficient acknowledgement" of the respondent's authorship of the TAFF programme. Following a brief analysis of the appellants' inclusion of the respondent's logo, Robert Walker L.J. found that sufficient acknowledgement of authorship had been given. He considered it significant that the respondent itself sometimes used its logo as a mark of identification and that the use of the correct name would not in any event have had any particular significance for the bulk of the programme's viewers. This was because the audience for the respondent's programmes in the United Kingdom was very small.[18] Thus, the defendants were able to establish all the elements required by section 30(1).

This was sufficient for the appellants to escape liability for copyright infringement. Nevertheless, the Court of Appeal also came to a conclusion on section 30(2) (the "reporting current events" defence). Here, it was found that Ms Allwood's pregnancy, the media's coverage of the story of her pregnancy and the fact that an interview had been sold to German

12 With regard to section 30(2), a "sufficient acknowledgement" was not necessary in a case such as this because "[n]o acknowledgement is required in connection with the reporting of current events by means of a sound recording, film, broadcast or cable programme." (Copyright, Designs and Patents Act 1988, section 30(3))

13 *Pro Sieben Media AG* v. *Carlton UK Television Ltd and another* [1998] F.S.R. 43, at p. 60-61.

14 Sitting with Nourse and Henry L.JJ.

15 *Pro Sieben Media AG* v. *Carlton UK Television Ltd and another* [1999] W.L.R. 605, at p. 614.

16 *Ibid*, at p. 617.

17 *Ibid*, at pp. 617-8.

18 *Ibid*, at p. 618.

television for a substantial sum all constituted "current events" within section 30(2).[19] Unlike Laddie J., Robert Walker L.J. was satisfied that, on an objective assessment, the appellants' programme had been made for the purpose of reporting these events and that, for substantially the same reason as in the case of section 30(1), the use of the extract for this purpose was "fair dealing".[20]

COMMENT – MAINTAINING FLEXIBILITY IN INTERPRETATION

The Court of Appeal's decision that the phrase, "for the purpose of", was to be read objectively ought to have been anticipated. There would have been clear practical difficulties in allowing Laddie J.'s finding on this point to stand. As noted in the Court of Appeal, such an interpretation would have provided undesirable "encouragement to the notion that all that is required is for the user to have the sincere belief, however misguided, that he or she is criticising a work or reporting current affairs".[21]

Perhaps of greater interest is the contrast between the more liberal and flexible approach to the defence taken in the Court of Appeal and the stricter, more restrictive interpretation at first instance. The Court of Appeal's decision is certainly more in keeping with the approach which has generally been adopted in the past by courts in interpreting section 30.[22] This has been characterised by a concern to retain future flexibility by avoiding rigid interpretations of the provision. In this way, courts have traditionally sought to preserve the defence's historical function as a safety valve, the function of which is to prevent the law of copyright from interfering unduly with the public interest.[23] There are numerous examples of this tendency. For instance, courts have frequently refused further to define the requirements for "fairness" within the provision.[24] Any decisions which have sought to provide firmer "rules" with regard to the interpretation of the provision have usually been doubted or qualified in subsequent cases.[25] The decision of the Court of Appeal in *Pro Sieben* is entirely orthodox in this respect. This is apparent from Robert Walker L.J.'s view that "...'criticism or review' and 'reporting current events' are expressions of wide and indefinite scope. Any attempt to plot their precise boundaries is doomed to failure. They are expressions which should be interpreted liberally...".[26]

In particular, the Court of Appeal's interpretation of the requirement of "sufficient acknowledgement" deserves further note. It will be recalled that Laddie J. had found that an acknowledgment could only be "sufficient" where it was capable of being understood by "reasonably alert members of the relevant audience".[27] By contrast, the Court of Appeal accepted that the inclusion of a barely visible logo which was likely to have been recognised only by a tiny proportion of the appellants' programme's audience constituted a "sufficient acknowledgement".

Such an interpretation effectively treats the statute's requirement as an unnecessary restriction upon a court's ability to balance parties' interests justly. There is much to be said for this

19 *Ibid*, at p. 619.

20 *Ibid.*

21 *Ibid*, at p. 614.

22 And its statutory predecessors.

23 It should be noted that, prior to the Copyright Act 1911, the doctrine of "fair dealing" was a common law doctrine which was used to ensure that the copyright monopoly did not interfere unduly with the public interest.

24 See, for example, *Hubbard* v. *Vosper* [1972] 2 Q.B. 84, at 94 and *Beloff* v. *Pressdram Ltd* [1973] 1 All E.R. 241, at p. 262.

25 See, for example, *Time Warner Entertainment Company LP* v. *Channel Four Television Corporation plc* [1994] E.M.L.R. 1., in which the Court of Appeal doubted earlier *dicta* suggesting that the use of a work which had been obtained illicitly could never constitute fair dealing.

26 *Pro Sieben Media AG* v. *Carlton UK Television Ltd and another* [1999] W.L.R. 605, at p. 614.

27 *Pro Sieben Media AG* v. *Carlton UK Television Ltd and another* [1998] F.S.R. 43, at p. 55.

approach. The requirement for a "sufficient acknowledgement" of an author's claims can indeed be regarded as an unnecessary technicality. It is surely strange that an acknowledgement is not required in certain instances[28] whereas, in others, failure to provide such an acknowledgement precludes reliance upon the defence.[29] The interpretation adopted by the Court of Appeal does much to solve this difficulty by emptying the statutory requirement of almost all significance.

However, there is one respect in which the judgment of the Court of Appeal fails fully to promote the expansive approach to interpretation indicated above. As previously noted, section 30(1) only protects fair dealing "with a work for the purpose of criticism or review, *of that or another work or of a performance of a work...*". That is, the defence would be available, say, to a critic who used an extract from the work of one novelist to engage in criticism of the work of another novelist (as long as the extract was fairly used – for example, as long as it were not too lengthy). The defence would also be available where the critic used the extract to engage in criticism of the performance of a drama based on the work of another novelist. It was not however, according to Laddie J., available where the criticism was aimed at "the decision to pay for an interview"[30] rather than the TAFF programme itself. In such a case, there was insufficient connection between the criticism or review and the work itself.

This limitation represents a substantial restriction upon the defence's capacity to promote the public interest in freedom of discussion on matters of public interest. In the past, courts have mitigated its effect by interpreting "work" liberally. For example, in *Hubbard v. Vosper*,[31] the defendant included quotations from the plaintiff's works in the course of a wide ranging attack on his philosophy. In interlocutory proceedings for copyright infringement, the defendant claimed to be entitled to rely upon section 30's statutory predecessor.[32] In the Court of Appeal, Lord Denning M.R. considered that the defence could be made out in such circumstances, stating that:

> ...A literary work consists, not only of the literary style, but also of the thoughts underlying it, as expressed in the words. Under the defence of "fair dealing" both can be criticised, Mr Vosper is entitled to criticise not only the literary style but also the doctrine or philosophy as expounded in the books.[33]

In subsequent cases, the connection between criticism and work has been stretched yet further. For example, in *Time Warner Entertainment Company LP v. Channel Four Television Corporation plc*, the defendant's use of extracts from a film to support criticism of a decision to withdraw the film from circulation in the United Kingdom was found to fall within the boundaries of the defence.[34]

These decisions had been distinguished by Laddie J. in the present case. He had found that, in *Time Warner* case,

> ...The decision to withdraw the film from the British public was being criticised on the basis of an assessment of the artistic and cultural value of the film itself...The fact that criticism or review of a work may be used as a springboard to attack something else, does not detract from the fact that the work is being criticised or reviewed.[35]

28 Specified in section 30(3): see n. 1 *supra*.

29 Ironically, this point had previously been made by Laddie J. himself, speaking in an extra-judicial capacity. See the text of his 1995 Stephen Stewart Memorial Lecture, published as "Copyright; over-strength, over-regulated, over-rated?" [1996] 5 E.I.P.R. 253.

30 *Ibid*, at p. 60.

31 [1972] 2 Q.B. 84.

32 Copyright Act 1956, s. 6.

33 *Hubbard* v. *Vosper* [1972] 2 Q.B. 84, at p. 94.

34 [1994] E.M.L.R. 1.

35 *Pro Sieben Media AG* v. *Carlton UK Television Ltd and another* [1998] F.S.R. 43, at 52-3.

In the present case, however, the programme from which an extract had been taken had not been criticised or reviewed at all. The criticism or review related only to the respondents' *behaviour*. This is a most unsatisfactory distinction. It is very difficult to distinguish between the respondents' programme and the fact that the programme was a recording of an interview for which payment had been made. The problem here really results from the very existence of such an unnecessary technical restriction in the statutory provision. However, it would have been open to the Court of Appeal to have interpreted this restriction in a more expansive manner and to have found that the appellants had criticised the respondent's "work" in this case. However, the decision at first instance was not challenged on this point.

Instead, the Court of Appeal found that Laddie J. had taken insufficient account of the reference to "...criticism or review, of that *or another* work..." within section 30. In this case, because the appellants' programme could be construed as a critique of a *collective* body of "other work" (defined as "the fruits of chequebook journalism"), section 30(1) was satisfied. This was fortuitous but also far from satisfactory. It is absurd that criticism or review must be of a "work", "another work" or a "performance of a work" before the protection of section 30(1) can be obtained. It may, for example, be fair dealing to use an extract from a novelist's work to criticise the collective genre of rap music [36] while it may not be fair dealing to quote from the same novelist's work in the course of a critique of his personal behaviour.[37] It is very difficult to justify this distinction in a provision which is designed to secure the public interest in free discussion. It would perhaps have been more satisfactory for the Court of Appeal simply to have disagreed with Laddie J.'s narrow construction of the sub-section on this point rather than to have taken refuge in a statutory technicality. Nevertheless, taking account of the history of the interpretation of section 30, it can optimistically be predicted that a more expansive approach will ultimately prevail.

JONATHAN GRIFFITHS *

[36] Works within this genre would each constitute either "literary works" or "musical works" within the definitions in the Copyright, Designs and Patents Act 1988.

[37] Unless his personal behaviour is somehow indivisibly associated with the novel.

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MORE "STORMY WEATHER" FOR THE PENSIONS OMBUDSMAN: JURISDICTION AND TRUSTEES' POWERS REVISITED

Edge v. *The Pensions Ombudsman* [1998] 3 W.L.R. 466

INTRODUCTION

Despite the increasing volume of legislation and case law in the field of occupational pension schemes the decision of Sir Richard Scott V.-C. in *Edge* v. *Pensions Ombudsman*[1] examined two themes that have recurred in pensions litigation and to which a set of coherent answers has been slow to develop. The first, is the jurisdictional uncertainty that confronts the Pensions Ombudsman as a result of the interaction of the Pension Schemes Act 1993 sections 146, 149 and 151,[2] and the Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1991 paragraph 2;[3] and the second is the manner in which a power of amendment must be exercised by the trustees.

In *Edge* the trustees amended a pension scheme in August 1993. The amendments reduced the contributions of the members and provided an additional benefit for those in service at 1 April 1994. Some pensioners who no longer paid contributions and would not benefit from the additional benefit complained to the Ombudsman that the amendments were unjust. He determined that the trustees acted in breach of trust by making the amendments and the additional pension benefit. The reduction in members' contributions and the consequent reduction in the employer's contributions were therefore not validly introduced. The scheme should be administered as it stood prior to the amendment and the trustees should seek payment of the full contributions due during the period between the date of the amendment and the determination. The trustees appealed.

THE JURISDICTIONAL UNCERTAINTY

It is important to note from the outset that there was no comprehensive review of authority relevant to the issues which so singularly damned the decision of the Ombudsman in the opinion of Scott V.-C. The tenor of his judgment was set very early on when he said (after pointing out that the Ombudsman had been "meticulous" in inviting representations from the parties involved),

> ... the Pensions Ombudsman did not seek or allow the opportunity for comment by anyone else ... (and the determination and directions thereunder) ... purported to deprive an *unrepresented* class of members of a benefit apparently validly given to them ... (and imposed) ... on the employee members and on the employers, *all unrepresented*, obligations to pay contributions at a level higher than those appearing from the Scheme Rules... (emphasis added). [4]

Against this, it is instructive to understand the statutory provisions governing the Ombudsman's powers which, though *prima facie* are comprehensive in nature - allowing a wide range of issues to be investigated - contain the lacuna averted to above.

* *This note was in press when the Court of Appeal judgment in this case was handed down. A further note on the Court of Appeal decision will follow in the next issue of this journal.*

1 [1998] 3 W.L.R. 466 (Chancery Division).

2 Now the Pensions Act 1995 as re-enacted and amended.

3 S.I. 1991/588.

4 *Op. cit.*, p. 469.

The Statutory Background

The Pension Schemes Act 1993, section 146, empowers the Pensions Ombudsman to deal with complaints and disputes in pension matters. The wording of section 146 is wide and allows the Ombudsman to investigate "any complaint... by a complainant who alleges that he has sustained injustice in consequence of maladministration..." or "any dispute of fact or law...".[5] This is wider than the jurisdiction conferred on ombudsmen in other spheres, and as Scott V.-C. said, there is "... no limit, save such limits as are imposed by the regulations made under section 146 of the Act, to the type of complaints of injustice sustained by maladministration or as to the type of disputes of fact or law which arise in relation to a scheme that the Pensions Ombudsman may entertain...".[6]

An investigation into a complaint of "injustice in consequence of maladministration" is a common factor in all statutory ombudsmen jurisdictions and also applies to the Pensions Ombudsman, but clearly (and unusually), he has a "second string to his bow".[7] There are a number of reasons for establishing an Ombudsman for pension disputes and the efficacy of the office is compendiously dealt with in, *inter alia*, the Goode Committee Report,[8] but it is in relation to his jurisdiction over disputes of fact and law that the call in some quarters for a statutory tribunal to deal with such issues is loudest.[9]

Against this background, Scott V.-C. set about attacking the Pensions Ombudsman's determination on jurisdictional grounds. This approach can be conveniently grouped under two headings; the first deals with the inability of the determination to bind interested persons not party to the complaint (*i.e.* other scheme members and the employer), and the second, the invalidity of the determination based upon issues of "fairness". This second point is a corollary of the first.

The Inability to Bind Interested Persons

In a nut-shell, Scott V.-C. stated that the problem with the statutory scheme was that it did not provide for the situation where, say a complaint against the trustees was upheld, but the remedial steps taken prejudice the position of a third party or parties. In this respect in *Edge*, for example, there was a resultant financial burden placed upon the employer and scheme members who *may* have joined the scheme after 1st April 1994. The position of members and the employer, who are not complainants here, exhibit some differences in relation to the construction of the statutory framework so that it is not necessarily obvious that they be treated the same, but they are unified by Sir Richard Scott's general concern about the lack of "fairness" in the procedure adopted by the Ombudsman (see *infra*).

Scott V.-C. pointed out that it had not been suggested that the other members of the scheme may be said to be persons "claiming under" the trustees within section 151 (3)(c) of the 1993 Act. Here, they had an interest in the fund in their own right. There was, said Scott V.-C., no way that the determination could be made binding upon them.[10] The position of the employer could arguably be different in that S.I. 1991/588, paragraph 2, provides for the application of the investigatory scheme under the 1993 Act to "apply in relation to the employer as they would

5 Subject to the Pension Schemes Act 1993, s. 146(6)(c) which allows regulations to be made which exclude certain matters from the jurisdiction of the Pensions Ombudsman. These matters are contained in S.I. 1991/588 and S.I. 1996/1271.

6 *Op. cit.*, p. 473.

7 See Robert Walker J. in *Westminster City Council* v. *Haywood* [1996] P.L.R. 161 at p. 166.

8 Pension Law Review Committee, Cm 2342-I (HMSO, 1993).

9 See Thomas & Dowrick, *Blackstone's Guide to the Pensions Act 1995*, (Blackstone Press, 1995), p. 119.

10 A similar phrase in the Arbitration Act 1975, s. 1 concerning the staying of court proceedings has been said to cover the interest of a party which has devolved to some other person by means of death, bankruptcy or voluntary assignment (see *Piercy* v. *Young* (1879) 14 Ch. D. 200 and *Aspell* v. *Seymour* [1929] WN 152). A more extensive meaning in the Pension Schemes Act 1993, s. 151, it is suggested, is largely rejected in *Edge*.

apply in relation to the trustees or managers of such a scheme".[11] As neither side to the appeal raised this point, Scott V.-C. felt vindicated in concluding that it may be common ground that paragraph 2 did not apply to bind the employer here, though it was accepted that such an approach might be possible.

In general though, Scott V.-C. conflates the idea that persons not party to a complaint within the statutory framework cannot be *bound by* a determination of the Ombudsman (subject to statutory provision) and the idea that persons not party to a complaint can be *affected by* the same. There is nothing unusual in decisions of administrators or courts affecting persons not party to the decision. When, for example, a decision of the court determines, say that a certain sum is liable to tax, its effects are felt by all relevant taxpayers. To advocate that this provides *carte blanche* authority to render all such decisions potentially nugatory where interested parties have not been consulted or involved would seem very odd indeed. In *Cheall* v. *Association of Professional Executive Clerical and Computer Staff*,[12] Lord Diplock said,

> [d]ecisions that resolve disputes between the parties to them, whether by litigation or some other adversarial dispute-resolving process, often have consequences which affect persons who are not parties to the dispute; but the legal concept of natural justice has never been extended to give such persons as well as the parties themselves rights to be heard by the decision-making tribunal before the decision is reached.[13]

It is worth noting these remarks even though they are centred around the concept of natural justice and may require qualification,[14] because the approach of Scott V.-C. is so influenced by the inability of the members and the employer to have their views and interests considered by the Ombudsman. This of course leads us to the second (and related) issue.

Invalidity Based Upon "Fairness"

This is Scott V.-C.'s second line of attack. On this issue he concluded that it is improper for the Ombudsman to entertain complaints where those whose proprietary interests would be adversely affected by his determination had not had a fair opportunity to make representations in defence of their interests and in which they would be accordingly bound (or affected), by the same. This follows from "an application of the ordinary principles of natural justice and also as a matter of construction of the statutory provisions". We have already noted that there is a difference between being bound by a determination or order and being affected by the same and the concept of natural justice (or fairness[15]), has never automatically provided for those affected by decisions to have a right to put their case. Fairness means different things in different contexts and the courts are, and should be, loathe to provide for a right to be heard in every case where a party is affected by a decision. That this should be so is borne out by the severe circumscription of the Pension Ombudsman's jurisdiction that follows from Scott V.-C.'s approach. The case of *Cheall* (*ante*) provides some support for this view but this is clearly in *extremis* and requires qualification.

This issue has arisen in the context of those whose financial interests have been adversely affected by a decision of a regulatory body, but have not been accorded a right of hearing pertaining to such a decision. In *R* v. *Life Assurance Unit Trust Regulatory Organisation Ltd.*

11 The importance of this "identification" is addressed later.

12 [1983] 2 A.C. 180.

13 *Ibid*, 190.

14 See *infra*.

15 See Lord Diplock in *CCSU* v. *Minister for the Civil Service* [1985] A.C. 374

ex parte Ross,[16] Mann L.J. in the Divisional Court had denied that the applicant was owed a duty of fairness by the decision maker, his view being influenced by Lord Diplock's approach in *Cheall.*[17]

The Court of Appeal also denied that W. Plc were owed a duty of fairness by Lautro, though Glidewell L.J. modified this stance by accepting that the rules, which required W. Plc to be served with a copy of the relevant notice defined with precision those who were owed a duty of fairness[18] and this included the right to have its interests considered.

Whilst Glidewell L.J. accepts that in some prejudicial circumstances there may be a *duty of fairness*, it is only in the minority of circumstances, it is suggested, that such a duty will be owed. This of course says nothing about the *content* of such a duty in such circumstances which may, again in the minority of such cases, involve a right to make representations. This is nothing like the *carte blanche* duty that Scott V.-C. seems to suggest is required of the Pensions Ombudsman.[19] It is important to note that a duty of fairness was recognised in circumstances where the applicants had been subject to some putatively prejudicial effects of Lautro's proceedings and had been "identified" by the relevant rules which provided for a copy of the intervention notice to be served on them. The consistent theme is that those who are empowered to make such decisions should be able to identify with a high degree of precision those to whom the duty of fairness may be owed. On this basis, the highest one can possibly state is that the employer *may* be the recipient of a duty of fairness, as being "prejudiced" and "identified" within the statutory framework.[20] Again this says nothing of the content of such a duty but it is likely, following the reasoning of Glidewell L.J. above, that it would have required the Ombudsman to have, at least, invited their comments. Arguably, as far as the other scheme members are concerned, they had a conduit for their interests in the shape of the trustees themselves and the conduct of their "defence" to the action. Whether there is a duty upon the trustees to represent members' interests in general before such proceedings is a moot point, but there is some support for this.[21] One final point to mention here is that Scott V.-C. concludes that the remedial steps required of the trustees by the Ombudsman could not be done as a court of law

16 [1992] 3 W.L.R. 549. Lautro had exercised its intervention power to prohibit a member insurance company and its appointed representative (a company, W. Plc), from accepting any further business from the public whilst it was conducting an investigation of W. Plc and a former director. Under Lautro rules, only the member company had a right of appeal but a copy of the intervention notice was served, again under Lautro Rules, on W. Plc. W. Plc had no concomitant right or opportunity to make representations. The member company decided not to appeal and terminated its agreement with W. Plc, resulting in financial prejudice to W. Plc. A current director of W. Plc, sought judicial review of Lautro's stance.

17 After referring to Lord Diplock's speech in *Cheall*, Mann L.J. at p. 563 said, "These remarks were made in a different context to this, but I regard them as apposite. I think it is important that a regulatory body should know with precision from whom (if anyone) they have to invite or receive representations without first having to form an impugnable judgment as to who those persons are".

18 He had prefaced this conclusion by saying, at p. 579 that: "I accept that very frequently a decision made which directly affects one person or body will also affect, indirectly, a number of other persons or bodies, and that the law does not require the decision making body to give an opportunity to every person who may be affected however remotely by its decision to make representations before the decision is reached. Such a principle would be unworkable in practice. On the other hand, it is my opinion that when a decision-making body is called upon to reach a decision which arises out of the relationship between two persons or firms, only one of whom is directly under the control of the decision-making body, and it is apparent that the decision will be likely to affect the second person adversely, then as a general proposition the decision-making body does owe some duty of fairness to that second person, which, in appropriate circumstances, may well include a duty to allow him to make representations before reaching the decision. This will particularly be the case when the adverse effect is upon the livelihood or the ability to earn of the second person or body".

19 Similarly, in *R* v. *Stock Exchange, ex parte Else* [1993] B.C.L.C. 834, Popplewell J. accepted that a group of shareholders formed a readily identifiable group but had no right to be notified so as to have their representations heard or be considered by the Stock Exchange when their company's listing was cancelled. The decision of the Court of Appeal (*ibid*) did not vary Popplewell J.'s decision on this aspect. Also in *R* v. *Life Assurance & Unit Trust Regulatory Organisation, ex parte Tee*, unreported, Lexis Transcript, the Court of Appeal, in rejecting Jowitt J.'s more conservative approach to the issue of fairness, *vis-à-vis* LAUTRO and the applicant, was unanimous in its acceptance of Glidewell L.J.'s approach (*supra*).

20 Where the Occupational Pensions Regulatory Authority conducts proceedings, its procedure requires certain persons to be given notice of such proceedings as well as others whom OPRA determine may be "directly affected" (by a review), or in other respects, those persons as "the justice of the case require". For the purpose of identifying the parties, no further guidance is given. See Occupational Pensions Regulatory Authority (Determinations and Review Procedure) Regulations 1997 (S.I. 1997/794).

21 See *Re Courage Group's Pension Schemes* v. *Imperial Brewing & Leisure* [1987] 1 All E.R. 528.

could not have required these to be done. Here, this was because the deed of amendment could not be set aside as against the employer and employees who were not party to the proceedings. Again, this is in part a conflation of the positions of the respective parties, but also, there is little agreement on this point in the decisions which consider such an issue.[22]

THE AMENDMENT TO THE SCHEME

Two major issues arose concerning the exercise of the power of amendment by the trustees. The first was whether by exercising the power in the manner the trustees did they committed a breach of trust. This in turn raised three sub-issues, namely, whether there was a duty of impartiality on the trustees when exercising the power; whether there was a minimum standard of negotiation the trustees must undertake when negotiating with the employer to secure additional benefits for the members; and whether the interests of the employers could be taken into account by the trustees when the power was exercised. The second major issue was whether the trustees breached the duty not to put themselves in a position where their personal interests conflicted with their fiduciary duty to the members.

The Exercise of the Power

The Ombudsman in *Edge* determined that the trustees had a duty to act impartially between various beneficiaries. He drew support for this argument from *Cowan* v. *Scargill*[23] where Megarry V.-C. said that the trustees when "... exercising their powers must do so in the best interests of the trust, holding the scales impartially between different classes of beneficiaries".[24] Undoubtedly the law recognises a duty of impartially, but it manifests itself in a certain way, namely where trust property is invested by a trustee and the property consists of successive beneficial interests.[25] This necessitates the trustees investing in property which by its very nature will produce income while preserving capital. However the Ombudsman attempted to extend this rule to trustees exercising a discretion to increase the benefits of members in service at a particular date. Scott V.-C. said this was erroneous. *Cowan* v. *Scargill* did not apply to the exercise of *all* powers, merely to those which dealt with the exercise of an investment power. Impartiality is an irrelevant factor in the exercise of a power to choose which beneficiaries, or class of beneficiaries, should be the recipients of the benefit of a trust. Such a decision inevitably involves the trustees in choosing one beneficiary (or class) over another, and it is a nonsense to speak of a duty of impartiality in such a case.

Rather, the standard by which to judge the valid exercise of such a discretion was, Scott V.-C. opined, whether the trustees took into account irrelevant, improper or irrational factors, whether they acted honestly and for the purpose for which the power was given and did not act for any ulterior purpose. This represents the established view of the way in which such a discretion should be exercised,[26] for it has been recognised that there is no single standard governing the exercise of such discretions, but rather a range of standards depending on the rules of the trust and the circumstances in which these rules may be interpreted.[27] However, Scott V.-C. advocated a further aspect to this test, and said "... unless [the trustees'] decision

22 Whether the Ombudsman does have such power, see *Miller* v. *Stapleton* [1996] 2 All E.R. 449 (No), *Westminster City Council* v. *Haywood* [1996] 2 All E.R. 467 (Yes), *Wild* v. *Pensions Ombudsman* [1996] F.L.R.680, (Yes); and *Hillsdown plc* v. *Pensions Ombudsman* [1997] 1 All E.R. 862, (No).

23 [1985] 1 Ch. 270.

24 *Ibid*, pp. 296-7.

25 *Howe* v. *Earl of Dartmouth* (1802) 7 Ves. 137.

26 See, *inter alia*, *Re Manisty's Settlement* [1974] Ch.17; *Tempest* v. *Lord Camoys* (1882) 21 Ch. D. 571.

27 See, for example, R.L. Nobles, "The Exercise of Trustees' Discretion under a Pension Scheme", [1992] J.B.L. 261 at 262.

can be said to be one that no reasonable body of trustees properly directing themselves could have reached, the judge cannot interfere".[28] Linguistically this is similar to the test propounded by Lord Greene M.R. for reviewing the actions of local authorities in *Associated Provincial Picture Houses Ltd* v. *Wednesbury Corp*,[29] where he said "it may still be possible to say that, although the local authority have kept within the four matters which they ought to consider, they have nevertheless come to a conclusion, so unreasonable that no reasonable authority could ever have come to it".[30] There are clearly two aspects to the *Wednesbury* test. In the first the court examines the correctness of the decision making process (or the exercise of the discretion) whereas in the second the court examines the nature of the decision, although Lord Brightman in *Chief Constable* v. *Evans* [31] emphasised that this did not involve the court assessing whether the decision was itself fair and reasonable.

There is no doubt that "unreasonableness" as a concept has infiltrated the examination of the correctness of the decision making process in relation to powers for the Court of Appeal in *Re Hastings-Bass* [32] said that the court should not interfere unless, "... it is clear that [the trustee] would not have acted as he did (a) had he not taken into account considerations which he should have taken into account, or (b) had he failed to take into account considerations which he ought to have taken into account",[33] but a question arises whether Scott V.-C.'s propounded test could result in a reasonableness test being applied to the actual decision, although he strenuously denied the court's ability to assess the fairness of the exercise of a discretion which the Ombudsman had thought permissible. Nevertheless the court in recent years has exhibited a willingness to take a more interventionist rôle in the exercise of a power [34] and will in fact exercise a power where there is no one who can exercise it.[35] If the court is minded to extend this approach it is suggested it will not necessarily be restricted by the view of Lord Brightman in *Evans* since public law concepts sit artificially in the context of trust powers. In administrative law the constitutional position of the courts *vis-à-vis* parliament and *vis-à-vis* the executive, acts *prima facie* as a restriction on the courts commentating on the efficacy of a decision taken by a public body. Furthermore, the conservative approach taken by Lord Brightman is justified on the basis of a distinction between an appeal and a review. In the former the appellate body is in a position to substitute its own views for that of the person or persons impugned. In the latter the conceptual basis of a review requires a circumscribed rôle for the reviewing court.

It has been rare until recently to find an express power dealing with surplus funds in the case of a scheme which is continuing.[36] Therefore the surplus was disposed of *via* the power of amendment, as in *Edge*. The exercise of the power in *Edge* necessitated the trustees in obtaining the

28 *Op. cit.*, 487.

29 [1948] 1 K.B. 223.

30 *Ibid*, p. 233.

31 [1982] 3 All E.R. 141 at p. 155

32 [1975] Ch. 25. See also *Dundee General Hospital's Board of Management* v. *Walker* [1952] 1 All E.R. 896 (a Scottish appeal to the House of Lords), and more recently *Scott* v. *National Trust* [1998] 2 All E.R. 705.

33 P. 41. This clearly encapsulates the concepts of, say, irrationality or dishonesty, but is wider.

34 See *McPhail* v. *Doulton* [1970] 2 All E.R. 228 at 247 where Lord Wilberforce said, "... although the trustees may, and normally will, be under a fiduciary duty to consider whether or in what way they should exercise their power, the court will not normally compel its exercise. It will intervene if the trustees exceed their powers and possibly if they are proved to have exercised it capriciously. But in the case of a trust power, if the trustees do not exercise it the court will...".

Traditionally it has been thought that the court should not be involved in assessing the merits of the decision since a power is entrusted to a donee to exercise in a manner he chooses - see for example, *Tabor* v. *Brooks* (1878) 10 Ch. D. 273 where the trustees had power to apply the income of a trust for the benefit of a husband, wife and children. The husband was a drunkard and he and the wife had separated and the wife was "wholly destitute". The son of the marriage was provided for by the trustees and the balance was paid to the husband. Nothing was given to the wife. The reason for this was that the trustees believe that the wife should be provided for by the husband and that she should live with him. There was no *mala fides* on the part of the trustees in the exercise of their discretion and therefore the court could not intervene, even though the court thought the decision was unwise.

35 See *Mettoy* v. *Evans op. cit.*

36 This is because prior to the Finance Act 1970 the return of surpluses to an employer in a continuing scheme was generally prohibited.

consent of at least three-quarters of the employers and hence invariably involved the trustees in a process of negotiation. The Ombudsman in *Edge* determined that the trustees would commit a breach of trust in such a situation where they did not negotiate "hard enough" with the employer. Scott V.-C., however, rightly disagreed with this view. It is inevitable in this situation that the employees' rights, at least in part, are dependant on the negotiating skills of the trustees as much as any rules of law. Negotiation by its very nature involves a process of discussion, haggling, compromise and "give and take". It is a process which is alien to the trustee of a traditional trust, but more common in an employment context. Since employment concepts inevitably pervade occupational pension schemes [37] it is a process which the trustees must be prepared to undertake at times. But to hold the trustees liable for lack of "hard" negotiation seems to be contrary to the fundamental nature of negotiation.

The Position of the Employers

It was proposed in *Edge* that the trustees were not entitled to take into account the position of the employers when deciding how to reduce the surplus by the exercise of the power of amendment. Furthermore the Ombudsman said that by exercising the discretion as they did the trustees provided financial assistance to the employers, by reducing their contribution rate. While it may be correct in the context of traditional trusts that a power of amendment in a trust deed should not be exercised in a manner that takes into account the economic circumstances of the settlor, the pension trust is different. The settlor in the guise of the employer continues to play a crucial rôle in the trust. Rather than constituting the property in the trustees by way of bounty at the creation of the trust and then taking no further part in the trust, the employer "drip feeds" property to the trustees on a periodic basis. Hence it is suggested the employer's continued solvency remains an important factor, and one which the trustees are entitled, if they wish, to take into account.[38]

Counsel for the defendant argued that where a power of amendment could not be implemented without the consent of the employers, the rôle of the trustees was to promote the interests of the employees to the exclusion of the employers, who were in a position to "look after themselves".[39] If by this counsel meant that the employers were in an economically dominant position that may be so, but she failed to recognise that in granting or withholding consent the employers are influenced by two factors. The first is the need to maintain good industrial relations between themselves and the employees; and the second is the seminal judgment of Browne-Wilkinson V.-C. in *Imperial Group Pension Trust Ltd* v. *Imperial Tobacco Ltd*,[40] where he said that employment law considerations were relevant to the exercise of an employer's power or consent under a pension scheme. Therefore employers cannot, without reasonable and proper cause, conduct themselves in such a manner calculated or likely to destroy the relationship of trust and confidence that is inherent in the relationship of employer and employee. An obligation of good faith is thus implied into the way in which employers exercise any power of consent reposed in them. Rather suprisingly this argument was not explored in *Edge* despite *Imperial* receiving subsequent approval.[41]

Conflicts of Interest

There is a well established body of English case law which imposes liability on a fiduciary

37 *Imperial Group Pension Trust Ltd* v. *Imperial Tobacco Ltd* [1991] 2 All E.R. 597.

38 As Scott V.-C. pointed out in *Edge*, in response the Ombudsman's comments, "...the continued viability of the respective employers was something that, in the interest of the pension scheme and its members as a whole, the trustees were entitled to want to promote"; *op. cit., p.* 489.

39 *Op. cit.*, p. 489.

40 *Op. cit.*

41 See, *inter alia*, the Court of Appeal in *Stannard* v. *Fisons Pension Trust* [1991] P.L.R. 225 at 234 and the New Zealand Court of Appeal in *UEB Industries* v. *Brabant* [1992] 1 N.Z.L.R. 294 at 297.

who has placed himself in a position where his interest and duty conflict.[42] It is the possibility of a conflict occurring which exacts liability on the trustee, and the standard of culpability is low since the courts have held the rule to be violated where there is a mere or remote possibility of the conflict occurring.[43]

The pension trust is such that an opportunity arises for such a conflict as various parties have more than one role to fulfil. In *Edge* the Ombudsman determined that the trustees who were also members of the scheme were accountable under the no conflicts rule for any benefit to which they had already or might in the future become entitled under the amendment, and furthermore said that the effect of the Pensions Act 1995, s. 39 [44] endorsed this view.

If this is correct then Parliament has created two categories of beneficiaries in a pension trust, the first being those who are trustees of the scheme and the second being those who are not. The former would be disadvantaged *vis-à-vis* the latter, as the following example illustrates. If the trustees decide that the level of contributions the members must make to the fund should be reduced, those members who are not also trustees of the scheme clearly take the benefit of this decision, whereas those members who are also trustees will have to continue to pay contributions at the higher rate. Parliament could not have intended such an asinine consequence, which would incidentally result in employees exhibiting extreme reluctance in acting as trustees. A far more sensible view, it is suggested, is that the effect of the section is to provide in statutory form a general exception to the no conflicts rule where employees are elected to the position of trustees of the scheme.[45]

CONCLUSION

There are many aspects to the decision in *Edge* which must be applauded as they represent both a pragmatic and jurisprudentially correct approach to the problems that arose. Nevertheless there are two aspects of the case that cause concern. The first is the undoubted difficulty for the Pensions Ombudsman if the views of Scott V.-.C. regarding the Ombudsman's jurisdiction and consideration of interests of those not party to the dispute are correct. And the second is the approach he took to the manner in which the court will judge the exercise of a trustee's discretion in that he attempted to introduce into trust law a reasonableness test which has until now been largely resisted by the judiciary, and which may involve the judiciary in assessing the merits of a trustee's decision to exercise a power. It remains to be seen whether these more controversial aspects of this decision receive subsequent judicial approval when the case is heard on appeal.

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42 See, *inter alia, Keech* v. *Sandford* (1726) Sel Cases in Chancery 61, *Aberdeen Railway Company* v. *Blaikie Brothers* (1854) 1 Macq 461, *Phipps* v. *Boardman* [1967] 2 A.C. 46 and *Regal (Hastings) Ltd* v. *Gulliver* heard in 1942 but not reported until [1967] 2 A.C. 134.

43 Doubt was cast upon this by Lord Upjohn, in the minority judgment in *Phipps* v. *Boardman, ibid*, where he imposed an objective standard on the trustee - the rule being violated only where there was a "real sensible" possibility of a conflict occurring judged by the standard of a reasonable man (at p. 124). The traditional view, however, was re-endorsed in *Guinness plc* v. *Saunders* [1990] 2 A.C. 63.

44 This says that: "No rule of law that a trustee may not exercise the powers vested in him so as to give rise to a conflict between his personal interests and his duties to the beneficiaries shall apply to a trustee of a trust scheme, who is also a member of the scheme, exercising the powers vested in him in any manner, merely because their exercise in that manner benefits, or may benefit him as a member of the scheme".

45 Even if Parliament had not invalidated the effect of such a rule it seems to be accepted that it would not have been applied with full vigour by the courts, since it is arguable that the employee-trustee has not *placed himself* in a position of conflict (See *Sargeant* v. *National Westminster Bank* (1990) 60 P. & C.R. 518) but is there as Scott V.-C. said in *Edge* as a result of the rules of the pension scheme which require the body of trustees to include employee members. In such a position where the rules of the scheme contemplate that the trustees will also be employees of the scheme it is conceivable that such trustees will have, from time to time, to exercise powers in such a way that their duty and interest inevitably conflict. See Nobles R., *Pensions, Employment and the Law*, (Clarendon Press, 1993).

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BOOK REVIEWS

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

HUMAN RIGHTS

Minority Rights in the "New" Europe
edited by PETER CUMPER and STEPHEN WHEATLEY
The Hague, Martinus Nijhoff Publishers, 1999
ix and 385 pp., Hardback, £79.00
ISBN 90-411-1124-7

This collection of essays was published in the context of the protection of minority rights in the Balkans and elsewhere. The authors grapple with the perennial conflict between the claims of national sovereignty and minority rights. This is the conflict that the proposed peace terms for Kosovo presented by the President of the European Union to the Federal Republic of Yugoslavia on 3 June 1999 seek to resolve. The essays do not purport to deal with minorities distinguished by sexuality, disability or gender. Instead, they focus on ethnic, racial, linguistic and religious minorities. Minority rights are defined as those rights granted to members of minority groups in recognition of their difference from the general population for the purpose of protecting and promoting that difference rather than the sum total of individual human rights enjoyed by the members of that group.[1]

The essays examine the response of the main institutions within Europe (*i.e.* the Council of Europe, the Organisation on Security and Co-operation in Europe and the European Union) to the developing concept of minority rights. They also consider the increasing recourse to bilateral and multi-lateral arrangements in this context. Particular attention is paid to the situation in the former Yugoslavia (although not including the treatment of Albanians in Kosovo which presumably came too late for the text), to the Ukraine (especially with regard to the Crimea) and to the position of the minority Catholic population in Northern Ireland. There is an appendix containing a collection of international documents relevant to minority rights in the "New" Europe.

The volume makes a relatively modest claim. It merely "examines" legal responses to the demands of ethnic, racial and religious groups in post-Cold War Europe. In the process of examining the new legal regimes in the post-Soviet era, the authors consider substantive concepts in the area of minority rights, such as positive discrimination (entitled "preferential treatment"), power-sharing, regional autonomy, proportional representation and pluralist democracy. However, no new model for the protection of minority rights is developed. In this regard, reference could perhaps have been usefully made to systems adopted outside Europe so as to construct an appropriate framework for application to minority situations within Europe. For example, the Indian Constitution makes provisions for positive discrimination in favour of disadvantaged groups known as "scheduled" (*i.e.* under-privileged) castes.

[1] P. Cumper and S.Wheatley, *Minority Rights in the "New" Europe*, (Martinus Nijhoff Publishers, 1999), at p.19.

The essays under the heading, "Conflict resolution and national minorities" seek, *inter alia*, to ascertain the value of the Dayton Peace accords for Bosnia and of the "international legal order" in negotiating the conflict between minority rights and national sovereignty. Recently, the international community has sought to resolve these two opposing claims by effectively limiting the exercise of state sovereignty. This is illustrated by the peace terms providing for immediate withdrawal of all Yugoslavian military, police and para-military forces from Kosovo, a province of Yugoslavia, and by the stationing there, under a UN mandate, of an effective international civilian and military presence in order to guarantee the protection of the Albanian population. Machinery also exists, in the form of the International Criminal Tribunal, for the indictment and prosecution of those heads of state who might be responsible for war crimes against minorities in their own territories. President Milosevic has already been indicted for such crimes. The authors could possibly have further explored these developments.

On Northern Ireland, it is stated that at the heart of the protection of minority rights are the ideas of freedom and equality and the prohibition of discrimination.[2] It could, however, be argued that the problem has moved on from the question of rights and freedoms to that of self-determination. The difficulty of applying the principle of self-determination to a "divided" society is pointed out and current ideas about this subject are discussed.[3] However, again, no claim to have come up with original ideas for resolution of the conflict is made.

This book is a welcome publication and it comes at a time when the question of protecting minority rights in Europe, Africa and some parts of Asia is presenting a very serious challenge to statesmen and international lawyers. The work will be of interest to students of law, politics and social sciences and even to a wider, more general, readership.

M. ABUL FAZAL*

PUNISHMENT AND THE COMMUNITY

Punishment in the Community: The Future of Criminal Justice
by ANNE WORRALL
Harlow, Longman 1997, vi and 170 pp., Paperback, £16.99
ISBN 0582-29305-7

Community Punishment: A Critical Introduction
by IAN BROWNLEE
Harlow, Longman 1998, ix and 221 pp., Paperback, £16.99
ISBN 0582-29772-9

At first sight, it is difficult to understand why the same publisher has published two books on ostensibly the same subject within such a short period of time. Both books set about the task of examining the philosophical and policy changes which have produced a profound shift in emphasis in the perception and practice of non-custodial sentencing during the last thirty or so years. During this time, the limited retributivist philosophy of just deserts has replaced utilitarianism as the predominant justification for sentencing and has manifested itself through the provisions of the Criminal Justice Act 1991. In addition to curtailing judicial discretion, this Act represented a deliberate policy initiative to divert more serious offenders towards custodial sentences and to

[2] *Ibid*, at p. 312.

[3] *Ibid*, at pp. 308-12.

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develop credible non-custodial alternatives for the remainder (the so-called policy of "bifurcation").[1] However, the period since the 1991 Act has witnessed the rapid erosion of the just deserts rationale for sentencing and its replacement by "populist punitiveness"[2] and political pragmatism in sentencing policy. Hence, it has become more necessary than ever for community sentences to be perceived as "tough" alternatives to imprisonment in order to justify the political rhetoric of being "tough on crime and tough on the causes of crime". Both books are therefore written in the context of these significant changes in recent penal policy.

Perhaps a clue to the difference between these books can be discerned from their titles. Worrall's focus is upon the dialectic between punishment and community and its implications for the future of criminal justice. Her book is divided into three main parts. The first contains four chapters examining the principles and politics of community punishments. Chapter one, in which Worrall introduces the reader to the concept of community punishment, is concerned with the relationship between the state and the individual and the development of categorisations of community punishment as either self-regulatory penalties, financial penalties or supervisory penalties. She briefly identifies relevant principles of sentencing and punishment philosophies before concentrating on the criminal justice system's potential for discrimination on the grounds of race, gender and class. Chapter two covers familiar territory,[3] charting the demise of the rehabilitative ideal and its implications for alternatives to custody. Chapter three seeks to summarise the genesis, principles and impact of the Criminal Justice Act 1991 and its demise. This is probably the weakest chapter in the book since Worrall's account amounts to little more than a summary of previously well-documented points and singularly fails to address the inherent contradictions in the philosophical coherence of its provisions. It devotes little over a page to criticisms of the Act, and amendments to it.[4]

The following chapter addresses the much less discussed issue of the nature of the "community" in which offenders are punished. This examines the concept of "community" from the perspective of community policing and crime prevention, victims of crime, prisons and management in the police, probation and prison services. Worrall argues that the punishing community is not resourceful, tolerant or healing but discouraging of reintegration and conformity.

Part Two of the book, consisting of six chapters, is a comprehensive account of the changing role of the Probation Service. Again, many of the themes addressed in these chapters have been considered elsewhere[5] and the underlying links between probation and the arguments postulated in the rest of the book are not made explicit. Nevertheless, chapter eight contains an interesting account of the development of counselling in probation and touches on the controversial issue of effectiveness. Worrall's thesis becomes more apparent in the book's concluding chapter. Here, she asserts that the discourse of punishment in the community needs to be uncoupled from that relating to custody in the sense that community sentences are only seen as being effective in so far as they are able to replicate the pains of imprisonment. Once so liberated, community punishments might more readily serve the needs of the socially excluded to whom the state is equally obliged and who have suffered unfair discrimination hitherto. In sum, Worrall's book is important more for its theoretical and contextual analysis than as a rigorous or innovative attempt to detail the relationship between law and policy.

Brownlee's book forms part of Longman's criminology series, the aim of which is "to provide

1 See further, M. Cavadino and J. Dignan, *The Penal System: An Introduction*, 2nd ed. (Sage Publications, 1997), at pp. 100 – 103.

2 See A. Bottoms, "The Philosophy and Politics of Punishment and Sentencing", in C. Clarkson and R. Morgan, eds., *The Politics of Sentencing Reform*, (Clarendon Press, 1995), at pp. 39-41.

3 For detailed analysis, see A. Ashworth, *Sentencing and Criminal Justice*, 2nd ed., (Butterworths, 1995).

4 A. Worrall, *Punishment in the Community: The Future of Criminal Justice*, (Longman, 1997), at pp. 36-37.

5 See, for example, T. Newburn, *Crime and Criminal Justice Policy*, (Longman 1995), at chapter 4.

a broad and thorough introduction to criminology".[6] As the first book published in this series, Brownlee's account admirably fulfils this objective in providing a rigorous and comprehensive analysis of community punishment in a philosophical and socio-legal context. The book is divided into eight chapters, together with useful suggestions for further reading. Chapter one describes how the present system of non-custodial sentences in England and Wales has emerged from the 1970s. It immediately introduces the reader to the sentencing framework imposed by the Criminal Justice Act 1991 before tracing the reasons for its emergence. When discussing the significance of the "bifurcation" strategy, Brownlee makes the important point (echoing Worrall) that non-custodial sentences have proliferated in the absence of any meaningful attempt to question the continued prominence accorded to incarceration in penal policy.[7] He also acknowledges the fundamental significance of the pre-1991 Act policy decision that greater consistency in sentencing would be achieved if non-custodial sentences were no longer considered as alternatives to custody but subjected instead to the same just deserts rationale as custodial sentences. Further, "bifurcation" depends on the continued success of probation as a rehabilitative measure and there is no doubt that its increased use for "up- tariff" offenders since the 1991 Act has reduced its comparative efficacy in this respect. However, the most disappointing feature of the chapter is its failure to analyse more fully the way in which the provisions of the 1991 Act reflect the shift in sentencing philosophy to just deserts.[8] Nevertheless, this is partly redeemed by an interesting section on the complicated issue of the impact on sentencing patterns of the 1991 Act.[9]

Chapter two, covering the philosophical justifications for community punishments, is succinct and particularly useful, ending with the somewhat pessimistic but realistic conclusion that sentencing in the trial courts reflects a continuing tension between the demands of retributivist justice (albeit limited by the proportionality principle implicit in just deserts) and sentencers' pervasive desire for the individualisation of sentences. Chapters three and four deal with the changing role of the probation service in the context of the two dichotomous rationales of welfarism and managerialism. Here, again, the discussion takes full account of the theoretical debates. The following chapter provides the reader with a fairly mundane but useful description of the various community penalties available. Perhaps here the author could have revisited the justificatory issues in more depth (particularly with regard to community service).

Chapter six provides a valuable chapter on financial and nominal penalties and contains a well-integrated theoretical analysis.[10] Chapter seven contains an interesting and rare discussion of literature on the effectiveness and evaluation of community punishments and addresses the important question of whether an inevitable link exists between the rising prison population and the expansion of community penalties.[11] In his concluding chapter, Brownlee utters what may regrettably prove to be a forlorn plea for rationality in non-custodial sentencing:

> The ultimate aim must be to fashion a comprehensive system of punishments in which a range of non-custodial penalties provide the successful steps for a ladder of scaled punishments outside prison, to replace the present "binary" system in which imprisonment is seen as a punishment and everything else is seen as an alternative, a letting off.[12]

Brownlee agrees, however, that it is government's responsibility to change penal culture and popular opinion towards the recognition that custody is only appropriate for the more serious

6 I. Brownlee, *Community Punishment: A Critical Introduction*, (Longman, 1998), at p. vi.

7 *Ibid*, at p.13.

8 For further discussion, see S. Rex, "Applying Desert Principles to Community Sentences: Lessons from Two Criminal Justice Acts", [1998] Crim. L.R. 381.

9 I. Brownlee, *Community Punishment: A Critical Introduction*, (Longman, 1998), at pp. 23-24.

10 *Ibid*, at pp. 138-140.

11 *Ibid*, at p. 180.

12 *Ibid*, at p. 193.

offences rather than attempting to make non-custodial sentences appear indistinguishable from custodial sentences.[13] Like Worrall, Brownlee alludes to the need to focus attention on social exclusion and the causes of criminality rather than regarding penal reform as the panacea for society's ills. Surely, he is correct in asserting that principles of reintegration and reprieve will only become more attractive once the desire for retributive punishment diminishes.

In conclusion, in this reviewer's opinion, the main strength of Worrall's polemic lies in the strong theoretical distinctions drawn between punishment, community values and penal policy in relation to community sentences. Brownlee's account not only addresses the theoretical tensions and contradictions of community sentences but goes further in providing us with a thorough historical, socio-legal analysis of the recent development of community punishment and its significance. In so doing, he has made a valuable contribution to the available literature.

RALPH HENHAM*

[13] *Ibid,* at p. 194.

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EDITORIAL

In order to reflect the full range of views and the diversity of experience within the Law School, the Journal will, from time to time, invite colleagues to contribute "guest editorials" addressing particularly topical concerns. Professor Mark Findlay has kindly agreed to contribute the first guest editorial, which appears below.

THE JURY UNDER ATTACK – NOTHING CHANGES IN THE BATTLE OVER CRIMINAL JUSTICE?

THE HOME SECRETARY RECENTLY SUFFERED a defeat in the House of Lords over his Criminal Justice (Mode of Trial) Bill. Among other problematic, and some say contentious, proposals the Bill purported to restrict access to trial by jury for persons accused of a range of what could be really quite serious offences. This was to be achieved by expanding the jurisdiction of the magistrates' courts, giving them the power to rule that a matter should be tried summarily rather than before a jury, as may now be the case.

