Cambridge Law Journal, **64(3)**, November 2005, pp. 523–574
Printed in Great Britain

THE
CAMBRIDGE LAW JOURNAL

VOLUME 64, PART 3 NOVEMBER 2005

CASE AND COMMENT

APPEALS

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

R. v. *Bentham*, noted [2004] C.L.J. 543. Appeal allowed: [2005] UKHL 18, [2005] 1 W.L.R. 1057

R. (Laporte) v. *Chief Constable of Gloucestershire*, noted [2004] C.L.J. 535. Appeal dismissed: [2005] EWCA Civ 1639, [2005] 2 W.L.R. 789. Leave to appeal to the House of Lords granted: [2005] 1 W.L.R. 2003 (H.L.)

Sirius International Insurance Co. (Publ.) v. *FAI General Insurance Ltd.*, noted [2004] C.L.J. 288. Appeal allowed: [2004] UKHL 54, [2004] 1 W.L.R. 3251

A RIGHT TO AN ORAL HEARING IN QUASI-JUDICIAL PROCEEDINGS?

FOR many years, especially since the Second World War, the issue has been debated in the development of quasi-judicial procedures in the context of public law and administrative law: is there a right to an oral hearing? The House of Lords has given a clear steer on the common law in *R. (West)* v. *Parole Board*; *R. (Smith)* v. *Parole Board (No. 2)* [2005] UKHL 1, [2005] 1 W.L.R. 350 (noted by Padfield, [2005] C.L.J. 276).

The procedure must be fair. The right to an oral hearing depends upon an assessment of a variety of factors: What is the nature of the issue? What are the circumstances? What is the legal and administrative context? What does the public interest require? Are the facts in issue? Are the facts likely to be in issue? How

https://doi.org/10.1017/S0008197305286956 Published online by Cambridge University Press

serious is the issue? Is liberty in issue? In an application for parole, or in resisting revocation and recall, no new sentence is involved but liberty, albeit subject to restrictions, most certainly is. Is credibility or veracity in issue? Is it a situation in which oral argument and cross-examination and presentation could realistically add anything to the papers? Might an oral hearing give an opportunity to explain or mitigate facts, perhaps "second hand" facts, perhaps somewhat selective or biased facts? Might an oral hearing give the parties the opportunity to sense the way the decision-making body is thinking, an opportunity which would not be available on the papers, and thus give the opportunity to influence the decision-making body in a significant way? Institutions may favour the official line, they may treat individuals as numbers or nuisances, they may be institutionally reluctant to grant an oral hearing. The procedure can be informal and flexible and adapted to the circumstances. A fair procedure does not require rules of evidence and curial formalities.

The concept of the oral hearing may sound good, but there are many problems. Everybody has to be assembled together. A suitable venue has to be found. Notice has to be given. There will be delay. There will be expense. The facts may not be in dispute, everything is in the papers, the oral hearing may be a weary repetition of the facts in the papers. It may be clear from the papers that the applicant has no arguable case. The decision is anyway a value judgment. Frivolous and vexatious behaviour can occur, though this should always be controlled by the decision-makers.

In contemporary bureaucratic controlled society millions of quasi-judicial issues between citizen and State have to be decided every year. Most decisions are taken on the papers by board members, officials, civil servants, local government officers, councillors. The safeguard is usually to be found in a right of appeal, to a tribunal or to the Secretary of State, where a right to an oral hearing is usually given, by statute, or by regulation, or by convention. Then there is the right of appeal on a point of law to the court. And there is always the ultimate remedy of judicial review, bringing the matter into the normal court judicial process: *R. (Alconbury)* v. *Secretary of State for the Environment, Transport and Regions* [2003] 2 A.C. 295.

Then there is the European Convention on Human Rights. The House of Lords decided in *West* and *Smith* that the common law duty of procedural fairness satisfied Article 5(1) and (4) (but that on the facts there had been a breach of that duty), and did not need to decide upon the relevance of Article 6, namely in the

https://doi.org/10.1017/S0008197305286956 Published online by Cambridge University Press

determination of civil rights and obligations or of any criminal charge, the entitlement to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, with significant minimum rights in a criminal matter (Article 6(2) and(3)). The minimum term imposed by a trial judge on a life sentence is now subject to appeal in the normal way: Criminal Justice Act 2003, sections 269 and 271. The minimum term imposed before the Criminal Justic Act 2003 is open to review by the Lord Chief Justice. There is no right to an oral hearing unless perhaps more information is required, written representations would not suffice, and no undue burden would be imposed upon the Lord Chief Justice: *R. (Dudson)* v. *Secretary of State for the Home Department* [2005] UKHL 52.

In planning, well over 90 per cent. of planning applications are dealt with on the papers by the officers under delegated powers. The major and controversial applications may be referred to the councillors, who may or may not hold oral hearings. Oral hearings may reveal new points and new insights into the merits and demerits of an application. However, they may be full of irrelevant, "emotional", repetitive and time-consuming points, with nothing achieved except a public airing of "prejudices" and "grievances". Councillors may subconsciously be influenced by political or other extraneous considerations. Councillors are not required by law to grant oral hearings; any injustice may be remedied by judicial review: *R. (Adlard)* v. *Secretary of State for the Environment, Transport and Regions* [2002] EWCA Civ 735, [2002] 1 W.L.R. 2515.

Under the Licensing Act 2003, chapter 17, transferring alcohol licensing from the magistrates to the local authority, the decisions are to be taken by councillors (ss. 3 and 4); there must be a statement of licensing policy (section 5), subject to ministerial guidance (section 182); there can be virtually no delegation to officers (section 10); and there must be an oral hearing subject to prescribed procedure (section 183). General ethical standards are laid down by the Committee on Standards in Public Life. Under the Licensing Act 2003 (Hearings) Regulations 2005, S.I. 2005, No. 44, there must be a public hearing; the hearing takes the form of a discussion led by the authority; there is no cross-examination unless required by the authority; though with permission a party may question another party; and a party is entitled to address the authority. The authority will normally deliberate in private, but give a reasoned decision in public.

The taxi licensing committee must act fairly and be ready to hear all interested persons, though it may sit in private because the

https://doi.org/10.1017/S0008197305286956 Published online by Cambridge University Press

reputation and livelihood of the driver may depend upon the outcome: *R.* v. *Liverpool Corporation ex p. Liverpool Taxi Fleet Operators' Association* [1972] 2 Q.B. 299, C.A.; Local Government (Miscellaneous Provisions) Act 1976, part II, sections 45–80. There is a right of appeal to the magistrates' courts.

Not surprisingly, the law presents a confused patchwork appearance. The situation may be governed by statute, which may require an oral hearing, or may give the power to dispense with an oral hearing, or may say nothing. There are numerous examples, in immigration, social security, education, health, highways, and many others (see H.W.R. Wade, *Administrative Law*, 9th ed. (Oxford University Press 2004), pp. 929–930). In *Local Government Board* v. *Arlidge* [1915] A.C. 120 the House of Lords denied any common law "right" to an oral hearing (Lord Haldane at 134, Lord Parmoor at 141); in *Ridge* v. *Baldwin* [1964] A.C. 40 the House of Lords held that a chief constable facing dismissal was entitled to "natural justice", which included the right to be informed of the allegation against him and the right to be "heard", but whether that right to be "heard" involved an oral hearing or could be the right to make written representations was not spelt out (Lord Reid at 66 and 79, Lord Morris at 121, Lord Hodson at 132; see also *British Oxygen* v. *Minister of Technology* [1971] A.C. 610, Lord Reid at 625E). *R. (West)* v. *Parole Board* does at least indicate the criteria to be applied where at common law or by statute a discretion exists whether or not to hold an oral hearing.

If an oral hearing is denied, and lawfully, there can be no doubt that the citizen is entitled to know the allegation made against him, to have full disclosure of the allegation, to have the right to make rebutting representations, and to have a reasoned decision.

The leading comparative lawyer the late Professor Hamson used to speak of the "extreme orality" of the English trial in the common law system as its main advantage (C.J. Hamson, *The English Trial and Comparative Law* (Heffer, Cambridge 1954), and more generally *Executive Discretion and Judicial Control, An Aspect of the French Conseil d'Etat* (Hamlyn Lectures, Stevens 1954)).

Administrative Justice, Some Necessary Reforms: The Report of the Committee of the JUSTICE—All Souls Review of Administrative Law in the United Kingdom (Oxford, Clarendon Press 1988) recommended informal hearings and a code of practice, led by the Council on Tribunals (paras. 9.20 and 10.22).

Perhaps it is time for a statutory code of fair procedure, setting out the relevant principles and relevant factors to be considered by

https://doi.org/10.1017/S0008197305286956 Published online by Cambridge University Press

a quasi-judicial body in exercising its discretion in deciding whether or not to hold an oral hearing.

ALEC SAMUELS

A DEDICATED FOLLOWER OF (RELIGIOUS) FASHION?

THE question of Muslim religious dress in state schools has arisen in many European States. Now, the English Court of Appeal has decided upon it, in *R. (on the application of SB)* v. *Denbigh High School* [2005] EWCA Civ 199, [2005] 2 All E.R. 396. In this case, the school had allowed, among permitted uniforms, the wearing of a Muslim outfit for girls, a *shalwar kameeze* (a long blouse and trousers) with a headscarf. The claimant, who initially wore this uniform to school, had decided, motivated by change in her perception of appropriate Muslim dress, that her religion required her to wear a full body covering *jilbab*. This the school did not permit.

The student asked, in an application for judicial review, for a declaration that the school's decision to exclude her was unlawful. The Administrative Court judge dismissed the application. The Court of Appeal allowed the appeal and gave the declaration. The crux of its reasoning was that the school, in reaching the decision, started from the premise that the student had to obey its policy. What it should have done, according to the Court, was to start from the premise that the student had a legal right with which the school was interfering, and therefore the onus was on the school to justify its interference with that right.

The Court reasoned that the school's decision could not stand, because in reaching it, the school had not taken into account that it was restricting a right protected by the European Convention on Human Rights and Fundamental Freedoms (in this case, Article 9, the rights to freedom of religion), and therefore by the Human Rights Act, and had not therefore asked if this restriction was legitimate under the Convention. By deciding that a decision reached without consideration of the Convention right was unlawful, the Court did not have to enter into a substantive determination whether the school's restriction on Article 9 rights was permissible according to the Convention. The claimant asked for declaratory relief only. Had she asked to return to the school, the school's decision would have had to be made anew.

Should not the Court itself check whether the decision of the public authority is lawful under the Convention? Many decisions

https://doi.org/10.1017/S0008197305286956 Published online by Cambridge University Press

made by public authorities every day must conform to the Human Rights Act. In fact, this may be the single most important piece of legislation that all public authorities must consider. But often they will not give it due consideration. Should the court send the decision back for reconsideration or should it assess the compliance with the Convention rights of the decision which was made? Sending the decision back is almost an invitation for the authority to reach the same conclusion, but tailor its new decision around the balancing test (between protected right and countervailing State interest) required by the Convention, making it that much harder to attack in court. This also requires the applicant to go through two cycles of judicial review. It is suggested that it would be better if the court itself assessed whether the decision complied with the Human Rights Act, on the basis of the considerations of the authority brought before it in evidence. While, of course, not substituting its own decision for that reached by the authority, the court could assess whether the interference with the right was for a permissible aim and proportional under the Convention (in accordance with the decisions of the European Court of Human Rights, in this case particularly *Sahin* v. *Turkey*, Appl. No. 44774/98). Such an approach would give better guidance to the authorities, in this case schools, on how they must lawfully address the matter. Under the Court's approach, schools are given no guidance on how to address similar claims under Article 9, beyond the requirement that Article 9 will be the starting point of their deliberations. The suggested approach would also prevent the authority from being able to tailor its new decision to meet with the courts' approval, while in fact relying on the same considerations as in the original decision. In the present case, ample evidence was adduced as to the reasons behind the school's decision. Either these are legitimate reasons for restriction of the student's Article 9 right under the Convention, or they are not. The Court could, and should, have decided upon that.

Of the considerations the school cited for its policy some should not be seen as legitimate. That some non-Muslim students claimed to fear those students wearing the *jilbab* is clearly not a good reason. Schools should not pander to prejudice, as the Court itself observed. One reason cited by the school, however, is a valid reason for restriction of religious expression. That is the pressure encountered within the school on other Muslim students to conform to a more extreme religious dress code than the one they adhere to. These students' freedom of religion must be protected, not from the restrictions of government but from the more subtle restrictions created by communal pressure. It is precisely because

https://doi.org/10.1017/S0008197305286956 Published online by Cambridge University Press

these students *are* religious (although of a more moderate religious persuasion) that such communal pressures work, and circumvent, in effect, the students' mechanisms of free choice. (Somewhat analogous considerations of a prohibition on wearing veils in university were cited in *Sahin*). A balance between two Article 9 rights is called for. This could be a legitimate reason to restrict religious dress, but only on real evidence that such pressure was exerted on other students.

More worryingly, in this case there are indications that the claimant herself may have been under such pressure. Although the Court found that the girl's belief was genuine, perhaps it should have looked at the social context in which such belief was formed. She was the daughter of immigrants from Bangladesh. Her father was dead, and her mother (who died during the legal proceedings) spoke no English. An older brother and another man had accompanied her to school on the first day of wearing the *jilbab* and had confronted the head teacher about this. Perhaps the change of mind about religiously appropriate dress was indeed hers, uninfluenced by external pressure—after all, a young woman can change her mind about her view of her religion's dictates—but under the circumstances it is hard to tell.

One troubling aspect of this case is that the brother of the claimant had acted in the proceedings as her litigation friend. Under rule 21.2 (2) of the Civil Procedure Rules 1998, a child must have a litigation friend to conduct proceedings on its behalf, unless the court makes an order (under rule 21.2 (3)) permitting the child to conduct proceedings without a litigation friend. However, the appointment of the brother as the student's litigation friend rendered him in a potential conflict of interest, between acting as a representative of his sister and presenting his own beliefs. The Court could have made an order for the student to conduct proceedings without a litigation friend, or to substitute another litigation friend, pursuant to rule 21.7. Of course, the siblings' beliefs may be identical. Conversely, familial pressures may exist even after severance of the procedural connection, but this would be one step to separating the religious wishes of the student from those of her family. The rules of procedure, as well as the substantive determination, must be applied with a view to the social context of the case. This is crucial to guaranteeing religious freedom of minors.

