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CASE AND COMMENT

COLLATERAL CHALLENGE DEFENDED OR NO SMOKE WITHOUT FINE

THE imposition of a £10 fine for violating a no-smoking ban on a train to Brighton is an unlikely start for a decision of major constitutional importance—even when the incendiary incident occurred, as here, on 5 November. Nevertheless, *Boddington* v. *British Transport Police* [1998] 2 W.L.R. 639 has provided the House of Lords with the opportunity to deliver a strong affirmation of a defendant's right to raise the validity of the administrative action which has resulted in his prosecution as a defence in criminal proceedings.

After a long campaign of civil disobedience, Peter Boddington was charged with smoking a cigarette on a Network South Central train in violation of byelaw 20 of the Railways Byelaws 1965. Boddington did not deny the facts alleged but sought to challenge the validity of the byelaw and the decision of the railway company to implement it on all carriages by way of defence. He was convicted by the stipendiary magistrate and the Divisional Court dismissed his appeal, holding that the defence of invalidity was not available in criminal proceedings and that any challenge had to be brought by means of judicial review.

The existing doctrine on the availability of collateral challenge in criminal proceedings was confused and exhibited the particular tension which underlies much public law litigation. If, as *O'Reilly* v. *Mackman* [1983] 2 A.C. 237 suggests, the protections afforded public bodies by the judicial review procedure are necessary in the interests of legal certainty, the prospect of administrative action being set aside in enforcement proceedings which may occur some years later is a disturbing one. On the other hand, the notion that a court should hold against the defendant (and perhaps impose a term of imprisonment) when the legal basis of the public body's action is questionable raises very real concerns for the rule of law and individual justice.

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The former considerations, compounded by fears of inconsistency between different benches of magistrates in distinct parts of the country, persuaded the Divisional Court in the present case to extend a principle announced by its predecessor in *Bugg* v. *Director of Public Prosecutions* [1993] Q.B. 473. *Bugg* decided that although a defendant should be permitted to raise the substantive invalidity of a byelaw as a defence on a criminal charge, judicial review provides an exclusive remedy where the alleged flaw is procedural (such as a failure to consult).

The House of Lords was unimpressed by the attempt to impose a rigid dichotomy on the available grounds of challenge where the distinction between procedure and substance possessed no compelling justification and was likely to prove extremely difficult to apply in practice. The House therefore overruled *Bugg* and held that it was a matter of constitutional principle that a defendant should be able to impugn the validity of the acts of public authorities by way of defence in criminal proceedings on all relevant grounds (although, on the facts, Boddington's challenge failed). The House did not, however, go so far as to hold that collateral challenge would always be available: the question in every case would require the construction of the specific statutory context. This proviso was necessary to accommodate the House's own recent decision in *R.* v. *Wicks* [1998] A.C. 92 in which it held that where Parliament had provided a complex system of appeals and where the decision was one addressed specifically to the defendant, exercise of the right of appeal and judicial review might provide exclusive modes of challenge.

It follows that administrative action which is unlawful, as with a byelaw which is ultra vires, must be void. Any other conclusion would make a nonsense of the defence. Unless the public authority's action is declared retroactively to be a nullity, even a successful collateral challenge would not avail the defendant as the conduct giving rise to the prosecution necessarily predates the legal proceedings in which the defence is raised. However, the House did not speak with one voice on a related issue which has assumed some importance in recent years. This concerns the effect of the decision or norm before it is set aside and, in particular, whether others may invoke their belief in its validity as a defence when proceedings are brought against them. The situation arose most famously in a successor case to *Bugg* in which one of those arrested for violation of the byelaw there held to be invalid sought compensation for wrongful arrest. The Court of Appeal rejected the claim in *Percy* v. *Hall* [1997] Q.B. 924 and Lord Steyn in the present case appears to regard this result as correct. The Lord Chancellor disagreed and adopted the logically purer view that if the action was void, it was incapable of producing *any* legally valid consequences. Lords Browne-Wilkinson and Slynn of Hadley explicitly left the

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question open and Lord Hoffmann unhelpfully agreed with both Lord Irvine of Lairg and Lord Steyn. However, the House is unlikely to be able to avoid the issue for long as the Court of Appeal recently decided in *R.* v. *Governor of Her Majesty's Prison Brockhill, ex p. Evans (No. 2)* [1998] T.L.R. 416 that proceedings in the tort of false imprisonment may be brought against a prison governor where the decision to authorise the continued detention of a prisoner was invalid.

This disagreement on the effects of invalidity should not detract from the unanimity of the House's general approach to collateral challenge nor from the importance of this decision for individual defendants and those interested in the principled development of public law.

IVAN HARE

ELECTION SPENDING AND FREEDOM OF EXPRESSION

WITH the imminent incorporation of the European Convention on Human Rights and the recent publication of the Report of the Neill Committee on Standards in Public Life (Cm 4057), these are exciting, if fluid, times for those with an interest in party political funding. In tandem these initiatives will begin the long overdue process of reform to the law and practice of elections in the UK. A key difficulty awaiting the new regime is one long familiar to many other Western democracies, namely how to regulate election spending whilst preserving the integrity of an entrenched right to freedom of expression, a question recently considered by the European Court of Human Rights in *Bowman* v. *UK* (141/1996/762/959).

In the run up to the 1992 General Election, the Society for the Protection of the Unborn Child and its executive director, Phyllis Bowman, printed and distributed $1\frac{1}{2}$ million leaflets nationally, including 25,000 in Halifax, detailing the position on abortion of each of the major candidates in that constituency. The leaflets described the Labour candidate as a "leading pro-abortionist" and her Conservative opponent as having a "firm commitment to defending the unborn child". Mrs. Bowman was subsequently charged under section 75(5) of the Representation of the People Act 1983. This Act governs electoral law in the UK and whilst it places no limit on electoral expenditure at a national campaign level (see *R.* v. *Tronoh Mines* [1952] 1 All E.R. 697), constituency expenditure is subject to stringent limits. Section 76 limits the expenditure of each candidate to about £8,300 with all expenditure being channelled

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through a candidate's election agent, who submits an account after the election.

Circumvention of this rule by third party expenditure is prohibited by section 75(l) which requires that "No expenses shall, with a view to promoting or procuring the election of a candidate at an election, be incurred by any person other than the candidate [and] his election agent . . . [save that this restriction does not] apply to any expenses not exceeding in the aggregate the sum of £5". Following *DPP* v. *Luft* [1977] A.C. 962, negative campaigning is deemed to fall within the ambit of this section. The case against Mrs. Bowman was that the cost of the Halifax campaign exceeded the prescribed £5 expenditure limit. Owing to the summons being issued out of time, the prosecution against her failed. Nevertheless she applied to the European Commission of Human Rights claiming that her prosecution under section 75(5) was an unjustifiable restriction on her rights under Article 10, which protects freedom of expression, but permits restrictions on a number of grounds. The Commission agreed and referred the case to the Court.

The key issues for the Court were whether the restrictions (*a*) pursued a legitimate aim and (*b*) were necessary in a democratic society. As to the first, the Court accepted the Government's submission that the expenditure ceiling sought to secure equality of participation between candidates. Preventing third parties (especially wealthy ones) from campaigning for or against particular candidates, and thereby potentially distorting political debate, promoted fairness. Accordingly, section 75(1) pursued the legitimate aim of protecting the rights of others, both candidates and electors. As to necessity, reading Article 10 together with Article 3 of the First Protocol, the Court noted that "free elections and freedom of expression, particularly freedom of political debate, together form the bedrock of any democratic system". Whilst these elements are ordinarily mutually sustaining, they could, and in the instant case did, conflict. Although Contracting States have a margin of appreciation in managing this conflict, the Court was impressed by the applicant's submission that the £5 limit was disproportionate and illogical, given that no restrictions applied to the media and national expenditure is effectively unlimited. In practice the restriction served as a complete barrier to Mrs. Bowman's publishing information with a view to influencing the electorate of Halifax in favour of an anti-abortion candidate. The Court was not satisfied that it was necessary to limit third party expenditure to £5 in order to secure the valid end of candidate equality and held that section 75 violated Article 10.

Such reasoning is welcome in that it balances Article 10 against Parliament's aim of imposing expenditure ceilings to promote

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electoral fairness. This approach is to be distinguished from the absolutist stance of the Supreme Court in a series of campaign financing cases, typified by the landmark decision in *Buckley* v. *Valeo* 424 U.S. 1 (1976) which held at pp. 48–49 that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voices of others is wholly foreign to the First Amendment". By finding UK law to be inconsistent with the Convention on the basis of proportionality, the Court accepted that whilst money may well be speech, expenditure limits are not *per se* an objectionable fetter on freedom of expression. In this way, the Strasbourg court is travelling along similar lines to that of the Supreme Court of Canada in the important case of *Libman* v. *Quebec (Attorney General)* 151 D.L.R. (4th) 385. In both cases the tribunals emphasised the importance of equality in electoral matters, a consideration that has ceased to trouble the US Supreme Court.

Less satisfactory are the practical implications of the decision. The Court's reasoning suggests it would not object to a (say) £500 limit on the basis of proportionality. Although this extension does not obviously compromise the principle of electoral equality, it does create the opportunity for like-minded persons to "pool" resources against particular candidates and thereby skew the balance of debate. As average candidate spending limits are currently around £8,300, only a modest number of individuals need to pool for such an impact. The effect of large groups "splintering" would be the same. This difficulty was noted in *Libman* v. *Quebec (Attorney General)*, which recognised the need to limit expenditure to low levels and prevent third parties from pooling their spending as a means of achieving fairness and equality in elections. It is however not certain that even the most detailed membership registration regulations can counter determined attempts to "pool" and "splinter". Accordingly, raising expenditure limits from the *de minimis* level of £5 may have the unintended effect of undermining expenditure ceilings and, as noted in *Libman* v. *Quebec (Attorney General)* at p. 413, "the spending limit system would lose all its effectiveness if independent spending were not also limited".

NAVRAJ SINGH GHALEIGH

THE LOCKERBIE CASE CONTINUES

THE background to the *Cases concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Jurisdiction and Admissibility)* 1998

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I.C.J. Rep. is well known; in 1988 Pan Am Flight 103 was blown up over Scotland and 270 people were killed. The USA and the UK accused two Libyans of the bombing and sought their extradition. Libya argued on the basis of the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation that it was not bound to extradite its own nationals but could try them in its own courts, if appropriate. Libya took the cases to the International Court of Justice. It failed in its requests for provisional measures (see Lowe, (1992) 51 C.L.J. 408), but continued with its claims that the USA and the UK should respect its rights under the Montreal Convention and not put pressure on it to surrender the accused. The respondents made preliminary objections to the jurisdiction of the Court and to the admissibility of the application.

Their main line of argument was that this was not a matter for the Court because the Security Council had dealt with the issue by passing Resolutions 731, 748 and 833. The USA and UK claimed that these Resolutions required Libya to surrender the two accused and also to demonstrate its renunciation of support for terrorism. As Resolutions 748 and 833 were made under Chapter VII of the UN Charter, they were binding and overrode the provisions of the Montreal Convention; there was therefore no longer any dispute between the parties under the Montreal Convention.

Libya argued that the Security Council Resolutions did not in fact require surrender of the accused, but that if they did they were ultra vires. The determination by the Security Council in Resolution 748 that "the failure by the Libyan Government to demonstrate by concrete actions its renunciation of terrorism and in particular its continued failure to respond fully and effectively to the requests in Resolution 731 (1992) constitute a threat to international peace and security" was not justified. There was no threat to international peace and security and therefore the Security Council was acting ultra vires.

