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Towards a Welsh health law: devolution, divergence and values†

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ABSTRACT

COVID-19 and Brexit have given political impetus to re-examine Wales's place within the United Kingdom's devolution settlement. Health has been a key site for divergence in law and policy as between the administrations in Cardiff and London. In light of these contests, and the longer-running trends in devolution, this article considers whether a distinct 'Welsh' health law has now emerged. We examine the constitutional context and the range of sources for this new legal field. We argue that a set of values can be identified through an attentive reading of the legislative output of the Welsh Parliament, through reflection on the policy development of health in Wales, through the devolution process. While accepting that these are varied and heterogeneous, these values are as much an expression of universal ethical goals as they are of any delineable Welsh essence. No mere summation of positive law, these values allow one to define a distinctive realm of Welsh health law, have the potential to act as an interpretative lens for analysing law and policy flowing from Westminster, and could potentially act as a value structure for further Welsh legislation.

Keywords: devolution; divergence; values; Welsh jurisdiction; COVID-19; health law; healthcare; Coronavirus Act 2020; NHS; Brexit.

INTRODUCTION

The health landscape of Wales and the United Kingdom (UK) is changing. Pre-existing tensions and divisions over Brexit and wider constitutional issues of devolution and governance have been illuminated and exacerbated by COVID-19.[2] At the onset of the pandemic, the Welsh, Scottish and Northern Irish administrations and

† First published in NILQ COVID-19 Supplement 72(S1) (2021) 62–90.

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2 J Bradbury, 'Welsh devolution and the union: reform debates after Brexit' (2021) 92 Political Quarterly 125; G Evans 'Devolution and Covid-19: towards a "new normal" in the Territorial Constitution?' (2021) (1) Public Law 19-27.

the UK Government, for England, committed to respond in a closely coordinated fashion,[3] in line with the Sewel Convention and the Memorandum of Understanding. However, by May 2020 each began to develop policy independently.[4] Legal divergence has been matched by political dispute, with Cardiff and Edinburgh claiming they were ignored and outflanked, and Westminster complaining of deviation for its own sake.[5] The pandemic has undoubtedly made the existence of an increasingly distinct Welsh 'health space' visible to the wider public. It has also highlighted the contested and uneven nature of devolution, dramatising the defence of legislative autonomy in Wales and Scotland and resultant push-back by an actively pro-union UK Government.[6] These vectors traverse the adjustment to Britain's departure from the European Union (EU), with all three devolved administrations denying consent to the EU (Withdrawal Agreement) Act 2020. The destination of powers repatriated from Brussels, and the scope of the UK-wide internal market, are significant for the health competencies of devolved administrations.

Divergence in health law and policy across the UK is not a new phenomenon. It has been in train, steadily if often unremarked, since the implementation of devolution in 1998. In Wales, distinctive measures on organ donation, tobacco control and the structure of the health service, for example, have attracted the attention of scholars in law, ethics and health policy.[7] Such reviews have generally been discrete, however, focusing on a specific measure and contextualising it with reference to, say, English or Scottish equivalents. Less attention has been directed to the emerging ensemble of law and regulation as a whole. The contemporaneous challenges of COVID-19 and Brexit provide us with the occasion for just such an encompassing review.

We take up this challenge, inquiring into the nature and scope of health law in Wales and considering its prospects for further development. We first provide a brief chronology of Welsh devolution through the lens of health and contextualised by COVID-19. We subsequently outline sources of Welsh health law and explore emergent areas in which a distinct Welsh application and interpretation is visible, focusing on key initiatives like organ donation, tobacco control and the structure of NHS Wales. Welsh health law 'exists', we argue,

3 Coronavirus Act 2020.

4 'Covid: has devolution helped or hampered coronavirus response?' (*BBC News*, 28 October 2020).

5 W Hayward, *Lockdown Wales: How Covid-19 Tested Wales* (Seren 2020).

6 M Kettle, 'Johnson's last-minute bid to save the union can't undo years of neglect' *The Guardian* (London, 25 January 2021).

7 S Greer and D Rowland (eds), *Devolving Policy, Diverging Values? The Values of the United Kingdom's National Health Services* (Nuffield Trust 2007).

not only as a distinctive corpus of legal rules and policies, but also as a set of distinct challenges related to its constitutional frame and technical complexity, as well as the unique population health problems which it is deployed to address. Moreover, we will also suggest briefly that the distinctiveness of Welsh health law also rests on moral and political values which can be identified in current Welsh practice, in historical forms of health solidarity in Wales, and in the common British and European inheritance. Our conclusion draws out briefly some implications for health law scholarship in a devolved UK of the developments we have identified in the case of Wales.

HEALTH AND THE DEVOLUTION SETTLEMENT

Welsh legislative autonomy has evolved since 1998, from administrative to executive devolution, and from measures to primary law-making. Its pre-history can be traced to the start of the twentieth century. At that time, local authorities and the Welsh Board of Health were generally responsible for health, but there existed no distinct 'Welsh' decision-making level, *per se*. When the National Health Service (NHS) was established across the UK in 1948, newly nationalised voluntary and local authority hospitals were managed by regional boards, including one for Wales. The latter was directly accountable to the central government in London.[8] As the political founder of the Service, Aneurin Bevan, put it, 'when a bed-pan is dropped on a hospital floor, its noise should resound in the Palace of Westminster'.[9] No official Cabinet-level position representing Welsh interests existed until the creation of the Welsh Office and the position of Secretary of State for Wales in 1964, who was given responsibility for health in 1969.[10]

Policy determined in Westminster did not always reflect local needs, and the Welsh Office was devolved in administrative capacity only. Key reform initiatives like the Griffiths Report challenging the lack of NHS management structures (1983) and the 'internal market' among general practitioners and NHS hospitals (1991) were simply adopted and implemented in Wales as elsewhere. The advent of devolution came in 1998, following a (narrow) victory for the 'Yes' campaign in

8 P Michael, *Public Health in Wales (1800–2000): A Brief History* (Welsh Government 2008) 20.

9 Cited in P Nairne, 'Parliamentary control and accountability' in R Maxwell and N Weaver (eds), *Public Participation in Health: Towards a Clearer View* (The King's Fund 1984) 33–51.

