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CASE AND COMMENT

JOURNALISTS' SOURCES AND DISLOYAL EMPLOYEES: DISCRETION, FACT AND JUDGEMENT

Two recent decisions afford contrasting examples of the operation of section 10 of the Contempt of Court Act 1981, which grants a writer or publisher a limited privilege to withhold the source of published information. The privilege acknowledges the importance of maintaining the flow of information to the public about matters of legitimate public concern, a process which may depend on a journalist's ability to keep a promise of anonymity or non-attributability made to his source. The privilege is lost, however, where it is "established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime". Since these exceptions are widely stated and reflect public interests of (potentially) equal importance with the flow of information to the press, the application of section 10 inevitably depends on the court's assessment of the comparative weight of the conflicting interests in the circumstances of the particular case.

The decision of the Court of Appeal in *Camelot Group plc* v. *Centaur Communications Ltd.* [1998] 1 All E.R. 251 illustrates the point that the interests of justice, requiring disclosure, may include an employer's right to identify and dismiss a disloyal employee who has divulged confidential information in breach of trust. An employee of Camelot, which runs the National Lottery, had leaked a copy of draft accounts to a journalist, enabling him to publish an article which embarrassed the company by highlighting the extravagantly large pay rises recently enjoyed by its directors. The "fat cats storm", accurately predicted in the article, led to meetings with the responsible government minister and an agreement that the company should give additional sums to charity and good causes. Although Camelot had obtained an injunction

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preventing any further use of confidential information by the publisher, there remained a continuing threat of similar unauthorised disclosure in the future; and a climate of suspicion and distrust continued to damage the morale of the company's workforce. An internal inquiry had not been able to identify the source of the leak.

Since the company's accounts were in any case due to be published just one week after the improper disclosure, as the source would have known, it is not surprising that the Court of Appeal upheld an order at first instance for the return of the documents to assist in identifying the source. Although it is difficult to suppress a certain pleasure that the directors had less opportunity to control the initial presentation of the company's accounts than they might have wished, it is also hard to disagree with Schiemann L.J.'s view that "embargoes on the disclosure of information for a temporary period are a common and useful feature of contemporary life", or with Mummery L.J.'s conclusion that premature publication of the draft accounts served mainly the publisher's private purpose in securing a scoop.

In *Chief Constable of Leicestershire* v. *Garavelli* [1997] E.M.L.R. 543, by contrast, the Divisional Court held that the interests of justice did not require a journalist to reveal the source of information in an article which accused the Northumbria police force of falsifying crime statistics. A superintendent, who had recently obtained relevant information from the police computer and whose fiancee was a journalist and friend of the article's author, naturally came under suspicion. At a police disciplinary hearing, the author, Garavelli, denied that either the superintendent or his fiancee was the source of her information, but she refused to give any further information. The presiding officer applied for Garavelli to be committed to prison for contempt; but the court held that the interests of justice would not be served by requiring her to answer. The superintendent had not yet himself given evidence, and the tribunal would eventually have to decide whether or not the inference could be safely drawn that he had disclosed the relevant information.

In so far as the Divisional Court appears to have held that the interests of justice were unaffected by the journalist's refusal to disclose her source, the decision is not persuasive. As a matter of common sense, there is some substance in the presiding officer's view that the weight of her testimony was to some degree affected by her immunity from cross-examination about her source. Would we feel entirely confident that an officer convicted of improperly disclosing information in these circumstances had received a fair trial? The result may none the less be justified as striking a reasonable balance between the demands of justice and the public interest in protecting sources: if the officer's guilt could not be established beyond reasonable doubt, he would have to be acquitted.

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The court cites Lord Griffiths' denial that there is a "balancing exercise between two competing areas of interest" (see *Re an Inquiry under the Company Securities (Insider Dealing) Act 1985* [1988] 1 A.C. 660); but it is clear that that is precisely what is required. The journalist's privilege is a prima facie immunity only, and there is no escape from the weighing of relevant considerations on the facts of each case. Both the intrinsic importance of the information disclosed, if any, and the means of its procurement will inevitably, and rightly, colour the court's assessment of the balance of interests. Although Lord Bridge (in *X Ltd.* v. *Morgan-Grampian Ltd.* [1991] 1 A.C. 1) suggested that whether the requisite necessity of disclosure was established was a "question of fact rather than an issue calling for the exercise of the judge's discretion", he recognised, somewhat inconsistently, that it was a question of "fact" which called "for the exercise of a discriminating and sometimes difficult value judgment".

It is hard to know whether the European Court of Human Rights would agree with the *Camelot* decision. Although there must be an overriding requirement of public interest to justify an order for disclosure of sources for the purposes of Article 10 of the European Convention, the Court has accepted that a company's desire to unmask a disloyal employee is a legitimate, though not conclusive, consideration. In *Camelot*, Schiemann L.J. attributed the divergent decisions in *Goodwin* v. *U.K.* (1996) 22 E.H.R.R. 123 (European Court) and *Morgan-Grampian* (House of Lords) to differences of judgement in the application of essentially the same tests to the same facts. There was an analogy with courts reaching different conclusions about whether or not a particular course of conduct amounted to negligence. Opinions will differ on whether, in those circumstances, the European Court's decision was justified or its intervention legitimate. There is force in the complaint of the dissenting judges in *Goodwin,* that the majority had failed to explore the requirements of justice in the detail necessary if the judgments of the English courts were to be persuasively rejected.

Moreover, the European Court's concern with the potentially "chilling effect" of an order for disclosure on the exercise of press freedom must be kept in proportion: as Schiemann L.J. observed, that is a consideration which could be met only by a blanket rule against disclosure. An absolute protection for journalists' sources, regardless of the strength of conflicting demands of justice, broadly understood, would be no more plausible or tolerable an interpretation of Article 10 of the Convention than would be such an interpretation of section 10 of the Contempt of Court Act. It follows that we should neither expect nor desire the enactment of Article 10 by Parliament to make any significant difference to the court's determination of such cases. The demands of justice, concerning the protection of admitted

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legal rights, should not be overridden by a general policy in favour of the free flow of information to the press, however important in the abstract, without careful analysis of all the material considerations as they arise in the particular case. If, moreover, there is any difference between the present position and the ordinary common law approach, it is inevitably only one of emphasis or degree.

T.R.S. Allan

MALICIOUSLY PROCURING THE ISSUE AND EXECUTION OF A SEARCH WARRANT: EASIER ACCESS TO A REMEDY?

Until recently, it was not certain whether or not the malicious procurement of the issue and execution of a search warrant was an actionable tort. Indeed, the only reported successful claim for damages in English law in such an action was the ancient case of *Elsee* v. *Smith* (1822) 2 Chit. 304. However, judicial confirmation of the existence of the tort has finally been given in a landmark Privy Council case, *Brian Gibbs and others* v. *John Mitchell Rea* (*The Times,* 4 February 1998).

The case involved an action for loss and damage brought by a former managing director of a bank in the Cayman Islands, the claim arising from the issue and execution of four search warrants relating to Mr. Rea's home and his former employer's premises. These had been obtained by the Detective Inspector in charge of the Drug Profit Confiscation Unit of the Royal Cayman Islands Police Force.

The decision of Harre C.J. in the Grand Court of the Cayman Islands went against Mr. Rea, but this was overturned in the Court of Appeal of the Cayman Islands where he was awarded damages. On the Detective Inspector's appeal, a majority of the Judicial Committee of the Privy Council upheld the decision in Mr. Rea's favour, asserting the existence of the tort as one founded on the intentional abuse of the court process.

Four prerequisites for the establishment of the tort were outlined by Gault J. in the majority opinion. To succeed in a claim, a plaintiff must show first that a defendant made or caused to be made a successful application for a search warrant. Secondly, it must be proved that a defendant had no "reasonable and probable cause" to seek a warrant. This depends upon the statutory wording as to the conditions necessary for its issue. The relevant provisions in this case required an applicant to have *inter alia* a subjective belief in good faith that material grounds existed for suspicion that an individual had carried on or benefited from drug trafficking, and that material

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valuable to the investigation might be on the specified premises. Such a belief had to be reasonably held when viewed objectively. To succeed under the tort, a plaintiff must prove "the negative absence of the necessary state of mind". Presumably the word "negative" is being used emphatically here, and so Gault J. was describing the "absence of the necessary state of mind" as a negative which must be proved.

Thirdly, a defendant must have acted maliciously, which means that his motive must have been either spiteful or improper. Where a defendant has obtained a warrant for a purpose not specified as permissible under the relevant statutory provisions (such as for a "fishing expedition"), his motive will have been improper.

Finally, as in any tort, the damage caused must be attributable to the act complained of—here "the issue *or* execution" [emphasis added] of the warrant. Apparently, it would be sufficient if the damage were to be caused by the issue of a warrant, even if for some reason it was not executed.

The second and third limbs of the test were those which most concerned the Privy Council, which was split three to two, principally over what inferences could be drawn from the undisputed primary facts. Mr. Rea had to prove on a balance of probabilities that the Detective Inspector had not believed that there were grounds for suspicion when he procured the warrants. The majority found that the evidence provided by Mr. Rea when "knitted together" formed a circumstantial case of the absence of reasonable cause, from which could be inferred improper purpose and hence malice. The circumstantial evidence could be accorded weight because of the difficulty a plaintiff faces when attempting to prove a negative in relation to matters exclusively within a defendant's knowledge. Thus where, as here, a defendant remains silent, even slight evidence raised by a plaintiff tending to establish the commission of the tort may be "converted into proof".

The majority of the Privy Council stated that "more than" the absence of reasonable cause was required for there to be conclusive proof of malice. Exactly what would establish "more than" the absence of reasonable cause was not made clear, although it appears to have been fulfilled in this case only by the Detective Inspector's silence, which supported an inference that there was no credible explanation to give.

The minority were not prepared to draw the necessary inferences from the facts relied upon by Mr. Rea, taking a more charitable view of the Detective Inspector's refusal to explain. Lord Goff was willing to speculate upon the possible reasons for the silence. Although the Detective Inspector had not claimed public interest immunity in

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order to protect a secret source of information, the dissenting Lords observed that a defendant who made such a claim could never be certain of its success. Thus, the "safer course in the interests of all concerned" might be for a defendant to offer no evidence. This view is in stark contrast to the majority's refusal to speculate in favour of a party who knew the true facts but chose not to disclose them. The minority opinion can be explained only on policy grounds. Lord Goff placed a heavy emphasis on the lower standard of certainty required to procure a warrant than to prosecute, and focused on the difficulties facing the police in the fight against international crime.