ANAT SCOLNICOV

https://doi.org/10.1017/S0008197305286956 Published online by Cambridge University Press

DURESS REVISITED

So accustomed had we become to appellate courts grappling with the defence of provocation that we had almost forgotten that the other excusatory defences in criminal law raised their own difficulties. In *R.* v. *Hasan* [2005] UKHL 22, reported as *R.* v. *Z* [2005] 2 W.L.R. 709, the House of Lords has revisited the law of duress. Following the lead taken in *R.* v. *Howe* [1987] A.C. 417 it has imposed tight bounds on the applicability of the defence.

The facts of the case fit into a common pattern. Hasan was a driver working for a woman involved in prostitution. In the course of his work he discovered that a client had a safe. Some time later he entered the house with a knife and attempted to steal money from the safe, events which led to his being charged with aggravated burglary. His defence was that he was acting under the duress of one Sullivan, an associate of the woman, a man whom he believed to have committed three recent murders and who had threatened serious harm to him and his family if he did not do as he was told. In the event he was convicted of the offence. The important issue raised on appeal was whether he could rely on the defence when he had knowingly put himself in a position in which he might be put under duress. The trial judge had directed the jury that the defence was not available to a person who "voluntarily associates with the sort of people who he knows are likely to put pressure on him", but this had been held by the Court of Appeal to be a misdirection. According to them, "there must be anticipation of pressure to commit a crime of the type charged" ([2003] EWCA Crim 191 at [72], [2003] 1 W.L.R. 1489, 1508).

In the House of Lords the question divided into two distinct parts. First was whether the compulsion had to have been foreseen by the accused himself, or whether some more objective test of foreseeability should be used. Second was whether the contemplated pressure was the subjection to any compulsion by threats of violence, the subjection to compulsion to commit criminal offences, or the subjection to compulsion to commit criminal offences of the same type (or the same type and gravity) as the offences that were actually committed.

So far as the first of these questions is concerned, their Lordships decided in favour of an objective test (see *per* Lord Bingham at [38], with whom Lord Steyn, Lord Rodger and Lord Brown agreed; Baroness Hale is not so explicit but her reference at [76] to what the defendant "should" have foreseen points in the same direction). Behind this lies a policy-driven objective approach to the defence as a whole. Following *R.* v. *Graham* [1982] 1 W.L.R.

https://doi.org/10.1017/S0008197305286956 Published online by Cambridge University Press

294, 300, and contrary to the model direction provided by the Judicial Studies Board, it is stressed—obiter, no doubt, but highly persuasively—that duress will only be available as a defence to a person who honestly *and reasonably* believed that he or she (or a close relative) was being threatened with death or serious injury, thereby driving a wedge between it and the purely subjective conditions formulated for self-defence and provocation, where the defendant falls to be judged on the facts as he or she honestly believed them to be. Duress can be treated as different from self-defence, for (as has long been recognised) it relies peculiarly on the defendant's own assertions. So too does provocation, but provocation is only a partial defence whereas duress, if successful, leads to a complete acquittal. It may perhaps be, therefore, that duress is distinct from the other defences and its greater degree of objectivism acceptable on pragmatic grounds. Perhaps. But we need to remember that at this point we are concerned with the defendant's perceptions rather than his or her power to hold firm in the face of threats, risk or provocation. Convicting the weak-minded who can persuade the jury that they honestly believed they would be kidnapped by aliens if they did not commit some offence will not help catch the weak-willed, nor will it discourage the out-and-out liar who weaves a wholly believable story that he was being threatened with death or serious injury.

The second question, what the foreseeable pressure has to be, is again answered in the way which is least favourable to the accused. The majority ruling, articulated by Lord Bingham at [37] and [39], is that all that needs to be foreseeable is the risk of being subjected to any compulsion by threats of violence. This, with all respect to their Lordships, is unacceptably wide. Clearly preferable is Baroness Hale's opinion, dissenting on this point, that something far more serious is required. It is not quite clear from her speech exactly what test she would favour. At [77] she speaks of the need for foreseeability of duress, *i.e.* "threats of such severity, plausibility and immediacy that one might be compelled to do that which one would otherwise have chosen not to do", whereas at [79] she refers to the need for the foreseeable compulsion to be of the commission of a crime. A combination of these would be preferable: foreseeable threats of severe violence (although not necessarily technically of duress) to commit a crime. Otherwise a woman who decides to stay with her abusive husband rather than leave him, even though it is foreseeable that he will threaten her with violence if she does not submit to his sexual demands (or do the washing-up and cook his meals), will be unable to rely on the defence of duress if he (unforeseeably) threatens to kill her unless she beats up her sister.

https://doi.org/10.1017/S0008197305286956 Published online by Cambridge University Press

Baroness Hale's strictures point to the fundamental problem with the approach of Lord Bingham, its over-strong focus on the central case of the man who joins a violent criminal gang and then says that he did not expect to be pressurised to commit crimes by threats of serious violence. The person who "voluntarily lays himself open to duress" ([21]) becomes by the end of his speech a person who "voluntarily surrenders his will to the domination of another" ([37]), a person "voluntarily associating with known criminals" or one who "voluntarily becomes or remains associated with others engaged in criminal activity" ([38]). Hasan himself fits snugly into this category, but it is easy to imagine very different cases—and not only Baroness Hale's battered woman—where the application of the general rule formulated to deal with the gang member would lead to results both socially undesirable and morally unfair. In *R.* v. *G* [2003] UKHL 50, [2004] 1 A.C. 1034 (noted [2004] C.L.J. 13) a narrow subjective definition of recklessness served its purpose in bringing about the acquittal of the defendant children at the expense of opening the door for more reprehensible individuals to escape conviction; in *Hasan*, faced with an unsympathetic defendant, the House of Lords has done the reverse.

DAVID IBBETSON

PROVOCATION RESTRAINED

THE Privy Council in *Attorney General for Jersey* v. *Holley* [2005] UKPC 23, [2005] 3 W.L.R. 29 disapproved the decision of the House of Lords in *Smith* [2001] 1 A.C. 146 (noted [2002] C.L.J. 23) concerning the operation of the objective test within the provocation defence, by a majority of six to three. Although *Holley* is a decision of the Privy Council concerning an appeal from the Court of Appeal of Jersey, the judges used it as an opportunity to resolve definitively the state of the law of provocation in England, which is identical to that in Jersey.

To establish the provocation defence two tests need to be considered, known as the subjective and objective tests. Lord Nicholls, who delivered the judgment of the majority in *Holley*, also described them as the factual and evaluative tests, which are more accurate terms. The factual test requires the jury to consider whether the defendant lost self-control suddenly and temporarily. The evaluative test requires the jury to consider whether the defendant should have lost self-control by reference to the standard of the reasonable or ordinary person. It has been recognised since

https://doi.org/10.1017/S0008197305286956 Published online by Cambridge University Press

the decision of the House of Lords in *Camplin* [1978] A.C. 705 that the jury can take into account relevant characteristics of the defendant when considering the evaluative test, but there has been a great deal of controversy as regards the identification of a clear rationale to determine which characteristics are relevant and why. In *Smith* the House of Lords held that any characteristic is relevant if it affects the degree of control which society could reasonably expect of the defendant and which it would be unjust not to take into account: [2001] 1 A.C. 146, 173 *per* Lord Hoffmann. In *Holley* the majority rejected this approach and concluded, in effect, that the evaluative test consists of two separate elements. The first involves an assessment of the gravity of the provocation, for which characteristics and circumstances of the defendant can be relevant. The second concerns whether the ordinary person would have lost their self-control and this is to be assessed by reference to a uniform objective standard which is not qualified, other than by virtue of the age and gender of the defendant. Since Holley had not been taunted about his chronic alcoholism it followed that this was not relevant to the evaluative test. The minority, which included Lord Hoffmann, affirmed *Smith* and effectively considered that the evaluative test involves only one question, namely whether the ordinary person would have lost self-control. The minority emphasised that it is only fair to compare like with like and so the ordinary person should be treated as suffering from alcoholism because this had affected Holley's ability to exercise self-control.

The approach of the majority is consistent with section 3 of the Homicide Act 1957, as interpreted in *Camplin*, and so is technically correct. But it is still necessary to determine when and why certain characteristics and circumstances of the defendant are relevant when assessing the gravity of the provocation. The underlying rationale appears to be that it is not possible to assess the gravity of the provocation on the ordinary person without regard to certain characteristics and circumstances of the defendant. But these can only be taken into account if the provocation relates to them in some way; a connection is required. For example, if the defendant is taunted by the victim about being gay, the impact of that taunt on the ordinary person can only be properly assessed if he or she is assumed to be gay. For, if the defendant is straight, a taunt about homosexuality is considered to be much less grave. Of course, there may be circumstances where a straight defendant who is alleged to be gay might have been provoked to lose self-control. Presumably in such circumstances the defendant's sexuality will be taken into account when evaluating the gravity of the provocation because of the connection between the taunt and the characteristic.

https://doi.org/10.1017/S0008197305286956 Published online by Cambridge University Press

If there is no connection to the provocation the characteristics and circumstances of the defendant must be ignored. This is particularly significant as regards battered women who kill their abusive partners. Following *Smith*, if the woman's ability to exercise self-control was affected by her suffering from battered woman syndrome, her condition was relevant to the evaluative test. Following *Holley*, it is no longer relevant, because the defendant is unlikely to have been taunted about the syndrome. It follows, as the majority acknowledged, that battered women who intentionally kill will have to rely on the defence of diminished responsibility instead. That might be considered to be a more appropriate defence, since women who suffer from battered woman syndrome are not fully responsible for their actions and tend not to have been provoked to kill. Diminished responsibility will be expected to do the same work as the *Smith* version of provocation and it will be found wanting because it involves a very different test, involving abnormality of mind, and the burden of proof is on the defendant.

The minority used three lines of argument in their attempt to preserve *Smith*. First, they analysed dicta in a number of cases, particularly *Camplin*, which they interpreted as allowing the jury to consider all characteristics of the defendant when evaluating the defendant's loss of self-control. But these dicta typically are consistent with the approach of the majority as well. Secondly, the minority considered the distinction between assessing the gravity of the provocation and the loss of self-control as illogical, unjust and difficult for the jury to apply. This is certainly a stronger argument, although it can be minimised by the trial judge directing the jury clearly as to the existence of two aspects of the evaluative test and emphasising that characteristics and circumstances of the defendant are only relevant to the first part if there is a direct connection between the nature of the provocation and the characteristic or circumstance. Finally, the minority relied on the underlying function of the defence as a mechanism for avoiding the mandatory life sentence as a concession to human frailty and imperfection. This is the strongest argument in favour of *Smith*. By seeking to interpret the evaluative condition very widely, the minority were clearly motivated by a desire to maximise the opportunity for trial judges to select the appropriate sentence to fit the crime. For the majority, however, this could only be achieved by Parliament, once the extensive review of the law of murder which is presently being undertaken by the Home Office and the Law Commission is complete.

Statutory reform is the only way forward now. But *Smith* must not be forgotten. Although technically incorrect, the broad thrust

https://doi.org/10.1017/S0008197305286956 Published online by Cambridge University Press

of the *Smith* interpretation of the evaluative test was just and fair. If the mandatory life sentence is not going to be abolished we need a broad partial defence which takes into account the defendant's ability to exercise self-control. As the minority emphasised, it is essential that the evaluative test compares like with like.

GRAHAM VIRGO

POSSESSION OF CANNABIS FOR MEDICINAL PURPOSES

IN *R.* v. *Quayle* [2005] EWCA Crim 1415, the Court of Appeal heard a set of conjoined appeals and decided that a person who possesses cannabis purely for medicinal purposes, even if it gives him relief from the crippling effects of an illness, has no defence to the charge of possession. Duress of circumstances is unavailable, and the conviction of the cannabis user is compatible with his right to privacy under Article 8 ECHR.

It is hard to disagree with these rulings as a matter of legal interpretation. Let us start with the elements of defence of duress of circumstances. The defendant must be acting to prevent a threat of death *or* serious bodily harm which cannot be met in another way: *R.* v. *Pommell* [1995] 2 Cr. App. R. 607. Admittedly, those elements might be satisfied if his illness (in some cases, multiple sclerosis) can amount to serious bodily harm, and if the medicines prescribed by the patient's doctor have already proven ineffectual.

But even if the person who takes the drug regularly is averting an imminent threat of serious harm, the threat which he is meeting is of an ongoing nature, and affects many people. In the words of the Court (at [57]), the defendants' conduct "contravenes the legislative policy and scheme *on a continuing and regular basis"* (emphasis added). So, for the first time since *Southwark LBC* v. *Williams* [1971] 2 All E.R. 175 (C.A.), a court seems to have given recognition to the notion (more usually discussed in academic texts) that the perceived emergency which bases a defence of duress of circumstances (or "necessity", if one must) should be an emergency of a likely "one-off" nature. Parliament must legislate to create exceptions for "regular" cases where application of the law would cause hardship. It is not enough, then, that there is nothing which explicitly rules out the defence in the Misuse of Drugs Act 1971: any defence needs to be included in the statute.

The Article 8 argument was that the prosecution and conviction of the drug user interferes with his private life, again assuming that he derives some therapeutic benefit from the drug. If that were so,

https://doi.org/10.1017/S0008197305286956 Published online by Cambridge University Press

perhaps the court would have to revise its self-imposed limitation on the defence of duress of circumstances, as discussed above. But that "interference" would be justified if it were necessary and proportionate towards the protection of health: Article 8 (2) ECHR. One can see why the Court accepted this. Recent research commissioned by the government suggested that the dangers to health from taking cannabis are indeed substantial and that the potential medicinal effects are normally relatively marginal. Thus, a blanket ban on the possession of cannabis is not disproportionate—or at least, so Parliament was entitled to conclude (note that it matters only that the law can presently be defended: it does not matter that the law might have been insufficiently thought through back in 1971). Understandably, the Court of Appeal showed substantial deference on the need to combat the harms of cannabis by criminal prohibition.

Unfortunately none of the counsel in *Quayle* tried an even bolder human rights argument based on Article 3 of the ECHR: that the very act of prosecution would subject the patient to inhuman or degrading treatment in so far as it would be likely to inhibit him from resorting to his only cure for his illness in the future. The right in Article 3 is absolute, so if it is engaged, the State cannot justify interference by pointing to the same public policy interests as might justify interference under Article 8. Thus the problem of deference to the government's assessment of the risks to health from cannabis use would disappear too.