The Court gave two separate judgments, but the reasoning and the operative parts of the judgments were essentially the same and they will be discussed together in this note. (Indeed, the identity of interest between the USA and UK made it somewhat surprising that the UK was allowed an *ad hoc* judge.) The Court gave a brief and rather technical judgment carefully avoiding the fundamental issue underlying the arguments of the parties, that of the power of the Court to allow judicial review of the decisions of the Security Council.

Libya based its application on Article 14 of the Montreal Convention which gives the Court jurisdiction to decide on "any dispute concerning the interpretation or application" of the treaty. The USA and the UK argued that the Court did not have

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jurisdiction. First, Libya had not shown that there existed a legal dispute between them and, second, if there were such a dispute it did not concern the interpretation or application of the Montreal Convention; the question was about the reaction of the international community to Libya's support for terrorism. The Court predictably gave this argument very short shrift. It held that the parties disagreed on whether the destruction of the Pan Am aircraft was governed by the Montreal Convention; thus there was a dispute as to the legal regime applicable between the parties. Moreover there was a specific dispute about Article 7 which sets out the duties of States such as Libya in whose territory alleged offenders are found, and also a dispute about Article 11 on the duty of the USA and the UK to hand over evidence to Libya. Accordingly the Court found by thirteen votes to three that it had jurisdiction under Article 14 of the Montreal Convention.

The respondents also argued that the case was not admissible because the Security Council resolutions requiring surrender of the accused had defined the obligations of the parties. The Court held (by twelve votes to four) that admissibility should be decided at the date of the application. Because Resolutions 748 and 883 were passed after the Libyan application they did not make the case inadmissible. However, the Court was willing to entertain the possibility that Libya's claims might have become without object after the date of application, as in the *Northern Cameroon* (1963 I.C.J. Rep. 38) and *Nuclear Tests* (1974 I.C.J. Rep. 272) cases. The USA and UK argued that any judgment would be devoid of practical purpose. The Court took a formalistic approach and thus avoided a decision on the possibility of judicial review. It based its decision on Article 79 of the Rules of the Court; this governs objections as to jurisdiction, admissibility and "other objections, decision on which is requested before further proceedings". The division of objections into categories is problematic and was challenged by some of the judges, but the Court did not go into the theoretical differences between jurisdiction, admissibility and other objections. Article 79(7) provides that an objection may be disposed of at the preliminary stage only if it is of an exclusively preliminary character; the aim of this provision was to avoid the type of situation that arose in *Barcelona Traction* (1970 I.C.J. Rep. 3) and the *South West Africa* cases (1966 I.C.J. Rep. 3) where after much delay and full argument on the merits the cases were eventually decided on the basis of preliminary issues. In the *Lockerbie* cases the Court held that the US and UK objections were not exclusively preliminary; their argument that the Security Council resolutions determined the rights of the parties involved the claim that the Security Council resolutions were incompatible with the

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Montreal Convention and prevailed over it. These issues were inextricably interwoven with the merits.

Therefore the question whether the Security Council resolutions determined the dispute was put off. The scope of the power of the Security Council to make decisions that there exists a threat to international peace and security and to take action under Chapter VII of the UN Charter has become topical since the end of the Cold War with the increase in the activity of the Security Council. Concern over the legitimacy of Security Council action has supplanted earlier despair at its inaction. The controversy as to whether the Court has the power to determine the validity of Security Council resolutions is obvious in the divisions between the judges in their separate and dissenting opinions. Four judges expressly declared themselves in favour of some sort of judicial review; the US and UK judges rejected this. But it may be that a decision on this issue will prove unnecessary. In July 1998 the USA and UK, facing a clear danger that the Security Council sanctions imposed on Libya would no longer be accepted by African and Arab States, gave signals that they were prepared to meet Libya's proposal for a compromise: an international trial of the two accused to be held in a neutral State.

CHRISTINE GRAY

GOVERNMENT OF FOREIGN STATE—PROOF OF EXISTENCE

THE State speaks with one voice in international law. And that voice, of course, is the executive's, usually, but not invariably, that of the Foreign and Commonwealth Office (FCO). Upon a variety of matters a certificate as to certain facts issued by the executive will be regarded by the courts as conclusive of them. This function was, historically, a matter of common law though there are now several statutory provisions in that regard, most notably the Diplomatic Privileges Act 1964 s. 4 and the State Immunity Act 1978 s. 21 identifying defendants who will have immunity from the jurisdiction (see [1998] C.L.J. 4).

In one matter, however, the executive no longer speaks. That is as to the identity of the government of another State. For whilst the executive will "continue to recognise States in accordance with international doctrine" (and issue certificates), "we have decided that we shall no longer accord recognition to governments" (Statement by the Secretary of State, Lord Carrington, 28 April 1980).

This was clearly a sensible change in practice for two reasons: first, it prevents the interpretation of recognition of a government as

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"implying approval" of a regime notwithstanding lack of such intent and, second, it avoids the confusion which had arisen when two regimes, one recognised as a government *de facto* and the other as a government *de jure*, had existed ostensibly simultaneously: see *Haile Selassie* v. *Cable and Wireless Co. Ltd.* [1938] 1 Ch. 839 and *The Arantzazu Mendi* [1939] A.C. 256. In other words, whether a government exists or not is now a question of fact for the court alone to resolve in a given case. But how is such question of fact to be determined? The matter arose in *Sierra Leone Telecommunications Co. Ltd.* v. *Barclays Bank plc* [1998] 2 All E.R. 821.

A coup took place in Sierra Leone on 25 May 1997. The Government of President Kabbah was exiled to the neighbouring State of Guinea. The plaintiff company, which was wholly owned by the Government of Sierra Leone and whose directors, conformably with its articles of association, were appointed by that Government, had an account with Barclays Bank in London. The company had executed a mandate authorising named directors to draw on the account. Following the coup, the revolutionary "authority" in Sierra Leone purported to appoint new directors who revoked the mandate and who instructed the Bank not to honour certain instructions issued to it by the original directors. The Bank thus "was being asked to make a difficult choice, whether to continue to honour the original mandate or to accept the revocation".

Cresswell J held:

(1) in the absence of contrary provision, the contract between company and bank was governed by English law, the law of the place where the account was kept: *Libyan Arab Foreign Bank* v. *Bankers' Trust Co.* [1989] Q.B. 728, 746 ("the principle established in the Libyan assets case" is "substantially unchanged by the Contracts (Applicable Law) Act 1990");

(2) the "law of the place of incorporation determines who are the corporation's officials authorised to act on its behalf (*Carl Zeiss Stiftung* v. *Rayner and Keeler Ltd. (No. 2)* [1967] 2 A.C. 853)"; here, obviously, that was the law of Sierra Leone;

(3) the revolutionary "authority" which had purported to change the composition of the plaintiff's board and to revoke the original mandate was not the government of Sierra Leone. Thus the original mandate remained in place.

Cresswell J. followed Hobhouse J. in *Republic of Somalia* v. *Woodhouse Drake & Carey (Suisse) SA* [1993] Q.B. 54, noted [1993] C.L.J. 4. In his view, four factors arose in determining whether the court should regard such authority as a government.

(*a*) Is it the constitutional government of the State? Clearly it was not, though statements by the FCO, whilst referring to the "legitimate

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government of President Kabbah", did not explicitly describe the alternative regime as "unconstitutional". Those statements expressed profound disapproval of that regime and chirruped on cheerfully about its being "undemocratic". Whether Cresswell J. and more particularly the FCO regarded "constitutional" and "democratically elected" governments as synonymous is unclear.

(*b*) The degree, nature and stability of the regime's control. The evidence was clear: the regime had no control over the greater part of Sierra Leone where "there was a lack of a semblance of order".

(*c*) Whether HMG had dealings with the regime. It did not and its attitude to it had been clearly expressed in the moralising terms one has come to associate with the latter-day FCO

(*d*) In marginal cases, has there been some degree of international recognition? Clearly here there had been none; sanctions had been imposed upon the "authority" by the Security Council and the EC, and the Organisation of African Unity and Economic Community of West African States had condemned it.

Accordingly the composition and authority of the originally constituted board of the plaintiff company had not been affected and the purported revocation of the mandate was ineffectual. This decision is clearly right and is to be welcomed. But what if the regime in Sierra Leone *had* been in effective control? It takes but little imagination to think of a number of regimes of which HMG disapproves and with which it chooses to have only the most formal dealings owing to, for example, violations of human rights by them. What would the court do then? Would the decision in *Anglo-Iranian Oil Co. Ltd.* v. *Jaffrate (The Rose Mary)* [1953] 1 W.L.R. 246 come into play? And what *is* the ratio decidendi of that case?

Recognition of governments is not now an issue for an English court. One can only speculate about how important recognition (or rather non-recognition) of a *State* may be for such court in the light of *Carl Zeiss* (above, at p. 954 *per* Lord Wilberforce), *Hesperides Hotels* v. *Turkish Aegean Holidays Ltd.* [1978] Q.B. 205, 218 *per* Lord Denning and the Foreign Corporations Act 1991.

JOHN HOPKINS

CAESAREAN SECTIONS AND THE RIGHT OF AUTONOMY

CYNICS were unimpressed by the proclamation of the Court of Appeal in *Re MB (Caesarean section)* [1997] 2 F.C.R. 541 (noted [1997] C.L.J. 509) that the law protects a pregnant woman's right to

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autonomy and bodily integrity. The Court of Appeal had held that it would be unlawful for a doctor to perform a Caesarean section on a competent woman if she refused to consent to the operation—even if the lives of the woman and unborn child would be endangered if the operation was not performed. Cynics argued that the courts would always circumvent these fine-sounding principles by finding the woman incompetent to make the decision, as they did in *Re MB* itself. However, subsequently in *St. George's Healthcare NHS Trust* v. *S* [1998] 3 All E.R. 673 the Court of Appeal held that a woman was competent and that a doctor acted unlawfully in carrying out a Caesarean section on her. The NHS Trust and doctors were therefore potentially liable in tort for trespass and perhaps even guilty of criminal offences.

S, the woman at the centre of *St. George's Healthcare NHS Trust* v. *S*, was 35 weeks pregnant when she was informed by her doctor that she was suffering from, *inter alia,* pre-eclampsia and needed to be admitted to hospital for an induced delivery. She insisted that she wanted the child to be born naturally and refused to consent to any medical treatment, even if this meant that her life or that of the foetus would be endangered. Although S was suffering from depression her doctors decided that she was competent to refuse to consent to medical intervention in her pregnancy. Despite this she was detained under section 2 of the Mental Health Act 1983 at Springfield hospital and later transferred to St. George's hospital. Following an *ex parte* application made on behalf of the NHS Trusts, Hogg J. granted a declaration that it was lawful to carry out a Caesarean section on S without S's consent. This was done and as a result a baby girl was born. S did not attempt physically to resist the operation because she thought that to do so would be undignified. S appealed from Hogg J.'s decision and sought judicial review of the hospital's actions.

The Court of Appeal allowed the appeal and declared that the detention and treatment had been unlawful. Judge L.J., who gave the judgment on behalf of the court, also held that S should not have been detained under the Mental Health Act 1983. He warned of the danger of a social worker determining that a patient was suffering from a mental disorder simply because her decision was irrational or bizarre. Although the court accepted that S's reactive depression could constitute a mental disorder for the purposes of the Act, it could not be said that S required detention for assessment of the depression, as required to justify detention under section 2 of the Act. Further, the Act only authorised treatment of the mental disorder itself (section 63) and the Caesarean section was not treatment of any mental condition. The Court made it clear that if a

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person was detained under the Mental Health Act 1983 and treatment was required for a condition not related to the mental disorder, the doctors either required the consent of the patient (if competent) or needed to determine that the patient was unable to consent to the treatment and that the treatment was in her best interests.