The majority decision, however, has done much to clarify the law in relation to the now clearly established tort, and indeed Mr. Rea's success may herald a proliferation of civil claims of a similar nature. Yet the task facing a plaintiff in proving the malicious procuring of the issue and execution of a search warrant by inference remains a formidable one, particularly where, unlike *Gibbs* v. *Rea,* causation is in dispute.

LAURA DAVIDSON

HOMICIDE BY PRENATAL ASSAULT REVISITED

IN *Attorney-General's Reference (No. 3 of 1994)* [1997] 3 W.L.R. 421, the House of Lords was faced with the question whether an assault on a pregnant woman, where the violence was directed at the woman or her unborn child, may result in liability for homicide should the assault cause the death of the child after live birth.

The Court of Appeal had answered the question in the affirmative, reasoning that even if the violence were directed at the unborn child, as it was just as much part of the mother's body as her arm or leg, liability for homicide could attach through the doctrine of transferred malice. This assimilation of mother and fetus, criticised in an earlier casenote (see [1996] C.L.J. 207), was rejected by the House. Lord Mustill pointed out that their relationship was one of bond not identity: "The mother and foetus were two distinct organisms living symbiotically, not a single organism with two aspects".

The House also pointed out that, in any event, as this was a case in which the violence had been directed at the mother, not her unborn child, the terms of the Reference were too wide. Lord Mustill observed that to deal with all the points it raised would be the function of a textbook, not a judgment, and he declined to decide whether it would be murder to cause death after live birth by injuring the fetus but not the mother.

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In respect of death after live birth as a result of injuries inflicted on the mother, the House rejected the Court of Appeal's reasoning that this could result in liability for murder through the doctrine of transferred malice. Lord Mustill concluded that the application of the doctrine to such a case would require its unwarranted extension involving a double transfer of intent: first, from the mother to the fetus and, secondly, from the fetus to the child after birth.

By contrast, the House held that such a prenatal assault could result in liability for constructive manslaughter of the child. The House rejected a defence submission that liability could not attach because an act could only be "dangerous" in respect of living persons. Distinguishing *Church* [1965] 1 QB 59, where the victim was thought to be dead at the time of the unlawful act, Lord Hope observed that unlike someone who had died, the life of a fetus lay in the future, not the past, and it was not sensible to say it could not be harmed. Once born, it was exposed, like other persons, to the risk of injury, and could carry with it the effects of things done to it before birth which could prove harmful after birth. On grounds of public policy, the child should be regarded, when it became a person, as within the scope of the defendant's mens rea when he stabbed the mother.

The House's rejection of the assimilation of mother and unborn child is to be welcomed. However, its rejection of the doctrine of transferred malice in this context is less persuasive. If an assailant causes grievous bodily harm to X with intent to do so, and thereby causes the death of Y (even if Y was unborn when the assault occurred), it is difficult to see why the use of the doctrine to convict the assailant of murdering Y involves its extension rather than its application. Morever, the House's "No" to liability for murder appears even odder in the light of its "Yes" to liability for manslaughter.

In sum, this is an important case which addresses some of the issues raised by one of the more arcane aspects of the offence of homicide but which also contains, particularly in the speech of Lord Mustill, an erudite and more general analysis and critique of the offence.

JOHN KEOWN

SUICIDE IN CUSTODY

REMANDED in custody on charges of fraud and failure to answer to bail, Martin Lynch, 29 years old, was placed in a very bare cell at Kentish Town Police Station just before one o'clock on 23 March 1990. The doctor called by the police, who knew that he was a

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suicide risk and had consequently removed his belt, thought him quite sane. At 1.57 p.m. the police checked his well-being, but on the next visit only eight minutes later he was found irremediably unconscious: he had hanged himself by threading his shirt through the hatch in the door and the much smaller spy-hole above it. This was possible only because the glass lens was missing from the spy-hole and the flap of the hatch had been left open, contrary to standing orders.

This last omission formed the basis for the claim brought by his unmarried partner under the Fatal Accidents Act 1976 for the benefit of their young child. The claim was dismissed by the trial judge, effectively on the ground that the death was due to the deliberate act of the decedent, but the Court of Appeal by a majority reversed and held that the police must pay the damages in full: *Reeves* v. *Commissioner of Police* [1998] 2 W.L.R. 401.

Although the damages were only £7,800, the forthcoming appeal to the House of Lords is of importance. If the police are held liable for the death of Martin Lynch, who so determinedly seized the brief and unobvious opportunity afforded to him, they will hardly ever be able to escape liability for a prison suicide—and there were 70 of them last year alone, a number apt to increase when prisoners realise that they can provide for their families by dying, like those in the past who refused even under the *peine forte et dure* to plead to a charge of felony. The case is also important for students of the law, for in addition to a question of duty it involves all possible defences to a charge of negligence, namely *novus actus interveniens, volenti non fit injuria,* contributory negligence, and even *ex turpi causa* (which will not be further considered here or in the House).

The trial judge had held that the police were under a duty to take reasonable care of their prisoner. This is quite correct: being in charge of him against his will, they must try to see that he is not injured against his will. But in an earlier case of a suicidal prisoner not of sound mind (*Kirkham* [1989] 3 All E.R. 882, 887, affirmed [1990] 3 All E.R. 246) the duty had been described as one "to take reasonable care to prevent the person held committing suicide". The defendant in our case did not challenge this, and Buxton L.J. felt able, with an iteration which lent no cogency to his conclusions, to *infer* as a matter of logic (and therefore of law!) that the defences of *novus actus interveniens, volenti non fit injuria* and contributory negligence were all *inapplicable ab initio,* even where the decedent was quite sane.

The learned judge was certainly in error as to the role of the "duty" concept in the law of negligence. The function of the duty concept at common law is to conduce to an apparent rationalisation

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of a decision, reached on other grounds, that a defendant must—or need not—pay for harm suffered by the plaintiff as a relevant result of relevantly unreasonable conduct on the part of the defendant: it does not by itself determine what consequences are relevant. "Duty" is an operator, not a real number. To say that the police are under a duty to take care of those in their charge (and whose autonomy is to that extent restricted) can rightly mean only that if a detainee is injured it is appropriate to inquire into the conduct of the defendant and ask, *inter alia*, whether it was a relevant cause of the injury. For an appeal judge to say, and keep repeating, that the finding of such a duty *precludes* any question as to causation or any other reason why the party injured should not recover full damages is nothing short of dotty. Courts are supposed to answer questions, not beg them.

The eminently sound and sensible dissenting opinion of Morritt L.J. is in marked and welcome contrast to this algebraic and Q.E.D. approach: "In my view", he said, "the voluntary, deliberate and informed act of a plaintiff intended to exploit the situation created by the defendant albeit in breach of duty precludes a causative link between the breach of duty and the consequences of the plaintiff's action". In other words the decedent's act was a *novus actus* which insulated the defendants from ulterior consequences of which their negligence was undoubtedly a precondition. He also, quite rightly, said that the decedent could not complain of the consequences of an act which he embraced and engineered. In this he followed the view of Lloyd L.J. in *Kirkham*'s case that *volenti* would be a defence where the suicide was of sound mind.

Lord Bingham, however, said that "The deceased took advantage of the defendant's breach of duty, as it was known he might, but he cannot in my judgment be said to have consented to it". This is a very odd reading of the facts: the deceased must have been delighted to see that the warder had unintentionally provided him with a means of escape. It also rests on an odd view of the *volenti* defence, akin to the misunderstanding of Buxton L.J. who asked: "... is it realistic to say that by deliberately killing himself Mr. Lynch assumed a *risk* that he might kill himself?" It is the question which is unrealistic, because although it is true that the defence may be applicable where the plaintiff has consented not to the actual damage but to the risk of it, a person who is *volens* as to the actual harm he intentionally does to himself is manifestly an a fortiori case, indeed the *paradigm* case, of this defence, though for obvious reasons it rarely comes to court.

But there is more behind Lord Bingham's view. He is unhappy with the distinction between those of sound and those of unsound

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mind: "Since there is in any event no sharp line of demarcation between mental normality and mental abnormality, it would be unworkable in practice to treat the state of mind of a deceased as determinative of his estate's right to recover". In other words, we are all to be treated as mad because some are marginally madder than others, unless, indeed, we are back at the old-fashioned view that life is so marvellous, even in a police cell with a prosecution coming up, that anyone who wants and elects to quit it must be crazy. So much for the autonomy of the sane adult.

The divergence of views on the defence of *volenti* is matched by a difference of opinion on the applicability of the Law Reform (Contributory Negligence) Act 1945. The trial judge had held that the decedent was at fault as to 100 per cent. Morritt L.J. agreed with him, preferring the earlier of two contradictory Court of Appeal decisions on the point whether 100 per cent. contributory negligence was possible. On this question (as on the scope of the duty) Lord Bingham was hesitant, and would have preferred to reduce the damages by 50 per cent., but in the event he agreed with Buxton L.J. because Buxton L.J. would not agree with him: otherwise "we should achieve the very unsatisfactory outcome that only one member of the court would support and two members would oppose each of the three possible solutions on contributory negligence". The extraordinary ground on which Buxton L.J. held the Act inapplicable was that "a claim that is not open to attack on grounds of *volenti* or *novus actus* can [not] be defeated on grounds of contributory negligence". Nor could he see any difference "in principle" between the case before him and the case where a child toys with a bomb.

To treat a sane and informed adult as demented or infantile cannot be right, and the law does not do it, even when he is in jail. If a prisoner decides to starve himself to death, the prison authorities are not entitled to use force to stop him: "The right of the defendant to determine his future is plain. That right is not diminished by his status as a detained prisoner" (*Home Secretary* v. *Robb* [1995] 1 All E.R. 677, 682). The law of tort thus protects the autonomy of the individual by treating as wrongful any physical intervention designed to thwart his decision. But is starvation the only way that prisoners are to be allowed to kill themselves? A prisoner may have no residual liberty of movement (*Hague* [1992] 1 A.C. 58) but surely he is not to be deprived of all liberty of choice: to say that he must stand trial and serve his sentence although he would much rather die is reminiscent of the practice in the past whereby those condemned to death were sedulously kept alive until the hangman came. Is the power of exit from life, which could not practically or legally be denied him when at liberty, to be removed from him when he is on

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remand? Respect for the free decision-making of the individual surely entails that he accept in law, as in fact, the consequences of his deliberate self-regarding acts. In *Barrett* v. *Ministry of Defence* [1995] 1 W.L.R. 1217 the Court of Appeal was correct to say that an occupier need not seek to prevent an off-duty employee drinking himself unconscious, but now once again it has shown itself disregardful of free choice.