That, however, is the question—*is* the Article 3 right engaged? The nearest analogy is with *R.* v. *DPP, ex p. Pretty* [2002] 1 A.C. 800 (H.L.) where it was thought that a refusal by the Director of Public Prosecutions not to rule out the prosecution of Mr. Pretty for any prospective act of assisted suicide he might commit did not (on causal grounds) subject Mrs. Pretty to inhuman or degrading treatment. It was her illness which did that, and not the effects of the DPP's decision on the freedom of action of her husband.

It is a difficult authority to distinguish, but one ought at least to try. In *Pretty*, the illness (motor neurone disease) would necessarily cause suffering and death. There is no cure available, short of accelerated death (and the State is quite entitled not to recognise that as a cure). But where a prohibited drug may restore a patient to at least temporary health, then there may be a stronger link between a decision to prosecute him for possession of the drug and the harm which would then be caused by the untreated condition. Surely one cannot say that the patient breaks the chain of causation by not doing an act (the use of cannabis) which might alleviate his suffering but which he expects would lead to further prosecution.

https://doi.org/10.1017/S0008197305286956 Published online by Cambridge University Press

So the argument in court could be that the prosecutor's exercise of discretion to proceed was an "unlawful act" under section 6 (1) of the Human Rights Act 1998 (because it was incompatible with Article 3); and that the court should terminate this continuing "unlawful act" by declaring the proceedings to be an abuse of process. This bold contention should at least be arguable if it is confined to those (exceptional) cases where (1) no conventional medicine has been effective, (2) there is substantial evidence that cannabis was helping the patient, and (3) the latter would not continue to use the drug if he feared further prosecution. Note that the accused would not necessarily be entitled to receive compensation in subsequent civil proceedings if the decision to prosecute were accepted to be an "unlawful act" (section 8 of the HRA). Nor should there be any suggestion that the police committed any "unlawful act" in arresting the drug user and in otherwise investigating the circumstances of the case.

JONATHAN ROGERS

DRUGS, MANSLAUGHTER AND UNORTHODOX DOCTRINE ON CAUSATION

R. v. *Kennedy* [2005] EWCA Crim 685, [2005] 1 W.L.R. 2159 is the latest in a series of manslaughter cases where death has resulted from the victim's self-administration of an unlawful drug prepared by the defendant and the defendant has been convicted of unlawful act manslaughter constructed out of section 23 of the Offences Against the Person Act ("OAPA")1861. In 1997 Kennedy was convicted on the basis that he wilfully encouraged the deceased to "inject himself unlawfully". His case was brought back to the Court of Appeal by the Criminal Cases Review Commission under section 9(1) of the Criminal Appeal Act 1995 on two grounds: first that subsequent case law had cast doubt on the reasoning behind his conviction and second that Kennedy's trial judge had failed to direct the jury properly on the issue of causation.

The Commission's first point refers to *Dias* [2001] EWCA Crim 2986, [2002] 2 Cr. App. R. 96 in which the Court of Appeal accepted that the "principal" act of self-injection is not a crime and thus there can be no form of accessory liability for it.

According to the orthodox criminal law of causation the Commission's second point was also correct: Kennedy's behaviour could not have made him guilty of manslaughter as a principal rather than as an accessory either, because the victim's wholly voluntary self-injection should be regarded as having broken the

https://doi.org/10.1017/S0008197305286956 Published online by Cambridge University Press

chain of causation connecting the defendant to the death, whether the rules used are those concerning "foreseeable *and not daft*" intervention by the victim (*Roberts* (1971) 56 Cr. App. R. 95, emphasis added) or "free, deliberate and informed" action by third parties generally (*Pagett* (1983) 76 Cr. App. R. 279). However, since *Dias* the Court of Appeal has departed from this orthodoxy, most notably in *Finlay* [2003] EWCA Crim 3868 (but see also *Rogers* [2003] 1 W.L.R. 1374), applying instead the test of pure foreseeability used in the much-criticised case of *Environment Agency* v. *Empress Car Co. (Abertillery) Ltd.* [1999] 2 A.C. 22. In neither *Finlay* nor *Empress* were *Roberts* and *Pagett* even discussed, the ultimate source for the *Empress-Finlay* line of reasoning being instead a tort case, *Stansbie* v. *Troman* [1948] 2 K.B. 48. In its review of Kennedy's case the Court of Appeal was thus given the chance to reconsider the conclusions reached in *Finlay*. Unfortunately the court confirmed that the change of direction was deliberate. Kennedy was liable even though he had only helped the "victim" to inject himself.

In doing so, the Court of Appeal examined two criticisms that had been levelled by the Commission at the result in *Finlay*. One was the point noted above, that if the victim is not a principal for the purposes of accessory liability he cannot be a principal for the purposes of joint principalship with the defendant (see also R. Heaton, "Principals? No Principles!" [2004] Crim. L.R. 463). However, in dealing with this criticism the Court of Appeal did not frame it in quite these terms, focusing only on the definition of the defendant's actions: "if *the defendant* cannot be an accessory, then nor can he be a joint principal" ([45], emphasis added). This then allowed the court to adopt what was, with respect, a process of reasoning that was circular. At [45] it said that the unlawful act under section 23 was "independent", but at [44] it had described the defendant as "acting in concert" with and "helping" the victim to take his own life. It is hard to see how an unlawful act thus described can possibly be independent of the victim's status as at least a joint "principal", something *Dias* established he could not be. It is thus clear that however hard it seeks to avoid doing so explicitly, the Court of Appeal is nevertheless using secondary liability (see also [28]).

Before *Finlay* the position in criminal law was simple. If the defendant had directly caused the offensive result he would be guilty as a principal. If he had not, he could at most be an accessory for having practically helped someone else's direct causation of that result. In *Finlay* and *Kennedy* the Court of Appeal has removed this distinction, essentially holding that when

https://doi.org/10.1017/S0008197305286956 Published online by Cambridge University Press

accessory liability cannot be used *per se*, accessory conduct will nevertheless be enough to constitute liability as a principal. On this basis secondary liability becomes redundant for crimes which are not wholly constituted by behaviour. If I lend my crowbar to help a burglar, am I not now "jointly responsible" for the resulting burglary under *Finlay* and *Kennedy*, rather than an accessory to it? Surely I am, given the analogy the court drew at [53] with the case of one nurse who carries out "certain preparatory actions (including preparing the syringe) and hand[s] it to a colleague who inserts the needle and administers the injection, after which the other nurse may apply a plaster". These nurses are said to be "interlinked but separate parts in the overall process of administering the drug", an analogy which is inapt, surely, precisely because both nurses—unlike Kennedy—are separate from the person injected. It is thus perfectly possible for them to be *joint* principals because either separately can be a principal, unlike the self-injector of heroin.

This point was made particularly forcefully by the Commission in relation to its second criticism, which was that a "coach and horses" had been driven through section 2 of the Suicide Act 1961 [48]. The Court of Appeal's response is again unconvincing. At [49] the court regards the Act as providing a "statutory code" for suicide situations such that "it would be an abuse to prosecute someone assisting another to commit suicide for murder" under *Finlay* and *Kennedy*. "Furthermore, in practice, it would not happen." But why not? It is not enough simply to say that the criminal law covers a particular situation but will not be used. If the law can be used in a particular way there is a danger that it will be. Conversely, if the 1961 Act is an exclusive code, should the Court of Appeal not have taken that into account in interpreting section 23 OAPA 1861? Even if it is not thought to be a "dangerous consequence" of *Rogers, Finlay* and *Kennedy*, the fact that it is a consequence at all should give pause for reconsideration.

Rogers, Finlay and *Kennedy* thus lead to serious practical problems, widening the law until the boundaries are no longer clear and weakening the line between accessory and principal liability. Where the addict dies, why should all suppliers of drugs not ultimately be brought within the boundaries of section 23 manslaughter, again reducing the need for specific drug-related offences? It is evident from the court's discussion of *Dalby* (1982) 74 Cr. App. R. 348 at [13]–[17] that it does not intend mere supply to be sufficient, but given the facts and conclusions of *Kennedy* and *Finlay* it may be. Finally it is not completely clear whether the new rules of causation are applicable outside the context of the supply

https://doi.org/10.1017/S0008197305286956 Published online by Cambridge University Press

of drugs. They could indeed be, depending on what is meant by "a case of this nature" in paragraph [42]; especially since at paragraph [42] the court apparently confines the "free, deliberate and informed" test for a break in the chain of causation to situations in which the two parties are not acting in concert.

Whatever the remaining questions, it is clear from the judgment in *Kennedy* that the conclusions reached in these cases are deliberate and that, whether or not it could do so, the Court of Appeal is not about to undo them. It is therefore to be hoped that ultimately the House of Lords will restore *Pagett* and *Roberts*, even in cases of "concerted action". This would rebuild the boundaries described above, but it would not leave the law without a means of prosecuting particularly culpable suppliers for manslaughter since, as I have argued elsewhere ([2005] C.L.J. 66), gross negligence manslaughter provides a better alternative.

REBECCA WILLIAMS

HIV AND RESPONSIBLE SEXUAL BEHAVIOUR

R. v. *Konzani* [2005] EWCA Crim 706, [2005] 2 Cr.App.R. 198 is yet another case where the Court of Appeal grapples with criminal liability for the reckless transmission of HIV to a sexual partner. In *R.* v. *Dica* [2004] EWCA Crim 1103, [2004] 3 W.L.R. 213 (noted by Rogers [2005] C.L.J. 20) the court did away with the rule derived from *Clarence* (1888) 22 Q.B.D. 23 that consent to sexual intercourse carried with it consent to the risk of transmission of diseases which can be transmitted through such intercourse. It also held that a person who "concealed" his or her HIV positive status from a sexual partner and infected that partner with the HIV virus through unprotected sexual intercourse could be liable for an offence of inflicting grievous bodily harm under section 20 OAPA 1861, that partner's consent to the intercourse being no defence. *Dica* drew on the notion of concealment in the context of exploring the validity of the victim's consent. What *Dica* did not make clear, however, was whether "concealment" required something more from the defendant than merely "leaving the unsuspecting victim ignorant" of his HIV status. *Dica* left room for two possible readings: one which said that no-one who consents to sex in ignorance of her sexual partner's HIV positive status ever consents to the risk of transmission of HIV (the "informed consent" reading of *Dica*), and a second reading on which it would be possible for a

https://doi.org/10.1017/S0008197305286956 Published online by Cambridge University Press

victim who is ignorant of the defendant's possible HIV status to consent to the risk of transmission of HIV by communicating a willingness to take that risk, conscious of her own ignorance of its magnitude. On this liability-restricting reading of *Dica*, the criminal law would only protect victims who ask a defendant about his HIV status, and perhaps those who by virtue of a pre-existing relationship of trust with the defendant have a legitimate expectation that such highly sensitive personal information will be disclosed to them without prompting. By contrast, victims who have unprotected sex with their eyes wide shut (*i.e*. knowing that they don't know anything about the defendant's HIV status, and that they haven't asked) would not be able to complain that they did not consent to the risk of transmission of HIV.

In *Konzani*, the defendant repeatedly had unprotected sexual intercourse with three different women, all of whom contracted HIV from him. He knew of his HIV positive status and of the risk of infection pertaining to sexual intercourse. His first victim was a 15-year-old virgin whom he seduced. She never asked him any questions about his HIV status. His second victim was a woman he met at a prayer meeting who moved in with him and lived with him for about six months. She never asked him any questions about his HIV status either. His third victim was an aid worker who, at the beginning of their affair, once jokingly remarked that she hoped he did not have any diseases; a remark to which the defendant replied: "Don't be stupid". The defence formally admitted recklessness, but argued that Konzani's victims had consented to the risk of transmission of HIV by consenting to unprotected intercourse with him; failing that, that the defendant had "honestly believed" that the victims had consented. Taking from *Dica* (and from the observations of Lord Woolf C.J. in *R*. v. *Barnes* [2004] EWCA Crim. 3246) that consent to the risk of transmission of HIV through unprotected intercourse with an HIV positive partner means *informed* consent, the Court of Appeal ruled that none of the victims in *Konzani* consented to that risk. It furthermore held that if the defendant on those facts claims that he "honestly believed" that the women consented to the risk of transmission of HIV by him, this is in law irrelevant. In order to provide the defendant with a defence based on an honest belief in the alleged victim's consent to an offence against the person, that belief, in the words of the court, "must be concomitant with the consent which provides a defence".

Commentators who believe that first *Dica* and now *Konzani* cast the net of criminal liability for the transmission of HIV too widely have concentrated their attention on the court's treatment of this

https://doi.org/10.1017/S0008197305286956 Published online by Cambridge University Press

last point: whether the defendant should have been able to claim to have had an honest belief in the victim's consent. But this is a red herring. The court's ruling on this point follows with logical inevitability from its approach to consent. There is no logical space for facts which are insufficient for holding that a victim has given valid consent to the risk of transmission of disease (namely, that the victim had consented to unprotected intercourse with the defendant) to form the basis of a relevant belief in consent. A relevant belief in consent is a belief in facts which, if true, establish consent. The defendant did not claim to have believed in such facts. His "belief" amounted to no more than an assertion that the defendant expected the law to treat the victims' agreement to unprotected intercourse with him in these various situations as consent to the risk of infection; and this is a mere mistake of law on the basis of which he cannot deny *mens rea*. The Court of Appeal was entirely correct in rejecting the defendant's appeal on this point.

If there is a problem with *Konzani*, it is that the decision comes down on the "informed consent" side of the possible *Dica* readings too quickly, and without any real appreciation of the difficulties raised by that. If *Konzani* means that the need for asking whether anything the defendant said, did, failed to say or failed to do amounted to "concealment" in the broader sense of that word falls away, this may well draw the line of responsibility for the consequences of autonomous choices unfairly between those who are HIV carriers and those who run the risk of having unprotected sex with a person they know nothing about. The defendant in *Konzani*, asked to explain how he had ended up having unprotected sex with the second victim, said that "The entire sex thing had happened so fast". This should give potential victims as well as potential defendants pause for thought about the proper basis and distribution of that responsibility.