So could a Caesarean section be performed on a competent woman who refused to consent? At the heart of the reasoning of Judge L.J. was a simple proposition: the right of a competent patient to refuse treatment was absolute and no "concession" should be made to this principle. "S is entitled not to be forced to submit to an invasion of her body against her will, whether her own life or that of the unborn child depends on it. Her right is not reduced or degraded merely because her decision to exercise it may appear morally repugnant" (p. 692). The Court of Appeal stated that an individual's right of autonomy and bodily integrity outweighed other principles that the law holds dear, such as sanctity of life.

It should, however, be noted that outside medical law there is less squeamishness about breaching these rights. Two obvious examples are section 55 of the Police and Criminal Evidence Act 1984 (intimate searches without a suspect's consent) and the defence of self-defence in criminal law. These situations can be distinguished from the one under discussion here, but suggest that the rights of bodily integrity and autonomy are not regarded as absolute in the law generally. Is it really true, as the Court of Appeal suggests, that there are no circumstances when it is permissible to infringe an individual's bodily integrity however great the harm caused to other people and however small the invasion of bodily integrity? No doubt if S's child had been born alive and needed a kidney transplant few would approve of the forcible taking of a kidney from S to save the child's life. However if a fearful epidemic threatened a State's population, would it not be permissible to take by force a blood sample from a citizen who appeared to have developed an immunity to the disease? Seeing autonomy as an absolute value can be challenged as being overly individualistic. One can argue that the protection of community values might in extreme cases outweigh an individual's autonomy, particularly as the values and structure of a society crucially affect the range of choices its members can make about how to live their lives. And it is the protection of those choices which is at the heart of the right of autonomy.

A crucial point in this case is not brought out in Judge L.J.'s reasoning: S was not performing a positive act which was posing an unjust threat to the unborn child, but an omission. In S's own words she was "letting nature take its course". Therefore the crucial question should have been whether there is a legal duty on a pregnant

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woman which requires an invasion of her body in order to promote the foetus's interests. Such a duty would be unlike any imposed elsewhere by the law.

The legal status of the foetus was also discussed, although given the paramountcy of the principle of bodily integrity it was not essential to the decision. Judge L.J. described the foetus as, when viable, "certainly human" (p. 687), "a unique organism" (*per* Lord Mustill in *Attorney-General's Reference (No. 3 of 1994)* [1998] AC 245, 256) and "protected by the law in a number of different ways" (p. 687) and stressed that there was a "profound physical and emotional bond between the unborn child and its mother" (p. 695). However, Judge L.J. stated: "while pregnancy increased the personal responsibilities of a woman it did not diminish her entitlement to decide whether or not to undergo medical treatment" (p. 692). He rather elusively did not explain whether "personal responsibilities" of pregnancy were legal in nature. However he quoted with approval *Winnipeg Child and Family Services (Northwest Area)* v. *G* (1997) 152 D.L.R. (4th) 193 in which the Supreme Court of Canada had held that it would be unlawful to detain a glue-sniffing mother for the purposes of protecting her unborn child.

The Court of Appeal was deeply concerned by the legal procedures that resulted in Hogg J.'s declaration, in particular that the declaration had been made without S being given the opportunity to present her case. The Court of Appeal suggested guidelines to be followed in these kinds of cases in the future, most notably that if treatment is going to be carried out against a patient's wishes the proceedings should be *inter partes*, and if necessary the Official Solicitor should be instructed to represent the views of the patient.

On the view of the Court of Appeal, S and her unborn child should have been allowed to die, thereby upholding S's right to bodily integrity. The right of autonomy is greatly treasured in our society but sometimes it calls for the highest of sacrifices.

JONATHAN HERRING

LOOK BEFORE YOU LEAP

ON a pleasant evening in Darwin, Australia, in April 1987 Nadia Romeo went with her friends to a popular spot, the Dripstone Cliffs, for a beach party. She was nearly 16 and had little experience of alcohol, but she and a friend consumed about 150ml of rum in 90 minutes. At about 11.45 pm both she and her friend fell over the

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edge of the cliffs onto the beach below and Nadia suffered high-level paraplegia. Neither of the girls had any recollection of the circumstances in which they fell, but there was an area of eroded ground at the top of the cliffs that might have appeared to the girls as a path to the beach below (although it did not have this appearance in daylight, nor would it have appeared this way to a sober, alert person on the night). In short, it appears that they either walked over the edge with their heads in the air or attempted to jump to the beach below (nearly 20 feet) and woefully misjudged the distance. None the less, Ms Romeo decided to sue the Conservation Commission of the Northern Territory. Although she lost in every court, the 5–2 majority decision of the High Court of Australia in *Romeo* v. *Conservation Commission of the Northern Territory* (1998) 72 A.L.J.R. 208 will give little comfort to public bodies responsible for the control and management of land.

At first glance, the Conservation Commission appears to have had very little to do with the injury suffered by the plaintiff. By virtue of the Northern Territory Conservation Commission Act 1980 it was responsible for the management and control of the cliffs as part of its general duty to promote the conservation and protection of the natural environment of the Territory, and in the exercise of these powers it constructed a graded but untarred road to the cliffs and a car park fenced by low-set logs at the top. However, the plaintiff's complaint did not relate to this development work; rather, the plaintiff's claim was based on a duty of care owed by the Commission to take positive steps to prevent her causing herself foreseeable injury. This is not exceptional; imposing liability for omissions in the context of ownership and control of land has long been the province of the law on occupier's liability. However, the position is complicated where a statutory body exercises powers of management and control: unlike a private owner, it may have no ability to limit entry to the land. In addition, the statutory body will normally have a wide discretion as to *how* it exercises its powers. These factors led Brennan C.J. to hold that the liability of a public body with powers of control and management of property was "not founded in the common law of negligence but in a breach of a statutory duty to exercise its power and to do so reasonably having regard to the purpose to be served by an exercise of the power" (at p. 214). Although the powers were given to provide protection to those who entered the property, the manner of their exercise was for the authority, and this could only be challenged on public law grounds; thus there could be no disparity between the authority's public law duty and the duty owed to the entrant as a member of the class of those entering the premises. In *Romeo*, the powers were

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exercised on the basis that entrants would exercise reasonable care for their own safety (as in *Aiken* v. *Kingborough Corporation* (1939) 62 C.L.R. 179). This was not an irrational basis on which to exercise the powers, and in the absence of conduct that created or increased the risk to the plaintiff the action should fail.

The remainder of the majority dismissed the appeal on the simple ground that no breach of a common law duty of care had been established. As the possibility of entrants failing to exercise reasonable care for their own safety was foreseeable, the Commission owed a duty of care under the "undemanding" test set out in *Nagle* v. *Rottnest Island Authority* (1993) 177 C.L.R 423. However, Toohey, Gummow, Kirby and Hayne JJ. held that it was unreasonable to require the Commission to fence all elevated areas under its control. Nor was a warning sign necessary as, unlike *Nagle* (where the danger of shallow water was not obvious to the plaintiff diver), the risk of falling off the cliff was self-evident. The minority took a similar approach but differed on the facts. McHugh and Gaudron JJ. accepted the plaintiff's argument that it would only have been necessary to fence the area immediately adjacent to the car park as the risk was greatest at that point. The duty under *Nagle* was imposed in respect of foreseeable risks (one of which was that intoxicated persons might be present at the cliffs) and, given the seriousness of the potential harm and relative ease of erecting an effective precaution, the minority held the Commission in breach, although they accepted that any award would have to be reduced for contributory negligence.

Although public authorities can take some comfort from the result, they will be considerably more troubled by the reasoning. Apart from Brennan C.J., the court did not find it necessary to consider the relationship between the public and private law duties of the Commission as the decision was based on other grounds. However, Kirby J., obiter, said (at 238) that the decision whether to fence or not would not be within the area of "policy" into which the court could not pry. None the less, he accepted that virtually every suggested precaution has financial and economic implications. If this is correct, a finding of negligence appears to second-guess the public body's own assessment of its financial and economic priorities, a task entrusted to it by Parliament. In the absence of a public law justification such as *Wednesbury* unreasonableness, under what mandate can a court make this reallocation? This is not to advocate immunity for public bodies; where actions cause or increase the risk of damage to the plaintiff it may be appropriate to require the public body to pay compensation. But where the complaint is of a failure to act to *prevent* the plaintiff from suffering damage, there is much to

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be said for the approach of Brennan C.J. that the public body's private law duty should be no more extensive than its *public* law obligations, a view which finds tacit support in the majority decision of the House of Lords in *Stovin* v. *Wise* [1996] A.C. 923. Why should there be a further enquiry as to the liability of the public body (more accurately its ratepayers or taxpayers) once it has exercised its powers on the basis that people will take reasonable care for their own safety?

In this respect, *Romeo* may conveniently be compared with another recent decision of the High Court of Australia, *Pyrenees Shire Council* v. *Day* (1998) 72 A.L.J.R. 152. In that case a local authority was held liable to the tenants of a property that was destroyed by fire and to neighbours whose property was also damaged. The authority had previously inspected the property and had notified the then tenant that the fireplace should not be used as it constituted a fire danger; none the less he continued to use it and later told the incoming tenants that it was safe to use. They took his word and used the fireplace, which ultimately resulted in the fire that caused the damage. The local authority was found liable in negligence for failing to exercise statutory powers to ensure that remedial measures were *actually* taken so that the fireplace was no longer a danger. This is not the place to embark on a detailed comparison, but essentially the difference in result between the two cases is simply the finding of breach against the local authority in *Pyrenees*. If these cases are to be decided at this stage of a negligence action, one further difficulty should be noted. In *Romeo* Kirby J. (at p. 235) and Hayne J. (at p. 241) suggested that the requirement to show a breach of duty acts as an adequate limitation on a public authority's liability. However, leaving liability to the arbiter of fact will prevent claims from being struck out at a preliminary stage, with the result that public authorities will be forced to take most cases of this nature to trial or settle, the costs of which will be paid by the taxpayer. Such public funds might, perhaps, be better spent fencing the edges of cliffs.

MARK LUNNEY

EX TURPI CAUSA AND MENTAL DISORDER

IN September 1992 Christopher Clunis, who had a long history of mental disorder, was discharged from a hospital where he had been detained under section 3 of the Mental Health Act 1983. Under section 117 of that Act, it was the duty of his local Health Authority

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to arrange to provide after-care services for him until it was satisfied that he no longer needed them. After an interval of twelve weeks, during which he failed to attend three out-patient appointments and a mental health assessment arranged for him, Clunis launched an unprovoked and fatal knife attack on a total stranger, Jonathan Zito, at Finsbury Park tube station. Clunis was charged with murder, but a plea of guilty to manslaughter on the grounds of diminished responsibility was accepted, and the trial judge ordered his detention in a secure mental hospital. Clunis claimed damages for his incarceration from the Health Authority, arguing that it was in breach of a common law duty to treat him with professional care and skill, and that if it had acted more expeditiously he would either have been detained or consented to become a patient before the date of the attack and therefore would not have been able to commit it—in other words, that a timely brief period of hospitalisation would have saved him from an indeterminate but doubtless much longer period. The first instance judge refused to strike out the action, but a unanimous Court of Appeal allowed the Health Authority's appeal: *Clunis* v. *Camden and Islington Health Authority* [1998] 2 W.L.R. 902.