TONY WEIR

MORE SHOCK HORROR FOR EMPLOYEES

IN *Hunter* v. *British Coal Corporation* [1998] 2 All E.R. 97 an employee, Mr. Hunter, hit a high pressure water hydrant with the vehicle he was driving at the time, fracturing the hydrant and thereby threatening to flood the mine. One of his fellow employees, Mr. Carter, attempted to help him shut off the valve. They did not succeed and Mr. Hunter went to fetch further assistance. When he was 30 yards away the hydrant exploded, killing Mr. Carter. Mr. Hunter initially assumed that Mr. Carter was unharmed, but when he was informed of the death 15 minutes later he blamed himself and suffered a shock which triggered a two-year depressive illness. The trial judge found as a fact that the accident (and the death) had been caused by the fault of the defendant employer, which had failed to observe the relevant regulations about the siting of the hydrant, and had not been caused or contributed to by Mr. Hunter in any way. Could Mr. Hunter recover damages from his employer for the shock which he suffered on hearing about a death which he did not witness but for which he felt himself to be responsible? The trial judge held not and the majority of the Court of Appeal agreed, but their reasoning demonstrates some of the confusion surrounding this topic. It was accepted by all members of the Court of Appeal that if Mr. Hunter was classified as a secondary victim he would fail in his claim for nervous shock since he lacked, amongst other things, the necessary physical proximity required by the House of Lords in *Alcock*: he had witnessed neither the accident itself nor its aftermath. The only way in which he could recover was if he could bring himself within some other category, either (i) because he could be regarded as a primary victim or (ii) purely on the basis of the contractual duty of care which the defendant owed him as his employer.

It was accepted that Mr. Hunter was not in personal danger at the time of the explosion and he was not a rescuer. He could not be

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regarded as a classic primary victim. However, Lord Oliver suggested in *Alcock* that the category of primary victims could be expanded to include situations "where the negligent act of the defendant has put the plaintiff in the position of being, or thinking that he is about to be or has been, the involuntary cause of another's death or injury and the illness complained of stems from the shock to the plaintiff of the consciousness of this supposed fact" ([1992] A.C. 310 at 408). An example given of this category is *Dooley* v. *Cammell Laird & Co. Ltd.* [1953] 1 Lloyd's Rep. 271, in which the plaintiff was using one of his employer's cranes when the cable broke (owing to the employer's negligence) and the load plummeted towards the plaintiff's workmates. The plaintiff succeeded in recovering damages from his employer for his ensuing shock even though he did not see whether the load hit anyone (and in fact it did not).

However, the majority in *Hunter* distinguished *Dooley*, stating that whilst the crane-driver was a direct participant in the accident, Mr. Hunter was not. Brooke L.J. and Sir John Vinelott held that temporal and physical proximity is necessary to found primary liability, and great emphasis was placed on the fact that Mr. Hunter did not suffer the shock on hearing the explosion, but only 15 minutes later when he was informed of Mr. Carter's death. Hobhouse L.J. agreed that "physical participation" by the plaintiff is necessary to establish the legal proximity between the plaintiff and the defendant, but he believed that the necessary nexus is created by the plaintiff's belief that he causes another's injury. Accordingly, his participation must relate to the event which leads to his belief that he is responsible for the injury (the load dropping from the crame or, here, the vehicle hitting the hydrant) and not the event which causes the victim's injury (the hydrant exploding). Rather unusually, in *Hunter* the two events were not concurrent. Once this participation is established (as Hobhouse L.J. found it was in *Hunter*) the plaintiff is an "involuntary participant" within Lord Oliver's categorisation and a primary victim. The requirement of *legal* proximity is thereby satisfied without any need to go on to satisfy the *physical* proximity test set out for secondary victims in *Alcock*.

Hobhouse L.J.'s analysis is to be preferred. The heart of a nervous shock claim is the need to establish a nexus between the plaintiff and the defendant: legal proximity. However, this case could have been even more simply decided if the courts could have put aside the unhelpful distinction between primary and secondary victims and instead concentrated on the relationship, if any, between the plaintiff and the defendant. If the two are in a special relationship, such as employer/employee, as here, then the nexus or legal proximity issue is satisfied without further analysis. (Of course, if they are not in such

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a relationship it is necessary, at present, to enter the muddy waters of *Alcock*.) The other issues in the case could then be tackled by way of fault and remoteness. The Court of Appeal could simply have asked whether there was a special relationship between Mr. Hunter and British Coal (yes) and whether it was reasonably foreseeable in the circumstances that Mr. Hunter would have suffered from the type of harm (nervous shock) which he did (probably).

On the second point, it was argued that the employer/employee relationship could create an entirely separate nexus on which to base nervous shock liability. Reliance was placed on the Court of Appeal's decision in *Frost* v. *Chief Constable of South Yorkshire* [1997] 2 W.L.R. 1194 in which the policemen who were present in the Hillsborough stadium were allowed to recover for the nervous shock which they suffered. The Court of Appeal in *Hunter* generally doubted that this was a separate category (it is clear that merely being an employee will not automatically ensure recovery: see, *e.g.,* the position of Janet Smith in *Frost*), but in view of the fact that the Court felt able to decide *Hunter* adequately on other grounds, and of the pending review of *Frost* by the House of Lords, this issue was left largely undiscussed.

In deciding this rather novel case, the majority also felt constrained by the anticipated publication of the Law Commission's Final Report, *Liability for Psychiatric Harm,* which has since appeared (Report No. 249). Unfortunately the Law Commission seems to have felt inhibited by the rapid rate of change in this area. Its principal recommendation is that "those who suffer psychiatric illness as a result of the death, injury or imperilment of a loved one" (p. 4), *i.e.* the classic *Alcock* secondary victim, should no longer need to establish physical and temporal proximity, leaving them with just the requirement of showing a close tie of love and affection, as presently formulated. Situations such as *Hunter* and *Frost*, where there is a special relationship between plaintiff and defendant, are left largely untouched (in order to allow them to "mature" through further judicial analysis), save for the general recommendations which are intended to apply to all nervous shock cases, principally that the need for the illness to be caused by a "shock" should be removed. It is unfortunate that the Law Commission's recommendations are so limited. It is hoped that the House of Lords will take the opportunity offered to it by *Frost* to review this area, and particularly the "special relationship" cases like *Hunter,* more thoroughly.

JENNIFER PAYNE

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REINING IN THE *BOLAM* TEST

Bolitho v. *City and Hackney Health Authority* [1997] 3 W.L.R. 1151 is a landmark authority on medical negligence, chiefly in respect of the standard of care.

In 1984, a two-year-old boy, Patrick Bolitho, who had a history of hospital treatment for croup, was admitted to a hospital run by the defendant health authority. The day after admission, he suffered two short episodes during which he turned white and had difficulty breathing. During the first episode, Dr. H., the senior paediatric registrar, was summoned but failed to attend. Patrick nevertheless recovered. During the second episode, Dr. H. was again contacted and replied that she had asked the senior house officer in paediatrics, Dr. R., to attend. Dr. R. did not do so. Again, Patrick recovered. Half an hour later, however, Patrick suffered a third respiratory attack which resulted in cardiac arrest and subsequent death. Patrick's mother brought, as administratrix, an action in negligence against the defendant authority. At trial, the authority conceded that Dr. H. had been negligent in failing to attend Patrick or to arrange for a suitable deputy to do so; liability therefore hinged on causation.

It was common ground that prior to the third episode intubation to provide an airway would have prevented the cardiac arrest. The trial judge identified the question as whether Dr. H. would have intubated, or if she would not have, whether (applying the test laid down in *Bolam* v. *Friern Hospital Management Committee* [1957] 1 W.L.R. 583) such a failure would have been contrary to accepted professional practice. He accepted Dr. H.'s evidence that she would not have intubated and, having heard conflicting expert evidence on the appropriateness of intubation in the circumstances, held that the plaintiff had not shown that a failure to intubate was contrary to accepted practice. The Court of Appeal (Simon Brown L.J. dissenting) dismissed the plaintiff's appeal. The plaintiff appealed to the House of Lords.

Counsel for the appellant advanced the submission (which had found favour with Simon Brown L.J.) that the *Bolam* test was not relevant to causation. Lord Browne-Wilkinson, delivering the judgment of the House, observed that this was generally, but not always, so. While it was not relevant to deciding what Dr. H. *would* have done had she attended, it was relevant in deciding what Dr. H. *should* have done had she attended. A defendant could not escape liability by saying that the damage would have occurred in any event because he or she would have committed *another* breach of duty.

Counsel for the appellant also submitted that the judge had wrongly treated the *Bolam* test as requiring him to accept the

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opinions of the expert witnesses for the defence, even though the judge was unpersuaded of their logical force. Lord Browne-Wilkinson agreed that a judge is not bound to acquit a doctor of negligence simply because the doctor leads evidence from medical experts that the doctor's conduct accorded with sound medical practice. The fact that the *Bolam* test refers to a "responsible" body of medical opinion showed that the court must be satisfied that the exponents of the body of opinion relied on can demonstate that it has a logical basis. In particular, in cases involving the weighing of risks and benefits, the judge, before accepting a body of opinion as responsible, must be satisfied that the experts, in forming their views, have directed their minds to the question of risks and benefits and have reached a defensible conclusion. In the vast majority of cases, the fact that distinguished experts are of a particular opinion will demonstrate the reasonableness of that opinion. If, however, in a rare case, it can be demonstrated that the professional opinion is not capable of withstanding logical analysis, the judge is entitled to hold that the body of opinion relied on is not reasonable or responsible.

The present case was not one of those rare cases. Although at one point the trial judge had acknowledged that, as a layman, he was attracted by the plaintiff's argument that the views of the defendant's experts were not logical, it was implicit in his judgment that he regarded those views as reasonable and responsible. In any event, it was clear that this was not a case in which the expert evidence for the defence (not least that of a consultant paediatrician in respiratory diseases who favoured running what he considered to have been a small risk of respiratory failure over the invasive procedure of intubation) could be dismissed as illogical.