It appears, however, that there might still be room to appreciate the host of issues raised under the heading of "concealment" in future cases. The defence in *Konzani* had admitted recklessness; but perhaps this was done too willingly. The concept of recklessness is based on the notion that the defendant (knowingly) takes more than a socially acceptable risk. Built into this is the idea that there are some risks to which one must not expose others, and other risks which an agent can ignore because it is up to those potentially affected by them to protect themselves against these risks if they so wish. In deciding what is criminally reckless, the courts will have to think clearly and critically about the proper distribution of risks and responsibilities between consenting sexual partners. The idea of

https://doi.org/10.1017/S0008197305286956 Published online by Cambridge University Press

concealment can be put to work in helping to draw that line in future HIV transmission cases.

ANTJE PEDAIN

PUBLIC LAW LIABILITY—A COMMON LAW SOLUTION?

THE Human Rights Act 1998 continues to exercise a pervasive influence on English law. One area in which the Act is beginning to bite is the liability of public bodies for loss caused when performing public functions. Such liability previously existed only in private law, but the Act creates a distinct form of public law liability for breach of a Convention right (see [2005] C.L.J. 8). In addition, the Act is having an indirect effect as the ordinary law of tort is developed by reference to Convention jurisprudence.

JD v. *East Berkshire Community Health NHS Trust* [2003] EWCA Civ 1151, [2004] Q.B. 558, affirmed [2005] UKHL 23, [2005] 2 W.L.R. 993, illustrates the power of the HRA to alter private law. These conjoined appeals concerned claims in negligence against NHS trusts which had wrongly accused parents of child abuse. In all three cases a parent sought damages for psychiatric harm caused by the false accusations or their consequences. In one case the child also claimed and the local authority was a defendant. *X (Minors)* v. *Bedfordshire CC* [1995] 2 A.C. 633 seemed fatal to the actions. In that case, the House of Lords held that it could never be "fair, just and reasonable" to impose a duty of care upon local authorities when deciding whether to take children into care. It felt that doing so would make local authorities unduly cautious and defensive for fear of being sued, inhibiting the effective performance of their statutory duties (the "inhibition" argument). Furthermore, it would cut across the whole statutory regime set up to protect children at risk. That regime involves the participation of the police, educational bodies, doctors and others. It would be almost impossible to disentangle their respective liabilities for reaching a decision found to be negligent (the "factual inquiries" argument).

However, the claimants successfully argued that *Bedfordshire* is no longer good law. The Court of Appeal (Lord Phillips of Worth Matravers M.R., Hale and Latham L.JJ.) acknowledged recent changes in judicial attitudes towards negligence claims against public bodies, in particular the shift in emphasis from the existence of a duty of care to the precise standard of care required. Decisions such as *Barrett* v. *Enfield LBC* [2001] 2 A.C. 550 and *Phelps* v.

https://doi.org/10.1017/S0008197305286956 Published online by Cambridge University Press

Hillingdon LBC [2001] 2 A.C. 619 "significantly restrict the effect of *Bedfordshire"* (at [49]). The court then considered whether the enactment of the HRA has affected the common law principles of negligence. It observed that, in light of Strasbourg jurisprudence on Article 8, "litigation involving factual inquiries ... is now a potential consequence of the conduct of those involved in taking decisions in child abuse cases". As a result, the "factual inquiries" argument deployed in *Bedfordshire* "will largely cease to apply" (at [81]). Moreover, the possibility of claims under the HRA nullifies the "inhibition" argument: "Insofar as the risk of legal proceedings will inhibit individuals from boldly taking what they believe to be the right course of action in the delicate situation of a case where child abuse is suspected, we think that this factor will henceforth be present, whether the anticipated litigation is founded on the 1998 Act or on the common law duty of care".

The court therefore held that, as regards the child, *Bedfordshire* cannot survive the HRA. It added at [83]: "Given the obligation of the local authority to respect a child's Convention rights, the recognition of a duty of care to the child on the part of those involved should not have a significantly adverse effect on the manner in which they perform their duties". However, since the child's interests may conflict with the parents' interests, no duty of care is owed to the parents. The parents' appeal to the House of Lords was dismissed (Lord Bingham dissenting). Significantly, though, the defendants did not appeal against the finding that they owed a duty of care to the child. Their Lordships indicated that they were right not to do so: as Lord Nicholls confirmed at [82], "the law has moved on" since *Bedfordshire*.

JD continues the trend of more readily finding that public bodies owe a duty of care and focusing instead on setting an appropriate standard of care. Lord Bingham welcomed that trend "since the concept of duty has proved itself a somewhat blunt instrument for dividing claims which ought reasonably to lead to recovery from claims which ought not" (at [49]). Interestingly, the House of Lords gave serious consideration to the argument that the duty concept should be abandoned altogether. Lord Nicholls found it "not without attraction" and outlined an alternative approach analogous to that used when considering alleged breaches of human rights. In such cases the court may "look backwards over everything which happened" and "[i]n deciding whether overall the end result was acceptable the court makes a value judgment based on more flexible notions than the common law standard of reasonableness and does so freed from the legal rigidity of a duty of care" (at [93]). However, he shied away from such a radical

https://doi.org/10.1017/S0008197305286956 Published online by Cambridge University Press

development because an alternative control mechanism to keep liability within acceptable bounds has yet to be identified.

English law therefore seems stuck with the duty concept for the foreseeable future. As a result, some claims, such as those of the parents in *JD*, will continue to be struck out without a full trial on the basis that even if the claimants were able to prove all of the facts which they allege, they could not establish a cause of action. Yet the duty concept has been thoroughly demystified: it contains no inherent truth or logic, but is merely an expression of current judicial thinking on the proper limits of tortious liability. The malleability of the *Caparo* test—requiring foreseeability of loss, proximity between claimant and defendant and that imposing the duty would be "fair, just and reasonable"—is amply illustrated by the *volte-face* from *Bedfordshire* to *JD*. The third limb in particular has been derided as "a euphemistic way of describing virtually unstructured judicial discretion" (C. Harlow, *State Liability—Tort Law and Beyond* (2004), p. 30). Even senior judges have acknowledged that it is "something of a 'label' attached by the court if it decides that public policy requires a duty of care to be imposed" (*Commissioners of Customs and Excise* v. *Barclays Bank* [2004] EWCA Civ 1555, [2005] 1 W.L.R. 2082 at [31], *per* Longmore L.J.).

Since private law doctrine can no longer conceal policy-driven judicial law-making, the time is ripe for a full review of the appropriate extent of public bodies' liabilities. Considerations of principle and policy for and against liability should be openly debated. In particular, express identification and evaluation of the competing public and private interests at stake when an individual seeks compensation from a public body would make for more transparent and sophisticated decision-making. The Court of Appeal hinted along these lines in *Marcic* v. *Thames Water Utilities* [2002] EWCA Civ 64, [2002] Q.B. 929 but was overruled by the House of Lords, where only Lord Nicholls could begin to countenance so unorthodox an approach ([2003] UKHL 66, [2004] 2 A.C. 42).

Nevertheless, while explicit interest analysis may be a bridge too far, *JD* shows that the House of Lords is at least willing to develop tort law in line with Convention jurisprudence. The outcome may be that interest analysis gradually emerges at common law. A greater focus on rights enjoyed by claimants, rather than duties owed by defendants, will go some way towards shifting the burden to public bodies to explain why they should not be required to pay compensation when their actions have caused loss to individuals. This may bring to the fore the competing interests involved: the

https://doi.org/10.1017/S0008197305286956 Published online by Cambridge University Press

private interest in compensation being paid and the (alleged) public interest in compensation being denied. If they wish to deny recovery, the courts will have to articulate more clearly why they feel that this particular claimant's interests are outweighed. Routine recital of unsubstantiated policy arguments against holding public bodies liable will not suffice. However, the House of Lords' refusal in *JD* to extend a duty of care to the parents, largely on "inhibition" grounds convincingly rebutted in Lord Bingham's spirited dissent, shows that such reasoning has not yet been wholly expunged from English law.

Finally, it is noteworthy that the fact that the same action was required of the defendants by their public law duty to respect Convention rights as by a proposed private law duty of care to the child encouraged the Court of Appeal to impose the latter duty. This resurrects the approach of the minority of the House of Lords in *Stovin* v. *Wise* [1996] A.C. 923, which had appeared to wither on the vine in *Gorringe* v. *Calderdale MBC* [2004] UKHL 15, [2004] 1 W.L.R. 1057. This type of reasoning could ultimately pave the way for the conferral upon the courts of a power to award compensation for loss caused by unlawful administrative acts without the need to establish a private law cause of action. However, judicial creation of pure public law liability is probably beyond even the House of Lords: it is to Parliament that we must look for reform.

IAIN STEELE

CAUSATION AND CONTRIBUTORY NEGLIGENCE

IN *Fairchild* v. *Glenhaven Funeral Services Ltd.* [2002] UKHL 22, [2003] 1 A.C. 32 (noted by Tony Weir [2002] C.L.J. 519) the House of Lords controversially held that an employer who negligently exposed an employee to asbestos was liable when that employee contracted mesothelioma, even though it could not be proved that the defendant employer's asbestos caused the condition rather than asbestos to which he was negligently exposed by one or more other employers for whom he had worked. The defendant, it was said, would be able to seek contribution from other employers (if solvent and traceable) under the Civil Liability Contribution Act 1978, section 1 of which provides that "any person liable in respect of any damage ... may recover contribution from any other person liable for the same damage". But what happens if the victim, as well as being exposed to asbestos by more than one employer,

https://doi.org/10.1017/S0008197305286956 Published online by Cambridge University Press

exposes himself to it during a period of self-employment? The answer, according to *Barker* v. *Saint-Gobain Pipelines plc* [2004] EWCA Civ 545, [2005] 3 All E.R. 661 (Kay, Keene and Wall L.JJ., upholding the decision of Moses J.), is that the defendant employer is liable on the *Fairchild* principle, but the damages may be reduced for contributory negligence (here, by one-fifth).

Mr. Barker was employed for eight and a half years in the defendant's steelworks and was exposed during that time to asbestos dust; it was accepted that this exposure was a breach of the defendant's duty to provide a safe system of work. He had earlier worked for another employer as a pipe lagger for six weeks, again with exposure to asbestos. After leaving the defendant's employment, he worked for more than twenty years as a self-employed plasterer, and on three separate occasions exposed himself to asbestos dust for short periods. He contracted mesothelioma and died, and a claim for damages was pursued by his widow.

Mesothelioma is an "indivisible" injury: it can be caused by a single asbestos fibre. It is not aggravated by continued exposure and there is no link between the length of exposure and the severity of the condition. Since the "guilty" fibre cannot be identified, it is impossible to say that one period of exposure rather than another caused the condition. *Fairchild* was argued on the basis that the defendant employer either was liable in full because he had materially increased the risk of damage (in which case he would be able to seek a contribution under the 1978 Act from any other employer similarly liable), or was not liable at all because the "but for" or "more probably than not" test of causation (reaffirmed by the House of Lords in *Wilsher* v. *Essex AHA* [1987] A.C. 1074) was not satisfied. The House of Lords adopted the first solution, but expressly left open the question of whether the defendant might be entitled to an apportionment of his liability to reflect the extent of the overall exposure for which he was responsible, because this point had not been argued before their Lordships. In *Barker* counsel for the defendant contended, first, that the *Fairchild* principle could not apply where the victim was not "innocent" because it was based on the policy of protecting innocent employees against negligent employers. Secondly, he argued that, if the principle did apply, it should be modified in the interests of justice by a new principle of apportionment, thus departing from the well-established rule for indivisible injuries that each concurrent tortfeasor is liable for the full amount of the damage (*Dingle* v. *Associated Newspapers Ltd.* [1961] 2 Q.B. 162). Both these arguments were rejected by Moses J. and the Court of Appeal (for

https://doi.org/10.1017/S0008197305286956 Published online by Cambridge University Press

discussion of the apportionment argument, see Sarah Green (2004) 120 L.Q.R. 566), leaving the defendant to rely on a claim for contribution against the other employer and the defence of contributory negligence. Leave to appeal to the House of Lords has been granted.

It was hardly to be expected that the defendant would escape liability simply because the victim might in fact have caused his own injury: such a result would be reminiscent of the time before 1945 when the claimant's fault was a complete defence. But is a reduction of damages for contributory negligence the right way of dealing with the problem? At first sight it is: what was sauce for the claimant goose in *Fairchild* must be sauce for the defendant gander in *Barker*, and equating material increase of risk with actual causation of damage ought to work both ways. But the source of the sauce is different. *Fairchild* was a decision on the common law. *Barker* too applies the common law in determining the defendant's liability, but the reduction of damages for contributory negligence is governed by a statute, the Law Reform (Contributory Negligence) Act 1945, which was mentioned but not quoted in the judgments.

Section 1(1) of the 1945 Act begins: "Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons ...". Can it really be said that Mr. Barker's mesothelioma was suffered as the result of his own fault? Is it legitimate to apply the policy considerations openly acknowledged in *Fairchild* to the interpretation of a statute? Do the words "as the result" now mean "as the deemed result"? If so, does this extended interpretation only apply where the six conditions of liability identified by Lord Bingham in *Fairchild* at [2] (or perhaps the slightly different six specified by Lord Rodger at [170]) are satisfied, or is it of more general application?

Pleas of contributory negligence have succeeded in some surprising circumstances: for instance, the sane but inadequately supervised Mr. Lynch was held 50 per cent. responsible for his own suicide (*Reeves* v. *MPC* [2000] 1 A.C. 360). But there is no doubt that Mr. Lynch's death was the result of his own deliberate acts, whereas Mr. Barker's careless but spasmodic self-exposure to asbestos may have had no causative effect whatsoever with regard to his mesothelioma. *Fairchild* has been criticised as too claimant-friendly and *Barker* may be thought to redress the balance, but it does so without any consideration of the wording of the relevant statute and is one more step towards assimilating the causative potency of probabilities and mere possibilities.