10 D Miers and D Lambert, 'Law making in Wales: Wales legislation online' (2002) Public Law 663.

the 1997 referendum.[11] Devolution was seen by the Labour party, long dominant in Wales, as an opportunity to restore the non-market ethos of Bevan's NHS and to put 'clear red water' between it and the New Labour and Conservative Governments in London.[12] Under the keystone Government of Wales Act 1998 (GOWA 1998) health was deemed an area of conferred power through a process of executive, rather than legislative, devolution. This meant the newly created National Assembly for Wales could pass secondary legislation on health, but only after seeking the UK Parliament's approval on a case-by-case basis. Even then the doctrine of parliamentary sovereignty allowed (and still allows) Westminster to pass overriding legislation on exclusively devolved matters. Functions of the Secretary of State for Wales were transferred to the Assembly.[13] Tax powers were not included among these competencies.[14]

The Government of Wales Act 2006 (GOWA 2006) gave the Assembly primary law-making powers for the first time, allowing it to pass legislation ('Assembly Measures') on certain prescribed areas and establishing health as a non-reserved power. A 2011 referendum asked voters whether the Assembly should have direct legislative powers over 20 areas including health and education, as well as tax-raising powers: 63.5% voted yes on a relatively low turnout of 35.2%.[15] The Commission on Devolution in Wales 2012 recommended further expanding primary law-making and fiscal powers,[16] resulting in the Wales Act 2017. The Act extended Wales's fiscal powers, increasing the Welsh Government's borrowing limits and enabling it to set Welsh rates of income tax as well as moving Welsh devolution to a 'reserved powers' model, conceding legislative power to Cardiff in all but a series of enumerated areas.[17] This strengthening of devolution was reflected

11 The creation of a Welsh Assembly was approved by 50.3% in the 1997 referendum, representing a 50.1% turnout. N Duclos, 'The 1997 devolution referendums in Scotland and Wales' (2006) French Journal of British Studies 12.

12 D S Moon, 'Rhetoric and policy learning: on Rhodri Morgan's "clear red water" and "made in Wales" health policies' (2013) 28 Public Policy and Administration 306.

13 Transfer of Function Orders 1999; GOWA 1998, s 22(2), sch 2.

14 GOWA 1998, sch 2.

15 R Scully, 'Welsh referendum analysis: Wales "united in clear vote"' (*BBC News*, 4 March 2011).

16 Commission on Devolution in Wales, 'Empowerment and responsibility: devolving financial powers to Wales' (HM Treasury/Wales Office 2012); 'Empowerment and Responsibility: Legislative Powers to Strengthen Wales' (Office of the Secretary of State for Wales 2014).

17 Wales Act 2017, s 7A.

in the Assembly renaming itself Senedd Cymru (the Welsh Parliament) in 2020.[18]

It is clear from the foregoing that how we define health affects the scope of devolution. A narrower definition, focused on clinical medicine and orthodox public health interventions may concede more scope to the areas reserved to Westminster, limiting the action of Welsh authorities. Turning to the relevant legislation, schedule 2 of GOWA 1998 referred to '[h]ealth and health services'. This was preserved and elaborated on by GOWA 2006, which describes health as 'physical or mental health' and encompasses 'health and emotional well-being', 'social and economic well-being' and citizens' rights.[19] A similarly broad understanding of health is warranted by article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) which the UK has ratified.[20] General Comment 14 of the United Nations (UN) Committee on Economic Social and Cultural Rights defines the right broadly to include not only healthcare and standard disease control measures, but also underlying social and environmental determinants like housing and clean air. This inclusive approach is underwritten by the current popularity of 'Health in All Policies', acknowledging the influence that laws, actions and interventions outside the direct remit of the health sector have for the promotion of health.[21] Though not explicitly referenced in the legislation, GOWA 2006's definition of health and wellbeing is certainly consistent with such an approach.

It is important, however, to note that the scope of devolution in this area is not solely determined by definitions, but also by practice and policy. Reserved powers in ostensibly non-health areas may limit Cardiff's capacity to legislate for health. For example, prison policy is reserved to Westminster, but the Welsh Government manages prisoner healthcare.[22] As a result, there is no clean break, but a 'jagged edge' which causes difficulties in law and practice.[23] This unevenness is not simply a matter of definitions and overlapping competences. It is also a site of contestation between Cardiff and Westminster, as we explore in the next section with reference to the challenges of the recent coronavirus pandemic and the UK's exit from the EU.

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18 Senedd and Elections (Wales) Act 2020, s 2.

19 GOWA 2006, sch 5, matter 15.10 (a)–(f).

20 General Comment 14 of the Committee on Economic, Social and Cultural Rights.

21 E Ollila, 'Health in all policies: from rhetoric to action' (2011) 39 Scandinavian Journal of Public Health 11.

22 T Enggist et al (eds), *Prisons and Health* (WHO Regional Office for Europe 2014) 2.

23 R Jones and R W Jones, 'Justice at the jagged edge' (Wales Governance Centre 2019).

PULLING AWAY AND PUSHING BACK: COVID-19 AND BREXIT

COVID-19 has exposed the significance, and potential inadequacy, of current devolution arrangements.[24] In March 2020, Westminster passed the Coronavirus Act 2020, a collaborative effort which conferred new powers on devolved administrations.[25] A collective decision to institute a UK-wide lockdown was made on 23 March, though increasing divergence in timing and scope emerged over the following months.[26] The Government in Cardiff generally took a more cautious approach than its London counterpart, implementing a slower exit from the original lockdown in spring 2020 and a stricter 'firebreak' in Autumn 2020.[27] Most conspicuous in UK-wide media were restrictions on the movement of people into and out of Wales, which re-established a frontier with England that has not existed since mediaeval times.

Although civil service contacts, as between Cardiff, Belfast, Edinburgh and London, worked well throughout the crisis, intergovernmental relations were notably strained at the highest level.[28] UK Prime Minister Boris Johnson refrained from all communication with Mark Drakeford and Nicola Sturgeon, Welsh and Scottish First Ministers, in the key months between May and September 2020.[29] Rhetorical styles differed too, with Drakeford positioning himself, in Laura McAllister's words, as 'the political antithesis of Johnson'.[30] An early rise in popularity for the Welsh Labour Government was tempered by the UK Government's successful vaccine procurement strategy.[31] Labour's subsequent success in the Senedd elections of May 2021 has been attributed to the cautious approach to COVID-19 taken by Drakeford and former Health Minister Vaughan Gething, and to Wales's vaccine

24 Evans (n 2 above).

25 Coronavirus Act 2020, ss 11–13, ss 37–38, s 52, ss 87–88, s 90. For example, devolved ministers are empowered to temporarily close educational establishments.

26 Health Protection (Coronavirus) (Wales) Regulations 2020.

27 'National coronavirus firebreak to be introduced in Wales on Friday' (Welsh Government, 19 October 2020).

28 Hayward (n 5 above) ch 8.

29 Ibid.

30 L McAllister, 'Covid-19: how have our political leaders performed in the face of such a crisis?' (*Wales Online*, 4 July 2020).

