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# CASE AND COMMENT

## APPEALS

APPEALS in cases noted in earlier numbers of the *Journal* have now been disposed of as shown:

*Deutsche Morgan Grenfell Group plc* v. *Inland Revenue Commissioners*, noted [2004] C.L.J. 27. Appeal allowed in part: [2005] EWCA Civ 78, [2006] 2 W.L.R. 103

*R. (SB)* v. *Governors of Denbigh High School*, noted [2005] C.L.J. 527. Appeal allowed: [2006] UKHL 15, [2006] 2 W.L.R. 719

*Sutradhar* v. *National Environment Research Council*, noted [2005] C.L.J. 23. Appeal dismissed: [2006] UKHL 33

## CRIMES, THE COURTS AND CUSTOMARY INTERNATIONAL LAW

IN *R.* v. *Jones and others* [2006] UKHL 16, [2006] 2 W.L.R. 772, the 20 appellants in the three appeals before the House, all of them peace activists, had been charged with a range of criminal offences arising out of their unauthorised entry onto military land and disruption of activities thereon in the immediate run-up to the invasion of Iraq by the US, the UK and Australia in 2003. The essence of the variety of defences raised in each case was that the UK and/or the US's preparation for and participation in the invasion of Iraq constituted the crime of aggression under customary international law and consequently under the law of England and Wales, a crime which the defendants were seeking to prevent. The question put to their Lordships, for a preparatory ruling in one case and on appeal from conviction in the other two,



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was whether the crime of aggression formed part of English criminal law in the absence of legislation to this effect and, if so, whether the issues it raised were justiciable.

The House of Lords unanimously dismissed the appeals. Aggression was not a crime under English law. Lords Bingham and Hoffmann gave the leading judgments, with which Lords Rodger, Carswell and Mance agreed, the last adding a few paragraphs of his own.

Lord Bingham was willing to accept, as had the Crown, the "general truth" of the appellants' core contention that customary international law is part of the law of England and Wales, even if he hesitated to embrace the proposition "in quite the unqualified terms in which it has often been stated", sympathising as he did with the view that customary international law "is not a part, but is one of the sources, of English law". Lord Hoffmann preferred to "say nothing about the reception into English law of rules of international law which may affect rights and duties in civil law", an issue Lord Mance also thought unnecessary to address. Secondly, unlike the Court of Appeal, their Lordships held that the crime of aggression existed at customary international law with sufficient clarity to permit its trial and punishment.

As for the last, crucial step, Lord Bingham (whose views were mirrored by Lord Mance)—pointing to Blackstone's examples of violation of safe-conducts, infringment of the rights of ambassadors and piracy *iure gentium*, as well as, he thought it "at least arguable", to war crimes—accepted "that a crime recognised in customary international law may be assimilated into the domestic criminal law of this country". But this did not follow automatically: "a crime recognised as such in customary international law (such as the crime of aggression) may, but need not, become part of the domestic law of England and Wales without the need for any domestic statute". His Lordship's reading of the authorities led him to conclude that customary international law is applicable in the English courts only where the constitution permits. In this light, it would be "odd" if the executive could, through the contribution of its practice to the formation of a customary international rule, "amend or modify specifically the *criminal* law". As it was, since *Knuller (Publishing, Printing and Promotions) Ltd.* v. *Director of Public Prosecutions* [1973] A.C. 435, in which the House of Lords surrendered its common-law power to create crimes, statute was now the sole source of new criminal offences; and a raft of Acts showed that, when domestic effect was sought to be given to crimes under customary international law, the practice was to legislate. (In the latter regard, Lords Bingham and

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Mance both noted that Parliament had consciously opted not to legislate for the crime of aggression during the passage of the International Criminal Court Act 2001.) This reflected what all three Lords identified as an important democratic principle, namely, in the words of Lord Bingham, "that it is for those representing the people of the country in Parliament, not the executive and not the judges, to decide what conduct should be treated as lying so far outside the bounds of what is acceptable in our society as to attract criminal penalties". Lord Hoffmann made the point with characteristic robustness: new domestic offences, which included offences derived from customary international law, "should ... be debated in Parliament, defined in a statute and come into force on a prescribed date", "not creep into existence as a result of an international consensus to which only the executive of this country is a party".

The conclusion that statute was needed was all the more compelling in relation to the crime of aggression, a crime intimately associated with action by the State itself, given the courts' slowness to review the exercise of prerogative powers over the conduct of foreign affairs and the deployment of the armed forces. The latter, however, was not a question of justiciability as such, though Lord Hoffmann conceded that this "may be simply another way of putting the same point". That is, one could not could start by determining whether aggression is a crime under English law and then proceed to consider whether the issues it raises are justiciable. Rather, the discretionary nature of the power whose exercise gave rise to the putative offence was a factor to be considered in determining whether aggression was a crime under English law in the first place.

The case represents the first occasion on which the Lords have been called upon to examine in any depth the shibboleth, sprung from what appears to have been a conspiracy between Blackstone and Lord Mansfield, that customary international law is part of the law of England; and it is striking that of the three substantive judgments, two decline explicitly to affirm the accuracy of this increasingly invoked proposition, while the third prefers a slightly different formulation, even if, in the end, it is hard to see any practical upshot of the distinction between being a part and a source of English law. Lord Bingham's fundamental premise, on which Lords Hoffmann and Mance implicitly base their judgments, that customary international law is applicable in the English courts only where the constitution permits, is undoubtedly correct: it explains, among other things, why contrary statute has been consistently held to trump any domestic manifestation of a

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customary international rule. In recognising this principle, the Lords acknowledge that the relationship between international law and English law is inescapably dualist (at least when that word is taken to mean that each is sovereign or supreme in its own domain), even if the specific rule that customary international law is part of English law can be characterised as monist. The latter merely represents the terms on which—the licence under which—English law lets customary international law in.

Whether one agrees with the Lords that the incorporation into English law of a crime under customary international law is trumped by the constitutional principle that the creation of new crimes is the sole preserve of Parliament ultimately depends on a choice between theory and practice. It could be argued that, if a crime exists at customary international law, and the latter is part of English law, then its judicial recognition cannot be considered the coining of a novel offence; and that as long as individuals know that customary international law is part of the law of the land, there can be no complaint about lack of fair warning. But this probably pushes abstract principle too far. Effectively there is no difference between "recognising" an offence under English law for the first time and creating it.

ROGER O'KEEFE

## QUALIFYING THE HUMAN RIGHTS ACT: DETENTION UNDER SECURITY COUNCIL RESOLUTIONS

MR. Al-Jedda, a dual Iraqi-British national, has been detained without charge since October 2004 by British forces in Basra at the Shaibah Divisional Temporary Detention Facility on the basis that his internment is necessary for imperative reasons of security in Iraq. According to the Secretary of State for Defence, there are reasonable grounds for believing he has been personally responsible for recruiting terrorists into Iraq, facilitating the travel of a known explosives expert into Iraq and with him carrying out attacks around Fallujah and Baghdad, and conspiring to smuggle high tech detonation equipment into Iraq.

Mr. Al-Jedda sought judicial review of his detention arguing it breached his rights under Article 5, Schedule 1 of the Human Rights Act 1998 ("HRA") and at common law, and requested release and return to the UK. While Mr. Al-Jedda denied involvement in any terrorist activity, he did not challenge the factual basis for his detention. He also acknowledged that in

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returning to London he might be liable to prosecution and measures under terrorism legislation. For his part, the Secretary of State acknowledged that there is currently insufficient material to support criminal charges and Mr. Al-Jedda's detention is on a preventive basis only under the authority of United Nations Security Council Resolution ("UNSCR") 1546 (2004) and Iraqi law.

As the Secretary of State had accepted that the detention did not comply with Article 5(1) and that, in accordance with *Al-Skeini* [2005] EWCA Civ 1609 (currently on appeal), Mr. Al-Jedda falls within the jurisdictional scope of the HRA as a person detained in a compound under British control, the case turned on the argument that UNSCR 1546 (2004), passed under Chapter VII of the UN Charter, qualified Mr. Al-Jedda's HRA rights. Both the Divisional Court and Court of Appeal (in a unanimous decision) dismissed Mr. Al-Jedda's claims, holding that on its proper construction, the HRA's scope is subject to the United Kingdom's obligations under the UN Charter and Security Council resolutions and these prevail in the event of any inconsistency: *The Queen (on the application of Hilal Abdul-Razzaq Ali Al-Jedda)* v. *Secretary of State for Defence*, [2005] EWHC 1809 (Admin) and [2006] EWCA Civ 327. The reasoning can be summarised as follows:

- The geographical scope of the HRA is coextensive with the extent to which the European Convention on Human Rights ("ECHR") "has effect for the time being in relation to the United Kingdom" (section 21) or where a remedy would have been available before the European Court of Human Rights (applying *Quark* [2005] UKHL 57, [2005] 3 W.L.R. 837);
- Article 103 of the UN Charter provides that in the event of a conflict between the obligations of UN Member States under the Charter and their obligations under any other international agreement, their obligations under the Charter prevail;
- UN Security Council Resolutions are UN Charter obligations and so prevail over obligations under the ECHR (see to similar effect the decision of the European Court of First Instance in *Kadi,* Case T-315/01, 21 September 2005) and the International Covenant on Civil and Political Rights ("ICCPR"). Accordingly there was no need to make a formal derogation from the ECHR or the ICCPR;
- UNSCR 1546 (2004) authorises the United Kingdom, as part of the Multinational Force in Iraq at the request of

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the Iraqi Interim Government and in accordance with its terms, "to take all necessary measures to contribute to the peace and security in Iraq", including internment of suspected terrorists;

– Therefore Article 5 of the HRA does not operate to the extent to which it is qualified by UNSCR 1546 (2004).

As this last point indicates, establishing the extent of the qualifications to Article 5 entailed the interpretation of a partly unincorporated Security Council resolution (on this point see *Republic of Ecuador* v. *Occidental Exploration and Production Co.* [2005] EWCA Civ 1116, [2006] 2 W.L.R. 70, at [29]–[31]). Brooke L.J. stated that human rights obligations continue to the extent that they are not qualified by the resolution; the Security Council has not sanctioned indefinite internment as the UN mandate expires on 31 December 2006 and can be terminated or altered at any time; cases must be reviewed every six months; there is no power to continue detention unless this is necessary for imperative reasons of security and those responsible should continue to address whether internment is a proportionate response to the security threat posed by the internee; and the terms of Article 78 and other provisions of Geneva Convention IV (relative to the Protection of Civilian Persons in Time of War) prescribing the terms and conditions of internment continue to apply under the relevant Security Council resolutions, notwithstanding that British forces are no longer in belligerent occupation. There was no suggestion on the facts that these points were in issue. Mr. Al-Jedda's detention fell within the scope of the resolution and accordingly outside the operation of the HRA. Brooke L.J. rejected the argument that the UN Charter, properly interpreted, imposed the same positive obligations as Article 5 ECHR and that action under Chapter VII of the Charter was subject to such norms. The question of the validity of the resolution (whether it conflicted with a higher *ius cogens* norm) was not before the court, and Brooke L.J. suggested strongly that in any event this question could not be entertained by national courts.

Mr. Al-Jedda's claim that the lawfulness of his detention should be considered under common law was also dismissed as Iraqi law applied under the Private International Law (Miscellaneous Provisions) Act 1995. So too was his charge that the decision to keep him in Iraq was irrational. He was not, said Brooke L.J., in the equivalent of a Guantanamo Bay legal black hole.

Although *Al-Jedda* turned ultimately on questions of domestic law, it illustrates the interplay between international and domestic law, calling on national courts to make decisions concerning

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conflicting international and national norms, conflicting international norms and conflicting domestic constitutional norms. The judges' comments reflect these tensions. Moses J. in the Divisional Court acknowledged that the "notion that so fundamental a right as that which is enshrined and protected in Article 5, namely the right to liberty, can, in an area within the jurisdictional scope of the 1998 Act, be removed, is startling, not least because it has been achieved without any express warning in the resolution itself and without any announcement by the Executive, still less the opportunity for scrutiny by Parliament" (at [34]), whereas Brooke L.J. in the court above focused on the "inevitable conflict between a power to intern for imperative reasons of security during the course of an emergency, and a right to due process by a court in more settled times" (at [87]; see also [111]–[112]). All the same, the outcome was agreed and *Al-Jedda* plots a clear path through the conflicts raised.