C.A. HOPKINS

https://doi.org/10.1017/S0008197305286956 Published online by Cambridge University Press

HELLO! AGAIN: PRIVACY AND BREACH OF CONFIDENCE

THE action brought by Mr. Michael Douglas, his wife, Ms. Catherine Zeta-Jones and "OK!" magazine against rival "Hello!" magazine continues to provide legal, as well as popular, interest. It has now reached the Court of Appeal for the second time: *Douglas* v. *Hello! Ltd.* [2005] EWCA Civ 595. It may be recalled that at trial, Lindsay J. awarded both the Douglases and OK! substantial damages, for Hello!'s breach of confidence in publishing unauthorised photographs of the Douglases' wedding (which OK! had had the exclusive right to publish, pursuant to a remunerative deal with the happy couple): [2003] EWHC 786 (Ch), [2003] 3 All E.R. 996. The present note deals with Hello!'s appeal on the breach of confidence point. Nicholas McBride deals below with OK!'s cross-appeal against the judge's dismissal of its claim founded upon the economic torts.

The Court of Appeal agreed with Lindsay J. that the Douglases had had a reasonable expectation that their wedding would be a private occasion, upon which an action for breach of confidence could be based. Counsel for Hello! argued with some force, however, that any such expectation had been destroyed by the Douglases themselves, through the consensual publication of wedding photographs in OK! magazine. This is a formidable submission. It is well-established that an injunction will not issue to restrain publication of confidential information which is already in the public domain: see the *Spycatcher* case, *Attorney-General* v. *Guardian Newspapers (No. 2)* [1990] 1 A.C. 109. After all, it is difficult to see how such information can meet the first and most fundamental requirement for an action for breach of confidence: that the information had "the necessary quality of confidence about it", *per* Lord Greene M.R., *Saltman Engineering* v. *Campbell Engineering* [1948] R.P.C. 203, 215.

Nevertheless, the Court of Appeal held that while these decisions remained good law in the ordinary case of (say) a trade secret, it was quite different where the information consisted of photographs taken on a private occasion. Every re-publication of such images would amount to a fresh invasion of privacy, and be productive of further distress. The fact that (authorised) photographs would anyway have been published might be taken into account to reduce the damages awarded for the publication of unauthorised images of the same occasion. But it could not provide a complete defence.

Now as a matter of preserving confidentiality, this is plainly nonsense. As a matter of protection of privacy, however, it is entirely admirable and correct. The Court of Appeal's decision

https://doi.org/10.1017/S0008197305286956 Published online by Cambridge University Press

provides yet another example of how a tort of invasion of privacy has developed in English law, in all but name. The "new sub-species" of breach of confidence is in fact nothing of the sort, when the fundamental features of that action (a relationship of confidence; any confidential information to protect) are so readily dispensable. As the Court of Appeal significantly commented: "There is thus a further important potential distinction between the law relating to private information and that relating to other types of confidential information".

Some might applaud the "breach of confidence" pantomime as crafty work by the courts. Protection of privacy is de facto ensured, while the courts simultaneously claim not to have created an action to ensure it. Not everybody is content to play along with the Doublethink involved in keeping the paradox airborne, however, and the doubters now appear to include the Master of the Rolls and Clarke and Neuberger L.JJ. in *Douglas:* "We cannot pretend that we find it satisfactory to be required to shoe-horn within the cause of action of breach of confidence claims for publication of unauthorised photographs of a private occasion". One can only agree. It would be more straightforward finally to grasp the nettle of horizontal effect of European Convention rights, and so to recognise an action for breach of privacy (etc.) between individuals. But of course, it is not for the Court of Appeal to rush in where the House of Lords has feared to tread—and their Lordships were decidedly timorous on this point in *Campbell* v. *Mirror Group Newspapers* [2004] UKHL 22, [2004] 2 W.L.R. 1232. Unless and until our highest court prefers boldness to subterfuge, invasion of privacy will continue to be the tort that dares not speak its name.

JONATHAN MORGAN

FATAL ATTRACTION: THE ECONOMIC TORTS IN THE COURT OF APPEAL

ONE basis of OK!'s claim against Hello! for damages in *Douglas* v. *Hello! Ltd.* [2005] EWCA Civ 595 was that Hello! had committed the economic tort of interference with trade or business by unlawful means in relation to OK! by publishing photographs of the Douglases' wedding.

In dealing with the question of whether Hello! had committed the tort of interference with trade or business by unlawful means, the Court of Appeal adopted wholesale the analysis of this tort advanced by Philip Sales and Daniel Stilitz in "Intentional Infliction of Harm by Unlawful Means" (1999) 115 L.Q.R. 411. In

https://doi.org/10.1017/S0008197305286956 Published online by Cambridge University Press

that article, Sales and Stilitz argued that A would be found to have committed the tort of interference with trade or business by unlawful means in relation to B if: (1) A did something he was not allowed to do under the law; and (2) A acted as he did with the intention of harming B—that is, A acted as he did with the *aim* or *purpose* of harming B; and (3) B suffered some kind of harm—not necessarily an interference with his trade or business—as a result of the defendant's actions. The Court of Appeal agreed with this analysis, adopting (at [174]) Sales and Stilitz's suggestion that as interference with trade or business is not in fact an essential element of this tort, it should from now on be known as the tort of "intentional infliction of harm by unlawful means".

The Court of Appeal went on to hold that Hello! had not committed this tort in relation to OK! by publishing photographs of the Douglases' wedding. Admittedly, Hello! acted unlawfully in publishing the photographs—doing so involved a breach of confidence vis-à-vis the Douglases. OK! also suffered harm as a result of Hello!'s actions. But Hello! had not acted as it did with the *aim* or *purpose* of harming OK! It had merely sought, by publishing the photographs, to bolster its own position in the magazine market—to show its readers that it could obtain for them exclusive photographs of high-profile events like the Douglases' wedding. There was, for example, no evidence that Hello!'s executives would have been disappointed or frustrated had OK! suffered no harm as a result of Hello!'s scoop.

Had the Court of Appeal left the matter there, no one but OK! would have had much cause to be displeased with this aspect of the Court of Appeal's decision. However, the Court of Appeal did not leave things there. Despite noting (at [175]) that "there are a number of disparate economic torts which have differing characteristics and do not all fall to be approached in the same way", the Court of Appeal soon threw off all restraint, unable to resist the siren call to unify the economic torts. At [221] it wrote, "[Tony] Weir and most other writers, including Hazel Carty and Messrs Sales and Stilitz, are of the view that the gist of all the economic torts is the intentional infliction of economic harm. We consider that this is a fair and satisfactory conclusion to draw from the authorities ..."

Unfortunately, the available authorities do *not* support this view of the economic torts. (This view, incidentally, is *not* endorsed by *any* of the authors cited by the Court of Appeal.) The economic tort of passing off can clearly be committed by a defendant without his having had an intention to cause the claimant harm, as can the economic tort of deceit. What about the economic tort of inducing

https://doi.org/10.1017/S0008197305286956 Published online by Cambridge University Press

a breach of contract? In *Lumley* v. *Gye* (1853) 11 E.R. 854, Gye persuaded Johanna Wagner to sing at his opera house. Johanna Wagner was already contracted to sing exclusively for Lumley. The Court of Queen's Bench held that Lumley could sue Gye for inducing Wagner to breach her contract with Lumley if it were shown that Gye intended to persuade Wagner to commit a breach of contract when he persuaded her to sing for him. Proof of this intention would be supplied by showing that Gye *knew* that Wagner would commit a breach of contract if she sang for Gye. The court did *not* hold that it had *also* to be established that Gye's aim or purpose in acting as he did was to harm Lumley—in other words, that Gye would have been disappointed or frustrated if Lumley suffered no loss of business as a result of Wagner's failure to sing for him. So *Lumley* v. *Gye* seems to establish, then, that a defendant *can* commit the tort of inducing a breach of contract even if he was not intending to harm the victim of the breach when he acted as he did.

Despite this, the Court of Appeal insisted at [199] that if A induced B to breach her contract with C, A could only be held liable for committing the tort of inducing a breach of contract if he intended to harm C when he acted as he did. This is arguably true if A induced breach by *preventing* B from performing her contract with C. In that case, it is arguable that C will only be able to sue A if A committed the Sales and Stilitz tort of "intentional infliction of harm by unlawful means" when he prevented B from performing. As we have seen, to establish that A committed *that* tort, it has to be shown that A intended to harm C when he acted as he did. If, however, A induced B to breach her contract by *persuading* her not to perform, it had always been understood—on the basis of cases like *Lumley* v. *Gye*—that it did *not* have to be shown that A intended to harm C when he acted as he did.

So why did the Court of Appeal say what it did at [199]? The most charitable explanation is that it mixed up its intentions. As we have seen, there is some support for the proposition that a defendant can only be held liable for inducing a breach of contract if he intended to cause someone to commit a breach of contract. Perhaps the Court of Appeal thought that showing that a defendant intended to cause someone to commit a breach of contract came to the same thing as showing that a defendant intended to cause loss to the victim of the breach. But they do not. Suppose, for example, that Hello! had secured its photographs by persuading the Douglases to breach their exclusive contract with OK! and allow one of Hello!'s photographers into their wedding reception. In that case, Hello! would have clearly intended to persuade the Douglases to breach their contract with OK!—but their aim or purpose in so

https://doi.org/10.1017/S0008197305286956 Published online by Cambridge University Press

acting would not have been to harm OK! but to bolster Hello!'s position in the celebrity magazine market.

The error into which the Court of Appeal fell at [199] of its decision in the *Douglas* case has now been entrenched in English law by the subsequent decision of the Court of Appeal in *Mainstream Properties* v. *Young* [2005] EWCA Civ 861. In that case, the defendant assisted two employees to commit a breach of their contracts of employment. The employees in question were employed by the claimant, a property development company. The employees identified two properties as being appropriate for development by the claimant, but instead of purchasing the properties for the claimant, they purchased them for themselves. The defendant helped fund the purchases. The claimant sued the defendant for committing the tort of inducing a breach of contract. A differently constituted Court of Appeal applied paras. [199] and [221] of the Court of Appeal's judgment in the *Douglas* case and found that a defendant could only be held liable for inducing a breach of contract if he intended to harm the victim of the breach when he acted as he did. Accordingly, the claimant's claim was dismissed: there was no evidence that the defendant's aim or purpose in financing the employees' purchases was to harm the claimant.

The result will please those like David Howarth who would like to see the tort of inducing a breach of contract abolished: see his "Against *Lumley* v. *Gye*" (2005) 68 M.L.R. 195. There will be very few inducing breach of contract cases where it will be possible to show that the defendant acted as he did with the express aim or purpose of harming the claimant. However, Arden L.J. (who gave the leading judgment) indicated (at [70]) that in certain exceptional circumstances it might be possible to find that a defendant intended to harm the claimant even if the defendant did *not* act as he did with the aim or purpose of harming the claimant. A similar suggestion was made by the Court of Appeal in the *Douglas* case at [217] and [224]. It will be unfortunate if these dicta are followed. The law will become very unclear indeed if the courts from now on take the line that liability for committing an economic tort is dependent on its being shown that the defendant intended to harm the claimant, and at the same time resile from that line by holding defendants liable in certain "exceptional" cases because it has been "found" that they had an intention to harm, when in fact no such intention existed. We have had enough of that in the law on murder; it will be depressing if we now start to see the same sort of thing happening in the economic torts.

NICHOLAS J. MCBRIDE

https://doi.org/10.1017/S0008197305286956 Published online by Cambridge University Press

A *SPECTRUM* OF OPINION

THE House of Lords has now finally resolved the substantive questions of the *Spectrum Plus* litigation: *In re Spectrum Plus Ltd. (in liquidation)* [2005] UKHL 41, [2005] 3 W.L.R. 58. As noted earlier (at [2004] C.L.J. 560), the case concerned the effect of a "specific charge" over book debts. The charge was granted on terms identical to those which Slade J. had held to create a fixed charge in *Siebe Gorman & Co. Ltd.* v. *Barclays Bank Ltd.* [1979] 2 Lloyd's Rep. 142. The question was whether, in the light of *Agnew* v. *Commissioner of Inland Revenue (Re Brumark Ltd.)* [2001] UKPC 28, [2001] 2 A.C. 710, the terms should be given the same effect in the present case as in *Siebe Gorman*. In other words, did the terms create a fixed or a floating charge after *Agnew*? The answer to that question in turn established who had priority of recourse to the Company's assets in insolvency, pursuant to section 175(2)(b) of the Insolvency Act 1986: the holder of a fixed charge would have priority of recourse over preferential creditors, but preferential creditors would have priority over the holder of a floating charge.

The charge required Spectrum Plus Ltd. ("the Company") to pay the proceeds of the book debts into its account with National Westminster Bank plc ("the Bank"), and the Company was further not permitted to "sell factor discount or otherwise charge or assign" the debts without the Bank's consent. However, the Company could draw on the bank account into which those debts were paid once collected. At first instance, Sir Andrew Morritt V.-C. held that *Agnew* meant *Siebe Gorman* was no longer good law. So, in the light of *Agnew*, the present charge was a floating charge. Few were surprised by this. Rather more surprisingly, the Court of Appeal overturned that decision and held the charge to be a fixed charge. Leave was promptly granted for an appeal to the House of Lords, which reversed the decision of the Court of Appeal and restored the Vice-Chancellor's judgment. The charge was a floating charge after all, and the Company's preferential creditors consequently had priority over the Bank.

The principles of property law laid down by the House—what determines whether a charge is fixed or floating for the purposes of the insolvency legislation—are fully presaged by the *Agnew* case. As Lord Scott put it (*Spectrum Plus* at [111]):

> In my opinion, the essential characteristic of a floating charge, the characteristic that distinguishes it from a fixed charge, is that the asset subject to the charge is not finally appropriated as a security for the payment of the debt until the occurrence

https://doi.org/10.1017/S0008197305286956 Published online by Cambridge University Press

> of some future event. In the meantime the chargor is left free to use the charged asset and to remove it from the security. On this point I am in respectful agreement with Lord Millett [in *Agnew*].

These words echo closely those of Sir Francis Beaufort Palmer, over 120 years earlier:

> A floating security constitutes a valid equitable charge on the property for the time being of the company, and attaches finally on the appointment of a receiver or a winding up, the company in the mean time being at liberty to deal with its assets by way of sale, lease, or otherwise, as may seem expedient in the ordinary course of its business.

(See Palmer, *Company Precedents* (London, Stevens & Sons, 3rd ed., 1884) at pp. 258–259.) Viewed in this light, *Spectrum Plus* could be described as simply the welcome re-assertion of orthodoxy, namely that the distinguishing feature of a floating charge is to be found in its practical consequences.