Bolitho is a significant and welcome decision to the extent that it reins in the *Bolam* test. Hitherto, the courts have, with few exceptions (see [1995] C.L.J. 30), tended to interpret and apply the test so as to allow doctors to determine the legal standard of care in actions arising out of diagnosis or treatment. Even more disturbingly, the courts have used the test to allow doctors to determine other matters beyond their competence, such as the extent of the patient's right to be informed of risks and alternatives; the "best interests" of incompetent patients; and the very value of patients' lives (see John Keown, "Doctor Knows Best?: The Rise and Rise of the *Bolam* Test" (1995) S.J.L.S. 342). *Bolitho* is good as far as it goes, but it does not go as far as it should. For one thing, it is not clear whether medical opinion may be disregarded only if it is illogical. What if the logic is flawless but the premise unsound or unpersuasive? For another, Lord Browne-Wilkinson limits his comments to diagnosis and treatment and does not include the disclosure of risks. Although, therefore,

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Bolitho may at least help to stop the rot, there is still much work for the courts to do in reclaiming from the medical profession the power which they have unwisely delegated to it. *Bolitho* is a step in the right direction, but the road is long.

JOHN KEOWN

MORE LIGHT ON *DUNLOP* V. *LAMBERT*

IN their judgment in *Alfred McAlpine Construction Ltd.* v. *Panatown Ltd.* (*The Times,* 11 February 1998), the Court of Appeal has added yet another to the list of explanations for the rule in *Dunlop* v. *Lambert* (1839) 6 Cl. & F. 600; 7 E.R. 824. There, the House of Lords held that, where goods had been lost at sea, a consignor could recover substantial damages even though the goods, by the time of the loss, had become the property of the consignee. Since then, it has generally been accepted that the same result follows even though the consignee has neither title, risk, nor an immediate right to possession of the goods. It has also generally been assumed that the consignor holds the damages for the benefit of the true owner.

In modern times, the rule has been confirmed by the House of Lords in *The Albazero* [1977] A.C. 744, with the modification that it does not apply to contracts which contemplate that the carrier will enter into separate contracts (such as bills of lading) with the eventual owner. Both rule and modifications were later applied to building contracts, by the House of Lords in *St. Martins Property Corporation Ltd.* v. *Sir Robert McAlpine Ltd. (sub nom. Linden Gardens Trust Ltd.* v. *Lenesta Sludge Disposals Ltd.)* [1994] 1 A.C. 85 and by the Court of Appeal in *Darlington Borough Council* v. *Wiltshier Northern Ltd.* [1995] 1 W.L.R. 68.

Since the promisee's right to recover substantial damages has not been made to depend on any question of agency or trust, the rule seems less than fully consistent with the basic compensation principle of damages. It also appears inconsistent with the common belief that when A as promisor contracts with B as promisee to confer a benefit on C, neither B nor C can recover substantial damages in contract, in C's case for want of privity and in B's, because he has suffered no loss. No wonder, then, that the rule should have proved difficult to explain.

Alfred McAlpine Construction Ltd. v. *Panatown Ltd.* was another building construction case. It arose from a contract between McAlpine as contractors and Panatown as employers to design and build an office block and multi-storey car park on JTC terms, on a

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site in Cambridge. Panatown alleged that the building as completed was seriously defective and might even have to be demolished. However, at no stage had they owned the construction site, which belonged to their associated company, Unex Investment Properties Ltd., who were the actual developers. On the day the construction contract was signed, McAlpine entered into a separate "Duty of Care Deed" with Unex, under which limited liability for negligence was accepted.

The case came before the Court of Appeal on an issue of law under the interim award of an arbitrator. The judgment of the Court (Evans, Hutchinson and Mantel L.JJ.) was delivered by Evans L.J. He defined the question for decision as being: "are Panatown debarred from recovering substantial as opposed to nominal damages, by reason of the fact that they were not and are not owners of the land?" The Court held, applying the *St. Martins* decision, that the employers qualified to recover substantial damages under the *Dunlop* v. *Lambert* rule and were not debarred from doing so by the Duty of Care Deed. That instrument provided for limited liability incurred on a quite different basis from the main contract. It could not have been intended to deprive the employers of their rights.

The distinguishing feature of the judgment in the *Panatown* case is the explanation it offers for the *Dunlop* v. *Lambert* rule. According to Evans L.J., its rationale is "contract based" and the promisee's right to substantial damages arises because the parties to the contract intended or contemplated that it should. In his view, the general rule that a plaintiff cannot recover damages in respect of another person's loss "can be modified by agreement, express or implied, between the parties concerned". This formulation obviously derives from the speech of Lord Diplock in *The Albazero* but with, it is submitted, at least one vital difference. It is true that, according to Lord Diplock, much depends upon the contemplation and intention of the parties. But ultimately, on his reasoning, the right of the consignor to substantial damages arises because he is "treated in law" (by what one takes to be a kind of fiction) as having entered into the contract for the benefit of third persons who might acquire an interest. In other words, the right to recover substantial damages is derived by force of law. By contrast, and always assuming that the promisee in this type of case does suffer no loss because the loss is that of the third party, Evans L.J. seems to be saying that contracting parties themselves are able to impose a liability in damages upon one another which, ex hypothesi, would go well beyond a genuine pre-estimate of the promisee's loss. In any other context, that would be a penalty. Moreover, the learned Lord Justice's actual formulation would seem to allow the possibility of the parties also agreeing that

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the promisee should be able to recover substantial damages without having to account for them to third party owners.

In a recent article in this Journal ("Contract Damages, *Ruxley,* and the Performance Interest" [1997] C.L.J. 537) I suggested that the real problem in these fact situations stems from the reluctance of common lawyers to accept in some contexts, though not in others, that the performance of a contractual promise, and the right to that performance, can in themselves have economic value, the measure of which will at least be the cost of making good any defects, or of obtaining alternative performance, and can also include consequential loss. The alternative, that a promisee can recover only nominal damages, means that, unless the promise is specifically enforceable, the promisor is denied the facility of being able to accept an enforceable obligation to perform his promise. That could be a grave disadvantage (as indeed it can also be with infant traders) since parties commonly accept contractual obligations in order to purchase reciprocal obligations from the other of them. It is also a result which offends common sense, and that usually signals a fallacy somewhere in the reasoning.

In the *St. Martins* case Lord Griffiths appeared, at least on one view, to have grasped the nettle and to have accepted that the right to performance can have value. He pointed out that, in everyday life, contracts for work and labour are constantly placed by those having no proprietary interest in the property on which the work is done. He instanced a husband contracting for work to be done to a matrimonial home belonging to the wife. Should the work be done ineffectively, the husband would suffer loss because he would not have received "the bargain for which he had contracted", the measure of damages being the cost of having the defects made good. Any other result would, in his view, be "absurd".

On the other hand, it has to be admitted that there may be a certain degree of ambiguity in Lord Griffiths' discussion of his principle. At one point, for example, he said: "In cases such as the present the person who places the contract has suffered financial loss because he has to spend money to give him the benefit of the bargain which the defendant had promised but failed to deliver". And four sentences later he added: "The Court will of course wish to be satisfied that the repairs have been or are likely to be carried out but if they are carried out the cost of doing them must fall upon the defendant who broke his contract". According to Professor Treitel, *The Law of Contract,* 9th ed. (1995), at p. 546, the "essence" of Lord Griffiths' reasoning is that the promisee recovers damages in respect of his own loss in making sure that the third party receives the intended benefit. He points out that that reasoning would be

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consistent with something said in *Beswick* v. *Beswick* [1968] A.C. 58. Arguably, it might also gain support from *Dunlop* v. *Lambert* itself, in so far as the consignor in that case had before the hearing reimbursed the consignee for its loss.

But, if this were all Lord Griffiths meant to convey, why should the other members of the House have thought his principle a novel one and have chosen to apply the *Dunlop* v. *Lambert* rule instead? Why, too, Lord Griffiths' reference to the husband having suffered loss, not because he had paid the cost of making good, but because "he did not receive the bargain for which he had contracted"? Certainly, Dillon and Steyn L.JJ. in *Darlington Borough Council* v. *Wiltshier Northern Ltd.* cannot have thought that the promisee's right to substantial damages turned on his benefiting the third party. Both thought that what he did with his damages should be no concern of the law.

In the *Panatown* case, Evans L.J. saw Lord Griffiths' principle, not as an alternative route to the same conclusion as *Dunlop* v. *Lambert,* but as being itself the underlying basis for the rule in that case. If that were indeed correct, and depending on which meaning is to be ascribed to the Griffiths principle, it could have the result that the learned Lord Justice was right, after all, to say that the rationale of the *Dunlop* v. *Lambert* rule was "contract based". The question of a penalty would in consequence not arise. And it could mean that the law has come full circle since the three early cases which preceded *Dunlop* v. *Lambert (Davis and Jordan* v. *James* (1770) 5 Burr. 2680; 98 E.R. 407; *Moore* v. *Wilson* (1787) 1 Term Rep. 659; 99 E.R. 1306; and *Joseph* v. *Knox* (1813) 3 Camp. 320; 170 E.R. 1397) in all of which it seems to have been concluded that the consignor's right to recover substantial damages for breach followed from the mere fact of his being the contracting party.

BRIAN COOTE

DEBT, DAMAGES AND RESTITUTION

STOCZNIA Gdanska SA v. *Latvian Shipping Co.* [1998] 1 W.L.R. 574 concerned six contracts to "design, build, complete and deliver" six ships. The buyers were to pay 20 per cent. of the price after receiving notice that the keel had been laid. The contract gave the seller the right to terminate if payments were not made and to retain any instalments paid and, if it terminated, to sell the vessel whether completed or not. Keels were laid for vessels 1 and 2 but the buyers failed to pay and the seller terminated. It then renumbered the keels, gave notice for payment under the third and fourth contracts,

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terminated those contracts when payment was not forthcoming, and renumbered the keels again and gave notice for payment under the fifth and sixth contracts. It then exercised its right of sale, appropriating the keels to a contract with a third party. As well as damages, the seller claimed the 20 per cent. instalments under all six contracts.

The Court of Appeal ([1996] 2 Lloyd's Rep. 132) held that the remedial regime under the contracts was an exclusive code which excluded the seller's common law claims in debt, that an innocent party was bound to treat a contract as discharged if it had no "legitmate interest" in future performance, and that there was only such an interest in respect of the first two contracts. It looked as though an authoritative answer would be given to the vexed question of how to reconcile the statement by Lord Reid in *White & Carter (Councils) Ltd. v. McGregor* [1962] A.C. 413, at p. 431 that the contract could not be kept open where there was no such legitimate interest with the rejection in English law, affirmed by Lord Reid and Lord Hodson (pp. 430, 445), of a rule that contract remedies must be exercised reasonably. But the House of Lords found for the buyers on other grounds, the *White & Carter (Councils)* issue did not arise, and the question remains one for debate sharpened by the signs of the beginning of a principle of good faith in English contract law.