In practice what would happen (if the Bill became law) would be that the prosecuting authorities would seek a ruling from a magistrate that for any of the charges scheduled in the Bill (and these include serious theft and assault), the trial should proceed in the magistrates' courts. In defence of these proposals it has been said that in other common law jurisdictions direction away from jury trial is available for similar offences. This is true, but with some fundamental procedural differences. In Australian jurisdictions, for instance, a range of less serious offences is nominated as electable for trial with or without a jury.[1] The election can be made by the prosecution or the defence, and in certain situations requires defence agreement. In no situation is the application made before the court to which the matter would be referred. There is no preliminary hearing on such an application and information as to the accused's prior criminal history is not taken into account in determining the form of trial. (It would be inappropriate, as even the Bill suggests, for the consideration of the accused's reputation to have any bearing on the election of jurisdiction.) Finally, if summary trial is chosen the court is not composed of lay magistates. Instead the magistrates' bench would be only comprised of legally trained practitioners with considerable trial experience. These safeguards are not to be found in the Bill.

It is not only problems with the process envisaged in the Bill that have generated interest and criticism. The Government's justifications for the measures have also been

[1] For serious offences such as homicide and rape there is also the possibility of trial by judge alone rather than before a jury. This, however, is almost always on the application of the accused.

challenged.[2] Wider concerns about the civil liberties consequences of the Bill seem to have been behind its defeat in the Lords. These took two forms. First was the adverse reaction to evidence that defendants from minority communities would, in particular, be likely to have their chances of acquittal adversely affected. Second was the more catholic position that jury trial is a cornerstone of our constitutional democracy and criminal justice. As such it should only be tampered with if the reasons are both compelling and irrefutable.

To understand the symbolic significance of the jury, and its place as a prize in the political struggle for justice, it is worthwhile reflecting on the tone of the Government's justification for this "reform". The Home Office, prior to its passage through the Lords, published a Briefing Note on the Bill in which it addressed some of the "most frequently asked questions" about the initiative. In fact, however, the most frequently asked question that I have encountered is: "Why would the Government, and the Home Secretary in particular, want to attack trial by jury in the first place, at this time, or with such dogged determination?" The answer, in my experience of governments of all political persuasions, lies in the temptation that by curtailing the jury a government (or its Home Secretary) will demonstrate the most potent control over workings of criminal justice. This is not because the jury has a massive and all-pervasive influence over criminal justice in practice. Quite the contrary. The practical impact of the jury has been gradually diminishing in every jurisdiction in which it operates except perhaps in the Russian Federation. The real prize in attacking the jury is to evidence power over an institution which, when measured in terms of community faith and public confidence, outstrips any other in the panoply of criminal justice.[3] If a government is able to propose policy justifications which triumph over jury trial they will resonate through the reform of criminal justice for time to come. This might also explain why the Home Secretary intends to press on with a revised Bill even while a Government-sponsored inquiry into criminal court procedure is under way.

What are the prevailing policy weapons in the present attack on the jury? These are revealed in the justifications for the Bill. The first is blatant managerialism. Trials must be as efficient and cost effective as possible. Juries waste time, delay process, and allow the unscrupulous defendant to filibuster. Whether or not this can ever be established, the cost savings suggested in justification of this exercise would largely rest outside the trial. As for manipulative accused persons, it seems far more likely that prosecution and charge bargaining practice will influence the ultimate plea more than will claims for jury trial.

Another prevailing policy perspective can be found in the "level playing field" image of justice. This is common ground for both liberals and conservatives and has seen the defeat of such traditions of common law criminal justice as the right to silence and protection from requirements as to defence disclosure. In the name of victims' rights, the protection of child witnesses, and the successful prosecution of the guilty we are now asked to restrict access to jury trial. Nothing is offered in recognition of the traditionally preferred rights (and trial position) of the "innocent until proven guilty" accused, except the slender thread of appeal against the initial court determination as to jurisdiction.

Democracy in the trial process is said to be ensured through a generous interpretation of the notion of election. In reality, however, it will be the state that will seek summary trial and not the accused, when it comes to more serious offences. And

[2] An example is Allen, S. "Straw on Trial" in *Gazette* 97/4 (27 Jan 2000):9.

[3] For confirmation of this see, Duff, P. (et. al.) (1992) *Juries: A Hong Kong perspective*, Hong Kong: HKU Press.

the "new right of appeal" offered to the accused will only be as potent as will be the availability of competent legal representation and legal aid.

The expansion of the summary jurisdiction, and the very significant impact this will have on the nature of criminal justice (particularly in light of the traditions of the magistracy in England) remain masked in the justifications for the Bill. It is said that the Bill will not result in magistrates dealing with cases that are too serious for them because the magistrates themeselves will determine suitability. The barrenness of this argument deflects attention from the otherwise clearly demonstrated redirection of power towards the lay magistracy in the determination of case seriousness, and from doubts about their own competence to manage it.

Ultimately, however, this Bill fits within the contemporary re-determination of the "rights" debate within criminal justice. A powerful alliance between the women's movement and victim's lobbies has elevated the position of the victim, bringing the latter forward from the far distance behind the state prosecutor, into the court-room as a voice for penalty and compensation. The rights of the witness (victim or otherwise) are now fair consideration in the determination of trial venue. Interestingly in the earlier draft Bill, the right to reputation was also advanced as a consideration against the accused's election for jury trial.[4] Here there exists the echoes of state paternalism in needing to protect the reputation of the few from the ravages of the jury.

In 1988 I was involved in a review of attacks against the jury.[5] Worthy of comment in relation to the present "reform" initiatives is that while the critique of the jury may be different today,[6] the policy purposes are largely the same, as is the nature of the political prize.

The relentless nature of the political struggle over the jury may be another reason for some circumspection when viewing the Government's arguments for legislative and procedural change. This is particularly so when the case against jury trial is constructed in the atmosphere of "new justice" for the accused.

MARK FINDLAY

[4] A qualified right in that victims/accused persons with a criminal history may find their reputation works against their interests in trial venue.

[5] See, Findlay, M. & Duff, P. (1998) *The Jury Under Attack*, London: Butterworths.

[6] Then it was largely focused around whether jurors could comprehend complex commercial crimes.

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ARTICLES

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

THE HUMAN RIGHTS ACT 1998: TRIPLE TROUBLE FOR THE OFT?

ALAN J. RILEY *

INTRODUCTION

ON THE FIRST OF MARCH 2000 the substantive, investigation and enforcement provisions of the Competition Act 1998 ("the Act") come into force throughout the United Kingdom.[1] The Competition Act repeals the complex, formalistic and largely toothless existing domestic competition regime[2] and replaces it with an effects-based system modelled on the EC competition rules.[3] The Act incorporates homologues of articles 81 and 82 of the EC Treaty (*ex* articles 85 and 86) into national law in the form, respectively, of chapter I and chapter II prohibitions.[4] It also draws deeply upon the powers of investigation and enforcement granted to the Commission by Regulation 17/1962.[5] In particular, the Director General of Fair Trading ("the DGFT"), and Office of Fair Trading ("the OFT") officials acting under his authority,[6] will have the power to order production of information[7] and the power to enter premises to obtain documents.[8] If the DGFT then proposes to make a decision that a suspect undertaking has committed an infringement of a chapter I or II prohibition, he will give written notice of his proposed action and permit the undertaking to make representations

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[1] Sections 71 and 75 of the Competition Act (the order-making powers) together with certain parts of schedule 13 came into force on enactment on 9 November 1998. Since then a series of five Commencement Orders have brought various parts of the Act into force. These are respectively No.1, SI 2750/1998; No.2, SI 3166/1998; No.3, 505/1999, No.4, 2859/1999 and No.5, 344/2000.

[2] The classic judicial criticism of the traditional regime, as embodied in the Restrictive Trade Practices Act, 1976, is that of Danckwerts LJ's who observed that certain elements of the legislation were "calculated to drive any accurately minded lawyer to despair": *Re British Basic Slag* [1963] L.R. 4 R.P. 116, 149. For detailed criticism of the RPTA regime see *Review of Restrictive Trade Practices Policy*, Cm 331 (HMSO 1988).

[3] Section 1 of the Act repeals the Restrictive Practices Court Act 1976; the Restrictive Trade Practices Act 1976; the Resale Prices Act 1976 and the Restrictive Trade Practices Act 1977.

[4] See ss. 2 and 18 respectively.

[5] J.O. (1959-1962) L204/62.

[6] The Act almost never refers to the OFT. Instead it refers to the DGFT through whom the OFT is deemed to operate. Consequently, in this paper the reference will be made to the powers of the DGFT rather than the powers of the OFT, except for purposes of clarification or where the Act so provides.

[7] Competion Act 1998, s. 26.

[8] *Ibid.*, ss. 27 and 28.

before a decision is finally made.[9] The DGFT may require the undertaking subject to a decision to terminate the infringement[10] and may impose penalties of up to 10% of the undertaking's UK turnover for every year of the infringement up to a maximum of three years.[11]

Clearly, the investigation and enforcement powers of the DGFT and his officials are considerable. This paper considers those powers in the light of the case law of the European Convention of Human Rights ("the Convention"). Such a consideration is timely given the incorporation of the Convention into national law *via* the Human Rights Act 1998 ("the HRA").[12] In Scotland, Convention rights may already be enforced with respect to acts of the Scottish Parliament and Executive.[13] *Starr and Chalmers* v. *Procurator Fiscal*[14] has already demonstrated the power of the Convention to upset existing administrative and judicial practices. When the HRA comes fully into force across the United Kingdom on the second of October 2000[15] it may well bring similar upsets in its train, including in the field of the investigation and enforcement of the competition rules.

This paper is divided into seven parts. Part two considers the question whether acts of the DGFT can be deemed criminal for the purposes of the Convention. This is an important first question, as a positive answer to it significantly widens the scope of the obligations that will be placed upon the DGFT and the OFT. Part three examines the power of the DGFT to require information to be produced in the light of the rule against self-incrimination as set out in *Funke* v. *France*[16] and *Saunders* v. *United Kingdom*.[17] Part four examines the power of the DGFT to obtain entry to premises in the light of *Miailhe* v. *France*,[18] *Cremieux* v. *France*,[19] *Chappell* v. *United Kingdom*[20]

[9] *Ibid.*, s. 31 and rule 14, OFT *Draft Procedural Rules Proposed by the DGFT*, OFT 411 (Office of Fair Trading, 1999).

[10] *Ibid.*, s. 32(1). See also paras 2.1-2.7,OFT, *Enforcement*, OFT 407, (Office of Fair Trading, 1999).

[11] Section 36(8) of the Act provides that: "No penalty fixed by the Director under this section may exceed 10% of the turnover of the undertaking (determined in accordance with such provisions as may be specified in an order made by the Secretary of State)". In Parliament this was confirmed as referring to turnover arising in the UK (see HC SC G, 16 June 1998). According to OFT News Release 31/99 of 10 August 1999, the Government has departed from this Parliamentary statement by proposing to impose a maximum 10% turnover fine for every year of the infringement, for up to three years of the infringement. No legal instrument in draft or final form has yet been published. Query, also the phrasing of s. 36(8). It does not set a maximum of 10% of the turnover of an undertaking specifically in relation to its global turnover, its UK turnover or the turnover affected by the infringement. Nor does it state whether the turnover figure is limited to one year or a defined period of years or an infinite number of years. The question arises therefore as to whether the Secretary of State has an extremely wide power to increase the fining powers of the DGFT. For example, the fining power could be set at 10% of the world-wide turnover of an undertaking for each year of the infringement, for up to 10 years. It could be argued, however, that the scope of the Secretary of State's power in s. 36(8) must be read in the light of s. 60 and thereby Community competition law, which limits the maximum turnover fine to 10% of the world-wide turnover of an undertaking. However, it may well be argued that s. 36(8) is an express provision to which s. 60 cannot apply. Furthermore, it is doubtful whether the provisions of Regulation 17 are intended to apply to the DGFT. Indeed the DGFT in drafting his procedural rules has worked on the basis that he is *not* required to follow the procedures adopted by the European Commission. *The Draft Procedural Rules*, *op. cit.*, para 12.

[12] The HRA does not provide for full incorporation. In particular, the doctrine of implied repeal does not apply to all acts adopted prior to the HRA and the courts must "take into account" but are not formally bound by the Convention case law, see respectively, ss. 3(2)(b) and 2(1) of the HRA. For an extensive discussion see Coppel, *The Human Rights Act 1998: Enforcing the European Convention in the Domestic Courts*, (Wiley, 1999) para 1.5-1.15. The impact of the limitations on the application of the Convention under the HRA are further discussed below.

[13] By virtue of s. 29(2) (d) of the Scotland Act 1998, legislation adopted by the Scottish Parliament will outwith the Parliament's legislative competence if it is incompatible with any of the Convention rights. Furthermore, under s. 57(2) of the Scotland Act 1998, members of the Scottish Executive have no power to make any subordinate legislation, or to do any other act, if to do so would be incompatible with any of the Convention rights. The Scottish Parliament was reconvened on 12 May 1999.

[14] 11 November 1999, not yet reported.

[15] Home Office News Release 153/99, 18 May 1999. As yet no draft or final statutory instrument has been published.

[16] [1993] 16 E.H.R.R. 297.

[17] [1997] 23 E.H.R.R. 313.

[18] [1993] 16 E.H.R.R. 332.

[19] [1993] 16 E.H.R.R. 357.

[20] [1990] 12 E.H.R.R. 1.

and *Camenzind* v. *Switzerland*.[21] Part five examines the power of the DGFT to find that an undertaking has committed an infringement of the Act in the light of the presumption of innocence doctrine. Part six considers possible means of defeating the application of the relevant Convention case law, firstly, by reference to section 60 of the Competition Act; and, secondly, by raising a Convention "business defence". Part seven, offers a conclusion, in which it is argued that the conflict between the Competition Act and the HRA poses considerable dangers for the successful introduction of the new competition regime.

CAN ACTS OF THE DGFT BE DEEMED "CRIMINAL CHARGES" FOR THE PURPOSES OF THE ECHR?[22]

In *Engel* v. *Netherlands*[23] the European Court of Human Rights ("the ECtHR") made two issues clear. First, that the Convention permits Contracting States in the performance of their functions as guardians of the public interest to maintain or establish a distinction between criminal and regulatory law. Second, that the definition of a criminal charge, for the purposes of the Convention, is autonomous. To have permitted the Contracting States themselves to provide definitions of criminal, regulatory and disciplinary law and to have obliged the court to follow such definitions would have undermined the objective and purpose of the Convention.[24]

In *Bendenoun* v. *France*[25] the applicant argued that the national proceedings in which tax surcharges were imposed upon him violated article 6(1). The French Government argued that the proceedings were not criminal, having instead all the hallmarks of an administrative penalty. The court disagreed with the French Government. It laid down four criteria to assess whether the proceedings were criminal or not. They were as follows:

> *General Application*
> The offences under which Mr Bendenoun was charged covered all citizens in their capacity as tax payers, and not a given group with a particular status.
>
> *Deterrence*
> The tax surcharges were intended not as pecuniary compensation for damage but essentially as a punishment to deter re-offending.
>
> *General Rule with a Dual Purpose*
> The penalties were imposed under a general rule, whose purpose was to both deter and punish.
>
> *Substantial Penalties*
> In Bendenoun the surcharges were very substantial, amounting to FrF 422,534 and FrF 570,398.

[21] [1998] E.H.R.R. 352.

[22] The act in question in the case of the Competition Act will be a written notice of the DGFT delivered to a suspect undertaking indicating the DGFT's intention to issue a decision against the undertaking and requesting that the undertaking makes representations to the DGFT within a specified time. OFT, *Draft Procedural Rules*, *op. cit.*, para 14.

[23] [1979-1980] 1 E.H.R.R. 647.

[24] *Ibid.*, para 81.

[25] [1994]18 E.H.R.R. 54.

Having weighed the various factors in the case, the court noted the predominance of those which had criminal connotations. None of them was decisive on its own but, taken together, they made the nature of the "charge" in question a criminal one within the meaning of article 6(1).[26]

The Strasbourg authorities have also considered the status of price fixing and competition rules. In *Deweer* v. *Belgium*[27] it held that a prohibition on price fixing could be criminal in nature for the purposes of the Convention.[28] Far more pertinently in *Stenuit* v. *France*[29] a fine had been imposed upon a company, Stenuit, for engaging in anti-competitive practices. The fine had been imposed by the French minister of economic and financial affairs under national competition law. Stenuit having exhausted national procedures applied to the Strasbourg authorities. It argued that it had been subject to a criminal charge and that its right to a fair hearing had been violated. The European Commission of Human Rights made a number of important points. First, the aim pursued by the national competition law was to maintain free competition within the French market. The law in question consequently affected the general interests of society that are normally protected by criminal law. Second, with regard to the nature and severity of the penalty, the amount of the fine actually imposed, FrF 50,000, was not in itself negligible. But above all there was that fact that the maximum fine (*i.e.* the penalty to which those responsible for the infringements made themselves liable) amounted to 5% of annual turnover. This, the Commission argued, revealed that the penalty in question was intended to be a deterrent.[30]

Unlike article 15(4) of EC Regulation 17, the Competition Act provides no guidance as to whether the fines imposed for a substantive infringement are of a criminal law nature.[31] However (as explained above) for the purposes of the Convention, even if the Act itself had stated that neither a written notice that the DGFT intends to issue a decision finding that an undertaking has infringed the Act, nor the imposition of any fine, were to be regarded as criminal in nature that would not itself be decisive. Far more relevant are the *Bendenoun* criteria. Applying those criteria to the Competition Act provides a very strong case for saying that a written notice of the DGFT may constitute a criminal charge for the purposes of the Convention and that a fine for a substantive infringement is of a criminal law nature.

General Application

Although sections 3(1) and 19 (1) provide that the chapter I and II prohibitions do not apply to certain excluded sectors,[32] the Act is clearly not limited to a group with a particular status. The Act applies to most private undertakings engaged in the provision of goods and services in the United Kingdom.

[26] *Ibid.*, para 47.

[27] [1979-1980] 2 E.H.R.R. 439.

[28] In *Deweer*, the Court emphasised the punitive character of the impugned regulations as a factor weighing heavily in its decision as to their criminal law character. *Op. cit.*, para 46.

[29] [1992] 14 E.H.R.R. 509.

[30] *Ibid.*, paras 60-67.

[31] Sections 42 to 44 of the Act do create criminal offences in relation to obstruction of the OFT's powers of investigation as set out in ss. 26, 27 and 28. Clearly, the existence of criminal sanctions in relation to obstruction of its investigations do not assist the OFT in arguing that a written notice does not constitute a criminal charge for the purpose of the Convention and that the OFT's subsequent substantive decision is not of a criminal law nature.

[32] Section 3(1) of the Act provides for four schedules of exemption, respectively concerning mergers and concentrations; competition scrutiny under other enactments; planning obligations and other general exclusions and professional rules. Section 19 provides that only the schedules relating to mergers and concentrations and general exclusions shall apply to the chapter II prohibition. The Secretary of State may amend the exclusion schedules for both chapter I and II prohibitions.

Deterrence

As the OFT has explained in its own guidelines the fines that may be imposed by the DGFT are not intended to be damages in the nature of pecuniary compensation, but are penalties imposed to deter re-offending.[33]

General Rule with a Dual Purpose

The Act provides a general rule whose purpose is both punitive and intended to deter.[34]

Substantial Penalties

The DGFT can impose substantial penalties upon undertakings. Penalties of up to 10% of an undertakings UK turnover for each year of the infringement, up to a maximum of three years.[35]

In addition, the emphasis in *Stenuit* on the fact that the object of French competition law was to protect a general interest of society, the maintenance of free competition, is reflected in the Act. As the OFT has pointed out in its own guidelines, the DGFT "will apply and enforce the provisions of the Competition Act 1998 in order to ensure that the competition process is unhindered by anti-competitive activity".[36]

It should also be noted that *Bendenoun* and *Stenuit* have changed the view of the European Court of First Instance ("the CFI") and the European Court of Justice ("the ECJ") (and perhaps even the European Commission) as to the criminal nature of investigation procedures in EC competition law under article 15(4) of EC Regulation 17. Advocate General Leger in *Baustahlgewebe* v. *EC Commission* was notably forthright:

> It cannot be disputed-and the Commission does not dispute-that in the light of the case law of the European Court of Human Rights and the opinions of the European Commission of Human Rights, the present case involves a criminal charge."[37]

That view was supported in practice by the CFI in *LVM and Others (PVC)* v. *EC Commission*, where the court reviewed the time the Commission had taken to carry out its investigative and contentious procedures.[38] Under the Convention case law, review of investigatory and administrative proceedings that do not themselves comply with the reasonable time principles of article 6(1) is only required if the procedures themselves are criminal in nature.[39]

If acts of the DGFT are to be treated as criminal in nature for the purposes of compliance with the Convention, a far wider number of compliance questions come into play. For example, the role of the rule against self-incrimination; the impact of section 26 of the Act and the legality of an infringement decision itself.[40]

[33] OFT, *DGFT's Guidance as to the Appropriate Amount of Penalty*, OFT 423 (Office of Fair Trading, 1999), para 2.1: "The objectives of the Director's policy on financial penalties are to impose penalties on infringing undertakings and to ensure that the threat of penalties will deter undertakings from engaging in anti-competitive practices."

[34] OFT, News Release 31/99, 10 August 1999, *op. cit.* Comment from the DGFT, Mr. John Bridgeman: "The possibility of high penalties will, I hope concentrate the minds of managements which still have to focus on the full implications of next years switch to a tough new competition regime. The more serious an infringement, the higher the penalties are likely to be. The intention is that they should act as a major deterrent to companies who believe that they can distort or prevent competition for their own benefit. Anti-competitive behaviour, particularly if it involves price-fixing or market sharing, exacts a heavy cost from consumers, and those businesses which play by the rules. The potential size of the penalty should indicate to the business community that such behaviour will be punished severely."

[35] The Competition Act 1998 (Determination of Turnover for Penalties) Order 2000, S.I. 309/2000.

[36] OFT, *Major Provisions*, OFT 400 (Office of Fair Trading, 1999) para 1.1.

[37] C-189/95 P, Advocate General Leger, para 31, 10 December 1998, not yet reported.

[38] Joined Cases T-305-307/94, 313-316/94, 318/94, 325/94, 328/94 and 335/94, 20 April 1999, not yet reported.

[39] *Deweer, op. cit.*

[40] Two other significant Convention issues could also be raised in relation to the UK procedures: (i) Access to the file. Here it is submitted that an issue could be raised with regard to "equality of arms". However, the OFT will have an obligation

THE POWER TO OBTAIN INFORMATION

This part of this article first considers the power of the DGFT to obtain information under section 26 of the Act. It then examines the scope of the rule against self-incrimination under the Convention and assesses the power of the DGFT in that light.

The Power To Obtain Information Under Section 26

The key to the exercise of both the power to obtain information under section 26 and the power to enter premises under sections 27 and 28 of the Act is that the DGFT has reasonable grounds for suspecting that either the chapter I or II prohibition has been infringed. The OFT has given examples of the types of information that may provide grounds for reasonable suspicion. These include: copies of secret agreements provided by disaffected members of a cartel, statements from employees or ex-employees, or complaints.[41]

Once the DGFT has reasonable grounds for suspicion he may use his powers to obtain information or enter premises.[42] Of these powers the OFT has indicated that it expects that the power to obtain information pursuant to section 26 will be the most frequently used power of investigation.[43] Section 26(1) provides that the DGFT may require any person to produce to him a specified document, or to provide him with specified information, which he considers relevant to the investigation. In its guidance notes the OFT has explained that "any person", includes not only suspect undertakings but also complainants, suppliers, and customers or competitors of a suspect undertaking.[44]

The power is to be exercised by a notice in writing.[45] The notice must indicate the subject matter and purpose of the investigation and the nature of the offences created by sections 42 to 44 of the Act.[46] The DGFT may also specify in the notice the time and place where any document is to be produced or any information is to be provided and the manner and form in which it is to be provided.[47]

The DGFT's power under this section to require a person to produce a document includes the power, where the document is produced, to take copies or extracts of the document and to require the person producing the document, or any person who is a present or past officer of the suspect undertaking, to provide an explanation of the document.[48] A person required by the DGFT to provide an explanation of a document may be accompanied by a legal adviser.[49] The DGFT also has the power, where a document is not produced, to require the person called upon to produce it, and to require him to state, to the best of his knowledge and belief, where it is.[50]

under s. 60 to comply with the extensive access to the file requirements imposed by the CFI in the Case T-30 & 36 &37/91 *Solvay and ICI* v. *Commission ("Soda Ash")* [1995] E.C.R. II 1175: (ii) a further and perhaps sounder argument can be raised in relation to the Convention, especially in relation to *John Murray* v. *United Kingdom* [1996] 22 E.H.R.R. 29, with regard to the right of access to a lawyer during "on-the-spot" inspections.

[41] OFT, *Powers of Investigation*, OFT 404 (Office of Fair Trading, 1999) para 2.1.

[42] *Ibid.*, para 3.2. Section 26, and the powers of entry contained in ss. 27 and 28 are independent.

[43] *Powers of Investigation, op. cit.*, para 3.1.

[44] *Powers of Investigation, op. cit.*, para 3.4.

[45] Section 26(2).

[46] Section 26 (3) (a) and (b). In relation to offences created by ss. 42 to 44, see below.

[47] Section 26(5) (a) and (b).When setting the appropriate time limit for the production of documents or information the DGFT will consider the amount and the complexity of the information required and the urgency of the case. See *Powers of Investigation, op. cit.*, para 3.10.

[48] Section 26 (6) (a) (i) and (ii).

[49] *Draft Procedural Rules, op. cit.*,rule 13(3).

[50] Section 26 (6) (b).

Criminal sanctions can be imposed for refusal to comply with a section 26 notice. Section 42(1) Act provides that a person is guilty of an offence if he fails to comply with a requirement imposed upon him under section 26. Section 42 (6) then provides that a person guilty of such an offence is liable on summary conviction to a fine not exceeding the statutory maximum, currently £5000, or on conviction on indictment to an unlimited fine.[51] Factors that will be taken into account when determining where to commence proceedings include the gravity of the alleged offence and the complexity of the matter.[52]

Sections 43 and 44 of the Act then provide for further criminal sanctions where documents requested under a section 26 notice are destroyed or falsified or where the information produced is false or misleading. Again, a defendant may be charged summarily or on indictment under sections 43 or 44. However, if on indictment, a gaol sentence not exceeding two years and/or an unlimited fine may be imposed.[53]

A wide range of persons can be affected by these criminal sanctions. If an offence by a body corporate is proved to have been committed with the consent or connivance of an officer (or because of neglect on his part) that officer as well as the body corporate is guilty of the offence and liable to be proceeded against and punished accordingly.[54] "Officer" is defined broadly under the Act to mean a director, manager, secretary or other similar officer or a person purporting to act in such a capacity.[55] In addition, offences can be committed by any "person" to whom a written notice is directed or from whom an explanation under sub-sections 26(2) or (6)(a)(ii) is required. This would clearly include employees as well as the officers of an undertaking.[56]

There are two principal limitations on the power of the OFT to obtain documents and information; (i) the rule against self-incrimination; and (ii) legal professional privilege.

The OFT guidelines accept that a rule against self incrimination applies in relation to its powers of investigation under sections 26, 27 and 28.[57] However, the OFT has taken the view that the defence against self incrimination which will apply is that provided by the EC case law, essentially the rule as set out by the ECJ in *Orkem* v. *EC Commission*[58]. In support of its application of the rule in *Orkem* it cites section 60 of the Act, which provides for the UK authorities to handle cases in such a way as to ensure consistency with Community law.[59]

In *Orkem* the ECJ held that under article 11 of Regulation 17/62[60] (the EC equivalent of section 26) the Commission is entitled to compel undertakings to furnish information, even if this can be used to establish a case against it under article 81(1) or 82 EC. However, it could not compel an undertaking "to provide it with answers

[51] *Powers of Investigation, op. cit.*, para 7.7.

[52] *Powers of Investigation, op. cit.* Offences will be tried either summarily in the Magistrates' Courts or Sheriff Court or, in the case of more serious offences, on indictment in the Crown Court or the High Court of Justiciary, para 7.5.

[53] A number of defences are provided in s. 42 including, in s. 42(2), proof by the person charged with an offence that the document was not in his possession or control and that it was not reasonably practicable for him to comply with the requirement. Section 42(3) provides a defence of reasonable excuse in relation to providing information, explanation of a document or stating where a document is to be found. A general defence is provided by s. 42(4) if the OFT investigator failed to act in accordance with the procedures of ss. 26 or 27. There are however no statutory defences to charges of knowingly or recklessly destroying documents or providing false or misleading information.

[54] Section 72(2).

[55] Section 72(3).

[56] The definition of persons is provided by s. 59(1). See also Whish and Freeman, *A Guide to the Competition Act 1998* (Butterworths, 1999), para 4.24.

[57] *Powers of Investigation, op. cit.*, paras 6.3-6.4.

[58] Case 374/87, [1989] E.C.R. 3283.

[59] For a discussion of the impact of s. 60 see below.

[60] *Op. cit.*

which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove".[61] As Kerse points out the value of *Orkem* to a defendant undertaking is limited.

It does not stop the Commission asking simple factual questions (e.g. have there been any meetings between your firm and one or more of the following (named) firms? When and where? Who, by name and function, was present? What was discussed? Nor did it prevent the Commission from asking for copies of documents (*e.g.* notes, memoranda, minutes) to be produced. An undertaking might, as in *Societe Generale* v. *EC Commission* be required to provide factual explanations of the terms of an agreement.[62] Thus:

> ...The extent of the privilege is thus narrow and may serve to avoid oppressive behaviour on the part of the Commission. But in practice it is no inhibition on the Commission provided that leading incriminatory questions are avoided.[63]

Under section 30 of the Act legal professional privilege applies to both section 26 and 27 notices, section 27 authorisations and section 28 warrants. Section 30 also provides that a person shall not be required to produce or disclose privileged communications. These are defined as communications between a professional legal adviser and his client or documents made in connection with, or in contemplation of, legal proceedings and for the purpose of those proceedings, which in proceedings in the High Court would be protected from disclosure on grounds of legal professional privilege.[64] As the OFT guidelines point out,[65] the protection provided by section 30 is wider than that provided by the ECJ in *AM&S Europe Ltd* v. *EC Commission.*[66]

The Rule Against Self-Incrimination In The Convention Case Law

There are two key Convention cases in relation to the privilege against self-incrimination, *Funke*[67] and *Saunders.*[68] In *Funke* customs officials initiated a search and seizure operation at the Funke's residence. The officials sought particulars of overseas assets held by Funke in violation of French tax and foreign exchange regulations. The seizure of papers at Funke's residence led the customs authorities to initiate parallel proceedings for disclosure of all bank statements of accounts held abroad. Funke refused to disclose the documents requested by the authorities. Consequently, he was convicted and fined by the Strasbourg police court under the French customs code for failure to produce the documents in question.

Before the ECtHR Funke argued that article 6(1) of the Convention included a provision against self-incrimination and that that privilege had been violated by the French authorities. The Government took the view that the customs regime was not criminal in nature. It argued that it had merely asked Funke to provide particulars of the evidence found by the customs officers. Despite the support of the ECHR Commission, the ECtHR itself did not follow the argument of the French authorities.

[61] *Orkem, op. cit.*, paras 34 and 35. This paragraph is replicated in the OFT guidelines. See, *Powers of Investigation, op. cit.*, para 6.4.

[62] Case T34/93, [1995] E.C.R. II 545 para 74.

[63] Kerse, *EC Antitrust Procedure*, 4th edition, Sweet and Maxwell, London (1999) para 3.44.

[64] In application of s. 30 to Scotland it is provided that references to the High Court are to be read as references to the Court of Session and references to legal professional privilege are to be read as references to confidentiality of communications.

[65] OFT, *Powers of Investigation, op. cit.*, para 6.1-6.2.

[66] Case 155/79, [1982] E.C.R. 1575. Essentially, *AM&S* limited the privilege to independent, non-in-house, lawyers qualified in a Member State. Section 30 of the Act goes much further. It applies to in-house lawyers and appears to apply the privilege to qualified lawyers as a class, including those coming from third states.

[67] *Supra*, n. 16.

[68] *Supra*, n. 17.

In its view (considered above) the new regulatory regime was criminal in nature, article 6(1) included the privilege against self-incrimination and the French Republic's demand for information in *Funke* had violated that privilege. The ECtHR ruled that,

> the customs secured Mr Funke's conviction in order to obtain certain documents which they believed must exist although they were not certain of the facts. Being unable or unwilling to procure all the documents by some other means, they attempted to compel the applicant himself to provide the evidence of the offence he had allegedly committed. The special features of customs law cannot justify such an infringement of the right of anyone charged with a criminal offence within the ordinary meaning of this expression in Article 6, to remain silent and not to contribute to incriminating himself.[69]

The ruling in *Funke* is unsatisfactory for two reasons. First, there was very little reasoning in the ECtHR's ruling and, as the ECHR Commission had agreed with the French Government, there was no supportive reasoning to draw upon from its opinion. Second, the ruling appeared to be extremely broad. At first blush it appeared that any request for production of documents, and presumably testimony compelled by penal powers, in relation to a criminal or regulatory procedure deemed criminal could be caught by *Funke*.[70]

In *Saunders*, the ECtHR was given the opportunity of considering again the scope of the privilege against self incrimination under the Convention. The *Saunders* case arose as a result of statements made under the UK Companies Act to Department of Trade ("DTI") inspectors by the former Guinness Chairman, Ernest Saunders. The case did not revolve around the application of article 6 to the DTI procedure but rather the use of statements (which the DTI had obtained under the Companies Act procedure) in a subsequent complex fraud trial, at the conclusion of which Mr Saunders had been convicted.

The ECtHR took the view that the right to silence and the right not to incriminate oneself were generally recognised international standards which lay at the heart of the notion of a fair procedure under article 6.[71] It held that the right not to incriminate oneself is primarily concerned with respecting the will of an accused person to remain silent. The court took the view that the legal systems of the Contracting Parties to the Convention, do not extend the rule against self-incrimination to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers, where such material has an existence independent of the will of the suspect such as, *inter alia*, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing.[72]

The court argued that in considering whether the use made by the prosecution of the statements obtained from Saunders amounted to an unjustifiable infringement of the privilege it was necessary to determine whether he had been subject to compulsion to give evidence and whether the use of his testimony at trial had infringed the basic principles of a fair procedure. It held that it was clear from the Companies Act that Saunders was subject to legal compulsion to give evidence, and that a refusal could

[69] *Funke, op. cit.*, para 44.

[70] For a discussion of the *Funke* and *Saunders* cases see Warbrick, "Self Incrimination and the ECHR", in *Pressing Problems in the Law, Volume I, Criminal Justice and Human Rights*, (OUP, 1995), ed. Birks, p. 89; Davies, "Self Incrimination, Fair Trials and the Pursuit of Corporate and Financial Wrongdoing", in *The Impact of the Human Rights Bill on English Law* (Clarendon Press, 1998) ed. Markesinis, p. 31; and Stessens, "The Obligation to Produce Documents Versus the Privilege Against Self-Incrimination: Human Rights Protection Extended Too Far?" (1997) E.L.Rev. HRC/45.

[71] *Saunders, op. cit.*, para 68.

[72] *Saunders, op. cit.*, para 69.

result in a finding of contempt and consequently the imposition of fines or a period of imprisonment.[73]

In relation to the infringement of the basic principles of a fair procedure, the UK had argued that nothing said by Saunders in the statements was incriminating. The statements were exculpatory. The court rejected this argument. First, some of Saunders' answers were in fact of an incriminating nature in the sense that they contained admissions knowledge of information which tended to incriminate him. Second, the right not to incriminate oneself could not, in the court's view, reasonably be confined to statements or admissions of wrongdoing or to remarks which are directly incriminating. Testimony obtained under compulsion which appears on the face of it to be of a non-incriminating nature, such as exculpatory remarks or mere information on questions of fact, may later be deployed in criminal proceedings in support of the prosecution case. It could be used, for example, to contradict or cast doubt upon other statements of the accused or evidence given by him during the trial or to otherwise undermine his credibility.[74] Furthermore, the court observed that the admissions made by Saunders must have exerted additional pressure on him to give testimony during the trial, rather than to exercise his right to remain silent.[75]

The court left open the question of whether the right not to incriminate oneself is absolute or whether infringements of it may be justified in particular circumstances.[76] However, it rejected the UK argument that the complexity of corporate fraud could justify such a marked departure from one of the basic principles of a fair procedure. It held that article 6 applied to all types of criminal offences without distinction, from the most simple to the most complex.[77]

Saunders is a distinct improvement on *Funke*. Not least because it provides detailed reasoning as to the basis for the privilege against self-incrimination under the Convention. It also casts a shadow over *Funke*. *Saunders* expressly refers to the obtaining of documents by compulsory powers, subject to a warrant. It would appear that the court was resiling from the far more sweeping protection it provided in *Funke* against any production of incriminating documents under compulsion. That broader protection would now appear to be limited to testimony under the *Saunders* rule. Another notable feature of the *Saunders* case is the breadth of what the court regarded as constituting an incriminating statement. It is in no way limited to direct admissions as in *Orkem*, but will apply to factual statements and even exculpatory ones.

It could be argued that the *Saunders* rule is limited to the use of statements in criminal trials and does not apply to investigatory procedures where there are compulsory powers to obtain evidence.[78] It is true that in *Fayed* v. *United Kingdom*[79] the court ruled that article 6 did not apply to the same Companies Act procedure as deployed in *Saunders*. However, this was because the DTI inspectors were investigators only and not adjudicators. That would not be the case where the purpose of the

[73] *Saunders, op. cit.*, para 70. Saunders was obliged under ss. 434 and 436 of the Companies Act 1985 to answer the questions put to him by the DTI Inspectors. A refusal could have led to a finding of contempt of court and the imposition of a fine or committal to prison for up to two years. It was no defence to such refusal that the questions were of an incriminating nature.

[74] *Saunders, op. cit.*, para 71.

[75] *Saunders, op. cit.*, para 73.

[76] *Saunders, op. cit.*, para74.

[77] *Saunders, op. cit.*, para 75.

[78] Davies, *op. cit.*, p35.

[79] *Fayed* v. *United Kingdom* [1994] 18 E.H.R.R. 221.

investigatory procedure was to provide evidence for a conviction and the investigation and prosecution were carried out by the same body. In such circumstances, it is submitted that the *Saunders* rule would be applied by the ECtHR.

Assessing Section 26 In The Light Of The Convention

Part of the argument regarding whether written notices or requests for explanation of documents under section 26 of the Act infringe article 6 (1) of the Convention revolves around whether or not acts of the DGFT under the Act are criminal in nature for the purposes of the Convention.[80] That argument is discussed extensively above and is not further discussed here.[81] The OFT could argue, however, that while the acts of the DGFT under the Act may be characterised as criminal for the purposes of the Convention, for the rule in *Saunders* to apply the acts of the DGFT would have to be expressed in *national* law as being criminal in nature. After all, *Saunders* concerned the use of testimony in proceedings that were expressly criminal under national law. However, there are three factors which, taken together, provide a very strong case for saying that a requirement that national law should deem the acts or proceedings in question as criminal is not good under the Convention. First, although the proceedings in which the testimony were used in *Saunders* were expressly criminal in nature, the testimony was obtained under powers contained in the Companies Act which were not expressly criminal. Second, the broad statement of principle in *Saunders* as to the rights of the suspect faced with legal compulsion militate against such a restrictive interpretation of the ruling of the ECHR in that case. Third, in *Funke*, the ECtHR was minded to apply a broader rule against self-incrimination in a context where national law did not expressly provide that the proceedings were criminal in nature. Furthermore, it can be argued that if the view of the OFT were upheld the autonomy principle, which permits the ECtHR to determine what constitutes a criminal charge for the purposes of the Convention, would be undermined.[82]

Clearly if a broad rule against self-incrimination exists under the Convention, as *Funke* suggests, then the ability of the DGFT to issue written notices under section 26 (1) of the Act, or of his officials to ask for explanations under section 26(6)(a)(ii), is seriously undermined. The DGFT will not be able to require documents to be produced or questions to be answered nor to impose penalties if suspect undertakings do not produce the requested documents or answers.[83]

On the other hand if, as it appears, *Saunders* has cut back the scope of *Funke* then in principle documents can be required by written notice, and if they are not provided to the DGFT criminal sanctions can be imposed under section 42(1) and (6) of the Act. However, even *Saunders* places limits on the application of section 26. A warrant

[80] The argument in this part of the article will also apply to the requests for an explanation of documents produced pursuant to ss. 27(5)(b)(ii) and 28(2)(e).

[81] See above.

[82] It could also be argued, that the privilege is only intended to protect individuals and not corporate bodies. This argument can be rejected on two grounds. First, it is clear from article 34 of the Convention that, "any person" may bring a claim against a Contracting State. There are many examples under the Convention of undertakings claiming protection under the Convention, for example, *The Sunday Times* v. *United Kingdom* [1979-1980] 2 E.H.R.R. 245; and *National Provincial Building Society and others* v. *United Kingdom* [1998] 25 E.H.R.R. 17. Second, there is a particular antitrust argument which underpins the rights of undertakings. In EC and (*via* s. 60 of the Act) presumably UK competition law, "undertakings" include both major public corporations and sole traders. If any attempt was made to limit the rule in *Saunders* to individuals, the ECtHR would be faced with the problem of depriving individuals who were sole traders of their rights under the Convention. If the court were to seek to apply the rule in *Saunders* to one class of undertaking but not another it would contradict its own case law in respect of the need to ensure equality of treatment between all those who claim rights under the Convention. See, in particular, the application of the equality of treatment argument by the ECtHR, in respect of the argument in favour of applying article 8 to business premises in *Niemietz, op. cit.*, para 29.

[83] However, there would be nothing to stop the DGFT asking questions of third parties.

would, in particular, be required before an undertaking could be bound to deliver up documents. It would appear therefore that in order to conform with *Saunders* section 26 would have to be amended to permit application to the courts for a warrant in order to enforce delivery of documents by a suspect undertaking and before a penalty could be imposed.

By contrast, a written notice section 26(1), requiring answers to be given concerning a suspect undertaking's general business activities, or a request for an explanation of a document under section 26(6)(a)(ii), would be likely to be prohibited by the rule in *Saunders*. This is because the decision in *Saunders* attacks legal compulsion not just when it is used to require answers to leading questions, as in *Orkem*, but also in respect of a far broader swathe of questions. It is submitted to apply *Saunders* to antitrust cases would be to prohibit the asking of questions on such subjects as the operation of the business and even as to economic questions.[84]

The OFT could make two further arguments in defence of section 26. First, it could argue that the penalties that can be imposed for failure to comply with section 26, can only be imposed by an independent and impartial tribunal, which fully complies with article 6(1) of the Convention. The difficulty with that argument is that it overlooks the approach of the ECtHR in *Saunders* to the question of self-incrimination. *Saunders* could only have been subject to criminal sanction for failing to respond to the questions of the DTI inspectors, if he had been convicted before a court, which also fully complied with the provisions of article 6(1). In *Saunders* the ECtHR was not concerned with the question whether *Saunders*' case had been heard before an independent and impartial tribunal before the imposition of penalties upon him, but with the fact of legal compulsion, however imposed, which required him to provide testimony.

A second OFT argument is that the privilege against self-incrimination can only apply in relation to a suspect undertaking. Under the Act a body corporate can be subject to legal compulsion,[85] and although the OFT may have to accept that the rule in *Saunders* prevents it from seeking criminal sanctions against the undertaking itself, it may nevertheless be able to adopt a different approach. This is because the Act permits the DGFT to require officers of the company,[86] employees and ex-officers and ex-employees to provide documents and answer questions under section 26.[87] The OFT could attempt to issue section 26 notices against such people to circumvent the privilege against self-incrimination held by the undertaking itself. It is submitted than such an attempt would be unlikely to succeed given the jurisprudence of the ECtHR requiring that Convention rights be practical and effective, not theoretical and illusory.[88]

THE POWER OF ENTRY

We must now examine the power of OFT officials acting under the authorisation of the DGFT, or by warrant, to enter premises and to conduct "on-the-spot" inspections

[84] *Saunders*, *op. cit.*, para 71. The ECtHR emphasised that even exculpatory or factual answers given under compulsion could amount to an infringement of the privilege.

[85] Section 72(2).

[86] Section 72(3) defines officer as a director, manager, secretary or other similar officer or anyone purporting to act as such.

[87] Section 26 notices and explanations can be directed to persons without limit. This would bring within it any individual employee or ex-employee and any undertaking. See the definitions section, s. 59(1) and the comment of Whish and Freeman, *op. cit.*, para 4.24.

[88] *Artico* v. *Italy* [1980] 3 E.H.R.R. 1, para 33; and *Soering* v. *United Kingdom* [1989] 11 E.H.R.R. 439.

under sections 27 and 28 of the Act. We must then examine the scope of the protection offered by article 8 of the Convention to business premises before assessing the powers of the DGFT in light of the Convention case law.

The Power Of Entry Under Sections 27 And 28 Of The Act

The Act provides the DGFT with two powers of entry. In both cases, however, section 25 requires that, before the power can be exercised, the DGFT must have reasonable grounds for suspecting that there has been an infringement of a chapter I or chapter II prohibition. If section 25 is satisfied OFT officials acting under the DGFT's authorisation may (under section 27) be granted a power of entry to premises without a warrant. Under section 28, the DGFT may, on certain grounds, seek a warrant (from the High Court in England and Wales and from the Court of Session in Scotland) for OFT officials to obtain entry to premises.

The Power Of Entry Without A Warrant

There are two types of power of entry under section 27. The first arises under section 27(2). Here an investigating officer is required to give two working days written notice of the intended entry and must indicate in the notice the subject matter and purpose of the investigation and the nature of the offences created by sections 42 to 44.[89] This power applies to third parties, such as customers or suppliers.[90]

The second power, under section 27(3), applies either (i) where the DGFT has reasonable suspicion that the premises are or have been occupied by an undertaking which he is investigating under section 25; or (ii) where the investigating officer has taken all such steps as are reasonably practicable to give notice but has not been able to do so (in which case the written notice is not required).[91] The power of entry under section 27(3) can be exercised by the investigating officer on production of evidence of his authorisation and a document indicating the subject matter and purpose of the investigation and the nature of the offences created by sections 42 to 44.[92] Essentially, the latter type of power of entry therefore permits OFT officials to make unannounced "on-the-spot" inspections.[93]

A number of powers are granted to an investigating officer on entering any premises whether following an inspection by written notice or by production of his evidence of authorisation. The officer may take with him such equipment as may be necessary, such as a portable computer or tape recording equipment.[94] He may require any person on the premises to produce any document which he considers to relate to any matter relevant to the investigation and if the document is produced to require an explanation.[95] The officer may also require any person to state to the best of his knowledge and belief, where any such document is to be found.[96] Copies or extracts of any documents that are produced may be taken.[97] Finally, he may require any

[89] Section 27(2).

[90] *Power of Investigation, op. cit.*, para 4.2.

[91] Section 27(3).

[92] Section 27(4).

[93] The OFT has indicated that such inspection will normally occur during ordinary business hours. *Powers of Investigation, op. cit.*, para 4.9.

[94] *Powers of Investigation, op. cit.*, para 4.7.

[95] Section 27(5)(b).

[96] Section 27(5)(c).

[97] Section 27(5)(d).

information which is held in a computer and is accessible from the premises and which the investigating officer considers relates to any matter relevant to the investigation to be produced in a form in which it can be taken away and is visible and legible.[98]

Section 42(1) of the Act provides that a person[99] is guilty of an offence if he fails to comply with a requirement imposed on him under section 27. In addition, section 42(5) provides that a person is guilty of an offence if he intentionally obstructs an officer acting in the exercise of his powers under section 27. Both these offences can be tried summarily or on indictment. The penalties that can be imposed are respectively, the statutory maximum fine, currently £5000, and an unlimited fine.[100]

The powers of the DGFT, as Whish and Freeman point out, amount to a right of peaceable entry.[101] Criminal sanctions may be imposed upon a body corporate and upon any officers of a company who prevent access to premises. However, OFT officials cannot force entry on the basis of a section 27 written notice or authorisation of entry.

The Power Of Entry With A Warrant

On an application made by the DGFT to the High Court or the Court of Session, a judge may issue a warrant on one of three grounds. First, that there are reasonable grounds for suspecting that there are on any premises documents, the production of which has been required under section 26 or 27 and which have not been produced as required.[102] Second, there are reasonable grounds for suspecting that there are on any premises documents which the DGFT has power under section 26 to require to be produced and if the documents were required to be produced, they would not be produced but would be concealed, removed, tampered with or destroyed.[103] Third, an investigating officer has attempted to enter the premises in the exercise of his powers under section 27 but has been unable to do so and that there are reasonable grounds for suspecting that there are on the premises documents the production of which could have been required under that section.[104]

A warrant issued under section 28 must indicate the subject matter and purpose of the investigation and the nature of the offences created by sections 42 to 44.[105] The court granting the warrant must authorise a named OFT official and any other officials, whom the DGFT has authorised in writing, to accompany the named official. These officials will be authorised by the warrant to enter the premises specified in the warrant, using such force as is reasonably necessary for the purpose.[106] The warrant will also authorise the officials to search the premises and take copies of, or extracts from, any document appearing to be of a kind in respect of which the warrant was granted.[107] Officials will also be permitted to take possession of documents where such action

[98] Section 27(5)(e).

[99] The same definition of "persons" applies to s. 27 as to s. 26.

[100] The same penalties are imposed under s. 27 for destroying or falsifying documents or providing false or misleading information as under s. 26.

[101] Whish and Freeman, *op. cit.*, para 4.10.

[102] Section 28(1)(a).

[103] Section 28 (1)(b), which also provides in relation to s. 28(1)(b) that where a judge is satisfied that it is reasonable to suspect that there are also on the premises other documents relating to the investigation concerned, the warrant shall also authorise the named officials to search for, copy and if necessary, take away other relevant documents.

[104] Section 28(1)(c).

[105] Section 29(1). S. 29(2) makes it clear that the powers conferred by s. 28 are to be exercised only on production of the warrant. Section 29(3) and (4) provide for a procedure where the premises are not occupied.

[106] Section 28(2)(a).

[107] Section 28(2)(b).

appears to be necessary for preserving the document or preventing interference with them or where it is not reasonably practicable to take copies of the documents on the premises.[108]

The warrant will also authorise officials to require any person to provide an explanation of any document appearing to be of the relevant kind or to state, to the best of his knowledge and belief, where it may be found.[109] It will also authorise officials to require any information which is held in a computer accessible from the premises, and which the named officer considers relates to any matter relevant to the investigation, to be produced in a form in which it can be taken away.[110]

A warrant continues in force until the end of the period of one month beginning with the day on which it is issued.[111] Any document taken into the possession of the OFT may be retained for a period of three months.[112]

As with section 27, a person[113] can be guilty of an offence for failing to comply with a requirement imposed under section 28 as a result of the provisions of section 42(1). This offence can be tried summarily or on indictment, the former can result in a fine of up to the current statutory maximum of £5000, the latter to an unlimited fine. However, in addition to sub-section 42(1), sub-section 42(7) provides that a person who intentionally obstructs an officer in the exercise of his powers under a warrant is guilty of an offence and is liable on summary conviction to a fine not exceeding the statutory maximum and, on conviction on indictment, to gaol for a term not exceeding two years or to a fine or both.[114]

As Whish and Freeman point out investigation by warrant is a serious matter.[115] By warrant OFT officials can use reasonable force to gain entry.[116] By contrast to the position under section 27, officials can take away the originals of documents and retain them for three months if it is not practicable to copy them on the premises or if taking them away is necessary to prevent disappearance. Finally, the potential penalties for obstruction of officials operating under a warrant are greater; a person convicted on indictment for such an offence can be sentenced to a gaol term.