Of course, applying these general principles to the particular facts of a given case may be a messy and complex business: the precise terms of charges are hugely variable in what they allow a chargor to do (if anything) with the charged assets. Indeed, one of the reasons why the Court of Appeal held as it did in *Spectrum Plus* was that it took the terms of the charge in question to be materially different from those at issue in *Agnew*. Many difficulties could have been avoided, however, if the courts, and parliamentary counsel, had kept in mind the fact that floating charges are not uniform constructs of law, but distinct securities that display a shared feature—a shared practical consequence—which is uniquely relevant in drawing a particular statutory distinction made for particular statutory purposes.

The legal world can rest assured, however, that clever transactional lawyers will seek to exploit fully any difficulties in applying the law: it is quite inevitable that they will try to benefit their clients, both lenders and borrowers, at the expense of preferential creditors, by attempting to create security arrangements which give a creditor the advantages of a fixed charge in a debtor's insolvency, but still (and, if needs be, through other contractual arrangements) allow sufficient flexibility for the debtor to continue to run its business. (Lord Phillips M.R. appeared to be aware of this: see *Spectrum Plus* [2004] EWCA Civ 670, [2004] Ch. 337 at [94].) After all, this is nothing more than a contemporary iteration of the very processes which created floating charges in the first place: that is, developments by innovative practitioners, in response to their clients' commercial demands and the existing state of the

https://doi.org/10.1017/S0008197305286956 Published online by Cambridge University Press

law, followed by reaction from a judiciary largely composed of those who were, a mere decade or so earlier, amongst those very practitioners (see (2004) 120 L.Q.R. 108). This is also the process which generated the heresies of *Siebe Gorman* (above) and *Re New Bullas Trading Ltd.* [1994] 1 B.C.L.C. 485 (C.A.). Such interactions form a vital mechanism of legal development in a common law system, but one which academic commentators can easily miss: innovative transactions are not as easily accessible when they occur as when they become the subject of reported litigation, years later.

The interesting question is how robustly the courts will respond to new attempts to let borrowers and lenders "have their cake and eat it", and how they will interpret and characterise such arrangements in order to reach their results. Given the references in *Spectrum Plus* to the policy underlying the statutory privileges of preferential creditors, and to the injustices that floating charges can work on unsecured creditors in the absence of statutory regulation, it seems likely that the modern-day successors of those who first developed floating charges may well find the judiciary rather unsympathetic to their efforts. Indeed, the judges may well find support for such an approach in more recent statutory attempts, introduced by the Enterprise Act 2002, to improve the position of ordinary unsecured creditors as against the holders of floating charges: the chargee's remedy of receivership has widely been replaced by administration in the interests of creditors as a whole; and a "prescribed part" of assets subject to a floating charge has been made available to meet the claims of unsecured creditors. (Note Beatson, "Has the Common Law a Future?" [1997] C.L.J. 291 and "The Role of Statute in the Development of Common Law Doctrine" (2001) 117 L.Q.R. 247.)

One of the reasons why the *Spectrum Plus* case reached the House of Lords was the Court of Appeal's decision to follow its own earlier ruling (*New Bullas*) rather than more recent Privy Council authority (*Agnew*). The House of Lords confirmed this aspect of the Court of Appeal's judgment as technically correct (at [93] and [120], *per* Lord Scott, and [153], *per* Lord Walker, Lord Steyn concurring in both speeches; *contra* at [163], *per* Baroness Hale). Nevertheless, the case stands in contrast to the High Court's acceptance of another Privy Council ruling, *Attorney-General for Hong Kong* v. *Reid* [1994] 1 A.C. 324, in preference to Court of Appeal authority, *Lister & Co.* v. *Stubbs* (1890) 45 Ch.D. 1: see *Daraydan Holdings Ltd.* v. *Solland International Ltd.* [2004] EWHC 622 (Ch), [2005] Ch. 119 at [75]–[86], *per* Lawrence Collins J. The *Daraydan* case was decided between the judgments of the High Court and the Court of Appeal in *Spectrum Plus*, but was not cited

https://doi.org/10.1017/S0008197305286956 Published online by Cambridge University Press

at any stage in the *Spectrum Plus* litigation. Nevertheless, following their Lordships' speeches in *Spectrum Plus*, the *Daraydan* case must now be regarded as doubtful authority on the rules of precedent, though the judge's words (at [85]) still bear repetition.

> The system of precedent would be shown in a most unfavourable light if a litigant in such a case were forced by the doctrine of binding precedent to go to the House of Lords (perhaps through a leap-frog appeal under the Administration of Justice Act 1969, section 12) in order to have the decision of the Privy Council affirmed. That would be particularly so where the decision of the Privy Council is recent, where it was a decision on the English common law, where the Board consisted mainly of serving Law Lords, and where the decision had been made after full argument on the correctness of the earlier decision.

This issue of precedent is of ever decreasing practical significance, however: the Judicial Committee of the Privy Council now has very little role to play as a court of final appeal outside the United Kingdom. New Zealand, the last foreign jurisdiction whose size made it likely to send much significant commercial litigation to the Privy Council, has recently abolished appeals to the Committee. The Caribbean Court of Justice now exists and will shortly take over the functions still exercised by the Judicial Committee in relation to independent Commonwealth countries of the Caribbean. A judicial relic of Empire is following the Empire it served into history.

The final aspect of *Spectrum Plus* that merits comment is its consideration of prospective overruling of previous authority. Late in the day, counsel for the Bank argued that if the House were to overrule *Siebe Gorman* and *New Bullas*, it should do so only prospectively, as companies had granted, and banks had accepted, many charges which assumed that those cases were correctly decided. The House rejected the argument for the purposes of the present case, but left open the possibility of prospective overruling in future litigation: '"Never say never" is a wise judicial precept', *per* Lord Nicholls at [41], echoed by Lord Scott at [126]. Members of the House asserted its own right to determine the limits of its own jurisdiction (at [69], *per* Lord Hope), and to construe statutes, but not to suspend them (at [126], *per* Lord Scott). The impact of European Law on such issues was not considered, however, though the tenor of Lord Scott's speech suggests that, if push came to shove, judicial deference to Parliament may not be quite so *démodé* as sometimes thought. Beyond this, however, and though their Lordships considered a large volume of cases from many

https://doi.org/10.1017/S0008197305286956 Published online by Cambridge University Press

jurisdictions, there is very little indication of precisely when a ruling might be genuinely prospective only. The one substantial indication of future practice is that, in appropriate human rights cases, "It would be odd if in interpreting and applying [European] Convention [human] rights the House was not able to give rulings having a comparable limited temporal effect" to those issued by the European Court of Human Rights. (See the speech of Lord Nicholls at [42].) Tantalising, but not yet more.

RICHARD NOLAN

HERESIES AND HUMAN RIGHTS

THE "heresy" of "non-adverse possession" was famously buried by the House of Lords in *J. A. Pye (Oxford) Ltd.* v. *Graham* [2002] UKHL 30, [2003] 1 A.C. 419, [43]–[45] *per* Lord Browne-Wilkinson (noted [2003] C.L.J. 36). That case re-established the orthodox view that a squatter dispossesses the paper owner of land simply by proving his own possession of it. The exclusivity of his possession necessarily displaces the paper owner. Now, the interpretative obligation in section 3 of the Human Rights Act 1998 ("HRA 1998") has driven a first instance judge to resurrect the heresy.

In *Beaulane Properties Limited* v. *Palmer* [2005] H.R.L.R. 19 Beaulane Ltd. was the registered proprietor of a field. It made no present use of the land but hoped one day to realise its development potential. Applying the authoritative *Pye* definition of possession, Palmer would have completed twelve years' adverse possession in June 2003. Consequently, Beaulane held it on statutory trust for Palmer, who became entitled to be registered as proprietor in Beaulane's place: Land Registration Act 1925 ("LRA 1925"), section 75. In this way, Beaulane inadvertently "lost" its paper title.

Or maybe not. Nicholas Strauss Q.C., sitting as a Deputy High Court judge, accepted Beaulane's contention that this finding would amount to a deprivation of its possessions without compensation, thus engaging Article 1 of the First Protocol to the European Convention on Human Rights. He rejected dicta in the Court of Appeal judgment in *Pye* ([2001] EWCA Civ 117, [2001] Ch. 804, [43] *per* Mummery L.J.) that the adverse possession regime in the LRA 1925 merely deprived a person of a right of access to the courts. Clearly, imposing a statutory trust was in substance a deprivation and went beyond simply barring B's right of action to recover possession (*cf.* Limitation Act 1980, sections 15, 17). Moreover, none of the classic policy justifications for allowing

https://doi.org/10.1017/S0008197305286956 Published online by Cambridge University Press

adverse possession (see Dockray [1985] Conv. 272) apply to *registered* land, where title is conclusively proved by the register, rather than by long possession. Therefore, Beaulane's loss of its estate was *prima facie* incompatible with Article 1.

However, the judge avoided a declaration of incompatibility by reviving the old concept of "non-adverse possession". For adverse possession claims under the LRA 1925, he ascribed to the term "dispossession" in Schedule 1, para. 1 of the Limitation Act 1980 a meaning which he believed it bore when the 1925 Act was conceived. Accordingly, adverse possession would only be established if the squatter's use of the land was inconsistent with the registered proprietor's actual or intended use. He relied on a dictum of Bramwell L.J. in *Leigh* v. *Jack* (1879) Ex.D. 264, 273 to support this meaning. This saved Beaulane from losing its estate since Palmer's use of the land for casual grazing did not interfere with Beaulane's plans to develop it.

Searching for a compatible interpretation was a laudable aim and, indeed, a statutory obligation (HRA 1998, section 3). But relying on old conceptions of adverse possession was perhaps not the best way to achieve it. It would have been simpler to have construed the relevant words without them. That is, he might have held that a squatter would only "dispossess" the registered proprietor if he used the land in a way which conflicted directly with the proprietor's present or future uses for it. In that way the proprietor would be unlikely to lose his land inadvertently. That interpretation would have done no "judicial vandalism" to the statute (*R. (Anderson)* v. *Home Secretary* [2002] UKHL 46, [2002] 1 A.C. 837, [30] *per* Lord Bingham) though it would have differed from the general definition of possession which *Pye* re-affirmed.

There were good reasons to keep *Leigh* v. *Jack* buried. First, Bramwell L.J. might never have said what is commonly attributed to him. His dictum does not appear in the alternative reports of his judgment (*cf.* 49 L.J.Q.B. 220; 42 L.T. 463; 28 W.R. 452; [1880] J.P. 488). Secondly, if he did say it, he probably meant something different. Read in the context of the alternative reports, he probably meant that the paper owner's intended use of the land was relevant to whether he had discontinued his possession rather than been dispossessed. A contemporary text interpreted the dictum in this way (*Lightwood's Possession of Land* (1894), p. 198). Thirdly, the dictum is redolent with the pre-19th century learning on disseisin and ouster which the Real Property Limitation Act 1833 sought to abolish. The Act marked a break in the law of limitation from feudal conceptions of land-holding. How ironic that modern human rights legislation should be the instrument of its resurrection.

https://doi.org/10.1017/S0008197305286956 Published online by Cambridge University Press

Property lawyers need not be too concerned about *Beaulane*. Although HM Land Registry's practice guide on adverse possession treats it as good law, its area of application is narrow. It only applies to cases where the squatter completed his period of adverse possession against registered land between 2 October 2000 and 13 October 2003, *i.e.* after the H.R.A. 1998 came into force but before the Land Registration Act 2002 took effect. The new adverse possession procedure under Schedule 6 of the 2002 Act cured the flaw of its predecessor. In nearly all instances it prevents the registered proprietor from inadvertently and irrevocably losing his estate to a squatter. The general law definition of dispossession from *Pye* applies everywhere else: unregistered land; registered land where adverse possession was completed after the LRA 2002 came into force; and land registered under the 1925 Act where the possession was completed before the HRA 1998 took effect. Presumably, it also applies to secure possessory titles to chattels under the Limitation Act 1980, section 3(2). More fundamentally, *Beaulane* centres only on so-called "inadvertent" dispossession. It says nothing more generally about dispossession or discontinuance. And even in this narrow sphere, the decision may yet conflict with that of the European Court of Human Rights, which is itself considering the issue in an appeal against the *Pye* decision.

Nicholas Strauss Q.C.'s exercise of the interpretative obligation in the HRA 1998 has undoubtedly fragmented the common law's consistent approach to defining possession in different kinds of property. But as the LRA 1925 fades from relevance, the heresy of *Leigh* v. *Jack* will be quietly re-interred and that consistency eventually restored.

ADAM CLOHERTY
DAVID FOX

OF STUDENTS AND BABIES

WHEN the concept of Union citizenship was introduced into the EC Treaty at Maastricht, it was not clear whether it would serve as a catalyst for change or merely as a rhetorical device. In recent years the Court has indicated that Union citizenship has substance and that it is destined to be "the fundamental status of nationals of the Member States" (Case C-184/99 *Grzelczyk* [2001] E.C.R. I-6193). Having taken this decision, the Court has used Union citizenship to require a rethink of the orthodox case law on free movement of persons (Case C-138/02 *Collins* [2003] E.C.R. I-000); and to justify

https://doi.org/10.1017/S0008197305286956 Published online by Cambridge University Press

restrictions to the limits to the Residence Directives (Case C-413/99 *Baumbast* [2002] E.C.R. I-7091)—in that case Directive 90/364 on Persons of Independent Means—by applying the principle of proportionality in a rigorous fashion.

The potentially transformative power of EU citizenship has been confirmed in two recent decisions of the Court of Justice, Case C-200/02 *Chen* v. *Secretary of State for the Home Department* [2004] E.C.R. I-000 and Case C-209/03 *R. (on the application of Danny Bidar)* v. *London Borough of Ealing* [2005] E.C.R. I-000). Chen's parents, who were Chinese, wished to have a second child but this was forbidden in China under the single child policy. With the benefit of good legal advice, Mrs. Chen entered the UK when she was about six months pregnant and moved to Belfast to give birth. Under Irish law, any child born anywhere on the island of Ireland acquired Irish nationality. With her Irish passport, baby Catherine, and her mother, moved to Wales.