The principal reason for the decision was the rule of public policy that a plaintiff cannot base a claim on his own criminal or immoral act (*ex turpi causa non oritur actio*). Beldam L.J., who handed down the judgment of the Court of Appeal, dismissed the plaintiff's argument that this rule did not apply to causes of action founded in tort, and held that it was not confined to particular causes of action. He supported the view of Lords Goff, Keith and Browne-Wilkinson in *Tinsley* v. *Milligan* [1994] 1 A.C. 340 that the rule should be applied uniformly, and not only in cases where it would "affront the public conscience" to allow an action to succeed. Given the seriousness of Clunis's crime, the question of what acts are sufficiently grave to attract the operation of the rule did not arise. A more difficult issue was the effect of Clunis's mental state at the time of the killing, since *Burrows* v. *Rhodes* [1899] 1 Q.B. 816 established that the rule only applies where a plaintiff is aware that his conduct is illegal or immoral. But Beldam L.J. pointed out that there had been no question of a verdict of not guilty by reason of insanity; the plea of diminished responsibility amounted to an admission that Clunis knew what he was doing and that it was wrong. In the court's view, *Meah* v. *McCreamer* [1985] 1 All E.R. 367, where a road accident victim whose head injury turned him into a rapist was allowed to recover from the negligent driver damages for the sentence of imprisonment imposed upon him for the rapes, was not to be regarded as authoritative, since *ex turpi causa* had not been argued on behalf of the driver in that case. It may be recalled, however, that

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in *Meah* v. *McCreamer (No.2)* [1986] 1 All E.R. 943, where public policy was one of the reasons for Meah's failure to obtain damages from the driver for the compensation which he had been ordered to pay to the rape victims, Woolf J. defended his own decision in the earlier case on two grounds, suggesting that it might have been the same even if *ex turpi causa* had been raised. The first ground was that the damages provided a fund to benefit the plaintiff in respect of the physical injuries caused to him by the defendant, the imprisonment presumably being regarded as a loss of amenities consequent upon those injuries (a point on which *Clunis* is readily distinguishable). The second was that the damages provided Meah with a sum from which he could compensate his rape victims and support his former wife and child. No such sum will be available to compensate Mr. Zito's dependants.

McCreamer, however, was a very different kind of defendant from the Camden and Islington Health Authority. Even if Clunis's claim had not failed on the public policy ground, it would have been defeated by the defendant's second argument, that its statutory obligations to provide after-care did not give rise to a common law duty of care. Applying *X (Minors)* v. *Bedfordshire County Council* [1995] 2 A.C. 633, Beldam L.J. said that the question was "profoundly influenced by the surrounding statutory framework"; section 117 was not apposite to create a private law cause of action for failure to carry out the duties which it imposed, since the appropriate remedy for such failure was a complaint to the Secretary of State, and it would not be just and reasonable to impose a common law duty in relation to the provision of after-care services, which gave rise to a relationship of a different nature from that which normally exists between a doctor and his patient.

Since this was a striking-out application, it was unnecessary to decide whether, if a duty had been held to exist, the Health Authority's failure to take more vigorous steps to pursue the elusive Clunis would have amounted to a breach, although there are hints in the judgment that it would not. In any event, it may be suggested that in so far as there may have been a failure in the implementation of the controversial "care in the community" policy, its true victim (or perhaps the victim of the policy itself) in this case was not Christopher Clunis but Jonathan Zito.

C.A. Hopkins

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ALICE AND THE JUDICIARY—INTERPRETING CONTRACTS

WHEN the discussion between Humpty Dumpty and Alice takes on the role of leading case and its interpretation becomes a matter of dispute between a Lord Justice of Appeal and a Lord of Appeal in Ordinary, then it might be thought that the academic lunatics have taken over the legal asylum.

Sometimes the decision in a case is only important for the parties, for those in similar situations, for the state of the law but not for those who study law. The decision in *Investors Compensation Scheme Ltd.* v. *West Bromwich Building Society* [1998] 1 All E.R. 98, or rather, bits of the speech of Lord Hoffmann, should concentrate the mind of all students of law because it tells us how to read, how to avoid being self-important and reminds us that contracts are about getting things done. That his Lordship should have to do this ill reflects on our legal culture, but the Ptolemaic approach to expounding law—epicycle upon epicycle in fruitless search of perfection—still haunts.

The facts of a case are never irrelevant and so must be stated. In short, investors had been sold home income plans, negligent advice having been given contrary to rules made under the Financial Services Act 1986. The Investors Compensation Scheme Ltd. (ICS) was set up to compensate such investors and some claims were assigned to ICS by investors. The question arose whether the investors had assigned claims for, *inter alia*, negligence or misrepresentation, under a clause excluding from assignment

> Any claim (whether sounding in recission for undue influence or otherwise) that you [the investor] have or may have against the [building society] in which you claim an abatement of sums which you would otherwise have to pay in respect of sums borrowed by you from that Society in connection with the transaction and dealings giving rise to the claim

The trial judge, reversed by the Court of Appeal but upheld by the majority of the House of Lords (Lord Lloyd of Berwick dissenting), held that only claims for an abatement of debt, arising out of a claim for recission, were reserved to assignor investors.

In a nutshell, the question was whether "Any claim (whether sounding in recission for undue influence or otherwise)" could mean "Any claim sounding in recission (whether for undue influence or otherwise)": in the Court of Appeal Leggatt L.J. relied on the exchange between Alice and Humpty Dumpty in *Alice Through the Looking Glass* to say that it could not, be it "commercial nonsense" or not. But Lord Hoffmann differed:

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> Alice and Humpty Dumpty were agreed that the word "glory" did not mean "a nice knock-down argument". Anyone with a dictionary could see that. Humpty Dumpty's point was that "a nice knock-down argument" was what he meant by using the word "glory". He very fairly acknowledged that Alice, as a reasonable young woman, could not have realised this until he told her, but once he had told her, or if, without being expressly told, she could have inferred it from the back-ground, she would have had no difficulty in understanding what he meant.

It is preposterous that Lord Hoffmann should have to tell lawyers (*inter alios*) how to read, but he did so quite superbly. He iterated that "fundamental change . . . has overtaken this branch of the law", the result of which

> is to assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life. Almost all the intellectual old baggage of "legal" interpretation has been discarded.

For the sake of those who will not read Lord Hoffmann's speech, your commentator will summarise his Lordship's summary of "the principles"—principles which are being cited on each and every occasion (one is reliably informed).

(1) "Interpretation" means what any reasonable person in the position of the parties at the time of contracting would have understood.

(2) "Background" includes "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man".

(3) But the law excludes evidence of previous negotiations, of alleged subjective intent "for reasons of practical policy". As his Lordship implies, this morass needs some serious work: what is civil evidence about?

(4) Meaning in this context is not about the meaning of words (*in vacuo?*) but what the parties using those words against the relevant background would have understood the meaning to be.

(5) We neither assume easily that people make mistakes in formal documents nor that in commercial contracts we should do commercial nonsense in the name of the parties' presumed intention.

At this point the reader might appeal to that famous schoolboy sage Nigel Molesworth and reflect on his adage "any foole kno", but that is no defence: as Lord Hoffmann remarks, "Many people, including politicians, celebrities and Mrs Malaprop, mangle meanings and syntax but nevertheless communicate tolerably clearly what they are using the words to mean". If we fail to understand language as a shared practice then we will cease to be social animals. No one can

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possibly object to "terms of art" being shared by those in particular trades, businesses or branches of the law, but it has come to a sorry pass when we have to have a Lord of Appeal tell us what we should have learnt *When We Were Very Young*—at least when we were law students. Commercial law has to work and contract is the supreme vehicle for doing that work: "the old intellectual baggage" referred to by Lord Hoffmann simply gums up the works. No doubt, given the last word, Alice would have said "curiouser and curiouser"—but then she was wise beyond her years.

DAVID FLEMING

RESTITUTION FOR SERVICES PERFORMED UNDER AN ILLEGAL CONTRACT

ALAGA & Co. was a firm of solicitors representing a number of Somali refugees applying for asylum in the UK. Ali Mohamed, a leading figure in the Somali community in the UK, sued Alaga: *Mohamed* v. *Alaga & Co.* [1998] 2 All E.R. 720. He had introduced the refugees to Alaga and wanted to be rewarded for making the introductions. He claimed that Alaga had entered into an oral contract with him whereby it undertook to pay him half of any fees it received from the Legal Aid Board in respect of refugees that he introduced to the firm. Unsurprisingly, perhaps, Alaga denied making any such agreement. It was unlawful for it to do so. The rules of the Law Society have legal force under the Solicitors Act 1974, s. 31. Under rule 3 of those rules a solicitor may accept introductions of business from other people so long as he or she does not reward the introducers of that business in any way. Under rule 7 of the same rules a solicitor is not allowed to share or agree to share his or her fees with anyone else except other practising solicitors, his or her employees and his or her retired partners. Lightman J. assumed, for the purposes of deciding the case, that Alaga did agree to pay Mohamed for any refugees he introduced to the firm.

The contract, he held, was unenforceable. To hold otherwise would involve the court in compelling Alaga to do precisely that which Parliament had decreed that Alaga must not do—pay someone for introducing business to the firm and share fees earned by it with someone not authorised to receive those fees. Lightman J. also held that Mohamed would be barred from bringing a claim for his services in restitution. Such a claim would be based on the principle that a defendant who freely accepts a benefit arising out of work done by the plaintiff under a contract with the defendant must pay that plaintiff a reasonable sum for that benefit if the plaintiff, for some

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reason, cannot make any claim for his work under the contract: *Sumpter* v. *Hedges* [1898] 1 Q.B. 673; *Craven-Ellis* v. *Canons Ltd.* [1936] 2 K.B. 403; Law Reform (Frustrated Contracts) Act 1943, s. 1(3). To apply that principle here would result in the court's compelling Alaga to pay Mohamed a reasonable sum for the business he introduced to the firm—again, something that is forbidden by legislation. So Mohamed's claim in restitution for his services was denied.

The result reached by Lightman J. is desirable. As he pointed out (at p. 724E–J), public policy demands that the courts should strongly discourage the making of agreements of the kind Mohamed claimed that Alaga made with him. The existence of such agreements creates a risk that someone in need of legal services will be recommended to a firm which is not best suited to handling his business and will be overcharged for the services he receives as the firm he employs seeks to recoup the commission paid out for obtaining his custom. People in Mohamed's position will be discouraged from entering into such agreements as a result of Lightman J.'s decision. They will know that the courts will not in any circumstances take any steps to ensure that people who find business for solicitors' firms for reward are made better off as a result.

Mohamed might have been able to obtain something for the work he did for Alaga & Co. by another route. Lightman J. conceded (at p. 725J) that if Alaga did agree to pay Mohamed for any introductions he made to the firm, it might have owed Mohamed a duty to tell him that it was required by law not to make such an agreement. If Alaga owed Mohamed such a duty, he could have sued Alaga for damages for its breach, claiming that if that breach had not occurred he would not have worked for Alaga, thereby obtaining damages equal to the value to him of the time and efforts he spent working for Alaga. Alternatively, and more ambitiously, Mohamed could have argued that the principle of liability in *Planche* v. *Colburn* (1831) 8 Bing. 14—which says that if I do work under a contract with you but have no right to be compensated for that work under the contract because it is incomplete, I can still recover a reasonable sum for the work I did even if the work I did was of no benefit to you, if the reason I did not complete the work was because your breach of contract made further performance on my part futile—should be extended to allow him to claim a reasonable sum for the time and efforts he spent working for Alaga. Significantly, the 1974 Act would *not* have prevented either of these claims against Alaga from succeeding. Success would not reward Mohamed for introducing business to Alaga; it would compensate him for giving up his time and efforts to drum up that business. Perhaps bringing a claim for

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damages or for compensation under the principle in *Planché* v. *Colburn* would not have benefited Mohamed much—there could not have been much work involved in his handing out business cards to refugees he came across in his day-to-day activities. But if he had brought such a claim, it is submitted that the court should have denied it on grounds of public policy, so as further to discourage people in Mohamed's position from entering into agreements to find business for solicitors' firms for reward. Of course, it may be contended, such a stance can only encourage solicitors' firms to try and lure people like Mohamed into finding business for them. They will know that they will not be held liable to pay a penny to people who succumb to their promises of reward and attempt to find business for them. However, they will still be subject to the sanctions of the Law Society—and it is to be hoped that the Law Society has rigorously investigated Mohamed's claims and taken any appropriate action.