Ancillary Matters

There are three principal ancillary matters, self incrimination, legal professional privilege and access to a lawyer. The first two have already been discussed extensively above and therefore will only be discussed briefly here. In relation to self incrimination, the protection offered by the ruling of the ECJ in *Orkem* will also apply to the production of documents, the provision of information and explanations under sections 27 and 28.[117] Equally, the protection of documents subject to legal professional

[108] Section 28(2)(c).

[109] Section 28(2)(e).

[110] Section 28(2)(f).

[111] Section 28(6).

[112] Section 28(7).

[113] The definition of person is the same as for ss. 26 and 27.

[114] Additional penalties exist in relation to ss. 43 and 44 as in relation to ss. 26 and 27 for destroying or falsifying documents or for providing false or misleading information.

[115] Whish and Freeman, Guide, *op. cit.*, para 4.12.

[116] *Powers of Investigation*, para 5.4. This does not include force against a person.

[117] Section 27(5)(b)(ii) and s. 28(2)(e) respectively. Although as Whish and Freeman, *Guide*, *op. cit.*, para 4.18 point out s. 28(2)(e) requires an explanation of any document appearing to be of a relevant kind, without specific reference to any document having been produced. The investigator could in theory require explanation of a document that appears to exist but which he has been unable to find. However, the OFT's emphasis in the guidelines on conformity with Community law suggest that they OFT will not act in this way. See *Powers of Investigation*, *op. cit.*, para 6.3.

privilege pursuant to section 30 will apply to the power to copy and take documents under sections 27 and 28.

The OFT has indicated that an undertaking subject to a section 27 notice or authorisation or to a section 28 warrant will be able to contact its legal advisers during the course of an investigation.[118] Furthermore, rule 13 of the Draft Procedural Rules provides that an officer shall grant an occupier's request to allow a reasonable time for the occupier's legal adviser to arrive at the premises before the investigation continues, if the officer considers it reasonable to do so and if he is satisfied that such conditions as he considers appropriate to impose in granting the occupiers request are complied with.[119] Its guidelines indicate that the OFT intends to go no further than the practice of the EC Commission when determining how long to wait for legal advisers to come. It emphasises that the delays must be kept to a strict minimum and must not unduly delay or impede the investigation.[120]

Article 8 Of The ECHR

The overriding purpose of article 8(1) is to protect the individual and other legal persons against the action of public authorities. To that end article 8(1) sets out to protect four interests; private and family life, home and correspondence. Article 8(2) then sets up three cumulative tests as to whether an interference with article 8(1) is justified. First, any interference must be in accordance with the law; second, it must pursue a legitimate aim; and thirdly it must be necessary in a democratic society.[121] Usually, the Contracting States are able to comply with the first and second limbs of the test.[122] They often, however, come unstuck with the third limb, which requires a State to show a pressing social need and, in particular, the proportionality of the measure in question.

It was unclear until relatively recently whether business premises could fall within article 8(1). However, in *Niemietz* v. *Germany*[123] the ECtHR provided a convincing argument as to why article 8(1) should apply to them. First, it pointed out that there was no reason of principle why the notion of private life should be taken to exclude activities of a professional or business nature since, after all, it is in the course of their working lives that the majority of people have a significant if not the greatest opportunity of developing relationships with the outside world. Second, it is often not possible to distinguish clearly which of an individual's activities form part of his professional or business life and which do not. Furthermore, if article 8 were interpreted as applying only to those whose work and personal lives are not easily separated, those whose work and personal lives are separable would not have the equal protection of article 8. Such an interpretation, the court argued would lead to an unacceptable inequality of treatment.[124] Third, the word "home" had already been interpreted in certain Contracting States, notably Germany, as extending to business

[118] *Powers of Investigation, op. cit.*, 4.10.

[119] *Draft Procedural Rules, op. cit.*, rule 13.

[120] *Powers of Investigation, op. cit.*, paras 4.10 and 4.11.This emphasis on keeping delays to a strict minimum does not sit easily with the modern practice of the Commission. In *Mewac* OJ 1993 L20/6, the inspectors appeared to be ready to wait for the arrival in Marseilles of a lawyer from Paris.

[121] Article 8 of the Convention provides that: "(1) everyone has the right to respect for his private and family life, his home and correspondence; and (2) there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

[122] Coppel, *op. cit.*, para 10.35.

[123] [1993] 16 E.H.R.R. 97, para 29.

[124] *Ibid.*, para 29.

premises. Furthermore, the court argued that such an interpretation was fully consonant with the French text of the Convention, since the word "domicile" has a broader connotation than the word "home". Again, in relation to home or domicile, the court raised the equality of treatment question; it may be equally impossible to distinguish between home and work premises as between work and personal life.[125] Fourth, to interpret "private life" or "home" as including professional or business activities or premises would be consonant with the essential object and purpose of article 8, namely to protect the individual against arbitrary interference by the public authorities.[126] Fifth, the court also noted that the object of the search in *Niemietz* (and indeed most searches in regulatory matters) had been to obtain documentary evidence, including "correspondence" a term which (when used in article 8) was unqualified by any reference to either private or business activity.[127] Furthermore, as the court pointed, out no distinction is made between private and business communications in the context of correspondence in the form of telephone calls.[128]

The court also observed that such an extensive interpretation would not unduly hamper the Contracting States as they would retain their entitlement to, "interfere" to the extent permitted by article 8(2). Furthermore, that entitlement might be more far reaching where professional or business activities or premises were involved than would otherwise be the case.[129]

Derogations from the rights protected by article 8(1) of the Convention must, under article 8(2), satisfy three conditions. They must be in accordance with the law; they must have a legitimate aim; and their interference with protected rights must be necessary in a democratic society. The ECtHR has accepted that the Contracting States have a margin of appreciation in assessing the need for supervision.[130] However, it has also taken the view that the derogations authorised by article 8(2) are to be interpreted narrowly and that the need for them in any given case must be convincingly established.[131]

For a derogation from lawful under article 8(2) it must be in accordance with the law. Three requirements are placed on the state. It must have some basis in the domestic legal order either through statute or the common law;[132] that such domestic law must be accessible in the sense that it must be published;[133] and its consequences for the citizen must be foreseeable and compatible with the rule of law.[134] The foreseeability criterion essentially requires that the law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which the public authorities are empowered to interfere with the rights protected under article 8(1).[135] The scope of the rule of law criterion was set out by the court in *Malone* v. *United Kingdom*.[136] It implies that there must be a measure of legal protection in domestic law against arbitrary interference by public authorities with rights safeguarded by article 8(1).[137]

[125] *Niemietz*, *op. cit.*, para 30.

[126] *Niemietz*, *op. cit* , para 31.

[127] *Niemietz*, *op. cit.*, para 32.

[128] *Niemietz*, *op. cit.*, para 32 and *Huvig* v. *France* [1990] 12 E.H.R.R. 528, paras 8 and 25. See also *Halford* v. *United Kingdom* [1997] 25 E.H.R.R. 523.

[129] *Niemietz*, *op. cit.*, para 31.

[130] *Funke*, *op. cit.*, para 55.

[131] *Funke*, *op. cit.*, para 55; and *Klass* v. *Germany* [1979-1980] 2 E.H.R.R. 214, para 42.

[132] *Huvig*, *op. cit.*, para 28.

[133] *Chappell*, *op. cit.*, para 56; and *Huvig*, *op. cit.*, para 29.

[134] *Huvig*, *op. cit.*, para 26.

[135] *Huvig*, *op. cit.*, para 29.

[136] [1985] 7 E.H.R.R. 14, para 33.

It follows that any interference with a protected right must have a legitimate aim such the advancement of national security, public safety, the economic well-being of the country; the prevention of disorder or crime; the protection of health or morals; or the protection of the rights and freedoms of others. Legitimate aims recognised by the ECtHR as justifying searches include; customs control,[138] anti-terrorism legislation[139] and protection of copyright.[140]

In relation to the "necessary in a democratic society" criterion the ECtHR has consistently focused upon the existence in the relevant legislation and practice of adequate and effective safeguards against abuse. The court's view as to the adequacy of safeguards can be illustrated by three cases in relation to search and seizure operations approved or carried out by the state. The first, *Chappell*[141] concerned an Anton Pillar order obtained in the English High Court. In that case a judicial warrant was obtained *ex parte*; evidence was presented to the judge.[142] The order itself had significant limitations as to its scope; it could only be enforced at certain times; it was only operational for a short period; and any materials seized could only be used for specific purposes. Furthermore, these safeguards were buttressed by a series of undertakings given by the plaintiffs or their solicitors. Finally, the execution of the order was in the hands of a solicitor who although representing the plaintiff, had overriding obligations to comply with the order as an officer of the court. Although the ECtHR agreed with the Court of Appeal that the manner of entry and the number of those involved were "disturbing and unfortunate and regrettable" the safeguards were approved and the execution of the order could be regarded as proportionate to the end pursued.[143]

By contrast in *Cremieux*[144] and *Miahille*[145] the investigatory powers of the French customs authorities were condemned. The court noted that

> the customs authorities had very wide powers in particular, they had exclusive competence to assess the expediency, number, length and scale of the inspection. Above all in the absence of any requirement of a judicial warrant the restrictions and conditions provided for in law which were emphasised by the government appeared too lax and full of loopholes for the interference in the applicants' right to have been strictly proportionate to the legitimate aim pursued.[146]

However, it is clear that a judicial warrant is not required in every case that the state wishes to enter premises be they business or residential. In *Camenzind*,[147] despite the fact there was no judicial warrant, the court accepted that the interference was justified under article 8(2). However, in that case there were extensive safeguards, including notice and the attendance of a lawyer and an independent observer. Furthermore, the search was limited to checking certain items of electrical equipment.[148] It is therefore necessary to examine carefully the circumstances of the case, in particular the extent of the search, the means used and the strength of the safeguards.

[137] *Huvig, op. cit.*, para 33.
[138] *Funke, op. cit.*
[139] *John Murray, op. cit.*
[140] *Chappell, op. cit.*
[141] *Supra*, n. 20.
[142] *Chappell, op. cit.*, paras 59 and 60.
[143] *Chappell, op. cit.*, para 63.
[144] *Supra*, n. 19.
[145] *Supra*, n. 18.
[146] *Miailhe, op. cit.*, para 38, *Cremieux, op. cit.*, para 40.
[147] *Supra*, n. 21.
[148] *Camenzind, op. cit.*, para 46.

Finally, in order to satisfy article 8(2) it is not enough even to have a judicial warrant. It is also necessary to consider the extent of the scope of the power of investigation granted by the judicial authorities. In *Niemietz*,[149] the court found that a warrant drawn in broad terms, without any limitation, when considered in the light of a lack of other procedural safeguards, such as the presence of an independent observer as a factor tending toward the conclusion that the interference did indeed fall outside article 8(2).[150]

Assessing Sections 27(3) And 28 Under the Convention

The focus of concern in relation to the OFT's powers of entry in relation to the Convention is likely to be section 27(3) of the Act, the power to enter premises without a warrant. The OFT could argue that there is in fact no interference under article 8(1), as it cannot force an undertaking to permit entry. However, a refusal to submit to a section 27(3) DGFT authorisation amounts to a criminal offence, to which significant criminal sanctions may be attached. There is no direct Convention case law on the point. However, it is submitted that while no entry may actually be forced pursuant to an section 27(3) authorisation, the existence of criminal sanctions grants the state significant coercive power in relation to premises, sufficient to amount to an interference with article 8(1).

Another approach for the OFT would be to rely on the general principles of EC law, in particular fundamental rights principles, *via* section 60, to defeat an article 8 challenge. The question of the conflict between section 60 and the Convention is discussed below. However, on this point, the OFT is on very weak ground. It is true that in *Hoechst* v. *EC Commission*[151] the ECJ rejected the notion that article 8 could apply to business premises, "the protected scope of that [a]rticle is concerned with the development of a man's personal freedom and may not therefore be extended to business premises. Furthermore, it should be noted that there is no case law of the European Court of Human Rights on the subject."

However, as the ECtHR has now ruled in *Niemietz* that article 8 does apply to business premises, it is likely that the ECJ or CFI will follow the Convention case law. Consequently, when an appropriate case arrives in Luxembourg, the rule in *Niemietz* may be applied as fundamental rights principle of Community law.[152]

As the powers contained in section 27(3) of the Act do therefore fall within the scope of article 8(1) it is necessary to consider whether those powers can be justified under article 8(2). Is the interference with an article 8(1) right in accordance with the law; does it have a legitimate aim and is it necessary in a democratic society?

It is clear, of course, that the OFT's powers of inspection have a basis in national law. The power itself is set out in section 27(3) of the Act and supplemented by detailed guidelines.[153] It is also clear that the Act has a legitimate aim; the enforcement of the UK competition regime aims to protect competition in the United Kingdom and thereby protect the economic well-being of the country. The more difficult question, discussed under the "necessary in a democratic society head" is whether the broad nature of the powers under the written notice procedure, unaccompanied by special procedural safeguards, such as a judicial warrant, is justified by article 8 (2).

[149] *Op. cit.*

[150] *Niemietz, op. cit.*, para 37.

[151] Case 46/87, [1989] E.C.R. 2859.

[152] Which may explain why the Commission's recent White Paper proposes that the CFI should have the power to issue warrants permitting Commission inspections: *White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty*, (European Commission, 1999) paras 109-111.

[153] *Powers of Investigation, op. cit.*

If the powers contained in section 27(3) of the Act are considered alongside the English Anton Pillar regime (which was approved by the ECtHR) and the French customs authority's powers of search (which were condemned) the OFT's power looks as if it falls on the condemned side of the line. Unlike the case of the Anton Pillar orders, national law does not require the obtaining of a judicial warrant. Furthermore, like the French customs authority, the OFT can act of its own volition and with broad discretion. That view is reinforced by considering *Camenzind.* In that case although the ECtHR did not in fact insist upon the need for a judicial warrant this was in circumstances where the national law itself required the giving of notice and the presence of an independent observer and the search itself was limited. By contrast, the section 27(3) regime can operate without notice and without an independent observer, and the power of investigation is very broad. The only significant feature which distinguishes the OFT's powers from those of the French customs authority is that it cannot force entry, it can only seek criminal sanctions against refusals to permit entry. It is submitted, however, that the lack of a power to force entry is not, on its own, of sufficient weight to allow the section 27(3) power to be regarded as justifiable under article 8(2).[154] The likelihood is that the ECtHR would take the view that there are still not enough adequate safeguards to protect undertakings.

By contrast the power of entry pursuant to judicial warrant under section 28 is likely to be regarded as subject to safeguards sufficient to allow its justification under article 8(2).

However, a further issue may affect both sections 27 and 28. It arises from the scope of the power granted to OFT officials, whether by authorisation or by warrant. In *Niemietz* the ECtHR condemned the broad nature of the judicial warrant because the Munich district court had permitted a search, and seizure of documents, without any limitation.[155] It is true that *Niemietz* concerned the search of a lawyer's office and the infringement of professional secrecy. However, a general principle remains regarding an authorisation or warrant drawn in broad terms. In fact section 27 of the Act grants the DGFT powers to issue authorisation permitting officials to require any person to produce documents which are relevant to the investigation. Although the scope of a warrant under section 28 will be a matter for the courts it is likely that the OFT will be seeking a warrant in similar, if not broader, terms than would be contained in an authorisation granted by the DGFT under section 27.

The OFT can however, make two strong arguments in favour of a broad authorisation or warrant. First as the ECJ itself has pointed out in relation to "on-the-spot" investigations under EC Regulation 17, the antitrust authorities cannot be expected to know exactly in advance what they will find.[156] Second, the OFT can also draw on *Niemietz* itself. The ECtHR indicated in that case that article 8(2) might permit a much broader interference where it related to business activities or premises (as opposed to domestic premises).[157] The need for a broad authorisation or warrant in order properly to carry out an investigation in relation to competition matters at business premises may be exactly the class of case the ECtHR had in mind.

[154] It is notable that in both *Chappell* and *Camenzind*, the former concerning entry under a judicial warrant, and the latter concerning entry without warrant, there was an independent element in the operation of the power of search. In the first case judicial supervision. In the second case, the presence of an independent observer. It may be that the ECtHR will require in most cases some independent element in the granting or exercise of the power of search as a necessary safeguard to bring the interference within art. 8(2).

[155] *Niemietz, op. cit.*, para 37.

[156] *Hoechst, op. cit.*, para 27.

[157] *Niemietz, op. cit.*, para 31.

Even without section 27(3) of the Act many "on-the-spot" inspections would, in fact, still be able to go ahead. For example, in the most serious cases, such as suspected cartel operations the OFT would be able to argue that there would be reasonable grounds for suspecting that if documents were required to be produced they would be concealed, destroyed or tampered with and therefore a warrant was necessary under section 28 (1)(b). The potential unlawfulness of entry under a warrant issued pursuant to section 28 would therefore only be likely to cause problems for the OFT in less serious cases.[158]

DECISIONS OF THE DGFT AND THE PRESUMPTION OF INNOCENCE

This part of this article first provides a brief overview of the decision-making power of the OFT. It then considers the scope of the presumption of innocence and finally it assesses the decision-making power of the DGFT in the light of the presumption of innocence.

The Decision-Making Power Of The DGFT Under The Act

Following an investigation by his OFT officials, the DGFT may come to the conclusion that there is sufficient evidence to support a decision that there has been an infringement of a chapter I or II prohibition. However, section 32(2) of the Act requires that before the DGFT issues a decision he is required to give the suspect undertaking written notice of the proposed decision and the opportunity to make representations.

The rights of the undertaking are fleshed out further in rule 14 of the Draft Procedural Rules.[159] First, the written notice must state the matters to which the DGFT has taken objection, the action he proposes to take and the reasons for it.[160] Second, the suspect undertaking must be given a reasonable opportunity to inspect the documents in the DGFT's file relating to the proposed decision.[161] Thirdly, written and oral representations made by the suspect undertaking must be considered within a period to be specified in the written notice.[162] Fourthly, the suspect undertaking must be allowed a period within which it may indicate that it considers any part of the notice to be confidential.[163]

Following the making of representations by the suspect undertakings the DGFT may adopt an infringement decision.[164] The Act does not provide that the decision should, in fact, be reasoned. However, the OFT has indicated that infringement decisions should be reasoned.[165] In addition, as Whish and Freeman point out, application of

[158] Presumably following a declaration under HRA, s. 4(4) of the incompatibility of s. 27(3) of the Act, the Secretary of State would seek an amendment by the fast track procedure under the HRA which would provide for a new s. 27(3) which did require a warrant, on broader grounds than under s. 28.

[159] *Draft Procedural Rules, op. cit.*, rule 14.

[160] *Draft Procedural Rules, op. cit.*, rule 14(3)(a).

[161] *Draft Procedural Rules, op. cit.*, rule 14(3)(b). See also the impact of rule 14(5) in relation to confidentiality discussed below.

[162] *Draft Procedural Rules,op. cit.*, rule 14 (3)(c). The DGFT has also indicated in the guidelines that he does not intend to adopt a formal oral hearing, such as that which exists in EC competition procedure rules. However, he accepts that there is a place for oral representations which in some cases may clarify written representations. Such oral representations will not be equivalent to the EC's formal oral hearings. See para 12, specific policy issues.

[163] *Draft Procedural Rules, op. cit.*, rule 14.(3)(d). It should be noted that the DGFT is permitted by virtue of rule 14(5) to withhold any document to the extent that it contains information which a person has stated to the DGFT to be confidential or which is in the opinion of the DGFT, otherwise confidential.

[164] Section 31(1).

[165] *Enforcement, op. cit.*, para 2.6.

EC law principles *via* section 60 of the Act would in all probability require infringement decisions to be reasoned.[166] The decision may include directions to modify or terminate the agreement or conduct[167] as well as the imposition of a fine penalty.[168]

The Scope Of The Presumption Of Innocence Under The Convention

Article 6(2) provides that everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law. At first sight this provision would appear to apply only to persons charged with criminal offences defined by national law.[169] However, in *Albert and Le Compte* v. *Belgium*,[170] the ECtHR applied the provision to disciplinary proceedings against doctors. Unfortunately the court provided little reasoning in that case. Nor has any subsequent case thrown any further light on the issue. Clearly, a strong argument can be made that if article 6(2) can apply to disciplinary offences as in *Albert and Le Compte*, it should also apply in other cases where the sanctions are significant. *A fortiori* in respect of regulatory offences which potentially carry heavy financial penalties, and which are deemed criminal for the purposes of the Convention.

Article 6(2) classically applies to national legal systems in two ways. First, it supervises the way national courts deal with factual presumptions and the evidential burden of proof. Second, it affects the way in which national courts impose cost penalties, or otherwise qualifies the acquittal of defendants.[171]

In *Allenet de Ribemont* v. *France*[172] the ECtHR extended the scope of article 6(2). That case concerned statements made by the French Minister of the Interior and senior police officers at a press conference regarding the guilt of the applicant. In particular, that he was one of the instigators of the murder under investigation. The French Government argued that such remarks came under the head of information regarding criminal proceedings in progress and did not infringe the presumption of innocence, since such a statement did not bind the courts and could be proved false by subsequent investigation.[173] The ECtHR accepted that article 6(2) did not prevent the public authorities from informing the public about criminal investigations.[174] However, the court noted that the statements by the senior French officials, made without any qualification or reservation, identified the applicant as one of the instigators of the murder. It held that such statements were a declaration of the applicant's guilt and, furthermore, that the statements prejudged the assessment of the facts by the competent judicial authorities with the result that article 6(2) had been infringed.[175]

Assessing The Decision-Making Power Of The DGFT Under The Convention

The difficulty with applying the presumption of innocence doctrine is that none of the Convention case law directly applies to the point. There are no decisions as to whether regulatory offences, carrying heavy penalties and which are considered to be criminal for the purposes of the Convention fall within article 6(2). As argued above, however,

[166] Whish and Freeman, *op. cit.*, para 4.52.

[167] Termination or Modification of agreements is permitted by s. 32(3). Termination or Modification of conduct is permitted by s. 33(3).

[168] Fine Penalties are imposed by s. 36.

[169] Reid, *A Practitioners Guide to the European Convention of Human Rights* (Sweet & Maxwell, 1998), p. 118.

[170] [1983] 5 E.H.R.R. 533, para 39.

[171] Reid, *op. cit.*, 118-119.

[172] [1995] 20 E.H.R.R. 557, para 39.

[173] *Ibid.*, para 40.

[174] *Allenet de Ribemont*, *op. cit.*, para 37.

[175] *Allenet de Ribemont*, *op. cit.*, para 41.

there is a strong case for saying that offences such as UK antitrust infringements should fall within article 6(2) given the serious consequences of a cartel or price-fixing case for the economy, the potential penalties that can be levied on accused undertakings and the fact that such offences are deemed criminal under the Convention.

A further problem, however, is that the ECtHR has only considered cases which involve applying article 6(2) to national courts in relation to presumptions or the burden of proof; to the qualifying of the acquittal of defendants; and to official statements as to the guilt of a defendant not yet convicted. There are no cases dealing with a situation in which an executive organ makes definitive statements of guilt following an administrative hearing, which does not comply with article 6(1).

It might be possible, however, to argue that so long as the administrative hearing protects the rights of defence a definitive statement of guilt at the end of the hearing may be made. Some support for that proposition can be gained from the *Minelli* case. In that case the ECtHR took the view that,

> the presumption of innocence will be violated if, without having previously been proved guilty according to law and, notably, without his having had the opportunity of exercising his rights of defence, a judicial decision concerning him reflects an opinion that he is guilty.[176]

It can be argued, however, that a DGFT decision stating that the applicant undertaking has committed a serious infringement of the Act is more akin to the statement of guilt in *Allenet de Ribemont*. With a DGFT decision, just as with the statements in *Allenet de Ribemont*, the OFT is stating without qualification or reservation, that a defendant undertaking is guilty of certain offences, prior to any judicial hearing. It has to be open to question whether the presumption of innocence is truly protected if a Contracting State can organise an administrative hearing before the same organ that is running the prosecution, concerning a charge which carries heavy penalties and is deemed criminal for the purposes of the Convention. The consequence of accepting that article 6(2) is limited in such circumstances would be effectively to reduce the scope of that provision and to provide a means for Contracting States to escape from the control of the ECtHR.

POTENTIAL OFT DEFENCES

There are two potential defences that the OFT can marshal against a Convention challenge to its investigative and enforcement powers. First, it can argue that section 60 of the Act permits the application of the ECJ's fundamental rights case law to the Competition Act, rather than the Convention case law. Second, it can argue that the fact that the Act is directed against undertakings permits a broader interference with Convention rights.

The Tension Between Section 60 Of The Competition Act And The Human Rights Act

The OFT may seek to defeat Convention challenges to its powers of investigation and enforcement by pleading sub-section 60(1) of the Competition Act provides that:

> The purpose of this section is to ensure that so far as is possible (having regard to any relevant differences between the provisions concerned), questions arising

[176] [1984] 5 E.H.R.R. 554, para 37.

> under this Part in relation to competition within the United Kingdom are dealt with in a manner which is consistent with the treatment of corresponding questions arising in Community law in relation to competition within the Community.

Sub-section (2) then provides that

> At any time when the court determines a question arising under this Part, it must act (so far as is compatible with the provisions of this Part and whether or not it would otherwise be required to do so) with a view to securing that there is no inconsistency between-
>
> (a) the principles applied, and decision reached, by the court in determining that question; and
>
> (b) the principles laid down by the (EC) Treaty and the European Court (the Court of Justice of the European Communities) and any relevant decision of that Court, as applicable at that time in determining any corresponding question arising in Community law.

Finally, sub-section 60(3) provides that, "the court must in addition, have regard to any relevant decision or statement of the Commission." [177]

Section 60 could be deployed by the OFT to argue that there should be consistency between the interpretation of the Commission's powers of investigation and enforcement and its own powers. In particular, the general principles of Community law, including fundamental rights principles, should be applied *via* section 60 to assist in the interpretation of the scope of sections 26, 27 and 28 of the Act. Furthermore, that any question as to the scope of the powers of investigation and enforcement of the OFT so far as they affect fundamental rights is one which should be properly referred to the ECJ under article 234 EC (*ex* article 177).[178]

At first sight this argument looks unpromising. Section 60(1) refers to, "questions arising. . . . . .in relation to competition." The section suggests that it applies to the substantive law and not to procedural questions or to the general principles that could apply to such questions. Furthermore, the OFT has confirmed that it is not following the procedures of the European Commission. However, both the OFT and the Government has taken the view that the general principles of Community law are to be imported, save where there is a relevant difference.[179]

In the view of the OFT, therefore, it would appear that *Orkem* and *Hoechst*, for example, could be cited in defence of sections 26, 27 and 28. Furthermore, if subjected to legal challenge, the OFT could seek a reference to Luxembourg, to (hopefully) reaffirm the narrow scope of those cases.

The difficulty with this view is that it does not take account of the advent of the Human Rights Act 1998, sub-section 3(1) of which provides that "[s]o far as it is possible to do so, primary legislation and subordinate legislation must be read and

[177] Section 60(4) applies the obligations in sub-sections (2) and (3) to the DGFT and any person acting under him. And s. 60(5) defines "court" in sub-sections (2) and (3) as referring to any court or tribunal.

[178] The ECJ made it clear in Case C-28/95 *Leur-Bloem* v. *Inspecteur der Belastingdienst* [1997] I E.C.R. 4161 para 34, that it has jurisdiction under art. 234 EC where, "the situation in question is not governed directly by Community law but the national legislature, in transposing the provisions of a directive into domestic law has chosen to apply the same treatment to purely internal situations and to those governed by the directive, so that is has aligned its domestic legislation." Furthermore, in Case 7/97 *Oscar Bronner GmbH* v. *Mediaprint Zeitungs und Zeitchriftenverlag*, 26 November 1998, not yet reported, the ECJ applied the Leur-Bloem principle to domestic competition law, where the domestic equivalent of art. 82 was not even on all fours with its EC progenitor.

[179] OFT, *Draft Procedural Rules*, *op. cit.*, para 12 and OFT, *Powers of Investigation*, *op. cit.*, para 6.3-6,4. See also the comments of Lord Simon, HL Committee, 25 November 1997, col. 960/961 and 5 March 1998, col.1363/1364.

given effect in a way which is compatible with Convention rights". Sub-section 3(2)(a) goes on to provide that this section, "applies to primary legislation and subordinate legislation whenever enacted".

The HRA does not, of course, affect the validity, continuing operation or enforcement of any incompatible primary legislation.[180] However, if a court[181] is satisfied that a provision of primary legislation is incompatible with a Convention right, and that the primary legislation concerned prevents removal of the incompatibility, it may make a declaration of that incompatibility.[182]

It is difficult to see how the HRA can fail to apply to powers under the Competition Act. It is clear from section 3 that the HRA has an extremely broad scope. All primary legislation, whether adopted before or after the date of enactment of the HRA, falls within its purview. It could however be argued by the OFT that section 60 of the Competition Act, by providing a Community conception of fundamental rights in competition matters acts as a *lex specialis* to the HRA. There are two good arguments against this proposition. First, there is no reference in either Act to provide the basis for such an interpretation. The argument is strengthened by the observation that both bills proceeded through Parliament at the same time and were enacted on the same day, 9 November 1998. It is reasonable to suppose that if Parliament had intended to provide for a special fundamental rights regime for the Competition Act it would, given the circumstances, have said so. Second, the effect of treating section 60 of the Competition Act as a *lex specialis* to the HRA would result in the United Kingdom violating its international obligations, in respect of the ECtHR, given the above discussion as to the incompatibility between the Convention case law and the Competition Act procedures. One of the principal objects of the enactment of the HRA was to reduce the embarrassing number of UK losses in Strasbourg.[183]

A Business Defence?

There is one further argument that the OFT could raise in defence of its procedures. The OFT could argue that the fact that the UK investigation and enforcement procedures apply to undertakings means that the breadth of interference permitted under the Convention is much broader than in the case of individuals. Furthermore, there is clear case law support for that argument. In *Fayed*, a claim of denial of access to a court, and a consequent violation of article 6(1), was made by virtue of the applicant being unable to bring defamation or judicial review proceedings to challenge the facts of a DTI report deemed privileged. The ECtHR took the view that

> . . .as to the enforcement of the right to a good reputation under domestic law, the limits of acceptable criticism are wider with regard to businessmen actively involved in the affairs of a large public company than with regard to private individuals.[184]

[180] HRA, s. 3(2)(b).

[181] HRA, s. 4(5) defines "court" as including the House of Lords; the Judicial Committee of the Privy Council; the Courts-Martial Appeals Court; and, in Scotland, the High Court of Justiciary, sitting otherwise than as a trial court or the Court of Session. Note, however, that the term does not encompass the Appeal Tribunal of the Competition Commission.

[182] HRA, s. 4(4).

[183] CM 3782 *Rights Brought Home* (HMSO, 1997) para 1.16. Query would the ECJ accept a reference on this issue, given the fact that it is the ECtHR that is the European Court responsible for control of the human rights standards of the Member States in domestic matters. Especially as the ECtHR has recently restated its rights in respect of Member State Convention obligations in the context of Community law in *Matthews* v. *United Kingdom*, 18 February 1999, not yet reported.

[184] *Fayed, op. cit.*, para 75.

More pertinently, in *Niemietz* [185] the ECtHR took the view that a broad interpretation of article 8(1), which resulted in business premises falling within the definition of private life and home

> would not unduly hamper the Contracting States, for they would retain their entitlement to, 'interfere' to the extent permitted by paragraph 2 of Article 8; that entitlement might well be more far-reaching where professional or business activities or premises were involved than would otherwise be the case.[186]

At first sight the argument for the permissibility of a broader interference with Convention rights in relation to the UK competition investigation and enforcement procedures appears to be made out. As Amato has observed antitrust law was developed for the purpose of bringing liberal democracies back into balance by placing limits on private power, that may not only threaten economic freedom but also public decisions exposed to its domineering strength.[187] The major undertakings which are likely to be the subject of these procedures do indeed have significant economic and political power.

However, this argument overlooks a proportionality argument. The OFT can bring its procedures into line with the Convention and still effectively supervise the application and enforcement of the Competition Act. For example, it makes little difference to the burdens of the OFT whether it obtains an authorisation from the DGFT or a warrant from the High Court or Court of Session, in respect of its power to obtain information or its power of entry.[188] Furthermore, in relation to the decision-making power of the DGFT and the presumption of innocence, the impact of the Convention case law would be actually to cut the OFT's workload. This would necessarily happen if the OFT had to seek a decision from the Appeal Tribunal rather than issuing its own decision. Effectively one stage, involving the deployment of considerable OFT resources, would be removed from its decision-making process.

One issue, however, remains of importance for the OFT; self incrimination. It will no doubt be argued that the OFT cannot comply with the rule in *Saunders* and effectively apply and enforce the Competition Act as well. It is, however, submitted that this does not stand up to a close examination. It is true that *Saunders* acts as bar to the application of section 26 of the Act, at least in relation to testimony evidence.[189] However, the Act could be amended so that testimony evidence could be obtained (or inferences drawn) from the representatives of undertakings in competition proceedings. To obtain testimony evidence and comply with the Act it would be necessary for proceedings to commence directly before the Appeal Tribunal, rather than by means of a written notice, followed by representations by the suspect undertakings and then by a decision of the DGFT.

If proceedings were commenced directly before the Appeal Tribunal and a representative of an undertaking were to refuse to answer questions put to him during cross-examination, the Convention would permit inferences to be drawn from such a refusal.[190] Furthermore, if evidence were taken on oath any deliberately false answers could result in criminal prosecution.[191]

Furthermore, a case can also be made that there are also more effective means of obtaining evidence, such as the encouragement of whistleblowers by provision of a well

[185] *Op. cit.*

[186] *Niemietz*, *op. cit.*, para 31.

[187] Amato, *Antitrust and the Bounds of Power* (Hart Publishing, 1997) 2.

[188] Clearly OFT officials would be spend extra time preparing draft warrants and pleading before the courts. However, it cannot be seriously argued that this is a disproportionate burden for the OFT to bear.

[189] *Saunders* indicates that documentary evidence can be seized or copied so long as warrant is obtained first, *op. cit.*, para 69.

drafted Cartel Whistleblowing Notice. The existence of such a notice in the US has had the effect of significantly enhancing the application and enforcement of their competition rules.[192]

CONCLUSION

There is a real danger for the OFT in the conflict between the investigation and enforcement provisions of the Competition Act and the provisions of the Human Rights Act. On and after the first of March 2000, the OFT hopes to "hit the ground running" by encouraging complainants, seeking out cartels and then imposing heavy penalties upon them. It thereby hopes to improve the competitive process of the UK economy. The danger is that that worthy object will be frustrated as wealthy business corporations and the corporate law firms they hire, use the HRA to frustrate the effective operation of the Competition Act. Instead of cracking down on cartels the OFT will find itself enmeshed in judicial review hearings in the High Court and ECHR challenges before the Appeal Tribunal.[193] It can only be hoped therefore that the UK Government will amend the Competition Act at the earliest opportunity to bring it into line with the Convention.

[190] *John Murray*, *op. cit.*, para 54. The ECtHR held that inferences can be drawn from silence , so long as there is already evidence that calls for explanation from the accused.

[191] *Severes* v. *France* [1999] 28 E.H.R.R. 265 para 47. The ECtHR held that the purpose of the oath is to ensure that a person tells the truth , not to levy compulsion upon him. The right to silence remains.

[192] The US Cartel Leniency Program, since its inception in 1993 has had a high degree of success. Over $500 million fines have been imposed; 35 Grand Jury investigations launched into international cartels and undertakings are entering the program at the rate of one a fortnight. By contrast the 1996 EC equivalent, has had very little impact, see Spratling, "Making Companies an Offer They Shouldn't Refuse: The Antitrust Division's Corporate Leniency Policy, An Update", February 16 1999, 35th Annual Symposium on Associations and Antitrust, The Carlton Hotel, Washington, D.C. The OFT has in fact adopted a similar procedure, see, *DGFT's Guidance as to the Appropriate Amount of a Penalty*, *op. cit*, para 9.1 *et seq.*

[193] Section 26, 27 and 28 written notices, authorisations and applications for a warrant cannot be attacked directly before the Appeal Tribunal of the Competition Commission, see s. 46(3) for the list of what is appealable and Whish and Freeman, *op. cit.*, para 5.17.

CIVIL PROCEDURE: PART 24 – HOW REAL IS A REAL PROSPECT OF SUCCESS?

JANE CHING *

"I . . . propose that the test for summary judgment should be easier for applicants to satisfy than the current test . . . the new test will in fact give effect to the corpus of judicial decisions on the current practice." [1]

INTRODUCTION

AFTER TWO DETAILED REPORTS on the civil justice system in England and Wales, the shape of civil litigation changed fundamentally from 26 April 1999. In this article the writer considers the emerging practice in relation to a single "Part" of the Civil Procedure Rules 1998 ("the CPR"): Part 24 governing the grant of summary judgment.[2] Further discussion of the apparent differences between the old and new procedure appears below under the heading "The Rule" but in summary they include: the probable shifting of the burden of proof (previously the largest share of the burden was on the defendant as respondent to the application); the opening up of the procedure to defendants for use against claimants (previously "plaintiffs"); the imposition of new criteria on which the application will be granted (a "real prospect" of success in the claim or the defence[3]); and inclusion of a proviso, of perhaps uncertain scope, to the effect that summary judgment can be avoided if there is some "other reason why the case or issue should be disposed of at a trial".[4]

The writer began this article with a simple aim in mind: to review the cases on Part 24 that had arisen over the first six months since the implementation of the CPR. A subsidiary aim was to try to achieve a position from which it would be possible to satisfy the natural desire of students for a degree of certainty in relation to the substantive criteria governing the outcome of an application: in short to determine the "X" and "Y" values in the following equations:

> X% = the chances of success necessary to avoid summary judgment ("a real prospect of succeeding/successfully defending"[5])

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[1] Lord Woolf, M.R., Access to Justice, Interim Report, Chapter 6 para 21. There is, of course, an inherent contradiction in the statement: if the new rule is only to consolidate the existing common law, there should be no change in the circumstances when judgment is obtainable, at least on an application by the claimant. Since it was not previously possible for a defendant to obtain summary judgment at all (except in relation to his or her counterclaim), it goes without saying that the new rules will make judgment for defendants easier to obtain.

[2] Properly now called "summary disposal" as a result of the provision for defendants to use the procedure against claimants. However, the familiar terminology persists and the expression "summary judgment" is used in this article to cover both claimant and defendant applications.

[3] CPR r. 24.2(a).

[4] CPR r. 24.2(b).

[5] My colleague Maureen Maksymiw points out that there is a third relevant percentage: the level at which a case, aside from being vulnerable to summary judgment, could be struck out under CPR r. 3.4(2)(a).

Y% = the chances of success which will avoid summary judgment but result in a conditional order.

Whilst reviewing the case law (such as it is) it became apparent that there are other questions to which the practitioner even more than the student would like to know the answer. These questions concern the allocation of the burden of proof and the nature of the grounds which must be shown in order to rely upon the proviso.

The Burden Of Proof Questions

This involves consideration of the relevance and effect, during the first four and a half months of the CPR regime, of paragraphs 4.1 and 4.2 of the supporting practice direction. Where exactly does the burden of proof lie in respect of the different limbs of the new rule? Which, if any, of the cases decided whilst that section of the practice direction was in force can safely be relied on?

A further question arises from the extension of the summary judgment jurisdiction to applications made by the defendant. Can it be said that there is any difference in approach to a claimant's application as opposed to a defendant's?[6] The possibility arises because, among other thing, defendants' applications will often be made in tandem with an application to strike out the claimant's case under CPR r. 3.4(2) (a) or (b) so that the mind of the court will be focused on the extreme end of the scale of success (or rather lack of success), whilst a claimant's application is more likely to be considered in isolation.

The "Other Reason" Question

To what extent, if at all, can Part 24 judgment be avoided where the limitations of interim hearings, without the appearance and cross-examination of witnesses, make it difficult to assess the prospects of success?[7] Have such issues been treated as a failure by the applicant to discharge his or her burden of proof on the substantive application or as some "other reason for trial" within CPR r. 24.2(b) (in which case the burden of bringing oneself within the proviso might seem to fall naturally on the respondent)?

The law stated in this article is believed to be correct as at 18 November 1999 although where possible reference has been made to cases decided after that date.

THEORETICAL BACKGROUND

One might, of course, legitimately ask whether in the CPR's climate of speed and economy, there is a place for a summary judgment procedure at all. If a case can be bought to a full trial more quickly and more cheaply than before, surely many of the justifications for the existence of the procedure, (for example: that it produces judgments at least for claimants which, because they are earlier than might otherwise be expected, are of greater practical benefit;[8] and that it prevents expenditure by the parties and by the courts on unmeritorious cases) will fall away? Further, there is a

[6] See further O'Brien, "The New Summary Judgment: Raising the Threshold of Admission"[1999] 18 C.J.Q. 132, an excellent article based on the draft rules prior to implementation.

[7] A consideration which used to fall within the proviso to RSC Ord. 14 that judgment could be avoided if there was "some other reason" for trial (RSC Ord. 14 r. 3(1)). The writer is obliged to Maureen Maksymiw for the alternative suggestion that the cases on this point under the new law could be treated as involving a failure to discharge the applicant's burden of proof rather than as reinstating the RSC Ord. 14 "other reason" for trial. If this issue falls within Part 24's "other reason" category, however, the burden of proof may then be a positive burden on the defendant to show that there is something that merits investigation at trial.

[8] This rationale is given in the substantial discussion of this issue, particularly in the context of the interlocutory (under the CPR "interim") injunction, in Zuckerman, "The Case for Commuting Correct Judgments for Timely Judgments" [1994]

fear[9] that summary judgment, given as it is on paper evidence only, is intrinsically likely to be a less objectively accurate (or "just") evaluation of the issues in dispute. The latter may perhaps underlie the continued view of the judiciary, discussed under "the limitations of summary process" below that there are disputes which it is inappropriate to resolve other than by a full trial.

In addition, it is suggested that there are wider interests involved in taking some cases to a full trial.[10] The wider interests, not so much of the community at large but of other litigants, are for the first time reflected in the CPR which require that the courts must "[take] into account the need to allot resources to other cases."[11] This is, however, a pragmatic, resource-led approach. Lord Woolf's approach to the proviso to the new rule (he considers that a full trial can be justified provided that the case raises issues of public interest) does, however, allow for a wider range of interests to be taken into account.

However, it is clear that provision for summary judgment has been retained and expanded in the CPR because the increased speed and economy of the new rules is only a relative change. Even in the fast track, in personal injury cases where the personal injury pre-action protocol may occupy a considerable period before the court becomes involved in the dispute, a case may still take a year before it can come to trial. Clearly many cases will continue to be resolved by negotiation or other means of reaching compromise between the parties without the intervention of the judiciary. The CPR are nothing if not highly pragmatic, especially in terms of the cost of litigation. Dealing with a case "justly" in the words of CPR r. 1 involves an apportioning of resources. In the words of Adrian Zuckerman:[12]

> . . .the needs of the community may be better served by faster and simpler proceedings, albeit at some costs to accuracy, than by a highly accurate procedure in which delays can rob judgments of their utility and in which expense places the protection of the law beyond the reach of the great majority.

Examining the draft rules prior to implementation, Derek O'Brien[13] wondered whether the application of the new process would operate simply as a procedural filter for obviously unmeritorious cases or as a complete substitute for trial. On the face of it the simple "procedural filter" has clear pragmatic uses. It is in obviously unmeritorious cases that the saving in cost to the litigants, the court and the wider community (including other litigants) most clearly outweighs any potential sacrifice in "justice" in the sense of a correct evaluation of the full merits and evidence. It might also be said that it is easier to identify a clearly unmeritorious case than to evaluate the full merits of the case.[14]

If the procedure becomes a full substitute for trial, however, then the significance of any limitations in summary procedure (of which the greatest is likely to be the absence

14 O.J.L.S. 353. The argument that an early judgment is likely to be of greater use is based upon the notion that it is more likely to be enforceable, delay being seen to increase the risk that the defendant might cease to be able to pay and that the claimant might be unable to make use of the money.

[9] Discussed by Zuckerman, *ibid.*

[10] "The importance of achieving justice between individual litigants is in no way diminished by recognition that the process of litigation, considered as a whole, serves at least two other ends, connected but distinct, and that their attainment should be included in the purposes of procedural law. First, civil proceedings serve to demonstrate the effectiveness of the law; secondly they provide the opportunity for the judges to perform their function of interpreting, clarifying, developing and, of course, applying the law" Jolowicz, "On the Nature and Purposes of Civil Procedural Law", *in International Perspectives on Civil Justice: Essays in Honour of Sir Jack Jacob*, (Sweet and Maxwell, 1990).

[11] CPR r. 1.1(2)(e).

[12] *Op. cit.*

[13] *Op. cit.*

[14] See the comments by Ward, L.J. in *Day*, discussed below.

of oral evidence and cross-examination) is vastly increased. Any discrepancy between the approach adopted for claimant's applications and for defendant's applications will be heightened. In fact as Adrian Zuckerman[15] and Derek O'Brien[16] have noted, the American system of summary judgment (available both to plaintiffs and to defendants) now demands that each party satisfy the burden of proof that they would have to satisfy at trial. Since, generally speaking, the burden at trial is heavier on the claimant/plaintiff, the result in the United States has been that defendant applications are much more likely to be successful than claimant applications.

Derek O'Brien suggests that the CPR wording offers the opportunity to import precisely that degree of apparent inequality into the system of England and Wales. The "real prospect of success" is a prospect of succeeding in establishing one's case at trial, a task which is more onerous for the claimant (except to the extent that the defendant puts forward an "affirmative defence" such as – broadly speaking – contributory negligence or, as in *Mahon* v. *Rahn*, discussed below, a claim of privilege in response to an allegation of defamation).

Whether such an approach has materialised in practice will form part of the discussion of the cases which follows. It is fair to say, however, that the writer's survey of Part 24 cases, on a superficial count, does not suggest that defendant's applications have in fact proved to be more successful than claimant's applications: the level of successful applications in both types of application is roughly even.

THE RULE[17]

In order to evaluate whether the current rule achieves Lord Woolf's stated aim of making summary judgment (*i.e.* judgment at a pre-trial stage) easier to obtain, it will be instructive for purposes of comparison to deal briefly with the previous rule. Before 26 April 1999, the plaintiff alone had power to apply for summary judgment against the defendant "on the ground that the defendant ha[d] no defence. . ."[18] Provided the plaintiff's application was not inappropriate or procedurally premature[19] and that there was affidavit evidence confirming the lack of defence,[20] the burden of proof was on the *defendant* to show that his or her case was good enough to merit "leave to defend."

No precisely similar remedy was available to the defendant faced with an unmeritorious claim unless the defendant could persuade the court actually to strike out the plaintiff's case under RSC Ord. 18 r. 19.

In practice the previous rules, supplemented by the "corpus of judicial decisions" referred to by Lord Woolf, established that the defendant could avoid judgment,[21] by showing some kind of defence on the merits[22] or a "triable issue" or ". . . that there

[15] *Op. cit.*

[16] *Op. cit.*

[17] CPR r. 24.2.

[18] RSC Ord. 14 r. 1.

[19] I.e. provided the action was not one of the limited kinds of cases excluded from summary judgment (such as defamation claims), and provided that the statement of claim had been served and an acknowledgement of service filed: RSC Ord. 14 r. 1(1).

[20] RSC Ord. 14 r. 2(1).

[21] Other than by demonstrating that the application was premature or that the plaintiff had failed to satisfy the initial requirements.

[22] Wording extracted by the editors of the *Supreme Court Practice, 1999* (1998, Sweet & Maxwell, London) from a series of cases includes: ". . .a fair case for defence, or reasonable grounds for setting up a defence, or even a fair probability that he has a bona fide defence. . ." (on the basis of credible evidence). Other wording to which they refer includes "more

ought for some other reason to be a trial. . ."[23] The issue was further complicated by the practice of granting leave to defend conditional on payment into court by the defendant of a sum of money, often, in liquidated claims, the entire amount claimed by the plaintiff.[24] In cases where the defendant had raised a defence but where the merits or *bona fides* of the defence were regarded with some suspicion, conditional leave would be granted.[25]

From 26 April 1999, summary judgment may be given "on the whole of a claim or on a particular issue" against a claimant who has "no real prospect of succeeding on the claim or issue" or against a defendant who has "no real prospect of successfully defending the claim or issue" provided in either case that "there is no other reason why the case [sic] or issue should be disposed of at a trial".[26]

The wording of the proviso ("there is no other reason why the case or issue should be disposed of at a trial") is, of course, very similar to the wording of the previous RSC Ord. 14 proviso (". . . that there ought for some other reason to be a trial. . ").[27] Despite this similarity in phraseology, it is clear that Lord Woolf considered *his* proviso to apply less to such practical issues as the evaluation of oral evidence or the need to resolve issues by expert evidence as to circumstances where "there [is] a public interest

than shadowy but less than probable". A detailed discussion appears in the *Supreme Court Practice, 1999* at n. 14/4/9. What has been suggested is that this need not exceed a 50% chance of success (see more detailed comments at n. 41 below).

[23] RSC Ord. 14 r. 3(1). It was accepted that such practical matters as the need to resolve an issue by examination in chief and cross-examination at a full trial rather than on the basis of paper evidence could constitute such a reason, as could the need for discovery or technical evidence. See further, *ibid.* at n. 14/4/10. The existence of a "bona fide" counterclaim could dislodge the judgement: *ibid.*, n. 14/4/14.

[24] RSC Ord. 14 r. 4(3).

[25] So for example the editors of the *Supreme Court Practice, 1999, op. cit.*, refer at n. 14/4/6 to "a real doubt about the defendant's good faith", defences that are "shadowy" and cases that are "almost" suitable for summary judgment to be awarded.