The Court said that Catherine, even though only eight months old, enjoyed the rights of Union citizenship. She could therefore enjoy the right to reside under Article 18(1), subject to the limitations and conditions laid down by the Persons of Independent Means Directive 90/364. These she satisfied: she had both sickness insurance and sufficient resources, so that she did not become a burden on the British State. The fact that these resources came from her mother was irrelevant: the Court noted that the Directive laid down no condition as to the origin of the resources, merely that they be sufficient. It concluded that a requirement as to the origin of the resources would add to the conditions already laid down by the Directive and so would constitute a disproportionate interference with the exercise of the fundamental right of freedom of movement and of residence provided by Article 18 EC. Thus, as with *Baumbast*, the Court used the citizenship principle, read in conjunction with the proportionality principle, to justify imposing restrictions on the limits laid down by the residence Directive.

Chen followed *Baumbast* in another respect: because Catherine, the holder of EC rights of residence, was too young to exercise those rights effectively without a carer, her (Chinese) mother was entitled to stay in the UK with Catherine for the duration of her residence. Thus, a third country national derived rights from a child in order to enjoy a right of residence in the UK.

Bidar concerned another limit to the Residence Directives, this time the express limit found in Article 3 of the Students' Directive 93/96 which provides that the host State is not required to pay maintenance grants to migrant students. Bidar, a French national, and his mother came to the United Kingdom in August 1998 to

https://doi.org/10.1017/S0008197305286956 Published online by Cambridge University Press

live with his grandmother. After his mother's death, Bidar continued living with his grandmother, who supported him while he attended the local secondary school. In September 2001 he started reading economics at University College London. While he received assistance with his tuition *fees* (which were charged to him at the same rate as for British students following Case 293/83 *Gravier* [1985] E.C.R. 593 and Case C-357/89 *Raulin* [1992] E.C.R. I-1027), his application for financial assistance to cover his *maintenance* costs, in the form of a student loan, was refused on the grounds that he did not satisfy the conditions laid down in the Student Support Regulations 2001. In essence, these Regulations required students to have been resident in the UK for three years prior to starting their course and to have been settled in the UK (a status that was, in practice, impossible for students to attain) before they were entitled to assistance with their maintenance.

The UK government thought that it was on safe ground in denying Bidar a maintenance grant and loan under Article 3 of Directive 93/96 and decisions of the Court in two cases decided on the same day, Case 39/86 *Lair* [1988] E.C.R. 3161 and Case 197/86 *Brown* [1988] E.C.R. 3205. These held that at that stage of development of Community law, the assistance given to students for maintenance and training fell outside the scope of the EC Treaty for the purposes of Article 12 EC. However, the Court of Justice had other ideas. It noted that Bidar, a citizen of the Union, was lawfully resident in the UK. His right of residence came from Article 18 read in conjunction, not with the Students' Directive 93/96, but the Persons of Independent Means Directive 90/364, the conditions of which he was deemed to have satisfied. And because he was lawfully resident in the UK, he was entitled to equal treatment under Article 12 in respect of social assistance benefits. The Court said that these benefits did now include assistance with maintenance costs, whether through subsidised loans or grants. It said that given the changes that had occurred at EU level in respect of education and training since *Lair* and *Brown*, and now confirmed by Article 24 of the Citizens' Rights Directive 2004/38, social assistance for a student "whether in the form of a subsidised loan or a grant, intended to cover his maintenance costs" fell within the scope of application of the Treaty. Bidar was therefore entitled to have the principle of non-discrimination on the grounds of nationality applied to him.

The Court then said that the English rules were indirectly discriminatory: requiring students to be settled in the UK and to satisfy certain residence conditions risked placing nationals of other Member States at a disadvantage since both conditions were likely to be more easily satisfied by UK nationals. However, the Court

https://doi.org/10.1017/S0008197305286956 Published online by Cambridge University Press

also accepted that while, in the organisation and application of their social assistance schemes, Member States had to show a certain degree of financial solidarity with nationals of other Member States, it was legitimate for a Member State to grant assistance only to students who had demonstrated a certain degree of integration into the society of that State. This integration could be shown through a period of residence. The Court suggested that a three-year residence requirement was compatible with Community law, but that the requirement to be settled was not since it was impossible for a student from another Member State ever to obtain settled status.

Three points should be noted from *Bidar*. First, the case confirms that non-economically active migrants, as Union citizens, can now enjoy benefits on the same terms as nationals, owing to a "certain degree of financial solidarity" which host States (and thus host State taxpayers) have to show with nationals of other Member States. Second, the limits laid down by Article 3 of the Students' Directive do not apply to those who are students but come to the host State in a capacity other than that of a student (for example where, as in *Bidar*, they come as a person of independent means).

The third and final point relates to maintenance. Had the Court ruled that maintenance grants were to be provided to all migrant students on day one of their arrival in the host State, this would have had a devastating effect on the education budgets of host States, particularly States such as the UK which are net recipients of students. The Court staved off this possibility by allowing host States to impose a proportionate residence requirement on all students prior to entitlement to maintenance grants and loans. In this way, the Court retained, at least in part, the spirit of the distinction drawn in *Brown* between fees (where full equal treatment was required) and maintenance (where it was not). In reaching this conclusion, the Court made an express link between residence, integration and solidarity: the longer migrants are resident in the host State, the more integrated they are in the society of the host State and thus the more solidarity they can expect from the host State in terms of benefits. The same philosophy underpins the new Citizens' Rights Directive 2004/38. There is, however, one remaining glitch: the Directive does not require States to give migrants equal treatment in respect of maintenance grants until they have been permanently resident for five years. Given the costs involved, it might just prove too tempting for the UK to resist taking advantage of this rule and increasing the residence requirement from three years to five.

CATHERINE BARNARD

https://doi.org/10.1017/S0008197305286956 Published online by Cambridge University Press

COPYRIGHT AND COMPETITION COLLIDE

COMPETITION law and intellectual property have never been easy bedfellows, as the decision of the European Court of Justice ("ECJ") in *NDC Health* v. *IMS Health* [2004] All E.R. (E.C.) 813 reminds us. IMS was a company which had found itself a remunerative and seemingly secure market niche in providing pharmaceutical manufacturers with regular and detailed regional reports of retail sales of pharmaceutical products in Germany. With the co-operation of its customers it developed what became known as the "brick structure", in effect a sales tracking map which sliced the country into 1860 segments based on political boundaries, postcodes and retail distribution systems. Use of the brick structure spread well beyond IMS's immediate customers to doctors, retail pharmacies and health insurers, a process IMS neither objected to nor charged for. Whether by accident or design, this faced any potential competitor with a formidable barrier to entry, given the demonstrable reluctance of IMS customers to accept anything other than reports based on the brick system in whose design they had been so heavily involved and to which they had adapted many of their internal marketing and data retrieval systems. One competitor, however, decided to grasp the path determinism nettle by adopting a reporting methodology so indistinguishable from IMS's structure that users would be spared the pain of readjustment. IMS's response was to claim copyright in the brick structure and sue for infringement in the German courts, who, after granting IMS interim relief and finding it dominant in the market for pharmaceutical sales data in Germany, asked the ECJ for a preliminary ruling as to whether IMS's refusal to licence its brick structure amounted to abuse in terms of Article 82 of the EC Treaty, and the extent and significance of any customer "lock in" in relation to that inquiry.

ECJ jurisprudence prior to *IMS* was clear on two points only. Proof of refusal and nothing more did not establish either dominance (irrelevant given the German court's finding) or abuse, but could do so in "exceptional circumstances" of which the facts of *Radio Telefis Eirean and Independent Television Publications* v. *EC Commission and Magill* [1995] 4 C.M.L.R. 718 (a failed attempt by television companies to head off the emergence of a comprehensive weekly programme guide by asserting copyright in the programming information which would compete with their own channel specific guides) provided the only successfully litigated example to emerge from the ECJ then or since. The liability-creating factors found to exist in *Magill* were then parsed by later

https://doi.org/10.1017/S0008197305286956 Published online by Cambridge University Press

litigants in their own interest. What was left unclear was whether these factors were simply a description of what made *Magill* exceptional (thus leaving open the inference that there were other unstated indicia of exceptionality) or whether they were intended to lay down across-the-board conditions of liability, and if the latter, whether the conditions were cumulative or alternative. Both issues remained unresolved despite some elaboration of the *Magill* factors in *Tierce Ladbroke* v. *Commission* [1997] E.C.R. II-923, CFI and *Oskar Bronner* v. *Media Print* [1998] E.C.R. I-7791, ECJ (the latter, significantly, not a case involving intellectual property).

When the preceding case law and its attendant doubts were shaken up by the ECJ in *IMS* and decanted into the narrow confines of an Article 234 request, what emerged was a five-point test to be applied by the German court: a refusal to licence by a dominant copyright owner will be anticompetitive if (i) a copyright licence is essential for carrying on the would-be licencee's business; (ii) that business is in a separate (secondary) market from the (primary) market in which the copyrighted material might be sold (one or both markets may remain hypothetical until the licence issue is resolved); (iii) the refusal prevents the emergence of a new product that the copyright owner does not offer and for which there is a potential consumer demand; (iv) there is no "objective" (*i.e.* competitively neutral) business justification for the refusal; and (v) the refusal forecloses all competition in the secondary market. While all five steps of the test were now clearly to be cumulatively applied, the ECJ's judgment remains tantalisingly vague as to whether they were necessary or merely "sufficient" (a term the court at one point uses, although elsewhere it refers to parts of its test as "determinative") for making out abuse. Nor is every step of the test entirely free of its own internal ambiguities. It needs no great prescience to predict, for example, that requirements that the suppressed product be new (better? cheaper? different?) and the withheld licence essential (technically irreplaceable? alternatives unaffordable and if so by whom, a player big or small?) are likely to become highly effective litigation generators on their own account.

Where does *IMS* leave the competition law and intellectual property interface overall? By tracking the facts of *Magill* so closely in its statements of principle, the ECJ was able to avoid the larger issue of why intellectual property should be treated differently from other forms of market advantage in the first place. Indeed, on a literal reading, *IMS* applies only to refusals to licence copyrighted works. No doubt it can be inferred from the ECJ's tangential reference to *Bronner* (although this is only clear in the Advocate

https://doi.org/10.1017/S0008197305286956 Published online by Cambridge University Press

General's opinion) that a line would be drawn between tangibles and intangibles in that there was no need to show product suppression in the former case, but why stop the hair-splitting there? One could also distinguish between copyright and other forms of intellectual property or between property and mere obligations (crucial in any jurisdiction where knowhow and trade secrets are protected only by liability rules). Why make private law categories case-deciders at all? Many instruments of market power (like the distribution system in *Bronner*) are only indirectly sustained by legal constructs. Regulatory regimes must be able to cut across private rights if they are to work at all. Nor does *IMS* make an economic case for giving inaction more favourable regulatory treatment than action. Legal formalism of the kind embraced in *IMS* and its precursors invites market participants to play games with the regulatory system in ways which make no economic sense. Most of the world's competition regimes have seen an historical movement from presumptions of vice to economics-based rules of reason. The presumption of virtue articulated here by the ECJ threatens to throw this process into reverse. It also suggests that there may be different regulatory outcomes depending on where national copyright laws draw the line between protectable form and expression and unprotectable information and technique.

IAN EAGLES

LIABILITY OF EXPERT WITNESSES FOR WASTED COSTS IN CIVIL PROCEEDINGS

IN *Phillips* v. *Symes (No. 2)* [2004] EWHC 2330 (Ch), [2005] 1 W.L.R. 2043 an expert gave an opinion that a bankrupt person had been mentally incapable of running his affairs for over twenty years. The expert, who had been instructed by the bankrupt, later retracted this report. In the meantime this dramatic opinion had complicated civil proceedings brought by the bankrupt's administrators. The costs wasted by this evidence could not be recovered from the bankrupt. Peter Smith J. decided that the court had jurisdiction to hear a wasted costs application against an expert who gave evidence in a civil case, and that this expert had a case to answer on the present facts. Experts can be liable for wasted costs if they are shown to have been reckless or in gross dereliction of their duty to the court. The decision involves regarding experts as "quasi officers of the Court". It would appear the same might be said of "single, joint experts" who act for both parties.

https://doi.org/10.1017/S0008197305286956 Published online by Cambridge University Press

This costs application arose in complicated proceedings brought by administrators of a bankrupt, Symes (for background, see *Phillips* v. *Symes* [2004] EWHC 1887 (Ch), Peter Smith J.). Symes's solicitors had appointed Dr. Zamar, a consultant psychiatrist, to produce a report on the bankrupt's mental capacity. His report was adduced as evidence. It stated that Symes had been unfit to manage his own affairs since 1980. If true, this would necessitate unravelling Symes's transactions since that date, including earlier stages of the present litigation.

Dr. Zamar later retracted his "dramatic" opinion, but not before much money had been spent demonstrating its lack of substance. Those legal costs could not be recovered from Symes because he was bankrupt. Instead, the administrators sought compensation for wasted costs against Zamar, alleging that his report involved a "gross dereliction of duty" towards the court. Peter Smith J. held that he had power to hear this application even though counsel conceded that the statutory power to make wasted costs orders is confined to legal representatives (at [35]). Instead the judge held that the jurisdictional basis is the court's extra-statutory or "inherent" power to order compensation to be paid by "officers of the Court", notably solicitors, whose gross misconduct of litigation causes costs to be wasted (citing *Myers* v. *Elman* [1940] A.C. 282, where this jurisdiction was traced to at least the eighteenth century). Peter Smith J. held that the same jurisdiction should apply no less to experts, on the basis that they are "quasi officers of the Court". This is because the paramount duty of experts when presenting evidence in a civil case is to assist the court.

This next step in Peter Smith J.'s reasoning concerned a point hitherto not examined in the authorities: whether recognition of a power to award wasted costs against experts would conflict with the witness immunity against civil liability for things said in court (at [75] to [93]). That immunity was formulated by Lord Hoffmann in *Arthur J.S. Hall* v. *Simons* [2002] 1 A.C. 615, 697, as follows:

> ... a witness is absolutely immune from liability for anything which he says in court [and] ... cannot be sued for libel, malicious falsehood, or conspiring to give false evidence ... The interests of justice require that they should not feel inhibited by the thought that they might be sued for something they say ...

He added, at 698:

> A witness owes no duty of care to anyone in respect of the evidence he gives to the court. His only duty is to tell the truth.

https://doi.org/10.1017/S0008197305286956 Published online by Cambridge University Press

Should this immunity preclude an application for wasted costs against an expert? Peter Smith J. held "no". In his view, the prospect of costs liability for "gross dereliction of duty" would not deter them from giving evidence.