31 'Covid-19: Wales has more confidence in Welsh Gov than England in UK Gov – study' (*Nation Cymru*, 21 June 2020); M Savage, 'Boris Johnson's poll lead over Labour boosted by Covid vaccine rollout' *The Guardian* (London, 27 February 2021).

roll-out programme which has been among the broadest and fastest in the world.[32]

Growing awareness of devolution and its applicability to health has, however, been accompanied by uncertainty as to which rules apply.[33] Much of the Welsh population get their news from London-based sources which often neglect to indicate that measures imposed by Westminster are specific to England only.[34] This potential for confusion threatens rule of law values concerning the 'knowability' of applicable criminal law and the capacity of citizens to hold governments to account. It also potentially jeopardises public health by undermining the even application of lockdown measures, which is essential to interrupting the spread of infection. This is not merely a matter of information and legal certainty, however. It also gestures to the current weakness of the Welsh public sphere and the absence of a robust civil society which can scrutinise and challenge Senedd Cymru and the Welsh Government.[35] This is not only an internal political weakness. The elision of Wales and England has also been reinforced by Westminster's increased deployment of the symbols and language of British identity and unity. Downing Street's COVID-19 briefings have been marked by the prominence of the UK flag and undifferentiated references to 'our nation', 'Britain' and 'our country'.[36]

This scene of contest and confusion has been exacerbated as a result of the UK's departure from the EU. If COVID-19 has promoted centrifugal tendencies between the devolved administrations and the UK Government, then by contrast the Internal Market Act 2020 may be the agent of recentralisation of power to Westminster. Passed to ensure the barrier-free movement of goods across the UK following the Brexit transition period, the Act mandates that the internal market be guided by principles of mutual recognition and non-discrimination. Legal and political scholars have identified the Act's troubling implications for pro-health policies under devolution.[37] Notably, no exception to these principles is permitted on public health grounds. Accordingly,

32 'Covid vaccination rollout: how is Wales leading the UK and the world?' (*BBC News*, 28 May 2021).

33 Hayward (n 5 above) ch 9.

34 'For Wales, see England? The UK media and devolution' (*IWA*, 25 September 2020).

35 R Rumdul, 'Critical friend or absent partner? Institutional and organisational barriers to the development of regional civil society' (2016) 23 European Urban and Regional Studies 848.

36 For a further example, see 'Eight-storey union flag planned for Cardiff UK-government building' (*BBC News*, 30 June 2021). h

37 N McEwen, 'The Internal Market Bill: implications for devolution' (*Centre for Constitutional Change*, 11 September 2020); T Lock et al, 'Rights and devolution after Brexit' (University of Edinburgh Working Paper 2018).

goods complying with English standards cannot be prevented from sale in Wales on the basis that Cardiff has legislated for a higher level of consumer protection. In other words, free trade is preserved within the UK by restricting the power of devolved governments to raise environmental and public health standards, as has been done in Wales regarding the single-use plastics and the pricing of alcohol.[38]

The administration in Wales refused to consent to the Act, invoking the process set out in Standing Order 29.[39] This restates the Sewel Convention, according to which the UK Government is obliged to obtain the consent of the devolved administrations in any case where it seeks to legislate in an area of non-reserved competence. Westminster ignored the Convention, passing the Act over the protests of the devolved governments. Consistent with its recentralising politics, it is effectively privileging the doctrine of parliamentary sovereignty over any more nuanced understanding of the contemporary UK constitution. In response, the Counsel General for Wales sought judicial review, arguing *inter alia* that the Act 'impliedly ... repeal[s] areas of the Senedd's legislative competence' by preventing the imposition of legislative requirements on the sale of goods in Wales that are additional to requirements elsewhere in the internal market.[40] Labelling the Act 'a constitutional overhaul' which curtails protections once enjoyed as part of the EU, he predicted that the UK will cut standards and use the Act 'to force the devolveds to follow suit'.[41] On 19 April 2021, the High Court refused permission to continue the Counsel General's case, which it called 'premature', as neither party had exercised powers under the Act.[42] However, the Court of Appeal subsequently granted permission to appeal due to the 'important issues of principle going to the constitutional relationship between the Senedd and the Parliament of the UK' raised by the applicants.[43]

38 British Medical Association, 'Parliamentary briefing: UK Internal Market Bill, House of Commons Committee Stage' (September 2020). See further, T Sokol, 'Public health emergencies and export restrictions: solidarity and a common approach or disintegration of the internal market?' (2020) 57 Common Market Law Review 1819.

39 J Miles MS, *Legislative Consent Memorandum: United Kingdom Internal Market Bill* (25 September 2020) [84]; Scottish Government, *Legislative Consent Memorandum: United Kingdom Internal Market Bill* (September 2020) [117].

40 *R (on the application of The Counsel General for Wales) v The Secretary of State for Business, Energy and Industrial Strategy* [2021] EWHC 950 (Admin), Case No: CO/188/2021.

41 J Miles, 'Why Wales must resist the Westminster power-grab, and how to do it' (*Wales Governance Centre*, 21 January 2021); Miles (n 39 above).

42 *R v The Secretary of State for Business, Energy and Industrial Strategy* (n 40 above) [37] and [6].

43 M Antoniw MS, 'Written statement: legal challenge to the UK Internal Market Act 2020 – update' (29 June 2021).

Our discussion of health law in Wales in this section has emphasised variability over time. On the whole, competences have expanded, though the recent push-back from Westminster may see some recuperation of powers *de facto*, if not *de jure*. To a certain extent Wales currently takes a middle way between the separatist tendencies of Scottish and (Northern) Irish nationalists on the one hand, and the assertive centralisation of English conservatives on the other.[44] Though the outcome of this contest cannot be predicted, it is clear that the discrete arrangements of Wales, Scotland, Northern Ireland and England have already given rise to four separate health systems premised on divergence, as well as convergence, asymmetry as well as replication. They are tied together by the law of a sovereign Parliament whose authority can and at times does override theirs. To contextualise this internal unevenness, we now examine the disparate sources of health law in Wales.

SOURCES OF WELSH HEALTH LAW

Law in Wales generally manifests in four ways: legislation passed by the Senedd, laws of general UK-wide application passed at Westminster, European and international law, and the binding common law of England and Wales. As will be seen, these principles and rules cannot be ordered into a neat hierarchy without remainder. Rather, Welsh health law is better regarded in its complexity as a 'spaghetti bowl' of norms derived from multivarious, sometimes conflicting, sources.

Welsh legislation

Wales has its own health law framework, comprised of primary and secondary legislation enacted by Senedd Cymru. Primary legislation ('Acts of the Senedd') has the same legal force in Wales as Westminster laws.[45] Welsh health laws include the Social Services and Well-being (Wales) Act 2014 and the Public Health (Wales) Act 2017. The former imposes a duty to promote the wellbeing of those who need care and support, emphasising outcomes and partnerships in care; the latter requires public bodies to carry out health impact assessments and imposes a duty upon Welsh ministers to make regulations about the circumstances and ways in which they carry them out. As noted above, all health-related matters are devolved to Wales, except for those explicitly reserved to Westminster, including abortion and xenotransplantation.[46] Given its significance for criminal law, mental

44 M Kettle, 'Only a full devolution reset can stop the UK splintering apart' *The Guardian* (London, 30 June 2021).

45 Permitted by GOWA 2006, pt 4.

46 Wales Act 2017, sch 7A, s J1, s J2.

capacity continues to be governed by the UK-wide legislation, related regulations and Code of Practice. By contrast, while the Mental Health Act 1983 as amended in 2007 applies across England and Wales, mental health policy is almost wholly devolved.[47] Thus, while the conditions under which people can be lawfully detained or compelled into assessment are not devolved, care quality and the operation of Mental Health Review Tribunals are.[48]