PENELOPE NEVILL

## IMMUNITY FOR TORTURE: THE STATE AND ITS REPRESENTATIVES REUNITED

IN *Jones* v. *Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia)* [2006] UKHL 26, [2006] 2 W.L.R. 1424 ("*Jones*") the House of Lords concludes that both the State and the individuals who act on its behalf enjoy immunity in civil proceedings alleging torture. While those who support the expansion of opportunities to enforce the prohibition on torture may consider this conclusion undesirable, it is, as a matter of current international law, unavoidable.

The claimant alleged that he was tortured while in prison in the Kingdom of Saudi Arabia ("the Kingdom") and sought to bring civil proceedings against the Ministry of the Interior (which was equated to the Kingdom) and against Lieutenant Colonel Abdul Aziz. In a conjoined appeal, three claimants alleged that they had been tortured while in the Kingdom and issued proceedings against four individuals (two officers in the Kingdom's police force, a colonel in the Ministry and the deputy governor of the prison in which they were confined). A unanimous House of Lords dismissed Jones' appeal against the Court of Appeal decision ([2004] EWCA Civ 1394, [2005] Q.B. 699) that the Kingdom was entitled to claim State immunity but upheld the Kingdom's appeals against the decisions that the individual defendants were not entitled to immunity. Lords Bingham and Hoffmann deliver the leading

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judgments, and both express their agreement with the other's reasoning.

Clearly, the Court of Appeal's finding that the State is entitled to immunity for torture, but officials acting on its behalf are not, draws a distinction between a State and its representatives. Any such distinction is rejected by the House of Lords. Lords Bingham and Hoffmann emphasise that a State can only act through its servants and agents. Both acknowledge that the State Immunity Act 1978 does not expressly provide immunity for a State's "representatives" or "officials"—immunity is granted to the "State". However, their Lordships refer to significant domestic and international authority to support the conclusion that the term "State" includes a State's representatives acting in an official capacity.

The Court of Appeal decision accepted that ordinarily a State's representatives acting in an official capacity are entitled to the same immunity as the State itself. What it denied is that an individual alleged to have committed torture is acting in an official capacity.

The House of Lords acknowledges the peremptory (or *ius cogens*) nature of the prohibition of torture but finds that this status alone does not deny its "official" nature. Both Lords Bingham and Hoffmann refer to the definition of torture in Article 1 of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984 ("the Torture Convention"), which provides that the necessary pain and suffering must be "inflicted by ... a public official or other person acting in an official capacity". They reject the argument that conduct can be "official" for the purposes of the Torture Convention but not "official" for the purposes of State immunity.

The House of Lords also denies that it is illogical that an individual could, following *R.* v. *Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No.3)* [2000] 1 A.C. 147 ("*Pinochet (No.3)*"), be criminally liable for torture but not liable in civil proceedings. The distinction is justified by international law, which denies immunity for individual criminal liability by "express exception" or "necessary implication" (Lords Bingham and Hoffmann at [31] and [81], respectively). Article 5 of the Torture Convention requires all Member States to assume and exercise criminal jurisdiction over alleged torturers where, *inter alia,* they are present in any territory under its jurisdiction and it does not extradite them to another State having jurisdiction. There is no equivalent provision in relation to civil proceedings. Article 14 of the Torture Convention, which provides that parties are to ensure that victims of torture obtain redress and have an enforceable right

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to fair and adequate compensation, only requires a private right of action for damages for torture committed in the territory of the forum State.

The conclusion that the denial of immunity in criminal prosecutions for torture is based on an express or necessary international law exception puts to rest any suggestion that immunity was denied in *Pinochet (No. 3)* because torture is not an "official" act. Lord Hoffmann explains the dicta in *Pinochet (No. 3)* on which the Court of Appeal relied as relevant to whether, pursuant to section 20(1) of the State Act Immunity Act 1978, torture is a "function of a head of State", not to whether it is an "official act". The possibility that torture is not a function of a head of State seems unlikely to have significant impact—any individual entitled to that immunity will surely be able to rely on immunity for official acts.

The House of Lords also takes issue with the Court of Appeal's conclusion that even though the individual defendants were not immune from civil proceedings, this did not necessarily mean that a claim could proceed against them. Any claim would be subject to the discretionary assessment of whether it is appropriate to allow service out of the jurisdiction. The House of Lords considers that this is inconsistent with the nature of State immunity, which is "an absolute preliminary bar, precluding any examination of the merits" (Lord Bingham at [33]). Lord Hoffmann goes further, saying that it would be "invidious in the extreme for the judicial branch of government to have the power to decide that it will allow the investigation of allegations of torture against the officials of one foreign state but not against those of another" (at [101]).

The House of Lords' conclusion that a State's representatives are entitled to the same immunity as the State itself in civil proceedings is bolstered by reference to the law on State responsibility. It is clear that States are responsible for the official acts of their representatives, even if those acts are illegal or unauthorised. Finding that a State representative alleged to have committed torture "was not acting in an official capacity would produce an asymmetry between the rules of liability and immunity" (Lord Hoffmann at [78]).

*Jones* closes the door on the possibility that the denial of immunity in criminal proceedings for torture in *Pinochet (No. 3)* was the first step towards denying immunity whenever torture (or the breach of a peremptory norm) is alleged. Such a development now depends on unambiguous international support.

JILLAINE SEYMOUR

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## LAUNDERING CONSPIRACY

THE offence of money laundering can be committed even if the defendant only suspected that the money being laundered was the proceeds of crime: see now Part 7, Proceeds of Crime Act 2002. But would such suspicion be a sufficient mental element if the defendant was charged with a conspiracy to launder money? The House of Lords confirmed in *Saik* [2006] UKHL 18, [2006] 2 W.L.R. 993, by a majority of four to one, that suspicion is not sufficient, and therefore quashed the appellant's conviction. It follows that the offence of conspiracy to launder the proceeds of crime will only be committed if the conspirators knew or intended that the money that would be laundered was or would be the proceeds of crime.

This result and the reasoning of the majority are entirely justified because of the very clear language of the Criminal Law Act 1977 which created the offence of statutory conspiracy. According to that statute, as analysed by Lord Nicholls, there are three mental elements for statutory conspiracy. First, an intention to make the agreement. Secondly, as identified in section 1(1), an intention to do the act prohibited by the substantive offence. Thirdly, as required by section 1(2), intention or knowledge that a fact or circumstance which is necessary for the commission of the substantive offence will exist when the agreement is carried out. It was this element which proved decisive in *Saik* because, for the substantive offence, it is not enough that the defendant suspected that the money was the proceeds of crime; it had to be the proceeds of crime as well: *Montila* [2004] 1 W.L.R. 3141. Consequently, for the conspiracy, the provenance of the money was held to be a particular fact or circumstance which needed to be known or intended. Lord Nicholls recognised that knowledge relates to something which already exists and intention relates to whether something will exist in the future. So, if the money has been identified at the time of the agreement, the defendants must know that it was the proceeds of crime and, if it had not yet been identified, the defendants must have intended that the money to be laundered would be the proceeds of crime. Similarly, for conspiracy to rape, the defendants must agree to have sex with a victim knowing or intending that he or she would not consent, since absence of consent is a necessary circumstance of the offence. Lord Brown, in his speech, considered that belief as to the existence of the fact or circumstance suffices. So, he suggested, if the defendants agreed to handle goods believing that they would be stolen, the offence of conspiracy to handle stolen goods would be committed.

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But the Criminal Law Act 1977 does not use the word "belief". The courts should instead focus on the word "intention" in such circumstances, so that the defendants would be guilty of conspiracy only if they were setting out to handle goods which were stolen; for otherwise they are not agreeing to commit that offence.

It does not follow, however, that a lesser mental element than knowledge or intention will be completely irrelevant for conspiracy. For if an ingredient of a substantive offence is not a fact or circumstance which is necessary for its commission, the mental element relating to that ingredient applies to the conspiracy as it does to the substantive offence. Lord Nicholls emphasised that a fact or circumstance will be a necessary ingredient if it is an element of the *actus reus* of the substantive crime. The operation of this test is especially well illustrated by a conspiracy to damage property being reckless as to whether life is endangered thereby, contrary to section 1(2) of the Criminal Damage Act 1971. Damage to property is a necessary fact which must therefore be intended or known. However, endangering life is not a necessary element because the offence can be committed even if life is not endangered; it is enough that the defendant is simply reckless as regards endangerment. This is therefore not an *actus reus* element, unlike the ingredient of money being the proceeds of crime for the laundering offence, and so it need not be known or intended. It follows that a conspiracy to commit this offence requires proof of intention to damage property and recklessness as to whether life is endangered.

A consequence of *Saik* should be a clarification of the law relating to conditional intention for conspiracy. Unfortunately, a number of their Lordships asserted that conditional intention was a sufficient mental element for conspiracy. But the actual decision in *Saik* appears to contradict this. For the defendant in that case could be described as having a conditional intent to launder the proceeds of crime, namely that he was willing to launder the money even if it was the proceeds of crime, but this was not a sufficient mental state for conspiracy. Rather than stating that a conditional intent is sufficient fault in all cases of conspiracy, their Lordships should have adopted a more sophisticated approach which distinguishes between negative and positive conditions. A negative condition arises where the conspirators want to commit a crime unless a particular condition exists, such as an agreement to steal from a bank unless a security guard is outside. Since the parties want to steal from the bank, this should be regarded as a conspiracy to steal despite the condition. A positive condition exists where the defendants are not setting out to commit a particular

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crime but are willing to commit it in certain circumstances. For example, conspirators may agree to steal from a bank and express a willingness to use a gun to kill if confronted by a security guard. This should be treated as a conspiracy to steal, because that is what the parties are setting out to do, but not a conspiracy to commit murder because, if the agreement is carried out in accordance with their intentions as section 1(1) requires, they will not kill. The parties may suspect that they might be faced with a situation where one of them kills, but at the time of the agreement that is not what they want and, following *Saik*, suspicion as to what might happen is insufficient fault for conspiracy.

Ultimately, a conspiracy is committed at the time of the agreement and in the light of the parties' intentions and knowledge at that time. Put simply, conspiracy is not about making an agreement which might lead to the commission of a particular crime; it is about an agreement that a particular crime be committed. The history of judicial interpretation of inchoate offences generally, but conspiracy in particular, over the last 20 years has been a history of judicial confusion. The House of Lords in *Saik* has, conditional intent apart, redeemed itself and it has done so simply by taking the words in the Criminal Law Act 1977 at face value.

GRAHAM VIRGO

## NO TORT LIABILITY FOR BREACHING FREEZING ORDERS

JUNE 2005 was a bad month for banks. They lost *Spectrum Plus* [2005] UKHL 41. June 2006 brought greater cheer when they won the appeal in *Customs and Excise Commissioners* v. *Barclays Bank plc* [2006] UKHL 28, [2006] 3 W.L.R. 1. In this case the House of Lords unanimously reversed the Court of Appeal's decision that a bank served with an asset freezing order (formerly known as a *Mareva* injunction) could be liable in negligence to the claimant if it allowed withdrawals to be made from an account frozen by the order. The author of this note commended the Court of Appeal's decision at [2005] 64 C.L.J. 26 but now adopts the relatively unusual course of admitting that their Lordships were right and he was wrong.

The case for recognising a duty of care in this area depends ultimately on showing that it is necessary to make this essential feature of the civil justice system work. Thus in the previous note it was argued that the potential liability of the bank for contempt of

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court was insufficient as it was too difficult to prove the necessary contumacious conduct (see *Z Ltd.* v. *A-Z and AA-LL* [1982] Q.B. 558, *per* Eveleigh L.J.). The flaw in this argument was its failure to see how financial institutions, risk averse as far as legal liability is concerned, would be unlikely to flirt even casually with the court's contempt jurisdiction. The kind of case where a bank might inadvertently allow funds to be transferred out of a frozen account is the very case where the issue of tort liability was tested. Shortly after service of the order upon the relevant branch, the customer used the bank's Faxpay system to withdraw funds without reference to the branch. If this sort of conduct is ever to attract legal liability it could only be on a negligence basis. A duty of care would almost certainly force banks to amend their systems to ensure the avoidance of liability, and this in turn would make asset freezing orders more effective. However, it is submitted that their Lordships were correct not to place this responsibility on banks for the following reasons.

First, the imposition of a duty of care on any third party when the defendant is subject to no similar duty of care is anomalous. The customer is defendant in an action brought by the claimant seeking the recovery of a debt or damages but owes no duty of care to observe the asset freezing order. The bank is defendant in an action brought by the claimant seeking damages for allowing funds to be withdrawn from an account the customer maintains with the bank. This account is frozen by the asset freezing order. As Lord Bingham engagingly put it, "It would be a strange and anomalous outcome if an action in negligence lay against a notified party who allowed the horse to escape from the stable but not against the owner who rode it out" ([2006] UKHL 28, at [18]).