NICHOLAS J. MCBRIDE

SALE OR RETURN CONTRACTS: THE RIGHT TO REJECT

RATHER than buying goods outright, retailers often find it convenient to receive goods under a "sale or return" arrangement. These agreements are not contracts of sale, but rather bailment arrangements that give the bailee the right either to buy or to reject the goods. A sale or return contract may require that the right to reject can be exercised only by the bailee physically returning any unwanted goods; however, in the absence of an express stipulation to this effect, these contracts are generally construed to require merely that the bailee give notice of rejection and make the goods available for collection by the bailor. The question then arises: what form must this notice take, and at what stage must the goods be made available for collection? These matters were considered by the Court of Appeal in *Atari Corporation (U.K.) Ltd.* v. *Electronics Boutique Stores (U.K.) Ltd.* [1998] 2 W.L.R. 66.

The plaintiff, Atari, had supplied the defendant with electronic games on terms that specified "full sale or return until 31 January 1996". On 19 January 1996, the defendant sent a letter to the effect that it had decided to cease to sell the product. It further indicated that it had requested all its stores to return the unwanted stock, after which it would provide a complete list of the goods to be returned. What was the effect of this communication? While the defendant argued that it had given an effective notice of its decision to return

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the goods, the plaintiff countered that this could not be so for two reasons: first, the letter had failed to describe the goods to be returned with sufficient specificity; and, secondly, the defendant did not have the goods available for collection at the time at which the notice was served. Hence, the plaintiff argued that, because the letter contemplated future action being taken to exercise the right of rejection (i.e. the compilation of a comprehensive list and the physical collection of the goods to be rejected), it could be interpreted only as a notice of intention to reject. The plaintiff further contended that, pursuant to section 18, rule 4 of the Sale of Goods Act 1979, because it had retained the goods without giving an effective notice of rejection, property passed to the defendant at the time fixed for the return of the goods. The matter came to the Court of Appeal after a summary judgment was given in favour of the plaintiff and upheld on appeal to judge in Chambers.

Waller, Phillips and Auld L.JJ. all dismissed the notion that an effective rejection required that the items to be returned be individually listed. Instead, they took the view that a generic description was sufficient. In dealing with the plaintiff's argument that the notice could not be effective because the goods were not ready for collection, the court stressed that whether the notice was adequate and what the prospective buyer, as bailee, did with the goods were two separate questions. If upon giving adequate notice a bailee failed to make the goods available for collection within a reasonable time, he or she would be liable for conversion. This, however, could not affect the validity of the notice. Thus, after giving notice to reject, the bailee is bound to return the goods. Any acts by the bailee that are inconsistent with the bailor's title will not amount to adoption of the transaction vesting title in the bailee; rather, they will constitute wrongful interference with the bailor's property.

Auld L.J. observed that the fact that the parties provided for rejection to be effected by a notice of rejection rather than physical return suggested that there was to be some delay after the notice was given and before the return of the goods to the supplier. He further argued that a rule allowing for generic description was better suited to the reality of arrangements involving large retailing outlets that would require some time to collect the stock in question after making the decision to discontinue sales. Thus, he argued that this rule would suit both parties because it would allow the supplier "to find at the earliest moment a purchaser for the rejected goods, wherever they are; similarly, it is in the interest of the prospective buyer speedily to shed his contingent contractual liability to buy".

Auld L.J. was no doubt right to conclude that the rule suits prospective buyers; it will enable them to make a late decision to

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reject the goods without having to provide a precise inventory, let alone to make the goods available for collection. However, sellers might object to this rule because a rejection notice that gives no more than a generic description of the goods to be returned does not leave the supplier in a position to know precisely how much of the stock will be returned—which is surely crucial if arrangements are to be made to sell on the stock. However, the Court's approach to the question of the effectiveness of notice should not prove unduly harsh upon suppliers. Waller L.J. suggested that it might be that the supplier was entitled to be put in a position to collect any goods that the defendants were seeking to return by the specified date. On this reading "full sale or return until 31 January 1996" would require that the notice be given and the goods be made available for collection by that date. Even if the date specified were treated as the final date for notice rather than for making the goods available for collection, at worst, the goods would have to be put at the disposal of the bailee within a reasonable time of notice being given.

The decision in *Atari Corporation (U.K.) Ltd.* v. *Electronics Boutique Stores (U.K.) Ltd.* is to be welcomed for clarifying an area of the law of sales that is surprisingly short of case law. It is now clear that if sellers want to ensure that they are in a position in which they have a complete inventory of the goods that are to be returned at the time of rejection, they must stipulate this in their contract with the prospective buyer.

CRAIG ROTHERHAM

HUNTING FOR ADVANTAGE

HUNTING with hounds raises fierce passions, which blaze both on and off the field. In our ever more litigious society, it was practically inevitable that these passions would lead to litigation. So it was that the National Trust's decision to stop stag hunting on its estates in Somerset and Devon came to be challenged in court. In *Scott* v. *National Trust* [1998] 2 All E.R. 705, Robert Walker J. had to deal with various tactical applications arising in the challenge to the National Trust's decision: his Lordship's judgment was not intended to, and did not, come even close to an opinion on the vexed question of stag hunting itself

Two sets of proceedings were at issue, and one contemplated set of proceedings. First, Mrs. Scott and others had begun proceedings, under Charities Act 1993, s. 33(1), against the National Trust and the Attorney-General as the guardian of charity. All parties accepted

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that the proceedings in question were charity proceedings within the meaning of the Act. Furthermore, the plaintiffs had received the requisite permission of the Charity Commissioners to prosecute that action. The object of the action was to quash the decision of the National Trust to stop stag hunting in the West Country. Secondly, Mrs. Scott, together with other co-plaintiffs, had commenced an action by writ against the National Trust, with like object in mind. Thirdly, the plaintiffs in the charity proceedings sought leave to bring judicial review proceedings against the National Trust, again with the object of quashing its decision about stag hunting.

As well as the application for leave, there were two interlocutory applications in the subsisting proceedings before Robert Walker J. First, the National Trust sought to have the charity proceedings and the writ action struck out: the Trust alleged that both actions disclosed no reasonable cause of action, or were otherwise an abuse of the process of the court; in addition, the Trust argued that the charity proceedings should be struck out because the plaintiffs in that action were not entitled to bring such proceedings, as they were not "persons interested in the charity" for the purposes of Charities Act 1993, s. 33(1). Secondly, the plaintiffs in the subsisting actions sought interlocutory injunctions, apparently to allow stag hunting to continue pending final determination of the litigation. In the end, all the applications were refused.

In the strike-out applications, the judgment of Robert Walker J. concentrated on the National Trust's second allegation, concerning Charities Act 1993, s. 33(1). The question of who is interested in a charity for the purposes of that provision, or its statutory predecessors, has never been definitively answered by the courts; indeed, the courts have warned against seeking definition of a matter which Parliament deliberately, and perhaps unavoidably, left so vague. However, some useful points of guidance can be taken from the *Scott* case.

The requisite interest in a charity seems to be an interest, greater than that of an ordinary member of the public, in securing the due administration of a charity. The fact that the plaintiff in charity proceedings may further some other purpose of his through the proceedings does not necessarily rebut his claim to have the required interest; yet if the real aim of the proceedings is not to secure the due administration of a charity, but rather to further the plaintiff's other interests, then the plaintiff will not have the necessary interest in the charity. Noteworthy in this connection is the judge's view that membership of the National Trust (Mrs. Scott was a member, one of around two million) might not alone be sufficient interest for the purposes of the present action, challenging a policy decision of the

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Trust. One wonders whether a court would draw the same conclusion if the subject of charity proceedings were the alleged infringement of a member's rights under the charity's constitution. Perhaps the subject matter of charity proceedings may be relevant to a decision about whether some person has sufficient interest in a charity to bring those proceedings.

The requirement that a plaintiff have an interest in charity proceedings acts as a filtering criterion, protecting charities from frivolous, vexatious or multiple actions. However, the notion of an interest does not have to be drawn too narrowly in order to achieve that effect, as charities also have the added protection inherent in the need for the Charity Commissioners, or the court, to consent to the prosecution of charity proceedings.

Mrs. Scott's action for leave to bring judicial review proceedings raised other difficult questions. Her attempt to seek procedural advantage through such an application was not itself stigmatised. What concerned Robert Walker J. was the overlap between that application and the charity proceedings, which the National Trust had just failed to halt. His Lordship, differing from the Charity Commissioners, thought that the proposed proceedings for judicial review would constitute charity proceedings, within the definition of Charities Act 1993, s. 33(8): he took a wide, pragmatic view of the phrase "proceedings . . . brought under the court's jurisdiction with respect to charities . . .", preferring not to restrict the definition to proceedings within the long established equitable jurisdiction over charities. It followed that such proceedings would need the permission of the Charity Commissioners or the court under Charities Act 1993, s. 33, as well as leave for the purposes of R.S.C. Order 53. No such permission or leave was granted. While the National Trust was, prima facie, a sufficiently "public" body to be amenable to judicial review, charity proceedings provided perfectly good means of holding its officers to account, so that the court declined to exercise its discretion and grant the necessary leaves.

Finally, there remained the matter of the interlocutory applications for interim injunctive relief. Robert Walker J. considered the grounds on which trustees' exercises of discretion can be reviewed. He acknowledged that decisions must be made in good faith, on the basis of proper information (but without unauthorised delegation) and also reasonably, though the latter criterion must not interpreted too narrowly, or review of trustees' decisions by the court will become too like an appeal against them. His Lordship acknowledged the clear similarities between the review of fiduciary discretions and the review of administrative decisions, though trustees are not a court, or an administrative tribunal: indeed, in a dictum which seems destined

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to return to the courts, his Lordship said that he was ". . . inclined to think that legitimate expectation may have some part to play in trust law as well as in judicial review cases . . .". In the event, the National Trust had not acted in such fashion as to justify the issue of an interlocutory injunction.

Hunting for tactical advantage in hostile litigation may not tell us anything about the rights or wrongs of hunting for stags with hounds. However, it has emphasised the potential breadth of judicial review, some of the difficulties to be faced in defining the scope of judicial review, and the increasing awareness of judicial review by private lawyers (and even trust lawyers). Also within the *Scott* case are some tantalising possibilities for the review of trustees' discretion, always a difficult and fascinating topic, and one increasingly litigated, particularly in the context of pension funds.

RICHARD NOLAN

NEGLIGENT MISSTATEMENT—A HEALTHIER DECISION FOR COMPANY DIRECTORS

THE decision of the House of Lords in *Williams* v. *Natural Life Health Foods Ltd.* [1998] 1 W.L.R. 830, reversing the Court of Appeal's decision ([1997] 1 B.C.L.C. 131), examines the issue of an agent's liability for negligent misstatement. Of course, agents will be personally responsible for their own negligence, even if that tort is committed while on the principal's business, but what is their responsibility for the negligence of their principal? Logically the answer is "none", and certainly in a company context statements made by directors on behalf of their companies have traditionally led to liability for the principal alone: "a company director is only to be held personally liable for the company's negligent misstatements if the plaintiffs can establish some special circumstances setting the case apart from the ordinary . . ." ([1997] 1 B.C.L.C. 131, 152 *per* Hirst L.J.). The Court of Appeal's decision in *Williams*, however, threatened to expand this category of "special circumstances" to such an extent as to make personal liability the norm for directors, at least in the context of small companies.