[26] CPR r. 24.2(a). It is pointed out by the author of the relevant chapter in *Blackstone's Guide to the Civil Procedure Rules* (1999, Blackstone, London), that the wording of CPR Part 24 can be traced back to comments in *Alpine Bulk Transport Co Inc* v. *Saudi Eagle Shipping Co Inc* [1986] 2 Lloyds' Rep. 221 to the effect that the test for setting aside a default judgment was higher than the mere "arguable case" which would defeat a summary judgment application under RSC Ord. 14 since it required a "real prospect of success". Note, however, the more recent decision in *Day* v. *Royal Automobile Club Motoring Services Ltd.* [1999] 1 W.L.R. 2150, C.A., heard prior to implementation of the CPR and discussed further in Browne, "A Matter of Semantics", (1999) Litigation 18(4) 18. Put simply the rationale for the difference between the criteria for setting aside a default judgment and those for the grant of summary judgment was that the defendant in a judgment case did not merit the benefit of any judicial doubt; he or she was already in breach of the rules of court. It is, however, worthy of note that CPR Part 13 governing the setting aside of default judgments against defendants now allows for the judgement to be set aside if "the defendant has a real prospect of successfully defending the claim" (CPR r. 13.3(1)(a)). The use of virtually identical wording - albeit that Part 13 is expressed as a positive (the defendant having to prove a real prospect) and Part 24 is expressed as a negative (the identity of the party bearing the burden of proof is discussed further below) – disposes at a stroke of the rationale for any distinction between the two procedures. The difference between positive and negative phraseology was considered significant at least by Ward L.J. in *Day* on the previous law as to setting aside: "Thus it is usually easy to identify the case which is hopeless and say 'There is no real prospect of success.' I add the emphasis to make the point that one is looking at the matter negatively. The approach is distorted if one uses 'real prospects of success' as a positive test. That wrongly encourages a test of judging fact on affidavit and then coming to a provisional view of the probable outcome. . .". These reservations are worth bearing in mind when considering the placing of the burden of proof under Part 24 and of the limitations of summary process generally. For completeness, it should be said that very similar wording is again used in the new practice direction governing appeals: "permission [to appeal] will be given unless an appeal would have no real prospect of success. . . A fanciful prospect is insufficient. Permission may also be given in exceptional cases even though the case has no real prospect of success if there is an issue, which, in the public interest, should be examined by the Court of Appeal." The rather more explicit wording of this practice direction seems to inform or be informed by Lord Woolf's approach both as to the nature of the "other reason" within CPR r. 24.2(b) and as to the standard demanded by the substantive criteria (see his comments in *Swain* v. *Hillman*, below).

[27] Note, however, judicial warnings to the effect that similarity of wording is no guarantee of similarity of interpretation, for example the comments of Hart J. in *Lombard Natwest Factors Limited* v. *Sebastian Arbis*, *The Times* 10 December 1999, Ch. D., reported by Lawtel, (Document C9200169).

in the matter being tried."[28] Given the different context within which "other reasons" arguments can arise, and for the avoidance of doubt, the following expressions will be used as far as possible in the remainder of this article:

> (i) The words "an RSC Ord. 14 'other reason'" will be used to refer to a reason other than one relating to the court's assessment of the merits of the case which would have displaced the possibility of summary judgment under the old rules;
>
> (ii) the words "a Woolf 'other reason'" will be used to refer to a reason which could displace summary judgment according to the particular use of the proviso in CPR r. 24.2(b) envisaged by Lord Woolf; namely recognition of the existence of a public interest in the case proceeding to trial; and
>
> (iii) the words "a CPR r. 24.2(b) 'other reason'" will be used to refer to a reason unrelated to the court's assessment of the merits of the case which will displace the possibility of summary judgment according to the provisio in CPR r. 24.2(b) but *other* than on the public interest grounds envisaged by Lord Woolf.

Before considering the case law, one should finish considering the mechanics and possible outcomes of an application under the new procedure. The application may be made by one of the parties, or the court may exercise its powers to make the order of its own initiative.[29] Normally the application will be dealt with on the basis of paper evidence (witness statements and documentary exhibits) and oral argument by or on behalf of the parties[30] although the court is entitled to dispose of the application on the papers without an oral hearing if it considers it appropriate.[31]

Such applications are commonly argued in parallel with applications to the court to exercise its power to strike out a statement of case (previously a "pleading") if it discloses no "reasonable grounds for bringing or defending the claim"; if it is an abuse of process; or if there has been a breach of the rules or an order of the court.[32]

If the application is successful, the court's order will be given as judgment on the claim (in a successful claimant's application); as the striking out or dismissal of the claim (in a successful defendant's application); as dismissal of the application (in an unsuccessful application); or as a conditional order.[33]

Oddly, those who formulated the practice direction supporting Part 24 thought it necessary to include a specific note to the effect that the court would no longer make orders in the previous form of "leave to defend."[34] Whether this is intended to have any more significant effect than the avoidance of doubt is not clear.[35] Its cosmetic effect is of course to suggest that the defendant has every right to defend his or her claim

[28] Lord Woolf M.R., *Access to Justice, Final Report*, Section 3b para 34. He would receive support in this approach from Professor Jolowicz, *op. cit.* See n. 26 above for the congruity between this approach and the wording of the practice direction on appeals. It has also been pointed out by District Judge Stephen Gold in "Civil Way", [1999] N.L.J. 1589 that s. 8 of the Defamation Act 1996, which creates a summary disposal mechanism specific to defamation claims, contains a similar proviso. He points out, however, that in the statutory proviso "other reasons" are explicitly stated to include such matters as conflicts of evidence (*i.e.* they include RSC Ord. 14 "other reasons"). The relevant sections of the Defamation Act are not, at the date of writing, in force but will operate in parallel to Part 24 by virtue of Practice Direction 53; defamation claims.

[29] CPR r. 3.3. See also Practice Direction 26, para 5.

[30] The "hearing" may take place over the telephone: Practice Direction 23 para 6. Whether the provisions of the Human Rights Act 1998 have any implications for this procedure is beyond the scope of the present article.

[31] CPR r. 23.8.

[32] CPR r . 3.4.

[33] Practice Direction 24, para 5.

[34] Although there may be evidence of this terminology being perpetuated. See *Penningtons* v. *Rabia Abedi*, 30 July 1999, Q.B.D.; and references to the first instance decision in *Monsanto plc* v. *Tilly* and others, 25 November 1999, C.A., both reported by Lawtel, (Documents C7200194 and C8600624).

[35] Gordon Exall considers this issue further in "Civil Litigation Brief: Woolf Reforms" (16), 143 Sol. J. 440.

rather than doing so merely on the sufferance of the court. In fact under the new rules with their explicit emphasis on "deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others",[36] it could be argued that the liberty of both parties to pursue their cases is subject to the permission of the court to an even greater extent than before. However, a similar note explaining that the CPR r. 24.2(b) "other reason" is a different animal to the old RSC Ord. 14 "other reason" (assuming that that is indeed the case) would have been equally if not more welcome to the practitioner.

THE BURDEN OF PROOF AND THE COMPLICATION OF PRACTICE DIRECTIONS

Prior to 26 April 1999, the burden of proof on the plaintiff in relation to an application for summary judgment was very limited. This was demonstrated by the common practice in unliquidated claims of supporting the application with a standard form one–page affidavit verifying that the sums outstanding remained due. The main burden was placed by the Rules of the Supreme Court ("RSC") on the defendant, who could nevertheless discharge it completely even if all that he or she could show was a defence that was "less than probable."[37] An attempt to understand whether, and if so to what extent, the criteria for success have altered must be informed by consideration of the burden of proof. Although the defendant's burden under the old rules seemed relatively slight, nevertheless a close–run application (perhaps therefore one that was somewhat speculative on the part of the plaintiff) could be decided against the defendant simply on the basis of a failure to satisfy the burden of showing a positive case. An order for conditional leave to defend, (although on one level a success for the defendant who could only demonstrate a "shadowy" case) nevertheless required the defendant to do in practice precisely what he or she sought to avoid: to pay over, pending trial, all or a large part of the disputed sum.

Analysis of the allocation of the burden of proof is, however, complicated by the fact that, unlike the RSC, the CPR themselves originally contained no explicit provision on the allocation of the burden of proof. However, until 13 September 1999, a practice direction supplementing Part 24 did contain the following

> 4.1 Where a claimant applies for judgment on his claim, the court will give that judgment if:
>
> (1) the claimant has shown a case which, if unanswered, would entitle him to *that* judgment, *and*
>
> (2) the defendant has not shown any reason why the claim should be dealt with at trial
>
> 4.2 Where a defendant applies for judgment in his favour on the claimant's claim, the court will give that judgment if *either*:

[36] CPR r. 1.4(2)(c).

[37] Wording extracted by the editors of the *Supreme Court Practice 1999* from *Radafin Bank* v. *Agom Universal Sugar Trading Co, The Times*, 23 December 1986, C.A.: *ibid.* n. 14/4/9. On this basis it was reasonable to maintain the distinction between the burden placed upon the defendant opposing an application for summary judgment and that placed upon a defendant seeking to have a default judgment set aside. The rationale for such a distinction has been discussed above, n. 26.

> (1) the claimant has failed to show a case which, if unanswered, would entitle him to judgment, *or*
>
> (2) the defendant has shown that the claim would be *bound to be dismissed* at trial.
>
> 4.3 Where it appears to the court possible that a claim or defence *may* succeed but improbable that it will do so, the court may make a conditional order.
>
> (author's emphasis)

Leaving aside the question whether there is any substantial difference between the expressions "that judgment" used a number of times in the paragraph and "judgment" alone, used in paragraph 4.2(1),[38] it was worrying that it was thought necessary to express the criteria for a claimant's application separately from those for a defendant's application, especially as by the use of the words "and" in paragraph 4.1 and "either" and "or" in paragraph 4.2, one test appeared cumulative and the other disjunctive.

The effect of the words "if unanswered" is also not without difficulty, especially if their meaning is the straightforward "if not responded to" or "if it were to be unopposed". Indeed, in *Taylor* v. *Midland Bank*[39] on a defendant's application the majority of the Court of Appeal regarded paragraph 4.2(1) of the practice direction as a matter of correct pleading. Rattee J. stated that "the amended statement of claim in this case does, just, disclose a case that requires to be answered", a view endorsed by Buxton L.J. A statement of case that fails to demonstrate a case is, of course, already vulnerable to being struck out under the separate jurisdiction of CPR r. 3.4 in any event.

Although *Taylor* involved a defendant's application, if the same analysis is applied to paragraph 4.1 (and assuming there is intended to be no difference between "that judgment" and "judgment" alone as used in paragraph 4.2) the result would be perilously close to saying that, on a claimant's application the claimant simply has to satisfy the very limited preconditions required of a plaintiff under the old rules, the principal burden of proof being on the defendant to dislodge the application.[40]

Furthermore, if one uses a strict but extreme analysis of paragraph 4.1, interpreting the proviso as applying only to a Woolf "other reason", it becomes hard to see how a defendant could defeat the application at all.

In attempting to reconcile the rule with the practice direction, and to accommodate the reference in the rule (but not in the practice direction) to a "real prospect of success" a complex series of tests might have to be erected even before the "other reason" proviso was considered. Indeed in *Taylor* v. *Bank of England* Buxton L.J. stated that the issue was initially one of considering the case as pleaded and asking ". . . whether in the words of paragraph 4.2(1) of the Part 24 Practice Direction, the claimant has failed to show a case which, if unanswered, would entitle him to judgment". He concluded that:

> The plaintiffs have not so failed. The terms of the pleading are, however, also relevant to the further issue of whether the defendant has shown that the claimant has no real

[38] The distinction being presumably that "that judgment" is capable of referring specifically to judgment on the part or parts of the claim actually applied for in the Part 24 application notice and, conceptually, judgment on a summary, pre-trial basis with paper evidence only. The word "judgment" alone in the circumstances would then appear to refer to judgment at trial. It is fair to say that the reported cases do not appear to have made any such distinction.

[39] *Taylor and others* v. *Midland Bank Trust Co Limited and others*, 21 July 1999, C.A., reported by Butterworths Direct and Lawtel, (Document C7200123).

[40] What exactly the defendant would have to show to satisfy that burden is discussed elsewhere. The practice direction suggests that the defendant could only avoid judgment by showing an "other reason".

> prospect of succeeding at trial. In that enquiry the substance rather than just the form of the case is in issue, and for that reason evidence can be considered...
>
> ...There are two limbs to that enquiry. First, can the basis of the plaintiffs' claim as set out in the pleading be shown to be so mistaken that it will be impossible to rely on it at the trial? Second, even if there is some substance in what the plaintiffs allege, are there other elements in the case that will nonetheless lead to the dismissal of the claim?"

Where it was the defendant who had applied for summary judgment, the wording of paragraph 4.2 omitted any reference to the "other reason" set out in the proviso to CPR r. 24.2 and equated the claimant's "no real prospect of succeeding" with a claim that was " bound to be dismissed".[41] A claim with an unrealistic but conceivable prospect of success is, of course, not necessarily one that is "bound to be dismissed".[42] This variation, phrased in the practice direction as an *alternative* to the claimants' failing "to show a case which, if unanswered, would entitle him to judgment" was not explicitly discussed in *Taylor*.[43]

Put simply, then, paragraph 4.1 caused potential difficulty where a defendant could raise a "real prospect" of a defence on the merits, whilst paragraph 4.2 caused difficulty where the claimant could raise some " other reason why the claim should be dealt with at trial" and where the claimant's case, though weak, was not "bound to be dismissed". Further uncertainty lay in defining what exactly would constitute a "reason why the claim should be dealt with at trial" within CPR r. 24.2(b).

From 13 September 1999, the first two sub-paragraphs of paragraph 4 of the practice direction were deleted, rendering further discussion of little practical interest. In reviewing the cases, however, it is necessary to bear in mind the level of potential uncertainty which had been raised by the wording of the practice direction. In the absence of these sub-paragraphs with their well-meaning attempt to allocate and define the burdens of proof however, we are left to seek from the courts not only guidance on the standard of proof involved in the application but also the allocation of the burden of proof.

THE CASES

How Are The Criteria Applied? What Is A "Real Prospect" Of Success?

Clearly it can be counterproductive to draw too many conclusions from the words used by individual judges or reporters to describe the chances of success in any given case.

[41] Colloquially, perhaps, would it be unreasonable to describe a case with "no real prospect of success" as being one that was, say, 75-90% likely to fail, while a case that is "bound to be dismissed" is one that is 100% likely to fail? A case that is "improbable" and might therefore attract a conditional order could perhaps then be put at 55-75% likely to fail. Derek O'Brien, *op. cit.*, has located authority describing a "triable issue" or "arguable case" meriting unconditional leave to defend under RSC Ord. 14 as being more than 50% likely to fail. Note, however, comments on this particular issue in *Surrey Oaklands* and in *Swain* v. *Hillman*, discussed below.

[42] After the deletion of this section from the practice direction, Lord Woolf M.R. confirmed in *Swain* v. *Hillman* (below) that there was a conflict between the rule and the practice direction's use of the expression "bound to be dismissed" "which indicated that the approach required was one of certainty ... If that was thought to be the effect of the practice direction, that would be putting the matter incorrectly because that did not give effect to the word 'real'...". Unfortunately, later in his judgment, his more general comments were phrased in precisely that degree of certainty: "If a claimant has a case which is bound to fail, then it is in the claimant's interests to know as soon as possible that that is the position. Likewise if a claim is bound to succeed, a claimant should know that as soon as possible". No-one can dispute this (except perhaps when acknowledging that matters of public interest, which Lord Woolf himself considered to be within the "other reason" category, might lead to a different conclusion). The difficulty, however, when seeking to establish the criteria to be applied, and the meaning of "a real prospect of success" is in establishing in what circumstances, short of certainty, the rule operates.

[43] The dissenter, Stuart-Smith L.J., circumvented the difficulties of the practice direction by regarding it as "giving instances where the court will exercise its power under the rule. It does not follow that there may not be other cases where the court should perfectly properly exercise its power".

In the absence of detailed psychological and linguistic data the best one can do is to examine words used as synonyms for the express criteria in CPR r. 24.2 to see what light, if any, they cast on the judicial approach. Similarly, although continued use of the older terms "triable issue" and "arguable case" might be considered to demonstrate a degree of congruity between the old law and the new, such use may in fact be nothing more significant than a judge inadvertently using familiar terminology.[44] With these caveats in mind, a chronological examination of the cases may still prove instructive.

In *Hofer* v. *Strawson*[45] heard in early March 1999, Neuberger J. was asked to decide whether the existence of a counterclaim could be relied on to set aside a statutory demand based on a stopped cheque. In holding that it could, in principle, do so an analogy was drawn with CPR r. 24.2. Having set out the test in the wording of the CPR and described the approach to be taken in such insolvency cases as "not dissimilar" to it, the judge then gave his judgment in the terms of there being a "genuine triable issue"; that being the wording of the relevant rule of insolvency procedure. Clearly, if the test under CPR r. 24 were to be one of triable issue in the old sense, then nothing had changed, except that the defendant now had the option of applying against the claimant.[46]

Nevertheless, as we will see, the old terminology is remarkably persistent: in *AB Volvo*[47] in early May 1999, the test for a claimant's application was reported as being satisfied because there was no "arguable" defence.[48]

A more pragmatic judicial approach was taken in a case to which the CPR had expressly been applied early: *Gray* v. *Gray and another.*[49] Here the court was asked either to strike out the claim as an abuse of process or alternatively to grant summary judgment to the defendant under CPR r. 24. It was alleged that the basis of the claimant's current action was inconsistent with sworn testimony he had given in a previous action. The evidence did not justify either a strike out or summary judgment and Neuberger J. refrained from delving into the precise wording of either the rule or the practice direction.

In *Waters* v. *Maguire,*[50] however, the claimant's claim was struck out under CPR r. 3.4(2)(d)[sic] but could, it was said, equally have been disposed of under CPR r. 24.2(a)(i) on the basis of that limb of the practice direction referring to a claim that was "bound to be dismissed". In an extreme case, clearly this is right. Note however that in at least one respect the jurisdiction for strike out does not overlap that for

[44] In cases falling within the transitional provisions of the CPR there is the additional complication that terminology that was appropriate when the application was made may not be strictly appropriate when the application was heard or appealed. The extent to which the CPR apply to pending applications is defined by CPR Part 51 and the supporting practice direction provides that: (a) in paragraph 14: in an existing case any new application for summary judgment made after 26 April 1999 must be made according to the criteria in Part 24, and (b) in paragraph 15: where an application for summary judgment in an existing case is made before 26 April 1999 but heard afterwards there is a "general presumption" that the criteria in Part 24 will be applied to it.

[45] *Hofer* v. *Strawson, sub nom In Re A Debtor* (no SD27 of 1988) *The Times* 17 April 1999, (1999) 5 C.L. 412, Ch. D. The explicit reference to CPR rule 24.2 does not appear in the *Times* report but is in the Lawtel summary (Document C9200082) and in the Butterworths Direct material.

[46] The expression was used again by Lawrence Collins QC sitting as a Deputy High Court Judge in *Artistic Upholstery* discussed below.

[47] *AB Volvo and another* v. *Heritage (Leicester) Limited* [1999] All E.R. (D) 478, Ch. D.

[48] But see *The Saudi Eagle*, (discussed above, n. 26) and the discussion of the possible percentage values which could be attributed to an "arguable case" and a case with a "real prospect of success". Just as the terms "triable issue" and "leave to defend" are still being used, so the expression "arguable case" is still to be found in the reports: for example *Mace and others* v. *Rutland House Textiles Limited (in administrative receivership),* 15 November 1999, Ch. D., reported by Lawtel (Document C7200546).

[49] 12 May 1999, Ch. D. reported by Butterworths Direct and Lawtel (Document C7600281).

[50] 13 May 1999, Q.B.D. reported by Butterworths Direct and Lawtel (Document C8600485).

summary disposal – under CPR r. 3.4(2)(c) a statement can be struck out on a purely punitive basis for failure to comply with the rules, practice directions or orders of the court.

It should also be remembered that under the common law, in a line of cases developed by Lord Woolf [51] prior to implementation of the CPR, cases which might conceivably have had a real prospect of success on the merits were struck out on a punitive basis (usually as a result of delay) as an abuse of process. It is suggested that although the jurisdictions are complementary, they are necessarily not identical and that this should be borne in mind especially by those seeking to make tandem applications.

In *Surrey Oaklands NHS Trust* v. *Hurley and others*[52] the first defendant had applied for a stay pending the outcome of criminal proceedings and had refused to serve a fully pleaded defence until the criminal proceedings had been dealt with. The claimant applied for summary judgment against all defendants. The first defendant was given more time to file a defence. The remaining defendants did not deny that sums were due, but alleged that the sums were not in fact due to the claimant. It was held that it was "improbable to say the least" that another body was entitled to the outstanding sums and a conditional order[53] was made against the remaining defendants. So an "improbable" defence may still have a "real prospect of success". This echoes the wording of Practice Direction 24 para. 4.3, despite the fact that something that is "improbable" carries a chance of success that is less than 50%. Can an allegation whose chances of success are less than 50% really be said to have a "real prospect of success" even though it might still constitute an "arguable case"?[54] If this is the case, the CPR have failed to implement Lord Woolf's intentions that summary judgment should be easier to obtain. The court again did not consider it necessary to distinguish between the tests for striking out a claim as an abuse under CPR r. 3.4 and the Part 24 test.

As will have been apparent from the outset, despite the caveats set out at the beginning of this chapter, the writer has an interest in the words used to describe the "real prospect" as an indicator, however rough, of the percentages involved. It is not impossible that a considerable section of the profession and the judiciary are sensitive to the semantic aspects of the problem. So, for example, in *Barrett* v. *Inntrepreneur*,[55] decided in June 1999, Park J seems to have avoided the difficulties inherent in the use of "arguable" or "triable" by approving the submission that the claimants (this being an application by defendants for summary judgment on their counterclaim) had no "maintainable" defence.

In the commercial court, later that month, in a defendant's application which would previously have fallen under RSC Ord. 14A[56] the judge in finding for the defendant commented that "nothing turns on any difference between the two sets of procedural

[51] Of which the most recent example, discussing the place of this line of cases within the CPR context is *UCB Corporate Services Limited (formerly UCB Bank plc)* v. *Halifax (SW) Limited*, 6 December 1999, C.A., reported by Lawtel (Document C9500503).

[52] 20 May 1999, Q.B.D. reported by Lawtel (Document C7200046).

[53] The writer has only successfully identified one other case during the period in which a conditional order was made, on that occasion as a result of "the unattractivenature of the defence and the court's suspicion that [the defendant] was seeking to avoid resolution of the central issues": *Teleglobe International (UK) Limited* v. *Nacamar Limited* 22 July 1999, Q.B.D., reported by Lawtel (Document C7200129).

[54] See the percentage values proposed in n. 41 above.

[55] 23 June 1999, Ch. D., reported by Butterworths Direct and Lawtel (Document C8600530).

[56] *Western Digital Corporation and others* v. *British Airways plc*, 28 June 1999, Q.B.D. Commercial Court, *The Times* 23 July 1999, otherwise reported by Butterworths Direct and Lawtel (Document C7200050). The fact that CPR Part 24 was intended to encompass both RSC Ord. 14 and RSC Ord. 14A had previously been confirmed in *Securum Finance Limited* v. *Ashton and another* [1999] All E.R. (D) 594, Ch. D.

rules". Under RSC Ord. 14A, it will be recalled, an application for the disposal of a case on a point of law could in any event be made by either party and in the absence of any specific provisions about burdens of proof, the burden would be assumed to have been on the applicant. Consequently an application under RSC Ord. 14A bore some resemblance to the current Part 24 procedure. On the facts of the case there may therefore indeed have been no appreciable difference, but the absorption of the previous RSC Ord. 14A into Part 24,[57] did bring with it the application of the criteria in r. 24.2 and, at that date, the wording of the practice direction.

A further variation on wording appeared in *Virdi* v. *Law Society* [58] where the claimant's case was said to raise "a purely academic question". Whilst this is probably a straightforward synonym for the "no real prospect of success"[59] what is significant, and may isolate this case from the mainstream, is the context in which this statement was made. The claimant had applied for withdrawal of a notice of intervention in a solicitor's practice. As defendant, the Law Society sought to have this application struck out as an abuse of process or under Part 24. In the circumstances the court was being asked to decide whether the intervention should *continue* rather than whether the notice of intervention had been correctly issued at the outset. It was held that by now, even if the notice were to be withdrawn, the practice only contained one active file and that therefore determination whether or not the intervention should *continue* was the purely academic question.

In *Mahon* v. *Rahn,*[60] decided in July 1999, a defendant's application was considered in the context of a libel case where it was said that there was a defence of absolute privilege. It is significant, in the context of practitioner and judicial response to the new rule and Lord Woolf's intentions as to its application, that counsel had begun by describing the threshold for success under Part 24 as being lower than the test under the previous rules.[61] Eady J. noted the use in the practice direction of the words "bound to be dismissed" as a "very high hurdle" but took a pragmatic approach since it was known by then that the practice direction was intended to be amended to reflect the "lower threshold". Deciding that the test to be applied was whether the defence of absolute privilege was bound to succeed or "at the least that there was no realistic prospect of its failing", the judge concluded on examination of the law that the defence was not available in the circumstances, refusing the defendant's application.

In *Hall* v. *Bank of England,*[62] Neuberger J.[63] dealt with a defendant's application to dismiss the claimant's action for damages arising from an alleged misfeasance in public office. The application was coupled, as seems to be becoming normal practice, with alternative applications based on want of prosecution and abuse of process. The case is most interesting, however, for a comment made *obiter* in relation to two issues on

[57] Practice Direction 24, para 1.3(1).

[58] 30 June 1999, Ch. D., *The Times* 20 July 1999, otherwise reported by Lawtel (Document C9200126).

[59] Unless you might consider a case with no "real prospect of success" to be 75-90% likely to fail and a "purely academic" case to be over 90% likely to fail. Again, as with the cases which were so weak they could be struck out under CPR r. 3.4, the extremes are comparatively easy to identify. So decisions were comparatively straightforward in a number of the cases discussed in this article. It is the borderline that is, as always, much more difficult – a difficulty which underpins Ward L.J.'s reservations about requiring a positive case to be proven in *Day* – see n. 26 above.

[60] 1 July 1999, Q.B.D. reported by Butterworths Direct.

[61] The previous test being described as whether or not there was an "arguable case"; see *The Saudi Eagle* discussed above. This does appear to be the judicial view, expressed again in *Monsanto plc* v. *Tilly and others*, 25 November 1999, C.A., *The Times* 30 November 1999, otherwise reported by Lawtel (Document C8600624). However, in *Hall* v. *Bank of England*, below, Neuberger J. expressly refused to give his views on the point.

[62] 14 July 1999, Ch. D. reported by Lawtel (Document C7200111). The pragmatic approach of Neuberger J. was adopted and followed in *Milner Neocal Limited* v. *Ellen Milner (as executrix of Jeremiah Milner, deceased)*, 10 September 1999, Ch. D. reported by Lawtel (Document C8300110).

[63] Responsible for a considerable number of decisions interpreting the effect of the CPR generally in the first six months after implementation.

quantum: that the claimant's case, although "weak and speculative" did have a real prospect of success. This may be the first attempt to define the attributes of a case at the opposite end of the spectrum from those that are equally at risk of striking out under CPR r. 3.4.

In *Project Consultancy*[64] the defendant's case was, however, described as being "at least arguable" with the proviso, discussed below, that the issue was not susceptible to resolution on a summary basis.

In *Artistic Upholstery*,[65] the claimant's application was successful, causing the relevant parts of the counterclaim to be dismissed.[66] The test applied was, on the face of it, one of triable issue. Lawrence Collins QC, sitting as a Deputy High Court Judge, said that : "I have to decide whether the validity of the expulsion is relevant and if not whether Art Forma's position raises a triable issue. . .". An alternative claim that the defendant's trademark application had been made in bad faith was not successful, less on the merits than because the court was not "convinced that the factual and legal issues associated with this aspect of the case are suitable for summary determination."

In *Qazi*[67] there was "nothing in any of the matters pleaded which warranted the conclusion" that there was any liability on the part of the defendant.

Thus far, it is submitted, the cases have established that if a case is, on the basis of the evidence available at the hearing, doomed to failure, summary judgment will be given. So, if the case could be struck out under Part 3.4(2)(a) as "disclosing no reasonable grounds for bringing or defending the claim", it can equally be disposed of under Part 24 in the absence of an effective "other reason". If the case is improbable a conditional order can be made.

The one case that does clearly trespass over the boundary into the difficult area where the respondent's case is not on the face of it doomed (or all but doomed) to failure, is *Hall*; although the comment that a case which is "weak and speculative" might still be capable of surviving the application (presumably at severe risk of a conditional order) is *obiter*. The continued use of the word "arguable" in a number of these cases suggests, however, that there is no appreciable difference in practice between the old law and the new,[68] despite the semantic difference described above.[69]

In *Customs and Excise Commissioners* v. *Lacara Limited*,[70] in early October, the word used seems to have been "untenable". Consequently, the issue of application and of appropriate terminology was still open when the question came before a Court of Appeal including Lord Woolf himself in *Swain* v. *Hillman and another*.[71] The defendants' application for summary judgment had been dismissed at first instance. They were no more successful before the Court of Appeal, Lord Woolf categorically describing the test as "a realistic, as opposed to a fanciful, prospect of success". Later,

[64] *Project Consultancy Group* v. *Trustees of the Gray Trust*, 16 July 1999, T.C.C., [1999] All E.R. (D) 842 also reported by Lawtel (Document C7100266).

[65] *Artistic Upholstery Limited (on behalf of itself and all other members of the Long Eaton Guild of Furniture Manufacturers)* v. *Art Forma (Furniture) Limited*, 29 July 1999, Ch. D., *The Times* 21 July 1999, [1999] 4 All E.R. 277, otherwise reported by Butterworths Direct and Lawtel (Document C8300100).

[66] So at least in the circumstances of this case the mere existence of a counterclaim is no protection against the remedy.

[67] *Qazi and another* v. *London Borough of Waltham Forest*, 3 August 1999, Q.B.D. Commercial Court, reported by Lawtel (Document C7200195).

[68] So, for example, *Mace and others* v. *Rutland House Textiles Limited (in administrative receivership)*, 15 November 1999, Ch. D. reported by Lawtel (Document C7200546).

[69] See n. 41 above, discussing the possibility that an arguable case could well be weaker than a case having a "real prospect of success".

[70] 11 October 1999, Q.B.D. reported by Lawtel (Document C7300153).

[71] 21 October 1999, *The Times* 4 November 1999, [1999] All E.R. (D) 1210, C.A. also reported by Lawtel (Document C8001279).

in *SIF* v. *Paul*[72] where the defence was one of set-off, it was held that the defendant had a real prospect of success. However, in *Glaxo*,[73] where *Swain* was applied, the discussion was initially phrased in terms of an "arguable" case and a "triable issue" before the term "fanciful" derived from Lord Woolf's judgment in *Swain* was finally used. It is relevant to the discussion of borderline cases, however that on one issue where the evidence was described as "thin" it was held, by Laddie J., that the underlying allegations were not "so insubstantial that they do not merit being tried". The final word on the subject in the period under discussion, is, however, a return to the old terminology when in *French Connection*[74] the claimant's application failed because the defendant had a case described as "really arguable".

In conclusion, despite the intentions of Lord Woolf and judicial comment to the effect that the new test was intended to be easier to establish than the old, the persistence of the old terminology at the very least[75] might suggest that in some cases judges are in practice applying the same parameters as they did under RSC Ord. 14. However, it is suggested that comparison of old and new regulatory wording should produce different results as to the percentage prospects of success required to succeed. On this analysis, then, those cases where conditional leave to defend might previously have been given might now fail to survive the application whilst the lower end of the spectrum of cases that would previously have obtained unconditional leave to defend could now expect a conditional order. Clearly hopeless cases would now, as then, be disposed of summarily.

ALLOCATION OF THE BURDEN OF PROOF

The significance of the allocation of the burden of proof in the application produces two concerns, both related to the fact that the application is dealt with on a summary basis, and, under the new system, may be dealt with entirely on the papers. First there is Ward L.J.'s concern expressed in *Day*[76] to the effect that it is possible on a summary basis to establish a negative (that the respondent has no real prospect of success *i.e.* to identify a hopeless, or all but hopeless, case) but that trying to establish the positive merits of a case (that the respondent has a real prospect of success) involves considerations unsuitable for summary process and suitable only for trial. Secondly there is Derek O'Brien's concern that the placing of the burden of proof could itself demand a mini-trial and produce inequality by requiring the claimant in all cases to prove his or her positive case.

In addition, whatever the position in relation to the substantive merits of the case, one cannot ignore the CPR r. 24.2(b) proviso: is it for the respondent to prove that there is an "other reason" or for the applicant to prove that there is not? Whether Ward L.J.'s reservations about the proving of positive allegations on a summary basis would also be significant on this point will depend, of course, on the nature of an acceptable "other reason".

[72] 11November 1999, C.A., reported by Lawtel (Document C9500482) and Butterworths Direct.

[73] *Glaxo Group Limited and another* v. *Dowelhurst Limited*, 18 November 1999, Ch. D., Patents Court, [1999] All E.R. (D) 1288, also reported by Lawtel (Document C8300119).

[74] *French Connection Limited* v. *Sutton*, 2 December 1999, Ch. D., reported by Lawtel (Document C9200187).

[75] The fact that the summary judgment provisions of the CPR originally appearing at Part 14 in the early drafts were re-numbered Part 24 in the final version suggests that the framers of the rules were prepared to take positive symbolic steps to distance the CPR procedure from the old RSC Ord. 14.

[76] See the quotation at n. 26 above.

The question first fell to be discussed in *A & D Maintenance*,[77] where the claimant was said to have discharged its burden of showing the lack of a real prospect of success in the defence, whilst the defendant had failed to discharge its burden of showing an "other reason" for the case to go to trial. The court thus applied the wording of the rule rather than the practice direction, placing the principal burden of proof on the applicant to prove the negative.

In *Taylor* v. *Midland Bank*,[78] which has already been discussed to some extent, Part 24 came before the Court of Appeal for the first time.[79] The defendant had initially applied to strike out the claimant's case under the old rules as disclosing no cause of action or as an abuse of process. Once the CPR had come into force, counsel adopted an argument under CPR r. 24.2, suggesting that the new rule "enables the court to apply a somewhat less stringent test than that applicable to strike out under the old rules". The Court of Appeal, by a majority, dismissed the defendant's application.

Rattee J., as we have seen, dissected the appropriate parts of the practice direction, placing a very limited burden of proof on the claimant apparently equating to an adequately pleaded case. It was for the defendants to show "that the claimants have failed to show a case ... or that the claim would be bound to be dismissed". A conditional order was not appropriate "if the claimants have pleaded a case they ought to be allowed to pursue"; an approach which, to say the least, appears to concentrate on the form of the case whilst overlooking the reference in the practice direction to the substance of the claim. Nevertheless, this approach does place the principal burden on the applicant in a defendant's application to demonstrate a negative.

Buxton L.J. took a similar two-stage approach, beginning with the adequacy of the pleading[80] before considering the substance of the claim, but again placing the burden of proving the negative on the defendant. He concluded that, as the evidence available was limited "it would have to be a clearer case ... before in these circumstances it is possible to say *before trial* (author's emphasis) that 24(2)(a)(i) is fulfilled". Thus Buxton L.J. clearly considered that the claimant's inability to prove its case on paper evidence at an interlocutory hearing was a failure to satisfy the burden of proof under the first limb of the rule. An alternative view would, however, have been to regard the need for further evidence as an "other reason" justifying the case to go to trial within the proviso of r. 24.2(b).

As paragraph 4.2 made no reference to the second limb of the rule, however it is difficult to assess the significance of this aspect of the decision in terms of whether the burden is on the applicant to establish that there is no "other reason" or on the respondent to prove that there is. We will return to this issue below.

Swain v. *Hillman*[81] was the second, and the more significant, Court of Appeal decision[82] this time unarguably after the alteration of the practice direction. Lord

[77] *A & D Maintenance and Construction Limited* v. *Pagehurst Construction Services Limited*, 23 June 1999, T.C.C., reported by Lawtel (Document C7100260).

[78] *Taylor and others* v. *Midland Bank Trust Co Limited and others*, 21 July 1999, C.A., reported by Butterworths Direct and Lawtel (Document C7200123).

[79] *Agency Press Limited (trading as Sold Out)* v. *Cohen*, 29 June 1999, C.A., reported by Lawtel (Document C8400472) although decided within the period under consideration was an appeal from a decision made in 1998 under RSC Ord. 14.

[80] He asked "[c]an the basis of the plaintiff's claim as set out in the pleading be shown to be so mistaken that it will be impossible to rely on it at the trial?"

[81] 21 October 1999, C.A., *The Times* 4 November 1999, otherwise reported by Butterworths Direct and Lawtel (Document C8001279). The approach adopted here was expressly applied in *Glaxo Group Limited and another* v. *Dowelhurst Limited, supra*, n. 73. Again there appears to be some potential confusion caused by the use of the expression "triable issue" as shorthand for the test under the CPR.

[82] A number of other summary judgment cases did in fact come before the Court of Appeal in the period but are omitted from this discussion as being appeals from decisions undeniably under RSC Ord. 14 and consequently as shedding no light on the subject under discussion.

Woolf, considering *Taylor*, exerted control over the standard demanded by the substantive criteria. As we have seen, he held that the test was of a "realistic" as opposed to "fanciful" prospect of success. He also acknowledged the limitations of summary process and held that there were issues in the case which needed to be investigated at a trial. As we have seen, this test was subsequently applied in *Glaxo*. However, although Lord Woolf in *Swain* discussed the amendment of the practice direction, he made no comment on the fact that the amendment had deprived practitioners of any explicit allocation of the burden of proof. Later, in *French Connection,* however, the burden was clearly stated, in a claimant's application and after the amendment of the practice direction, to be on the claimant to demonstrate that the defendant had no real prospect of defence. The writer has been able to locate no similar statement in respect of a defendant's application apart from the *dicta* of Buxton L.J. in *Taylor* to the effect that the burden is on the defendant.

If one acknowledges that the burden of proof in interlocutory applications is normally on the applicant then this is consistent with the normal state of things. Since, however, the summary judgment application does to some extent rehearse the issues for trial, which might cause it to be considered an exception to general approach, it is submitted that, adopting Ward L.J.'s view as expressed in *Day* as to the comparative simplicity involved in requiring a party to prove a negative in these circumstances, this is an appropriate approach. Indeed, as we will see below, Lord Woolf's view, expressed in *Swain*, was that the application should be anything but a mini-trial.

In respect of the proviso,[83] further discussion is necessary. There is a certain attractiveness in suggesting that it should be for the party with the weak case to justify, in accordance with the overriding objective, why that admittedly weak case should be permitted to use court resources in proceeding to trial. As has already been suggested, however, that might depend on the nature of the proviso: we have already seen in *Taylor* one instance of circumstances that would have constituted an RSC Ord. 14 "other reason" apparently being treated as a failure to satisfy the substantive burden of proof on the merits of the application.

THE LIMITATIONS OF SUMMARY PROCESS AND SOME "OTHER REASON" FOR TRIAL

The courts (including the Court of Appeal in *Taylor* and in *Swain*) were quick to acknowledge that there were limitations in the nature of summary process and the fact that some issues that cannot be adequately resolved outside the full trial mechanism. What is more difficult to establish is whether such limitations (when they are operative) are to result in the applicant being regarded as having failed to prove the grounds for his application under r. 24.2 (a), or whether they are to constitute an "other reason" justifying a full trial under r. 24.2 (b). Allied to this uncertainty is the question of allocation of the burden of proof. Is it for the applicant to prove positively that the case can be dealt with at an interlocutory basis or is it for the defendant to prove that it cannot?

The CPR r. 24.2(b) proviso was first considered in *Gray* v. *Gray and others*[84] in which Nicholas Warren QC, sitting as a Deputy High Court Judge, referred to the need to cross-examine witnesses at trial. He said that "[t]here is nothing which would justify

[83] The burden of establishing the proviso was placed on the defendant in a claimant's application in *A & D Maintenance*, discussed further on this point below.

[84] *Supra*, n. 49.

me in rejecting the evidence of Mr Yerbury and Mr Cornberg. Their evidence together with that of Wade and Young is something which must be tested in cross examination at trial".

Subsequently, in *A & D Maintenance*[85] the Technology and Construction Court came very close to having to consider the position of the "bona fide counterclaim" which under previous practice,[86] disqualified the plaintiff from obtaining summary judgment. Might a counterclaim (specifically a counterclaim which did not constitute a set-off and therefore a substantive defence) constitute "some other reason"?[87] Or would the application of the proviso in practice be confined to such rare matters as cases of public interest (the Woolf "other reason")?

The claimant had sought to enforce an adjudication award by summary judgment. The defendant had claimed that the dispute did not fall within the adjudication jurisdiction and that the existence of substantial claims in other litigation (not a set-off but equally not a counterclaim) constituted a reason under CPR r. 24.2(b) why the case should go to trial. It was held that although the claimant had discharged its burden of showing the defendant had no real prospect of success,[88] the defendant had not discharged its burden of showing "some other reason" to go to trial. Here, therefore we find a judge at least contemplating the idea that something analogous to a counterclaim might fall within the proviso; *i.e.* that the proviso might apply to matters other than the Woolf "other reason".

In *Project Consultancy*[89] where the claimant applied (unsuccessfully) under Part 24 to enforce the decision of an adjudicator (who had no jurisdiction to make the initial award if the defendants' submission as to the date of the underlying contract was accepted) Dyson J. considered the limitations of summary process more explicitly. He said that "...it is at least arguable[90] that no contract was concluded on 10 July, and that no contract was ever concluded between the parties...I am quite satisfied that it is not possible to resolve these issues by summary process, and without full evidence and argument."

This is a clear indication that an application can fail if the issue involved is not susceptible of resolution on an interlocutory basis. There are, it is submitted, two possible analyses of the above quotations. These are;

> (i) that the defendant's case was no more than "arguable" and therefore in principle had no real prospect of success, but that the limitations of summary process demanded that the question should be resolved at trial (i.e. an application of the proviso when judgment would otherwise have been given); or
>
> (ii) that the defendant's case was, in a looser sense, "arguable" and had some real prospect of success but that in any event the issues were unsuitable for summary process (i.e. that the claimant had failed to satisfy its burden of proof of showing on the papers that the defendant had no real prospect of success).

It is fair to say that the tone of the judgment favours the latter analysis.

Further reference to this issue, although *obiter*, can be found in *Artistic Upholstery*[91]

[85] *Supra*, n. 77.

[86] *Supreme Court Practice, 1999* at n. 14/4/14.

[87] See also *Hofer* v. *Strawson* above on the setting aside of a statutory demand because of the existence of a counterclaim.

[88] Not on this occasion, as it would be later in *Taylor*, treated as a simple matter of pleading.

[89] *Project Consultancy Group* v. *Trustees of the Gray Trust*, *supra*, n. 64.

[90] See above for a reservation as to whether a case that could only be described as "arguable" should, all other things being equal, have been allowed to survive the new Part 24 test.

[91] *Artistic Upholstery Limited* v. *Art Forma (Furniture) Limited*, Ch. D., *supra*, n. 65.

where a subsidiary issue on which the claimant sought summary judgment was related to an allegation of bad faith and Lawrence Collins QC, sitting as a Deputy High Court Judge, commented that "...I am not convinced that the factual and legal issues associated with this aspect of the case are suitable for summary determination".

A clearer indication as to this aspect of the workings of the rule may perhaps be found in *Milner Neocal.*[92] This case involved an unsuccessful defendant's application in considering which the court expressly followed *Hall* v. *Bank of England*, whilst ignoring the practice direction (which was about to be amended). The court concluded that there was a real prospect that either side might succeed. The court could not be confident that it knew what was going to happen at trial and considered that the "factual analysis" involved in assessing the issues would be appropriate only for trial. The court seems therefore to have considered the issue of the "real prospect of success" (under r. 24.2 (a)) separately from the question whether the issues could be resolved other than by a full trial. This might, then, suggest that the need for complex factual analysis is a CPR r. 24.2 (b) "other reason".

It is perhaps unfortunate that, in taking control of the Part 24 mechanism in *Swain*, where Lord Woolf himself recognised that certain issues were only suitable for trial that he did not also provide guidance on the application of the proviso in CPR r. 24.2(b). We do, however, already have Lord Woolf's views, which the writer has defined above as the "Woolf 'other reason'". Since His Lordship in *Swain*, had adopted the language of the Court of Appeal Practice Direction to define the substantive criteria it might fairly be inferred that he would endorse the approach explicitly taken in that practice direction to its own proviso, which applies only to matters of public interest. In fact, of course, the proviso was not discussed in *Swain* because it had no application to those circumstances.

Significant as the approach in *Swain* may be in this context, *Price* v. *Lloyd's*[93] is one of the final cases in this context within the period under consideration. Here, in a case involving a counterclaim, both parties made applications under Part 24 in respect of both main claim and counterclaim. The judge considered that "I am entirely unpersuaded that there is any prima facie case... for these reasons this ground of claim has no real prospect of success" and ultimately that the claimants' allegations were "misconceived and have no real prospect of success". He stated categorically that even if any of the claimants' claims had been "sustainable" that would not be a ground for granting a stay of execution on the counterclaim because on the facts the relevant contract precluded it. The court therefore raised the possibility that the mere existence of a counterclaim could prevent or in some other way suspend the operation of Part 24. The position is necessarily clearer when the counterclaim is a set off: *SIF* v. *Paul.*[94]

Consequently, although the analytical basis of the argument is unclear, as is the allocation of the burden of proof in respect of the proviso, one can at least provisionally conclude that;

> (i) complex factual and/or evidential matters may preclude the resolution of an issue under Part 24, especially where the respondent's case appears to have some prospect of success;

[92] *Milner Neocal Limited* v. *Ellen Milner (as executrix of Jeremiah Milner, deceased)* 10 September 1999, Ch. D., Patents Court, reported by Lawtel (Document C8300110).

[93] *Price and another* v. *Society of Lloyd's*, 22 October 1999, Q.B.D., Commercial Court, reported by Butterworths Direct.

[94] *Supra*, n. 72.

(ii) courts may be prepared to consider argument that matters other than the Woolf "other reason" may fall within the proviso; and

(iii) it is not impossible that the existence of a counterclaim might serve to displace a Part 24 judgment. A real prospect of success in a claim of set-off (which is, of course, a defence to the claim) does displace the judgment.

CONCLUSIONS

The Substantive Criteria

The effect of the wording of the practice direction has clearly and inevitably muddied the waters, particularly to the extent that it has led to issues being considered, in part at least, as a matter of form rather than substance. Ultimately, however, the effect is that cases prior to the amendment of the practice direction cannot be relied on, even on a persuasive basis, with any degree of confidence. For the same reason it is not yet possible to say whether there is any difference in approach between claimant's and defendant's applications; one has to compensate for the difference in approach enshrined in the first version of the practice direction. It may also be the case that summary judgment is so much a part of the claimant's established armoury that claimants will almost inevitably consider making such an application whilst the defendant's application, being new, has yet to be fully exploited as anything other than as backup to the more familiar application to strike out, now appearing in CPR r. 3.4. Nevertheless what appears to be the persistence of terminology specific to the old rules does not assist the analysis.

However, the degree of probability of success on the merits necessary to avoid summary judgment (the "X%" value in our initial equation) was perhaps most reliably, since the amendment of the practice direction, described by Lord Woolf in *Swain* in identical words to those of the Court of Appeal practice direction (shortly to become Practice Direction 52). A case that can be struck out under CPR r. 3.4 will clearly not survive. A "real prospect of success" should not, it is suggested, be casually regarded as identical to the previous "arguable case", especially as there is persistent judicial comment that the new test is easier for the applicant to satisfy. The degree of probability of success on the merits which, although sufficient to avoid summary judgment, will result in a conditional order (the "Y%" value in our equation) is, on the basis that conditional orders were made in only two of the cases under discussion, very difficult to define. Clearly it operates at the lower end of the scale of cases good enough to survive the application, the question is, as we have seen, whether a conditional order case would, under the old law, have escaped an order for conditional leave to defend.

The Burden of Proof

Again, the debate surrounding the effect of the practice direction has rendered clear analysis difficult. It is suggested that the substantive burden rests most happily on the applicant and the burden of the proviso on the respondent.

"Other Reasons"

The courts are prepared to prevent the hearing becoming a mini-trial or a substitute for full trial and it is clearly possible to prevent summary disposal of a case where there are matters requiring cross-examination or complex factual analysis. This does, however, seem to be operated by the courts more as a product of their approach to the

allocation of the burden of proof than to the Part 24 proviso. Who bears the burden of proving that the case is or is not suitable for summary process is not yet clear; nor is the nature of the "other reasons" capable of making a case unsuitable for summary disposal. Nevertheless it seems to be the case that the prudent practitioner should be prepared, as he or she always was, to deal with the suggestion that the case is too complex to deal with on a summary basis and or that the issues can only properly be resolved by oral evidence at a full trial. Whilst none of the cases under discussion raised matters of "public interest" it is clearly right that such cases should be permitted to proceed to trial. Even if, as seems to be the case, the courts do not wish to use the mechanism as a substitute for trial there may, of course, be circumstances – such as those which used to fall under the provisions of RSC Ord. 14A – where treating the application as if it were a trial of the substantive issues would not be wholly objectionable. In questions, for example, of interpretation, the difference between the way in which the matter can be handled on an interim basis and the way in which it would be handled at a full trial will be negligible.

Whilst it is only to be expected that the courts will wish to retain a general discretion to deal with applications on the merits of individual cases, this is an area which will need further monitoring. It is to be hoped at least that in the near future some consistency of terminology will be adopted and that further guidance will be received, ideally from the Court of Appeal, on the nature and application of the CPR r. 24.2(b) proviso.

THE RÔLE OF CONSULTATION IN MAKING ENVIRONMENTAL POLICY AND LAW[1]

STUART BELL and LAURENCE ETHERINGTON***

"Values are an essential element in decisions about environmental policies and standards. People's environmental and social values are the outcome of informed reflection and debate. To ensure that such values are articulated and taken into account, less familiar approaches need to be used to extend and complement present procedures for consultation and participation." [2]

"Consultation has an important role to play in publicising proposals, stimulating critical debate and eliciting a broad range of comments on the practicability and desirability of proposals." [3]

THESE TWO QUOTATIONS, taken from the Royal Commission on Environmental Pollution's (RCEP) 21st Report, reflect a growing concern that the procedures for public participation in environmental law and policy need to be reconsidered and extended. If the views of the RCEP are adopted we could be entering into a new phase of public participation in environmental policy and rule making. Indeed, there is a general move towards greater citizen involvement in all areas of local, central and devolved government although much of the focus has been on consulting the public in the context of service users rather than those outside the regulated community. The RCEP Report embraced this enthusiasm for an enhanced role for what we might call "environmental citizenship" by calling for greater participation in the policy and rule making process (which the RCEP generically termed "standard setting") being brought about by abandoning the sole reliance upon tried and trusted mechanisms for public participation through consultation and using alternatives such as Consensus Conferences, Citizen's Juries and Focus Groups.

This shift in thinking does not necessarily mean an end to the old mechanisms. It is conceded that existing methods will still have an "important role" to play.[4] There is, however, an implicit criticism of the existing methods of public participation particularly in complex and controversial issues.[5] The most common form of *public* participation (the emphasis is added for reasons which will become clearer below) in relation to environmental standard setting is by way of written consultation. The second quote puts this into context and raises a number of questions. What is the role of existing consultation exercises in the formation of environmental law and policy? Does it make a difference to the end result? Does the existing approach to consultation achieve the objectives set out in the RCEP Report?

This article considers some of these issues by way of a case study involving the various consultation exercises which have been undertaken in relation to the policy,

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[1] An earlier version of this article was given as a paper at "Environmental Law and Environmental Citizenship", a conference held at the University of Aberdeen, 26-27 August, 1999.

[2] Royal Commission on Environmental Pollution: 21st Report *Setting Environmental Standards* Cm 4053, The Stationery Office, p.101.

[3] *Ibid.*, p.103, para.7.13.

[4] *Ibid.*, p.104, para.7.19.