The legislative process is initiated when a 'Public Bill' is introduced by the Welsh Government, a Member of the Senedd, or a Senedd Committee.[49] The Bill undergoes a four-stage process under Standing Order 26, including consideration of general principles by the Senedd in plenary and by its Health, Social Care and Sport Committee, line-by-line scrutiny, a discussion of proposed amendments, and a final vote. Secondary legislation is laid down by ministers as statutory instruments and regulations.[50] The latter may augment UK, as well as Welsh, legislation. The Welsh Government is now subject to a duty to codify discrete areas of legislation, including health. This will involve a consolidation and rational ordering, though not a substantive rewriting, of all applicable statutes, both Welsh and UK-wide.[51]

Welsh legislation is subject to limitation and challenge in several ways. As we have discussed, it may be repealed or abrogated by subsequent Westminster statutes, though this is subject to the Sewel Convention which requires Cardiff's consent as a political matter.[52] Equally, devolved legislation must be repealed if found to exceed legislative competence by the Supreme Court on referral by the UK Attorney General or the Counsel General for Wales,[53] as happened with the Recovery of Medical Costs for Asbestos Diseases (Wales) Bill 2013.[54] Finally, all new Welsh legislation must be pre-certified

47 With the exception of detaining restricted patients, mental health policy and services are fully devolved to Wales. See 'Commission on Justice in Wales: supplementary evidence from the Minister for Health and Social Services' (Welsh Government 2019) 3.

48 B Hannigan, 'Observations from a small country: mental health policy, services and nursing in Wales' (2021) Health, Economy, Policy and Law 1, 5.

49 'Guide to the legislative process' (Senedd Cymru, 28 May 2021).

50 Eg Coronavirus Act 2020 (Commencement No 1) (Wales) Regulations 2020.

51 Legislation (Wales) Act 2019, s 1.

52 Inserted into GOWA 2006, s 107(6), by Wales Act 2017, s 2.

53 This was the case with the Local Government Byelaws (Wales) Bill which the Supreme Court ultimately held was within the Senedd's competence: *Local Government Byelaws (Wales) Bill 2012 – Reference by the Attorney General for England and Wales* [2012] UKSC 53.

54 *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill – Reference by the Counsel General for Wales* [2015] UKSC 3.

as compatible with the European Convention on Human Rights (ECHR)[55] and may be challenged under the Human Rights Act 1998 (HRA 1998) on the same basis as UK legislation.[56] Unlike the latter, however, Welsh laws can be struck down if they contravene Convention rights.[57] This additional check has been positively embraced by the Welsh Government, which opposed Westminster's 2016 proposal to withdraw from the ECHR and replace the HRA 1998 with a, 'British' Bill of Rights.[58]

Local authorities are empowered by Welsh legislation to plan, commission and provide frontline health services for their communities.[59] They also play an active role in addressing social determinants of health through functions relating to local transport, education and housing.[60] This is achieved through the passage of health-related byelaws (eg for the preservation of green spaces) and through policy development.[61] In particular the Well-being of Future Generations (Wales) Act (WBFGA) 2015 established public services boards (PSBs) within local authorities which have a statutory duty to carry out wellbeing assessments and formulate health and social care plans. The city of Cardiff PSB, for example, has acted to tackle air pollution by incentivising public transport use and cycling.[62]

UK legislation

The Westminster Parliament remains an important source of health legislation in Wales. Pre-1998 statutes have been carried over, though they are subject to amendment and repeal in areas of devolved competence such as health. Thus, the Children Act 1989 still applies

55 As with the Human Transplantation (Wales) Bill: Explanatory Memorandum incorporating the Regulatory Impact Assessment and Explanatory Notes (Welsh Government, 25 June 2013) [174]; Wales Office, Pre-Legislative Scrutiny of the Proposed National Assembly for Wales (Legislative Competence) (Health and Health Services) Order 2 (January 2011) [32].

56 GOWA 2006, ss 108A(1)–(2)(e).

57 T G Watkin, 'Human rights from the perspective of devolution in Wales' (British Academy Briefing 2016) 5.

58 House of Lords Select Committee, 'The UK, the EU and a British Bill of Rights, chapter 8: the impact of repealing the Human Rights Act in the devolved nations' (HRA0001) [159].

59 Local Government (Wales) Act 1994, sch 9, as amended by the Local Government (Wales) Measure 2011. See *Improving Health in Wales: A Plan for the NHS with its Partners* (National Assembly for Wales 2001) ch 4.

60 *Health in Wales: Chief Medical Officer's Report 2001/2002* (National Assembly for Wales 2002) 48.

61 Cardiff Council Environmental Scrutiny Committee, 'Report: cycling in Cardiff's parks' (March 2012) KF1, 6; Local Government Byelaws (Wales) Act 2012.

62 *Cardiff Well-being Plan 2018–2023: Annual Report 2019/20* (Cardiff Public Service Board 2020) 19.

subject to changes made by the Social Services and Well-being (Wales) Act 2014, which creates a statutory duty to assess the care and support needs of children and replaces the 'medical model' language of the UK Act, which determined need on specific bases of age and disability, with an 'impairment neutral' model, namely, 'people who need care and support'.[63] Post-1998 legislation of UK-wide application, such as the Health and Social Care Act 2012 and the Mental Capacity Act 2005, is a further source.[64] As noted above, the ongoing judicial review of the Internal Market Act 2020 will determine whether such legislation can be challenged for infringing on devolved competences. Should the application succeed, the Supreme Court would still only be able to advise on interpretation, as it cannot overturn an Act of the UK Parliament.[65] Under the Memorandum of Understanding between the constituent territories of the UK, consultations are to be held with the devolved governments on legislation that will apply across the UK, as was the case with the HRA 1998 and the Equality Act 2010, and on devolved matters and related policy fields regardless of whether they entail legislative change.[66] In addition, it is worth noting that the Welsh Affairs Committee at Westminster scrutinises Wales Office activity and UK proposals impacting Wales. In 2010 it inquired into the Senedd's legislative competence in relation to a change in organ donation rules discussed more fully in the next section.[67] Welsh Members of Parliament in the House of Commons can vote on health legislation regardless of its territorial scope of application.

European and international law

As the UK is no longer an EU member state, section 108(6) GOWA 2006, which required Acts of the Senedd to comply with EU law obligations, now has no legal effect.[68] New EU law has ceased to be binding in the UK following the Brexit transition period, but a snapshot of 'retained EU Law' as it applied on 31 December 2020 has been converted into domestic law.[69] Examples of this include UK Health and Safety (Consultation with Employees) Regulations 1996, which derived from the EU's Health and Safety Framework Directive

63 Social Services and Well-being (Wales) Act 2014, s 3. See L Clements, 'The Social Services & Well-being (Wales) Act 2014: an overview' (January 2021).