The facts of *Williams* were simple. Mr. Mistlin had built up an extensive knowledge of the health food business over a number of years. He then set up a company, Natural Life, of which he was the sole director and the only substantial shareholder, in order to franchise the concept of retail health food shops. The plaintiffs approached Natural Life with a view to acquiring a franchise and

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Natural Life supplied them with favourable financial projections. Encouraged, the plaintiffs entered the franchise but, inevitably, the projections were incorrect, and negligently so, and the plaintiffs' franchise failed. The plaintiffs sought to recover their losses from Natural Life, but when the company was wound up the plaintiffs turned to Mr. Mistlin, alleging that he had played a prominent part in compiling the projections (which he had) and that he had thereby assumed a personal responsibility to them for the negligent misstatements. This was despite the fact that Mr. Mistlin had not met the plaintiffs or had any pre-contractual dealings with them. Surprisingly, the Court of Appeal agreed, holding that the knowledge and experience of the company resided in Mr. Mistlin and that in compiling the projections he had acted "qua Mr. Mistlin rather than qua director" ([1997] 1 B.C.L.C. 131, 153 *per* Hirst L.J.). According to the Court of Appeal this personal expertise, which, as Sir Patrick Russell (dissenting) pointed out, will almost inevitably attach to the "one man" in a one man company, meant that Mr. Mistlin had stepped outside his position as agent/director and was therefore personally responsible for the plaintiffs' losses to the tune of £85,000.

The House of Lords unanimously disagreed, holding Mr. Mistlin to have no personal liability to the plaintiffs. In the process Lord Steyn, giving the leading judgment, made a number of important points about claims for negligent misstatement under *Hedley Byrne* and, accordingly, his judgment is likely to provide the starting point for *Hedley Byrne* claims in the future. First, his Lordship confirmed Lord Goff's statement in *Henderson* v. *Merrett Syndicates Ltd.* [1995] 2 A.C. 145 that the *Hedley Byrne* principle extends beyond negligent misstatements so that it can apply to economic loss caused by the negligent provision of services. Secondly, and more importantly, Lord Steyn confirmed the view in *Henderson* that the basis of a *Hedley Byrne* claim is an assumption of responsibility by the maker of the statement towards the plaintiff. His Lordship felt (rightly, it is submitted) that "the general criticism" which has been voiced about the principle of assumption of responsibility (see, *e.g.*, Barker, "Unreliable Assumptions in the Modern Law of Negligence" (1993) 109 L.Q.R. 461; Hepple, "The Search for Coherence" (1997) 50 *Current Legal Problems* 67) is "overstated". The test for an assumption of responsibility is an objective one: "the primary focus must be on things said or done by the defendant or on his behalf in dealings with the plaintiff" (p. 835) rather than the state of mind of the defendant. In the context of a principal–agent relationship, in order to establish personal liability between the agent and a third party, the issue was whether, judged objectively, the agent (Mr. Mistlin) had assumed personal responsibility towards the third

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party for the statements made or services provided. On the facts, he had not. A role for reasonable reliance did remain under a *Hedley Byrne* claim, according to Lord Steyn, but not as a method of establishing liability as such. Rather, reasonable reliance is important as a secondary issue, once an assumption of responsibility has been established, in order to demonstrate the causative link between the negligent statement and the plaintiffs' loss. Despite academic niggles, the central position of the assumption of responsibility in *Hedley Byrne* claims in the near future looks assured.

For company lawyers, the Court of Appeal's judgment had worrying implications. Mr. Mistlin's situation was by no means an uncommon one. Very often individuals who have built up expertise in a particular field set up companies in order to gain the benefits of limited liability (as shareholders) and separate legal personality (as directors). The House of Lords' decision indicates a welcome return to the orthodox view that those benefits should not be removed lightly; indeed, something quite out of the ordinary will be required. A director would have to create the clear impression that he was personally answerable for the advice or services, for example, by providing the services directly to the plaintiffs and invoicing them for the work done on his own headed notepaper rather than that of the company (*Fairline Shipping Corp.* v. *Adamson* [1975] Q.B. 180). The mere fact that Mr. Mistlin was the "one man" behind the company and that the knowledge and experience of the company resided with him was rightly held to be insufficient to found personal liability. The directors of small companies will undoubtedly wish to heave a collective sigh of relief.

JENNIFER PAYNE

SILHOUETTE AND THE LIMITS OF FREE TRADE

EVERYBODY loves a bargain. Supermarkets have found that the sale of cut price designer goods along with the groceries gives them the edge over their rivals, when consumer spending on food is expected to slump (*The Times*, 22 April 1998). The catch is that trade mark proprietors, such as Calvin Klein, having nurtured brand images, in which high prices and exclusivity reinforce each other, decline to sell their goods to the supermarkets, preferring to control distribution through specialist outlets. The supermarkets' response has been to go shopping on the "grey market": buying branded goods from third parties, which are sold more cheaply outside the European Community (EC) and the wider European Economic Area (EEA),

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and importing them into the EEA for resale. The issue decided by the recent judgment of the European Court of Justice, *Silhouette International Schmied GmbH & Co. Kg* v. *Hartlauer Handelsgesellschaft mbH*, Case C-355/96 (1998), was whether the importation and resale of such goods without the brand owner's consent constitutes trade mark infringement.

Silhouette, an Austrian company, produces expensive spectacles, which it markets worldwide. The "Silhouette" mark is registered in most countries. Silhouette supplies its products only to approved outlets in Austria and elsewhere. In 1995, it sold 21,000 "out of fashion" frames to a Bulgarian company, on condition that they should be sold only in Bulgaria or the former USSR. The frames, delivered to Bulgaria, found their way to the Austrian company, Hartlauer, "known for its low prices". Silhouette had not previously supplied Hartlauer because it considered that distribution by the defendant would be "harmful to its image". Silhouette sought to restrain Hartlauer from selling its frames in Austria under its mark, where they had not been put on the market by Silhouette or by third parties with its consent.

The key question that the Austrian Oberster Gerichtshof put to the ECJ in *Silhouette* was whether Article 7(1) of the Trade Mark Directive to approximate the laws of the Member States relating to trade marks (89/104/EEC) means that a trade mark proprietor is entitled to prohibit a third party from using the mark for goods that have been put on the market under that mark in a State that is not a Contracting State to the EEA. It also asked whether a trade mark proprietor could seek an order to prevent a third party using the mark on the basis of Article 7(1) alone. This latter question, particularly relevant to Austria's trade mark law, was answered in the negative and will not be considered further here.

Article 7(1) addresses the exhaustion of trade mark rights in the Community. It prevents a proprietor from prohibiting use of his mark in relation to goods that have been put on the market in the EEA under that mark by the proprietor or with his consent. It is incorporated into UK law by section 10(1) of the 1994 Trade Marks Act. In the UK, before the 1994 Act, international exhaustion appeared to have been ruled out by the decision in *Colgate Palmolive* v. *Markwell Finance* [1989] R.P.C. 49 C.A., although, significantly, the goods involved were of inferior quality. But does Article 7(1) also provide for exhaustion of trade mark rights on goods first put on the market outside the EEA?

The ECJ held that it did not. According to the Court, Article 5 of the Directive sets out the rights conferred by trade mark, and these include the entitlement to prevent third parties from using in

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the course of trade an identical sign on identical goods without the proprietor's consent. Among the practices which the proprietor is entitled to prohibit is the import or export of goods under the relevant trade mark. Article 7 states that in the specific circumstances of the goods having been put on the market by the proprietor or with his consent, the exclusive rights conferred by a trade mark are exhausted. But according to the ECJ, such "exhaustion occurs only where the products have been put on the market in the Community [or the EEA]".

The defendant's argument, endorsed by the Swedish Government, was that Article 7 leaves open the question of how far exhaustion should extend beyond the EEA, in which respect Member States are allowed to make their own rules. The plaintiffs, backed by the UK Government among others, responded that giving Member States such freedom was contrary to the Directive's aim of ultimately harmonising provisions of national law which most directly affect the functioning of the internal market. The ECJ agreed that the Directive must be construed as "embodying a complete harmonisation of the rights conferred by a trade mark", except that individual Members could give greater protection to marks with a reputation (Article 5(2)). It could not, therefore, be construed as giving Members the option to vary the national law to allow for international exhaustion of trade mark rights. To decide otherwise would be to negate the purpose of the Directive, "namely to safeguard the functioning of the internal market", and "inevitably" to create barriers to the free movement of goods. An objection that the Directive, adopted on the basis of Article 100A of the EC Treaty, could not regulate relations between Member and non-Member countries missed the point. The Directive was intended to define the rights of Community trade mark proprietors, not to regulate their relations with non-Member States. The latter could always be accomplished through agreements between the Community, itself, and non-Member countries over international exhaustion: a matter for policy, not legal argument.

The ECJ failed to deal with a number of knotty questions, such as what constitutes consent or how EC competition laws may be affected by its decision. Furthermore, in its desire not to make policy, the ECJ, inevitably, made policy by default. When the world worships at the altar of free trade, the *Silhouette* decision may appear perversely protectionist. But the fundamental purpose of the EC, of which the ECJ is merely one institution, is to "protect" the trading interests of its Members. In this context, a salient fact, mentioned in the earlier Opinion of Advocate General Jacobs (29 January 1998), may be that other non-Member States do not provide for international exhaustion of trade mark rights.

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Finally, does the *Silhouette* decision override the interests of consumers in acquiring designer goods as cheaply as those living outside the EEA? There is a counter-argument here too. The expansionist instincts of the large retailers, able to benefit from economies of scale, has led to the demise of many smaller retailers. A decision which allowed for the international exhaustion of trade mark rights would enable the large retailers to use these same marketing advantages against specialist retailers of designer goods, undoubtedly with similar consequences, a development which may well lead to a significant diminution of consumer choice in the long run.

JENNIFER DAVIS

A BROADER CONSTRUCTION OF THE EC TREATY PROVISIONS ON CITIZENSHIP?

IN *Martinez Sala* v. *Freistaat Bayern* (Case C-85/96, judgment of 12 May 1998, not yet reported), the Court of Justice has taken a step towards the clarification of the real force of the EC Treaty provisions on citizenship. Mrs. Martinez Sala was a Spanish national lawfully resident in Germany since 1968 and employed there at intervals between 1976 and 1989. In 1993, she applied to the State of Bavaria for a child-raising allowance, a benefit granted to all residents in Germany who had a dependent child in their care and were either unemployed or had no full-time employment. Her application was rejected on the grounds that at the time that she applied for the benefit she was not in possession of a residence permit, a requirement that had to be met by all non-German nationals. The central issue in the case was, therefore, whether Mrs. Martinez Sala had been discriminated against.

In the first part of its judgment, the Court examined whether the facts of the case could fall within the scope *ratione materiae* and *ratione personae* of Regulation 1408/71 on the application of social security schemes to employed and self-employed persons and their families moving within the Community ([1971] O.J. Sp. Ed. (II), 416) and of Regulation 1612/68 on free movement of workers within the Community ([1968] O.J. Sp. Ed. (II), 475). Regulation 1408/71 lays down the principle of equality of treatment for all the residents in a Member State to whom the Regulation applies in the receipt of social security benefits, whereas Regulation 1612/68 enshrines the principle of non-discrimination between national and non-national workers, *inter alia*, in the enjoyment of social advantages.