[5] *Ibid.*, p.104, para.7.19.

legislation and other rules dealing with historically contaminated land. By examining a typical consultation exercise the authors wanted to see what actually happened in the process, what responses were received and whether this made any real difference to the policy and rules which emerged at the end. The findings presented in this article represent a small proportion of the overall project partly on the grounds of brevity and partly because at the time of writing, the consultation exercise was continuing.[6]

A DEFINITION OF CONSULTATION

The phrase "consultation" can cover a multitude of different processes, some of which are expanded upon below. Thus, instead of trying to come up with an all encompassing but cumbersome definition it is probably better to try and break down the concept into a number of functional models. It should be stressed that these categories are not necessarily mutually exclusive as they can represent aspects or characteristics of the same process, in addition the list is intended to be illustrative rather than exhaustive.

The "Decision Making" Model

Consultation can be viewed within the context of individual or strategic decision making. Thus, there are the provisions on publicity and consultation with various statutory consultees across a range of application procedures for environmental consents.[7] It also covers wider issues such as consultation in relation to strategic development planning.[8] Until relatively recently much emphasis has been placed upon ensuring that this aspect of public participation is procedurally effective and transparent. In addition the Courts have created a number of principles which can control the quality of such exercises (*e.g.* the concept of legitimate expectation).[9]

The "Stakeholder" Model

Consultation can be seen within the context of achieving a compromised consensus between those who will be directly affected by the outcome of the consultation exercise. Within the decision making model this might include seeking the views of local residents on an application for planning permission. In the wider area of standard setting this might involve consulting those who will be affected by new rules to elicit their views on whether they will work in practice. The selection of the stakeholders in both of these models (*i.e.* the decision about who has a stake in the issue) is, of course something of a value judgment in itself. This is particularly emphasised in relation to environmental issues where the identity of the stakeholders could arguably extend to everyone.

The "Values" Model

Eliciting people's environmental values by way of consultation is different from consulting them as stakeholders. Consultation can be used to identify individual beliefs and priorities which are not necessarily associated with either any specific decision or any issue which that individual has a "stake" in.[10] One of the difficulties with this

[6] The final consultation paper on the implementation of Part IIA of the Environmental Protection Act 1990 was issued in September 1999. The package of legislation was scheduled to come into force on April 1, 2000.

[7] See *e.g.* the Environmental Protection (Applications, Appeals and Registers) Regulations 1991, S.I. 1991/507, reg. 4 which set out the publicity and consultation procedures in relation to applications for integrated pollution control authorisations.

[8] See *e.g.* the Town and Country Planning (Development Plan) Regulations 1991, reg.10, which sets out consultation procedures in relation to the making of Structure Plans.

[9] See *e.g. Council of Civil Service Unions* v. *Minister for the Civil Service* [1985] A.C. 374.

[10] See: *Sustainable Development: Opportunities for Change*, Department of the Environment, Transport and the Regions, Consultation Paper, 4 February 1998.

model is that "values" on their own can be difficult for people to identify. It is often only within the context of specific issues or related decisions that such values can be elucidated.

The "Technical Expertise" Model

In one sense this model is at the opposite end of a spectrum from the "Values" model. One of the purposes of some consultation exercises is to elicit views from "experts" (*e.g.* scientists, engineers, regulators and lawyers) with an interest in the area to ensure that there is some form of objective technical input into substantive proposals. Thus in individual decision making, the role of statutory consultee can inform the decision maker on different technical aspects of the decision. In a wider sense the participative aspects of an environmental assessment can ensure that all of the relevant environmental issues are considered. In the context of environmental rule making this model tends to be utilised with secondary legislation and other tertiary rules which can involve the consideration of highly technical issues.

Having identified some of the general models of consultation we can identify that in the area of environmental standard setting at least, combinations of the stakeholder, values and technical expertise models are often used in the traditional forms of public consultation exercise. These range from the consultation on policy issues which place a firm emphasis on the "Values" model (for examples see the consultation exercises on Sustainable Development[11] and Waste Policy[12]) to consultation on seemingly turgid technical issues with a firm emphasis on specialist expertise (for examples see various consultation exercises in relation to Fees and Charges Schemes[13] or technical documents such as Waste Management Papers[14]). It should be noted, however that this emphasis can be deceptive for several reasons. For example, it is not always possible to separate "values" and "expertise". In particular, those who are relying upon technical expertise rarely respond to such consultation exercise from a completely neutral standpoint. In giving technical responses it is also possible to indicate implicitly (or even explicitly) the values which underpin the response. Secondly, the issues which are raised in the context of a "values" based consultation exercise often require a degree of technical understanding in order to present a rational and considered response.

Moreover, even in circumstances where the consultation is "wide-ranging" with an emphasis on the elicitation of values it is very difficult to break away from the Stakeholder model. Thus there is a tendency to consult the "usual suspects"[15] and not to try to consider the elicitation of values from the wider policy community including the general public. This can lead to a situation where values are dressed up as technical responses. For example a consultation process involving waste management policy with an emphasis on ways in which we may reduce the amount of waste we produce may be sent to the waste management sector and local authorities. This type of stakeholder will respond to such exercises on the basis of their technical expertise but brush over the fact that their response will be inherently linked to their values. Without wishing

[11] *Ibid.* In addition there were various sectoral consultation papers in relation to Sustainable Business, Sustainable Construction, Biodiversity and the Sustainable Production and Use of Chemicals.

[12] See, *e.g. A Way with Waste*, Department of the Environment, Transport and the Regions, Consultation Paper, 28 October, 1998; *Less Waste, More Value*, Department of the Environment, Transport and the Regions, Consultation Paper, 9 June 1998.

[13] See *e.g. Pollution Prevention and Control – Proposed Interim Charging Scheme*, Environment Agency, Consultation Paper, 2 September 1999.

[14] See *e.g.* Draft Waste Management Paper 26E: *Landfill restoration and post-closure management*, Environment Agency, Consultation Paper, September 1996.

[15] The identity of consultees is considered below.

to generalise, it is probably fair to say that the values of these "usual suspects" are fairly consistent and connected to representative self interest rather than reflective of the values held by society as a whole.

A RATIONALE FOR THE CONSULTATION PROCESS

Consideration of these models leads on to the question – "Why consult at all?" Although there are various theoretical explanations as to why consultation is a "good thing" they can all arguably be traced back to the single concept of the legitimacy. This legitimacy refers not only to the outcome of the consultation process, but to the process itself, not only to the policy or rules which emerge from the results of the consultation, but the feeling that the process has been conducted legitimately. These two ideas are interlinked in the sense that the outcome of the exercise is validated by the manner in which the exercise is carried out. If we break down this single concept of legitimacy into digestible chunks there are a number of possible justifications for carrying out consultation. These are listed below.

Efficiency
Whether the policy makes sense or the rules can be implemented is a major concern for the maker of the rule or policy. The efficiency of the rules or policy which is the subject of the consultation is of fundamental importance. By broadening the range of people who can comment upon these issues, it is likely that any potential obstacles or problems will be identified and dealt with at an early stage.

Expertise
Tapping into the expertise which is available outside central government or the regulatory agencies can be a useful way of ensuring that the rules or policy have credibility with stakeholders whilst identifying issues which require technical input. In addition, such input can ensure that the rules are technically "correct" and assist with efficiency. In environmental rules and policy the breadth of the necessary expertise is often wide involving scientific, economic, legal, social and political issues.

Due Process
The RCEP put the argument for consultation in terms of a "right to make. . .views known".[16] This is linked very closely to the concept of legitimacy. Thus the process of consultation should be transparent and be conducted in a manner which emphasises due process. Any attempt to exclude views or deny this right would be bound to have a negative impact upon general perception of the overall process and ITS final outcome.

Negotiated Consensus
As we shall see in the case study, one of the reasons for consulting is to ensure that those directly affected by the subject of the consultation can negotiate with the policy/rule maker so that the final outcome of the exercise is most acceptable to the broadest range of interests.

Elicitation Of Values
If the policy/rule maker wants to ensure that the policy or rule fits with general priorities, consultation (in the broadest sense of the word) is one of the few ways in which people's values can be elicited.

[16] See above, n.1, p.102, para.7.8.

The RCEP summed up these justifications for consultation by stating:

> may also feel that people who believe their views have been taken into account are more likely to have confidence in the decision-making process and the policies which it produces.[17]

The answers to the "why?" question are very much linked to the functional models which were outlined above. For example, the stakeholder model of consultation can be associated with all of the above rationales, whereas the values model sits comfortably with the elicitation of values rationale. Ultimately the target of all of these models and their rationales is the same – the decision, policy or rules must be perceived as legitimate by anyone who is connected with the final result of the consultation process. Having identified some general characteristics which could be used to define what we mean by "consultation". We now turn to consider some of the mechanics of the process.

THE MECHANICS OF CONSULTATION

The Mechanics Of Consultation: The "What?" Question

What sort of consultation is carried out in the fields of environmental law and policy? If we avoid the age old problem of defining what we mean by "environmental law and policy" (*i.e.* consultation papers issued by any Government Department could, on one view, involve consideration of wider environmental issues) and the consultation associated with specific decision making, we are still left with a huge number of consultation exercises which take place every year. Although there has been a recent upsurge in consultation activity (which is arguably associated with a new administration wishing to elicit new ideas) the number and diversity of the issues which are subject to some form of consultation is huge. Just a brief examination of the DETR web page will reveal that there are over 60 papers (both archive and current) which could be said to cover "mainstream" environmental issues.[18] When we add to this consultation exercises undertaken by the regulators (*e.g.* the Environment Agency, Ofwat); or in relation to other jurisdictions (Scotland, Wales and Northern Ireland) we might take the view that we are faced with an epidemic of consultation! The range of issues is also incredibly wide. It includes general issues such as a series of papers on Sustainable Development[19] or the UK Climate Change Programme,[20] and very specific issues such as the Implementation of the Shellfish Waters Directive[21] or extensions to environmental advice services for business[22]. The sheer volume of these official consultation exercises raises at least two issues.

First, the resource implications even for "stakeholders" let alone disinterested parties are significant. Clearly some of the consultation papers are so restricted that level of general interest will be low (although this begs the question of whether there can ever be an exercise which is solely based on the technical expertise model and therefore does not raise any value based issues at all). Aside from a number of well-funded

[17] *Ibid.*

[18] See http://www.detr.gov.uk/consult.htm.

[19] See above, n.10.

[20] See *UK Climate Change Programme – a consultation paper*, Department of the Environment, Transport and the Regions, Consultation Paper, 26 October 1998.

[21] See *Implementation of the Shellfish Waters Directive (79/923/EEC) – Consultation Document*, Department of the Environment, Transport and the Regions, Consultation Paper, 17 June 1998.

[22] See *A Possible Further Phase (Phase 3) to the Environmental Technology Best Practice Programme – A Consultation Paper* Department of the Environment, Transport and the Regions, Consultation Paper, 15 December 1998.

representative industry groups (CBI, CIA and the Law Society spring to mind although some of the better funded NGOs also have a good response record) it is difficult to envisage any group having the resources to be able to respond to approximately one consultation paper a week (or perhaps more likely, two or three directly relevant papers per month). Secondly, until recently (mid 1998) it was not possible to access these papers directly. Although they were "available on request" the communication of the existence of consultation papers was left to press releases or *via* specialist journals. Outside of the stakeholders (who would receive copies direct), it would be unlikely that there would be much general interest.

The Mechanics Of Consultation: The "How?" Question

Whilst concentrating on the number and diversity of consultation papers which are issued by the DETR gives a good idea of the nature of consultation in environmental policy and rule making this method of consulting only performs one element of what we might call the "consultation package". As we shall see from our case study, consultation, both formal and informal, has many different aspects. The Cabinet Office introductory guide to conducting consultation exercises,"How to consult your users" lists many different methods of consultation.[23] These include:[24]

> (i) Open/Public Meetings: Holding an open meeting where members of the public can find out about and express views upon a particular issue. Such meetings are often used to both inform the public and gather some initial feed back on an issue).
>
> (ii) Consulting Representative Groups: Although consultation with representative groups can take the form of written consultation, meetings can be held to discuss views in a more informal manner.
>
> (iii) Face-To-Face Interviews: In addition to group consultation, individuals can be interviewed to explore values which cannot necessarily be revealed in writing or with others present.
>
> (iv) Focus Groups: Focus Groups commonly consist of a small number of people led by a facilitator who will direct discussion on a particular topic. The members of the group do not necessarily have any stated mutual interests but the group enables them to explore issues in depth and to share ideas with one another which will hopefully illuminate any discussion. Focus groups normally meet just once and therefore there is little scope to review any discussion. This type of consultation can be used to gather views from "non-stakeholders".
>
> (v) User panels: In contrast to the focus group, the user panel is designed to allow a group of the potential users of rules (either the regulator or regulated) to test or develop ideas.
>
> (vi) Citizens' Panels: Citizens' panels are significantly larger than other groups. They normally comprise a statistically significant number of individuals which are representative of the relevant population.. Members are selected to represent a cross section of society and are asked to give views on a range of issues from general values to specific options or proposals. The Government has recently set up a "People's Panel" of 5,000 people across the UK which follows this method of consultation.[25]

[23] See http://www.cabinet-office.gov.uk/servicefirst/1998/guidance/users/index.htm.

[24] *Ibid.*, chapters 9-15.

[25] Members are selected randomly to give an accurate cross-section of the UK (*e.g.* by age, background and region).

(vii) Citizens' Juries: Citizen's juries are made up of relatively small numbers of non-experts (12-16 is suggested) who listen to expert evidence on a particular matter which is the subject of the consultation and present conclusions.

(viii) Consensus Conferences: A variation on citizens' juries in the sense that a consensus conference can consist of 12 or more non-experts which conducts its own inquiries into a particular issue (as opposed to having the agenda set for them in the case of juries).

(ix) Surveys: It is possible to consult via questionnaires or surveys. This can enable a quantitative (as opposed to qualitative) analysis of opinions.

(x) Referenda/Deliberative Polling: Referenda could be used to glean yes/no answers to simple questions. A variant of the referendum is the use of deliberative polling where a representative sample of people is polled on an issue. They are then given further information on the issue and an opportunity to discuss things in greater detail. At the end of these discussions a further poll is taken to see if there has been any shift in opinion which might be reflected on a larger scale.

This general trawl through the variety of potential consultation mechanisms illustrates that what we might commonly call "consultation" can be a remarkably complex process rather than the mere posting of consultation papers to interested parties. This is not to say that all of these mechanisms are useful for every issue. Indeed each of these mechanisms has its own strengths and weaknesses (consideration of which is too lengthy to be dealt with in this article). Moreover, we need to be careful to separate public consultation from "information gathering" or "advice seeking" which takes place around (or before) the public exercise is carried out. This is still "consultation" which would fit within some of the models identified above, but it is not public participation in the wider sense of the phrase. As we see in the case study this (what we might call "private") consultation can have significant implications for the process of public consultation which runs alongside or in sequence.

A final aspect of this issue is the distinction between mandatory and discretionary consultation. Some consultation exercises are required by law. Obvious examples include the National Air Quality Strategy,[26] the National Waste Strategy,[27] and certain aspects of the contaminated land regime.[28] This formal requirement to consult must be distinguished from informal consultation which may take the same substantive form as formal consultation (*e.g.* by way of published consultation paper) but which is very different in law. If there is a specific statutory requirement to consult, there can be certain legal consequences and a substantive failure to comply with the duty would be subject to challenge. These mandatory consultation exercises must supply sufficient information to enable the consulted to tender a response, allow sufficient time to enable such a response to be given and for any response to be given proper consideration.[29] This specific duty with legal consequences can be contrasted with informal consultation exercises which can have legal consequences in circumstances where a "legitimate expectation" of consultation is created. This duty is, however, limited to the extent that there has to be a specific promise of prior consultation[30] or some direct interest in the

[26] See s. 80(6) Environment Act 1995.

[27] See s. 44A, Environmental Protection Act 1990.

[28] See *e.g.* s. 78YA, Environmental Protection Act 1990.

[29] See *e.g.* see *R* v. *Secretary of State for Social Services, ex parte Association of Metropolitan Authorities* [1986] 1 All E.R. 164.

[30] See *e.g. R* v. *Swale BC & Medway Ports Authority, ex parte RSPB* [1991] 1 P.L.R. 6.

subject of the consultation.[31] This latter point emphasises the implicit judicial support for the stakeholder model and tends to limit the concept of legitimate expectation in the context of informal consultation in environmental policy and rule making.[32]

The Mechanics Of Consultation: The "Who?" Question

Who is (or perhaps should be) consulted on environmental policy and rule making? Once again there is a theoretical distinction which can be drawn between mandatory and discretionary consultation although in practice such a distinction is not particularly pronounced.

With mandatory consultation the duty to consult is normally accompanied by a generic list of consultees including; the regulatory body (typically the Environment Agency); representatives of local government interests; representatives of industry; and any other appropriate bodies or persons.[33] Although the duty is subjective in the sense that the identification of relevant consultees is generally left to the discretion of the Secretary of State, the list of consultees is not normally controversial. Indeed, other than subject specific interest groups there is often little to distinguish one list in relation to waste management policy from another on air quality. Perhaps this reflects the fact that there is no evidence that there are any specific exclusions from consultation lists. Nor is there any identifiable bias. It would appear as if the list of consultees is compiled with a view to sending out information to as wide a group of *interested* people and groups as possible.[34] This of course begs the question about the efficacy of using this type of exercise to elicit value based views which are not necessarily based upon the views of stakeholders.

THE CASE STUDY

Having examined some of the mechanics of consultation we can now look at some of these theoretical issues in a practical context. We selected the various consultation processes which were/are/will be carried out in relation to the package of legislation, rules, and policy which constitute the regulation of historically contaminated land. Whilst we do not claim that this is the definitive consultation exercise which will produce conclusive findings, we selected this area for a number of reasons:

The Contentious Subject Matter

This is an area of environmental regulation where the stakeholders/policy community were never going to reach an easy negotiated consensus. The introduction of retrospective and retroactive liabilities which are associated with paying for the clean up of historically contaminated land was generally perceived as unfair (certainly as far as some of the stakeholders were concerned).[35] Although the concept of the "polluter pays" has been used to legitimise the subject matter of the consultation, this merely gives rise to debates about the identity of the polluter. In turn this broadens the range of potential stakeholders to include groups such as lenders, insolvency practitioners, developers and land owners. These stakeholders have all featured in the consultation

[31] See *e.g. AG of Hong Kong* v. *Ng Yuen Shiu* [1983] A.C. 629.

[32] Although there is clear affirmation of the principle in the decision making context, *e.g.* see *R* v. *Torfaen BC ex parte Jones* [1986] J.P.L. 686; and *R* v. *Great Yarmouth BC ex parte Botton Brothers* [1988] J.P.L. 18.

[33] This list is taken from the standard statutory format which is found where there is mandatory consultation, see *e.g.* s. 44A, Environmental Protection Act 1990 and s. 80, Environmental Protection Act 1990.

[34] Emphasis added.

[35] For example, the regulatory regime makes an operator which carried out previously lawful activities liable for the harmful consequences of those activities in certain circumstances.

papers as potentially liable parties. With such a broad range of potential stakeholders with potentially differing positions we were likely to find some good empirical evidence of their involvement and influence within the consultation process.

The Effectiveness Of The Responses

The switch from a system which was inherently non interventionist based upon the provision of information to a highly complex system of rules came about primarily as a result of the outcome of the initial consultation exercises on the Register of Contaminative Uses.[36] This policy shift provided good evidence to suggest that the consultation process was meaningful and worthy of study. Here, it could be argued, was a consultation process which worked and provided a justification for all of those representative organisations which responded. In addition, a policy "U-turn" indicated that the Government was open to suggestions as to both policy formulation and rule making. This legitimised the process to some extent and added weight to the argument that participation was worthwhile. In theory this should have made the responses more considered as no argument could be dismissed out of hand. In turn this meant that we would be able to undertake some empirical study of type and extent of the influence of the various sectors of the policy community.

The Range Of Issues

The range of issues which were the subject of consultation was particularly wide involving questions of risk assessment, cost benefit analysis, allocation and apportionment of retrospective liability, hardship and the overlaps of many different regulatory regimes. In addition, the issues were presented in many different ways ranging from broad sweeping policy dilemmas to highly specific technical questions. This meant that there could be an examination of different responses from different people both quantitatively and qualitatively across a broad spectrum against the backdrop of the models of and rationales for consultation which were outlined above.

The Role Of The Legal Community

Although members of the legal community are common respondents to consultation exercises,[37] the contaminated land process was of great interest to practising lawyers. First, the policy and the rules have a very dry legalistic tone to them. Even the guidance documents read like some sort of legal textbook. There are rules within rules, exemptions and exclusions all of which lend themselves to legal analysis and interpretation. Secondly, one of the issues – who should pay for the clean up (*i.e.* the allocation of liability) was a major part of the consultation process. This issue has complex implications for commercial and property transactions which are the bread and butter of the commercial lawyer. In addition the retrospective nature of the liability meant that although the rules have not been finalised, the commercial transactions which have been completed since the first legislation was announced have been negotiated against the backdrop of the consultation process. Thus every little change in policy and the rules has taken on great significance. On this level, the information is power as the lawyer who knows of the latest changes can incorporate them into the documentation of the latest deal. Thirdly, (and this is strongly linked to the last two points) the market has demanded that lawyers understand the implications of the new rules and can apply them in the wider context.

[36] For further discussion on the history of contaminated land legislation see below.

[37] Reflecting the technical expertise model – particularly in relation to rule making.

Consequently lawyers have played a very active part in the consultation process. This in turn made this particular consultation process more interesting for two reasons. First, it gave an indication of how lawyers grappled with mixed questions of technical expertise and values. Could they provide simple technical advice on the operation of the rules or would they go further and step out of their professional shells and give personal views? Secondly, it meant that there was good access to all of the stages of the consultation process – in particular, the unofficial meetings and consultation drafts. Through professional or personal connections there was an opportunity to find out much more about the consultation procedures than would have been the case had the process not involved lawyers to such a great degree.

The Length Of The Process

The history of the consultation process has been long and tortuous. This meant that enough data could be secured which would allow a degree of meaningful analysis. In particular this meant that there could be a comparison of participation at each stage of the consultation exercise to see whether interest was greater and responses more persuasive at some stages rather than others.

Although no consultation process could be said to be "typical", it was hoped that the exercise would demonstrate something which would have some significance in the wider context.

A BRIEF HISTORY OF CONTAMINATED LAND RULE DEVELOPMENT

The issue of how to deal with "contaminated land"[38] was first identified within Government as a potentially significant one for the United Kingdom during the late 1980's in a Report by a House of Commons Select Committee on the Environment on *Toxic Waste*.[39] Following the realisation that there may be problem, the Parliamentary Select Committee on the Environment produced a report on Contaminated Land in 1989[40] which attempted to identify the scale of this problem and concluded that the existing law was not sufficient to deal with it. Following further consultation, the Committee's recommendation that the *caveat emptor* rule be abolished in relation to contamination was included in the Environmental Protection Act 1990 by section 143, which provided for a set of public registers identifying contaminated sites. These rules would have attempted to correct imperfections as to market information. However, the Registers proposals were flawed in a number of respects, including: by merely identifying past uses of land, (as well as arguably identifying the wrong uses) they failed to identify land which was actually contaminated, rather than merely potentially contaminated; they made no provision for removal of sites from Registers which proved not to be contaminated or were "cleaned up"; and they identified problems without clearly identifying their extent and who was responsible for rectifying them. Land would therefore be "blighted" but with no incentives to do anything about it. The crucial issue, which was not addressed, was liability for and recovery of the costs

[38] Whilst the presence of any foreign substance in soil could lead to classification of land as "contaminated", the definition of "contaminated land" is a variable one, often based upon levels of contamination which are considered "acceptable" (with divergent views as to such acceptability): see, *e.g.*, NATO Committee on Challenges to Modern Society Pilot Study: UK Tour de Table Paper; UK Policy on Contaminated Land (September 1994) and the Environmental Protection Act 1990, s. 78A(2).

[39] House of Commons Session 1988-89: Second Report; *Toxic Waste* (22 I-III). The problem had been brought home to other Governments through high profile environmental disasters during the 1970s, such as incidents at Love Canal in New Jersey and Lekkerkerk in the Netherlands (where land contaminated by toxic waste disposal had resulted in severe problems).

[40] House of Commons Environment Committee: First Report on *Contaminated Land*: Session 1989-90, HC Paper 170-I.

of remediation.[41] Criticism and resistance to the Registers proposals from a variety of sources (and articulated, at least in part, through responses to two consultation exercises) resulted in their abandonment and a wholesale review of wider areas of policy and law. This included liability for clean up, clean up standards and when clean up would be required, as well as considering information dissemination. The policy review lead to proposals in the policy document *Framework for Contaminated Land* in 1994[42] and which were crystallised as a new legal regime in Part IIA of the Environment Act,[43] which provides a comprehensive (and complex) set of rules which seek to deal with: the identification of contaminated land; identification of clean up requirements; and allocation and apportionment of liability for these clean up requirements, as well as dissemination of information.

Public Consultation Papers

As identified above, consultation has been an important feature of rule development in contaminated land and there have been five public exercises this decade. They have respectively involved consultation upon; section 143 Registers (1) (1991);[44] section 143 Registers (2) (1992);[45] *Paying for Our Past* (1994);[46] Draft Statutory Guidance/ Regulations (1996);[47] and Revised Draft Statutory Guidance/Regulations (October 1999).[48]

These exercises have varied both as to their scope and form. Scope has varied in the breadth of the issues raised for respondents: some dealing simply with narrow aspects; and some asking much wider questions. Form has varied mainly by either presenting draft rules and asking for comments on the text, or asking wider questions and giving respondents a little more scope for broad comments. Not surprisingly, the most wide ranging and least structured exercise was *Paying for Our Past*,[49] taking place as it did during a complete re-think of contaminated land policy. Some of the features of these exercises are:

Section 143 (1) & (2)

These were very narrow in scope and fairly "technical" in nature. The basic questions asked respondents what information they thought should be included on Registers (as well as how it could be gathered), and whether there were concerns over the potential for Blight resulting from them. The rigid structure was that there would be Registers and that they would cover all land which had been subject to a number of "potentially contaminating" uses. The second exercise was very similar to the first, the main difference being a more limited number of "potentially contaminating" uses.

Paying for Our Past

This dealt with wider issues of clean up standards and liability (as mentioned above). The form was to provide background information as to the issues raised, preliminary conclusions which had been reached, and then to ask 15 questions (as well as leaving scope for making additional comments).

[41] Although some measures existed which could be used to secure clean up in some circumstances, for example Statutory Nuisance powers and the Environmental Protection Act 1990, s. 61(the latter never being brought into force).

[42] *Framework For Contaminated Land* (Department of the Environment ("DoE")/Welsh Office ("WO"), November 1994).

[43] Which inserts a 'Part IIA' into the Environmental Protection Act 1990.

[44] *Public Registers of Land Which May Be Contaminated – A Consultation Paper* (DoE, May 1991).

[45] *Environmental Protection Act 1990: section 143 Registers* (DoE/Welsh Office, May 1992).

[46] *Paying for Our Past* (DoE/WO Consultation Paper, March 1994).

[47] *Consultation on Draft Statutory Guidance on Contaminated Land* (DoE/WO, September 1996).

[48] *Contaminated Land: Implementation of Part IIA of the Environmental Protection Act 1990* (Department of the Environment Transport and the Regions ("DETR"), September 1999).

[49] *Op. cit.*

These questions had a number of interesting features:

(i) Some were predominantly "technical" in nature:"*Should there be changes to the State of the Art defence?*"[50] (requiring technical legal knowledge, although some background information was provided for non-experts).

(ii) Some concerned a mix of "technical" and general "values": "*Should there be liability limits for lenders, home-owners, etc & who should pay instead?*".[51] Questions such as these can lead to some confusion as they are a mix of values (who should pay to clean up historically polluted land) and technical expertise (knowledge of existing patterns of liability for lenders and others). It may be that access to the issues requires some level of expertise, but the substance then includes values, confusing the rationale for choosing/listening to respondents.

(iii) Some were "closed": "*Do you consider that, subject to any further consideration of the House of Lords judgment in the Cambridge case, there should be the minimum of change to private, Common law, undertaken only where it causes tensions or uncertainties, and not undertaken solely to keep Common law liability in line with regulatory* obligations?"[52] As well as being inaccessible to non-experts, such questions are extremely loaded and leading, basically presenting the anticipated answer and inviting concurrence with that view.

(iv) Some were simply "banal": "*Should avoidance be as difficult as possible?*"[53] and "*Should we only act on contamination posing unacceptable risks?*"[54] (Defining what is "acceptable" and determining what constitutes avoidance and how to prevent this being the real issues).

Draft Statutory Guidance/Draft Regulations (& Revised Guidance/Regulations)
An important initial distinction between these stages of public consultation and earlier processes is that, whilst the preceding consultation was voluntary, consultation with regard to Draft Statutory Guidance was mandatory as it was required by the primary legislation.[55] The form of consultation for these exercises was to simply ask for comment on the detailed draft text of very complex sets of rules. It is, therefore, arguably more technical in nature than *Paying for Our Past* as general policy issues (involving more values) should have been settled in the primary Legislation. However, "value" issues still arose at these stages, most notably "who should fund clean up of "Orphan' Sites" (sites where no solvent "polluter" or landowner is available to pay for clean up). This is an issue of great importance and one which clearly involves values at least as much technical expertise, and one which remained fudged in the Revised Draft Statutory Guidance.[56]

Private/Limited Exercises
As well as these public consultation exercises, there have also been numerous "private" or "limited" exercises where rule makers have consulted selected interests either individually, or in more limited exercises. These include: pre-consultation papers (all);

[50] *Paying for Our Past, op. cit.*, Question (8)(a).

[51] *Paying for Our Past, op. cit.*, Question (4)(b).

[52] *Paying for Our Past, op. cit.*, Question (6) (original emphasis), referring to the House of Lords decision in *Cambridge Water Co.* v. *Eastern Counties Leather* [1994] 2 A.C. 264.

[53] *Paying for Our Past, op. cit.*, Question (9)(b).

[54] Being one of the "priorities" referred to in *Paying for Our Past, op. cit.*, Question (1).

[55] See the Environmental Protection Act, 1990, s. 78YA.

[56] The final position is that Local Authorities have the power to clean up land, without suggesting that there is any compulsion.

drafts of consultation papers (all) & environment bill; "working" drafts of statutory guidance; and a "round table" discussion regarding "interim" draft guidance (1998). These types of exercises throw up a number of issues.

Limited exercises (such as the "round table") can create ill-feeling amongst the remainder of the policy community, particularly as having, or being perceived as having, inside knowledge and influence may be a commercial asset for legal and other professionals.[57] Here, what might be viewed by "excluded" participants as "favouritism" by the rule makers, can have commercial implications, as well as the general problems of selectively consulting on and discussing policy matters.[58] Private/limited exercises usually (if not always) take place earlier than the public exercises. Therefore, they are possibly more influential as they help to shape and set the boundaries for the public consultations and debate which follow. Thus earlier access to the rule making process may have a more significant impact upon it (as well as identifying the participant as having high standing with the rule maker[59]), by setting the agenda for wider consideration. Although there is little numerical data on the identity of "private" consultees, it appears from interviews with rule makers[60] that they tend to be the "usual suspects" of powerful industry, and other, pressure groups (which does include some NGOs in the environmental field[61]).

The rationale for this type of consultation appears to be to gather expertise on legal, scientific, financial or other "technical" matters and to identify what the more powerful members of the policy community want, or are willing to accept, without exposing initial proposals to wider public scrutiny. Thus the rule maker is seeking to gather expertise, but may also be interested in the values of key actors within the rule making process.

Involvement in Consultation

Having considered the form of consultation in contaminated land, the question arises of who takes part in the exercises. For public exercises, the information is available and some basic data can be produced.

Total numbers of respondents for all exercises are:

Exercise	*No. of Respondents*
s.143 (1)	319
s.143 (2)	433
Paying For Our Past	349
Draft Guidance	304

[57] For example, the circulation of "revised draft Statutory Guidance" to persons and bodies invited to sit at a "Round Table" meeting with the DETR in December 1998, caused a certain amount of bad feeling, particularly as the revised version was then passed on to some contacts of the original recipients. The possession of this kind of information can be used to suggest that the professional has a close connection with the rule makers, and so clients may believe that professional has inside, or early, knowledge regarding the rule making process, or even some influence upon it. In the case of the "Round Table" guidance, the impact would be limited as changes from the previous version were hard to find (which probably suggests that the limited circulation was even less necessary).

[58] See, *e.g.*, Garner, J. F. "Consultation in Subordinate Legislation", (1964) P.L. 105, Craig, P. P. *Public Law and Democracy in the United Kingdom and the United States of America* (Clarendon, 1990); and The Hansard Society Commission on The Legislative Process *Making the Law* (Hansard Society, November 1992).

[59] Which might identify the participant as an important actor within a "pluralist" rule making system, or as an actor within a "corporatist" system.

[60] Conducted by Laurence Etherington (as part of his PhD thesis) with civil servants who had worked in the DoE/DETR.

[61] The pressure used by such groups in order to secure participation in the rule making process generally being in the form of threatened censure in the media, or delay, rather than economic sanction: see Lowe, P. & Goyder, J. *Environmental Groups in Politics* (George Allen & Unwin, 1983), p. 60.

This shows a fairly consistent level of involvement of around 3 – 400 respondents.

One question which is immediately raised is whether these levels of involvement are satisfactory? It is very difficult to make a judgement as to this, however, any answer may depend upon the rationale underlying the particular consultation exercise. If technical expertise is the rationale, then satisfaction might depend upon who actually responded. If the rationale for carrying out the exercises is public participation generally, then the figures do seem rather low, irrespective of the actual make up of the respondents (though further information as to precisely who responded may help to confirm or otherwise this initial view). Therefore, respondents have been broken down into categories which seek to represent different groups involved in contaminated land issues (and which might represent some differing cultural perspectives).[62]

Earlier Exercises

For the two consultation papers on section 143 proposals the respondent breakdown is as follows:

	s.143 (1)	*s.143 (2)*
Local Authorities[63]	*(211) 66%*	*(181) 42%*
Business[64]	*(49) 15%*	*(83) 19%*
Consultants[65]	*(21) 6%*	*(52) 12%*
Finance/Insurance[66]	*(3) 1%*	*(13) 3%*
Lawyers[67]	*(10) 3%*	*(27) 6%*
Government Organisations[68]	*(5) 2%*	*(25) 6%*
Regulators[69]	*(0) -*	*(3) 1%*
Property Industry[70]	*(6) 2%*	*(28) 6%*
NGOs[71]	*(5) 2%*	*(6) 2%*
Others[72]	(9) 3%	*(15) 3%*

This data identifies Local Authorities as a major source of responses in the consultation processes and as having a significant involvement (numerically at least, even if not necessarily in terms of influence). This is not surprising as they had primary

[62] Although substantive responses have also been analysed, this analysis does not form part of this article. However, there does appear to be some correlation between response content and respondent categories, which may reflect differing cultural perspectives (at least in part). For discussions of cultural perspectives on concepts such as "risk" (including in the field of environmental policy), see Adams, J. *Risk* (U.C.L. Press, 1995), Renn, O. "Concepts of Risk: a Classification", in Krimsky, S. & Golding, A. Eds., *Social Theories of Risk* (Praeger, 1992), and Royal Commission on Environmental Pollution 21st Report, *Setting Environmental Standards* Cm 4053 (October 1998).

[63] Comprising all local authorities and representative groups made up of members from such authorities.

[64] Comprising all private and public companies, involved in manufacturing and other industry (not falling within other categories), together with their representative groups.

[65] Comprising all members of engineering and other professions (not falling within other categories), together with their representative groups.

[66] Comprising all organisations involved in the insurance and finance industry (including accountants), together with their representative groups.

[67] Comprising all practising solicitors and barristers, together with their representative groups.

[68] Comprising all Departments and agencies of central government, together with Quasi-Autonomous Governmental Organisations (not having a primarily regulatory function).

[69] Comprising all governmental bodies having primarily regulatory functions (not being local authorities).

[70] Those businesses and individuals directly involved in the property industry (which are not professional consultants). Whilst the Housing Corporation was considered to be sufficiently closely connected to Government to be logged as a "Government Organisation", individual Housing Associations were felt to be more closely related to the property industry and so were included in this category, though they might easily have been considered NGOs or even "Quasi-Local Authorities".

[71] Comprising community, environmental and other representative groups sharing a common interest (and not being directly connected to government).

[72] Comprising any other respondents (primarily private individuals and educational institutions).

responsibility for implementing the Registers proposals[73] (also being the primary regulators under the Environment Act[74]), as well as being potential funders of clean up and significant land owners (and polluters through waste responsibilities). They are also a readily identifiable group, and once the acknowledgement is made that local authorities are potential consultees, the obvious thing to do is to invite all of them to respond. Having all been asked their opinions, it is no surprise that a great many of them actually responded in view of the policy areas affected.

Local Authority responses only dropped slightly in number between the two exercises, however, others more than doubled between them. Although there is no data or other evidence to support this view, it is probable that blight concerns[75] generated, or publicised, by the first exercise resulted in industry and others becoming "sensitised" to the issue and it is possible that the strength of opposition to the proposals resulted in their increased involvement (which is further evinced by this exercise having the highest total of responses). This does not explain the proportionate increase in responses by "lawyers" and "consultants". One possibility for this (again unsupported by any evidence), is that here the "experts" were "sensitised" by the commercial opportunities for them becoming apparent.[76]

Later Exercises

In the later exercises, concerning *Paying for Our Past* and draft guidance/regulations, the respondents came from the various sectors indicated below.

	Paying for Our Past	*Draft Guidance/ Regulations*
Local Authorities	*(149) 43%*	*(172) 57%*
Business	*(90) 26%*	*(58) 19%*
Consultants	*(46) 13%*	*(25) 8%*
Lawyers	*(19) 5%*	*(18) 6%*
Government Organisations	*(21) 6%*	*(12) 4%*
Regulators	*(3) 1%*	*(4) 1%*
NGOs	*(13) 4%*	*(9) 3%*
Others	(8) 2%	*(6) 2%*

Some of the notable features emerging from analysis of the backgrounds of those who responded and the types of response they provided are:

(i) As with section 143 consultation exercises, there are fairly constant levels of involvement, with Local Authorities the main participants;

(ii) with the exception of other Regulators, all other respondent categories numbers reduced (though Lawyers only by one response); and

(iii) the 'Others' category comprises mainly Academic institutions and private individuals.

[73] See the Environmental Protection Act, 1990, s. 143 (now revoked).

[74] See the Environmental Protection Act, 1990, ss. 78A(9) and 78B(1).

[75] For a discussion of the effect of blight from contaminated land, see Petts, J. "Contaminated Sites: Blight, Public Concerns and Communication" (1994) Land Contamination and Reclamation 171.

[76] Although it could just as well be that the increasing awareness of contaminated land issues had resulted in a greater number of professionals gaining expertise in this area and their responses being based upon altruistic purposes. But see the findings regarding later exercises, below.

Low numbers may limit the statistical relevance of these figures, however, some interesting figures are generated which may be relevant to consideration of "expertise" and general "public participation" as rationales for conducting consultation exercises:

Consultants
Although we might anticipate that these would have more of a role to play as issues under consideration became more "technical" (particularly as commercial pressures would probably have increased the numbers of consultants having, or holding themselves out as having, expertise in relation to contaminated land), in fact, responses from this category nearly halved between the two exercises.

Academics
Although we might anticipate that academics from a number of disciplines, including law, might have expertise which the rule makers would find of use, only three academic institutions responded to *Paying for Our Past*: all non-law schools (though one was a lawyer not in a law school). Only two academic institutions responded to the Draft Guidance. One of these was from a law school (although the authors were conducting research into consultation and contaminated land). Of these very limited academic responses, at least one was really a bid for research funding from the Government, providing little information, which identifies that some institutions were also aware of the opportunities which contaminated land policy development could provide. This does not necessarily mean that academics were providing little input into the rule making process. For example, contributions may have been made through collective responses, such as that by the United Kingdom Environmental Law Association. Perhaps more importantly, other experts in the field may have been providing their input through more direct means, for example by undertaking research for the Department,[77] and/or involvement in the limited/private consultation exercises. However, the feeling remains that a significant amount of expertise was not being best gathered and used by the rule making process, and that the level of involvement by academics is disappointing.

Private Individuals
The very low numbers in these statistics are actually worse than they initially appear, as a number of these were retired experts and responding on the basis of expertise/ experience, rather than as private individuals identifying "values". However, it should also be said that the non-professional responses were (perhaps not surprisingly) often not the most informative or coherent and so when viewed in the context of a mass of much more professional and clear responses, may have been less compelling.

Involvement in Consultation- Response Detail

	Paying for Our Past	*Draft Guidance*	*Draft Regulations*
Confidential	*4%*	*3%*	*0%*
No Comment	*7%*	*3%*	*13%*
Short	*8%*	*45%*	*23%*
Long	*81%*	*52%*	*64%*

[77] For example, research projects carried out on standards for clean up by the Centre for Research into the Built Environment at Nottingham Trent University.

In the case of confidential responses, the level of detail given in the responses is, obviously, unknown. Responses were categorised as "no comment" responses where they said nothing of any substance at all. The reason for categorising responses as "long" and "short" is that it seems reasonable that more detailed responses may reflect more expertise on part of the respondent, although this is not necessarily the case. Responses to consultation on *Paying For Our Past* and on the draft guidance/ regulations were categorised as "long" or "short" in accordance with the following criteria:

> *Paying For Our Past*: Whether the majority of the response comprised more than a simple "Yes/No" to the questions;
>
> Guidance/Regulations responses: Whether the response had more than one detailed point relating to the text.

Unavoidable differences in the methods of categorisation between the three exercises may limit the usefulness of the comparisons. However, the proportion of detailed responses significantly reduced between *Paying for Our Past* and the later exercises. Some clues as to why this should be so, when the increased technicality of the subject matter would suggest that expertise was a more important aspect than the earlier exercise, are provided in some responses by the largest category of respondents – Local Authorities. One factor is mentioned by many respondents in this category: the lack of resources which were available to respond to the consultation exercise. Many Local Authorities complained that they did not have the resources available to implement the incoming regime,[78] and at least one then stated that resource allocation priorities prevented the provision of a detailed response to the consultation exercise.[79] Thus the main respondent category had a dis-incentive to provide detail reflecting its expertise as to the subject matter of the consultation (the drain on scarce resources) so that whilst the number of Local Authority responses increased (against the general trend of reducing for most other categories) this did not necessarily involve a corresponding increase in detailed, expert information. Lack of resources was not a factor generally mentioned by other categories of respondents, though it may have been influential for some of them. Less tangibly (and without being able to identify specific extracts from the responses in support), there is also a feeling of disillusionment with the consultation process which one gets from reading some of the Local Authority responses – a sense of fatigue after participating in many public and other consultation exercises and (possibly) a sense of cynicism as to which respondents were being listened to by the rule makers.

A quite different point is that lengthy responses to *Paying for Our Past* may reflect the width of the material and debate - providing the opportunity to "waffle" or "rant" at length on a number of issues, rather than provide useful detail reflecting expertise. Therefore, those statistical findings have to be treated with some caution.

SUMMARY OF FINDINGS

When/How?

Although the processes of consultation have almost amounted to a "rolling programme", the continuity is found mainly in the private and limited exercises and

[78] See *e.g.* Response Nos. 10, 11 and 12 to the *Draft Statutory Guidance* (1996), *op. cit.*

[79] See Response No. 23. The complaints as to lack of resources generally, and the specific linking here of that issue with ability to respond in detail, suggests that others may not have responded (or responded in detail) for this reason.

involvement for the less well-connected or influential has been much more irregular and punctuated by large gaps. The questions which have been asked publicly could be summarised as:

> "Do you agree that this is what we should we have on our Registers?" (twice),[80] then:
>
> "What do you think about our preliminary conclusions following the review?",[81] then:
>
> "What do you think about our (complex) detailed guidance and other rules to supplement the primary rules (which we did not ask you about)?" (twice)[82]

This identifies a huge gap between preliminary conclusions and the detailed implementation of a highly complex system of rules. Interviews confirm that there was frequent and intensive consultation with selected bodies during the drafting and passage of the Environment Bill (as is the norm for primary legislation[83]). It does seem odd, however, that such a crucial phase of rule development was devoid of wider, public consultation when the majority of the rule making process has been characterised by this. The simple reason for this would appear to be the usual problems of expense and (particularly) time pressures in seeking to get a contentious Bill through in a tight Parliamentary timetable.[84]

Some important questions which arise are: whether the normal political channels of representation are sufficient to plug these gaps when others have had direct access, and, if not, whether this gap undermines the process of public consultation generally?[85]

Who?

The consultation exercises can only really stand up with expertise rationale, or possibly wider participation of those directly using the rules. There are flaws in the process if this is the rationale, however, the most disturbing feature of the empirical findings is that if the rule makers have been seeking to elicit wider public involvement instead, or as well, as this, then they have failed miserably. So what was the main reason which the rule makers had for consulting and is this approach satisfactory?

Why?

In line with the analysis of respondents to "public" exercises, interviews suggest that the rule maker's main objective in consulting was getting powerful interests behind the rules: consultation as "marketing" for influential and powerful interests seems to have been the primary aim, where there was not a great deal of political will to see the initiative through. The section 143 experience had identified the problems of devising rules to which powerful groups were resistant and the rule makers probably did not want to go through a similar process again in this difficult policy area: the extent of private and public consultation would further support this view, focusing as it did on those powerful groups.

Consultation as a marketing tool may reflect a realistic approach to rule making and the interviews suggest that contaminated land consultation is considered a success by

[80] In *Public Registers of Land Which May Be Contaminated - A Consultation Paper*, op cit., and then in *Environmental Protection Act 1990: section 143 Registers, op. cit.*

[81] In *Paying for Our Past, op. cit.*

[82] In *Consultation on Draft Statutory Guidance on Contaminated Land, op cit.* and then in *Contaminated Land: Implementation of Part IIA of the Environmental Protection Act 1990, op. cit.*

[83] See *e.g.* Miers, D. & Page, A., *Legislation* (Sweet & Maxwell, 1990).

[84] See *e.g. Making the Law* (the Hansard Society), *op. cit.*

[85] A clue as to whether direct access leads to greater influence may be found by matching public consultation responses to outcomes in terms of rules devised. This is not explored in this article and, in any event, looking for bare correlations such as this is probably too simplistic an approach.

many of the rule makers (mainly by getting the "target" interests to accept the principles underlying the policy and engaging them in a debate as to how to shape and implement the policy). However, it is debatable whether much of the subject matter is really "technical" or "value" – based and the need to sell the rules to the core policy community, combined with the frequency, timing and intensity of consultation with these powerful groups may mean that they have been able to impose their *values* at the expense of those of the general public. At the end of the day, it seems that whether the rule makers in this area, were seeking expertise or values, the source of them remained the same. Whether this is the same for other areas of environmental law, or there is something special about contaminated land, and whether it is possible to engage the wider public in a discussion of such issues, are, therefore, important questions deserving further research. Whether this is satisfactory is a difficult question but one clue as to how comfortable the rule makers are with their approach may be found in the 'spin' put on the presentation of consultation papers and the suggestion that the majority of respondents to them were individuals: the Press Release[86] announcing the publication of the *Framework for Contaminated Land*[87] stated on a number of occasions that 349 ". . . individuals and organisations . . ." had responded to *Paying for Our Past*, and this method of presentation continued with the press release announcing consultation on the Revised Draft Guidance in October 1999, where the amendments to earlier drafts were said to have been made following input ". . . from over 500 individuals, local authorities and businesses and from the House of Commons Environment Committee."[88] Whilst this is not untrue, it being merely suggested that most of the people involved have been individuals and many Consultants and others being 'individuals', one view of these statements could be that the rule makers are wanting to give the impression that the consultation processes stand up to scrutiny on the basis of public participation as well as expertise.

CONCLUSIONS

There are a number of general points which arise from the case study. Written consultation continues to play an important role in consultation in that it provides a relatively cheap and practical means of communicating with the wider policy community. Moreover, changes were made to the policy and the rules as a result of the consultation. There are, however, significant defects in the system of written consultation. Although there is no analysis of the substantive responses to the various papers it will probably not come as a total surprise to find that the quality of the majority of responses was mediocre to poor (in the authors' view). This would tend to undermine the concept of consultation as a method of receiving objective technical input. In addition the process lacked transparency, accountability and accessibility. There is little opportunity to find out about the nature of responses of other consultees and no prospect of any public dialogue.

The effective parts of the process are arguably more private than public. Whilst this is not a particularly groundbreaking conclusion it does raise concerns about the purpose of the consultation. Our research indicates that in relation to the consultation process on the law and policy of the clean up of historically contaminated land, these initial private exercises have been used almost as a stakeholder focus group – that is

[86] Department of the Environment News Release No. 654, November 24, 1994, which does not seem to reflect the imbalance between these categories of respondents, and, if anything, seems to suggest the opposite.

[87] *Op. cit.*

[88] DETR News Release 981, October 8, 1999.

to "market test" the policy and rules by those who are going to be directly affected. The great danger of this approach is that the formal public consultation which follows these semi-private processes is shaped by the responses and suggestions which are made by interest groups with particular values or expertise. If there is a perception that the outcome of the consultation exercise is governed by a few relatively powerful interests making representations before the scope of the consultation is widened it could decrease the willingness to participate for those outside these interest groups.

The quality of the presentation of the issues was mixed. They ranged from highly technical questions which could only have been answered by a small number of consultees through mixed questions of values and expertise to other questions which were so leading or to which the answer was so obvious that it wasn't worth asking. On the "garbage in, garbage out" principle, it is not surprising that some of the issues were not dealt with very well in terms of responses.

On a deeper level, there is the issue of whether we should adapt the current system of consultation so that it engages wider public interests and if so whether this is practical. The RCEP has commented that it considers that the stakeholder model of consultation is not "useful or appropriate" to cover public concerns about the environment.[89] It then however goes on to consider how the values of the wider public may be elicited. In one sense, it could be argued that these suggestions of how to engage the wider public are primarily concerned with the broadening of the definition of stakeholder.

The nature of environmental issues means that the law and policy which are part of those issues could be said to directly affect everyone (to a greater or lesser extent). Moreover there are the interests of future generations and non-human interests which need to be considered (both of which present a dilemma as they can only be consulted on a representational basis). We should therefore be encouraging a culture of wider public participation on all environmental issues on the basis that each person's values have some connection with the law and policy on that issue. With this wide definition of stakeholder we are faced with the practical problem of consulting everyone in a manner which could elicit meaningful answers. Different methods of consultation will assist in meeting this aim but ultimately, in our view, there are four other factors which will encourage a culture of effective public participation through consultation.

First, the stage at which public values are elicited. The basic questions have to be asked right at the beginning of the process. In relation to contaminated land, some of these basic questions were discussed with stakeholders before the public were consulted. Even where very general questions were asked there was a degree of closure which indicated a particular policy option was preferred. Let's not forget that the consultation in relation to contaminated land was an opportunity to start with a relatively clean sheet. If the values of the general public are going to be incorporated into the shaping of the final policy and rules they must take precedence over other aspects of the consultation process.