Secondly, the bank would be subject to a duty of care not because of something it had chosen to do but because the law imposed that duty. All of their Lordships emphasised that there had been no "voluntary assumption of responsibility" by the bank and no reliance by the claimant. At [2005] 64 C.L.J. 26, at 27, it was said that the *Hedley Byrne* v. *Heller* test of "voluntary assumption of responsibility" applied by Colman J. at first instance was flawed because clearly no duty of care could be recognised on that basis. What the comment did not sufficiently acknowledge was how strong an indication this was that the threefold test of "fair, just and reasonable" was not satisfied. As Lord Hoffmann explained, "...the notion of assumption of responsibility serves a different, weaker, but nevertheless useful purpose in drawing attention to the fact that a duty of care is ordinarily generated by something which the defendant has decided to *do*" ([2006] UKHL

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28, at [38] (original emphasis)). Connected to this is Lord Mance's point (at [111]) that the bank had not been entrusted with any statutory responsibility that it might be expected it comply with.

Thirdly, the imposition of a duty of care could expose banks to liability out of all proportion to their fault. Although the Doomsday scenario of Cardozo C.J. in *Ultramares Corporation* v. *Touche* (1931) 174 N.E. 441, at 444 ("liability in an indeterminate amount for an indeterminate time to an indeterminate class") would not arise because the bank would only be liable to the claimant to the maximum sum frozen by the order, this could still be millions of pounds. Lord Mance stressed that exposing banks to this risk did not appear to be necessary to maintain standards of care ([2006] UKHL 28, at [111]).

Linked to the third reason in particular was the less persuasive reason advanced by some of their Lordships that it would be difficult in principle and practice to confine the duty of care to banks and not extend it also to other third parties holding assets of the customer. It would be difficult to justify exposing custodians other than banks to potentially uninsured liability for mere negligence, but their Lordships did not make it clear why this duty could not be confined to banks.

The only worry one is left with as far as the effectiveness of asset freezing orders is concerned is that bank customers might try to withdraw funds from bank accounts immediately an order is notified to them, in the hope that the bank has had insufficient time to adjust its systems to prevent something like a Faxpay withdrawal from frustrating the order. One possible solution to this might be to allow the claimant to notify the bank of the order a short time before the customer so that the bank gets time to make the adjustment. In any event it is probable that banks will adjust their systems to prevent this kind of scenario from arising, as evidence that it had become prevalent might prompt a change of approach from the courts or even from Parliament.

In conclusion the author confesses that his previously stated views were unpersuasive and that, as Lord Mance said, "[t]he common law has ... developed a system offering very significant protection for claimants, together with very considerable incentives, backed by ample sanctions, for banks and other third parties to do their best to comply" ([2006] UKHL 28, at [113]).

DAVID CAPPER

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A NEW GIST?

THE House of Lords' decision in *Barker* v. *Corus (UK) plc* [2006] UKHL 20, [2006] 2 W.L.R. 1027 was undoubtedly greeted with a sigh of relief by potential defendants to claims for negligence and their insurers. *Barker* further explains the exception to the orthodox rules of causation developed in *Fairchild* v. *Glenhaven Funeral Services Ltd.* [2002] UKHL 22 for certain cases where causation cannot be proved. The decision also establishes the principle of proportionate liability according to the risk to which the defendants exposed the claimants. Proportionate liability, however, will not apply in mesothelioma cases, as section 3 of the Compensation Act 2006, passed shortly after the decision in *Barker*, now stipulates liability *in solidum* for damages in mesothelioma cases, thus in effect reversing the House of Lords' decision on this point.

As in *Fairchild,* all claimants had negligently been exposed to asbestos dust in their employment, but in Barker's case there had also been exposure during a period of self-employment. The claimants had died of mesothelioma, a disease whose exact aetiology is still unknown. It can be caused by a single fibre but also by a combination of several fibres. In any event, the claimants could therefore not prove which defendant, if any, or which combination of defendants caused the disease. It could have been contracted while working for any of the employers, or, in Barker's case, during the period of self-employment, or even by a combination of fibres from different periods.

The House of Lords in *Barker* was faced with two issues: 1) what are the limits of the *Fairchild* exception, and 2) what is the extent of liability under the exception? However, there was a deep disagreement amongst their Lordships as to the nature of the exception, which of course would have an impact on the answers to those issues. For Lord Rodger and Baroness Hale (and indeed counsel for both appellant and respondents) the exception was that under certain circumstances, proof of causing a material increase in the risk is to be seen as a material contribution to causing the injury. But Lord Hoffmann, Lord Scott and Lord Walker understood the exception to be that the damage caused was the creation of the risk that the defendant might contract the disease. While this approach is convenient as it makes the decision on the two issues at hand easier, there is little support for it to be found in earlier decisions, for the reasons given by Lord Rodger in his speech (at [68]–[85]) that need not be repeated here. Redefining the "gist" of the action this way is indeed, as Lord Rodger puts it (at

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[71]), rewriting the key decisions on causation. Be that as it may, it is furthermore wrong on the facts.

At this point it is helpful to recall the reasons for the exception in the first place: that in some cases causation simply cannot be proved and that the application of the orthodox rules would lead to a fundamentally unfair result. Lord Hoffmann (at [33]) refers to his speech in *Fairchild* where he stated that he would prefer not to rely on a fiction of causation and instead wanted to rely on the fact that there was a causal contribution to the risk and that therefore this should be the gist of the action. So the assumption is, as Lord Scott put it (at [61]), that "each successive period of exposure has subjected the victim to a further degree of risk". Unfortunately that is also a fiction: we do not really know that all employers increased the risk. The aetiology of the disease is such that once contracted further exposure does not matter and certainly cannot increase the risk of contracting it. If the disease was contracted during the first employment, all following exposure did and could not increase the risk and hence there could not be a contribution to the risk. But whether that was the case, we do not know—which is exactly the point: we do not know whether all exposure actually increased the risk. Assuming that it did is therefore also resorting to a fiction.

Nothing is gained by replacing one fiction with another, but much can be lost. Redefining the gist of the action to be the risk or chance, which explicitly has been rejected in other decisions in personal injury cases, is a dangerous path that should not be followed. It would have been preferable to understand the *Fairchild* exception as an exception to the orthodox rules on causation necessitated by notions of fairness, allowing the claimant to leap the evidentiary gap and letting the mesothelioma remain the gist of the action.

Coming back to the two issues in *Barker*, their Lordships agreed (and could scarcely have done otherwise in the light of *McGhee* v. *National Coal Board* [1973] 1 W.L.R. 1) that the *Fairchild* exception also applies when one of the sources is non-tortious. According to Lord Hoffmann (who expressly corrected his position in *Fairchild*) another requirement, helping to distinguish *Wilsher* v. *Essex Area Health Authority* [1988] A.C. 1074, is that the agents in question must be "operating in substantially the same way". It is to be assumed that this rather elusive concept will lead to future litigation and its usefulness can be doubted.

Further it was held in *Barker* that the liability should not be *in solidum* but proportionate to the defendant's contribution to the risk of the injury occurring. If one follows the majority's approach, this is the logical consequence as the risk (as the gist of the action)

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is divisible. Otherwise such a departure from the orthodox rules on liability for an indivisible injury can be justified for rationales of fairness (*cf.* Baroness Hale at [127]). Interestingly, the latter approach is also taken by the European Group on Tort Law in their *Principles of European Tort Law* (Vienna, 2005) in Articles 3:103 and 3:106. The underlying problem of course is who should bear the risk of the insolvency of the other tortfeasors, and Lord Rodger (at [87]–[91]) makes a strong case that it should not be the victim and thus liability *in solidum* is to be preferred. Proportionate liability under the *Fairchild* exception could also lead to the undesirable consequences of prolonged proceedings and increased litigation cost, creating further hardship for the victims. Whether swayed by notions of fairness or for financial reasons, Parliament responded swiftly to the House of Lords' decision: section 3 of the Compensation Act 2006 now prescribes liability *in solidum* for damage caused by mesothelioma; for all other cases, proportional liability as established in *Barker* will apply, for better or for worse.

The House of Lords' decision in *Barker* is in many ways problematic, specifically with the majority unnecessarily introducing a new gist to the tort of negligence. By taking this route, their Lordships have undoubtedly materially increased the risk of future litigation trying to expand the notion that a risk or a chance can apparently now be the "gist" of an action.

JENS M. SCHERPE

## THE ONGOING MARCH OF VICARIOUS LIABILITY

IN *Majrowski* v. *Guy's and St. Thomas's NHS Trust* [2006] UKHL 34, [2006] 3 W.L.R. 125, the House of Lords confronted two interrelated questions: the scope of liability under the Protection from Harassment Act 1997 and the application of the doctrine of vicarious liability to bullying in the workplace. Majrowski alleged that he had been subjected to bullying and intimidation by his departmental manager. She had humiliated him in front of other staff, imposed unrealistic performance targets (backed by threat of disciplinary action), been excessively critical of his time-keeping and work and had, at times, refused to talk to him. It was suggested that this behaviour was due to homophobia. Although the Trust had responded to a formal complaint in 1998, Majrowski, who was dismissed in 1999 for reasons unrelated to the case, brought an action some four years later for damages under section 3 of the 1997 Act for distress, anxiety and consequential losses.

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This claim was surprising for a number of reasons. The Act was introduced by the government "to put a stop to the fear and misery caused by stalkers, nuisance neighbours and racial abuse". (Home Office press notice 376/96, 5 December 1996). Yet, in practice, it has been invoked in circumstances varying from animal rights protests (*Daiichi Pharmaceuticals UK Ltd.* v. *Stop Huntingdon Animal Cruelty* [2004] 1 W.L.R. 1503) to the publication of press articles (*Thomas* v. *News Group Newspapers Ltd.* [2002] E.M.L.R. 4). It had not, however, previously been applied to render an innocent employer responsible for the acts of harassment by his employee, and there is a traditional line of authority which excludes vicarious liability for acts of personal vengeance (see *Keppel Bus* v. *Sa'ad bin Ahmad* [1974] 1 W.L.R. 1082).

A further objection, raised at Court of Appeal level, but accepted by counsel as unwinnable in the House of Lords, was that a statute which imposed a duty on the employee alone would not support a claim for vicarious liability for breach of statutory duty. Although there was no clear authority on this point, both the Court of Appeal ([2005] Q.B. 848) and House of Lords found no reason why vicarious liability should not lie in this situation. An employer would be vicariously liable for breach of such statutory duty *unless* the statute expressly or impliedly excluded liability. This is consistent both with earlier dicta in the so-called "shot-firing" cases and with academic authority (see, notably, *National Coal Board* v. *England* [1954] A.C. 403 at 422; Atiyah, *Vicarious Liability in the Law of Torts* (1967), pp. 280–284). It thus becomes crucial to determine whether liability was expressly or impliedly excluded in this case.

Under the statutory tort of harassment, "A person must not pursue a course of conduct—(a) which amounts to harassment of another, and (b) which he knows or ought to know amounts to harassment of the other" (section 1(1)). Whilst the Court of Appeal had struggled to ascertain whether the Act impliedly excluded vicarious liability, Lord Hope provided an argument which defeated even the strong doubts of Baroness Hale and Lord Brown. Section 10 of the Act inserts a new section into the Prescription and Limitation (Scotland) Act 1973 which specifically refers to "the defender ... responsible for the alleged harassment, or the employer or principal of such a person" (s.18B(2)(b)). This formula was borrowed from earlier modifications to the 1973 Act—a factor which might indicate a failure by the Parliamentary draftsman to consider fully the implications of this form of wording—but was deemed to be a strong indication that vicarious liability was intended by the statute. In the light of a Parliamentary statement

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by the Home Secretary that the law in Scotland and England and Wales on this point was not intended to differ, it could not be argued that liability had been excluded—in fact, it had been expressly permitted.

Yet one must question what would have been the position in the absence of section 10. If this section is ignored, the fact remains that both the Court of Appeal (which did not rely on section 10) and the House of Lords were divided as to the extension of vicarious liability into the law of harassment. Baroness Hale argued that promoters of the Act might have opposed vicarious liability on the basis that it was aimed at prevention and protection, not compensation. It was certainly not intended to provide a means of circumventing established restrictions on distress damages, or to encourage litigation by those upset by the "irritations and misfortunes of life". Lord Hope accepted that, but for section 10, there was a strong argument that Parliament intended liability in damages to be personal to the perpetrator of the harassment.