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The Court considered first whether the child-raising allowance could be classified as a social security benefit (*i.e* family benefit) or as a social advantage. It had no difficulties in concluding that the benefit could be classified as both a family benefit (the Court invoked its decision in *Hoever and Zachow* (Joined Cases C-245/94 and C-312/94, [1996] E.C.R. I-4895) where it had already considered the nature of the same benefit) and a social advantage (given that the benefit was granted, *inter alia,* to national part-time workers and therefore could be linked to a contract of employment). What is interesting about the decision in this respect is that the Court confirmed the cumulative application of both Regulations to the same benefit, a point which it had set out for the first time in clear terms in *Commission* v. *Luxembourg* (Case C-111/91, [1993] ECR I-817). This finding had been ambiguous given that in some cases the Court seemed only to consider whether a benefit could be a social advantage if it had previously decided that it was *not* a social security benefit (Case 249/83 *Hoeckx* [1985] E.C.R. 973 and more recently Case C-57/96 *Meints* [1997] E.C.R. I-6689). Secondly, the Court considered whether Mrs. Martinez Sala fell within the scope *ratione personae* of those regulations (i.e. was she an "employed person" or a "worker"?), but was unable to reach a decision, since the national court had failed to provide sufficient information. Advocate General la Pergola expressed strong doubts that she could be classified as a worker within the meaning of the case law.

In the second part of the judgment, the Court concluded that the requirement imposed on non-nationals to be in possession of a residence permit to receive the benefit was clearly discriminatory. A long-standing line of case law confirms that residence permits have a declaratory force but not a constitutive one (Case 48/75 *Royer* [1976] E.C.R. 497) and here, the possession of the permit was constitutive of the right to receive the benefit. But, as seen above, it was unclear whether Mrs. Martinez Sala could be classified either as a worker or as an employed person. The question therefore remained of under which provisions of EC law Mrs. Martinez Sala could be put so that she might have the right to invoke the principle of non-discrimination. On this point the Commission argued that even if she did not come within the scope of the regulations mentioned above, she could rely directly on Article 8a EC, which provides for the right of free movement and residence for citizens of the Union. This provision has been, in the absence of a clear decision by the Court, the subject of an intense academic debate which has largely concluded that, in the present state of EC law, the final proviso to Article 8a EC subjecting the right to free movement and residence to the "limits and conditions" laid down by the Treaty and secondary legislation

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nullifies any possible addition to the already existing regulation of the free movement of persons. Thus, in 1990, three EC directives had already set out the right to residence for non-economically active persons provided that they have sufficient resources and are covered by sickness insurance. The right of residence in Article 8a EC seems therefore to be subject to the same limitations and has been interpreted in this way by the English courts (*R.* v. *Secretary of State for the Home Department, ex parte Vitale* [1995] All E.R. (EC) 946, [1996] All E.R. (EC) 461 (C.A.)) and by the Court of First Instance (Case T-66/95 *Kuchlenz-Winter* [1997] E.C.R. II-637). Hence, it appears that Member States can deny to non-economically active EU citizens the right to reside in their territories if the latter constitute a burden to their social security systems. Given that Mrs. Martinez Sala did *not* have sufficient resources, the interpretation of Article 8a EC suggested by the Commission was a far-reaching one.

The Court, guided on this point by the powerful Opinion of AG La Pergola, followed a different reasoning and considered that there was no need to invoke Article 8a EC, as the right of Mrs. Martinez Sala to reside in Germany was uncontested by the German Government. Mrs. Martinez Sala could, however, rely on Article 8(2) EC which attributes to the status of citizen of the Union the rights and duties laid down by the Treaty, and amongst which the right not to suffer discrimination on grounds of nationality takes centre stage. The Court, as it had done in the past (Case C-193/94 *Skanavi* [1996] E.C.R. I-929) managed to avoid interpreting Article 8a EC.

It is suggested that the dramatic outcome of the case belies its practical significance. On the one hand, the Court concluded that in all situations that fall *ratione materiae* within the scope of the Treaty, a citizen of the Union *lawfully resident* in a Member State can invoke the principle of non-discrimination. This is, in effect, a broad construction of Article 8 EC and one that shows that the provisions on citizenship have real teeth. It is, moreover, consistent with the Court's generous application of the principle of non-discrimination evidenced in decisions such as *Cowan* (Case 186/87 [1989] ECR 195). On the other hand, this interpretation was only made possible because the Member State *had already recognized* the right of residence. The issue of whether Article 8a EC gives the right of residence a wider content than the previously existing measures remains the crucial question. This case has not provided an answer.

ALBERTINA ALBORS-LLORENS

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KECK (RE)APPLIED

AFTER years of uncertainty over the precise scope of Article 30 of the EC Treaty, the decision in Joined Cases C-267/91 and C-268/91 *Keck and Mithourd* [1993] E.C.R. I-6097 was thought to have introduced some clarity. It will be recalled that in *Keck* the Court made a distinction between, on the one hand, "production requirements" or "product characteristics" to which the decision in *Cassis* applies (para. 15) and, on the other, "certain selling arrangements" which do not breach Article 30 provided "that those provisions apply to all affected traders operating within the national territory and provided that they affect in the same manner, in law and in fact, the marketing of domestic products and those from other Member States" (para. 16). The Court continued that where this proviso is satisfied, the national restrictions are not by nature such as to prevent the access of foreign goods to the market or to impede access any more than they impede the access of domestic products (para. 17).

Once equipped with the ruling in *Keck* the Court applied it with enthusiasm. For example, it found that national rules relating to "the times and places at which the goods in question may be sold to consumers" were certain selling arrangements (Cases C-401/92 and C-402/93 *Tankstation 't Heukske vof and J.B.E. Boermans* [1994] E.C.R. I-2199), as were rules concerning Sunday trading (Case C-69/93 and C-258/93 *Punto Casa SpA* v. *Sindaco de Commune di Capena and others* [1994] E.C.R. I-2355; Cases C-418 etc./93 *Semeraro Casa* [1996] E.C.R. I-2975). The application of *Keck* to such cases concerning the fixed circumstances in which goods are sold, at one stage removed from the actual importer of the product, is largely uncontroversial. However, controversy has surrounded the unthinking application of *Keck* to more "dynamic" situations, more closely linked to the activities of the importer, such as national restrictions on advertising (Case C-292/92 *Hunermund* v. *Landesapothkerkammer Baden-Wurtemberg* [1993] E.C.R. I-6787; Case C-412/93 *Leclerc-Siplec* v. *TFI Publicite* [1995] E.C.R. I-179) and other forms of sales promotion (for example national restrictions on resale at a loss—the facts of *Keck* itself). In these cases the Court has simply assumed that the proviso in paragraph 16 of *Keck* has been satisfied.

Advocate General Jacobs has been particularly vocal in his criticism of this approach, arguing in *Leclerc-Siplec* that advertising restrictions may pose a particularly serious threat to the integration of the market (para. 37). As he pointed out, in a number of pre-*Keck* cases which concerned restrictions on advertising (*e.g.* Cases C-1/90 and C-176/90 *Aragonesa de Publicidad Exterior* v. *Departamento de*

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Sanidad y Seguridad Social [1991] E.C.R. I-4151, Case C-362/88 *GB-INNO-BM* [1990] E.C.R. I-667) and restrictions on sales promotions (Case 382/87 *Ministere Public* v. *Buet* [1989] E.C.R. 1235 (door-to-door selling), Case 286/81 *Oosthoek* [1982] E.C.R. 4575 (free gifts)) the Court found a hindrance to imports constituting a measure having equivalent effect and then applied the principles in *Cassis*. This tends to suggest that such restrictions do not have an equal burden in law and in fact, as required by the paragraph 16 *Keck* proviso and as the Court thought in *Hunermund* and *Leclerc-Siplec*, and do impede access to the market.

While the Advocate General's observations fell on deaf ears in *Leclerc-Siplec*, his efforts were finally rewarded (to a limited extent at least) in Joined Cases C-34–36/95 *Konsumentombudsmannen* v. *De Agostini* [1997] E.C.R. I-3843. This case concerned a Swedish ban on television advertising directed at children under twelve and a ban on misleading commercials for skincare products. Having recognised that, following *Leclerc-Siplec*, these restrictions constitute certain selling arrangements, the Court then, for the first time, specifically addressed in detail the paragraph 16 proviso in *Keck*. It said that while the first condition was clearly fulfilled (the measure applies to all traders operating within the national territory), the second condition might not be. It said that "it cannot be excluded that an outright ban, applying in one Member State, of a type of promotion for a product which is lawfully sold there might have a greater impact on products from other Member States" (para. 42). It continued that while the efficacy of various types of promotion is a question of fact to be determined by the national court, "it is to be noted that in its observations De Agostini stated that television advertising was the only effective form of sales promotion enabling it to penetrate the Swedish market since it had no other advertising methods for reaching children and their parents" (para. 43). This is reminiscent of the Court's observations in *Oosthoek* that "to compel a producer either to adopt advertising or sales promotion schemes which differ from one state to another or to discontinue a scheme which he considers to be particularly effective may constitute an obstacle to imports" (para. 15). The Court continued in *De Agostini* that if such an unequal burden in law or fact is found then the national restriction is caught by Article 30 and the burden shifts to the Member State to justify it under principles similar to those in *Cassis*.

Therefore, in *De Agostini* the Court took *Keck* as a starting point and decided that the measure constituted a certain selling arrangement and did not breach Article 30, *unless* (as the Court indicated in this case) it was shown that the ban did not affect in the same way, in fact and in law, the marketing of national products and products

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from other Member States to which *Cassis* principles would apply (para. 44, although compare the bizarre and apparently contradictory wording in para. 47). However, in a case decided two weeks before *De Agostini* concerning a sales promotion, Case C-368/95 *Vereinigte Familiapress Zeitungsverlag* v. *Bauer Verlag* [1997] E.C.R. I-3689, the Court took *Cassis* as its starting point. The case concerned an Austrian law which prohibited publishers from including prize competitions in their publications. This meant that a German publisher was prevented from publishing in Austria a magazine containing crossword puzzles for which the winners would receive prizes. Athough the Austrian Government argued that, post-*Keck*, its legislation was not caught by Article 30 since its law concerned a sales promotion, the Court disagreed. It said that although the relevant national legislation was directed against a method of sales promotion, since it related to the actual content of the product (in so far as the competitions formed an integral part of the magazine in which they appeared) (para. 11), the national legislation did not concern a certain selling arrangement. It continued: "Moreover, since it requires traders established in other Member States to alter the contents of the periodical, the prohibition at issue impairs access of the product concerned to the market of the Member State of importation and consequently hinders free movement of goods. It therefore constitutes in principle a measure having equivalent effect within the meaning of Article 30" (para. 12). The Court then turned its attention to the justification and proportionality of those restrictions. Therefore, *Familiapress* was a production requirement case to which *Cassis* principles applied.

De Agostini and *Familiapress* reveal the greyness of the area in which restrictions on advertising and sales promotion fall. What is striking is that whichever way the cat is skinned (with a *Keck* knife or a *Cassis* knife) the result may well be the same: rules that obstruct methods for penetrating a new market fall within Article 30 but can be justified under *Cassis* principles. The difference between the two approaches may lie in the question of proof. If the measure is classified as a certain selling arrangement then the presumption is that there is no hindrance of access to the market and the trader will need to work hard to rebut this presumption *(De Agostini)*. If the measure is considered a production requirement it is presumed that there is an impediment to access to the market *(Familiapress)*.