The House held that the seller could not recover the instalments for vessels 3 to 6 as they had not fallen due, and the notices sent in respect of keels 3 to 6 were not in proper form in any case. In respect of vessels 1 and 2, there was nothing in the contract to suggest that the seller intended to abandon its common law right to recover accrued debts, nor was such recovery inconsistent with the express remedial regime. Either clear words or an inconsistency with the common law are required to rebut the presumption that a contracting party does not intend to abandon its common law remedies (*Gilbert-Ash (Northern) Ltd.* v. *Modern Engineering (Bristol) Ltd.* [1974] A.C. 689 at 717) and there is no need expressly to reserve common law remedies as had been done in *Hyundai Heavy Industries Co. Ltd.* v. *Papadopoulos* [1980] 1 W.L.R. 1129. The only issue was whether the debts had accrued and, in respect of vessels 1 and 2, this was not disputed.

To this the buyers argued that, assuming the seller had a claim in debt for the instalments due in respect of vessels 1 and 2, nothing was in fact due to the seller, since they in turn could recover those instalments on the ground of total failure of consideration. This in turn depended on the scope of the House's decision in *Hyundai,* another shipbuilding case, in which construction had started and instalments were held not to be recoverable, and the distinction

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between that case and *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd.* [1943] A.C. 32, a sale of goods case in which money paid was recoverable although work on the goods to be sold had commenced.

In *Stocznia* the parties were content to argue the case purely on the basis of total failure of consideration, so the question whether partial failure of consideration should be an accepted ground for restitution was not in issue. But Lord Goff did comment (at p. 590) that, although the rule requiring the failure of consideration to be total "has been subject to considerable criticism in the past,... in a comparatively recent Report (Law Com. No. 121 (1983)) ... the Law Commission has declined to recommend a change in the rule". At first glance it might be thought that his Lordship has taken a step back from what he stated in *Goss* v. *Chilcott* [1996] A.C. 788, but owing to the way the parties chose to run the case, it would probably not be right to read too much into this.

Turning to total failure of consideration, Lord Goff (with whom Lord Hoffmann, Lord Hope and Lord Hutton agreed) stressed (at p. 588) that "the test is not whether the promisee has received a specific benefit, but rather, whether the promisor has performed any part of the contractual duties in respect of which the payment is due". This in turn depends on what, on the true construction of the contract, was promised. These contracts were not simply for the sale of, or transfer of title to, certain ships, but for the design, construction and delivery of the vessels and, as some of that work had been performed, there was no total failure of consideration. Lord Goff's speech is important because of the clear emphasis on the requirement of "performance" of the agreed return. This may seem obvious, but in *Hyundai* "performance" was emphasised only by Lord Fraser. There is a subtle difference from the "bargained-for benefit" test formulated in *Fibrosa* and applied in many cases since then because the "bargained-for benefit" test may leave open the possibility of arguing that mere reliance expenditure will prevent the consideration from totally failing (cf. *Chitty on Contracts* §29-036). In fact the issue is whether any part of the agreed return has been performed or whether performance or payment is independent of performance of the agreed return. As recognised in *Rover International Ltd.* v. *Cannon Film Sales Ltd. (No. 3)* [1989] 1 W.L.R. 912, this in turn should not be determined upon a loose classification of the type of contract, be it sale or work and materials, although Lord Lloyd (at p. 600) stated that the distinction "between a simple contract of sale, in which the only consideration is the transfer of title, and a contract of sale which also includes the provision of services prior to delivery" was sound in principle although "sometimes a fine one". Lord Lloyd's

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view was similar to Lord Goff's although he used the language of "bargained-for benefit".

Stocznia's case also appears to provide an answer to the question as to the basis of their Lordships' approach in *Hyundai.* There, Lord Edmund-Davies explained the entitlement to instalments on grounds of the non-retrospectivity of discharge and "sound commercial reasons". But Viscount Dilhorne and Lord Fraser stated the entitlement had accrued unconditionally because the contract was for work and materials rather than for the sale of goods, the former on the construction of the contract, and the latter probably because there had been no total failure of consideration. The uncertainty stems from the fact that Lord Russell and Lord Keith, while doubting that the buyer remained liable for the instalments, decided that the buyer's guarantor, as a matter of the law of guarantee, remained liable. They said nothing about the basis of any right to recover an instalment that had been paid. In *Stocznia,* Lord Goff and Lord Lloyd (at pp. 898 and 907) said that they did not understand Lord Edmund-Davies to be taking a different approach to Viscount Dilhorne and Lord Fraser.

Certain questions, however, remain. Does continued liability purely depend upon the type of contract, and, if so, should it? Is the right to recover contractual or restitutionary? Lord Goff, in distinguishing the type of contract in question from one of sale, said (p. 589), citing *Dies* v. *British and International Mining and Finance Corp. Ltd.* [1939] 1 K.B. 724 and *McDonald* v. *Dennys Lascelles Ltd.* (1933) 48 C.L.R. 457 at 475–479, that in sale contracts "it has been held that the buyer's remedy is contractual, the seller's title to retain the money being conditional upon his completing the contract".

The decision in *Dies* is problematic, partly because the influence of the decision in *Chandler* v. *Webster* [1904] 1 K.B. 493, ultimately overruled by the *Fibrosa* case, inhibited a restitutionary solution. There is no doubt that the contract may govern the right to repayment after discharge. Perhaps this is more likely to be the case in contracts of sale than in other contracts. In the absence of such contractual rights, there is no reason why there should not be a restitutionary response if the elements are made out. To deny such a right creates asymmetry between sale contracts and other types of contract. *Dies* itself was an action for recovery by a buyer in breach. Stable J. concluded that if the "language used in the contract is neutral, the general rule is that the law confers" the right to recover (at p. 743). His reference to a "conferred" right is open to the interpretation that he meant an imposed restitutionary right or a contractual right. In the case of the latter, the right of recovery must be based on an express or implied term. It must be remembered that

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the plaintiff in *Dies* was in breach and was therefore enforcing a primary rather than a secondary right. If the law "confers" the right to recovery and it is not based on a term of the contract or a restitutionary right based on unjust enrichment, the interpretation of this case as contractual would amount to a return to implied contract theory which is clearly not intended.

Lord Goff's reference to the "seller's title to retain the money being conditional" is a reference to Dixon J. in *McDonald*'s case. The characterisation of a right as conditional is a matter of construction. That itself does not create a contractual right of recovery after discharge as that must come from an express or implied term. However, the nature of the right may be relevant to any implication. The conditional or unconditional nature of a right is the reverse side of dependent and independent obligations and is primarily concerned with performance and the right to recover prior to discharge: see further Beatson, *The Use and Abuse of Unjust Enrichment* (1991), chs. 3 & 4; Carter and Tolhurst (1994) 7 J.C.L. 273.

If we turn to restitutionary rights, the application of this contractual idea, that is, the seller's title to retain money being conditional, to explain failure of consideration has far-reaching consequences. The rules for recovery after discharge focus on the plaintiff's right to recover, not the defendant's right to retain. The entitlement of a vendor who receives payment under a contract, whether that entitlement is conditional or unconditional, should in principle never be called into question by discharge because discharge acts *in futuro*. If Dixon J.'s words are used to describe the restitutionary right of recovery, then failure of consideration would be proprietary since it would be based on the payee's title to retain being undermined. That is, on this approach, the focus would be on the right or title to retain rather than the right to recover. This is not the law, it is not the approach adopted in the modern law of restitution nor was it what Dixon J. meant. It is, however, the inevitable conclusion to which one is drawn if recovery is focused on the defendant's entitlement being undermined or failing to sustain itself. As Lord Wright in *Fibrosa* (at p. 65) pointed out, the conditional nature of the right is separate from the theoretical basis of recovery.

J. Beatson
G. Tolhurst

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THE SPY LEFT OUT IN THE COLD: FREEZING THE PROCEEDS OF CRIME

In all good spy stories, the double agent is ultimately thwarted by a powerful new weapon. The Court of Appeal is evidently familiar with the *genre,* for in *Attorney-General* v. *Blake* [1998] 1 All E.R. 833 it fashioned and deployed one new legal device against the Russian spy George Blake and plotted the re-commissioning of another, generally regarded as defunct.

Blake was a member of the Secret Intelligence Service, but was also a Soviet informant. He was tried and imprisoned, but escaped to Moscow in 1966, where he wrote his autobiography. This was published in 1990, earning considerable royalties. The Crown sought an account of profits and an injunction preventing the release by the publishers of outstanding royalties to Blake. Blake took no part in the proceedings and no attempt was made to reclaim sums already paid to him.

At first instance, the Crown relied solely on a private law claim that Blake had acted in breach of fiduciary duty. There were two problems with this claim. First, he had ceased to be under the usual fiduciary duty of loyalty, which subsists no longer than the relevant relationship, when he ceased to be a Crown servant. Secondly, as the Crown conceded, the book contained no confidential information and thus did not breach the separate, lifelong, fiduciary duty of confidentiality either (unlike the notorious *"Spycatcher",* considered in *Attorney-General* v. *Guardian Newspapers Ltd. (No. 2)* [1990] 1 A.C. 109). Inevitably, the Crown's fiduciary duty claim failed.

Before the Court of Appeal, however, the Crown relied additionally on the fact that Blake had contravened the Official Secrets Act, which he had contracted to observe during and after his employment. Yet this advanced the fiduciary duty claim no further: as *Bristol and West Building Society* v. *Mothew* [1998] Ch. 1 demonstrates, not every breach of duty by a fiduciary is a breach of fiduciary duty, and the same applies *a fortiori* to a breach by a *former* fiduciary.

But what of ordinary remedies for this breach of contract? The Crown did not seek an injunction preventing publication and could establish no loss from the breach; thus orthodox contract damages, compensatory only (according to the Court of Appeal in *Surrey County Council* v. *Bredero Homes Ltd.* [1993] 1 W.L.R. 1361), could only be nominal. The court in *Blake,* however, unimpressed with this orthodoxy, invited argument on whether so-called "restitutionary damages" might be available instead, to capture Blake's profit from the breach. Regrettably, the Crown decided not to acccept the invitation, leaving the court to express a tentative, obiter view on the question without the benefit of argument.