These comments highlight the real questions raised by this decision. By relying on the 1997 Act, the claimant circumvents many of the conditions for establishing liability against an employer, whether under the tort of negligence or under anti-discrimination law. In bringing a claim under section 3 of the Act rather than negligence, the claimant gains the benefit of a longer limitation period (six, not three years: Limitation Act 1980, section 11(1A)) and, significantly, may claim damages for mere anxiety, rather than psychiatric illness (section 3(2)). The condition of foreseeability of harm found in *Sutherland* v. *Hatton* [2002] 2 All E.R. 1 is not required. Similar advantages exist in relation to anti-discrimination law. If Majrowski had been able to claim discrimination on the grounds of sexual orientation, he would have faced the "employer's defence", that the employer had taken such steps as were reasonably practicable to prevent the employee from doing that act or acts of that description, and the very short three-month time limit for bringing the claim (see Employment Equality (Sexual Orientation) Regulations 2003 S.I. 2003/1661, Regs. 22(3) and 34, although only in force on December 1, 2003). Assuming that these requirements represent a compromise between the interests of employer and employee, *Majrowski* tips the scale firmly towards the employee. Little consideration is given to the potential impact on workplace relations or costs to employers (see Scott Baker L.J. in the Court of Appeal). To utilise a statutory provision which focuses on harassing behaviour, not compensation, to resolve workplace disputes appears to be a questionable use of legislation.

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A further concern must lie with the doctrine of vicarious liability itself. Since *Lister* v. *Hesley Hall Ltd.* [2002] 1 A.C. 215, the courts have adopted a generous approach towards liability, finding conduct as varied as sexual abuse by a warden of a children's home, to a vengeful knife attack by a bouncer outside a nightclub, to be "within the course of employment" (see *Lister* and *Mattis* v. *Pollock* [2003] 1 W.L.R. 2158). The "close connection" test has received criticism in that it "affords no guidance on the type or degree of connection which will normally be regarded as sufficiently close": *Dubai Aluminium Co. Ltd.* v. *Salaam* [2003] 2 A.C. 366 at [25]. Nevertheless, it remains the authoritative test. Lord Nicholls in *Majrowski* reiterates recent formulations of the test: that the conduct is closely connected with acts the employee is authorised to do if, looking at the matter in the round, it is just and reasonable to hold the employer liable (see *Bernard* v. *Attorney General of Jamaica* [2005] I.R.L.R. 398). Relevant policy factors which justify the imposition of liability on the employer will be the risk of harm to others resulting from economic activity, the incentive to increased employee-protection by employers, the identification of a solvent defendant and the benefits of loss distribution (Lord Nicholls at [10], Auld L.J. (C.A.) at [28]–[35]). Yet this loose formulation provides limited guidance for lower courts, save that the hurdle would appear to be relatively low. If it is accepted that sexual abuse is in the course of a carer's employment, it is hardly a significant leap to claim that bullying or other forms of harassment are within the employee's course of employment. The judgments in *Majrowski* indicate that a restrictive definition of "harassment" may prove a more effective barrier to claims. It remains to be seen whether this will provide a sufficient filter to avoid what Scott Baker L.J. openly referred to below as a "floodgates" problem.

While it is difficult to dispute the reasoning of the House of Lords in *Majrowski* in relation to section 10, one must express disquiet at the ability of the claimant to hijack the 1997 Act to obtain compensation. Bullying is a serious problem in the workplace, but is surely better dealt with by a considered legislative or judicial response rather than an opportunistic reading of unrelated legislation. Employment lawyers must now face the consequences of employers being targeted for claims of anxiety due to harassment in the workplace (claims not covered by the Employers' Liability (Compulsory Insurance) Act 1969). While *Majrowski* will no doubt be welcomed by victims, one must express concern at the unremitting increase of liability on employers, particularly when it flies in the face of the attempt by the Court of

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Appeal in *Hatton* to "strike a balance which is reasonable to both sides" (Hale L.J. at [13]).

PAULA GILIKER

## "DIRECTLY RELEVANT BACKGROUND CONTEXT" AND DEFAMATION DAMAGES

THE calculation of defamation damages in English law is a notoriously inexact science. As is well known, where a defendant is unable to make out a defence, the court will award an appropriate sum of damages to the claimant to compensate him for the harm inflicted upon his reputation. Such damages depend inherently upon the claimant's personal standing in the public estimation, and the quantum reflects the principle that a defamatory statement causes greater harm to a claimant of previously unsullied character than to one of widespread infamy. With this in mind, an unsuccessful defendant will often seek in mitigation to emphasise past unsavoury conduct on the part of the claimant, which may reduce the final damages accordingly.

This defence tactic has been tightly regulated by the courts. In *Scott* v. *Sampson* (1882) 8 Q.B.D. 491 it was held that, for reasons of pragmatism and fairness, general evidence of ill-repute within the community may be advanced in mitigation, but sundry instances of unrelated misconduct cannot be adduced to diminish the claimant's standing. In *Plato Films Ltd.* v. *Speidel* [1961] A.C. 1090, this position was subsequently endorsed by the House of Lords, predominantly on the basis that libel actions would be extended *ad infinitum* if the claimant was forced to defend every conceivable instance of misbehaviour committed during his lifetime, invoked by a defendant attempting to embroider a hitherto unproven reputation for iniquity. However, given that the distinction between evidence of bad character and evidence of specific misconduct indicative of such a reputation is often obscure, the Court of Appeal in *Burstein* v. *Times Newspapers Ltd.* [2001] 1 W.L.R. 579 ruled that *Speidel* did not preclude consideration of evidence of "directly relevant background context" in mitigation, since it is clearly pertinent to the damage allegedly suffered by the claimant.

This interpretation of *Speidel* was substantively challenged in *Turner* v. *News Group Newspapers Ltd.* [2006] EWCA Civ 540, in the context of an acrimonious attempt to use the offer of amends procedure that required judicial intervention to assess compensation pursuant to section 3(5) of the Defamation Act 1996. In February

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2004 the *News of the World* published a two-page lascivious article under the headline "Swingers and Losers", examining the effects of so-called "wife-swapping" parties on the relationships of the participants. The article contained a short side-piece detailing the experiences of one Arisara Turner, a former wife of the claimant and nominally the second defendant, in which she described her reluctance to participate in such activities and alleged that her (unnamed) husband had pressurised her into conducting a series of sexual encounters with strangers. The claimant, while accepting that he was identifiable only to a relatively minute proportion of the newspaper's readership, repeatedly complained to the editor with little success, before threatening legal action.

At this point the *News of the World* made an unqualified offer of amends, which the claimant chose to accept. The first defendant printed a suitable correction and apology and also undertook to pay compensation and costs, but stated that if an agreement could not be reached on the financial settlement it intended to rely upon "further matters" in any subsequent judicial proceedings. These "further matters" encompassed a *Burstein* plea of mitigation, comprising some 28 paragraphs detailing "lurid sexual practices" on the part of Turner. This document was apparently compiled in good faith based on information from the second defendant, who then promptly left the jurisdiction, rendering the newspaper unable to substantiate the majority of its background claims. Nevertheless, the first defendant amended its *Burstein* pleas and entered three key matters as mitigation: proof of the claimant's membership of and regular attendance at a specialist fetish club; Turner's assertive role as his wife's manager for a series of highly explicit sexual photographs and films; and his vitriolic comments reproduced in two national newspapers accusing his Thai wife of facilitating a marriage of convenience for immigration purposes and calling for her deportation.

At first instance, Eady J. held that these assertions comprised directly relevant background context and took them into consideration in assessing compensation, set at £9,000, following a deduction of 40% from a sum the judge would have awarded at trial. The claimant appealed for a lesser deduction on a variety of grounds, contending primarily that salacious evidence of his personal peccadilloes should not have been considered by the judge, on the basis that *Burstein* had been decided *per incuriam*. This position was based not on a failure to consider relevant authority—*Burstein* is a lengthy dissection of the semantics of legal reasoning behind the principle in *Speidel*—but rather that the Court of Appeal had misunderstood the reasons for Parliament's failure to

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change the law in the 1996 Act. An original working group had drafted a clause permitting the introduction of mitigating evidence of misconduct related to the same sector of the claimant's life as the defamatory publication. In *Burstein* it was observed that the clause failed for want of Parliamentary time, while in *Turner* evidence was introduced that criticism had led to its abandonment. Either way Keene L.J., who gave the leading judgment, found this argument insignificant, concluding that both interpretations led to the same outcome—Parliament ultimately chose not to implement the clause—and hence the *Burstein* principle had not been made in error.

The claimant then contended that *Burstein* was incompatible with previous authority, a position rejected by the court on the basis that the principle in *Scott* "has never, before or since, been absolute". This was particularly true in instances where the court, in assessing defamation damages, considered evidence of misconduct advanced under an ultimately doomed defence. The effect of *Burstein* was to recognise the fallacy of requiring a jury to assess damages in an "evidential vacuum" when a defence had been struck out, while conversely permitting such evidence to be considered in mitigation where a defence had merely failed. Indeed, it was important for the court to take an unblinkered view of the claimant so as to assess better his overall reputation and the tarnishing effect of the libel upon it. In this respect, *Burstein* was considered to have left the essence of previous cases intact—namely that the claimant should not be subjected to a roving inquiry into past conduct irrelevant to the matter in question.

The difficulties inherent in determining the threshold of admission of such evidence were also examined by the Court of Appeal. Clarifying the position under *Burstein*, Keene L.J. held that "it has to be evidence which is so clearly relevant to the subject-matter of the libel or to the claimant's reputation or sensitivity in that part of his life that there would be a real risk of the jury assessing damages on a false basis if they were kept in ignorance of the facts to which the evidence relates" (at [56]), a test satisfied by the first defendant in the present case. All things considered, *Burstein* was therefore also appropriate to the offer of amends process—a fairly obvious (if hitherto unarticulated) point, given the operation of section 3(5) of the 1996 Act.

The *Burstein* plea remains controversial in defamation law, not least because of the ironic position that it may reverse the so-called "chilling effect" on free speech presented by libel actions: the implied threat of further muck-raking may deter the victim of a defamatory statement from pursuing the matter, although it may

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police duplicitous claims of unblemished reputation. The definition of the parameters of *Burstein* is useful, although in practice this remains a highly subjective issue and may constitute a fertile source of complaints to the appellate courts over the admission of such evidence in individual cases, depending on whether the judiciary takes a broad or restrictive view of the evidential threshold in subsequent decisions. The entrenchment of *Burstein* in the present case means that such pleas should become increasingly commonplace in pre-trial defamation processes. Nevertheless, a note of caution has been quietly sounded by the Court of Appeal in *Turner* by endorsing a key observation of Eady J.: where the claimant enters a series of ultimately unsubstantiated allegations under a *Burstein* plea—whether in good faith or as a crude form of intimidation—this will amplify the claimant's loss and correspondingly increase his damages.

RICHARD CADDELL

## PROVING A BENEFICIAL JOINT TENANCY

IN *Stack* v. *Dowden* [2005] EWCA Civ 857, [2006] 1 F.L.R. 254 the Court of Appeal considered the consequences of technical conveyancing practice in quantifying the beneficial shares under a trust of land held by joint legal proprietors.

In 1993 an unmarried couple, Mr. Stack and Ms. Dowden, became the joint registered proprietors of their house. Ms. Dowden made the greater financial contribution to acquiring it. When the couple separated, Mr. Stack claimed a half-share in the sale proceeds. The property, he claimed, was held on an express or constructive trust under which the parties were beneficial joint tenants (if so, the parties would necessarily have taken equal beneficial shares). The Court of Appeal disagreed. There was no declaration of express trust but the court accepted that the property was held on a common intention constructive trust. It awarded 35:65 beneficial shares.

The Court of Appeal's reasoning followed from two established premises. First, if the parties had declared an express trust defining the extent of their beneficial interests then that would have been conclusive (*Goodman* v. *Gallant* [1986] Fam. 106). Secondly, if there were a constructive trust, the court would award the parties whatever beneficial share was "fair having regard to the whole course of dealing between them" unless there was evidence that

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they had actually agreed what their shares should be (*Oxley* v. *Hiscock* [2004] EWCA Civ 546, [2005] Fam. 211).

The argument turned on the words in the deed of transfer from the vendors to Mr. Stack and Ms. Dowden: "The Purchasers declare that the survivor of them is entitled to give a valid receipt for capital money arising from a disposition of ... the property". The Court of Appeal held that this power was merely consistent with the declaration of a beneficial joint tenancy but did not necessarily indicate an intention to declare one. Similarly, the words were not conclusive evidence that the parties had informally agreed to take joint beneficial shares under the constructive trust.