Arguably, there are many additional reasons to support this. First, experts are nearly always professionals and generously remunerated. Secondly, wasted costs hearings (unlike freestanding tort claims for professional negligence) are relatively efficient and speedy. This is because wasted costs applications are normally heard "seamlessly" by the trial judge himself. Thirdly, Peter Smith J. derived encouragement, although not direct support, from the fact that the *Arthur J.S. Hall* decision (above) had abolished "advocates' immunity" in respect of professional negligence. In short, "forensic" immunities are crumbling fast. Finally, a party-appointed expert's liability for wasted costs is residual: the aggrieved party's primary recourse for costs is against the party who called the relevant expert. For example, in *Re Colt Telecom Group plc* [2002] EWHC 2815 (Ch) Jacob J. ordered indemnity costs to be paid by a party whose expert's report was seriously defective. In the *Phillips* case, an order for indemnity costs against Symes, the instructing party, would have been ineffective because of his bankruptcy.

In passing, it should be noted that, at least in principle, a "single, joint expert" (on which, see CPR 35.7) should also be subject to a wasted costs application, because he too is undoubtedly a "quasi officer of the Court". But care is required to prevent wasted costs applications becoming a means of collaterally attacking the main judgment (on this, see Neil Andrews, *English Civil Procedure* (2003) at 40.89). A losing party will often feel aggrieved that the single, joint expert's evidence was defective, even a "gross dereliction of duty" towards the court. However, it would be a disaster for civil justice if the wasted costs jurisdiction were exploited to enable aggrieved litigants to re-open the merits of a final judgment.

Before long a higher court in later litigation will have opportunity to consider the merits and ramifications of the present case. But Peter Smith J.'s bold decision is certainly consistent with the expectation—made highly topical within the criminal sphere by the General Medical Council's condemnation of Professor Sir Roy Meadow—that expert evidence must be non-partisan, scrupulously considered, and intellectually honest.

NEIL ANDREWS

https://doi.org/10.1017/S0008197305286956 Published online by Cambridge University Press

CHILD WITNESSES AND THE EUROPEAN UNION

In recent years we have got used to the idea that criminal law and criminal procedure in this country must in principle conform to the European Convention on Human Rights, as interpreted by the Strasbourg Court. But few criminal lawyers, I believe, have ever in their wildest dreams imagined that it must also conform to the law emanating from the Council of Ministers at Brussels, as interpreted by the ECJ at Luxembourg. In the light of this, the recent decision in the *Pupino* case (C-105/3, Grand Chamber, 16 June 2005) will come to many as a surprise, if not a shock.

Signora Pupino was an Italian infant-school teacher whose methods of disciplining under-fives allegedly included hitting them, refusing to allow them to go to the toilet, and gumming their mouths shut with sticking plaster. For this, unsurprisingly, she found herself prosecuted for offences of cruelty to children. Under Italian criminal procedure, as reformed in 1988, witnesses must usually depose orally at trial, but in certain circumstances their evidence may be taken before a judge ahead of trial by a procedure known as *incidente probatorio*. The public prosecutor asked the court to allow the evidence of the little children to be taken in this way, but the court refused. The Italian Code of Criminal Procedure set out the circumstances in which this could be done, and this was not one of them.

Under the Treaty of European Union (TEU)—the constitutional arrangements agreed at Maastricht in 1992 and modified at Amsterdam in 1997 and Nice in 2000—the Council of the EU has power to make "Framework Decisions" on a wide range of matters relating to criminal justice. These Framework Decisions are rather like EC Directives. As a matter of EU law, the Member States are bound to amend their internal law to ensure that it complies with them, but as a matter of domestic law they do not take effect within the national system until this has been done. Of these there have been many, the most famous example being the one in 2002 requiring the Member States to replace extradition within Europe by a drastically simplified procedure (the European Arrest Warrant); which the UK Parliament, rather reluctantly, gave effect to in Part I of the Extradition Act 2003. Most Framework Decisions are inspired, like that one, by notions of Law and Order: which is not surprising, since the EU Council that issues them is in effect a club whose members are the Home Secretaries of the Member States. If a Member State fails to amend its law to comply with an EU Framework Decision it cannot be hauled before the ECJ in enforcement proceedings to compel it to do so, as it can

https://doi.org/10.1017/S0008197305286956 Published online by Cambridge University Press

where it fails to implement an EC Directive. But the courts of Member States may ask the ECJ for a preliminary ruling on its interpretation of a Framework Decision if they "opt in" to the procedure set out in Article 35 TEU—as Italy and many other Member States have done, although the UK has not.

In 2001, the Council issued a Framework Decision (2001/220/JHA, [2001] O.J. L82/1) setting out a list of guarantees that Member States undertake to provide for the victims of criminal offences. Under Article 3, "Each Member State shall take appropriate measures to ensure that its authorities question victims only insofar as necessary for the purpose of criminal proceedings". And under Article 8 (4), "Each Member State shall ensure that, where there is a need to protect victims—particularly the most vulnerable—from the effects of giving evidence in open court, victims may, by decision taken in open court, be entitled to testify in a manner which will enable this objective to be achieved, by any appropriate means compatible with its basic rights". By Article 17, Member States were required to bring their laws into line with these requirements by 22 March 2002.

The refusal of the judge in the *Pupino* case to allow the children's evidence to be taken in advance of trial led to a discussion about the compatibility of the relevant provisions of the Italian Code of Criminal Procedure with the Framework Decision, and to the judge invoking Article 35 of the TEU to refer the question to the ECJ at Luxembourg. This set alarm bells ringing in Home Offices and Ministries of Justice all over Europe. The governments of several other Member States (including the UK) intervened in the proceedings, in the hope of persuading the Court to say that references under Article 35 are inappropriate in the context of particular cases—and more generally, to try to persuade the ECJ to kill any suggestion that national courts are required to take account of Framework Decisions when interpreting their national laws.

In both of these hopes the national governments were disappointed.

The ECJ said that it was entirely appropriate for references under Article 35 to be made in the course of particular prosecutions. As regards the compatibility of Italian criminal procedure with the Framework Decision on victims, the Court said the instrument "must be interpreted as meaning that the national court must be able to authorise young children, who, as in this case, claim to have been victims of maltreatment, to give their testimony in accordance with arrangements allowing those children to be guaranteed an appropriate level of protection, for example

https://doi.org/10.1017/S0008197305286956 Published online by Cambridge University Press

outside the trial and before it takes place''. And on the broader issue, it said: ''The national court is required to take into consideration all the rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the Framework Decision''.

In reaching the conclusion that national courts must seek to interpret national law in the light of Framework Decisions, the ECJ referred to Article 10 of the EC Treaty, which imposes on Member States what is usually called the duty of ''loyal cooperation'' in furthering the aims European Community. It was this duty that the ECJ invoked long ago to create the rule that Member States must interpret their national law so as to conform with European *Community* law—*i.e*., the original body of European law, deriving from the EC Treaty. Though Article 10 itself applies only to Community law, a similar duty of loyalty, the ECJ said, applies in relation to the aims of European *Union* law, deriving from the Treaty of European Union (*i.e*., Maastricht and its progeny).

The *Pupino* decision is obviously of huge importance for the future of EU law in general. And for English criminal justice it is important too. For this, it has two implications, one narrow and one broad.

The narrow one, of course, concerns the evidence of children. In 1989, the Pigot Committee recommended that the law be changed to allow the evidence of little children (cross-examination and all) to take place out of court ahead of trial. But so far this has not happened, and in contested cases, child witnesses still have to come to court to undergo a live cross-examination. Provisions in the Youth Justice and Criminal Evidence Act 1999 that were intended to implement the Pigot recommendations have been abandoned by the Home Office—rightly, in my view—as over-complex and unworkable. They have not been brought into force, and never will be. The *Pupino* decision suggests that we shall now have to make a further attempt to find a way under which little children can give the whole of their evidence ahead of trial.

The broader and more significant implication is that our criminal courts, when construing the rules of English law in relation to criminal justice, must in future operate not only looking over their left shoulders at the Strasbourg Court and the ECHR, but simultaneously looking over their right ones at the Luxembourg Court and EU Framework Decisions.

At first sight, this looks very worrying. It suggests the image of an unhappy motorist afflicted with not one but two back-seat drivers, each with different views about the route the car should take. Fortunately, the ECJ foresaw this problem. The EU, it said,

https://doi.org/10.1017/S0008197305286956 Published online by Cambridge University Press

must respect fundamental rights as guaranteed by the ECHR. So when construing Framework Decisions, and trying to interpret national laws to take account of them, courts must always bear in mind the ultimate need to respect the requirements of the ECHR—and in particular the right to a fair trial under Article 6.

J.R. SPENCER

CONFESSIONS IN THE HOUSE OF LORDS: WATCH THIS *SPACE*

IN *R.* v. *Mushtaq* [2005] UKHL 25, [2005] 1 W.L.R. 1513, the House of Lords considered, and by a majority accepted, the argument that a trial judge who has ruled, pursuant to section 76(2) of the Police and Criminal Evidence Act 1984 ("PACE"), that an alleged confession has not been obtained by oppression or other impropriety, should direct the jury that, if they conclude that the alleged confession may have been so obtained, they must disregard it. This approach had been taken more than fifty years previously by the Court of Criminal Appeal in *R.* v. *Bass* [1953] 1 Q.B. 680. However, the approach in *Bass* had been disapproved by the Privy Council in the subsequent case of *Chan Wei Keung* v. *The Queen* [1967] 2 A.C. 160, approving the approach of the High Court of Australia in *Basto* v. *The Queen* (1954) 91 C.L.R. 628.

It is interesting that Lord Carswell in his judgment in *Mushtaq* took the view that the *Bass* direction was not couched in mandatory terms and hence a trial judge was not required to direct a jury that they *must* give no weight to an improperly obtained confession; with respect, this construction seems difficult to reconcile with the language used by Byrne J. in his judgment in *Bass* [1953] 1 Q.B. 680, 684–685. Both the Privy Council in *Chan Wei Keung* [1967] 2 A.C. 160 (at 171, *per* Lord Hodson) and the High Court in *Basto* (1954) 91 C.L.R. 628, 640 appeared to incline to the interpretation that under *Bass*, the jury must disregard the confession completely. Nor does Lord Carswell's interpretation appear to have been shared by the other members of the Appellate Committee in *Mushtaq* (see the judgments of Lord Rodger of Earlsferry at [47] and Lord Hutton at [14]; Lords Steyn and Phillips of Worth Matravers agreed with Lord Rodger); in any event, the point is now one of historical interest only, since the effect of the majority decision is that henceforth the jury *must* disregard the confession in such circumstances.

Counsel for the Crown in *Mushtaq* argued that a reversion to the approach in *Bass* would involve the jury in decisions as to

https://doi.org/10.1017/S0008197305286956 Published online by Cambridge University Press

admissibility, thus cutting across the fundamental division of roles between judge and jury. Lord Rodger, giving the leading judgment of the majority, was not persuaded by this argument, which he regarded as not strictly accurate since the role of deciding upon admissibility will already have been fulfilled by the judge in considering in a *voir dire* whether the confession is to be admitted; Lord Rodger even described the *Bass* direction to disregard the confession as "part and parcel of the jury's exercise of attributing the appropriate weight to the confession" (at [47]). Similarly, Lord Carswell did not consider that the direction would "amount to giving the jury a say in the admission of evidence or detract from the integrity of the principle that it is the province solely of the trial judge" (at [74]). Perhaps the most compelling justification for the approach of the majority on this point is that in practice juries are unlikely to accord any weight or value to a confession which they think has been obtained by oppression, so that in reverting to the position adopted in *Bass* the majority is merely marrying principle to well established practice, a point tacitly acknowledged by Lord Rodger. Thus, the significance of the majority's stance lies in its robust refusal to countenance the *mere possibility* that a jury might rely on a confession which was or may have been improperly obtained.

The other rationale invoked by the majority in support of its decision to revert to the *Bass* approach was the right against self-incrimination implied in Article 6(1) of the European Convention on Human Rights. Indeed, this was the sole ground on which Lord Carswell based his reasoning, his Lordship having concluded that the reference to "the court" in section 76(2) PACE was concerned solely with the judge and thus did not apply to the jury's function in considering the weight to be attached to a confession. Lord Carswell deemed it an "inescapable" conclusion that reliance by a jury upon a confession that was or may have been obtained by oppression was incompatible with Article 6; Lord Rodger reached the same conclusion.

Lord Hutton, dissenting on both points, opined that Parliament in passing section 76(2) "had no intention of altering the well established principle that the admissibility of a confession is a matter for the judge and the weight of the confession is a matter for the jury" (at [12]). His Lordship expressed his agreement with the interpretation of section 76(2) offered by Mirfield (*Silence, Confessions and Improperly Obtained Evidence* (1997), p. 52) that there "seems to be no good reason for the accused to have two bites of the cherry in relation to the issue of admissibility". On the Article 6 point, Lord Hutton drew support for his contrary position

https://doi.org/10.1017/S0008197305286956 Published online by Cambridge University Press

from, *inter alia*, the well-known decision of the European Court of Human Rights in *Schenk* v. *Switzerland* (1991) 13 E.H.R.R. 242 to the effect that it is for national law to lay down rules relating to the admissibility of evidence. Thus it is that, once again, the Appellate Committee has continued its trend of dividing sharply over determinations on the compatibility with Article 6 of domestic rules of evidence and criminal procedure (witness, *inter alia, Attorney General's Reference (No. 2 of 2001)* [2003] UKHL 68, [2004] 2 A.C. 72, noted [2004] C.L.J. 265; *Attorney General's Reference (No. 4 of 2002)* [2004] UKHL 43, [2005] 1 A.C. 264, noted [2005] C.L.J. 17).

The precise ambit of *Mushtaq* is a matter for conjecture. Will the reasoning of the majority be extended to non-confession evidence admitted by the trial judge on a *voir dire*, or can such cases be distinguished on the ground that concerns about the fairness of the trial itself, paramount in *Mushtaq*, do not there apply? After *Mushtaq*, the message is clear: watch this sPACE.

RAY RYAN
DES RYAN

https://doi.org/10.1017/S0008197305286956 Published online by Cambridge University Press