64 Westminster can also pass legislation for Wales only, like the Transport (Wales) Act 2006.

65 See the Counsel General's challenge of the Internal Market Act, discussed above.

66 Devolution Guidance Note 1 Common Working Arrangements [23]–[28].

67 House of Commons Select Committee, 'Organ donation (legislative competence)' (*Parliament.uk*, 4 April 2011).

68 EU Withdrawal Act 2020.

69 EU (Withdrawal) Act 2018, ss 2–4.

89/391/EEC, and the Control of Asbestos Regulations 2012 drawing on EU Directive 2009/148/EC.[70] British courts may have regard to decisions of the Court of Justice of the European Union (CJEU) so far as they are relevant or may aid in interpreting retained EU law in domestic cases, though they are not bound to do so.[71] However, the CJEU retains a time-limited jurisdiction in relation to the rights of EU citizens residing in the UK, which include rights to access healthcare and social security.[72] These are enforced through a preliminary reference procedure, by which UK courts seek guidance on the interpretation of citizens' rights in cases commencing within eight years of the transition period.[73]

International law relevant to health enters Welsh law in three ways. First, by direct incorporation into applicable UK law. Treaties may be domesticated in full, for example the ECHR through the HRA 1998, or in part, for example elements of the Convention on the Rights of Persons with Disabilities (CRPD) through section 6 Equality Act 2010.[74] Second, by direct incorporation through Senedd laws, for example the UN Convention on the Rights of the Child (CRC), article 24 of which confers the right to the highest attainable health standards, was integrated in Wales through the Rights of Children and Young Persons (Wales) Measure 2011. Third, by direct incorporation into Welsh law through secondary legislation, including the Equality Act (Wales) Regulations 2011. Additional to this are treaties ratified by the UK which it, and by extension the Welsh Government, is obliged to implement, even though their provisions are not part of domestic law, for example article 12 ICESCR which enshrines the right to the highest attainable standard of health for all. In addition, international law has proved an important source for Welsh policy and law-making in more indirect ways. For example, the Action on Disability Protocol embeds the CRC and optional protocols into Welsh law through a requirement being placed on specified bodies to have regard to the Convention when carrying out functions.[75]

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70 Health and Safety (Amendment) (EU Exit) Regulations 2018 (SI 2018/1370).

71 EU (Withdrawal) Act 2018, s 6.

72 Pt 2 of the European Withdrawal Agreement 2020. See T Hervey, N Miernik and J C Murphy, 'How is part two of the Withdrawal Agreement (citizens' rights) enforceable in the courts?' (*EU Law Analysis*, 28 May 2020).

73 European Withdrawal Agreement, art 158(1). Brought into UK law by the European Union (Withdrawal) Act 2018, s 7C, the UK legal effect will be the same as under the Treaty on the Functioning of the European Union, art 267.

74 The definition of 'disability' in the Equality Act 2010 overlaps with but is narrower than that in the CRPD.

75 Welsh Government, 'Action on disability: the right to independent living – framework and action plan' (2019) 7.

Professional and advisory bodies

Professional licensing and regulation of health workers in Wales remains a matter for UK-wide bodies, including the General Medical Council and the Nursing and Midwifery Council.[76] While not sources of law, statutory bodies like these and others help to shape and influence policy and governance by setting norms and standards for professional conduct. They enforce these standards through disciplinary powers, which are capable of review in the Court of Appeal and can result in practitioners being struck off the register.[77] Advisory bodies, professional associations and 'think tanks' operating at UK level, like the Nuffield Council on Bioethics, the Faculty of Public Health and the Nuffield Trust, provide expert input into policy and legislation affecting Wales, whether made in Cardiff or London. Thus, the Welsh Government pledged to invest an additional £295 million in NHS Wales in 2015–2016, after a Nuffield Trust report highlighted the threat to service provision resulting from Westminster's austerity policies.[78] This is complemented by the work of Wales-based bodies, whether official, such as the COVID-19 Moral and Ethical Guidance for Wales Advisory Group, which provides policymakers with COVID-related ethical advice, or civil society, such as Cymru Well Wales, a public and voluntary sector collective.[79] More indirectly, values and standards promoted by NHS Wales and Public Health Wales (PHW) may be taken up within the terms of employment contracts and, thus, be the focus of common law decisions on the quality of care or practices around the end of life, for example.

Common law and the 'Welsh jurisdiction'

Although legislation is increasingly important in health law generally,[80] case law remains central to areas such as consent, negligence and end-of-life decision-making, as well as to statutory interpretation.[81] In

76 Others include the General Dental Council, the General Chiropractic Council, the General Optical Council and the Hearing Aid Council.

77 See, for example, *General Medical Council v Bawa-Garba* [2018] EWHC 76.

78 A Roberts and A Chatsworth, 'A decade of austerity in Wales? The funding pressures facing the NHS in Wales to 2025/26' (Nuffield Trust 2014); 'Written statement – together for health' (Welsh Government, 25 March 2015). The report was commissioned by the Welsh Government.

79 PHW, ACE Aware Wales; Welsh Government, 'COVID-19 Moral and Ethical Guidance for Wales Advisory Group' (CMEAG-Wales).

80 M Brazier and J Miola, 'Bye-bye Bolam: a medical litigation revolution?' (2000) 8(1) Medical Law Review 85–114.

81 *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 583. See S W Chan and others, 'Montgomery and informed consent: where are we now?' (*British Medical Journal*, 12 May 2017). *R v Bournewood Community and Mental Health NHS Trust, ex parte L* [1998] UKHL 24; *HL v UK* [2004] ECHR 471.

our case, this remains the common law of England and Wales, which has been unified since 1535. The legal profession and judiciary are similarly fused across the two countries. In the present context it is worth noting, moreover, that legal commentators and the judiciary have treated law as being more or less one across all three jurisdictions, namely, Scotland, Northern Ireland, and England and Wales. Thus, leading Scots cases from *Hunter v Hanley*[82] to the recent *Montgomery v Lanarkshire Health Board*,[83] are treated as leading precedents for the whole UK.

This is starting to change, however. Whereas in 1999 Lord Bingham suggested that the prospect of a distinct Welsh common law was 'improbable', current and future trends render it more likely.[84] Thus, a distinct Wales court circuit has developed, alongside the practice of hearing Welsh cases in the Administrative Court in Wales[85] and the establishment of a Mental Health Review Tribunal for Wales, already mentioned.[86] All courts, common to England and Wales, or specific to the latter are faced with significant challenges in interpreting and applying applicable health law, given the complexity of sources. Where legislation from either Cardiff or London governs a field or an issue exclusively, its application will be unproblematic. But, as we have seen, this is rarely the case. Often it will be necessary to construe legislation of diverse origin together, as is the case with the Mental Health (Wales) Measure 2010 and the (UK) Mental Health Act 2007, for example. Moreover, the prior question of whether a field is exclusively governed by a specific law is always itself a matter of interpretation, as with more or less obvious examples of the 'jagged edge' between devolved and non-devolved responsibilities. These difficulties pose a significant impediment to the determination of the rights and responsibilities of health workers, patients and citizens, and thus to the effective delivery of care and public health more generally. Wales is alone in the UK in lacking a legal jurisdiction under which to determine these questions, and to allow the development of a coherent and intelligible body of law on the implementation of its devolved law-making powers in

82 *Hunter v Hanley* [1955] ScotCS CSIH_2.