At first sight this is surprising. A sole trustee of land cannot give a valid receipt for capital moneys arising from a disposition of the land (Trustee Act 1925, section 14(2)). The disposition would not overreach the trust and the purchaser would risk being bound by the beneficiary's interest (Law of Property Act 1925, sections 2(1)(ii), 27 (2)). But the sole survivor of a legal and beneficial joint tenancy of land can give a valid receipt. If one proprietor dies, the entire beneficial interest will be in the survivor. His equitable interest will merge with the legal estate, which will extinguish the trust. He will be free to dispose of the land, unaffected by the rules controlling dispositions by trustees. By contrast, a power in the survivor to give a valid receipt would be incompatible with the legal proprietors holding subject to a beneficial tenancy in common. If the first proprietor dies, the trust will not be extinguished. The surviving, sole trustee cannot make an overreaching conveyance by providing a receipt to the purchaser. Even if the trust instrument purported to confer a power to this effect, statute would nullify it (TA 1925, section 14(3)).

What other kind of trust could the survivor's power have been consistent with if not a beneficial joint tenancy? In 1993, before the Trusts of Land and Appointment of Trustees Act 1996, it might conceivably have indicated that the legal proprietors were holding on a bare trust for a third party (*cf*. *Harwood* v. *Harwood* [1991] 2 F.L.R. 274). Bare trusts arguably fell outside the former rules regulating trustees' powers to dispose of land. It might have been thought necessary to give a surviving bare trustee an express power to give a valid receipt so that he could make an overreaching conveyance. But the enactment of TLATA has made this tenuous construction irrelevant for conveyances after 1996. TA 1925, section 14 and LPA 1925, sections 2, 27 now apply to bare trusts. If a survivor's power to give a valid receipt appeared in a post-1996 conveyance, it would be hard to argue that it indicated anything but an intention to declare an express beneficial joint tenancy.

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Moreover, other conveyancing developments have overtaken the point of construction in the case. Since 1999 every deed of transfer to joint legal proprietors has required them to state explicitly the trusts on which they will hold the property (see now Land Registration Rules 2003, r. 58 and Form TR1). This practice clearly encourages the declaration of binding express trusts, which should prevent arguments after the event about the extent of each party's beneficial share under an implied trust.

What, then, of resulting trusts? It may seem that constructive trusts principles have edged them out but they should not be thought of as "largely redundant" (*cf.* Dixon, [2005] Conv. 79 at 84). The case demonstrates the continuing *functional* importance of the resulting trust rationale, particularly in quantifying the parties' beneficial shares under a constructive trust. Resulting trusts depend on an evidential presumption that the parties do not intend to relinquish their beneficial right to the money which they contribute to buying the property. Evidence of the parties' financial contributions remains very influential when the court determines the "fair" beneficial share to allocate to them under the constructive trust: "If ... the whole of the purchase price ... other than the mortgage advance was provided by D ... it is *impossible* ... to reach the conclusion that it is fair ... that their beneficial interests should be equal " (*per* Chadwick L.J. at [35], emphasis added). In an area where understandings are usually informal and the parties' recollections necessarily hazy, presumptions about the parties' intentions are crucially important.

Indeed, the continuing failure of property law to "recognise the value and impact of non-financial contributions" has recently driven the Law Commission to propose reform of this area of law (see Law Comm. CP 179 at para. 4.7 *et seq*). It seeks to replace the current trust law approach to allocating property on separation with a "holistic" scheme of "flexible remedies" allowing certain eligible cohabitants to apply for relief. But the ability of the proposed scheme to produce greater legal certainty—another laudable aim of the Commission—must be debateable. Surely highly emotional, warring ex-cohabitants will shift their energies to disputing the more "flexible" areas of the new regime. The grant of relief will depend on judicial discretion, albeit one exercised by reference to principles focusing on each party's contributions to the joint household and the family's welfare as a whole (paras. 6.45 and 6.77). However, it remains to be seen whether a desire to give better protection to a small number of vulnerable cohabitants cynically exploited by their economically more powerful partners (para. 5.53 *et seq*) justifies a far-reaching default regime applying to

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all child-rearing cohabitants, many of whom may have deliberately "opted out" of a defined legal status for their relationship.

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DAVID FOX

### *HASTING-BASS* AND THIRD PARTIES

OVER recent years, the courts have often considered the rule in *Re Hastings-Bass* [1975] Ch. 25. In *Sieff* v. *Fox* [2005] EWHC 1312 (Ch), [2005] 1 W.L.R. 3811 at [119] (noted [2006] C.L.J. 15), Lloyd L.J. summarised the rule as follows:

> Where trustees act under a discretion given to them by the terms of the trust, in circumstances in which they are free to decide whether or not to exercise that discretion, but the effect of the exercise is different from that which they intended, the court will interfere with their action if it is clear that they would not have acted as they did had they not failed to take into account considerations which they ought to have taken into account, or taken into account considerations which they ought not to have taken into account.

The question of what effect an application of this principle might have on third parties—people other than the trustees and beneficiaries of the settlement concerned—was at issue in *Donaldson* v. *Smith* [2006] EWHC 1290 (Ch).

Trustees of farmland in Essex decided to divide the land between two groups of beneficiaries (the children of two daughters of the settlor). The trustees therefore exercised their powers of appropriation and appointment so that they came to hold some of the farmland (the "Green Land") as bare trustees for one set of children and the rest (the "Red Land") as bare trustees for the other set.

The beneficiaries of the Green Land claimed an implied right of access to it over the Red Land. In order to settle the claim, the trustees secured alternative access to the Green Land. They already owned the freehold reversion to a strip of land which gave access to the Green Land, and they already held that reversion on trust for the beneficiaries of the Green Land. The trustees therefore took a surrender of the lease over the strip, so that the beneficiaries of the Green Land could gain access to it over other land held for them free from encumbrances. However, the beneficiaries of the Green Land believed that the new access was not as practically useful as the alleged right of way over the Red Land. The trustees sought directions from the court.

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The judge (David Donaldson Q.C.) dismissed an argument that a right of way over the Red Land had arisen under the rule in *Wheeldon* v. *Burrows* (1879) 12 Ch.D. 38. He was more sympathetic to a submission that such a right of way had arisen by necessity, but finally held against it: the necessity of implying an easement ended when the trustees arranged the alternative access, and so, therefore did any easement founded on such necessity (at [44]). In a rather desperate attempt to avoid this conclusion, the beneficiaries of the Green Land alleged that the surrender, which created the alternative access, was void under the rule in *Re Hastings-Bass* or void for common mistake. The judge rejected both submissions. He rejected the allegation of common mistake on the facts. The factual basis of the *Re Hastings-Bass* argument was that "the trustees cannot have appreciated the effect of the surrender on the alternative claim to a way of necessity over the Red Land, and would not have agreed it if they had done so" (at [53]). The judge found the evidence in support of this argument unpersuasive; but he also held that the rule in *Re Hastings-Bass* could not affect the validity of the surrender, even if the trustees had breached the rule.

The judge's first, and most important, point was that a trustee's capacity to contract is a function of the trustee's juridical personality, whether as an individual or as a corporation: capacity is not conferred by the trust itself. A trustee is bound by a contract simply because he, she or it is a legal person who has duly exercised the capacity conferred by law to make contracts. The rule in *Re Hastings-Bass* simply does not affect the formation of a contract. If a trustee makes a contract in breach of trust, the breach will not affect the *prima facie* validity of the contract itself; but it will mean that the trustee may not indemnify himself out of the trust fund when he comes to perform his obligations under the contract (see, *e.g.*, *Hosegood* v. *Pedler* (1896) 66 L.J. Q.B. 18 at pp. 20–21; *Vacuum Oil Co. Pty. Ltd.* v. *Wiltshire* (1945) 72 C.L.R. 319 at pp. 324–325 and 335). If a trustee acts in breach of the rule in *Re Hastings-Bass*, which may not necessarily amount to a breach of trust (see [2006] C.L.J. 15 at p. 16), the effect of that breach on the contract can be no greater.

Secondly, the judge stated that when a contract is made in breach of trust, the beneficiaries can seek the assistance of equity to set the contract aside "in an appropriate case" (at [55]). It is unclear quite what this means. A contract made by trustees should be set aside if principles of contract law so provide: for example, where there is an operative mistake, or some relevant misrepresentation. Equally, where trustees make a contract in breach of trust, a court will not grant specific performance of the

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contract (see, *e.g.*, *Turner* v. *Harvey* (1821) Jac. 169 at p. 178; *Dunn* v. *Flood* (1885) 28 Ch.D. 586 at pp. 594–595). If, however, as the judge appeared to suggest, a court could actually set aside a contract made by express trustees because of their breach of duty, the reason for the court's action must surely be found in the counterparty's unconscionable behaviour in relation to the breach. The breach does not diminish the trustees' ability to form a valid contract: it does not go to their capacity or authority to enter into the obligation (at [54]); and the trustees cannot easily argue that their consent to the contract was somehow impaired by the breach of trust, as they would either know about it or, at the very least, be under a duty to know their trust and so appreciate what would amount to a breach of that trust.

Thirdly, the judge emphasised that if the rule in *Re Hastings-Bass* has any effect on a contract, it would only render the contract voidable, not void *ab initio*. This accords with recent decisions on the effect of the rule on trustees' dispositive powers (see, *e.g.*, *Abacus Trust Co. (Isle of Man)* v. *Barr* [2003] EWHC 114 (Ch), [2003] Ch. 409 at [33]). The judge was at pains to point out that an administrative act, such as making a contract in the course of administering a trust, need not be treated in the same way as a dispositive act. With respect, this must be correct. When trustees make a contract in breach of trust, a legal obligation arises by virtue of the trustees' act as juridical persons: the obligation does not depend on the law of trusts for its existence or *prima facie* validity. The law of trusts might provide a reason why that obligation should be abrogated; but it does not entail that the obligation was void *ab initio*. Dispositive powers are different: they do depend on the law of trusts for their very effect, and the rule in *Re Hastings-Bass* might therefore affect them differently, by limiting their very scope. However, even in the context of dispositive powers, the rule in *Re Hastings-Bass* is best understood as only rendering a decision voidable because it governs how trustees should make their decisions (see [2006] C.L.J. 15 at pp. 17–18).

Finally, the effect of trustees exceeding their powers when making a contract can usefully be contrasted with the effect of a director doing likewise. Trustees make contracts as an exercise of their own powers as juridical persons (a matter of general law), and they seek an indemnity out of their trust fund in respect of the contract (a matter of trust law), which will not be allowed if they acted in breach of duty. In contrast, a director who makes a contract on behalf of a company acts as the company's agent. Hence, if the director exceeds or abuses his powers, he will not bind the company to the contract, although the company may

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become bound by operation of law (*e.g.*, by reason of the director's ostensible authority): *Hopkins* v. *TL Dallas Group Ltd.* [2004] EWHC 1379 (Ch), [2005] 1 B.C.L.C. 543. This distinction is one more reason to be cautious of analogies drawn between trustees and directors.

RICHARD NOLAN
MATTHEW CONAGLEN

## COMPENSATING COMMERCIAL AGENTS

EVER since the enactment of the Commercial Agents (Council Directive) Regulations 1993, the consequences of terminating a commercial agency have perplexed judges and practitioners. Quite apart from any common law remedy for breach of contract, regulation 17 created two distinct and alternative methods for providing financial redress to the commercial agent: "compensation", the default entitlement, or "indemnity", applicable only if contractually chosen by the parties. A claim generally arises upon termination of the agency, regardless of fault or breach of duty on the principal's part, and even if the relationship is terminated lawfully, for example by the agent's death, or upon the expiry of a fixed-term contract.

The legislation is stunningly silent as to how "compensation" should be calculated, reg. 17(6) baldly stating that "the commercial agent shall be entitled to compensation for the damage he suffers as a result of the termination of his relations with his principal". Courts have unsurprisingly reached divergent solutions as to the method of assessment: one approach, emphasising the French origin of the provision in the underlying 1986 European Directive, adopts the French rule that the agent should usually be awarded two years' gross commission (*King* v. *T. Tunnock Ltd.* 2000 S.C. 424); other courts, concerned that so inflexible a formula is not sanctioned by the drafting and might overcompensate, have preferred a more open-textured enquiry in order to make a "fair and proportionate" award (*Tigana Ltd.* v. *Decoro Ltd.* [2003] Eu. L.R. 189, Davis J.).