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Tentative it may be, but the court's favourable discussion of restitutionary damages is none the less extremely significant. For Lord Woolf M.R., restitutionary damages must be available in principle for certain, exceptional, breaches of contract, or the law of contract would be "seriously defective", leaving only the difficult task of isolating those exceptional circumstances. Two examples were suggested: (1) where the defendant fails to provide the full extent of the services which he contracted to provide and for which he charged the plaintiff ("skimped performance") and (2) where the defendant obtains his profit by doing the very thing which he contracted not to do. The second category encompasses the facts of *Blake* precisely and provides an alternative justification of the award of damages in restrictive covenant cases (such as *Wrotham Park Estate* v. *Parkside Homes Ltd.* [1974] 1 W.L.R. 798), conventionally explained as representing the plaintiff's loss of a notional licence fee to release the covenant. In many ways, the restitutionary analysis is more satisfactory, particularly in cases (such as *Wrotham Park* and indeed this case) where the plaintiff would simply never have licensed the breach at any price. However, should the plaintiff get the *whole* of the defendant's profits from the breach, as the Court of Appeal indicates? Might some proportion of the profits, although caused by the breach on a "but for" test, be regarded as primarily attributable to the defendant's skill and efforts, and thus too remote? Yet if the award is restricted to expenses saved by the defendant, this brings us back to the notional licence fee explanation, and the problem of the plaintiff who adamantly refuses to put a price on the covenant.

The example of skimped performance is potentially more problematic. The Court of Appeal wanted to provide a remedy in cases such as the notorious old American case of *City of New Orleans* v. *Fireman's Charitable Association* (1891) 9 So. 486. An analogous modern version might involve a month-long contract with a security firm to guard a factory during the owner's absence, specifying 10 guards and 10 alsatians per night. On his return, the owner discovers that the firm has saved money by sending only one guard each night, although fortuitously there were no burglaries or other security incidents. In the American case, the plaintiff recovered nominal damages because he had suffered no loss, prompting calls for a restitutionary remedy instead. But the fact that there were no burglaries does not mean the factory owner has suffered no loss: he did not receive the level of service for which he paid. If *goods* are delivered which do their job, but which are of inferior quality, no one disputes that the buyer has suffered a loss. Of course, a plaintiff cannot go to market and mitigate his loss once inferior *services* have been performed, but then again nor can a plaintiff who has purchased

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vintage champagne but received and consumed sparking wine. He may not have noticed the difference, but he has still suffered a loss! An alternative restitutionary claim is a welcome addition to the plaintiff's armoury in cases of skimped performance, but the gist of the problem is still the notion of loss: surely the factory owner would be equally deserving of a remedy even if the defendant had gained nothing from his breach, but had merely lounged around drinking with his guards every night?

Overall, the Court of Appeal's recognition that contractual remedies are deficient in principle without the possibility of restitutionary damages is most welcome, but it remains fascinating and extraordinarily difficult (as the Law Commission and academic commentators have found) to decide precisely which cases should attract them.

The Crown's refusal to ask for restitutionary damages was not the end of the story, however. An alternative claim in public law, based on Blake's criminal breach of the Official Secrets Act, was successful. The Court of Appeal decided that its jurisdiction to grant an injunction, on the application of the Attorney-General in his role as guardian of the public interest, was not restricted to relief restraining the commission of a crime. It should be extended, to uphold the public policy that a criminal should not benefit from his crime, by restricting his receipt of the proceeds. This policy is reflected in the confiscation provisions of the Criminal Justice Act 1988 (as amended), but the statutory mechanism is only triggered by the criminal conviction of the defendant, a sanction which the exiled Blake avoided. The facts were therefore sufficiently exceptional to justify the fashioning of injunctive relief to achieve the same public policy objective. Thus the Crown got its injunction, prohibiting the payment of further royalties to Blake, but strangely not the account of profits it would almost certainly have secured had it pursued restitutionary damges for breach of contract.

JANET O'SULLIVAN

CHARGES OVER CUSTOMERS' DEPOSIT ACCOUNTS

A BANK that wishes to advance money to a customer who has an account in credit may wish to utilise that credit balance as security for the loan. Similarly, a bank might find it advantageous if a third party who is guaranteeing a loan has an account in credit at the bank so that, in the event of the principal debtor's failure, the bank is in a position to set-off any sums outstanding on the loan against its own obligations to repay the surety. Surety arrangements of this

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kind provided the background for two test cases examined in *Re Bank of Credit and Commerce International SA (No. 8)* [1997] 3 W.L.R. 909. The bank had given loans to companies secured by arrangements pursuant to which third parties with deposit accounts at the bank (the "depositors"), first, purported to grant charges over those accounts, and secondly, accepted that they were not entitled to repayment until the loans had been repaid in full.

Following a dramatic scandal, the Bank became insolvent. Subsequently, the liquidators applied for directions as to whether they could require the companies to repay the loans in full without setting off the bank's own indebtedness to the depositors. Clearly this course of action would have been advantageous for the bank and equally disastrous for the depositors. In both cases the depositors were the beneficial owners of the companies for which they were acting as sureties. Given this direct financial interest in the affairs of the principal debtors, the only way the depositors could realise the value of their right to repayment by the bank would be if the bank, in seeking recovery of the loans from the companies, were required to set off the sums owed to the depositors, leaving the companies liable to pay only the balance. If, on the other hand, the liquidators were permitted to call in the debts owed by the companies without recourse to the depositors, the only benefit the depositors would have been able to derive from their rights against the bank would have been an all but worthless entitlement to a dividend in the bank's winding up.

The rules for set-off in corporate insolvency are found in Rule 4.90 of the Insolvency Rules 1986. Set-off is available where "there have been mutual credits, mutual debts or other mutual dealings between the company and any creditor of the company proving or claiming to prove for a debt in the liquidation". However, the facts of the case did not seem to indicate mutuality of the sort contemplated under the rule. On the face of it, the depositors' liability was only of a contingent nature as sureties of the companies' debt. It is well established that a secured creditor is not obliged to resort to his security. So how could it be argued that the bank was not entitled to sue the companies without first setting off the sums deposited as security?

The companies argued that the bank could not have a charge over the deposit accounts, and the arrangements could be effective only if they were read as making the depositors personally liable. They argued that it followed that the depositors were entitled to set-off. Thus the issue of set-off raised questions about the legal effect of a transaction of this type: could it actually constitute a charge? If not, could it still be effective as a matter of contract? At one time,

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such an arrangement was generally thought to give rise to a valid charge. However, in *Re Charge Card Services Ltd.* [1987] Ch. 150, Millett J. created considerable consternation by observing in an obiter dictum that it was "conceptually impossible" for such a transaction to create a charge. This view, which has influential adherents (see, for example, Goode, *Legal Problems of Credit and Insolvency* (2nd ed., 1988), p. 124), prompted legislation in some jurisdictions to put the status of these arrangements as charges beyond judicial interpretation.

While the Court of Appeal favoured the view expressed in *Re Charge Card Services,* its decision did not ultimately turn on the question of whether a bank could take a charge over a customer's deposit account. The Court concluded that, while the arrangement did not create a charge, it provided an effective security by ensuring that the depositors' chose in action was a "flawed asset"—a consequence of the contractual provision that prevented withdrawal prior to the repayment of the loan. Even if the depositors' liability could be characterised as personal, it was by way of guarantee and, thus, contingent on the failure of the principal debtor. As a consequence, there was not the mutuality contemplated by rule 4.90. Such mutuality would have existed only if the depositor had assumed the liability of a principal debtor (which explains why the depositor was entitled to set-off in *M.S. Fashions Ltd.* v. *Bank of Credit and Commerce International S.A.* [1993] Ch. 425).

While the House of Lords agreed with the Court of Appeal's view on the effectiveness of the "flawed asset" arrangement, it went further and concluded that the transaction gave rise to a charge. The Court of Appeal had contended that "a man cannot have a proprietary interest in a debt or other obligation which he owes another". Lord Hoffmann took a different view (one with which Lords Goff, Nicholls, Hope and Hutton all concurred). He noted that one basis for concluding that these devices could not be charges was a misreading of decisions that, viewed in their true light, purport to do no more than to reject the notion that a bank might have a possessory security interest over a chose in action—an interest which, by definition, cannot be possessed (see, for example, *Halesowen Presswork & Assemblies Ltd.* v. *Westminster Bank Ltd.* [1972] A.C. 785). A second objection was based on the argument that it is of the essence of an assignment of a debt that the assignee be entitled to sue the debtor to recover the debt. It was argued that, where the assignee of a charge is also the debtor, there is no one for him to sue and, therefore, this cannot be an assignment. Lord Hoffmann responded that the fact that an assignee is in a position to realise his security without suing should not be fatal. In his view, the only difference between a transaction of this sort and a charge over the

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book debt owed by a third party was in the method in which it would be realised: "instead of the beneficiary of the charge having to claim payment from the debtor, the realisation would take the form of a book entry". Lord Hoffmann further noted that he could see no public policy objection to these interests and thought that "the courts should be very slow to declare a practice of the commercial community to be conceptually impossible". In his view, "the law is fashioned to suit the practicalities of life and legal concepts like 'proprietary interest' and 'charge' ... do not have a life of their own from which the rules are inexorably derived".

Thus, one of the more abstractly conceptualistic controversies of modern commercial law has been laid to rest. The facts of the case—involving the failure of a large bank—are fortunately unusual. Its real impact may be that banks will be able to create charges over customers' credit balances without necessarily providing for the complete restrictions on withdrawal that characterise "flawed asset" arrangements.

CRAIG ROTHERHAM

HOW THE TRADE MARKS ACT SHAPES UP TO PERPETUAL MONOPOLIES

IN *British Sugar plc* v. *James Robertson & Sons Ltd.* [1996] RPC 281, Jacob J. asked whether the 1994 Trade Marks Act enables "big business to buy ordinary words of the English language at comparatively little cost". His answer was a resounding "no". In *Philips Electronics NV* v. *Remington Consumer Products,* 22 December 1997, he asks whether trade mark law, by conferring a perpetual monopoly, can interfere with the freedom to manufacture artefacts of a "desirable and good engineering design". The educated reader might hazard that he would again answer in the negative. And so it transpires. The thrill of the chase is to see how Jacob J. interprets the Act to reach this conclusion.

Philips has marketed a three-headed rotary shaver with the heads arranged in an equilateral triangle since 1966. In 1985, it registered a picture of this face for "electric shavers". The design is not now protected by patent. None the less, until Remington began marketing its DT55 rotary shaver, with a similar head design, but with the mark "Remington" prominently displayed, rotary shavers were unique to Philips. Philips alleged that the head of the DT55 shaver infringed its trade mark. Remington denied infringement, and countered that Philips' registration was invalid.