83 *Montgomery v Lanarkshire Health Board* [2015] UKSC 1.

84 T Bingham, 'The common law: past, present and future' (1999) 25(1) Commonwealth Law Bulletin 18–30, 25.

85 R Evans, 'Devolution and the Administration of Justice' (Lord Callaghan Memorial Lecture 2010), cited in H Pritchard, 'Revisiting legal Wales' (2019) Edinburgh Law Review 23, 123–130, 126.

86 For a powerful critique of liberal approaches to health law and ethics, see Commission on Devolution in Wales, 'Empowerment and responsibility: devolving financial powers to Wales' (HM Treasury/Wales Office 2012).

health.[87] While this raises rule of law issues of general concern, it is worth recalling that health law raises especially significant matters of life and death, essential liberties, and meaning and value in individual lives. Realisation of these formal values is threatened by growth of heterogeneous norm-creation and interpretation without clear oversight by practitioners, academics and the judiciary.[88]

Such concerns have led to calls for the creation of a separate Welsh jurisdiction.[89] While initially reluctant, the Welsh Government added its support in a 2021 policy statement *Reforming the Union*.[90] Academic commentators concur on the basis that Wales already possesses two of the three widely accepted prerequisites for a separate legal jurisdiction, namely, a defined territory and a distinct body of law, though not yet a structure of courts and legal institutions.[91] More importantly, the complexity of law in Wales requires the development of legal sub-disciplines and a body of specialist practitioners that can only come about through a distinct jurisdiction. The creation of the Administrative Court for Wales points the way in this regard,[92] as does the appointment of Lord Lloyd Jones to the Supreme Court on the explicit basis that a judge with Welsh expertise was needed to interpret post-devolution law.[93]

LEGISLATING FOR HEALTH

Health law in Wales is increasingly distinctive from that in England and the rest of the UK, not only as regards its sources, but also in its content. This is significantly due to the activity of the legislator in Cardiff, seeking to maximise use of its limited, if expanding, devolved powers. Health is of particular political importance in this regard, given the close association of the Labour Party, long dominant in Wales,

87 E Llwyd, N Evans and A F Jones, 'Developing a Welsh legal jurisdiction' (Plaid Cymru 2010).

88 J Montgomery, 'Law and the demoralisation of medicine' (2005) 26 Legal Studies 185.

89 Commission on Justice in Wales, 'Report: justice in Wales for the people of Wales' (2019) 498–500.

90 Evidence submitted by the Welsh Government to the Commission on Devolution in Wales, Welsh Government Evidence Paper WG17658 (18 February 2013) 2. 'Reforming our Union: shared governance in the UK' (Welsh Government, June 2021).

91 J Williams, 'The emerging need for a Welsh jurisdiction' (2010) IWA Agenda 42, 38–40, 38.

92 *R (Bridges) v Chief Constable of South Wales Police* [2020] EWCA Civ 1058, heard in Wales, was the first UK case to consider the compliance of automated facial recognition technology with ECHR rights.

93 'First Welsh Supreme Court judge is appointed' (*BBC News*, 21 July 2017).

with the NHS.[94] Reform of healthcare delivery has, thus, been a key focus since devolution. Admittedly, prior to 1998, the Welsh Office had discretion regarding the organisation of the health service in Wales.[95] However, ultimate policymaking power remained at Westminster and the service was in truth no more than a 'bilingual' copy of its English counterpart, adopting market-oriented reforms under both Conservative administrations from 1979 to 1997.[96] These neo-liberal reforms were undone soon after devolution, in Wales as in Scotland.[97] Instead, Cardiff sought to integrate health and local government,[98] promoting participation and decentralisation by vesting the running of the NHS in 22 local health boards which were subject to a process of democratic health planning through reinvigorated Community Health Councils.[99] This innovation was subsequently curbed as a result of the 2003 Wanless Report, which highlighted the failure of Wales's reformed NHS to deliver improvements in the quality of care and access to it.[100] Since 2009, therefore, the recentralised Welsh NHS has been comprised of seven health boards and three NHS trusts, collectively responsible for providing primary and secondary care, along with public and mental health, accountable directly to the Welsh Government. Though abrogating the more thoroughly democratic orientation of the first phase of devolution, this recentralisation was subsequently seen as enabling Wales's relative success in implementing lockdowns and rolling out vaccine delivery during the COVID-19 pandemic.[101]

In public health, devolved Welsh administrations have sought to deal with the country's distinctive health burden, much of it a legacy of industrialisation and deindustrialisation in urban areas. High-profile

94 T Smith and E Babbington, 'Devolution: a map of divergence in the NHS' (2006) 1 British Medical Journal Health and Policy Review 9.

95 For example, the Health Authorities Act 1995 enabled the Welsh Secretary to vary, abolish or create health authorities. This power was used in 1996 to disband Wales's nine authorities and replace them with five. See Health (Wales) Act 2003.

96 S Greer, 'Devolution and health in the UK: policy and its lessons since 1998' (2016) 118 British Medical Bulletin 16.

97 Ibid 21–22.

98 S Greer, 'Four way bet: how devolution has led to four different models for the NHS' (The Constitution Unit 2004) 4.

99 'Improving health in Wales: structural change in the NHS in Wales' (National Assembly of Wales 2001). Community health councils will be replaced in 2023 by a single national Citizen Voice Body, shifting away from localism and towards (English) centralization: Health and Social Care (Quality and Engagement) (Wales) Act 2020, s 23, pt 4.

100 D Wanless, 'The review of health and social care in Wales' (Welsh Assembly Government 2003).

101 H Gye, 'Wales has triumphed on vaccine rollout because of small supply buffer and centralised NHS, First Minister says' (*i*, 15 June 2021).

initiatives have been directed at reducing tobacco use and increasing organ donation. Thus, smoking restrictions in all workplaces were introduced in 2005,[102] following earlier UK Labour Government White Papers.[103] The ban was extended to enclosed public spaces, as well as school grounds, hospital sites, public playgrounds and children's football matches, in an effort to reduce the harmful effects of second-hand smoke.[104] The sale of nicotine products (including e-cigarettes) to children under 18 has also been proscribed, though attempts to instate a general ban on smoking in cars and vaping failed to secure sufficient support among legislators.[105] These initiatives were intended to 'de-normalise smoking behaviour and reduce the chances of children and young people taking up smoking', a goal which the Welsh Government affirmed was underpinned by children's right to health *inter alia* enshrined under the UN CRC.[106] On the whole, a more openly interventionist and frankly paternalist public health strategy has prevailed, in the face of objections from libertarian commentators and campaigners who sought to defend the right to smoke in terms of individual autonomy, an argument which apparently has less traction in Labour-dominated Cardiff than at Conservative-led Westminster.[107]

The rhetorical privileging of collective over individual interests also marked the reform of post-mortem organ donation in Wales, Thus, where the UK-wide Human Tissue Act 2004 operated a system of express consent, evidenced by a person registering to be an organ donor, the Human Transplantation (Wales) Act 2013 enshrines the principle of deemed consent, under which all who die are assumed to have agreed to their organs being donated unless they object.[108] The Act imposes a duty on Welsh ministers to increase public knowledge about consent and is premised on claims that countries with 'opt-outs' have higher donation rates.[109] Indeed, Wales has the highest organ

102 Action on Smoking and Health, 'Advance media briefing: government consultation on smoking in workplaces' (17 June 2005).