Now, in *Lonsdale* v. *Howard & Hallam Ltd.* [2006] EWCA Civ 63, [2006] 1 W.L.R. 1281, [2006] I.C.R. 584, the Court of Appeal has had a first opportunity to engage in detailed analysis of reg. 17. Owing to reduced profitability the defendant shoe manufacturer closed its business and duly terminated the claimant's commercial agency. He claimed nearly £20,000, the equivalent of two years'

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commission, but the trial judge declined to follow the French approach and awarded him only £5,000. In a careful judgment reviewing the earlier authorities, Moore-Bick L.J. (with whom Hallett and Jacob L.JJ. agreed) interpreted the Regulations afresh and dismissed the claimant's appeal.

The crucial starting point was to articulate the precise damage suffered by an agent when his relationship terminates. Contrary to what earlier cases had decided, "compensation" under reg. 17(6) is not concerned simply with finding a sum that would be just and equitable, but with providing redress for an identifiable loss, primarily the loss of the agency business and goodwill that the agent would have enjoyed had his relationship not come to an end; damages should accordingly reflect the value of this business at the date of termination. The French two-year rule, by contrast, made no reasoned attempt to ascertain the true extent of the agent's loss and was unsupportable, even as a broad guideline.

Key to understanding *Lonsdale* is the way it characterises the agent's entitlement. Superficially, the wording of reg. 17(6) is redolent of common law damages for future expectation loss. Moore-Bick L.J.'s analysis, however, is radically different. "Compensation" is the division of business assets between principal and agent: through his labours the agent builds up a share of goodwill, "a species of property" (at [30]) to which he is entitled upon termination of the agency. In paying compensation the principal is thus in effect "buying out" the agent's patrimonial entitlement, rather than redressing future loss. This confers on the agent a right he does not at common law possess. An analogy might be drawn with the dissolution of a partnership; indeed, the relationship between principal and agent envisaged by the Directive has sometimes been described as one of "quasi-partnership". Analysed in this way, there is clearly no room for the doctrine of mitigation, and no consideration whether the agent might have obtained alternative employment elsewhere.

The valuation of the agency business and associated goodwill should reflect the agent's potential future earnings from commission (reg. 17(7)(a)); the agent can additionally recover any expenses incurred on the principal's advice which owing to termination remain unamortised (reg. 17(7)(b)). Earlier cases had identified a host of factors relevant to the assessment of compensation, such as the duration of the agency and the quality of the agent's performance, but *Lonsdale* clarifies that these are relevant only insofar as they affect the valuation of the agency business and must otherwise be ignored. In most cases the court would need expert evidence on valuation, but where that would be disproportionate

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"the judge is entitled to apply his common sense and adopt a broad brush approach" (at [57])—hardly a recipe for certainty and perilously close to the "just and equitable" assessment that Moore-Bick L.J. was so anxious to disclaim.

Departing from the Scottish decision in *King* v. *Tunnock* (above), the Court of Appeal held that it was relevant when calculating the value of the agency to consider the state of the principal's business. Thus where, as in *Lonsdale*, the defendant company was in serious decline, the goodwill of the claimant's agency was inevitably reduced and only a modest award was appropriate. Since the valuation assumes a hypothetical sale at the date of termination, matters affecting the state of the principal's business that occur only after termination and are unforeseeable at that time should probably be disregarded, since they would not have influenced the perceived value of the agency; this issue was not, however, considered by the Court.

One difficulty with the date of termination approach to valuation is that compensation would be negligible where a fixed-term agency expires by effluxion of time, undermining one of the clear purposes of the Regulations (*cf.* *Light* v. *Ty Europe Ltd.* [2004] 1 Lloyd's Rep. 693, C.A.). A "purposive" approach must be used instead, valuing the agency on the fictional basis that it would run into the future. There is in this part of the judgment an uneasy shift in the basis of compensation, away from valuing the agent's business (approximately nil in these circumstances) towards preventing the unjust enrichment of the principal through its receiving the goodwill generated by the agent "free of charge" (at [48]).

Despite *Lonsdale's* very helpful identification of the focus of reg. 17(6), much remains uncertain, not least the potential overlap with a common law damages claim, and the relationship between the "indemnity" and "compensation" provisions (the UK is unique in having enacted both: all other European countries chose one alone, the vast majority opting for the German-inspired "indemnity" basis of redress). The House of Lords has given leave to appeal ([2006] 1 W.L.R. 1846) and it will be some time yet before lawyers feel entirely at home in the mysteries of the Regulations.

BENJAMIN PARKER

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## EUROPEAN CROSS-BORDER INSOLVENCIES: THE RACE GOES TO THE SWIFTEST?

THE European Insolvency Regulation (''the Regulation'': Council Regulation (EC) No. 1346/2000, O.J. [2000] L 160/1) is intended to provide for the ''efficient and effective'' resolution of cross-border insolvencies involving EU Member States. The Regulation eschews attempts to harmonise the substance of Member States' widely differing insolvency laws, and restricts itself to the provision of a unified scheme for allocating jurisdiction and choice of law. That even this, however, is an ambitious task, is well-illustrated by the European Court of Justice's first decision on the Regulation, *Eurofood IFCS Ltd.—Bondi* v. *Bank of America NA* (Case C-341/04, O.J. [2006] C 143/11).

Eurofood IFCS Ltd. (''Eurofood''), a company registered in Ireland, was a wholly-owned subsidiary of Parlmalat SpA (''Parmalat''), a company registered and operated in Italy. Parmalat was forced into Italian insolvency proceedings in December 2003, following a notorious accounting scandal. In January 2004, a winding-up petition was brought in Ireland against Eurofood, pursuant to which the Irish courts appointed a provisional liquidator (a form of interim relief pending a winding-up hearing). However, in February 2004, Parmalat's administrators persuaded the Italian courts to open insolvency proceedings for Eurofood in that country. The Irish High Court, refusing to accept the Italian court's jurisdiction, made a winding-up order against Eurofood in March 2004, and referred the dispute to the ECJ for a preliminary ruling. On the ECJ's conclusions, Ireland was the correct place for the opening of main insolvency proceedings and the Irish court had opened proceedings in January 2004; consequently, the Italian courts were bound to recognise this.

*Where should ''main'' proceedings be opened?*

Under Article 3(1) of the Regulation, ''main'' proceedings, which attract EU-wide recognition, must be opened in the Member State in which the debtor has its ''centre of main interests'' (''COMI''). For corporate debtors, the COMI is presumed to be the place of the registered office. However, this presumption is rebuttable. Recital 13 in the Regulation's preamble states that COMI should ''correspond to the place where the debtor conducts his interests on a regular basis and is therefore ascertainable to third parties''. This scheme reflects a drafting compromise between Member States whose conflicts rules treat companies as domiciled where they are incorporated, and those whose rules follow the location of the

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actual seat of business. Unfortunately, its inherent ambiguity leaves the application of COMI shrouded in uncertainty.

The ECJ in *Bondi* confirmed that COMI should have an autonomous meaning. As Ireland was the country of Eurofood's registered office, and the terms of the reference stated that this was also where its interests were regularly conducted, the ECJ concluded readily that Ireland was the COMI, but was unable to offer much authoritative guidance as to that concept's application. The Court did explain that the Article 3(1) presumption would be rebutted only by "factors which are both objective and ascertainable by third parties", reflecting the importance attached to certainty for those extending credit. At the same time, it took the view that the presumption would be rebutted in the case of a "letterbox" company carrying on no business at all in the jurisdiction of its registered office. It is possible to read this as implying that in cases where *some* business is carried on in the place of the registered office, the Court would be slow to find the presumption rebutted. Precisely which sorts of "objective and ascertainable" factors might be relevant remains uncertain, but it is perhaps worth noting that the advent of internet searches may render the registered office as readily discoverable as the location of physical premises.

Bondi's principal argument for rebuttal of the Article 3(1) presumption was that Eurofood was part of an insolvent corporate group, and Italy was the parent company's COMI. The Court rejected this: whilst it may be administratively convenient to conduct group insolvencies in a single jurisdiction, the Regulation's scheme makes no special provision for groups. This protects the interests of the creditors of subsidiaries, who enjoy structural priority within a group, but only at the price of considerable administrative inconvenience in group insolvencies. It also casts doubt on earlier English decisions, such as *Re Daisytek-ISA Ltd.* [2004] B.P.I.R. 30, which had displayed a more pragmatic approach to COMI in group contexts.

*Mutual trust: the "first in time" rule*

The problems associated with the uncertainty over the concept of COMI are exacerbated when we turn to the Regulation's scheme for avoiding conflicts between Member States' courts. Article 16 requires all such courts to grant immediate recognition to "a judgment [opening insolvency proceedings] handed down by a court of a Member State which has jurisdiction pursuant to Article 3". In conjunction with this, Recital 22 exhorts a principle of "mutual trust": "grounds for non-recognition should be reduced to the

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minimum necessary''. Moreover, in the specific case where the courts of two Member States both claim competence, then ''[t]he decision of the first court to open proceedings should be recognised in the other Member States without those Member States having the power to scrutinise the court's decision''. The ECJ in *Bondi* read this as directly effective in the interpretation of Article 16: main proceedings opened in one Member State must immediately be recognised in all the others, even if it is felt that the court where proceedings were opened has misapplied COMI. The recourse of disgruntled parties would be solely through the courts where proceedings have been opened (and thence to the ECJ, if necessary).

A strict ''first in time'' rule of course begs the question as to when proceedings are deemed to have ''opened''. In order to minimise the risk of conflicts between Member State courts, the ECJ concluded that a ''judgment opening proceedings'' under Article 16 should take an autonomous meaning that would enable it to apply at the earliest point possible. A ''judgment'' in relation to the opening of proceedings is defined in Article 2(e) to mean the opening of proceedings *or* the appointment of a liquidator. ''Collective insolvency proceedings'' and ''liquidator'' are defined (in Articles 1 and 2(e), respectively) by reference to lists in Annexes B and C, respectively. The Court ruled that the appointment of *any* such ''liquidator'', as a step towards the opening of any such ''proceedings'', would constitute a ''judgment'' triggering the first in time rule. As a provisional liquidator is, in the case of Ireland, listed in Annex C, and is appointed as a step towards the opening of winding-up proceedings (correspondingly listed in Annex B), then the Irish court had ''opened'' proceedings in January 2004, notwithstanding that under Irish law, the appointment of a provisional liquidator does not itself constitute the commencement of insolvency proceedings.

*Bondi* may lead to some undesirable forum-shopping in the short run: that is, some creditors may now race to open proceedings in ''favourable'' Member States which under Annex C permit the appointment of a ''liquidator'' at a very early stage. However, by focusing on the lists contained in the Annexes, the Court has permitted such problems to be resolved through negotiation about the contents of these lists (which have already been amended since the Regulation came into force: see Council Regulation (EC) No. 694/2006, O.J. [2006] L 121/1). Had the Court not given an autonomous meaning to ''judgment'', the forum-shopping problems would have been far more intractable.

JOHN ARMOUR

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## Discriminating Against a Discriminator

In *Serco Ltd.* v. *Redfearn* [2006] EWCA Civ 659, the Court of Appeal dealt with a novel question under the Race Relations Act 1976. Mr. Redfearn, a white man, was employed by Serco, a company engaged in the transport of people with physical or mental disabilities in Bradford. By all accounts, he was a perfectly satisfactory employee. However, when it became known that he had been elected as a local councillor for the British National Party (BNP), a party whose constitution states that it is "wholly opposed to any form of integration between British and non-European peoples", he was immediately and summarily dismissed.

Serco justified his dismissal on health and safety grounds: it feared that its passengers (many of whom are Asian in origin) would be anxious around him and that he might be attacked for his political views while at work. Mr. Redfearn contended that this ground was nothing more than a smokescreen. The normal avenues of redress were closed to him. A claim for unfair dismissal was unavailable as he had not served the minimum period of one year prescribed by section 108 of the Employment Rights Act 1996. Mummery L.J. was at pains to emphasise that this was not an unfair dismissal case (where Mr. Redfearn's complaints would have had real substance). He could not claim for wrongful dismissal as he had suffered no damage, and could not bring a claim under the Human Rights Act 1998 for an infringement of Articles 9, 10 or 11 as Serco is not a public authority. In any event, Article 17 might prevent use of the Convention to protect his views as they are incompatible with the Convention. The only way to seek redress was by shoehorning his complaint into one under the 1976 Act. This argument succeeded in the Employment Appeal Tribunal but failed in the Court of Appeal.