Secondly, greater effort needs to be made to separate the political and values based issues from the scientific and technical. For example something such as risk assessment or the allocation of liability can be constructed as a matter purely for the technical expert. This view can be used as a justification for excluding the general public from expressing a view on the matter. To do this, however, ignores the fact that many of these issues can (with technical assistance) be stripped back to basic questions of values. What risk is acceptable? Who should pay? On one level these are extremely

[89] See n.1, p.102, para.7.8.

complex questions but eventually there is a value judgment to be made. Indeed when the policy or rules are implemented, these questions will still need to be answered (with technical assistance), by individuals making value choices whether they be local councillors, inquiry inspectors or the local magistrates. If we don't expect the general public to be able to play a part in answering some of these questions what makes us think that these decision makers are going to fare any better?

Thirdly, if we are going to elicit values from the general public we need to ensure that the key issues are explored clearly and concisely enabling individuals to identify their own priorities. Written exercises are not particularly good at developing arguments or presenting different aspects of a problem. The public need to be able to explore such debates in a considered and rational manner. There is a great need to be make these issues user friendly and present the arguments as shades of grey rather than clear black and white. Otherwise we could find that public aspirations cannot be matched by the policy or rules which are selected.

Finally, the greatest challenge comes with the effective elicitation of public values – that is what to do with them once you have got them. If, as we argue, there is a need to encourage a culture of wider public participation in environmental policy and rule making, there is the corollary that such values have to be acted upon and given effect to even if they are contrary to the interests of the more traditional model of "stakeholders". Indeed if we are to take the effort to develop more sophisticated methods of consultation we need to understand the implications of doing that effectively. The concept of environmental citizenship depends upon the views of the "citizen" being taken seriously when consulted. Once this happens a cycle is created whereby the citizen recognises the value of their input and takes the time to consider their priorities with great care. This then adds to the weight which can be given to such values and the significance which is attached to them which further promotes the role of the environmental citizen.

"A RULING CLASS CONSPIRACY". LAW, ENCLOSURE AND THE POLITICS OF LEISURE

*DAVID McCARDLE**

INTRODUCTION

In the summer of 1999 the House of Lords handed down its judgment in an important land registration case, *R.* v. *Oxfordshire County Council, ex parte Sunningwell Parish Council.*[1] The case concerned an application by the parish council of Sunningwell, Oxfordshire to register an open space as a village green under the provisions of the Commons Registration Act 1965, sections 13 and 22(1). The House of Lords, overturning the recommendation of the non-statutory planning enquiry, the decision of the County Council and of the Court of Appeal, directed the County Council to register the open space as a village green. The effect of this decision was to prohibit the landowners from building two "executive homes" upon it.

Section 22(1) of the 1965 Act provides that applications for registration as a village green may be made in respect of land which falls within one of three categories, namely:

> (a) land which has been allotted by or under any Act for the exercise or recreation of the inhabitants of any locality; or
>
> (b) on which the inhabitants of any locality have a customary right to engage in lawful sports and pastimes; or
>
> (c) on which the inhabitants of any locality have indulged in such sports and pastimes as of right for not less than twenty years.

In *ex parte Sunningwell* the parish council relied exclusively on head (c). However, Lord Hoffmann mentioned in passing that applications made under heads (a) and (b) were utilising rights that have been long established. Head (b) applications rely on the notion of immemorial custom – in theory "a custom which predates the accession of Richard I in 1189",[2] which conjures up pastoral visions of "the traditional village green with its images of maypole dancing, cricket and warm beer".[3] Similarly, applications under head (a) could include land "which was allotted for exercise and recreation by Act of parliament or the Inclosure Commissioners when making an order for inclosure of a common under the Inclosure Act, 1845".[4] Lord Hoffmann went on to say that "before 1845, when commons were enclosed under private Acts of Parliament, it was common for the Act itself to set aside some land for this purpose".[5]

This article adopts socio-legal and historical perspectives to illustrate that those private Acts of Parliament which Lord Hoffmann mentioned actually played a pivotal role in the demise of the leisure pursuits of the labouring poor during the eighteenth and nineteenth centuries, rather than protecting them in the way that he infers. This relationship between leisure and law indicates that landowners' and the courts'

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[1] [1999] 3 All E.R. 385.

[2] *Op. cit.*, at p. 388.

[3] *Ibid.*

[4] *Ibid.*

[5] *Ibid.*

approach to the enclosure of land, their castigation of some leisure pursuits and the privileging of others, has helped shape the contemporary landscape of leisure too.

LEISURE AND THE CIVILISING PROCESS

This article has its roots in Norbert Elias' exploration of the "civilising process".[6] The development of sophisticated legal systems under the auspices of government was fundamental to the creation and maintenance of the disciplinary state, but greater self-control and a reduced tendency to engage in violence and warfare were also vital to the successful concentration of power in the state's hands. For Elias, a widespread acceptance among individuals of the need to exercise this self-control to this extent would be the hallmark of a "civilised society". This move towards a heightened awareness of the need for self-restraint is an ongoing process with a long history. Elias believed that it had its roots in "that series of political, legal, social, economic and military developments which together formed . . . the 'feudal regime'"[7] epitomised by the development of such chivalric activities as jousting and archery in Court circles.[8]

The pursuits that one might broadly call "modern sports" developed as a consequence of this civilising process. The drawing up of rules, the existence of acceptable norms of behaviour, the placing of limits on violence, the demarcation of boundaries and (in team games) providing for equality of numbers may be termed a "pseudo-chivalric" endeavour which reflected a heightened degree of self-restraint in a society which "regard(ed) offences against the prevailing pattern of drive and affect control, any 'letting go' by their members, with greater or lesser disapproval".[9] Consequently, sports provided at least some outlets through which pleasure could legitimately be obtained by watching or participating in violent or exciting activities. Proponents of the "civilising process" argue that sports have played a highly significant role in influencing individuals' behaviour, primarily through their function in respect of the expression and control of physical violence.

The manner in which Elias' theory has been developed in the years since his death has not been without its critics. Some point to the civilising process' disregard for feminist perspectives, its ethnocentric tendencies and its inability to accommodate gender and class differences.[10] Others are critical of Elias' tendency (and that of his acolytes) "to assume a 'natural' pre-civilised aggressiveness, spontaneity and lack of inhibition . . . [Elias] makes too much of the gradual withdrawal of the civilised classes from everyday cruelty to animals and the animal-baiting sports".[11] There are innumerable examples of situations where his "heightened self-restraint" has proved exceedingly fragile, and it is undoubtedly the case that

> highly sophisticated and refined preoccupations with the exercise of physical and emotional self-restraint can and do go hand-in-hand with physical and emotional violence against slaves, servants, women and employees. Similarly, collective relations of restraint and co-operation can break down into the kind of barbarism epitomised in the break-up of Yugoslavia.[12]

[6] N. Elias and E. Dunning, *Quest for Excitement: Sport and Leisure in the Civilising Process* (Blackwell, 1986).

[7] N. Davies, *Europe – A History* (Oxford University Press, 1996), at p. 311.

[8] D. Birley, *Sport and the Making of Britain* (Manchester University Press, 1993).

[9] N. Elias, *The Civilising Process. Volume 2: State Formation and Civilisation* (Blackwell, 1982), at p. 254.

[10] Jennifer Hargreaves, *Sporting Females. Critical Issues in the History and Sociology of Women's Sports* (Routledge, 1994).

[11] A. Hunt, "The Role of Law in the Civilising Process and the Reform of Popular Culture" (1995) 10(2) *Canadian Journal of Law and Society* 5-31 at p. 7.

[12] Hunt, *op. cit.*, at p. 11.

Murphy *et al.*[13] attempt to counter this by asserting that "whilst violence is probably increasing in many countries at the moment, the majority at least of Western societies are today considerable more 'civilised' internally, considerably less violent than they used to be, say, 100 years ago".[14]

The arguments as to the relative merits of the Elisian approach will continue *ad nauseum*, not least because they seem to be fuelled by personal enmity among those working within the field of sport sociology as much as they are by scholarly rigour. But this ought not to deflect attention from the fact that, since the seventeenth century, certain leisure pursuits have attracted considerable hostility from legislators and the judiciary while others have received their tacit support. Elias' work enables one to appreciate why this was the case, from a sociological standpoint.

The "uncivilised" leisure pursuits of the eighteenth and nineteenth centuries attracted hostility because they excited greater degrees of violence or unruly behaviour on the part of participants or spectators than was deemed tolerable by civilised society. The majority of those practices, including most animal sports, had all but disappeared by the end of the 1800s. They fell outside the parameters of civilised society as defined by Parliamentarians and the other wealthy members of society who "were instrumental in the greater pacification and regulation of (the lower classes') pastimes".[15] In contrast, sports like football and boxing flourished at that time because they were able to adapt and to "fit in" rather than operate as a counter-hegemonic subculture.

SPORT FOR ALL?

Elias[16] counselled against the tendency to see every development that occurred in the nineteenth century as inevitably being a product of the industrial revolution, but the "muscular Christian" who embodied the ideals of physical courage, chivalry and patriotic virtue was certainly a product of it. Some members of the aristocracy continued to see disreputable traditions such as prizefights and animal sports as the preferred means of binding the lower orders into society. Others had sought to achieve the same ends by extending the ideals of "muscular Christianity" to the working classes through the medium of other, "civilised" sports and pastimes such as track and field athletics events and team sports.[17] In doing so, they encountered "the antipathy of the poor, ill-educated and aggressive urban youths who remained the perennial but hostile targets of the proponents of this middle-class ideal".[18]

These were the individuals who represented "the irresponsible and sexually licentious 'dangerous classes'" who haunted the imagination of genteel nineteenth century England.[19] They presented a particular challenge to those who espoused Muscular Christianity, or – in more secular terms – the "cult of muscularity", which had it roots in the writings of Charles Kingsley.[20] Kingsley[21] believed sport could help transform

[13] P. Murphy, J. Williams and E. Dunning, *Football on Trial. Spectator Violence and Development in the Football World* (Blackwell, 1990).

[14] Murphy, Williams and Dunning, *op. cit.*, at p. 27.

[15] Elias and Dunning, *op. cit.*, at p. 40.

[16] Elias, *op. cit.*, at p. 151.

[17] Birley, *op. cit.*

[18] J. Mangan and J. Walvin, *Manliness and Morality: Masculinity in Britain and America 1800 – 1940* (Manchester University Press, 1987), at p. 5.

[19] R. Collier, *Masculinity, Law and the Family* (Routledge, 1996), at p. 221.

[20] A. Bloomfield, "Muscular Christian or Mystic? Charles Kingsley Reappraised" (1994) *Journal of Sport History* 107-122.

[21] Author of *Tom Brown's Schooldays* and, incidentally, responsible for the well-known saying, "every dog has its day".

middle class public school boys into possessors of the qualities sought of future Empire builders and leaders. The many hours per week devoted to the sporting ritual and physical exercise in boys' (public) schools taught the need for sustained effort and spirited determination in the face of adversity. It also taught the benefits of "self-denial and control over one's egoistic impulses, the acceptance of authority, how to fit in with one's peers, how to take decisions and confidently to lead subordinates, and to accept responsibility".[22]

The successful dissemination of "muscular Christianity" to the working classes became something of an obsession to many members of the public school-educated upper classes. The health of the working man had been the subject of much consternation, initial concern being raised by frequent outbreaks of cholera and typhoid and the lamentable physical attributes of those who volunteered for the Crimean War in 1850. There was a growing perception among the upper orders that a rational, disciplining athletic programme was needed to counteract the existence of the independent, plebeian, disreputable sporting tradition that had its origins in the rural leisure pursuits of earlier generations. Much emphasis was placed upon sexual probity and body imagery in these attempts to civilise the lower orders. "Active participation in organised sport, frequent and regular physical exercise, fitness and good health, and above all, a 'hard' body constituted the God-fearing, obedient, hard-working, respectable individual".[23]

Football and boxing would find their niche as sports in late nineteenth century England because they would be able to respond to this changing social landscape; so much so that they came to epitomise the application of the cult of muscularity to the sporting domain of the working classes. The formation of voluntary associations in other sports had provided the model for fledgling football clubs and for governing bodies like the Football Association, which oversaw the implementation of formalised rules governing the conduct of member clubs and their players. Prize fighting never had the same degree of formalised organisation that football adopted in the 1870s, but written rules governing the sport had been introduced as early as the 1743 – preceding the introduction of formal rules in more genteel and socially acceptable pursuits such as racing and cricket. Less formally, notions of what was and was not acceptable conduct so far as particular sports practices were concerned – what it meant to "play the game" – had existed in most sports since the middle of the eighteenth century. Generally, the participants followed these rules to a greater or lesser extent. But these written rules and unwritten conventions were accepted not because they made "the game" more straightforward to participate in or easier to understand, but because the rationale behind them was to prolong the excitement, tension and emotional pleasure of victory in the mock-battles of sport.

Fox hunting is the epitome of a highly specialised pursuit governed not by written rules but by conventions that the participants strictly adhered to. "While hunting the fox, gentlemen strictly refrained from pursuing and killing any other animal which came their way ... even though it might have served as a most desirable delicacy"[24] and the hunters would not actually engage in the killing themselves. This was "killing by proxy", with the actual death-dealing task being delegated to the hounds and the honour code governing the chase being augmented by the organisation of the event and

[22] John Hargreaves, "The Body, Sport and Power Relations". In Horne *et. al.* (eds.), *Sport, Leisure and Social Relations* (Routledge, 1986), at p. 143.

[23] John Hargreaves, *op. cit.* at p. 146.

[24] Elias and Dunning, *op. cit.*, at p. 160.

the whole aurora of sociability that surrounded the occasion.[25] The rules of the hunt had been designed specifically to make an easily achieved objective - killing a fox - less easy. This was done "not because it was felt to be immoral or unfair to kill a fox outright, but because the excitement of the hunt itself had become increasingly the main source of enjoyment for the human participants".[26]

But the lower thresholds of tolerance which had contributed to the introduction of those rules and the acceptance of those conventions had permeated through society only gradually. The history of "sports law" reveals frequent conflicts between those who supported the activities of the lower orders and those who opposed them. Judicial records from the sixteenth century show how the civil and ecclesiastical courts dealt with dancers, bowlers, cricket players and, of course, football players. But if legal intervention was supposed to police these pursuits out of existence, its impact was decidedly limited. Sports were certainly not immune to such pressures, but in the nineteenth century aristocratic individuals could still complain that "the more common sort divert themselves at football, wrestling, cudgels, ninepins, shovel-board, cricket, stow-ball, ringing of bells, throwing at cocks and lying at Ale houses".[27] However, most animal sports had all but disappeared from the sporting landscape; fox hunting was the exception.

That some traditional pastimes continued at a time when others were in decline illustrates that not all the leisure pursuits of the lower orders met with hostility from all those members of the higher social groups. Although the Sabbatarians and the middle class social reformers found allies among the respectable working classes in their campaign against the licentiousness of the feckless undeserving poor, the feckless poor also found sufficient support among the aristocracy to keep their pursuits going. These two extremities of the social scale "were never closer together than at the prize-fight, the cock-pit, the rat-catching (and) the race track",[28] and whatever the reasons for their involvement, there were always enough members of the aristocracy who would give positive assistance. This might involve the provision of ale or a winner's purse, or the loaning of land upon which a fair or a race meeting could be held.

But their support could take on more subtle forms too. Landowners and industrialists might acquiesce in the continuation of a long-established tradition or custom, such as Shrove Tuesday football matches which spilled onto privately-owned land, or the holding of a well-dressing on a work day. Their willingness to acquiesce was vital to the continuation of such practices in many rural communities.

But balances had to be struck between this "bread and circuses" paternalism and the need to impose religious probity or social control. Hostility on the part of those in positions of power and influence could be engendered by many factors. Some believed these leisure pursuits constituted a threat to public order, while others based their antipathy on the fact that participation in leisure invariably occurred at those times when a God-fearing citizen should be attending Church. This insistence upon a strict observance of the Sabbath attracted widespread support among those who believed that any recreational practices on the part of the lower orders inevitably encouraged licentiousness and an idle, ill-disciplined way of life that was an affront to the Lord. The opinion that any enjoyment of leisure activity by the labouring poor was at odds with the lifestyle they ought to follow was widely held among those for whom the

[25] See, for example, S. Sassoon, *The Complete Memoirs of George Sherston* (Penguin, 1972).

[26] Elias and Dunning, *op. cit.*, at p. 166.

[27] R. Malcolmson, *Popular Recreations in English Society, 1700-1850* (Cambridge University Press, 1973), at p. 34.

[28] H. Cunningham, *Leisure in the Industrial Revolution* (Croom Helm, 1980), at p. 11.

conspicuous enjoyment of such leisure activities as gaming and horseracing was, literally, a God-given right. Industry was a virtue sanctioned by God and the state, and the divine duty of the labouring poor was to labour. "The Rules of Religion and the Rules of Industry do perfectly harmonise", opined (the early industrialist) Josiah Tucker, and "all things hurtful to the latter are indeed a violation of the former. In short, the same good Being who formed the religious system also formed the commercial".[29]

The balance could be tipped by straightforward economic considerations too. From the late seventeenth century the death-knell for most leisure pursuits in rural areas had been sounded by landowners maximising the economic utility of their property – or limiting access to it for their own gaming and leisure interests – through an Act of Enclosure.

THE ENCLOSURE ACTS

There are many examples of leisure practices that suffered from landowners' use of enclosure and their recourse to the courts to reinforce their rights over enclosed land. The rigour of the earliest private Enclosure Acts was reinforced by the Waltham Black Act, 1723 and several Gaming Acts, which between them had introduced murderously repressive legislation against poachers. Just 27 days had been needed for the Black Act to pass through all its Parliamentary stages, from first reading to Royal Assent, and at no time was there a debate on the proposals or a formal division on the legislation. Under section 1 of the Act, which had been precipitated by a surge in the incidence of deer poaching in Windsor and the other royal parks in the early 1720s, it became a capital offence for persons

> Armed with swords, fire-arms or other offensive weapons, and having his or their faces blacked, (to) appear in any forest, chase, park, paddock or grounds enclosed . . . wherein any deer have been or shall be usually kept. Or in any warren or place where hares or conies have been or shall be usually kept, or in any high road, open heath, common or down . . . shall unlawfully and wilfully hunt, wound, kill, destroy or steal any red or fallow deer, or unlawfully rob any warren . . . or shall unlawfully steal or take away any fish out of any river or pond.

One hundred years previously, Coke had condemned legislation which had contained similar provisions as an affront to the established principle that no-one should lose either life or limb for killing a wild beast,[30] but this savage Act heralded "the onset of the flood-tide of eighteenth century retributive justice".[31] The number of capital offences exploded from 50 at the time of its passing to over 200 by 1820. In an age when the power of Peers and gentry was little hindered by either the Monarch or the general populace, the gaming laws and Enclosure Acts were part of an arsenal of oppressive laws. Although intended for use against poachers, these laws decimated the leisure pursuits of the rural poor. It goes without saying that most of them escaped the scrutiny of a Parliament whose members had reason to question neither their merit nor their severity. Thus

> Sir William Meredith (MP) observed . . . that he once passed a committee room where only one member was holding a committee, with a clerk's boy, and he happened to hear

[29] Malcolmson, *op. cit.*, at p. 91.

[30] Sir Edward Coke, *Lawes of England* (London, John More).

[31] E. P. Thompson, *Whigs and Hunters* (Penguin, 1980), at p. 23.

> something of hanging. He immediately had the curiosity to ask what was going forward in that small committee that could merit such a punishment. He was answered that it was an enclosing bill, in which a great many poor people were concerned and who opposed it, that they feared these people would obstruct the execution of the Act. And therefore this clause was to make it a capital felony in anyone who did so.[32]

These laws prevented those people whose customary leisure pursuits had taken place on the downs, the common lands and the forests from accessing lands that were suddenly enclosed. In no small measure, enclosure was responsible for the demise of "common land and its privileges, restricting opportunities for ordinary folk to play games".[33]

The Black Act itself was used regularly (although not particularly frequently) against poachers in the twenty years after its enactment. Its deployment thereafter tended to be limited to situations where there had been aggravating circumstances, such as malicious shooting or the accompaniment of threatening letters.[34] The taking of "one for the pot" or the playing of games on enclosed land did not attract the severity of the law to the extent that it could have done, and there are several instances of humane judgments from members of the judiciary which illustrate that this was so. In *R.* v. *Davis*[35] for example, the court invoked the doctrine of implied repeal in respect of the Black Act's provisions on deer poaching. Here, the defendant faced two charges – stealing a deer and killing it – and had been charged with a capital offence under the Black Act rather than with an offence against a less severe provision. The court noted that the preamble to a later Land Act (16 George III (1775)) had stated that "the statutes in force for the discovery and punishment of deer-stealers are numerous, and ... ineffectual", and that this Act had specifically repealed the capital provisions on dear stealing contained in nine earlier Acts. It had replaced them with a maximum penalty of a £30 fine, except in those cases where the accused had been armed or disguised. The Black Act was not one of the statutes that had been expressly repealed in salient part, hence its use in the instant case. But the court resurrected Coke's philosophy and decided that the 1775 Act was the only appropriate legislation to use in any case where the aggravating circumstances were absent. A later statute (42 Geo. III, c. 107 (1801)) provided that the stealing or killing of any deer on enclosed land would be punishable by up to seven years' transportation, but there is no evidence that such punitive provisions in this Act were widely used either. Along with the 1775 Act and the Black Act, it was repealed in 1827 (7&8 Geo IV, c 27) and not replaced.

This decline in the use of capital statutes to deal with cases of poaching and other unauthorised activities occurring on enclosed land illustrates the complexities underpinning "bread and circuses" paternalism. A balancing act had to be struck between customary rights and land ownership, and the law had to be upheld. Enclosure's impact on the traditions and customs of rural life had been as devastating as its impact upon the economics of it, and not least upon "those self-governing and customary elements in the structure of the pre-capitalist village economy".[36] The capital provisions may have been removed, but the landowners' rights were sacrosanct and had to be upheld.

However, there were a few occasions when a legal challenge to an enclosing Act was mounted and the courts did not uphold the landowner's right to use his property as

[32] D. Hay, 'Property, Authority and the Criminal Law'. In Hay *et. al.* (eds.), *Albion's Fatal Tree* (Penguin, 1974), at p. 114.

[33] Birley, *op. cit.*, at p. 83.

[34] Thompson, *op. cit.*

[35] (1783) 1 Leach 271.

[36] Thompson, *op. cit.*, at p. 239.

he wished. In some cases, the existence of a customary right of access for purposes which were deemed to be of public benefit was regarded as grounds for rejecting the landowner's claim that he had the right to enclose land, or to prevent unauthorised access to land which had already been enclosed. In *Fitch* v. *Rawling*[37] the defendant's right to play cricket on enclosed land was upheld. Buller J. spoke approvingly of "the liberty and privilege of exercising and playing of all kinds of lawful games, sport and pastimes". He rejected the plaintiff's contention that customary rights should only be upheld as being for the public good if it could be shown that "the activities were for the recreation and health of the inhabitants". Lawful games and pastimes were *a priori* for the public good and such customs should be upheld, said the learned judge. In *Hall* v. *Nottingham*[38] a parishioner's customary right to enter recently enclosed land, erect a maypole and dance around it, "and to otherwise enjoy on the land any lawful and innocent recreation at any time of the year" was upheld. In reaching this decision the court was aware that its decision "might absolutely deprive the freeholder of the use of his land".[39]

But despite the occasional existence of these relatively enlightened attitudes to leisure, there were still limits to the extent to which the courts would give priority to these customary rights even if those seeking access to the land had been able to establish custom or long user. For instance, it seems that claims would not be upheld if they conferred a financial benefit upon those who sought to invoke them. In *Wickham* v. *Hawker*[40] a custom to engage in hawking and gaming was deemed to be a profit rather than a mere leisure pursuit and accordingly was not enforceable as a customary right. The same conclusion was reached on similar facts in *Bland* v. *Lipscombe*;[41] and in *Lancashire v. Hunt*[42] where an injunction to prevent the training of racehorses on enclosed land owned by another was upheld for the same reason. It appears that the courts' willingness to uphold leisure interests only took effect in cases where the custom at issue was solely a right to engage in leisure for leisure's sake. If continuation of the right would provide a financial benefit to those who wished to uphold it while depriving the landowner of *his* financial benefit, it would not attract judicial sympathy. In fact, so far as private Enclosure Acts and the gaming laws were concerned, it appears that the existence or otherwise of a financial benefit represented the boundary between 'lawful sports and pastimes' (as *per* section 22(1) of the 1965 Act) and those which were unlawful. The available evidence suggests that neither the severity of any violence used in the pursuit nor the degree of inconvenience to the landowner was a consideration. That remained the case until attempts to prohibit prize fighting resulted in recourse to the courts after about 1820. Even then, policing of the prizefight was precipitated by a fear of disorderly behaviour on the part of the crowd during times of social unrest rather than by any concern about the severity of the violence that was meted out by the protagonists.[43]

ACCESS TO LAND LAW

Of course, before one could argue the existence of a customary right before the courts, one had to have sufficient social and economic capital to have access to the privileged

[37] (1795) 126 E.R. 614.

[38] [1875] 1 Ex. D. 1.

[39] *Ibid.*

[40] (1840) 10 Law J. Rep. (NS) Exch. 153.

[41] (1855) 24 L.J. (Q.B.) 155.

[42] (1894) 10 T.L.R. 310.

[43] D. McArdle, "A Few Hard Cases? Sport, Sadomasochism and Public Policy in the English Courts" (1995) 10(2) *Canadian Journal of Law and Society* 109-117.

portals of the legal system. Historians accept that the extent to which individuals sought recourse to the law to challenge the effects of enclosure on their lives was limited, although they give different explanations for this absence of legal protest. Neeson believed "resistance occurred only in exceptional circumstances, where unusually large commons had been lost, where small absentee owners let their lands or where enclosure was forced through without due process".[44] The Hammonds[45] felt this limited legal resistance to enclosure reflected the realism of those who had been most adversely affected – the rural poor – who knew that legal opposition would be futile and prohibitively expensive. But whatever the reasons, it was undoubtedly the case that recourse to the law was rare indeed.

It also seems that illegal opposition in the form of threatening letters or disturbances had little effect too. There were isolated, sporadic outbreaks against individual enclosures, but nothing approaching a coherent, articulate protest against the lack of protection that was being accorded to leisure pursuits and other rural traditions. Neeson's work on opposition to Enclosure in Northamptonshire suggests that the best chance of successfully opposing an enclosure was through the efforts of "early local opposition, voiced when proponents of enclosure first mooted their plans".[46] Once an Enclosing Act had been passed very little could be done to prevent its implementation, although there were occasions when popular protests against such an Act were decidedly threatening. The passing of one particular Act prompted its opponents to advertise a two-day football match on the site, inviting "all gentleman gamesters and well-wishers to the cause now in hand . . . to appear at any of the publick (sic) houses in Haddon, where they will be joyfully received and kindly entertained". £1,500 worth of posts and rails were pulled up and burned in the orgy of destruction that followed.[47]

Other forms of protest included parliamentary counter-petitions that detailed the detrimental effects, both social and economic, enclosure would have on the locality. Neeson considers these to be "more useful as guides to what kinds of grievance were felt rather than measures of how much (opposition) there was".[48] And it goes without saying that those who had the financial and social capital to articulate their protests through counter-petitions were the ones who could even contemplate access to the courts if all else failed. The accuracy of Hay's condemnation of enclosure as "the private manipulation of the law by the wealthy and powerful – a ruling-class conspiracy in the most exact sense of the word"[49] appears to be indisputable.

CONCLUSION

Enclosure's detrimental impact on leisure pursuits was not limited to its effects on leisure among the rural populace. When the population of urban areas exploded during the industrial revolution, attempts were made to import some of those rural pursuits into the ever-expanding towns and cities. But sports had become synonymous with public disorder, drunkenness and licentious behaviour on the part of those who ought not to have had the time for such frivolities. Attitudes towards many aspects of popular culture had hardened; customs which had once been tolerated were questioned

[44] J. Neeson, "The Opponents of Enclosure in Eighteenth-century Northamptonshire" (1984) 105 *Past and Present* 114–139, at p. 114.

[45] B. Hammond and J. Hammond, *The Village Labourer*, (London Press, 1911).

[46] Neeson, *op. cit.*, at p. 117.

[47] *Ibid.*

[48] Neeson, *op. cit.*, at p. 125.

[49] Hay, *op. cit.*, at p. 52.

and condemned. This hostility certainly helped prevent "animal sports" (dog-fighting, cock-fighting, bull-baiting and badger-baiting) from prevailing in the towns and there was a similar decline in the tolerance of mass-participation football and other games that had at least managed to gain some semblance of an urban foothold.[50] As early as 1757 one London magistrate had spoken sympathetically of rural pursuits as "laudable trials of manhood, to the improvement of English courage. ... But in [London], diversions calculated to slacken the industry of the useful hands are innumerable".[51]

Social and religious probity, urbanisation and the enclosure movement all contributed to the demise of the leisure pursuits of the rural poor in the seventeenth and eighteenth centuries. Not until the involvement of the public schools, the social reformers and the Muscular Christians did any of these pursuits re-entered the realms of respectable society. Boxing and "modern" football became acceptable because of their association with the Corinthian ideal and the public school ethos. They could be distinguished from prize fighting and mass-participation football, which had the potential to incite civil disorder and disobedience; but there was no way back for most animal sports.

"The passing of Gin Lane, Tyburn Fair, orgiastic drunkenness, animal sexuality and mortal combat for prize money in iron-studded clogs calls for no lament".[52] But however squeamish contemporary society may be about some of these pursuits, it should be remembered that pursuits like fox hunting thrived as a consequence of the enclosure movement while less offensive ones were policed out of existence. That this state of affairs arose, and continues to exist, is due solely to the different degrees of social and economic capital enjoyed by those who ordinarily participated in such pursuits. "The regulation of leisure increasingly meant the 'disciplining' and 'policing' – in a Foucauldian sense – of working class culture in such a way that 'respectable' and 'rough' became dividing, and divisive, categories for control of the working class population".[53] The civilised sports (as Elias would have it) became "the fulcrum of 'masculinity', promoting the cohesiveness of the team effort and the sanctity of 'fair play' in creative tension with the ideology of competition".[54] The uncivilised ones died.

One might suggest that football was able to establish itself as *the* sport of the "civilised" urbanised, working-class man because it filled a gap that had been created by the changes to the political and economic landscape – changes that the enclosure movement and the industrial revolution had heralded. "For those who remembered older, rural forms of sport, [football] helped to fill the passing of the often violent and disorderly festivals and traditions which were difficult to import into city life".[55] Perhaps that is straying too far from the point, but in any event and whatever the sociological and historical complexities may be, it is evident that Lord Hoffmann's understanding of private Enclosure Acts as measures which somehow contributed to the protection of ordinary peoples' leisure pursuits, is flawed.

[50] D. Russell, *Football and the English* (Carnegie Publishing, 1997).

[51] Malcolmson, *op. cit.*, at p. 161.

[52] Thompson, *op. cit.*, at p. 451.

[53] S. Redhead, *Unpopular Cultures. The Birth of Law and Popular Culture* (Manchester University Press, 1995), at p. 42,3.

[54] J. Williams and J. Taylor, "Boys Keep Swinging" in Stanko and Newburn, (eds.), *Just Boys Doing Business* (Routledge, 1994), at p. 216.

[55] *Ibid.*

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CASE NOTES

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

CONTINUED CONFUSION OVER EMPLOYEE STATUS

Carmichael and Another v. *National Power plc.* 1 W.L.R. 2042 (H.L.)
(Lords Irvine L.C., Goff, Jauncey, Browne-Wilkinson and Hoffmann)

INTRODUCTION

The House of Lords judgment in *Carmichael* is yet another in a long line of cases seeking to determine by mechanical or judicial means a method of deciding whether, in a particular set of circumstances, a worker is an employee *i.e.* employed under a contract of service, or self-employed *i.e.* working under a contract for services.

Mrs Carmichael and Mrs Leese worked at Blyth Power Stations as guides, escorting parties of visitors on tours, on a "casual as required" basis. They worked up to 25 hours *per* week, their salary which was regulated by collective agreement was paid net of income tax and national insurance deductions, they were provided with company uniforms and, on occasion, with a company motor vehicle. When the CEGB was floated on the stock market Mrs Carmichael and Mrs Leese were permitted – along with all employees – to apply for shares. They were not, however, entitled to sick pay, holiday pay or inclusion in the company pension scheme. They complained to a tribunal that they had not been given a statutory statement required to be issued to all employees under what is now section 1 of the Employment Rights Act 1996 within two months of the start of employment. Both the tribunal and the Employment Appeal Tribunal found that they were not employees as the requirement of mutuality of obligation was not satisfied within their relationship with National Power. However, the Court of Appeal[1] by a majority decision allowed their appeal. The court held that as a question of law the documentation provided to the appellants did constitute a contract of employment, and further, that the test of mutuality of obligation should include an element of reasonableness, and that the test in this case was satisfied. The House of Lords upheld National Power's appeal.

CARMICHAEL IN THE HOUSE OF LORDS

Their Lordships employed the test of mutuality of obligation.[2] The test turns on whether the company is obliged to provide work, and, if so, whether the worker is

[1] [1998] I.R.L.R. 30.

[2] See the use of this test in *e.g. O'Kelly v Trusthouse Forte plc.* [1983] I.R.L.R. 369 (C.A.).

obliged to accept the work offered. This, and the earlier cases give rise to such issues as the application of the test of mutuality of obligation; whether the test should be modified to include an element of reasonableness; whether, and when, the interpretation of documents may become a matter of law rather than of fact; and if, and when, a "global" or "umbrella" contract may either be found or implied. What the courts have apparently not considered, however, is the much more fundamental question of why it is necessary to continuously address the issue of employee status in this *ad hoc* manner; although since the question has been debated through the courts for more than 100 years, perhaps the cynical answer is "tradition". Certainly, the issue of employee status has become employment law's own *Jarndyce* v. *Jarndyce*.[3]

THE ISSUES

Over the years a number of tests for employment status have been propounded, developed, applied and, in the main, discarded. Many aspects of these tests may still be found in the reasoning of the courts in contemporary cases concerning employment status; issues such as the right to control the worker and whether the worker supplies his own equipment. In most scenarios identifying a worker's status when the worker is actually working for a company, should present very little problem to any court.

In 1969, in the case of *Market Investigations* v. *Minister of Social Security*,[4] Cooke J. posed the essential question regarding employee status: is the worker in business on his own account? If so he is self-employed; if not he is an employee. In answering the question it is, of course, necessary to consider all the particular factors of the individual case. This multiple test approach has been used on a number of occasions since, and was specifically approved by the Privy Council in the case of *Lee* v. *Chung and Shun Sing Construction and Engineering Co Ltd.*[5]

Although the *Market Investigations* approach works well in most cases (it would, for example, differentiate between a chauffeur and a taxi driver and between a shop assistant and a market stall holder) the courts have felt it necessary, particularly when dealing with atypical workers, to develop other tests and look for ongoing global or umbrella contracts. This search for global contracts in the cases of atypical workers (for example, casual workers, agency workers, home workers), has proved, in terms of case law, to be inconclusive and unsatisfactory. Perhaps the first question to be asked is why have the courts found it necessary to identify or imply such a relationship?

In *Carmichael*, for example, there should be no doubt that during periods of work Mrs. Carmichael was an employee. Outside these periods, however, Mrs. Carmichael was clearly not actually working for National Power, therefore any contract existing between the parties was not so much a contract of employment as an arrangement agreeing to offer and accept future individual contracts of employment.

One would perhaps think that common sense would make it clear that a casual worker who works irregular periods for a company is not that company's employee during the, possibly lengthy, periods when no work is being undertaken. Indeed, during these periods the worker may well be working elsewhere as either an employee or self-employed contractor, or even registering as unemployed and claiming a state benefit. Not only is identifying a global contract and imposing a liability on a company in such circumstances unfair, it is arguably unnecessary.

[3] See C. Dickins, *Bleak House*.

[4] [1969] 2 Q.B. 173.

[5] [1990] I.R.L.R. 236 (P.C.).

It is worth considering why the question of global contracts has become so important. Employment status must be decided for a number of reasons: it affects the schedule of income tax; it is vital to issues of vicarious liability; and employee status is a prerequisite for many of the employment rights contained in statute, particularly redundancy payments and unfair dismissal compensation. However, although clarification of employment status is necessary, it is arguable that a finding of a global contract is not.

AREAS OF SIGNIFICANCE IN EMPLOYMENT STATUS

Income Tax

The Inland Revenue has the right to demand deduction of personal income tax from all employees according to Schedule E,[6] whereas the self-employed are liable for a different rate of tax under Schedule D.[7] Tax is of course only paid on emoluments actually arising from the employment. It is not necessary to consider the status of the worker for any period of time during which no work is done and no payment is made. In other words, there is no necessity in terms of tax deduction to seek to identify a global or umbrella contract.

Vicarious Liability

Since the employer may only be liable for the actions of his employee carried out during the course of the worker's employment, the finding of a global or umbrella contract is irrelevant. As long as it is possible to find employment status during periods of actual work, the issue of vicarious liability will be settled. An employer will not be liable for the actions of an employee during periods of holiday, sickness or other absences. Consequently the question of global contracts should not arise. It is possible that a slight anomaly may be perceived in such cases as *Chief Constable of the Lincolnshire Police* v. *Stubbs*[8] where the police authority was found to be liable for the sexual harassment actions of an off-duty police officer, but the case may be explained on its facts; the actions took place during an event organized by the employer and the definition of "course of employment" in cases of health and safety and discrimination is wider than the definition applied to general tortious situations.[9] Again, therefore, a finding of any global contract is unnecessary.

Employment Rights

Entitlement to redundancy payments requires the employee to show a period of two years continuous service, and to apply to a tribunal for a finding of unfair dismissal the applicant must have been continuously employed for a period of one year. It is usually in order to satisfy these requirements that the courts have been asked to find a global or umbrella contract, particularly when faced with actions brought by casual or other atypical workers. In the case of *Airfix Footwear Ltd.* v. *Cope,*[10] concerning the employment status of outworkers, a global contract of employment was found by the Employment Appeal Tribunal based upon a continuing relationship between the parties

[6] Income and Corporation Taxes Act, 1988, s. 19.

[7] *Ibid.*, s. 18.

[8] [1999] I.R.L.R. 81 (E.A.T.).

[9] *Jones* v. *Tower Boot Co Ltd* [1997] I.R.L.R 168 (C.A.). *Cf. Irving* v. *Post Office* [1987] I.R.L.R. 289 (C.A.).

[10] [1978] I.R.L.R. 396 (E.A.T.).

of offering and accepting work regularly over a period of years. Again, in the outworker case of *Nethermere (St. Neots)* v. *Taverna and Gardiner*[11] an overall contract of employment was identified by the Court of Appeal, for similar reasons.

However, in *Carmichael* the House of Lords has approached a rather similar situation in a different way. As Lord Irvine stated: "...the documents provided no more than a framework for *ad hoc* contracts of service or services which Mrs Leese and Mrs Carmichael might make with the CEGB in the future".[12] This approach may be extended to cover both written and verbal agreements which may or may not be contracts, but which are certainly not in themselves contracts of employment, regardless of how they are worded, headed, or even understood by the parties.

Once it is accepted that only periods of actual work will count towards continuity of employment, the issue of whether an atypical worker has sufficient service for particular employment rights can then be addressed.

Continuity of Employment

Within a contract of employment continuity is protected by statute[13] and includes situations in which the terms of the contract may change, including changes to the place of work or even the job function.

Outside the contract of employment, up to 26 weeks of absence through sickness will not break continuity, neither will a temporary cessation of work, nor a situation whereby absences are not regarded as breaking continuity through custom or arrangement.[14] In such situations the courts have adopted different approaches depending upon the facts, as shown in the following examples.

In *Ford* v. *Warwickshire County Council*[15] the House of Lords held that in the case of a lecturer employed on a series of contracts from September to July each year, continuity was preserved, even though no actual contract subsisted between July and September. In *Flack* v. *Kodak Ltd.*[16] due to fluctuating seasonal demands, casual workers taken on and laid off on a number of occasions over several years were still held to have continuity of employment. In deciding whether the gaps in the employment were sufficient to break continuity, the court in *Ford* adopted a mathematical approach, comparing the duration of the gap with the duration of the work periods on either side of it. The approach in *Flack* was rather different in that the court there adopted a more general, "broad brush" approach, looking at the overall total period of the relationship.

These two very different approaches were reconciled by the Employment Appeal Tribunal in the case of *Sillars* v. *Charrington Fuels Ltd.*[17] when they suggested that the approach in *Ford* should be used when periods of work and breaks followed a regular pattern, whereas when there was no regular pattern the approach in *Flack* was to be preferred.

However, the courts have not shown consistency when considering continuity of employment. In the recent case of *Booth* v. *United States of America*[18] the Employment Appeal Tribunal stated that: "If, by so arranging their affairs, an employer is lawfully able to employ people in such a manner that the employees cannot complain of unfair

[11] [1984] I.R.L.R. 240 (C.A.).
[12] [1999] 1 W.L.R. 2042, at 2046.
[13] Employment Rights Act, 1996, s. 212(1).
[14] Employment Rights Act, 1996, s. 212(3).
[15] [1983] I.R.L.R 126 (H.L.).
[16] [1986] I.C.R. 775 (C.A.).
[17] [1988] I.C.R. 505 (E.A.T.).
[18] [1999] I.R.L.R 16 (E.A.T.).

dismissal or seek a redundancy payment, that is a matter for him".[19] Since the appellants in this case had been employed under a series of contracts of employment, each of up to 23 months in duration[20] with a gap between them of usually only two or three weeks, the adoption of such a position by the court is surely not only contrary to any purposive approach, but, since the arrangement was patently designed to avoid the provisions of statutory employment rights, it may also be contrary to section 203(1) of the Employment Rights Act, 1996.[21] Furthermore, reasoning along these lines by the court suggests that the doctrine of equity has little part to play in this area of employment law.

It may be thought that in practice there is little difference between applying a mutuality of obligation test and seeking to show continuity of employment. If there is mutuality of obligation between the parties over a given period of time then it is open to, indeed apparently required of, a court to find that a contract of employment exists. The difference between the two approaches here becomes apparent, in that if full mutuality of obligation in a contractual, rather than a moral, sense has to exist, then virtually all casual workers will be held not to have an ongoing contract. It will then presumably be necessary to apply case law to decide whether the gaps in their employment actually break continuity of employment. In other words, the test of mutuality of obligation is a test to determine whether a contract is in force between the parties during periods of no work, rather than whether the arrangement in force constitutes a contract of employment. For example, arrangements between businesses, of whatever size, may consist of a contractual obligation to provide and undertake duties, services or work for each other on a periodic or spasmodic basis. Such arrangements may well satisfy the test of mutuality of obligation, but would obviously not in such circumstances constitute a contract of employment. Mutuality of obligation therefore should surely be nothing more than a factor in determining continuity of employment; and, bearing in mind that continuity of employment is adequately covered by statute, an unnecessary factor at that.

The Court of Appeal in *Carmichael*[22] laid down a four stage approach in the determining of employee status. First, was there an agreement between the parties? Secondly, what were the terms, express and implied, of that agreement? Thirdly, did that agreement constitute a contractually binding relationship between the parties? Finally, was that contractually binding relationship a contract of employment? The issue of mutuality of obligation was considered by the Court of Appeal as the deciding factor in answering the final question, that is, in deciding whether the contract was a contract of employment.

On the one hand, it is unlikely that the House of Lords has rejected this four stage approach, which as far as it goes, is fully in line with statute,[23] yet Lord Irvine seems to have used the issue of mutuality of obligation for a different purpose, to disprove the existence of a contract of any sort. The application of a test of mutuality of contractual obligation cannot surely be applied to both prove that a contract exists and that the contract is one of employment, since the very nature of any bilateral contract is that it imposes mutuality of obligation on the parties. It would therefore appear that whilst the four stage approach of the Court of Appeal is correct, the issue of mutuality

[19] [1999] I.R.L.R. 16, at 18.

[20] This was at the time that the qualifying period for bringing an unfair dismissal claim was two years.

[21] This provides that any provision in an agreement will be void in so far as it purports to exclude or limit the operation of any provisions in the Act or precludes a person from bringing proceedings under the Act.

[22] [1998] I.R.L.R. 301 (C.A.).

[23] Employment Rights Act 1996 s.230.

of obligation is to be considered not at stage four, nor even at stage three as apparently implied by the House of Lords, but at stage two as an express or implied term of the agreement. It seems that the courts are thus, to paraphrase the late Eric Morecambe, asking all the right questions, but not necessarily in the right order.

Perhaps a better approach to *all* questions of employment status would be to ask:

(i) During periods of work, does an agreement exist between the parties? This is a question of fact. If so:

(ii) What are the terms, both express and implied, of that agreement? Again a question of fact. At this stage the court may consider such issues as whether there exists mutuality of obligation.

(iii) Does the agreement constitute a contract between the parties? This is a question of law. If so:

(iv) Does the contract constitute a contract of employment? According to the Court of Appeal in *O'Kelly* v. *Trust House Forte plc.*[24] (perhaps surprisingly), this is a question of law. Here the fundamental question is whether the worker is in business on his own account, and in addressing this question issues such as whether the worker is permitted to provide a substitute to cover for him from time to time may be considered:

(v) Having determined the periods within which a contract of employment exists, issues concerning income tax, vicarious liability, health and safety etc. can then be determined:

(vi) If the issue relates to employment rights such as redundancy or unfair dismissal for which a qualifying period is necessary, the final stage is to decide whether the periods of employment, along with any gaps contained within them, constitute sufficient continuity of employment to enable the applicant to proceed.

Application of this approach or test produces fair and consistent outcomes when applied to previous cases. It also overcomes the perceived problems of the "fact or law" debate which at times has restricted appellate courts from involving themselves in decisions made by tribunals without having to rely on *dicta* from *Edwards* v. *Bairstow*[25]

Although many may feel that employment law already contains too many multi-stage tests and formulae, it is submitted that the inclusion of one more is a small price to pay in order to impose some consistency and certainty into what is the most basic and fundamental of questions: who is an employee?

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[24] *O'Kelly* v. *Trust House Forte plc* [1983] I.R.L.R 369 (CA).

[25] [1956] A.C. 14 (H.L).

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A "STATUTORY" APPROACH TO REDUNDANCY

Murray and Another (A.P.) v. *Foyle Meats Ltd. (Northern Ireland)* [1993] 3 All E.R.769 (H.L.) (Lords Irvine L.C., Jauncey, Slynn, Hoffmann and Clyde)

INTRODUCTION

The recent house of Lords decision in *Murray* should now bring to an end the controversy that has existed for a number of years concerning the interpretation of section 139 of the Employment Rights Act, 1996. The case actually concerned the wording of section 11(2)(b) of the Contracts of Employment and Redundancy Payments Act (Northern Ireland), 1965 but the wording corresponds to section 139 of the Employment Rights Act 1996.

Mr Murray was employed in the slaughter hall of the respondent's meat processing plant as a "meat plant operative", a general term used to cover workers in various different areas of the factory. For business reasons the company decided to reorganise the slaughter hall, resulting in a number of redundancies from amongst those employees working in the slaughter hall, Mr Murray being one of them. He complained to an Employment Tribunal that his dismissal was unfair, contending that since both his contract and job title could require him to work anywhere within the factory, rather than specifically within the slaughter hall, it was unfair to select for redundancy only from within the slaughter hall. The employer argued that since the requirements of the business for employees to carry out work within the slaughter hall had diminished, and in fact Mr Murray had worked almost exclusively within the slaughter house, Mr Murray's dismissal was for reasons of redundancy.

Section 139(1)(b) states that:

> . . .an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –
>
> (a) the fact that his employer has ceased or intends to cease –
>
> (i) to carry on the business for the purposes of which the employee was employed by him, or
>
> (ii) to carry on that business in the place where the employee was so employed, or
>
> (b) the fact that the requirements of that business –
>
> (i) for employees to carry out work of a particular kind, or
>
> (ii) for employees to carry out work of a particular kind in the place where the employee was so employed by the employer, have ceased or diminished or are expected to cease or diminish.

BACKGROUND

Although section 139(1)(a) has generally caused the courts few problems, the same cannot be said of section 139(1)(b). Two often overlapping issues have been addressed by the courts in the application of sub-section (b): what is meant by "work of a

particular kind", and what is meant by "in the place where the employee was employed"? In seeking to answer these questions, the courts have developed a number of tests. The first of these, the "contract" test, was developed in the two *Nelson* v. *BBC*[1] cases, and examines the actual contract of employment in order to determine the range or scope of the work which the employee was contractually obliged in his employment to undertake, in order to decide whether section 139(1)(b)(i) or (ii) has been satisfied. The second test, the "function" test requires the court to consider only what in practice the employee's job function has been; in other words, what the employee has actually been doing, rather than what he could contractually have been required to do. This was hinted at in the decision in from *Cowen* v. *Haden Ltd.*,[2] but the Court of Appeal felt obliged to follow the authority of the *Nelson* cases. In the later case of *Safeway Stores* v. *Burrell*[3] a third approach was used, a "statutory" test which asks three questions:

(i) Was the employee dismissed?

(ii) If so, was there a diminution or cessation in the requirements of the employer's business for employees (not *the* employee) to carry out work of a particular kind, or an expectation of such in the future?

(iii) If so, was the dismissal of the employee caused wholly or mainly by that state of affairs?

Not surprisingly, application of these very different tests has produced at times contradictory results. Further complications arise when the issue of a mobility clause within the contract arises; for example, in the case of *High Table* v. *Horst*[4] it was argued before the court that the inclusion of a mobility clause within the contract meant that, when applying the "contract" test, the employee's place of work was anywhere that she could have been contractually obliged to work, whereas application of the "function" test would have restricted her place of work to the actual single location at which she had worked. An application, however, of the "statutory" test would have made little difference to the employee on the given facts. What the "statutory" test does allow for, however, is the principle of transferred redundancy known as "bumping". In a bumped redundancy it is very possible that the dismissed employee will find that his job still exists, but is now filled by another employee who has himself been transferred rather than made redundant when his original job disappeared through a redundancy situation.

This whole issue was considered in some depth by Morison J. in the case of *Church* v. *West Lancashire NHS Trust*[5] and although the decision in this case may no longer be relied upon following *Murray*, much of the argument still appears sound. His main area of concern was that the judgment in *Safeway*, which had been generally well received as ending the conflict between the "contract" and "function" tests, failed to give any weight to the words "work of a particular kind". Certainly, if *Safeway* and its "statutory" test were to be followed, virtually any dismissal following a down-turn in a company's business may be labeled "redundancy", with the consequence being that (assuming the company followed the guidelines laid out in *Williams* v. *Compair*

[1] *Nelson v. British Broadcasting Corporation* [1977] I.C.R. 649 (C.A.), and *Nelson v. British Broadcasting Corporation (No. 2)* [1980] I.C.R. 110 (C.A.).

[2] [1983] I.C.R. 1 (C.A.).

[3] [1997] I.C.R. 523 (E.A.T.).

[4] [1998] I.C.R. 409 (C.A.).

[5] [1997] I.C.R 423 (E.A.T.).