103 *Smoking Kills* (Department of Health 1998); *Secondhand Smoke, Public Health* (Department of Health 2004).

104 Smoke-free Premises etc (Wales) Regulations 2007; Public Health (Wales) Act 2017; Smoke-free Premises and Vehicles (Wales) Regulations 2020.

105 Public Health (Wales) Act 2017, pt 1, s 1(3)(d); 'E-cigarette ban proposals defeated in Welsh Assembly' (*ITV News*, 16 March 2016).

106 Welsh Government, 'Smoke-free law: guidance on the chances from March 2021' (22 December 2020).

107 Eg smokers' lobby group Forest, see 'Wales starts public smoking ban' (*BBC News*, 2 April 2007).

108 Human Transplantation (Wales) Act 2013, ss 1–4.

109 A Abadie and S Gay, 'The impact of presumed consent legislation on cadaveric organ donation: a cross-country study' (2006) 25 Journal of Health Economics 599.

consent rate of all four of the UK's constituent territories, though there has been little overall change in the number of suitable donors or successful transplants.[110] Again, this public health measure was adopted in the face of pro-autonomy arguments, with the Welsh Government justifying its reforms on the basis that Wales is 'a nation known for altruism, generosity and thought for others'.[111] This sense of exceptionalism has dissipated somewhat since then given that similar opt-out systems have now been implemented in England and Scotland, respectively, and one is currently proposed for Northern Ireland.[112]

Our discussion of selected initiatives suggests the emergence of a substantive corpus of Welsh health law. We have also picked out some features and trends as regards the values that informed these developments. These varied over time and issue. Thus, while solidarity was consistently emphasised, values of participation rose and fell in influence. There has undeniably been an expressive element to this legislation, with health policy reform used to signal both the fact that Wales is now self-governing in this area and that it pursues more 'virtuous' policies. In sum, the embrace of collectivism in the absence of participation has privileged the central (now Welsh) state as the lead actor in health, rather than either private companies, local government, or citizens themselves. This stance came to wider public attention during the COVID-19 pandemic, as we discussed above, with First Minister Drakeford claiming his Government's aim had been to keep Welsh people 'safe'.[113]

In practice, as we have noted, these specific initiatives have met with only modest success. A history of inequality, poverty and marginalisation, in both urban and rural areas, means that much of the population continues to suffer from relatively poor underlying health. These enduring features were reckoned to be one cause of Wales's high COVID-19 death rate, and indeed government policy and decision-

110 J Parsons, 'Ensuring appropriate assessment of deemed consent in Wales' (2019) 45 Journal of Medical Ethics 210.

111 D J Dallimore et al, 'Media content analysis of the introduction of a "soft opt-out" system of organ donation in Wales 2015–17' (2019) 22 Health Expectations 485; *Proposals for Legislation on Organ and Tissue Donation* (Welsh Government White Paper WG13956, 2011) 1.

112 The Organ Donation (Deemed Consent) Act 2019, also known as Max and Keira's Law; Human Tissue (Authorisation) (Scotland) Act 2019; Northern Ireland Department of Health, 'Public consultation document on the introduction of a statutory opt-out system for organ donation for Northern Ireland' (11 December 2020).

113 Welsh Government, 'Written statement: keeping Wales safe from coronavirus' (Welsh Government, 22 September 2020).

making have not gone without criticism in this regard.[114] Viewed in terms of effectiveness, then, Welsh policy might be considered 'different', but not necessarily 'better' when compared with that in other parts of the UK.[115] Ironically perhaps, this adds a further justification for taking Welsh health law seriously as such. In ways not always allowed for by political speech writers, the concrete institutional and epidemiological problems which law and policy seeks to reshape are particular to Wales. If health law is to be more than simply an exercise in closed doctrinal reasoning, it needs to be developed and critiqued with reference to these practical effects and their specific national and sub-national contexts. Accepting that, in the next and penultimate section, we widen our review, considering features of historic and contemporary practice which indicate a discrete, though by no means unique, set of concerns and values for health law in Wales.

VALUES FOR A WELSH HEALTH LAW

Values matter to the descriptive study of policy and law. Political scientists, studying divergence and convergence as between the four UK health systems, recognise that 'different systems make different choices because policymakers differ in the meaning and priorities they assign to different values'.[116] Scholars of health law have been less willing to embrace value pluralism as an explanatory variable in their accounts. Developing in symbiosis with modern bioethics, health law has instead been described with reference to universally valid principles cast in fairly abstract terms. It is ideally timeless and placeless, with actual variation more likely to be attributed to day-to-day political tactics and constitutional struggles. Against this, however, one of us has argued elsewhere that health law in the decades following the Second World War was *British* in a significant sense: permeated by locally specific cultural forms and assumptions about the purpose of the welfare state and the NHS, and the nature of clinical practice, for

114 J Halliday, '"It's heartbreaking": inequality reaps high Covid toll in south Wales valleys' *The Guardian* (London, 8 February 2021); 'Covid-19: UK had one of Europe's highest excess death rates in under 65s last year' (*British Medical Journal*, 23 March 2021). See also Hayward (n 5 above).

115 E St.Denny, 'What does it mean for public policy to be "made in Wales"?' (*LSE BPP*, 19 October 2016).

116 S L Greer and D Rowland, 'Why discuss values in health? Why now?' in S L Greer and D Rowland (eds), *Devolving Policy, Diverging Values? The Values of the United Kingdom's National Health Services* (Nuffield Trust 2008) 13.

example.[117] In pointing towards *Welsh* values as an additional indicator of distinctiveness, we are not thereby elevating the merely provincial in place of the universal. Rather, we are drawing out the analytical implications of the relativisation of Anglo-Britain as the container and source of health law across the UK. Given this constitutionally, legislatively and (in part) jurisdictionally plural landscape, an adequate account of health law in the UK requires us to attend to the values immanent in the institutional histories and professional cultures of the devolved nations. That is, of course, an onerous and open-ended task well beyond the scope of the present article. What we offer here, in the case of Wales, is a very brief indication of some distinct values and their sources in law, practice and social history. Before doing so, it is important to clarify that we are not claiming that some Welsh essence expresses itself in health law. Even if such a quality could be defined, it would be unlikely to find a way through the admixture of applicable norms deriving from a variety of national, British and international sources. Moreover, as will be seen, the values themselves can also be traced to these diverse sources, and they are shared to varying degrees by many other countries.