Although Philips also alleged infringement of its registered design, the principal issue addressed by the court was the trade mark

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registration. The parties agreed that the contested registration covered the three-dimensional shape of the head and was not just a pictorial representation of it. It was also agreed that the wording of the European Trade Mark Directive would be preferred over the Act, where the two diverged.

The first three grounds for invalidity considered were: was it a sign incapable of distinguishing the goods of one undertaking from those of other undertakings (section 1(1)); was it a mark devoid of distinctive character (section 3(1)(*b*)); and was it a descriptive mark (section 3(1)(*b*))? And, if either of the last two exclusions applied, had it acquired distinctiveness through use?

Did the mark fulfil the requirements of section 1(1)? The court held that a sign which cannot fully act as a guarantee of trade origin is incapable of distinguishing. Evidence suggested that while the public associated the three-headed design mark with Philips, they did not identify it as a Philips' product without an accompanying mark, "Philishave". Its primary message was: "this is a rotary shaver; from what you see, you know how the device works". No amount of use of the design mark alone would displace that message. Furthermore, as a representation of a common artefact, the mark was equivalent to the common word for it, and its descriptive meaning would never be entirely displaced. It was therefore incapable of distinguishing. It followed that it was devoid of distinctive character and was also descriptive. It could not be saved by the proviso as to use.

The court then considered the grounds for refusal of registration identified in section 3(2)(*a*)–(*c*), relating to shapes. These are new to the UK trade mark regime, as, until 1994, registration of shapes was prohibited. The court noted that as there are no saving provisos; if a sign falls within any of these exclusions, it cannot satisfy section 1(1) of the Act.

Is this a sign which consists exclusively of the shape which results from the nature of the goods themselves (section 3(2)(*a*))? According to the court, what constitutes "the goods themselves" depends upon how they are viewed as articles of commerce. Here, they would be viewed in the trade as a type of electric shaver, so both the picture and the shape mark did not result from the nature of the goods themselves, since electric shavers come in diverse shapes.

Is the shape of the goods necessary to give a technical result (section 2(3)(*b*))? In the Swedish case, *Ide Line* v. *Philips* [1977] E.T.M.R. 377, where the Philips' three-headed shape mark was also considered, the majority held not only that the sign was distinctive, but also that for this exclusion to apply, it is not enough that the shape derives from the function, it must also be necessary to obtain the result. Here the court demurred and framed its own test—in

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substance, does the shape solely achieve a technical result (whether or not other shapes may obtain the same result)?—and answered in the affirmative.

Lastly, does the shape give substantial value to the goods (section 3(2)(*c*))? The court held that any value attributable to the trade mark as an indicator of source should be disregarded. Instead, this exclusion is concerned, *inter alia,* with shapes which add value through their design or functional appearance. The three-headed shape is recognised as having an engineering function and so adds substantial value to the goods.

The question was then raised whether the registration was contrary to public policy (section 3(3)), since arguably the Directive (and the Act) had not intended, through trade mark registration, to afford indefinite protection to a product whose patent had expired. The court held that this was a matter of economic rather than moral concern, and it is to the latter that section 3(3) properly applies. Anyway, neither was relevant here. The mark failed because it fell within the absolute grounds for refusal of registration.

The court then turned to infringement. The defendant questioned Jacob J.'s own approach in *British Sugar,* which was that a "sign" even if not used in a trade mark sense may still infringe, but would have the defence of descriptive use, under section 11(2). How, asked the defendant, would a sign be saved if it was used neither in a trade mark sense nor descriptively? Since there was no obvious answer, the Directive had not meant infringement to cover such a situation. The court refused to take a view, although it doubted that such a situation could arise if the earlier mark was validly registered. Since the Philips' sign was invalidly registered, Remington's problem was solved in another way. None the less, using the *British Sugar* approach, and assuming the mark was valid, the DT55 face was confusingly similar to the Philips' mark and would infringe under section 10(2), although there was a defence under section 11(2)(*b*) because of honest, descriptive use by Remington.

The Philips sign is registered in Holland. Could it yet be saved by section 56(2) of the Act, incorporating Article 6*bis* of the Paris Convention, which is designed to provide protection for well-known trade marks which are not registered in the UK? The court doubted that a three-dimensional shape can be regarded as a trade mark for the purposes of 6*bis.* Furthermore, section 56(2) was intended to cover the situation where use of such a mark would cause confusion, but the mark's proprietor, having no business or goodwill in the UK, could not bring an action for passing off. In fact Remington's use caused no confusion. The claim under section 56 failed. So did the case alleging infringement of Philips' registered design.

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In the past, the British courts have opposed the granting of indefinite monopolies to shapes through trade mark registration primarily on public interest grounds (for example, *"Coca Cola" TM* [1986] R.P.C. 421, 448), and Jacob J. acknowledged the continuing relevance of the old safeguards. Indeed, this judgment fits squarely within the traditional British approach, although it is presented with a contemporary, free market, European gloss. Despite the apparent harmony of these approaches in this particular judgment, it is difficult to believe that they will always be so compatible.

JENNIFER DAVIS

"NAME THIS CHILD"

NAMES are used to identify and categorise, and hence the power to name is significant. In three recent cases the courts have been faced with disputes over the naming of children (two in the Court of Appeal: *Dawson* v. *Wearmouth* [1997] 2 F.L.R. 629; *Re P (Parental Responsibility)* [1997] 2 F.L.R. 722 and one in the Family Division: *Re PC (Change of Surname)* [1997] 2 F.L.R. 730). The law following these decisions seems, in outline, to be as follows.

On the birth of a child the mother and married father can select the surname with which the child should be registered, but it should be "the surname by which at the date of the registration of the birth it is intended that the child shall be known" (Registration of Births and Deaths Regulations 1987, regulation 9(3)). The unmarried father has no grounds to insist that the child be given his surname unless the child's mother consents or the court so orders. He could apply to the court for a specific issue order (under Children Act 1989, s. 8) that the child be registered with his name, but he would be unlikely to succeed, unless the mother's decision was "a maliciously or manifestly absurd choice" (*Dawson* v. *Wearmouth* at p. 635). If the parents are married and cannot agree on the surname with which the child is to be registered, then the matter should be referred to the court, again by way of a specific issue order (*Dawson* v. *Wearmouth*). Once the name is recorded on the register it can only be changed if there is a clerical error of fact or substance (Births and Deaths Registration Act 1953, s. 29). Technically the child's surname in law is not that with which she is registered but that by which the child is customarily known (*Re T (Otherwise H) (An Infant)* [1962] 3 All E.R. 970). Formal evidence that the child is now known by a new name is available through a deed poll, although this will not alter the name with which the child is registered. A deed poll is only effective if all those with parental responsibility provide written consent

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(*Practice Direction: Children: Change of Surname* [1995] 1 F.L.R. 458).

Prior to the recent cases there was some doubt over whether a parent could informally encourage a child to be known by a new surname if the other parent objected. This most commonly arose when the mother with whom the child lived remarried and wished to change the child's surname to that of the "new family" so that the child could share her mother's new name and that of her step-siblings. The doubt over the law arose owing to the provisions of Children Act 1989. Section 13 states:

> Where a residence order is in force with respect to a child, no person may—
> (*a*) cause the child to be known by a new surname; or
> (*b*) remove him from the United Kingdom
> without either the written consent of every person who has parental responsibility for the children or leave of the court.

The fact that section 13 was restricted to cases where there was a residence order in force led some to argue that where a residence order was *not* in force, a person with parental responsibility was entitled to change a child's name without leave of the court or anyone else's consent because, according to sub-section 2(7), "where more than one person has parental responsibility for a child, each of them may act alone and without the other (or others) in meeting that responsibility . . .". The courts rejected this argument in *Dawson* v. *Wearmouth* and *Re PC*. The practical explanation was that, if correct, the above argument could lead to a child's name being constantly changed, first by one parent and then by the other (*Re PC*). In *Dawson* v. *Wearmouth* the wording of section 13 was explained on the basis that it made it clear that the powers provided by a residence order were not so extensive as to include changing a child's name, and that sub-section 2(7) did not affect the law prior to the Children Act 1989 that a parent could not unilaterally change a child's surname.

The Court of Appeal in *Dawson* v. *Wearmouth* stated that, whenever two or more people have parental responsibility for a child, the child's name cannot be changed without their joint agreement or an order of the court. Only then may schools, doctors and others dealing with the child change their records to reflect the new name. If all of the holders of parental responsibility do not consent and if the child is the subject of a residence order, then the person wishing to change a child's name must make a free standing application under section 13. If there is no residence order in place, then an application under section 8 for a specific issue order is appropriate.

The law is still unclear in circumstances where only one parent

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has parental responsibility. Holman J. in *Re PC* suggested that such a parent could unilaterally change a child's name, although a father without parental responsibility who objected could bring the matter before the court by way of a prohibited steps order. But the Court of Appeal in *Dawson* v. *Wearmouth* stated that "the registration or change of a child's surname is a profound and not a merely formal issue, whatever the age of the child. Any dispute on such an issue must be referred to the court for determination whether or not there is a residence order in force and whoever has or has not parental responsibility" (p. 635). This seems to suggest that if only one parent has parental responsibility she may not change the name of the child without the other parent's consent unless the matter is referred to the court. The difference in these two views is that in *Re PC* the burden of bringing the dispute before the court is placed on the parent without parental responsibility who wishes to object to the changing of the name of the child; while in *Dawson* v. *Wearmouth* the burden is placed on the parent who is seeking to change the child's name.

Whenever the court is asked to resolve a dispute over the naming of a child, the welfare of the child (Children Act 1989, s. 1(1)) is to be the guiding criterion. With a section 8 application, sub-section 1(3) (the list of factors to be considered when deciding a child's welfare) will be taken into account. In relation to a section 13 application, the criteria in sub-section 1(3) do not have to be taken in account, but are likely to be considered as a matter of common sense (*Dawson* v. *Wearmouth*).

In applying the welfare principle the court usually takes into account various factors including: the length of time the child has been known by her present name (*Re P*); the strength of the relationship between the child and the non-resident parent (*Re P*); whether the change in name will reflect the family that the child resides in and so avoid embarrassment; whether court approval for removing the father's name may denigrate the father in the child's eyes (*Re B (Change of Surname)* [1996] 1 F.L.R. 791); and the views of the child (in *Dawson* v. *Wearmouth* the question was left open as to whether the views of a child aged 16 or above, or the view of a competent child, would determine the issue).