Maxam[6]) the dismissed employee may have no claim for unfair dismissal. Some support for the *Safeway* approach may be found by reference to the speech in the House of Commons of the then Minister of Labour, Ray Gunter, during the second reading of the Redundancy Payments Bill in 1965 – the wording of the legislation has remained constant through to the present s.139 – where he stated:

> The definition of redundancy is contained in Clause 1. What it amounts to is that the employer is required to make a redundancy payment where a worker is dismissed because the work on which he was employed has disappeared. It makes no difference what the reason for this is – whether it is due to a change in the methods of production, or a fall in demand for the product; whether to the complete closure of the establishment or its transfer to another location.[7]

The support for *Safeway* is in the words "it makes no difference what the reason for this is"; thus any dismissal brought about by a "redundancy situation" would be a potentially fair reason for dismissal.[8] Arguably, an alternative view would be to consider the words in Ray Gunter's speech, ". . .because the work on which he was employed has disappeared" as meaning that the work which has disappeared must be of a particular kind as done by the employee. This argument, however, runs the risk of becoming sterile; it appears doubtful that the true intentions of Parliament may be ascertained from any of the available documentation, if indeed this particular issue was ever considered. However, adopting a more contextual approach, Morison J. makes the point in *Church*, with reference to *Harvey*,[9] that at the time of the introduction of the original legislation no other statutory dismissal compensation was available to an employee, consequently it was usually the employee who wished to prove redundancy; whereas today it is usually the employer who seeks to prove redundancy as a generally much less expensive alternative to unfair dismissal compensation.

That said, the judgment in *Church* sought to draw artificial and unsustainable distinctions between a dismissal caused by a redundancy situation and a dismissal caused by the methods adopted by an employer in seeking to deal with a redundancy situation; consequently, following the House of Lords judgment in *Murray*, its passing need not be mourned.

THE HOUSE OF LORDS IN MURRAY

Their Lordships adopted a statutory approach to section 139, approving the reasoning in *Safeway*, thus impliedly doubting *Church*. Both the "contract" test and the "function" test were said by Lord Irvine to "miss the point", in that the key word in the legislation is "attributable"; therefore if a dismissal is brought about, as a question of causation, by a diminution in the requirements of the business for employees, the resulting dismissal will be for redundancy. Thus Mr Murray's dismissal was for the potentially fair reason of redundancy.

Two speeches were delivered by their Lordships, the leading one by Lord Irvine and a second by Lord Clyde. Two other members of the court, Lords Jauncey and Hoffmann agreed with both opinions. The final member of the court, Lord Slynn, agreed only with Lord Irvine, and made no mention of Lord Clyde's speech. This may

[6] [1981] I.C.R. 156 (E.A.T.).

[7] H.C. Deb. vol. 711, col. 38, 26 April 1965.

[8] Employment Rights Act, 1996, s. 98(2)(c).

[9] *Harvey on Industrial Relations and Employment Law*, (Butterworths) vol. 1, para. [E/21].

be of no significance, but since Lord Slynn is perhaps the most experienced employment lawyer in the House of Lords it is worth examining Lord Clyde's speech to consider whether it contains elements not found in Lord Irvine's and with which Lord Slynn may have disagreed. Lord Clyde, whilst warning against the use of various tests, particularly the "contract" test, did state that:

> That is not to say that the provisions of the contracts of employment are necessarily irrelevant; in some circumstances they may be useful, for example in throwing light on the kinds of work carried out or the place of employment. But the contractual terms are not determinative of the application of the subsection.[10]

Perhaps this suggests that Lord Clyde was not entirely comfortable with the purely "causation-based" approach adopted by Lord Irvine. In any event, it must be accepted that application of the "contract" test and the "function" test has bred both confusion and uncertainty, allowing courts to choose which approach to take. Consequently, the decision in *Murray* is most welcome in that it introduces consistency into this area of employment law. It does, of course, remain to be seen how widely, or perhaps loosely the word "attributable" will be interpreted in future. To take, perhaps, an extreme example, suppose a company employed ten workers, five making nuts and five making bolts. Due to a downturn in the demand for nuts, the company needed to make one worker redundant, and chose to respond to the situation by dismissing one bolt maker. According to *Murray*, that dismissal may be for reasons of redundancy, and not merely on the grounds of "bumping" or transferred redundancy. However, according to either the "contract" test or the "function" test the potentially fair reason of redundancy would not be the reason for the dismissal – leading presumably to a claim for unfair dismissal compensation. If *Murray* has the effect of making redundancy easier to prove for the employer, it will also, of course, make unfair dismissal harder to prove for the employee by broadening the scope of one of the five potentially fair reasons for dismissal. There are many who would not view such a development with enthusiasm.

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[10] *Op. cit.* at p. 774.

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THE FALL OF HUMPTY-DUMPTY'S WALL: PUTTING NEGLIGENCE TOGETHER AGAIN

David John Ord v. *Robert Andrew Upton (trustee to the property of David John Ord)* *The Times*, 11 January 2000 (C.A.) (Kennedy, Aldous and Mantell L.JJ.)

INTRODUCTION

The cause of action as a concept still exerts influence in two principal contexts, that of limitation of actions, and that of *res judicata*. In the limitation context, one asks in quite broad terms whether the relevant factual situation was actionable more than three, six or twelve years previously, according to the type of action.[1] In the *res judicata* context one asks whether the cause of action had been finally determined by a previous action, so that a subsequent action should not be allowed. It is a well settled rule of law that damages resulting from one and the same cause of action must be assessed and recovered once and for all.[2] It therefore remains of central importance for courts to understand what is meant by the term "cause of action".

In *Letang* v. *Cooper*, Diplock L.J. stated that "a cause of action is simply a factual situation which entitles one party to obtain from the Court a remedy against another person".[3] Where, however, the cause of action is in negligence, there is scope for some complexity. To the lay person negligence is a description of a careless form of behaviour. To the lawyer this is only part of the story. For the cause of action to exist there must be proof not only of behaviour, but proof also of damage and proof that the damage was caused by the behaviour. There must also be a recognised or recognisable duty in law. As Lord Macmillan put it in *Donoghue* v. *Stevenson*: "The law takes no cognizance of carelessness in the abstract. It concerns itself with carelessness only where there is a duty to take care and where failure in that duty has caused damage".[4] Leaving aside the duty ingredient, we are left with three chronological stages (carelessness, causation and consequence) which together comprise the factual situation and so raise the cause of action in negligence. Divergence, even at one only of these stages, from case to case, represents a potential challenge to the homogeneity of the cause of action in negligence.

FRACTURING THE "CAUSE OF ACTION"

Suppose that the same behaviour by the same process causes different forms of damage, as where a negligently driven car hits another car, causing property damage to the latter and personal injury to its driver. The orthodox view is that the personal injury and property damage give rise to two *different* causes of action.[5] Suppose next that the same behaviour by different processes causes the same form of damage, as where negligent underground tunnelling causes property damage by vibration and subsidence. It has only very recently been confirmed that such variety in process need not disturb the homogeneity of the cause of action in negligence.[6] Less surprising,

[1] In accordance with the Limitation Act, 1980, Part I.

[2] See *Brunsden* v. *Humphrey* (1884) Q.B. 141; County Courts Act 1984.

[3] [1965] 1 Q.B. 232, at 242.

[4] [1932] A.C. 562, at 618.

[5] This was the view of the majority in *Brunsden* v. *Humphrey*, n. 2 *supra*, and has been approved in a number of later cases, *e.g. Derrick* v. *Williams* [1929] 2 K.B. 559; *The Oropesa* [1943] P. 32; *Taylor* v. *O'Wray* [1971] 1 Lloyd's Rep. 497.

[6] *Stock* v. *London Underground Ltd.*, *The Times*, 13 August 1999.

perhaps, would be distinctions between causes of action based solely upon differences in the initial careless behaviour (where the process and resulting damage is the same). But, again, how distinct must the instances of careless behaviour be in order to found distinct causes of action? Suppose, for instance, that A is careless in his choice of building materials and the following month is careless in his choice of tools. One month later B uses the materials and tools to build a house, which falls down on account of A's mistakes. Is there just one cause of action against A? What if the limitation period fell between the two mistakes?

PUTTING THE "CAUSE OF ACTION" TOGETHER AGAIN

In the face of such potential fracture lines, a number of recent cases (most recently *Ord* v. *Upton*) have sought to emphasise the essential homogeneity of the cause of action in negligence. Thus in *Stock* v. *London Underground Ltd.*, Pill L.J. held that:

> In determining whether there is a single cause of action, or more than one cause of action, the fact that the physical damage complained of was all caused by the same breach of duty, negligent tunnelling, is in my view, a very important factor and in this case, no real distinction can be drawn between the mechanisms by which the different acts of physical damage were caused.[7]

In *Bovis Construction (South Eastern) Ltd.* v. *Greater London Council*, Oliver L.J. stated that:

> the phrase 'cause of action' . . . falls to be read in a broad sense and as embracing an identifiable monetary claim which the plaintiff has sought to advance even though it may consist of a number of 'causes of action' in the sense of elements which, individually, may involve the proof of different facts not applicable to other elements of the same claim.[8]

The same theme was taken up by Saville L.J. in the Court of Appeal in *The Nicholas H*,[9] where his Lordship stated that the substantive law of negligence should be uniformly applied regardless of the ultimate form of the damage:

> Whatever the nature of the loss sustained, the court approaches the question in the same way. There is good reason for this. The remedy the law affords in both cases (if a duty of care exists and is broken) is by way of financial compensation. If the loss or damage can be measured in both cases in money terms, why should there be any difference in principle between the two situations?[10]

THE FACTS

In about 1981 Mr Ord started to work as a labourer. In 1988 he developed back pain and in 1990 he underwent a successful micro-discectomy. By the summer of 1991 he again suffered back pain and consulted Dr Wadehra. On 14 September 1995 Mr Ord was adjudged bankrupt and Mr Upton was appointed as his trustee in bankruptcy with effect from 16 October 1996. Mr Ord was discharged from his bankruptcy on 15 September 1997. On 17 February 1997 Mr Ord issued a writ of summons against

[7] *Ibid.* (Transcript: Smith Bernal).

[8] (1985) 9 Con. L.R. 1, at 16.

[9] *Marc Rich & Co.* v. *Bishop Rock Marine Co. Ltd.* [1994] 3 All E.R. 686. (The decision of the Court of Appeal was subsequently upheld in the House of Lords [1996] 1 A.C. 211).

[10] *Ibid.*, at 691d-e.

Dr Wadehra and the Newcastle Health Authority claiming damages for personal injury occasioned to him by reason of their alleged negligence. By consent the action against the Newcastle Health Authority was discontinued; but the proceedings against Dr Wadehra continued, and liability was ultimately accepted. The medical negligence claim was substantial, comprising over £170,000 for loss of past earnings and interest thereon amounting to just over £45,000. His claim for future loss exceeded £730,000. In addition there was his general damages claim for pain and suffering.

The trustee claimed to be entitled to the damages for financial loss up to the period of Mr Ord's discharge from bankruptcy, but Mr Ord argued that no part of the cause of action in negligence vested in his estate on bankruptcy. He applied to the court (under section 303 of the Insolvency Act 1986) for guidance as to (amongst other things) whether any part of his damages claim vested in the trustee. At first instance His Honour Judge Behrens concluded, by his order of 11 May 1999, that Mr Ord's cause of action constituted property (a *chose in action*). That part representing the claim for loss of earnings in respect of the period of bankruptcy was held to vest in the trustee, and the claim for pain and suffering, loss of amenity, loss of mobility and all losses after the date of discharge from bankruptcy, continued to vest in Mr Ord.

The judge appeared, therefore to have created something of a paradox in terms of property law. He recognised that the negligence action (taken as a whole) was a single item of property (a *chose in action*), but nevertheless decided that part of this should vest in Mr Ord and part in the trustee in bankruptcy. In theory, therefore, his judgment would have resulted in some form of partition of the *chose in action*. The trustee supported the conclusion reached by the judge, but Mr Ord appealed. He contended that no part of the *chose in action* should be treated as having vested in his bankrupt estate, and that the trustee was not entitled to any part of the damages that would be recovered from the medical negligence action.

THE APPEAL

In dismissing the appeal, the Court of Appeal[11] held that the entire cause of action in negligence would in fact vest in the trustee in bankruptcy, but that the latter would be obliged to hold certain heads of damage (including damages for pain and suffering, and loss of earnings beyond the period of bankruptcy) on constructive trust for Mr Ord. Central to the appeal was the question whether property within the bankrupt's estate would include (for the purposes of sections 283 and 306 of the 1986 Act) the cause of action in negligence. Section 436 of the Act lists property to include:

> money, goods, things in action, land and every description of property wherever situated and also obligations and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property; . . .

Aldous L.J. accepted that Mr Ord's claim for negligence was a "thing in action" within that definition and therefore would *prima facie* appear to vest in the trustee. However, his Lordship acknowledged that there are certain actions which do not vest in the trustee. These include actions, such as actions for defamation and assault, where

[11] The unanimous judgment of the Court was delivered by Aldous L.J. References are to the Smith Bernal transcript.

"the damages are to be estimated by immediate reference to pain felt by the bankrupt in respect of his body, mind, or character, and without immediate reference to his rights of property".[12]

This exception has led to some odd results. His Lordship gave the example of a bankrupt who has in his bank a sum which includes money paid as damages for a libel. That sum would vest in his trustee. In contrast, where an action personal to the bankrupt, such as a libel action, was not settled before the end of the bankruptcy the cause of action would remain with the bankrupt, as would any damages awarded after discharge. Mr Ord's counsel submitted that when the cause of action related to the person, as in the case of Mr Ord's claim for personal injury, it did not vest in the trustee. Opposing counsel accepted that Mr Ord had only a single cause of action (referring to *Stock*, above) but submitted that it vested in the trustee pursuant to section 306 of the 1986 Act.

Aldous L.J. accepted that Mr Ord's claim could be categorised as being one for personal injury, but that such a categorisation "hides the true nature of the claim":

> The cause of action is for negligence. The result of that negligence is damage. The compensation awarded will be money and the objective will be to get at the sum which will put the injured party in the same position as he would have been in, if he had not sustained the wrong. The injury is actionable at the time physical harm is done, but the Court when assessing the damages looks at the position as it is at the date of the trial. Until 1970 it was the usual practice of the Court to award one global sum. That practice changed after *Jefford* v. *Gee* 2 Q.B. 130 and since then it has been customary to place a figure on each head of relevant damage. In this case the heads of damage will include pain and suffering and loss of past and future earnings. In modern parlance Mr Ord's claim is a single cause of action.

He rejected Mr Ord's submission that the cause of action was personal:

> It is a claim for damages for injury to his body and mind and also his capacity to earn and can therefore be considered as a "hybrid" claim, in part personal and in part relating to property. I have come to the conclusion that such an action vested in the trustee.

His Lordship referred with approval to Lord Campbell in *Rogers* v. *Spence*:

> There is no doubt that a cause of action which is exclusively confined to injury to property will pass to the assignees. In that case there is no difficulty. The difficulty is where there is . . . a mixed case of injury to the person and injury to the property. There has been no case as yet, which has decided what, under such circumstances, is to happen. It may possibly be that the law will give an action to the bankrupt for the personal injury which has been sustained by him, and will give an action to the assignees for the injury which has been done to the property.[13]

That judgment was delivered prior to the Supreme Court of Judicature Act 1873 which abolished forms of action, but even since that reform, the courts have persisted in drawing distinctions between causes of action in negligence on the basis only of the type of damage caused. In *Brunsden* v. *Humphrey*,[14] the plaintiff brought two actions in respect of the same incident, the first for damage to his cab, the second in respect of personal injury. Brett M.R. held that

[12] *Per* Erle J. in *Beckham* v. *Drake* (1849) 2 H.L. Cas. 579, at 604; 9 E.R. 1214, at 1222, affirmed in *Heath* v. *Tang* [1993] 3 All E.R. 694, at 697.

[13] (1846) 8 E.R. 1586, at 1594.

[14] See n. 2, *supra*.

> The collision with the defendant's van did not give rise to only one cause of action: the plaintiff sustained bodily injuries, he was injured in a distinct right, and he became entitled to sue for a cause of action distinct from the cause of action in respect of the damage to his goods.

Bowen L.J. concurred, but Coleridge C.J. dissented strongly. The approach of the majority has since been much criticised, for apparently resurrecting the old forms of action, and for confusing distinct heads of damage with distinct causes of action.[15] The distinct causes of action approach was nevertheless confirmed, albeit *obiter*, by Griffiths L.J. in *Buckland* v. *Palmer*.[16] *Brunsden* may be dead, but it is not yet buried. However, *Ord* v. *Upton* represents another nail in its coffin.

Aldous L.J. stressed that:

> [It is] essential to realise that when, since 1873, the name of a form of action is used to identify a cause of action, it is used as a convenient and succinct description of a particular category of factual situation which entitles one person to obtain from the court a remedy against another person. To forget this will indeed encourage the old forms of action to rule us from their graves.

Although mindful no doubt of the inferiority of his court, Aldous L.J. even went so far as to state that, in his "view", the House of Lords had been wrong to approve the application of *Brunsden* to the case of *Wilson* v. *United Counties Bank*,[17] the facts of which were closely analogous to those of *Ord* v. *Upton*. His Lordship stressed that the two "causes" in that case should more accurately have been treated as merely distinct heads of damage. He later emphasised this point as follows:

> The cause of action is for negligence . . . compensation for negligent acts. That compensation is assessed under a number of heads . . . The authorities are only consistent with the conclusion that the trustee is entitled to the damages for past and future loss of earnings and is not entitled to the damages for pain and suffering. As there is a single cause of action, it vested in the trustee.

The main issue in the case seems, therefore, to have been neatly resolved. There is but a single cause of action, and it should be seen to be a hybrid of property and personal claims, of different heads of damage. The different forms of damage should not be imagined to give rise to a number of distinct causes of action.

However, despite the apparent neatness of the solution, residual questions remain. One such relates to the trustee in bankruptcy's super-added status as constructive trustee. He is statutory trustee in favour of the bankrupt's creditors, and constructive trustee in favour of Mr. Ord. If we assume that these are two quite distinct trusts, can Mr. Ord rely upon the rule in *Saunders* v. *Vautier*[18] (as the sole adult beneficiary of a bare trust), and thereby bring the trust to an end upon request? There would seem to be no reason why not, as a matter of law, unless the reality is that there is but one trust, in relation to which Mr Ord and the creditors are beneficiaries with different claims upon the trustee. The reasoning of the Court of Appeal admits no ready resolution to this conundrum. In relation to this point Aldous L.J.'s remarks are somewhat ambiguous:

> The trustee would have to account to the bankrupt for the property which he obtained inadvertently or by arrangement . . . In such a case the trustee, if the cause of action vested

[15] See *Cahoon* v. *Franks* (1967) 63 D.L.R. (2d.) 274, and A. Samuels (1968) 31 M.L.R. 453.
[16] [1984] 1 W.L.R. 1109.
[17] [1920] A.C. 102.
[18] (1841) Cr. & Ph. 240.

in him, would have to consider carefully his duty to the bankrupt and would *probably*, if requested, assign the cause of action to him.

(emphasis added)

CONCLUSION

Ord v. *Upton* represents an inventive attempt to assert the homogeneity of the cause of action in the tort of negligence in the face of orthodox distinctions between causes of action derived from differences in the type of damage caused. The novel recognition of the *hybrid* nature of the cause of action neatly side-steps the restraints of orthodoxy. *Ord* v. *Upton* represents, therefore, another significant step in the common-sense development of the modern tort of negligence.

A theme is being quietly developed in the cases considered here, from *Bovis*[19] to *The Nicholas H*[20] to *Ord* v. *Upton*. The theme is acceptance that the precise processes by which careless behaviour causes damage, and distinctions between the type of damage caused, are less important than the essential factor that there has been negligence which is to be remedied by a financial award. No matter what variety of facts may precede the award in a case of negligence, the award always takes the same form, liquidated damages. It is through this theme that the homogeneity of the cause of action in negligence will ultimately be preserved.

Nevertheless, the theme is not yet universal. The "remoteness" limitation to recovery in negligence is still determined according to whether damage of the *particular* type caused was actually foreseeable.[21] And the court's resistance to recognising liability in negligence for that form of damage known as *pure economic loss* remains as entrenched as ever, despite the resurgence of the doctrine of voluntary assumption of responsibility.[22] Distinctions between types of damage may be a relic of the old forms of action, but having been admitted into the culture of modern tort law they represent too useful a restraint upon post-*Donoghue* liability in negligence to be abandoned entirely.

GARY WATT*

[19] *Op. cit.*

[20] *Op. cit.*

[21] *The Wagon Mound* [1961] A.C. 388.

[22] *White* v. *Jones* [1995] 2 A.C. 207.

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CLINICAL GUIDELINES, "NICE" AND THE COURT OF APPEAL

Penney and Others v. *East Kent Health Authority*
The Times, 25 November 1999 (C.A.) (Lord Woolf M.R., May and Hale L.JJ.)

Clinical negligence litigation in the NHS must now be viewed, as a matter of practical necessity, within the context of the Government's health reforms and strategy. Developments in the latter, in relation particularly to clinical guidelines and health quality, will, it is suggested, begin to make an impact on judges in clinical negligence actions. The main area of likely impact will be upon judges' assessments of the appropriate standard of care which practitioners must meet and the extent to which expert evidence will be required. In this regard, the recent decision of the Court of Appeal in *Penney* v. *East Kent Heath Authority* hints at the possible future for medical negligence with more reliance on clinical guidelines than on the clinicians themselves.

BACKGROUND

A central plank of the Labour Government's health reform strategy is that all patients are entitled to high quality care wherever they live.[1] Unacceptable geographical variations in the standard of health care have unfortunately developed over the years and this is now being addressed. The Government has created a special health authority, The National Institute of Clinical Excellence ("NICE"), with a remit which includes dealing with the problem of unacceptable variations in care.[2] NICE is expected to do this by providing health professionals with three types of guidance;

(i) the results of appraisals of new and existing health technologies;

(ii) clinical guidelines for the management of specific conditions; and

(iii) simple methods of clinical audit.[3]

To ensure that practitioners work within the guidelines of NICE, and apply best practice to their clinical duties, they will be subject to audit. Hence, in keeping with the new theme of clinical governance, evidence based practice should be the norm.

To complete the reform picture, underpinning the Government's health quality improvement strategy and NICE guidance is the Commission for Health Improvement ("CHI"). CHI carries out local reviews and has a troubleshooting role to make sure quality health services are being delivered.

Although NICE is only in its early days, it would appear that it will develop and disseminate robust and authoritative clinical guidelines, if the approach to the adoption of new drug remedies is anything to go by.[4] The fact that guidelines are needed seems to have been recognised within the NHS, given that it leads to more reflective clinical practice and that, if best practice is delivered, that must by definition lead to fewer complaints and less litigation. However, as will be explored below, there is a risk that adherence to such guidelines will impact upon the legal standard of care so as to fetter medical development.

[1] "The New NHS, Modern Dependable", Cm. 3807 (1997). See also the Department of Health publication, "A First Class Service, Quality in the New NHS", London: 1999.

[2] "NICE, National Institute for Clinical Excellence: A Guide to Our Work", London: 1999.

[3] NICE describes clinical guidelines as "systematically developed statements to assist practitioner and patient decisions about appropriate health care for specific clinical circumstances" (*ibid.*, at p. 15).

[4] See for example the reaction to the refusal in October 1999 of NICE to permit the NHS prescribing of the 'flu drug, Relenza.

THE FACTS OF PENNEY

The three claimants had all had routine cervical smear tests carried out by the East Kent Health Authority between 1989 and 1992 as part of the national cervical screening programme ("CSP"). Each of the smears taken was reported by primary screeners as being negative. As a result of the negative finding there was no medical follow up and the claimants went on to develop invasive adenocarcinoma of the cervix and had to undergo surgery, which included a hysterectomy. The claims for negligence were heard in Canterbury before His Honour Judge Peppitt QC sitting as a Deputy High Court Judge. He gave judgment in favour of the claimants on the issue of liability (the question of causation was not dealt with by agreement of the parties) and the Health Authority appealed. The Court of Appeal held, dismissing the appeal, that because of the observable abnormalities on the slides, they should not have been labelled negative. The standards of the CSP were not complied with and consequently the Health Authority was liable in negligence.

COMMENT

Clinical negligence cases have a reputation for not being the easiest types of cases to bring or defend. They often involve the assessment and evaluation of complex clinical expert evidence and facts; the *Penney* case is no exception. A notable feature of the case is the clarity and thoroughness of all the judges' assessment and evaluation of the evidence and facts of the case.

It was accepted in the general or generic agreed expert report which provided background information for the case, and was agreed by both sides, that cervical screening does not provide a fool-proof test. Even in the best laboratories there will be some false positive and some false negative smear results. The expert report made reference to National Standards published in 1996 indicating that primary screeners should detect 85-95 *per cent* of abnormal smears so that false negative reports do not exceed 5-15 *per cent*. More recently introduced quality control is intended to reduce false negative reports to 5 *per cent* or less.

National guidelines for the CSP require that the smear be given one of a number of classifications. The relevant classes discussed in *Penney* were:

Inadequate	- insufficient or poorly visualised cells
Negative	- no abnormal cells seen
Borderline changes	- changes of uncertain significance
Mild dyskaryosis	- mild neoplastic squamous changes
Glandular neoplasia	- severe glandular cell changes; possible adenocarcinoma.[5]

Of the above categories, the first three ("Inadequate", "Negative" and "Borderline") were more specifically referred to in evidence, since the link between the factual findings of what was on the smear and the action taken as a result, was crucial to establishing, in law, if negligence had occurred. In relation to the testing procedure, the trial judge had commented as follows:

[5] Smith Bernal Transcript, p. 4, para 13.

> If screeners consider that a smear is in the normal range (negative) or of such poor quality that it should be reported as inadequate and repeated, they report this. If the screener however detects or suspects that there is an abnormal smear the guidance states that they must pass it on to a supervisory checker. The supervisory checker can confirm the opinion of the primary screener or if it is still considered abnormal pass it on to a pathologist for examination and report. The report will usually be for a repeat test or for a referral to a gynaecologist for further investigation... The borderline category is used when after examination by the screener, checker and pathologist there is uncertainty whether the cells in a smear are within the normal range... a holding category until the uncertainty is removed as a result of the test being repeated.[6]

On the basis of the evidence, he had found, as a matter of fact, that whilst the smears may have been difficult to interpret, each of the claimant's slides showed some form of abnormality and should hence have been classified as borderline. The consequences of not receiving a borderline classification and receiving a negative classification were critical to the patients' health and future well being. If detected at an early stage pre-cancerous or cancerous conditions can usually be effectively dealt with by relatively minor surgical treatment. The longer the diagnosis is left the more difficult the treatment becomes.

THE LEGAL CONSIDERATIONS

Having established on the basis of the facts that the smears did show abnormalities, the trial judge had had to decide whether or not the failure to label the smear as inadequate or borderline was negligent – in other words did the screener fail to meet the required standard of care. In addressing this point, he had asked himself the following question: "Could a reasonably competent screener, aware of what a screener exercising reasonable care would observe on the slide, treat the slide as negative?"[7]

The Court of Appeal found that the trial judge had not erred in law and that the standard of care which he had chosen,"...that of a reasonably competent screener exercising reasonable care at the time when the screening took place",[8] was correct. He had properly directed himself, both to ignore any advances in screening practices that had occurred since the relevant events, and not to be unduly swayed by the fact that all claimants had subsequently developed carcinoma: "...[I]n cases where an exercise of judgment is called for, the fact that with the benefit of hindsight that judgment was exercised wrongly is not itself proof of negligence".[9]

As the Court of Appeal noted, the overall approach of the trial judge was consonant with the well-established *Bolam* principle (from *Bolam* v. *Friern Hospital Management Committee*[10]). That principle is to the effect that the required standard from medical practitioners is that of a "responsible body of medical men skilled in that particular art" (a cervical smear screener being a "medical man" for these purposes). In addition the judge had considered *Maynard* v. *West Midland Regional Health Authority*[11] and *Bolitho* v. *City and Hackney Health Authority*[12] which arguably clarify the *Bolam* test.

[6] *Ibid.*, p. 4 paras11 and 14.
[7] *Ibid.*, p. 7 para 27.
[8] *Ibid.*, p. 6 para 22.
[9] *Ibid.*, p. 6 para 22.
[10] [1957] 1 W.L.R. 583.
[11] [1984] 1 W.L.R. 634.
[12] [1998] A.C. 232.

Thus the Court of Appeal drew particular attention to the following words from the speech of Lord Scarman in *Maynard*, which had been cited by the trial judge:

> In the realm of diagnosis and treatment there is ample scope for genuine difference of opinion and one man clearly is not negligent merely because his conclusion differs from that of other professional men. The true test for establishing negligence in diagnosis or treatment on the part of the doctor is whether he has been proved to be guilty of such failure as no doctor of ordinary skill would be guilty of, if acting with ordinary care.[13]

The Court of Appeal observed that, in the *Maynard* case, Lord Scarman had gone on to remark that:

> doctor who professes to exercise a special skill must exercise the ordinary skill of his speciality. Differences of opinion and practice exist, and will always exist, in the medical as in other professions. There is seldom any one answer exclusive of all others to problems of professional judgment. A court may prefer one body of opinion to another but that is no basis for a conclusion of negligence.[14]

In deciding which "differing opinion" is to be preferred, the more recent "gloss" of the *Bolitho* case may also be useful. This was highlighted by the Court of Appeal in *Penney*, when it referred to the following words from Lord Browne-Wilkinson's speech in *Bolitho*:

> The court has to be satisfied that the exponents of the body of opinion relied on can demonstrate that such opinion has a logical basis. In particular in cases involving, as they often do, the weighing of risks against benefits, the judge before accepting a body of opinion as being responsible, reasonable or respectable will need to be satisfied that, in forming their views, the experts have directed their minds to the question of comparative risk and benefits and have reached a defensible conclusion on the matter.[15]

Hence the Court of Appeal agreed that the approach of the trial judge, in considering what standard was required on a *Bolam* test basis and then questioning whether there was a logical basis for this, had been correct. What both these tests show is that the court is cognisant of the fact that medical opinions can and do differ and that the court has a role in establishing which opinion best meets the standard of care required in law. However, the existence of differing medical opinions may be subject to limitation following *Penney* where the issues of national clinical guidelines are concerned, as discussed below.

THE "ABSOLUTE CONFIDENCE" TEST

In deciding the issue of the correct standard of care, and whether this standard had been met, the trial judge had relied on a test of screener satisfaction known as "the absolute confidence test", which, according to the judge, all the experts seemed to endorse. This test, which is incorporated into the clinical guidelines of the CSP, demands that cytoscreeners operate on a level of absolute confidence; *i.e.* that they are not to report cases as negative unless they are absolutely confident that this is the case. The origins of this test can be seen in the transcripts of the experts for both sides and in a report published in 1997 (The Wells Report) on screening practices referred to by

[13] Smith Bernal Transcript, p. 6 para 23. (Lord Scarman in his turn was quoting from the speech of Lord President Clyde in *Hunter* v. *Hanley* (1955) S.C. 200).

[14] *Ibid.*, p. 6 para 24.

[15] *Ibid.*, p. 7 para 25.

the judge. The factual evidence had shown that there were abnormalities or doubts as to the interpretation of the slides. In such circumstances the judge found that a reasonably competent screener would have referred the slides to a checker and that there should have been a smear classification of borderline applying "the absolute confidence test of satisfaction". In itself, the application of this test may not immediately suggest a drastic move away from the use of the *Bolam* test in establishing the correct standard of care – the clinical experts in the case all supported the test. However, the novelty in accepting this benchmark for practitioners lies in where it came from – the clinical guidelines. Whilst it may be anticipated, or hoped, that clinical guidelines will be based on the best *clinical* practice and established by clinicians themselves, this is not in fact certain given the existence of NICE – a small body that will not necessarily have the practical experience of the techniques in question.

In addition, and perhaps a matter that should be of more concern to medical practitioners, is the fact that the existence of clinical guidelines may lead to stagnation in medical developments. The courts have long recognised that medicine is a changing science. New or novel techniques will arise and not give rise to liability in negligence *per se*, even though under the *Bolam* test, a responsible body of practitioners may not support the technique in question. Nevertheless, with the increase in clinical guidelines, requiring all practitioners to comply with set procedures in treating patients, such legal flexibility to assess whether or not negligence has occurred may disappear. Even if clinical guidelines are not accepted by the courts to be written in "tablets of stone", the ability to defend a negligence case where guidelines have not been complied with will be increasingly difficult. An additional change may be the reduction in the need for experts at all in a case. Judges will merely have to consider the national guidelines and consider to what extent the defendant practitioner or NHS Trust has complied with them.

CONCLUSION

Even if the situation above with respect to clinical guidelines does not come to fruition, such guidelines will undoubtedly come to play an increasing role in relation to experts and the application of the *Bolitho* "logical argument" approach. As Charles Foster has suggested:

> Experts will have to appear not only respectable but reasonable. The defendant will be judged not only by the cut of his expert's suit. Experts will have to be prepared to say not only that they do something a particular way, but why... Reports will have to be more carefully reasoned and referenced... Evidence-based medicine might begin to play a part in medical litigation. If the published evidence makes a wholly one-sided case against a particular , it will be difficult for any expert to say that its adoption by the defendant was reasonable, even though he or she is in august medical company in doing so.[16]

As Foster goes on to note, if the justifications for clinical decisions contrary to clinical guidelines are to be probed, the lawyers and judges who are involved will have to be more medically literate than they are now. Moreover they may well face an uphill struggle in rationalising why the guidelines should not be upheld and thus simply endorse them more or less uncritically.

However, whilst there may be difficulties to be faced in the future arising from clinical guidelines some important possible benefits should not be overlooked. Lawyers

[16] C. Foster, "*Bolam*, Consolidation and Clarification", *Health Care Risk Report*, Vol. 4, Issue 5, 1998.

will be better able to judge the merits of clinical negligence cases by determining whether clinical guidelines have been followed.[17] This could in turn serve to reduce the cost of litigation in the NHS. Additionally the removal of experts from the litigation process which may arise from reliance on clinical guidelines to set the "*Bolam* standard" can certainly be seen to fit with the new culture of civil litigation in the post-Woolf era.

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[17] See further Hyams *et al*, "Medical Practice Guidelines in Malpractice Litigation: An Early Retrospective", *Journal of Health Politics, Policy and Law*, Vol. 21, No. 2, Summer 1996, p. 289.

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THE FACTORTAME SAGA: THE FINAL CHAPTER?

R. v. *Secretary of State for Transport, ex parte Factortame and others (Factortame III)* [1993] 3 C.M.L.R. 597; (H.L.) (Lords Slynn, Nicholls, Hoffmann, Hope and Clyde)

INTRODUCTION

The judgment of the House of Lords in *R.* v. *Secretary of State for Transport, ex parte Factortame (Factortame III)* has been greeted primarily with surprise that there could be anything left on which to give judgment in that long-running piece of litigation. In fact a final judgment in Factortame's action against the British Government, in respect of the latter's ill-fated attempt to restrict "quota-hopping" in British waters, remains elusive since issues of causation and quantum have still to be decided. The initial claim, *R.* v. *Secretary of State for Transport, ex parte Factortame*[1] which subsequently became known as *Factortame II,* was the application for judicial review of the validity of the Merchant Shipping Act 1988. This gave rise to an interim application for that Act to be suspended, *R.* v. *Secretary of State for Transport, ex parte Factortame*[2] (known as *Factortame I* since it was the first issue to be decided). Finally, in Joined Cases *Brasserie du Pêcheur* v. *Germany* and *R.* v. *Secretary of State for Transport ex parte Factortame*[3] (*Factortame III*) the applicants claimed damages for losses sustained while the invalid Act had been in force. The ruling of the Court of Justice in *Factortame III* (on the legal principles governing such damages claims) was applied by the Divisional Court in the United Kingdom, which had referred the issue.[4] The judgment of the Divisional Court was subject to appeal in the Court of Appeal and the House of Lords, and the latter's decision has now been given.

THE FACTS AND THE HISTORY OF THE LITIGATION

Briefly, in the 1980s the United Kingdom Government formed the view that Spanish fishing vessels with no genuine connection to the United Kingdom had registered in Britain in order to obtain access to British fishing waters. The Government therefore introduced new licensing conditions pursuant to the Sea Fish (Conservation) Act, 1967 restricting registration by reference to nationality, residence and social security contributions. The majority of these conditions were found by the Court of Justice to be unlawful in *R.* v. *Ministry of Agriculture, Fisheries and Food, ex parte Agegate Ltd.*[5] and *R.* v. *Ministry of Agriculture, Fisheries and Food, ex parte Jaderow Ltd.*[6] Considering that the situation was worsening, the Government subsequently enacted the Merchant Shipping Act, 1988. This provided that a vessel could only be registered as British if all the legal owners and at least 75 *per cent* of the beneficial owners were "qualified persons or companies"[7] and its charterer, manager or operator was a qualified person. The vessel must also be managed and its operation directed and controlled from within the United Kingdom.

[1] Case C-221/89, [1991] E.C.R. I-3905.

[2] Case C-213/89, [1990] E.C.R. I-2433.

[3] Joined Cases C-46/93 and C-48/93,[1996] 1 C.M.L.R. 889.

[4] Pursuant to article 234 (*ex* 177) EC.

[5] Case C-3/87, [1989] E.C.R. 4459.

[6] Case C-216/87, [1989] E.C.R. 1509.

[7] Qualified persons were defined as British citizens resident and domiciled in the United Kingdom, and qualified companies were defined as those incorporated in the United Kingdom with their principal place of business there.

On 19 June 1990, in *Factortame I*, the Court of Justice ruled that the English rule of law preventing suspension of the Act pending determination of its validity must be disapplied and, on 25 July 1991, in *Factortame II* it held that the requirements of the Merchant Shipping Act as to nationality, residence and domicile for legal and beneficial owners, charterers and managers and operators of fishing vessels were contrary to Community law and in particular to article 43 (*ex* 52) of the EC Treaty on the freedom of establishment. However the requirement that the vessel be managed and its operations directed and controlled from within a Member State was not contrary to Community law.

Meanwhile, the Commission had also brought proceedings against the United Kingdom under article 226 (*ex* 169) EC. On 10 October 1989 the President of the Court of Justice made an order for interim suspension of the Act pending a final ruling and, on 4 October 1991, the Court of Justice ruled the Act invalid in the article 226 EC proceedings. Under article 228 (*ex* 171) EC the United Kingdom was obliged to take measures to comply with this judgment.

In *Factortame III* the Court of Justice repeated its reasoning in *Francovich* v. *Italy*[8] that although the Treaty did not expressly provide for Member State liability in damages for breach of Community law, such liability was vital to ensure the full effectiveness of Community law. The obligation to remedy breaches of Community law was also part of the duty of Member States under article 10 (*ex* 5) EC to fulfill their Treaty obligations. However, where a Member State had a wide discretion over its actions, it could only be liable for a breach of Community law where that breach was sufficiently serious, the rule of law infringed was intended to confer rights on individuals and there was a direct causal link between the breach and the damage sustained by the applicant.[9]

The Court of Justice ruled that the British Government had a wide discretion over the registration of vessels, which was a matter of national competence, and over regulation of fishing, where the common fisheries policy left a margin of discretion to Member States. It confirmed that the first condition was satisfied in *Factortame III* since article 43 (*ex* 52) EC was intended to confer rights on individuals. As to the second condition, the Court of Justice ruled that in assessing whether the breach of Community law committed by the Member State was sufficiently serious, national courts could take into account a number of factors. These factors included the clarity and precision of the rule breached, the measure of discretion left to the national authorities by the rule, whether the infringement and damage were intentional or involuntary, any contribution to the State's act or omission made by the position taken by a Community institution and the adoption or retention of measures or practices contrary to Community law.[10]

When *Factortame III* returned to the Divisional Court[11] in the United Kingdom, that court ruled that, on the facts, the enactment of the Merchant Shipping Act, 1988 constituted a sufficiently serious breach of EC law so as potentially to give rise to liability in damages to the applicants.[12] The court noted a number of relevant factors: the intended effect of the domicile and residence conditions was discrimination on the ground of nationality; the Government was aware that the conditions would cause loss to the applicant; the Commission was hostile; the use of primary legislation meant that

[8] Case C-479/93, [1995] E.C.R. I-3842.

[9] Note 3, *supra*, at 989.

[10] *Ibid*, at 990.

[11] [1998] 1 C.M.L.R 1353.

[12] *I.e.* subject to the latter proving causation and quantum.

under domestic law interim relief was unavailable; the superior rules of law of proportionality and legitimate expectation had been breached; and the Government had failed to comply immediately with the Order of the President of the Court of Justice in proceedings under article 226 (*ex* 169) EC that the Act should be suspended pending determination of its validity.

The Court of Appeal upheld the judgment of the Divisional Court[13] and the Government made a further appeal to the House of Lords. It argued that its breach was excusable, since the law was not clear until the judgment in *Factortame II* and there was substantial objective justification in the form of protection of the national fish quota. In addition, other Member States had adopted the same approach as the United Kingdom, the national courts regarded the issue as complex and the Government had sought and relied on independent legal advice that its action was in accordance with Community law. The United Kingdom was not obliged to follow the advice of the Commission and it had not intended to breach Community law or injure the respondent fishermen. Finally, even if the breach caused by the nationality condition was sufficiently serious, that caused by the residence condition was not.

THE JUDGMENT OF THE HOUSE OF LORDS IN FACTORTAME III

The House of Lords ruled that the conditions as to nationality and domicile constituted a sufficiently serious breach of Community law. First, the relevant rule of Community law was not ambiguous but was clear, and of fundamental importance. The EC Treaty prohibited any discrimination on the ground of nationality and this was underlined in the context of the common agricultural policy in article 34(3) (*ex* 40(3)) EC since any common organisation of the market set up under article 33 (*ex* 39) EC must exclude any discrimination between producers and consumers.

Second, the United Kingdom Government had not acted inadvertently but after consideration, and the inevitable consequence of that action was to prejudice the rights of Spanish fishermen and non-British citizens with financial stakes in British registered fishing vessels.

Third, the nationality condition was obviously discriminatory and contrary to article 43 (*ex* 52 EC). Here, the House of Lords permitted itself to comment obliquely on the fact that the Court of Justice had exceeded its jurisdiction under article 234 (*ex* 177) EC by straying from the interpretation of Community law into its application on the facts. The House of Lords noted that, although the question of whether this was a sufficiently serious breach was a matter for the national courts, the Court of Justice had "stated bluntly that the nationality condition constituted direct discrimination which was manifestly contrary to Community law".

Fourth, the adoption of the nationality condition in the Act was not an unintentional or excusable breach. It was true that legal advice had suggested that a nationality test would be compatible with Community law and that Advocate General Mischo had argued in *Jaderow*[14] that Community law did not restrict the registration of vessels and, in *Agegate*,[15] that certain residence conditions were compatible with Community law. However, that legal advice was qualified and Member State discretion in this area was subject to Community control under the Common Fisheries Policy. The Commission had told the United Kingdom Government that the proposed conditions were

[13] [1998] 3 C.M.L.R. 192.

[14] See n. 6, *supra*.

[15] See n. 5, *supra*.

prima facie contrary to the right of establishment under article 43 (*ex* 52) EC. It had continued to state its opposition and eventually took article 226 (*ex* 169) EC proceedings. Although this advice was not conclusive as to whether there had been a breach of Community law, it was suggestive. In addition, the Divisional Court (and later the House of Lords) suspended all three conditions, and the decisions of the Court of Justice in *Jaderow* and *Agegate* gave the government no encouragement. It was also obvious that the damage suffered by the respondents would be serious and immediate.

In summary, the deliberate adoption of legislation which was clearly discriminatory on the ground of nationality, and which inevitably violated article 43 (*ex* 52) EC, was a manifest breach of the EC Treaty. It was a grave breach, both intrinsically and as regards the consequences it was likely to have on the respondents. The Commission opposed it and, despite the view of Advocate General Mischo, there was no decision of the Court of Justice to support it. The nationality condition therefore constituted a sufficiently serious breach. The retention of this condition after the decisions in the *Agegate* and *Jaderow* and the short transitional period before the coming into force of the 1988 Act constituted a sufficiently serious breach. The domicile condition should be treated in the same way as nationality, and it was therefore also a sufficiently serious breach.

As to the residence condition, a condition applicable to fishermen could be justifiable on the ground of protecting British fishing communities if limited to residence in those communities. However, a condition which covered shareholders and directors of companies owning fishing vessels but allowed fishermen to live anywhere could not be justified. Discrimination on grounds of residence could constitute indirect discrimination on grounds of nationality[16] and in any event it was artificial to separate the conditions. Rather, they should be treated as cumulative. The residence condition therefore constituted a sufficiently serious breach.

COMMENT

There is little of surprise in this judgment in the light of the clear steer given by the Court of Justice in *Factortame III* towards a finding of a sufficiently serious breach, and the judgments of the Divisional Court and the Court of Appeal to that effect. The importance of the judgment really lies in the fact that the highest court in the land has now stated, unequivocally, that the actions of the United Kingdom in respect of quota-hopping constituted a sufficiently serious breach of Community law potentially giving rise to damages. The judgment also gives guidance for future applicants and the government. First, the fact that favourable legal advice is received will not, of itself, render a breach of Community law excusable. Second, any delay in giving effect to a ruling of the Court of Justice is likely to be considered to be a sufficiently serious breach of Community law in itself. Third, where a serious injury to the potential applicant is a foreseeable result of the government's action, this will also give weight to the argument that there has been a sufficiently serious breach.

CONCLUSION

This judgment dealt solely with the issue of whether the breach of Community law committed by the United Kingdom constituted a sufficiently serious breach. The Court

[16] Case 152/73 *Sotgiu* v. *Deutsche Bundespost* [1974] E.C.R. 1530.

of Justice had already ruled that the rule of law breached was for the protection of individuals and the third condition for State liability in damages, the existence of a causal link, was not considered. A further judgment will therefore be required in respect of each applicant in order to determine whether the enactment and retention of the Merchant Shipping Act caused loss to them. Indeed it has been reported that lawyers for many potential applicants among the Spanish fishing community are already working on their compensation claims.[17]

The establishment of a causal link will not necessarily be easy. For example, in *Brasserie du Pêcheur* v. *Germany*[18] the Bundesgerichtshof (the German Federal High Court) ruled that the German Government's prohibition on the import of beer containing additives, although a sufficiently serious breach, had not caused loss to the applicant because no proceedings had been taken against it pursuant to that prohibition.[19]

Similarly, in *R.* v. *Secretary of State for the Home Department ex parte John Gallagher*[20] the Court of Appeal ruled that there was no causal link between the United Kingdom's breach of Community law and the loss suffered by the applicant, Gallagher. The latter had been excluded from the United Kingdom pursuant to procedures laid down by the Prevention of Terrorism (Temporary Provisions) Act 1989 which the Court of Justice subsequently found to be contrary to Directive 64/221 on derogations from the free movement of persons. However, the Court of Appeal held that he could lawfully have been excluded had the procedure laid down in the Directive been properly followed, and indeed would have been so excluded.

Indeed, a failure to prove causation was also fatal ultimately to the claim in *Francovich* v. *Italy (Francovich II)*.[21] Although that case itself involved the non-transposition of a Directive, and therefore the conditions for State liability were slightly different,[22] the applicant failed to prove the causal link between the State's breach and the loss he had suffered. On the facts, the Directive which Italy had failed to transpose into national law would not have given rights to Francovich.

The final hurdle which the *Factortame* applicants face is the award of damages. In the absence of Community legislation governing the award of remedies, national law applies subject to the requirement that reparation must not be impossible or excessively difficult to obtain,[23] and therefore issues such as the mitigation of loss must be addressed. In the interests of justice it is to be hoped that these outstanding issues are resolved more expeditiously than those so far addressed.

ELSPETH DEARDS*

[17] T. Jones, "Law Lords back Spanish claim", *The Times*, October 29 1999.

[18] [1997] 1 C.M.L.R. 971.

[19] Proceedings had been taken against the applicant in respect of another prohibition, that of marketing as "Bier" beer not manufactured in accordance with specific provisions, and therefore a causal link existed between *this* prohibition and the loss to the applicant. However, the German Federal High Court held that the prohibition in question did not constitute a sufficiently serious breach of Community law, and therefore no State liability arose.

[20] [1996] 2 C.M.L.R 951.

[21] *Op. cit.* (The applicant's failure on causation in this case was particularly ironic, given that the principle of Member State liability was first established in the landmark judgment of *Francovich* v. *Italy (Francovich I)* Joined Cases C-6 & C-9/90, [1991] E.C.R. I-5403.

[22] *Ibid.*

[23] See n. 3, *supra*, at 995.

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NOTTINGHAM LAW JOURNAL

BOOK REVIEWS

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

LEGAL PROFESSION

The Ethics and Conduct of Lawyers in England and Wales
by ANDREW BOON and JENNIFER LEVIN
Oxford and Portland, Oregon, Hart Publishing, 1999
418 pp., Hardback, £35.00, ISBN 1 84113-018-4 and Paperback £18.00
ISBN 1 84113-019-2

It is now commonplace to note that the legal profession in England and Wales is in a state of change. This change has been driven by new arrangements in the delivery and funding of legal services,[1] together with increasing encroachment by Government into the self-regulatory mechanisms of lawyers' professional bodies.[2] Change has also occurred because the profession has increased dramatically in size, has more female and ethnic minority members, and a younger age profile. In the case of solicitors, the client base has changed,[3] and the last decade has seen the rise of large city firms. These events, and the way they are radically changing the nature of the legal profession, have spawned a number of academic books and articles on the legal profession in England and Wales. Until recently, this burgeoning literature has largely neglected legal ethics. This neglect has begun to be addressed by a number of new works in this area,[4] and this book provides a useful addition to this important aspect of professionalism.

The main purpose of the book is to examine the collective ethics of the legal profession, particularly as they are manifested in the profession's rules of conduct. Although there are now other providers of legal services, the authors restrict their study to those two groups traditionally thought of as the legal profession, barristers and solicitors. Rather than confine themselves to a description of the rules of conduct, the authors aim to provide critical discussion of the rules and to locate them in a historical, comparative and social context. This comparative element is mainly confined to the

[1] At the beginning of the 1990s, the Courts and Legal Services Act, 1990 provided for the introduction of conditional fee arrangements, extended rights of audience, and new providers of legal services. At the end of that decade, the Woolf "revolution" in civil procedure began to take effect. In addition, the Access to Justice Act 1999 is making fundamental changes to publicly funded legal services.

[2] This began with the Courts and Legal Services Act 1990 but the Access to Justice Act 1999 presents a threat of direct intervention by the Lord Chancellor in the case of certain rules of conduct and complaint handling.

[3] Solicitors used to serve private clients in the main. Now clients are companies and Government, through state-funded legal aid schemes.

[4] See, for example, K. Economides (ed.), *Ethical Challenges to Legal Education and Conduct* (Hart Publishing, 1998); R. Cranston (ed.), *Legal Ethics and Professional Responsibility* (Clarendon Press, 1995); S. Parker and C. Samford (eds.), *Legal Ethics and Legal Practice: Contemporary Issues* (Clarendon Press, 1995); A. Sherr and L. Webley, "Legal Ethics in England and Wales" (1997) 4 *International Journal of the Legal Profession* 109; I. Sheiman, "Looking for Legal Ethics" (1997) 4 *International Journal of the Legal Profession* 139; P. Kunzlik, "Conditional Fees: The Ethical and Organisational Impact on the Bar", 1999 62(6) M.L.R. 850-878.

United States which has an extensive academic and practitioner literature in this area. The authors hope that this critical approach will increase awareness not only of the rules of conduct but also of the origins and potentials of professional ethics.