Mummery L.J., with whom Dyson L.J. and Sir Martin Nourse agreed, began his analysis by observing that the "self evident aim of the race relations legislation is to promote an anti-discrimination policy" (at [17]). The 1976 Act prohibits both direct (section 1(1)(a)) and indirect (section 1(1)(b) and 1(1A)) discrimination on "racial grounds" (namely colour, race, nationality, or ethnic or national origins—section 3(1)).

Section 1(1A) was introduced to implement the Council Directive 2000/43/EC, and although it is easier to establish indirect discrimination (identifying a "provision, criterion or practice" as opposed to a "a requirement or condition" under section 1(1)(b)), it has a narrower scope. The complaint here was made under sections 1(1)(a) and 1(1A). Indirect discrimination can be justified;

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direct discrimination cannot. Part II of the 1976 Act covers race discrimination in the employment field and makes it unlawful for an employer to discriminate against an employee by dismissing him (section 4(2)).

It fell to Mr. Redfearn to establish that he had been treated less favourably on racial grounds. In order to do so, he relied on the wide definition given to that term in a line of authorities following *Showboat Entertainment Centre Ltd.* v. *Owens* [1984] I.C.R. 65 (which itself followed *Zarczynska* v. *Levy* [1979] I.C.R. 184). Showboat dismissed a white man when he refused to comply with its discriminatory instruction to exclude black people from its amusement centre. Browne-Wilkinson J. characterised the issue as whether, "for the purposes of the Act of 1976, A [can] unlawfully discriminate against B on the ground of C's race" (at 67C). He held that the words "on racial grounds" are perfectly capable "in their ordinary sense of covering any reason for an action based on race, whether it be the race of the person affected by the action or of others". Thus, it is clear that A can be liable for discriminating against B on the ground of C's colour or race.

As Mummery L.J. stressed, *Showboat* is not confined to cases of an employer using his employees to implement a racist policy; it also applies to cases where, for example, a white employer dismisses a white employee for marrying a black person (*Race Relations Board* v. *Applin* [1975] A.C. 259). Mr. Redfearn argued that *Showboat* should not be restrictively interpreted, claiming that "on racial grounds" covers any case in which the discriminator's less favourable act was "significantly informed by racial considerations or racial attitudes" or was "referable to race" (at [39]). Further, he argued that, following *Nagarajan* v. *London Regional Transport* [1999] I.R.L.R. 172, discrimination only had to have a "significant influence on the outcome"; it did not have to be the primary consideration. He contended that any concern that the court might have about the appearing to permit racist conduct could be dealt with at the remedy stage: only nominal damages need be awarded.

Mummery L.J. considered that it was important to have regard to the consequences of adopting one interpretation of "on racial grounds" rather than another. He held that Mr. Redfearn's interpretation was too wide: "[h]is sweeping proposition is wrong in principle, is inconsistent with the purposes of the legislation and is unsupported by authority" (at [43]). It produces the following absurd consequence: an employer who, in trying to improve race relations, dismissed an employee found to have been guilty of racist abuse would be liable for direct race discrimination. The policy of the 1976 Act would be turned upside down.

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The circumstances in which Mr. Redfearn was dismissed included racial considerations, but that did not mean that his dismissal was "on racial grounds" (at [46]). Mummery L.J. also rejected the alternative argument, based on *James* v. *Eastleigh BC* [1990] I.C.R. 554, that there was direct discrimination because Serco adopted a race-based criterion for dismissing him (belonging to a whites only organisation). Rather, he was treated less favourably "not on the ground that he was white, but on the particular non-racial characteristic shared by him with a tiny proportion of the white population" (at [49]), that is, membership of a political party like the BNP. Serco's response would probably have been the same to a similar political party which confined its membership to black people.

As to indirect discrimination, Mummery L.J. found that the appropriate provision, criterion or practice under section 1(1A) could not be as narrow as "membership of the BNP" but would be more along the lines "of membership of a political organisation like the BNP, which existed to promote views hostile to members of a different colour than those that belonged to the organisation" (at [54]). Clearly Mr. Redfearn would not be disadvantaged as a white person. The question of justification thus did not arise.

As Mummery L.J. pointed out, there is simply no law prohibiting discrimination on political grounds. Under section 108(3) of the 1996 Act, there are specific instances (such as pregnancy, protected disclosure and assertion of a statutory right) in which an employee is protected against unfair dismissal without having to satisfy the one-year period of qualifying service. The list of specific instances has grown over the years as Parliament has reacted to sociological changes. What protection is afforded to employees is a highly political and sensitive issue. Some might argue that as "[u]npopular political opinions are lawful, even if they are intolerant of others and give offence to many" (at [10]), employees should never be dismissed merely for holding let alone expressing them. The Court of Appeal was silent as to whether this is a lacuna in the law that needs to be rectified. However, in a modern democracy, it cannot be right that a person can be dismissed for unexpressed beliefs, whatever their nature, if they are unconnected with and do not hinder that person's employment.

JONATHAN LEWIS

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DIVORCE AND THE MULTI- MILLIONAIRE: THE SEARCH FOR PRINCIPLE

THERE is no place for discrimination between husband and wife in their respective roles. Fairness, judged against a yardstick of equality, rules. So much was clear from the decision of the House of Lords in *White* v. *White* [2001] 1 A.C. 596 in the case of asset division on divorce. But *White* involved a long marriage in which the extent of the capital assets by themselves outweighed any possible future needs of the parties. How should this elusive principle of fairness be applied in the case of a much shorter, childless marriage, or in the unusual case where the capital assets are insufficient to support a clean break but where the exceptional income of one party can meet both of their needs many times over? In the absence of clear statutory objectives, these were the respective questions for the House in the conjoined appeals of *Miller* v. *Miller* and *McFarlane* v. *McFarlane* [2006] UKHL 24.

Melissa Miller's marriage lasted just two years and nine months. Following her engagement to Mr. Miller, she left her job in public relations in Cambridge to join her husband-to-be in London, where she worked for another public relations firm at a salary of £85,000 per annum. Mr. Miller had already established a highly successful career in asset management. At the time of the marriage, he was already worth £16.7 million, rising to £17.5 million by the time of the first instance hearing. But he had also joined a newly established company and acquired 200,000 shares in it. It was not possible to calculate precisely the value of these shares, but expert estimates ranged from £12 million to £18 million. In contrast, Mrs. Miller's assets were worth about £100,000 and, after paying her costs, she would find herself about £300,000 in debt. The judge awarded Mrs. Miller a capital sum of £5 million which was far in excess of what she would require for her "reasonable needs". This award was upheld by the Court of Appeal, in part on the controversial reasoning that the husband's "misconduct" in leaving his wife for another woman, although not conduct which it would be inequitable to disregard under the Matrimonial Causes Act 1973, section 25(2)(g), could be used as a counter-balancing factor to the brevity of the marriage. The judge was also entitled to have regard to the legitimate expectation of living to a high standard as the ex-wife of Mr. Miller.

Julia McFarlane's marriage was in contrast a long one which had produced three children, now aged 16, 15 and 9 years. Both she and her husband were professionally qualified, he as a chartered accountant and she as a solicitor. In 1991, following the birth of their second child, they took a joint decision that she

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should give up her career and that they should concentrate on the husband's career. By 2002–3 the husband's gross partnership income was £1,286,000. His wife's income was negligible since ceasing work. On divorce the parties agreed that the capital assets of about £3 million should be equally divided. But these were insufficient to achieve an immediate clean break and Mrs. McFarlane also required an income award. The parties agreed that a so-called "joint lives" order was appropriate and the dispute concerned the level of periodical payments. The district judge awarded her £60,000 a year for the children's maintenance and £250,000 a year for herself. Bennett J. allowed the husband's appeal and reduced the award for the wife to £180,000, considering that the figure of £250,000 was "way above" her needs. This, he thought, would subvert the principle that the purpose of periodical payments was maintenance and not the accumulation of capital, since capital orders were to be made once and once only. The Court of Appeal held that, in exceptional cases such as this, periodical payments *could* be used to accumulate capital but, in restoring the order for £250,000, removed the joint lives order, on the basis that it gave insufficient weight to the clean break principle, and replaced it with an extendable five-year term order.

The House of Lords unanimously dismissed Mr. Miller's appeal and allowed that of Mrs. McFarlane. The two principal speeches of Lord Nicholls of Birkenhead and Baroness Hale of Richmond identify three alternative and overlapping rationales for redistribution—that the relationship has generated *needs*, that there should be *compensation* for relationship-generated disadvantage, and that marriage is a *partnership* of equals so there should be a sharing of the fruits of that partnership. This third rationale has a resonance with community of property regimes but, in a system which has separation of property as its starting point, the question arises as to what property may properly be classified as "matrimonial" and what "non-matrimonial". It is also an approach which does not sit easily with the generally accepted view that *all* assets owned by the parties are in principle available for redistribution under the extremely wide discretionary jurisdiction in England. Nonetheless it was acknowledged by the House that the *source* of assets could be taken into account and that this was more likely to be appropriate in the case of a short than a long marriage. There was a shade of difference between Lord Nicholls and Baroness Hale on what should properly be defined as matrimonial property. It was common ground that it should *include* property acquired by joint efforts during the marriage for the family and should *exclude* property obtained by one party by gift or

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inheritance, but Baroness Hale was apparently more willing (albeit in a very small number of cases) to exclude also from the definition "business or investment assets which have been generated solely or mainly by the efforts of one party" (at [150]).

Mr. Miller's appeal was dismissed essentially for two reasons. First, although the husband brought great wealth into the marriage which more than justified a departure from the principle of equal division, the accretion to his wealth during the marriage as the result of the work which he did was also very substantial and the wife was entitled to have some share in this. Secondly, the judge was entitled to have regard to the high standard of living enjoyed by the parties during the marriage as a key factor in the case. Mrs. Miller would not be able to maintain this on her own. The House disagreed profoundly, however, with the Court of Appeal's treatment of the conduct issue. It was not permissible to let conduct in through the back door by regarding it as falling within "all the circumstances of the case" where it was clearly way short of the sort of exceptional conduct or misconduct which it would be inequitable to disregard. This is a welcome reaffirmation of a long-standing principle that the rights and wrongs of married life are essentially non-justiciable. The reference to "conduct" in these cases is often a euphemism for "extra-marital affair", and the arguments for taking it into account are essentially moralistic ones. For adultery to be accepted as routinely relevant to financial awards would be to turn the clock back decades. Indeed, if Part II of the Family Law Act 1996 had been implemented, adultery would have disappeared altogether as a relevant concept in divorce. The House also took the opportunity to revisit the notion of the "special" or "stellar" contribution. Like conduct, this should be relevant only in truly exceptional circumstances. This may not quite sound the death knell for the sort of argument which prevailed in the Court of Appeal in *Cowan* v. *Cowan* [2002] Fam. 97, and from which that Court had already been retreating in *Lambert* v. *Lambert* [2003] Fam. 103. But there is certainly a strong steer from Lord Nicholls that parties and their advisers ought not "to enter into the minute detail of the parties' married life, with a view to lauding their own contribution and denigrating that of the other party" (at [66]).

The compensation principle looms large in the decision to allow the *McFarlane* appeal and to restore the joint lives order. For Lord Nicholls, this was "a paradigm case for an award of compensation in respect of the significant future economic disparity, sustained by the wife, arising from the way the parties conducted their marriage" (at [93]). The novel feature of the Lords' decision is the acceptance by the House that the purpose of periodical payments is

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not confined, as was generally thought, to maintenance but can also be, in appropriate cases, compensation. Thus "if one party's earning capacity has been advantaged at the expense of the other party during the marriage it would extraordinary if, where necessary, the court could not order the advantaged party to pay compensation to the other out of his enhanced earnings when he receives them" (at [32]). Thus, the Court of Appeal had been mistaken in treating the surplus of income over expenditure as simply a means for the wife to accumulate capital, since this was to confuse the distinction between needs and compensation. It was appropriate to place the onus on the husband to return to court to seek a variation of the joint lives order rather than to limit the term of periodical payments and place the onus on the wife to seek an extension. This result, as Lord Hope of Craighead noted, is not achievable in Scotland where the equivalent legislation, in pursuit of the clean break, *bars absolutely* financial support of the ex-spouse beyond three years and expressly excludes "compensation aimed at redressing a significant prospective disparity between the parties arsing from the way they conducted their marriages" (at [144]).