So is the law satisfactory? It is noticeable that changing the name of a child is seen by the courts as "a profound issue" and so, exceptionally, changing a child's name cannot be carried out by a single parent with parental responsibility but requires the consent of the court unless all those with parental responsibility consent. But is changing a child's name such a "profound" issue—more significant than her schooling, her religious upbringing, or medical treatment, instances where parental responsibility can be exercised independently?

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Cynics see disputes over names as concerning "proprietary claims" between adults over children and of little significance to children themselves. Others see the name as an important symbol of a child's identity and representation of the biological link between a child and her father, although it should be stressed that the name changes in these cases do not affect the birth certificate and so there is no question of making it harder for a child to discover her biological origins. If one accepts that the issue of name changing is "profound", the debate seems to be over which is more important—to strengthen the link between the child and the "non-resident father" or to help to accommodate the child into the "new" family. Realistically there is little the courts can do about the name a child is known by from day to day, especially if the child or resident parent is insistent on being known by a particular name. Indeed Holman J. in *Re PC* ordered that on formal records the child must retain her father's name, but informally the child could be known by her mother's new name. However, the result of this is that at moments of stress in a child's life (for example when visiting a doctor) the issue of the surname surfaces when such situations should be as "stress-free" as possible. There is therefore much to be said for the father's identity to be reflected on the birth certificate (be that in the child's surname or by being referred to as the father) and otherwise the child to have the surname name she, or her primary carer, chooses.

An alternative way of considering these cases is that it may be that the courts are trying to enforce co-operative decision-making by parents, despite the wording of sub-section 2(7). Indeed it is unclear what other "profound issues" the courts may in the future decide fall outside the ambit of sub-section 2(7) and require parental agreement or court resolution.

Many of these difficulties over the naming of children could be overcome by adopting a system of choosing a family surname which reflects the surname of both the mother and father. But at present most in our society prefer using the father's name alone, and this is perhaps the root of the problem.

JONATHAN HERRING

HUMAN RIGHTS AND TAXPAYERS

Is it really worth having all this fuss and bother about the Human Rights Bill? Over the years the Convention has been interpreted to require United Kingdom courts to change their practices in various ways at the personal level, but what about protecting a person from an unjustified demand for tax? Suppose that the Inland Revenue

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demands tax from you which the courts later determine to be unlawful because the regulation under which the demand was made was not valid. You were not a party to that litigation but you are clearly within the ambit of the decision supplied by the courts. The Inland Revenue then persuades Parliament to deprive you of the benefit of the decision by retroactive legislation, although leaving the actual party to the litigation with the fruits of that enterprise. Is this the stuff on which the judges at Strasbourg will rush to protect the taxpayer from the State? The answer sadly is no—these judges are not going to risk embarrassing the contracting States by making rights bite where that would be expensive: *National Provincial Building Society and others* v. *United Kingdom* [1997] S.T.C. 1466. Of course these judges may fear that contracting States would reduce the powers of the court were they do so such a thing; such a fear would not be irrational since the German and UK Governments proposed that direct tax matters should be removed from the European Court of Justice in the sessions leading to the Treaty of Amsterdam. Perhaps a supra-national body is right to be cautious, but what should our own courts do? Once the Convention is incorporated into our domestic law, will our own judges feel a little more strongly about the matter and perhaps grant a declaration that the legislation is incompatible with the Convention? If they have a right to be incensed about the way in which Parliament protects the Revenue at the expense (literally) of the taxpayer, will they do something or will they just couch like lions under the throne of Parliamentary Sovereignty?

The demand stemmed from the decision of the Inland Revenue to change the law relating to the tax treatment of building societies as from the start of the tax year 1986–87. Before 1986–87, building societies were taxed under voluntary arrangements which had been in place since the late nineteenth century; in 1986 these arrangements were replaced by a new statutory basis (now Income and Corporation Taxes Act 1988 ss. 476–491). The Revenue took the view that some societies' profits for a few months in the year before 1986–87 would escape any charge to tax and so enacted Regulations, made under powers in the 1986 Act, which would enable them to collect that tax.

The Regulations were highly controversial. The building societies complained that the Regulations would lead to double taxation, a view denied by the Revenue, which had a keen interest as a lot of money was at stake. The Court at Strasbourg was inclined to accept the Inland Revenue's view of these effects rather than the building societies'.

The applicants in the present case were three building societies which had paid the tax when it was demanded of them. A fourth

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society, the Woolwich, having also paid the tax, then (on 18 June 1986) began legal proceedings to challenge the validity of the Regulations. In due course, as we all know, the Woolwich won: *R.* v. *I.R.C. ex p. Woolwich Equitable Building Society* [1990] 1 W.L.R. 1400; it went on to win a case based on restitution to recover interest as from the date of its payment (and not just of the date of its successful hearing in the High Court in 1987). It was in the course of this litigation that the House of Lords rejected the argument that the payment, having been made under a mistake of law, was therefore irrecoverable: *Woolwich Equitable Building Society* v. *I.R.C.* [1993] A.C. 70, on which see [1992] C.L.J. 25 (Gareth Jones on the Court of Appeal) and [1993] C.L.J. 31 (Graham Virgo on the House of Lords).

Meanwhile Finance Act 1991 s. 53 had provided that the Regulations were to be made lawful—by being incorporated in statutory form—and with retroactive effect, save for a building society which had commenced proceedings to challenge the validity of the Regulations before 18 July 1986. The Woolwich was the only building society to satisfy this condition, the date being one month after it had begun its proceedings for judicial review and no other society having come forward to join it in the meantime. In July 1991 one of the three applicants began proceedings to challenge another part of the 1986 Regulations; the other two followed suit in November 1991 and March 1992. So Finance (No. 2) Act 1992 s. 64 was passed, which retroactively validated the regulations in issue, so stifling the application for judicial review and any subsequent claim for restitution. There was no need for specific mention of the Woolwich here as the section barred actions for repayment of money and the money due to the Woolwich had been repaid.

Could the applicants successfully challenge the validity of the retroactive legislation under the European Convention on Human Rights? Their efforts failed. They tried four arguments. The first argument was that the legislation was an unjustifiable interference with their right to peaceful enjoyment of their possessions under Article 1 of Protocol 1. On this the Court first debated whether claims which had been asserted, but which had not yet reached an enforceable final judgment, could be possessions for this purpose, and decided not to decide the issue (paras. 67–70). The Court was, however, clear that the legislation interfering with those possible possessions was justifiable. The Court would give the contracting States considerable leeway to determine their own tax policy, only intervening if the State's action was "devoid of reasonable foundation". The Court echoed the Government's argument that the legislation of 1991 and 1992 was designed to carry out Parliament's 1986 intentions

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and prevent the applicants from frustrating that intention by exploiting technical defects in the legislation and benefiting from a windfall (para. 77). While it may be appropriate for a supra-national body to give the legislature a significant "margin of appreciation", it is less clear that our own courts should.

The second argument was that there was a breach of Article 1 of Protocol 1 and Article 14 of the Convention because of the discrimination in favour of the Woolwich in the Finance Act. The court held that it was not every difference in treatment which would amount to a violation of Article 14; the Woolwich was entitled to separate treatment because it had taken the independent and bold stance of mounting a legal challenge. It was justifiable on reasonable and objective grounds to exempt the Woolwich from the general and justified retroactivity (para. 90). One should note that Judge Jambrek gave a dissenting opinion on this point, viewing the Woolwich litigation as a test case action on behalf of the other building societies in general.

The third argument was that there had been a breach of Article 6(1) of the Convention because the applicants had been deprived of a fair and public hearing. This was the only issue on which the Commission had thought that there had been a breach, but again the Court found against the applicants. The good news was that Article 6(1) was applicable, the Court holding that the right to restitution was a private law action regardless of its tax background. The bad news was there was no breach of Article 6(1). Here the Court held that the actions started in 1991 and early 1992 were launched against a background of Parliament's original intentions of 1986 and its already articulated willingness to pass retroactive legislation in 1991. Article 6(1) could not be interpreted to prevent any interference by the authorities in legal proceedings to which they were party. Moreover there was an even more compelling public interest motive in making the 1991/92 actions unwinnable, in that the challenge to the Treasury Orders created uncertainty over the substantial amounts of revenue collected from 1986 onwards (para. 112). Some of the reasoning under this head suggests that the Woolwich itself would have had difficulty persuading the Court to protect it, had the Revenue refused to repay it.

The fourth argument was that the measures violated two articles of the Convention—Article 6(1) in conjunction with Article 14. The Commission had expressed no view on this point, but the Court thought that its reasoning on the second argument applied here also; Judge Jambrek dissented here again.

What lessons are to be learnt? The first must be that, while the European Court of Human Rights is a tribunal to which tax-related

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issues can properly go, there is a strong resistance to doing anything which might obstruct the fiscal intentions of the contracting States. In this the Court is behaving like many (but not all) other constitutional courts which do not wish to obstruct the legislature in this area—although being very willing to control subordinate legislatures. Thus in the United States the Supreme Court has been very reluctant to agree to constitutional arguments on tax matters at the Federal level, whereas a very different line has been taken in Germany, not least since the protection of the family is incorporated into the constitution. The second is that, for the moment at least, taxpayers wanting to challenge demands for tax, whether because a statutory instrument is ultra vires or because the Revenue's interpretation of the law is wrong, must do so on their own initiative or join the initiatives of others, but not wait for the outcome of a test case to which they are not actual parties. The form of retroactive legislation used by the Revenue in this case is quite common (see, *e.g.,* Finance (No. 2) Act 1987 s. 62, reversing the decision in *Padmore* v. *I.R.C.* [1987] S.T.C. 36, affirmed [1989] S.T.C. 493). If taxpayers fail to act they can expect little mercy from the UK Parliament and, at present, no protection from the Convention or its Protocols. Those free-riders who are the delight of economists have found that in this area they ride at a price. The third is that work needs to be done on the way in which the Revenue are allowed by Parliament to decide that some will be protected from retroactive legislation and others not. Is the present apparently minimalist approach simply the least which Parliament feels like doing without upsetting the judges? If so, should the judges simply accept this or should they now assert their new human rights jurisdiction? The 1997 case shows that the Court of Strasbourg will not encourage them to hasty action, but if political controls are ineffective in this county, why can we not look to the judges for protection? Is this not what the Convention is meant to be about?

JOHN TILEY

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