One final point to note—in the context of Articles 59 and 60 the Court has, in all cases to date, found that where a non-discriminatory restriction on the freedom to provide services exists it nevertheless "directly affects access to the market in services in the other Member

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States" (Case C-384/93 *Alpine Investments* [1995] E.C.R. I-1141, para. 38). It therefore breaches Article 59 unless justified by "imperative requirements in the public interest". In *De Agostini* the Court also had to consider whether the restrictions on advertising breached Article 59. With surprisingly little analysis the Court said that Member States could take measures relating to television advertising provided that the national court found them justified and proportionate. This decision at least enabled the Court to reach more or less the same conclusion in respect of the goods and services part of the judgment without clearly articulating how.

CATHERINE BARNARD

COMITY AND ANTISUIT INJUNCTIONS

A fundamental tension underlies English law's approach to antisuit injunctions. Justice may warrant protecting a defendant from oppressive proceedings in a foreign forum by ordering the plaintiff to desist. But such relief challenges a foreign court's right to police its own process. How can the demands of justice and of comity be reconciled? When should concern for the one give way to respect for the other? Perhaps because antisuit relief reflects wider equitable principles, the prevention of injustice has long been the overriding imperative in such cases. But English courts are increasingly sensitive to the charge of chauvinism and respect for comity has become a real consideration in shaping their approach.

Suppose that an injunction is sought to prevent foreign proceedings which defy an English jurisdiction agreement. The discretion to refuse relief was once largely confined to ensuring the timeliness of the application. It has even been said that comity is irrelevant in such cases (*The Angelic Grace* [1995] 1 Lloyd's Rep. 87, 96). But that provocative view has recently been doubted (*Toepfer Intl. GmbH* v. *Societe Cargill France* [1998] 1 Lloyd's Rep. 379). And such injunctions may be granted less readily in future. Relief will now be denied if the foreign court is the *forum conveniens* (*Akai Pty. Ltd.* v. *People's Insurance Co. Ltd.* [1998] 1 Lloyd's Rep. 90). This equates such cases with those where the presence of a foreign jurisdiction agreement justifies a stay of English proceedings according to the principles enunciated in *The El Amria* [1981] 2 Lloyd's Rep. 119, such reciprocity of treatment dispelling concerns about comity.

Similar deference to comity underlies the approach of the House of Lords in *Airbus Industrie GIE* v. *Patel* [1998] 2 W.L.R. 686. The plaintiffs had sued Airbus, a French corporation, in Texas, concerning an aircraft accident in India. The Court of Appeal enjoined the

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plaintiffs from proceeding although Bangalore, not England, was the natural forum (see [1997] C.L.J. 46). They entertained the application because justice required that relief be granted, and because the Texas plaintiffs were amenable to English jurisdiction *in personam*, being English-domiciled. But the House of Lords disagreed, declining jurisdiction. Comity requires that a court may intervene only if it has a connection with, or an interest in, the dispute. Normally (but not invariably) it should be the natural forum, as in the leading case, *Aerospatiale* v. *Lee Kui Jak* [1987] A.C. 87.

Airbus thus dispels the hitherto widespread belief that jurisdiction exists whenever justice compels that such relief be granted, provided that the enjoined party is subject to the power of the court. But *Airbus* is not perhaps the unequivocal endorsement of comity that it appears to be. Indeed, the decision illustrates not so much the power of the principle as the rather limited sense in which English courts understand it. For *Airbus* stands for two propositions. A dispute must be sufficiently connected with England to justify relief. But equally a court is immune from criticism if such a connection exists, for if so, "there will be no infringement of comity" (*per* Lord Goff, p. 695).

But is the argument from comity answered merely because a court is appropriately connected or interested? *Airbus* notwithstanding, the English approach is open to more fundamental objections. One concerns how relief is granted once jurisdiction is taken. Vexation or oppression is required under *Aerospatiale* principles, but an applicant may in practice succeed by demonstrating little more than the added inconvenience and expense it would suffer by defending proceedings abroad, as perhaps in *Aerospatiale* itself. Does that warrant such intrusive relief?

More importantly, it may be irrelevant to insist that a court should be appropriately connected with the dispute. The real question is not whether the English court is connected with the case, nor even whether it is more connected than the foreign forum. It is whether any court, whatever its interest, and whatever justice requires, is entitled to determine the acceptability of proceedings elsewhere. The Supreme Court of Canada squarely faced the issue in *Amchem Products Inc.* v. *Workers' Compensation Board* (1993) 102 D.L.R. (4th) 96, also involving Texas proceedings. It held (in effect) that relief should be limited to situations where a foreign court has exercised an exorbitant jurisdiction. The Texas court, complying with US "minimum contact" requirements, had not. This approach dramatically curtails the power to enjoin proceedings, effectively confining it to cases (surely exceptional) where a foreign court is wholly unconnected with the dispute. Moreover, the absence of a doctrine of *forum non conveniens* (which Texas then lacked) is not decisive.

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But, if *Amchem* exposes the core of the comity problem, its implications were never explored in *Airbus*; tantalisingly, however, Lord Goff considered the Canadian approach "of considerable interest" (p. 699). The question thus remains whether English law's approach to antisuit injunctions is truly compatible with comity. A future court may yet confirm that it is, as *Airbus* suggests. But the time may have come to heed the implicit message of *Amchem* and to end the pretence that this is so. Unless we accept, uncomfortably, that comity is irrelevant, this compels a more restrictive view of anti-suit relief. What then does comity require? The *Amchem* approach is problematic in practice (see [1997] 56 C.L.J. 46). But policy may justify enjoining proceedings which defy English jurisdiction agreements, at least in circumstances equivalent to those in which the presence of a foreign jurisdiction agreement justifies staying English proceedings. A court should also be entitled to preserve the integrity of its own process, as where a party who supplies evidence in English proceedings is sued abroad in consequence (*Bank of Tokyo* v. *Karoon* [1986] 3 W.L.R. 414). Again, as *Amchem* implies, it might be permissible to prevent the exercise of extraterritorial jurisdiction by foreign courts (*Midland Bank plc* v. *Laker Airways Ltd.* [1986] Q.B. 689). But, however the law might be reshaped in future, the challenge is not to legitimise English law's existing approach, as *Airbus* implies, but to examine whether it is legitimate at all.

RICHARD FENTIMAN

CONDITIONAL FEE AGREEMENTS: THE COURTS AND PARLIAMENT IN UNISON

THE developments noted here show that conditional fee agreements have become a significant, perhaps even the dominant, means of securing access to civil justice. The political popularity of such agreements is not hard to explain. Since 1949, civil legal aid has enabled the less well-off to litigate in the ordinary courts. But it is notorious that many people are excluded from justice, either because they are deterred by the size of the potential contribution to a legally-aided action or because their modest means disentitle them altogether from that system. Furthermore, legal aid is perceived by Treasury officials to be an excessive drain on the *fisc*.

The Courts and Legal Services Act 1990 introduced the conditional fee agreement into English law, even though many Law Lords spoke against this concept during the Parliamentary debates. The scheme was implemented by secondary legislation in 1995, but

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at first it applied only to certain classes of litigation. From 29 July 1998 (the Conditional Fees Order 1998, S.I. 1998/1860), conditional fee agreements can apply to any type of court litigation, other than certain family law matters mentioned at section 58(10) of the 1990 Act.

Such an agreement is defined by section 58(1) of the 1990 Act as one which concerns litigation services and provides for the client's "fees and expenses, or any part of them to be payable only in specified circumstances". The agreement usually awards the lawyer a success fee exceeding his ordinary charge. This "uplift" can be as great as 100 per cent of the normal fee (article 4 of the 1998 Order).

One view is that conditional fee agreements rival sliced bread in their capacity to increase human happiness. Although the lawyer risks zero or meagre payment in defeat, she is more likely to receive a handsome prize when the client wins, a prize no longer vitiated as champertous, according to section 58(3) of the 1990 Act, so long as it does not exceed double payment for a single job. The client will pay the lawyer only if he wins, although in defeat he will remain liable for the opponent's costs, a risk against which most plaintiffs can now insure. As for the opponent, the "indemnity" costs principle protects him if he wins, and if he loses the action section 58(8) of the 1990 Act makes clear that his costs liability does not extend to paying the "uplift" incurred by the other side under the conditional arrangement. In practice, therefore, the "uplift" is funded by any damages or other money recovered in the action by the plaintiff.

In *Thai Trading Co. (a firm)* v. *Taylor* [1998] 2 W.L.R. 893, Mrs. Taylor bought a bed from the plaintiff and paid for it in part. The seller sued her for the balance. Mrs. Taylor counter-claimed to recover her part-payment. Her husband, a solicitor, acted for her on a "no win, no fee" basis but, in the event of success, without any charge beyond his normal fees. Costs were awarded in favour of Mrs. Taylor, but the plaintiff argued that at common law a conditional fee agreement is unlawful and, therefore, the plaintiff need not indemnify her costs.

The Court of Appeal upheld Mrs. Taylor's costs claim and held that at common law a solicitor can validly agree to act on the basis that he is to be paid his ordinary costs if he wins but not if he loses. The court rejected authority, notably *Aratra Potato Co. Ltd.* v. *Taylor Joynson Garrett* [1995] 4 All E.R. 695, which had declared such an agreement to be contrary to public policy. Millett L.J. was unpersuaded that conditional fees are pernicious:

> . . . it is in my judgment fanciful to suppose that a solicitor will be tempted to compromise his professional integrity because he will be unable to recover his ordinary profit costs in a small case

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> if the case is lost. Solicitors are accustomed to withstand far greater incentives to impropriety than this.

But what of big cases? The courts can now only pray and exhort. Thus in *Hodgson* v. *Imperial Tobacco Ltd.* [1998] 1 W.L.R. 1056, 1065, Lord Woolf M.R. emphasised that a statutory conditional fee arrangement does not change the lawyer's foremost duty to the client and the court to disregard his own financial interest during litigation, especially when advising the client about the merits of a settlement or discontinuance of the claim.

In *Bevan Ashford (a firm)* v. *Geoff Yeandle (Contractors) Ltd. (in liquidation)* [1998] 3 W.L.R. 172, Scott V.-C. considered the validity of conditional fee agreements for the conduct of arbitration. Y, a company in liquidation, wished to sue B. The solicitor's fee agreement with Y, although conditional, did not provide for an "uplift" and so fell within the common law principle recently stated in the *Thai* case, already noted. However, Y's barrister proposed acting on a conditional basis, with an uplift of 50 per cent. in the event of success. This went beyond the *Thai* decision. Y, therefore, sought a declaration whether the barrister's fee agreement was valid.

His Lordship noted that in *Re Trepca Mines Ltd.* [1963] Ch. 199 it was said that the traditional policy objection to conditional legal fees applies to arbitration no less than to court litigation. He held that the statutory scheme for conditional fee arrangements introduced by the Courts and Legal Services Act 1990 does not extend to arbitration. But this was not decisive since notions of public policy can change over time. To avoid an absurd discrepancy between court litigation and arbitration, Scott V.-C. concluded:

> . . . if a conditional fee agreement relating to a particular cause of action is sanctioned for proceedings in court by [the statutory scheme], the conditional fee agreement is free from any public policy objection in relation to arbitration proceedings in pursuance of that cause of action.

This and the Court of Appeal's decision in *Thai* are good examples of the courts shaping the common law by analogy with legislative principle, a technique which Beatson has advocated more generally (see [1997] C.L.J. 291, 312). Time will surely reveal whether the change of policy with regard to these fee agreements is sound.

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