The book is also intended to contribute to the teaching of legal ethics at both the undergraduate and professional stages. Until recently, ethics was not considered a proper part of legal education, a factor explaining the neglect of this area as a subject of academic study. This is now changing, and, as Boon and Levin note, the "last 20 years have seen a large increase in activity around the issues of ethics and conduct".[5] The study of ethics is not a part of the core syllabus of undergraduate programmes but conduct issues now feature in the vocational courses of solicitors and barristers. There is also a growing debate about the relevance of ethics to the practice of law. In chapter six, the authors provide a useful historical overview of legal education, and explore the possibilities and implications of adopting a more radical approach to promoting professional ethics. They make out a case for inculcating an explicit common ethic throughout all stages of legal education, believing that this will help to overcome the lack of homogeneity within the profession. If legal education does become the key to this, the book will provide a useful starting point for courses of study.

The book is in five parts. Parts I and II are essentially contextual, setting the scene for the more detailed study of the rules of conduct in the last three parts of the book. Part I explores the relationship of ethics and the professions and Part II examines the regulatory framework of the profession, including legal education and disciplinary mechanisms. Part III concentrates on the core duties of lawyers, particularly towards clients. This is developed in Part IV, where the key duties to clients are considered in more detail. Part V explores the ethics of dispute resolution, "the activity which, arguably, provides a defining social role for lawyers".[6] There is also an epilogue, which considers the predictions for the future of the legal profession and its ethics.

The issues addressed in Part I of the book are fundamental to any understanding of professionalism and ethics. Thus, this part examines the sources of legal ethics and how they can be analysed and evaluated. It discusses the changes taking place in the legal profession, and how these external and internal changes will impact upon the profession's ethics. It provides a summary of the external changes which are serving to undermine some aspects of self-regulation by the profession, for example, competition, consumerism and increased intervention by the state. The tensions between commercialism and professionalism are highlighted, and questions are raised about the role of ethics in this changing external environment. Problems internal to the profession are also discussed. One of the most significant of such problems is the lack of homogeneity among the members of the professional group. As a result of this, ideas of professional norms of behaviour become problematic and it therefore becomes difficult to built trust, and thus claim legitimacy for the group. If the dominant values of the group are those of the market place, with their emphasis on individualism and consumerism, this leaves little scope for the notion of shared values which is basic to an ethical framework.

The functions of lawyers are also discussed, particularly their role in the administration of justice. This is a problematic role because lawyers have a dual function. They have to represent the interests of their clients and thus adopt a partisan position but they also have to facilitate the operation of the law and have duties to the court and to society at large. In this, they appear to be unlike other professional groups. The authors note that the adversarial system, and a legal system which equates justice with

[5] A. Boon and J. Levin, *The Ethics and Conduct of Lawyers in England and Wales*, (Hart Publishing, 1999), at p. 107.
[6] *Ibid.* at p. vi.

the defence of rights, brings with it a particular approach to ethics. This adversarial approach is now being challenged as a result of reforms in the civil justice system and the authors see this decline as offering an opportunity for lawyers to review their ethical commitment. This part of the book also provides an historical overview of the concept of professionalism and the role of ethics within this concept. Ethics are seen as a part of the bargain professionals make with the state in return for autonomy and power. The authors raise the issue of whether ethics are any longer necessary, given the changing nature of the bargain which is now occurring.

Of crucial importance to a work of this kind are definitions of ethics and professionalism, and the relationship between the two. The conventional view on professional ethics is that they "represent the highest ideals of an occupational group providing important services to society in a spirit of public service".[7] The authors note that this view has been challenged and that the claims of professionalism have been subject to scrutiny. Nevertheless, they do appear to accept, rather uncritically, that professions serve the public good, that all "professions share a commitment to the service of clients",[8] and that they do so by the rules of ethics and conduct.

The authors consider the differences between ethics and codes of conduct, noting that professional ethics "is a term frequently used interchangeably with the rules governing professionals".[9] The authors differentiate between rules and ethics, in that the latter are also a commitment to honesty, integrity and service in the practice of law. They maintain that professional ethics are principally concerned with the moral dimensions of professional work, which cannot be comprehensively covered by the rules of conduct alone. This must be true, in the sense that ethical rules must advance moral values, rather than serving the interests of the professional group. Professional codes and rules of conduct can be self-serving,[10] being more concerned with protectionism and professional conformity than correct behaviour.[11] The authors emphasise the idea of altruism underlying professional ethics and they make a proposition that "professional ethics claim *legitimacy* for those *norms of behaviour* which promote *trust* in the professional group".[12] The idea of trust is essential to professional ethics, as a betrayal of trust in the individual professional-client relationship undermines the faith in the professional group. The authors do not, however, emphasise that "trustworthiness" can be good business practice and thus also be self-serving. What makes it ethical is "whether the purpose of the rule is to advance values that are *imperative in the public interest*, divorced from the self-interest of the practitioners concerned".[13]

Part II of the book provides information on the establishment and evolution of disciplinary standards and codes of conduct and discusses the tension between the regulatory and representative functions of professional bodies. It provides a summary of the disciplinary and complaints framework, and asks what combination of self-regulation and external regulation is optimal in disciplinary matters. Finally, this part of the book makes the case for including a study of ethics in all stages of legal education as a means of addressing some of the problems facing the profession.

[7] *Ibid.* at p. 6.

[8] *Ibid.* at p. 175.

[9] *Ibid.* at p. 6.

[10] See P. Kunzlik, *op. cit.*, at p. 851.

[11] B. Abel-Smith and R. Stevens, *Lawyers and the Courts* (Heinemann, 1967).

[12] A. Boon and J. Levin, *The Ethics and Conduct of Lawyers in England and Wales*, (Hart Publishing, 1999), at p. 9 (original emphasis).

[13] P. Kunzlik, *op. cit.*, at pp. 851-852.

Parts I and II of the book are informative and draw upon a vast range of sources. They provide a comprehensive, if at times brief, discussion of some of the main debates around the legal profession and professionalism. There are, however, some important omissions. The effects of globalisation, information technology and specialisation are not discussed in any detail. These factors are referred to in the epilogue but they are far too important as contextual issues to be left to a postscript. Nevertheless, these two parts of the book do highlight a number of questions, such as whether a profession needs to have ethics in order to be considered a profession and whether it can define its own ethics. However, it does not address the issue of whether we need professionalism any more and what aspects of the professional bargain are worth preserving.

The remaining three parts of the book consist of detailed discussions of the important aspects of lawyers' professional duties. This makes it a valuable resource, providing comprehensive and often insightful commentary on aspects of professional codes. Part III is a general introduction to these professional duties, which are essentially concerned with the balance lawyers are expected to achieve between the rights of clients, third parties, the profession and society in general. The authors note that the lawyer-client relationship is no longer based on paternalism and that clients now have a much more powerful role in the relationship. This raises ethical issues, as the clients' interests may thus become strengthened at the expense of other legitimate interests. Lawyers do have obligations to third parties, although the authors note that these duties do not figure large in the ethics of the legal profession. In this context, there is a very brief discussion of *White* v. *Jones*, and the purpose of wasted costs orders. This part of the book also touches on the justifications for the divided profession and ends with a brief excursus into the Woolf reforms, unmet legal need, and *pro bono* work. It concludes, not surprisingly, that the legal profession's commitment to public service is ambiguous and asserts that "lawyers need to accept positive obligations to promote the public good",[14] but without really articulating why.

Part IV of the book explores the duties to clients and potential clients in more detail. This provides a very useful discussion of the issues around the duty of confidentiality and the separate rule about professional privilege, highlighting the areas which present ethical problems for professionals. There is a very enlightening discussion about the rules on money laundering and the conflicts which this can create for lawyers. The authors make an important point that ethical behaviour in this area serves a valuable commercial interest. Legal professional privilege is a valuable commodity which the profession should not lose. Another chapter is devoted to the rules on conflict of interests and confidentiality. These concepts are closely connected with the adversarial process but they are also relevant in areas of non-contentious work. The rules on conflict of interests have become more pertinent with the number of solicitors' firms which are merging, as well as in relation to buyers, sellers and mortgagees. The authors note that the Law Society's advice on personal relationships is thin. They also take up the point, introduced earlier in the book, that if civil procedures becomes less adversarial as a result of Woolf reforms, the rules on conflict of interest may have to be radically revised to accommodate a more co-operative and facilitative ethos.

A chapter is devoted to fees and costs, and the authors note that "despite their centrality to the role of the lawyer, remarkably little attention has been given to fees in texts on legal ethics other than in relation to the perennial debate over contingency fees".[15] They also note that complaints about lawyers' charges are the most common

[14] A. Boon and J. Levin, *The Ethics and Conduct of Lawyers in England and Wales*, (Hart Publishing, 1999), at p. 243.
[15] *Ibid.* at p. 285.

of all complaints received by the Law Society and the Legal Services Ombudsman and that most of these concern a lack of adequate fee information. The chapter contains much useful information, as well as giving the standard justifications as to why fee levels cannot be left to the operation of the market. More discussion on this point would have been useful, especially as the authors state that the same arguments about fee control apply for corporate clients. As the justifications for costs regulation include the fact that clients are not repeat players, the reasons for the same controls for corporate clients need to be more clearly articulated. What is less contentious is the statement that clients should be informed of the level of fees, be given regular updates, and that there should be effective, fair and accessible procedures for reviewing fees to rectify overcharging. The chapter also examines the different ways lawyers charge, and looks, in a cursory way, at the issues around conditional and contingency fees.

Part V deals with the ethical issues involved in dispute resolution. This is an area which has seen significant changes over the last decade. Not only has there been a diversification of dispute resolution mechanisms, there are also new provisions for funding, and new providers of, legal services. The implications of these changes for legal ethics "are profound",[16] as they could change significantly the role of lawyers in dispute resolution. The authors maintain that much of the rationale for the current ethics of lawyers is based on criminal representation. This adversarial approach has been criticised in relation to civil justice. The new litigation landscape raises ethical issues as the courts will now exercise a great deal of control over the process. The authors appear to approve of the new process, on the basis that approaches to litigation and bargaining "which depend on honesty and problem solving offer a more coherent theoretical basis for lawyer's role in dispute resolution".[17] In a chapter devoted to advocacy, the cab-rank rule, advocates' duties, and the advantages and disadvantages of higher rights are analysed. The final chapter in this part of the book examines the increased use of alternative dispute resolution techniques and the implications of this for lawyers. The authors note that the codes of conduct of lawyers in the United Kingdom do not impose obligations to advise on the most suitable methods of dispute resolution. They conclude that, as an adversarial approach is no longer considered appropriate, lawyers must adapt their role, in order to become facilitators of consensual dispute resolution. This is no doubt true but seems to ignore the fact that many lawyers have always worked in non-contentious settings where skills of negotiation and facilitation have been required.

The Epilogue highlights some future developments "which may be a catalyst for changes in professional ethics".[18] These developments include specialisation, routinisation, bureaucracy, information technology, the decline of adversarialism, deprofessionalisation and globalisation. Some of these issues have been addressed in the book, but many need more elaboration as they are now no longer in the future, but very much a part of the legal landscape. In a sense, this is one of the problems of writing in this area. The rapid rate of change means that books are out of date before publication. This is highlighted by all the references to ACLEC in Parts I and II of the book. A major problem identified in relation to these changes is the possibility that the profession may split into specialist groups, without any distinctive ethical foundation.

Nevertheless, the book ends on an optimistic note. The authors believe that, despite the incursions into professional autonomy, it is unlikely that the profession will abandon ethics. Their view is that the state needs professionals, and the recent reforms,

[16] *Ibid.* at p. 314.
[17] *Ibid.* at p. 338.
[18] *Ibid.* at p. 397.

in relation to access to justice, assume that lawyers will retain high ethical standards. Ethics are seen as a way of balancing the conflict between commercialism and professionalism. Ethics could hold the key to the future of legal professionalism, as a way of tempering the new entrepreneurial spirit of the profession. As has been noted elsewhere, an appropriate model for the legal profession is "humane professionalism", which recognises that the profession exists "not just for itself but for the common good".[19] If this is to be achieved, each ethical rule of the profession must be analysed to test whether it truly serves the public interest, and is thus truly ethical. This book provides a useful starting point for such a project.

MARY SENEVIRATNE*

LEGAL PROFESSION

Cause Lawyering: Political Commitments and Professional Responsibilities, edited by AUSTIN SHERAT and STUART SCHEINGOLD, Oxford and New York, Oxford University Press, 1998, 545 and (bibliography) 5 pp., Paperback £14.99, ISBN 0–19–511320–9

This is a fascinating and important book. Fascinating because it examines a wide variety of situations in which lawyers have sought to use their professional skills to further political goals, to "do good," at least by their own lights. Important because it documents the struggle of lawyers in several countries to vindicate human rights and to assert the rule of law in the face of repressive regimes of various shades. It reminds one that to be a lawyer can be a noble profession (even if that nobility may be shaded by the ambiguous or mixed motives of the lawyers concerned). It demonstrates that, even in more liberal countries, the legal process and creative and sometimes courageous lawyers can play an essential part in securing social progress (contentious though that concept may itself be).

The book opens with a chapter by the editors ("Cause Lawyering and the Reproduction of Professional Authority") introducing the contributions which follow and putting them into the context of current debate (primarily in America) about the concept of cause lawyering and the issues to which it gives rise. The remainder of the text is presented in four parts. Part I includes contributions investigating the "Contexts and Conditions of Cause Lawyering".[1] Part II, on "Cause Lawyering and the Organization of Practice," then considers the impact of differing models of practice organisation upon cause lawyering. It contains three contributions focusing upon the American experience[2] before concluding with a chilling account of Israel's use of planning laws to destroy the way of life of the Israeli Bedouins and of the efforts of lawyers from differing backgrounds, and different types of organisation, to afford the Bedouins some protection within the restricted legal process available to them.[3]

[19] *Seventh Annual Report of the Legal Services Ombudsman 1997*, (HMSO, HC 793) at p. 9.

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[1] C. Menkel-Meadow, "The Causes of Cause Lawyering: Towards an Understanding of the Motivation and Commitment of Social Justice Lawyers"; R. Abel, "Speaking Law to Power: Occasions for Cause Lawyering"; and S. Scheingold, "The Struggle to Politicize Legal Practice: A Case Study of Left-Activist Lawyering in Seattle".

[2] A. Porter, "Norris, Schmidt, Green Harris, Higginbotham & Associates: The Sociological Import of Philadelphia Cause Lawyers"; J. Kilwein, "Still Trying: Cause Lawyering for the Poor and Disadvantaged in Pittsburgh, Pennsylvania"; and L. Trubek and E. Kransberger, "Critical Lawyers: Social Justice and the Structures of Private Practice".

[3] R. Shamir and S. Chinski, "Destruction of Houses and Construction of a Cause: Lawyers and Bedouins in the Israeli Courts".

Part III of the book then focuses on the "Strategies of Cause Lawyering under Liberal Legalism".[4] Having thus considered the particular opportunities for, and difficulties in, cause lawyering in countries where due process and the rule of law are taken for granted, the book then closes by considering the position under systems which either do not recognise, or which threaten, such fundamental principles. Thus in Part IV, "The Possibilities of Cause Lawyering beyond Liberal Legalism", contributors discuss the experiences of cause lawyers in the Third World, in Indonesia and Malaysia, in the Israeli-Occupied Territories, in Argentina and Brazil, and under Cuban Socialism.[5]

It is not possible, in a review of this length, to discuss all of the fascinating insights that can be gleaned from the diverse contributions in this book, dealing as they do with lawyers working in so many varied contexts. However, some themes, or rather questions, do recur throughout the work and these, combined with the author's introductory chapter and the logical structure of the book, do give the work a literary coherence as a whole. The key recurrent questions are indeed pretty fundamental, although the answers provided differ as between contributors. Such competition of ideas, however, helps to make this a stimulating read. Thus, as the editors themselves acknowledge, "cause lawyering is itself a contested concept".[6] The editors have therefore sought to talk about "the parameters rather than the definition of cause-lawyering" and have "chosen the term 'cause-lawyering' precisely because it conveys a core of meaning in many historical and cultural contexts while being sufficiently inclusive to accommodate a range of forms".[7]

This approach clearly accommodates the heterogeneous views of the contributors but is amply justified. To insist upon a rigid definition of the term would tend to close down the dialogue contained in this book, much of which explores the very fundamental components of "cause lawyering". The term should really be regarded as a convenient label, but no more. It is good that the views illuminating the topic have not been confined by dogma. All the more so since definitions in this area tend to be rather subjective, being based upon the personal values of their proponents. The idea of the cause lawyer as "the [morally] good lawyer",[8] or the lawyer who "does good", depends upon one's own perception of what is, or is not, "good".

The lawyer who uses his or her skills to campaign against road building projects, or against field trials of genetically modified crops, may be a "good" lawyer from the point of view of those anxious to protect the environment. They will not, of course, be so regarded by those who believe that such projects are environmentally insignificant but essential to economic development. Similarly, lawyers who devote themselves to appealing against death sentences in the United States may be seen as moral agents by some (including, as it happens, this reviewer) but will no doubt be regarded by others as being ethically deficient wasters of appellate court time and as defenders of the

[4] M. McCann and H. Silverstein, "Rethinking Law's 'Allurements': A Relational Analysis of Social Movement Lawyers in the United States"; S. Serett, "Caring about Individual Cases: Immigration Lawyering in Britain"; and A. Sarat, "Between (the Presence of) Violence and (the Possibility of) Justice: Lawyering against Capital Punishment".

[5] S. Ellmann, "Cause Lawyering in the Third World"; D. Lev, "Lawyers' Causes in Indonesia and Malaysia"; G. Bisharat, "Attorneys for the People, Attorneys for the Land: The Emergence of Cause Lawyering in the Israeli-Occupied Territories"; S. Meili, "Cause Lawyers and Social Movements: A Comparative Perspective on Democratic Change in Argentina and Brazil"; and R. Michalowski, "All or Nothing: An Inquiry into the (Im)possibility of Cause Lawyering under Cuban Socialism".

[6] A. Sherat and S. Scheingold at p. 5.

[7] *Ibid.*

[8] See D. Luban (ed.), *The Good Lawyer: Lawyers' Roles and Lawyers' Ethics* (Totawa, N.J.: Rowman & Allanheld, 1983).

indefensible.[9] Most of the examples of cause lawyering in this book (quite naturally) concern lawyers involved in humanitarian, liberal or left-wing causes. This raises the question whether politically committed conservative lawyers (*e.g.* "pro-life" lawyers opposing abortion, or lawyers engaged in "protecting" industry from what they might regard as unfounded mass tort or environmental action – perhaps by instituting pre-emptive so-called "SLAPP" actions)[10] can be regarded as cause lawyers? For this reviewer at least, there seems to be no reason why they cannot. They may qualify by virtue of their political motivation, regardless of whether they espouse causes of which one would (personally) approve. Indeed, any other conclusion would seem to deprive the concept of the "cause lawyer" of intellectual validity and would reduce it to being just another aspect of political correctness.

Many similar "boundary questions" as to the nature of cause lawyering are also addressed throughout the book. Can a lawyer be regarded as a "cause lawyer" only if he or she is motivated by a desire to do good? Is he or she disqualified if the primary motivation is to earn fees whilst, incidentally, doing good ?[11] Can socially or politically committed lawyers working in the public service be regarded as cause lawyers and, if so, how do they operate?[12] Is the cause lawyer's primary loyalty to the client or to the cause? How can the process of litigation in which success in an individual case may depend upon emphasising the unique features of the case, and de-emphasising the general impact of a desired decision, serve a more universal cause? Why do lawyers continue to act in a cause when (as in the case of American lawyers acting for Death Row prisoners) they know that they are bound to lose? How do cause lawyers exploit their privileged status as professionals to advance their causes; and how do they reconcile (if at all) their professional responsibility (and the risk of discipline from their professional bodies) with their moral commitment to the causes they serve? These are just some of the fascinating questions addressed in this book. These issues would be stimulating even if they were presented in an abstract way. For this reviewer, however, what makes them come to life is the fact that they are presented throughout the book in the context of the dilemmas and struggles faced by real lawyers. Space does not permit a description of all of these excellent case studies but three, in particular, might be mentioned to give a flavour of the book.

First, for example, there is Shamir and Chinski's account (already mentioned above) of lawyers' attempts to defend Bedouins charged with breaching Israeli planning laws.[13] This is both chilling and instructive. It describes how, as a matter of policy, Israel sought to concentrate Israeli Bedouins (who a couple of decades earlier had been

[9] See Hank Williams Jr., "If the South Would Have Won" quoted by A. Sarat in "Between (the Presence of Violence and (the Possibility of) Justice: Lawyering against Capital Punishment", in A. Sherat and S. Scheingold (eds), *Cause Lawyering*, (Oxford University Press, 1998), p. 317 at p. 317:

"I'd make my Supreme Court down in Texas,
and there wouldn't be no killers getting free.
If they were found guilty,
then they would hang quickly,
instead of writin' books and smiling on TV".

[10] Strategic Lawsuits Against Public Participation.

[11] Lawyers, perhaps, such as Jan Schichtmann who features in Jonathan Harr's *A Civil Action*, (Century Books, 1995). Cf. the dialogue between characters in John Gresham, *The Street Lawyer*, (Doubleday, 1998), at p. 59:

" '– I'm thinking of public interest law."
'What the hell is that?'
'– It's where you work for the good of society without making a lot of money.' "

[12] For a possible example of public sector cause lawyering, see Kamlesh Bahl, "Equal Opportunities And the Law: Catalyst For Change" [1994] 3 Nott. L.J. 1.

[13] For further recent literature about cause lawyering in Israel, see M. Keren, "Legal professionals and civil disobedience: an Israeli case study" (1999) 6(1) *International Journal of the Legal Profession* 91; and Yoav Dotan, "Cause Lawyers crossing the lines: patterns of fragmentation and cooperation between state and civil rights lawyers in Israel" (1998) 5(2/3) *International Journal of the Legal Profession* 193.

required to move from their traditional lands to an area of the Negev Desert) into planned new towns in order to be assimilated into modern, industrial society. Shamir and Chinski quote Moshe Dayan, who, as Minister of Agriculture in 1963, explained that the policy was intended to destroy the Bedouins' way of life by transforming them into "an urban proletariat." He said that:

> . . .the Bedouin would not live on his land with his herds, but would become an urbanite who comes home in the afternoon and puts his slippers on. His children would become accustomed to a father who wears trousers, does not carry a Shabaria and does not search for vermin in public. The children would go to school with their hair properly combed. This would be a revolution, but it may be fixed within two generations. Without coercion but with governmental direction. . .*the phenomenon of the Bedouins will disappear.*[14]

The "governmental direction" in question included, particularly from 1985, the aggressive application of Israeli planning law as a means of preventing the Bedouin from constructing or improving homes outside the designated urban areas. The authors describe how the application of this law, combined with a repressive system of surveillance, resulted in Bedouin being prosecuted on criminal charges of infringement of the planning law and having their homes subjected to demolition orders.[15] They describe how some lawyers sought to defend individual defendants and to organise a more general (though ultimately unsuccessful) challenge to the planning law itself before Israel's High Court of Justice. It is easy, of course, to be appalled by such policies and impressed by the courage and ingenuity of those lawyers who sought to oppose them but, after all, they are remote from our own country and it "couldn't happen here". Or could it? Except as a matter of degree, does the Israeli policy described in this work really differ that much from the policy of containment of gypsies in recognised sites in the United Kingdom? It is an unsettling thought that there may be a need for equally robust cause lawyers to defend the gypsies' way of life here?[16]

Another of the case studies itself comes from the United Kingdom and has a topical resonance. It is Susan Sterrett's contribution on "Caring about Individual Cases: Immigration Lawyering in Britain", which considers the political context and legal structures applicable to immigration and refugee entry into the United Kingdom. It is of great interest in itself and describes how the nature of the United Kingdom legal system, which "makes it difficult to change rules through litigation", forces lawyers to focus on working for individual clients rather than for long-term change. The topical relevance of the piece arises from the fact that, with the recent increase in asylum applications from Eastern Europe and the Balkans, immigration lawyers have been accused by the Government of unscrupulously encouraging "bogus asylum-seekers". As a result, legal aid in immigration cases will be confined to firms contracted with the Legal Aid Board. According to the Lord Chancellor's Department:

[14] R. Shamir and S. Chinski, "Destruction of Houses and Construction of a Cause: Lawyers and Bedouins in the Israeli Courts", A. Sherat and S. Scheingold (eds.), *Cause Lawyering*, (Oxford University Press, 1998), at p. 227 (original emphasis).

[15] One such prosecution was of a woman who based her defence on a plea of special circumstance in that she suffered from kidney failure and needed dialysis three times a day, and that it was "the small construction next to her tent, in which the dialysis machine was stored, that had been targeted for demolition [under the planning law]". Although the court acknowledged her severe health condition, it refused to use its discretion to decline to make an order since such a condition did not justify a breach of planning law and since, in the court's view, the defendant should have sought residence in a regulated area and obtained a construction permit there. See R. Shamir and S. Chinski, "Destruction of Houses and Construction of a Cause: Lawyers and Bedouins in the Israeli Courts", A. Sherat and S. Scheingold (eds.), *Cause Lawyering*, (Oxford University Press, 1998), p. 227 at pp. 232-3.

[16] Cf. *Buckley* v. *United Kingdom* (1997) 23 E.H.R.R. 101, noted by Sebastian Poulter, "The Rights of Ethnic, Religious and Linguistic Minorities" [1997] 3 *European Human Rights Law Review* 254 at p. 261 *et seq.*

> Restricting legal aid work to specialised, contracted providers is intended to cut irresponsible applications and to prevent incompetent or unscrupulous advisers who cause unnecessary delays, wasteful expenditure and exploitation of vulnerable applicants in the immigration and asylum system.[17]

Of course, even if some immigration lawyers have acted improperly, many, probably the vast majority, will no doubt have simply acted to the best of their abilities, and within the law, to pursue their clients' interests. The scapegoating of their profession[18] and the imposition of enhanced regulation through the exercise of the State's legal aid monopsony are stark reminders that in the United Kingdom, as much as in Israel (or elsewhere in the world), it can take a great deal of professional courage to act for unpopular clients, whether or not as a "cause lawyer".

Another of the case studies, Daniel Lev's contribution on "Lawyers' Causes in Indonesia and Malaysia," seems also to contain warnings for the United Kingdom. In addition, given the recent eruptions in East Timor, it has further topical interest. It describes how, in Indonesia, the military and Government, having long dominated the civil courts, achieved control over the activities of "the troublesome, self-governing advocacy [sic]" so as to contain public criticism and resistance by absorbing the advocates' professional bodies into a new regulatory organisation and imposing governmental/judicial disciplinary control over the entire profession. This culminated in 1987 in a "joint decision" by the Minister of Justice and chairman of the Supreme Court on procedures for supervising and regulating legal counsel which allowed for measures to be taken against counsel who "act, behave, bear themselves, speak, or issue statements that indicate lack of respect for the law, statutes, *public authority, the courts, or their officials*".[19] As Lev points out, the "thrust" of the joint decision" was to negate "the profession's claim to autonomy. . .[and] to remove disciplinary powers from the advocates' association to the judiciary and the Ministry of Justice".[20]

Once more, this is a depressing story lightened only by the courage of those advocates who sought to maintain their independence from the regime. Again, however, it may have lessons for the United Kingdom. As disenchantment with self-regulation of the legal profession grows; as demand increases for external regulation; as procedural rules require litigators and advocates to "co-operate" with the courts; as "managerial" judges, encouraged by the new rules, become increasingly salutary in their stated willingness to punish so-called "inefficient lawyers" in civil cases through wasted cost orders;[21] and as the Government floats the idea of allowing judges to "fine" lawyers in criminal cases who "unnecessarily" prolong trials,[22] it is at least

[17] Press Release No. 242/99, Lord Chancellor's Department, 31 August 1999.

[18] For an example of a similarly intemperate attack upon lawyers by Mr. Jack Straw, the Home Secretary, see John Steel and Simon Davis, "Straw attacks 'hypocrite' civil rights lawyers", *The Daily Telegraph*, 15 September 1999, in which Mr. Straw is reported as blaming local authorities' disinclination to apply to Magistrates' Courts for "anti-social behaviour orders" under the Crime and Disorder Act 1998 on "civil liberties lawyers" who [he said] had campaigned against the orders and were guilty of "well-heeled hypocrisy". He is reported to have said that the "opposition of some in legal circles irritated and angered him" and that he "[had] in mind some lawyers and so-called legal experts who have been running a campaign against anti-social behaviour orders suggesting, ludicrously, that they go against the European Convention on Human Rights."

[19] D. Lev, "Lawyers' Causes in Indonesia and Malaysia", A. Sherat and S. Scheingold (eds.), *Cause Lawyering*, (Oxford University Press, 1998), p. 431 at p. 440 (my emphasis).

[20] *Ibid.*

[21] For criticism of the "disciplinary" approach adopted by the Woolf Report and now underlying the Civil Procedure Rules, see M. Zander, "The Government's Plans on Civil Justice" (1998) M.L.R. 382 at pp. 386 – 388.

[22] That judges might use such powers to reflect their personal prejudices against specific types of defendant (or in favour of the authorities) cannot be ruled out. See Geoffrey Robertson QC, *The Justice Game* (Vintage, 1999), at p. 58: "Justice Melford Stevenson. . .was in full flight. He caused consternation at the defence bar by cutting the fees of barristers who had dared to waste the court's time by accusing police of 'planting' fingerprint evidence against a group of Irish defendants: 'Counsel has no duty,' he intoned in his gravel-pit voice, to be a louspeaker to a maladjusted set'." The fact that, contrary to Melford Stevenson J.'s prejudices, it may have been in the public interest (as well as that of the

possible that structures are unwittingly being created in England and Wales which could, under a less democratic government, be used repressively to stifle lawyers acting in unpopular causes.[23] This is not to say that the advent of undemocratic government seems likely, nor that these developments might help bring such government about.[24] Nonetheless, when reforming the system of justice, it would be foolish to ignore experience elsewhere. As indicated in this case study, the experience in Indonesia (just as under totalitarian regimes elsewhere and in other times) has been that the control of the legal profession, by ministerial regulation and by giving politicised judges punitive powers over the lawyers appearing before them, has been a key element in the maintenance of repressive regimes.

PETER KUNZLIK*

ELECTRONIC COMMERCE

Internet and Electronic Commerce Law in the European Union, by JOHN DICKIE, Oxford, Hart Publishing, 1999, xxii + 154 pp., Paperback, £30.00, ISBN 1-84113-031-1

Electronic commerce, best defined as "all forms of commercial transactions . . . based upon the electronic processing and transmission of data",[1] continues to grow exponentially. Buying and selling on the "net" is no longer a domain exclusively reserved for international businesses. Thanks to the rapid expansion of the Internet, this way of trading has become very attractive for consumers. However, this new market gives rise to a range of new legal problems which are only beginning to be addressed at the national, inter-governmental and global level. In this book, John Dickie concentrates on the European level.

He seeks to outline and analyse the elements of the legislative framework which have already been created or are in the process of being developed by the European Union. In doing so, he surveys a large number of Directives, Draft Directives, Recommendations and Communications of direct or indirect relevance to the field of electronic commerce. Chapter one introduces the reader to the concept of "electronic commerce" and gives an overview of its legal implications. Chapter Two deals with financial services and taxation; both of which give rise to interesting new problems in the context of electronic commerce. This chapter includes an outline of the Draft Directives on

defendant concerned) for counsel to be able to air allegations of police malpractice is indicated, amongst other things, by the activities of Detective Inspector Challoner (whose *modus operandi* in "fitting up" political demonstrators in the 1960s is also recounted by Robertson, *op. cit.*, at p. 59). This shows just how misconceived was the judge's "disciplinary" approach to those who challenged police evidence. Quite apart from the injustice potentially wrought on individual defendants (and their counsel), such judicial failure to countenance the possibility of police misconduct must, to some extent at least, have been responsible for allowing it to flourish; although Melford Stevenson J. would, no doubt, have been horrified to learn of the widespread corruption within the Metropolitan Police which, on Sir Robert Marks' appointment as Commissioner, was the subject of the "Countryman" investigation.

[23] For recognition of some of the constitutional implications of the new regime, see R. Scott, "Access to Justice" (1997) 3 J.S.B.J. 2; and for the implications for civil liberties of r. 48.7 of the Civil Procedure Rules, see P. Lewis and M. Bowden, "Wasted costs under the Woolf regime", (1999) 143(3) S.J. 237.

[24] Cf. Edward Garnier QC, "Lawyers must keep independence", *The Lawyer*, 2 August 1999.

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[1] OECD, Electronic Commerce: Opportunities and Challenges for Government (OECD, 1997) at p. 11.

financial services[2] and electronic money institutions[3] and of measures on cross-border payments and taxation.[4] In Chapters Three and Four, the author considers the Draft Directives on Electronic Commerce[5] and Electronic Signatures[6] respectively, which will, once adopted, become the most significant measures in this area. Dickie takes the reader through the draft legislation and explains how it may apply in practical situations. This is followed in Chapter Five by an analysis of the problems relating to copyright and a description of the Draft Directive on Copyright in the Information Society[7] and the Directive on Conditional Access Services.[8] Chapter Six looks at the rules on data protection as contained in the "Data Protection" Directive[9] and Chapter Seven follows with a consideration of aspects of commercial communications. Chapter Eight then examines the application of two specific consumer protection measures, the Directive on Unfair Terms in Consumer Contracts[10] and the Directive on certain aspects of the Sale of Consumer Goods and Associated Guarantees,[11] in the context of electronic commerce. This chapter also considers the Directive on Cross-Border Injunctions[12] and looks briefly at the relevant rules of the Brussels[13] and Rome[14] Conventions on private international law. Chapter Nine, which is largely based on a previous article by the author,[15] analyses the application of the "Distance Selling" Directive[16] to electronic commerce transactions. In chapter ten, Dickie offers his conclusions on European Union law relating to electronic commerce. This brief overview indicates that Dickie has considered the application of a large body of legislation. The book also makes passing reference to many more measures. Both the breadth and depth of research are excellent and produce a complete picture of the relevant European Union legislation.

The book itself is largely descriptive and surveys a considerable number of legislative instruments, both current and proposed, in just under 100 pages. In the concluding chapter, Dickie outlines his argument that the framework emerging at the European level fails to take proper account of the position of the individual, is slow to develop and is characterised both by incompleteness and lack of internal coherence. These are highly significant arguments. A more holistic approach, examining the legislation against this backdrop would have made the book and its argument considerably more powerful.

[2] Proposal for a Directive of the European Parliament and Council concerning the Distance Marketing of Consumer Financial Services, COM (98) 468 final.

[3] Proposal for European Parliament and Council Directives on the Taking Up, the Pursuit and the Prudential Supervision of the Business of Electronic Money Institutions, COM (98) 727 final.

[4] Directive 97/5 on Cross-Border Credit Transfers, O.J. 1997 L43, p. 25.

[5] Proposal for a European Parliament and Council Directive on certain legal aspects of Electronic Commerce in the Internal Market, COM (98) 586 final. Reproduced as an annex to the book.

[6] Proposal for a European Parliament and Council Directive on a Common Framework for Electronic Signatures, COM (98) 297 final.

[7] Proposal for a Directive on Copyright and Related Rights in the Information Society, COM (97) 628 final.

[8] Directive 98/84 on Conditional Access Services, O.J. 1998 L320, p. 54.

[9] Directive 95/46 on the Protection of Physical Persons as regards the Processing of Personal Data and the Free Movement of Data, O.J. 1995 L281, p. 31.

[10] Directive 93/13 on Unfair Terms in Consumer Contracts O.J. 1993 L95, p. 29.

[11] Directive 99/44/EC on certain aspects of the Sale of Consumer Goods and Associated Guarantees, O.J. 1999 L171, p. 12.

[12] Directive 98/27 on Injunctions for the Protection of Consumers' Interests, O.J. 1998 L166, p. 51.

[13] Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1968, O.J. 1979 C59 p. 1.

[14] Rome Convention on the Law applicable to Contractual Obligations, 1980, O.J. 1980, L266, p. 1.

[15] J. Dickie, "Consumer Confidence and the EC Directive on Distance Contracts" (1998) 21 Journal of Consumer Policy 217.

[16] Directive 97/7 on the Protection of Consumers in respect of Distance Contracts, O.J. 1997 L144, p. 1. This is also reproduced as an Annex to the book.

The target audience of this book is wider than the academic community, although it will perhaps have most to offer to those who are familiar with European Community law, and the rationales of European Community consumer law in particular. At times, a reader who is unfamiliar with these areas may not fully appreciate Dickie's arguments. A future edition would benefit from a brief chapter outlining relevant aspects of EC law.

There are other niggles. On occasion, the use of language is perhaps a little too vague; lacking the precision one would expect in a book dealing with such a detailed subject. Also, some terms of art are not explained at all, or explained only rather imprecisely. Again, these are points that could easily be remedied in a second edition. Perhaps the most significant criticism is that much of the important legislation in this area exists in draft form only and therefore any discussion of such drafts is inevitably out of date almost as soon as the book is published. A reader who is interested in the details of the law in this area will therefore need to refer to the legislation itself once this is adopted. Nevertheless, a reader who seeks a broad introduction to this area will gain a great deal from this book.

John Dickie's book is a very valuable one and should be on the bookshelves of every academic and practitioner interested in the legal regulation of electronic commerce. In his preface, Dickie notes that no book had been previously published on this subject which is surprising as it has generated many journal articles. However, this reviewer cannot help but feel that a longer gestation period would have benefited both the presentation of the legislation and the development of Dickie's argument. A second edition is already planned. It is to be hoped that this will materialise sooner rather than later and that more space will be given both to Dickie's important argument and to the analysis of the legislation. Future editions of this book should be able to build on this edition's potential to become the leading text in this field and its shortcomings should, for now, not be given too much weight. This book is recommended to anybody with an interest in this area.

CHRISTIAN TWIGG-FLESNER*

JOINT VENTURES

Negotiating International Joint Venture Agreements, by STEPHEN SAYER, London, Sweet & Maxwell, 1999, Looseleaf, £195.00, ISBN 0-421-63140-6

Of all possible transactions a lawyer may become involved in, the one which will probably most defy categorisation is a joint venture. With apologies to Lord Denning,[1] there are joint ventures and there are joint ventures. The reason is quite simple. The commercial idea does not marry up with a recognised legal mechanism. To a certain extent, therefore, the lawyer must fit a commercial square peg in a legal round hole. For example, what a client may consider commercially to be a joint venture, the law may consider to be a merger or a partnership. The creation of any text on joint ventures is therefore an unenviable task as it must cover a large number of diverse and complex areas.

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[1] *Crabb* v. *Arun District Council* [1975] 3 All E.R. 865 at 871.

The title of this book will give a clue as to the market at which it is aimed. According to the foreword, it is designed to be "a business tool for commercial lawyers around the world who find themselves needing to set up cross border joint ventures".[2] As a consequence, the tone of the book is, in the author's own words, "unashamedly practical".[3]

As such, by far the largest section is that devoted to corporate joint ventures, on the basis that the author considers this to be the commonest form of joint venture. There are also other major sections covering co-operative joint ventures, that is, collaborative projects and European Economic Interest Groupings. Much of the fundamental information concerning their regulation by competition authorities is covered in an introductory section.

As is becoming increasingly common with practitioners' texts, precedents are supplied both in hard copy and on disk. These consist of a pre-transaction checklist, pre-contractual enquires, an agreement for the creation of a corporate joint venture (including its articles of association), an agreement for the creation of a European Economic Interest Grouping and an agreement for a co-operative joint venture. These precedents form the backbone of the book and much of the text comprises commentary on them.

This is a highly practical approach which some readers will no doubt welcome. A lawyer's primary concern upon instructions will be the paperwork which will have to be generated. Therefore, because this book equips the reader with both the appropriate documentation and the means to handle it with confidence, it is extremely useful to the practitioner, particularly one without much experience of the area. Details of the author's own formidable expertise are given at the outset of the book. As a result of this expertise, he is able to give valuable practical insights. For example, in research and development ventures, much may depend upon the knowledge which each of the parties brings to the venture. The author makes the following observation:

> ... here is a particular difficulty about representations made by one of the parties concerning the technology before the agreement is entered into. It is in the nature of such agreements that the potential parties need to establish with one another the skills, knowledge and qualifications that each of them has. Without being satisfied as to this they will not wish to enter into the agreement. In seeking to satisfy the other party on this score, it is all too easy to make representations concerning the "efficacy or usefulness" of one's technology.
>
> A representation of this nature which is subsequently shown to be untrue and upon which the other party relied ... would enable that other party to rescind the agreement and claim damages. It is therefore important, and usually in the interests of both parties, that such an eventuality is excluded.[4]

However, one drawback of this precedent-driven approach is that the layout of the text is somewhat "piecemeal" in a number of places. Rather than being presented in sustained prose, commentary is provided on a clause by clause basis. This can make locating certain information difficult and pre-supposes that the reader's focus will be upon the precedents. Some readers may prefer a more "traditional" form of delivery.

What is perhaps surprising, given the book's title, is that the emphasis is firmly on United Kingdom joint ventures. For example, the precedent for a corporate joint venture pre-supposes that the joint venture vehicle will be an English registered

[2] S. Sayer, *Negotiating International Joint Ventures*, (Sweet & Maxwell, 1999), at vii.

[3] *Ibid.* at para. 1-38.

[4] *Ibid.* at para. 14-63.

company. Similarly, the contract for the collaborative joint venture is drafted with a common law jurisdiction in mind. Whilst the information given is excellent and in a particularly pellucid style, a consequence of this approach is that the reader's insight is not advanced very far into specific jurisdictional issues outside the United Kingdom. When mention is made of international matters, it is somewhat cursory. For example, in the introductory section, the reader is told that:

> Some jurisdictions have created a specific legal form known as a joint venture; often these are to be found in emerging economies such as Russia and China ... But in many jurisdictions ... there is no distinct legally recognised form known as a joint venture.[5]

It would have been useful if the author could have been more specific on this point and given further information on the Russian and Chinese systems. In general, details of the relevant law of some major foreign jurisdictions would have been very welcome.[6] Whilst no book can operate as a substitute for the opinion of foreign counsel, some insight can nevertheless give the instructing lawyer an advantage.

It should be noted that the focus on the United Kingdom is deliberate and acknowledged by the author on the basis that it is impossible to produce a book giving comprehensive world coverage. The author also makes the point that much of what is addressed is of general concern. Nevertheless, it is somewhat doubtful that the text can fulfil its aim, as noted above, with such an approach.

The commentary on competition law represents an exception to this narrow focus. The explanation of both European Community and United Kingdom law is extremely clear and helpful and there is also commentary devoted to competiton law in the United States, in which the author explains the differing roles of the Antitrust Division of the Department of Justice, the Federal Trade Commission and the Sherman and Clayton Acts. It is frustrating, therefore, to be left with a feeling that similar insights could have been given elsewhere. Perhaps as the text is supplemented by subsequent releases, this feeling will diminish.

In summary, this is a book eschewing the traditional format of textbooks and focusing on the major fee-earning work of a practising lawyer, that is, the production of the necessary paperwork. As a consequence, for the reader who is looking for a comprehensive reference guide, this text may not be suitable. However, for the reader who is looking for a ready-made set of precedents with excellent explanatory notes, this work is to be recommended.

JASON G. ELLIS*

[5] *Ibid.* at para. 1-02.

[6] See, for example, I. Hewitt, *Joint Ventures*, (FT Law & Tax, 1997), at p. 375.

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NOTTINGHAM LAW JOURNAL

NOTTINGHAM MATTERS

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

RESEARCH WORK IN PROGRESS – THE INTERNATIONAL CRIMINAL TRIAL PROJECT

MARK FINDLAY *

The debate surrounding the establishment of the International Criminal Court[1] provides a critical example of the conflation of political imperative and criminal justice. In addition, it keenly identifies the manner in which the criminal trial (and its procedures) are viewed by the "international community" as crucial to the resolution of global conflict.

The political push for an international criminal law, and its institutions,[2] recently has relied on the connection between the image of a "just" international military intervention,[3] and the necessity to punish "crimes" which either justified that intervention or were perpetrated by those opposed to it. At the conclusion of the military context, the resolution of these "crimes" is transferred into the court-room and the trial.[4] Further, the trial is perhaps a slightly less contentious domain where the two principal procedural styles confront one another.[5] The same could not be said, for instance, of the pre-trial phase.[6]

The desire to understand developments towards international criminal law, procedure and their institutions of sanction will generate the need to disentangle the

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[1] For an overview of the issues at the heart of the recent debate, and the American critique in particular, see Jomel Angat, "A Pragmatic and Philosophical Justification for the International Criminal Court: A response to US objections", *Centre for Global Security Studies* (June 1995) http://www.cgss.8m.com/ICC.htm; CNN Transcripts, "Millennium 2000: Would an International Criminal Court help or hinder the pursuit of global justice?", *Burden of Proof* (2 January 2000, http://cnn.com.TRANSCRIPTS/0001/02/hp.00.html).

[2] In the US view, for instance, the connection between political priorities and the rule of law is clear at an international level. See, David Schaffer, "Address Before the Southern Californian Working Group on the International Criminal Court" (1988) http://www.pbs.org/wgbh/pages/frontline/shows/karadzic/genocide/iccus.html

[3] This concept of a "just" war not only regularly appeared in the rhetoric of NATO over Kosovo, but has since been implicit in delineating the "crimes" of the Serbians from the necessities of NATO forces – see also Gary Ulmen, "Just Wars or st Enemies" in *Telos* (1996) 109:99-112.

[4] See D. Robinson, "Trials, Tribulations and Triumphs: Major developments in 1997 at the International Criminal Tribunal for the Former Yugoslavia" in *Canadian Yearbook of International Criminal Law* (1997) XXXV:179-213.

[5] See V. Tochilovsky, "Trial in International Criminal Jurisdictions: Battle or scrutiny" in *European Journal of Crime, Criminal Law and Criminal Justice* (1998) 6/1:55-59.

[6] This is not to downplay the significant differences between civil law and common law evidentiary rules and trial practice, the comparative analysis of which will form the basis of much of the research project. See, for instance, D. Nsereko, "Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia" in *Criminal Law Forum* (1994)5/2-3:507-555.

principal competing procedural styles,[7] to test the nature and location of the important points of difference during the trial, and to speculate on the potentials for synthesis. In order to achieve this the trial process itself must be reduced to its significant sites for decision-making, and the manner in which discretion can be exercised explored in comparative procedural terms. Discretion could be the key to institutional and procedural harmonisation anticipated as part of internationalisation. It might also reveal where differences in the competing ideologies and procedures of criminal justice may only be reconciled for political unity rather than jurisprudential consistency.

Colleagues associated with the Centre for Legal Research (Nottingham Law School) have embarked on a major research project which will comparatively analyse the trial process in civil and common law legal styles, and generate wider reflections on international criminal procedure. The International Criminal Trial Project (ICTP) will revolve around two complementary spheres:

- critically examination of the internationalisation of criminal trial procedures and institutions; and
- analysis of those competing procedural styles at work within national and international criminal trials.

It has as its aims:

- to critically examine contemporary debate over the synthesis of common law and civil law criminal procedure;
- through qualitative and quantitative method, to understand the features of process which distinguish the common law and civil law models of criminal justice;
- in particular, to examine the official discourse of the principal players in the trial process, within examples from both legal styles[8], and the international criminal tribunals;
- to develop a matrix for evaluating preferred criminal justice models. (The matrix will emerge from detailed analysis of the role, function and discourse of principal players in the trial process);
- to utilise the matrix in the analysis of synthesising selected components of each model;
- to critique criminal justice policy options in light of the issues identified in the analysis of synthesis. This critique will have the potential for application both at the local jurisdictional, and international levels;
- to propose a revised model for the reform of criminal justices process (and its component parts), and associated policy formulation, on local, comparative and international levels.

[7] These, in their simple contemporary political sense are the procedural traditions of the common law and the civil law jurisdictions which have prevailed in the conflicts which sponsored the war crimes tribunals of Nurmberg, Japan, and more recently Rwanda and the former Yugoslavia. See I. Sunga, *The Emerging System of International Criminal Law: Developments in codification and implementation* (Kluwer, 1997).

[8] In this respect it may be useful also to examine trial from hybrid jurisdictions such as the US, and Scotland where certain features of the root tradition have been extensively modified. Further, if we are to examine trials across the civil law jurisdictions of Europe the uniqueness of each jurisdiction should be recognised along with the common tradition.

The project in its comparative phase will investigate particular trials from civil and common law traditions, and before international tribunals. Crucial sites for decision-making will be identified in order to explore issues such as difference and synthesis. The policy ramifications for international criminal trial procedure will face critical analysis in light of trial practice.

Besides the methodological difficulties inherent in different trial record keeping practices, and problems with access, the selection of the trial as a centre for comparative research may be criticised on another more fundamental level. It could be said that in neither procedural style is the trial exemplary of the procedures of criminal justice. In common law the vast majority of prosecutions are settled through guilty pleas and never go to trial. In the civil law traditions most prosecutions are diverted or settled through plea during the detailed investigation process preceding the trial. Aligned to this issue of procedural representativeness is a comparative dilemma. Trials differ in form and significance between the two styles. For instance, the adversarial process in common law trial means that the visual theatre of the trial through the examination of witnesses in person may appear in stark contrast to the dossier led trial in civil law, where most of the action has occurred beyond the court room.

Recognising these challenges to the comparative project the team remains convinced of the value of the trial as the procedural focus for the research. Across both styles serious crime is tried. Serious crime is also far more likely to be defended and therefore tried. Serious crimes and their trial have produced many of the procedural safeguards around which criminal justice traditions have grown. In practice there may prove to be less that divides the adversarial from the inquisitorial trial. For instance, the more complex the case the more that the significance of documentary evidence will prevail. And there is little doubt that the ideology of criminal justice in both traditions takes the trial as its manifestation. This is confirmed by the paramount place of the trial in the institutionalisation of international criminal justice.

To date the project team has settled a detailed project design, and is formulating discreet research initiatives for the comparative and international phases. The assistance of commentators from throughout the common law and civil law worlds is being sought.

In summary the project is developing:

- a critical examination of the contemporary debate over the synthesis of common law and civil law criminal procedure, with special reference to the trial process;[9]
- through qualitative and quantitative method, to understand the significant points of procedural difference which distinguish the common law and civil law models of trial justice;
- to employ analytical methodologies that will distill comparable data from the official discourse within the accounts of various trials and judgements;
- by developing and applying a policy matrix for evaluating preferred criminal justice models, to review the potential synthesis of selected and problematic trial components from each model;

[9] In talking of the trial process it is not intended to preclude limited consideration of pre-trial initiatives particularly directed to influence trial procedure or outcomes.

- eventually, to critique criminal justice policy options for reforming trial process (at the local jurisdictional and international levels) in light of the issues identified in the analysis of procedural synthesis, and to propose procedural reform, and associated policy formulation;
- to critically evaluate practices and proposals within internationalised criminal trial procedure; and
- from this, to critically review the social, legal and political context of developments and proposals towards the internationalisation of criminal trial procedure and its institutions.

A significant policy outcome of the research will be the identification of more effective trial procedures through the critical adaptation of civil law trial experience within a common law context. Further, the work will provide an opportunity to comment on the manner in which any synthesis between common law and civil law trial procedures might assist in the development of an international criminal jurisdiction, and support globalised notions of criminal justice.[10]

[10] The globalisation of justice and the paradox which this presents is discussed in Mark Findlay, *The Globalisation of Crime* (Cambridge University Press, 1999).

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