The clean break principle, to which the courts must have regard but which they are not required to implement, lies at the heart of the *McFarlane* appeal. Its treatment by the House is perhaps the least satisfactory aspect of the decision since it is arguable that insufficient attention was given to the ideology which lies behind it. The principle, first enacted in the Matrimonial and Family Proceedings Act 1984, should not be viewed simply as a matter of cold financial calculation. Rather it embraces a philosophy which firmly rejects ongoing dependency following divorce, especially, even in these days of formal gender-neutrality, the dependence of women on men. Principles fashioned with only the extremely rich in mind must nonetheless be sound enough to provide an appropriate mixture of certainty and flexibility for everyone. For the overwhelming majority of divorcing women, spousal support means at best "rehabilitative", time-limited periodical payments. A combination of the clean break directive and a much higher incidence of child support have made lifelong spousal support a rarity for ordinary people, except in the tiny minority of cases in which there is a real and demonstrable need for maintenance. There will be many women today who will instantly recoil from the very notion of "joint lives" support, whether or not reviewable and whether or not masquerading as compensation. This seems to have been grasped in Scotland and by the Court of Appeal, but not perhaps by the Judicial Committee.

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The decision is also a striking endorsement of the significance of status in family law, at a time when there is much talk of a move to more functional legal characterisations of family relationships. We should not lose sight of the fact that much more important to the success of both Mrs. Miller and Mrs. McFarlane than the contributions which either made was the fact that they happened to be wives. Had Julia McFarlane merely cohabited, for however long, there would have been no question whatever of her receiving any income support from her partner, and Melissa Miller, had she not been married, would in all probability have left with nothing. It is the fact of marriage which makes the all-important difference. The gap between the married and the unmarried may be narrowing in many areas of the law, but here it is widening to a gulf. The present decision makes all the more urgent the Law Commissions' tentative proposals for, *inter alia*, the creation of an adjustive jurisdiction in relation to cohabitants (see Law Commission Consultation Paper No. 179, *Cohabitation: The Financial Consequences of Relationship Breakdown* (2006)).

ANDREW BAINHAM

QUANTIFICATION OF DAMAGES—SUBSTANCE OR PROCEDURE?

THERE is a contradiction at the heart of this casenote. On the one hand, the House of Lords was completely right in its decision in *Harding* v. *Wealands* [2006] UKHL 32, [2006] 3 W.L.R. 83 overturning the Court of Appeal's judgment (noted [2005] C.L.J. 305) and reinstating that of Elias J. On the other, it was utterly wrong.

Lord Hoffmann, delivering the leading speech, asked himself a plausible question: whether the issue of damages for personal injury caused by negligent driving should be referred to the applicable law (as a matter of substance) or whether it is a question of procedure determined in accordance with English law. Liability for the injury caused by the accident in New South Wales had been admitted in this case. However, if New South Wales law on damages were applied, the claimant received less than under English rules. What was the intention of Parliament in using "procedure" in section 14(3)(b) of the Private International Law (Miscellaneous Provisions) Act 1995? Lord Hoffmann distinguished procedure from substance as remedy from right. "Procedure" was not limited to the manner of proceedings before the court, which was the narrow meaning adopted by the Court of Appeal. "Procedure" therefore

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included all issues concerning the remedy including the assessment of the amount of damages payable. He held this was consistent with the majority opinion in *Boys* v. *Chaplin* [1971] A.C. 356. The Law Commission had clearly taken that view in the Report on which the draft Bill was based; likewise Lord Mackay's statement to the House. Parliament was found not to have intended any change. That traditional view of procedure was treated as unarguably and self-evidently true. The House of Lords would have had to be as bold and enlightened as the Court of Appeal to come to a different conclusion. A claimant suing in England for damage caused by an accident abroad has only to show that liability for a particular head of damage arises under the applicable law, but the assessment of the actual amount of damages payable by the defendant is to be done exclusively according to the *lex fori*. Having asked the question he did, in the manner he did, the answer was inevitable.

Nevertheless, it was the wrong answer. This case went to the heart of the function of conflict of laws. What is the proper role for the applicable law and what is the proper role for the *lex fori*? The traditional meaning of procedure compared to substance was not subjected to careful scrutiny by their Lordships, nor by Parliament, nor by the Law Commission. No mention was made of the purpose or function of the distinction between substance and procedure. There was no discussion of the principles involved in drawing that, rather delicate, distinction. It is not as easy as it appears. Lord Hoffmann saw substantive matters as only those determining whether the tort is actionable. These would presumably include whether pure economic loss can be recovered, or whether there is liability for nervous shock, and also questions of causation, remoteness and forseeability. Rules on the applicable interest rate to discount future earnings, rules capping the maximum damages, and rules preventing recovery of the first week's wages are now definitively all procedural, as those were the rules of New South Wales law at issue. Lord Hoffmann's blithe assurance that New South Wales law considered such rules procedural merely adds to the disquiet. However, what of foreign rules on contribution, or joint liability, or strict liability, or requirements for wilful default, or replacement of damages with a social security scheme? Most of these look substantive; they determine the circumstances in which a right to damage arises and do not merely quantify the amount of money payable. This decision can be interpreted to mean that so long as a liability for the type of damage suffered exists under the applicable law, such rules are procedural and not to be applied.

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That conclusion is wrong in principle. It denudes the applicable law of much of its function and gives English law qua *lex fori* an importance beyond its function. There is little reason in deciding that New South Wales law is the most appropriate, forseeable and closely connected law and then not applying it as fully as practicably possible. The purposes of applying the procedural rules of the *lex fori* are solely for pragmatic, administrative efficiency of the courts. This result even makes a careful identification of the applicable law unnecessary. English law will determine the most important issue so long as the applicable law permits recovery for a type of damage. In addition, giving the *lex fori* such a wide application encourages inappropriate forum-shopping. That issue was not discussed despite its centrality to the majority in the Court of Appeal. Lord Hoffmann was very concerned that US levels of damages were not to be made available in the English courts. However, English levels of damages are higher than almost anywhere else. Here the claimant received 30% more than he would have received in New South Wales. This claimant may have had sufficient contacts with England to justify the English court in deciding this case and granting English levels of damages. Indeed, Elias J. held that English law was the applicable law. The important point is that English law *must* apply to the question of assessment of damages, irrespective of a complete lack of connection with England beyond the commencement of proceedings here. Foreign claimants are now best advised to start actions in tort in England. One could argue that jurisdictional rules should solve this problem, but one would be wrong. First, our common law jurisdictional rules are not failsafe—as this case demonstrated at an earlier stage. More importantly, the jurisdictional rules are often not discretionary. An English defendant sued here under Article 2 of the Brussels 1 Regulation by a German claimant in respect of a road accident in Germany would be liable for English levels of damages. This would be so even when the defendant had hired the car in Germany and the German claimant had recovered all that he was entitled to under the German social security law. Foreign insurers with a possible English victim will no doubt be increasing their premiums considerably, so prepare to pay more for your rental car abroad.

Such substantial conflict of laws cases rarely end up in our highest court. Facts are hardly ever very similar so we rely more heavily on principles and the purpose of the rules as guidance than a straightforward black letter approach. Even Lord Hoffmann accepted that the decision was wrong in principle and in logic, but no matter. He merely remarked somewhat sadly that Parliament

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made the law even if it was wrong. Never has Geoffrey Cheshire's epithet of the paralysing hand of the parliamentary draftsman been so true.

PIPPA ROGERSON

## THE EVIDENTIAL STATUS OF PREVIOUS INCONSISTENT STATEMENTS

FOR many years, the common law rule about the evidential status of a witness's previous inconsistent statements was the *pons asinorum* for students of the law of evidence. As those who crossed it will recall, it was as follows. A witness who had earlier told a different tale could have his earlier inconsistent statement "put to him" in cross-examination; if in response he then "adopted" it—*i.e.* agreed that he had made it and admitted it was true—the earlier statement then became admissible as evidence of the matters it contained. But if he refused to adopt it, the earlier statement was not in law evidence of any facts asserted in it, although the tribunal of fact could treat it as bearing on the credibility of the witness's oral testimony in court. So if the witness told the police "the answer is a lemon", but later told the court "the answer is an orange", there would be no legally admissible evidence before the court that the answer was a lemon: but there would be evidence that the answer was an orange, plus a good reason for disbelieving it.

No tears were shed when this abstruse rule was abolished in civil proceedings by the Civil Evidence Act 1968, which provided that where a previous inconsistent statement is put to a witness, the contents count as evidence on which the court may act if it believes the earlier statement, rather than the later one. In criminal proceedings, however, the old rule lived on: where, if it continued to hinder law students, it continued to help those defendants who (or whose muscular friends) could persuade the prosecution witnesses to retract their initial statements to the police. In 1997 the Law Commission said that the old rule should be abolished in criminal proceedings too, and six years later section 119 of the Criminal Justice Act 2003 achieved this. Section 119 came into force in April 2005, and two months later the Court of Appeal considered it for the first time in *Joyce and Joyce* [2005] EWCA Crim 1785. This case shows us that the change, technical as it may appear, has important practical implications.

Following a shooting carried out in broad daylight in the streets of Liverpool, three people who had seen it gave statements to the

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police identifying the defendants, who were known to them, as the assailants. At trial, all three witnesses retracted their statements, and produced implausible explanations as to why their initial identifications had been wrong. *"Nulla so: nulla vidi, e se c'ero, dormivo"*, as they say in Sicily: "I know nothing: I saw nothing, and if I was there I was asleep". At the end of the prosecution case the trial judge rejected a defence submission of "no case to answer" and left the evidence to the jury, which convicted, evidently because it believed what the witnesses had originally said to the police and not what they had told the court in evidence—and heavy sentences were imposed.

Upholding the convictions, the Court of Appeal said:

> In the light of the new statutory provisions in relation to hearsay, in our judgment it would have been an affront to the administration of justice, on a trial for offences based on this terrifying conduct, if the jury had not been permitted by the judge to evaluate, separately and together, the quality of the three witnesses' oral evidence and to rely, if they thought fit, on the terms of their original statements...

Under the earlier law, the defence submission of "no case" would have succeeded, and acquittals would undoubtedly have followed; and this change provokes a number of related thoughts.

First, the change can be seen in wider context as a part of a series of moves to modify the traditional rules of criminal evidence to cope with the practical (and horrifying) difficulties of witness-intimidation in violent crime. Thus in *Sellick* [2005] EWCA Crim 651, [2005] 1 W.L.R. 3257, the Court of Appeal, after an extensive survey of both the Strasbourg and the English case law, had earlier decided that a conviction could in certain circumstances be based upon the initial statements given to the police by witnesses who, through fear, failed even to appear at the eventual trial. And in *Davis, and Ellis and others* [2006] EWCA Crim 1155 the Court of Appeal, after a similar survey, and a reference to statistics about gun-related crime, has now ruled that in certain circumstances a conviction can properly be based on the evidence of witnesses who testify at trial anonymously.

Secondly, *Joyce* and the other cases also mark a decisive move away from the traditional common law position, according to which the only form of evidence on which it is acceptable to found a conviction in a criminal case is oral testimony given live at trial–on oath, in the presence of the defendant, and subject to cross-examination. Behind this change there lurks an unspoken change of attitude towards traditional ideas: including rising scepticism about the value of the oath, and a growing acceptance that, contrary to

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the traditional view, what a witness said in private immediately after a traumatic incident is quite as likely to be true as what he says in public, in the presence of the defendant, ages later. And there is also an acceptance that, in principle, defendants can be adequately protected by other safeguards than the right to cross-examine: for example, full disclosure of the evidence in advance, and the right to call evidence to challenge or rebut.

(Such notions have, of course, been long accepted in the inquisitorial tradition on the Continent; and here it is interesting to see that in 2001, as part of a conscious attempt to reform their criminal procedure on "Anglo-Saxon" lines, the Italians solemnly enacted the very rule about the status of a witness's previous inconsistent statements that we have just abolished. If the first principle of comparative law is that the grass on the other side of the fence is always greener, the second seems to be that we borrow our neighbours' legal tools only after they have decided to put them in the bin!)

The most obvious effect of *Joyce* and the related case law is to enhance the evidential status of the statements potential witnesses give to the police. This raises important questions about the way in which the police obtain such statements and record them. At present, this is a matter about which there are scarcely any rules, and the law leaves the police to their own devices. A similar situation formerly existed as regards police interviews with suspects: the fruits of which, unlike witness-statements, were generally admissible in evidence as "confessions". After years of complaints (both true and false) about police misconduct and ineptitude when interviewing suspects, the English legal system faced this problem with the Police and Criminal Evidence Act 1984, which (*inter alia*) provides that such interviews must be tape-recorded. If witness-statements are to be more widely admissible in evidence, then surely similar precautions are needed here as well.

J. R. SPENCER

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