Solidarity

Mutual concern and assistance have repeatedly been picked out as distinctive Welsh values, particularly by Labour leaders since devolution. Former First Minister Rhodri Morgan, for example, referred to solidarity as 'the powerful glue' of Welsh society.[118] This talk is no doubt strategic and performative, striving rhetorically to create a distinct polity within the terms of one party, and has properly been met with scepticism by some academic commentators.[119] Nonetheless, it does build on a tradition with historical warrant, albeit one which is more pluralistic than that evoked for party political advantage. Central to most accounts are the Welsh origins, not just of the founder of the NHS, Aneurin Bevan, but of its institutional form. As we have noted, prior to 1948, healthcare was provided across the

117 J Harrington, *Towards a Rhetoric of Medical Law* (Routledge 2017). The enduring importance of the NHS as a marker of Britishness is borne out in current debates about the terms of any future reunification of Ireland: see S Breen, 'Poll: NHS could be crucial in border poll with support for united Ireland and the Union running neck-and-neck' *Belfast Telegraph* (Belfast, 25 October 2020).

118 Rhodri Morgan, 'Clear red water' (speech to the National Centre for Public Policy Swansea, 11 December 2002)

119 Moon (n 12 above). See also, D Evans, K Smith and H Williams, 'Introduction: the Welsh way', in D Evans, K Smith and H Williams (eds), *The Welsh Way: Essays on Neoliberalism and Devolution* (Parthian 2021) 1–24.

UK through a patchwork of charitable, local authority and private facilities.[120] This largely restricted the best and most comprehensive care to the wealthy. The South Wales coalfield was a partial exception with its network of medical aid societies. Pooling the subscriptions of miners, societies employed general practitioners to deliver primary care for all, as documented in A J Cronin's bestselling 1937 novel *The Citadel*.[121] Alongside them, miners' institutes, hubs of community life in South Wales, catered to wider welfare needs by promoting sport and leisure activities.[122] For Cronin, this health infrastructure provided the blueprint for socialised medicine across the UK.[123] Bevan, who had himself chaired the Tredegar Workmen's Medical Aid Society, claimed that: 'all I am doing is extending to the entire population of Britain the benefits we had in Tredegar for a generation or more. We are going to "Tredegar-ize" you.'[124]

Solidarity was not limited to the coalfield or to groups traditionally seen as bearers of Welshness. Thus, nineteenth-century Irish immigrants, faced with sectarian hostility from the local population, established 'Hibernian societies' to provide mutual aid for healthcare and welfare more generally.[125] The 1980s saw a Wales-focused campaign to challenge prejudice and discrimination relating to the HIV/AIDS pandemic and to promote inclusive and rational public health strategies in response.[126] While wider alliances were not easily formed, they were able to build on the solidarity shown by the 'Lesbians and Gays Support the Miners' group in South Wales during the national strike of 1984.[127] Though women (and children) benefited from the medical aid societies, the latter were largely led and funded by men. There is nonetheless an important history of women's collective action for health down to the present day. Thus, in the nineteenth and early twentieth centuries, middle-class organisations, like the Ladies Samaritan Fund, raised and distributed funds for local hospitals and patients.[128] With a more overtly political focus, the suffrage movement from the 1890s onwards allied with Welsh nationalist and

120 Cf Michael (n 8 above) 3.

121 M Longley, 'Prudent progress in the Welsh NHS' (Nuffield Trust, 29 July 2015).

122 See, for example, Blackwood Miners' Institute, 'Our history'.

123 A J Cronin, *Adventures in Two Worlds* (Gollancz 1952) 140.

124 'NHS 70: Aneurin Bevan day celebrations in Tredegar' (*BBC News*, 1 July 2018).

125 P O'Leary (ed), *Irish Migrants in Modern Wales* (Liverpool University Press 2004) 44, 190, 207.

126 D Leeworthy, *A Little Gay History of Wales* (University of Wales Press 2019) 115ff.

127 Ibid xi.

128 K Bohata et al, *Disability in Industrial Britain: A Cultural and Literary History of Impairment in the Coal Industry, 1880–1948* (Manchester University Press 2020) 108.

socialist campaigns to promote social goals, including health.[129] Much more recently, Muslim women of South Asian heritage established and ran food delivery and support services in Cardiff and Swansea for communities disproportionately affected by the COVID-19 pandemic.[130] Mutual aid in these diverse forms has not been exclusive to Wales, of course.[131] We make no plea for exceptional virtue here. Rather, we do point to the framing of many of these initiatives in terms of specifically national traditions and note that this provides a discursive resource for argument about the development of health law in Wales.

Sustainability

Welsh historical experience also informs a concern with sustainability on the part of government and civil society. From the early nineteenth century, Wales was a major site of extraction (eg coal and slate mining) and primary processing (eg steel production) for the British economy. With ownership largely resting outside the country, this skewed development and created a massive burden of ill-health and environmental damage. Deindustrialisation since the 1960s, again imposed by external political and economic forces, has seen many of these difficulties persist and added new challenges (eg addiction and mental illness).[132] Over the same extended period, the Welsh language lost in prestige and numerical predominance, being marginalised by processes of British state-formation (eg in law and education) which privileged English.[133] Not surprisingly perhaps, devolved Wales has taken conservation and regeneration as key goals. An official commitment to achieve a bilingual society was matched by GOWA 1998, which imposed a duty on the Assembly (now Senedd) to promote sustainable development across all policies.[134]

The latter commitment has been given fuller legal form in the WBFGA 2015, which seeks to put the UN's Sustainable Development Goals at

129 U Masson, '"Hand in hand with the women, forward we will go": Welsh nationalism and feminism in the 1890s' (2003) 12 Women's History Review 357.

130 R Youle, 'The untold story of the Swansea Bangladeshi community and how it is reacting to the coronavirus pandemic' (*Wales Online*, 30 July 2020); E Ogbonna et al, 'First Minister's BAME COVID-19 Advisory Group report of the Socioeconomic Subgroup' (Welsh Government, 2020) 8.

131 See, for example, M Gorsky, 'Mutual aid and civil society: friendly societies in nineteenth-century Bristol' (1998) 25 Urban History 302.

132 C Jones, 'In what sense sustainable? Wales in future nature' in Evans et al (n 119 above) 91–104.

133 See G A Williams, *When Was Wales? A History of the Welsh* (Penguin 1984) 245–248.

134 See, respectively, Welsh Assembly Government, *Iaith Pawb: A National Action Plan for a Bilingual Wales* (WAG 2003); GOWA 1998, s 121.

the heart of public administration, as we have noted above. The Act's underpinning ethos of ensuring 'that the needs of the present are met without compromising the ability of future generations to meet their own needs'[135] can be read as a response to the instrumental depletion of Welsh lives and landscapes in the past. Its legal operationalisation of moral duties to coming generations is unique in the world.[136] A statutory duty is placed on public bodies to work collectively to achieve seven wellbeing goals, which include health and wellbeing, equality, and global responsibility. Citizens may seek judicial review of official decisions that fail to take account of these goals,[137] but it is the office of the Future Generations Commissioner which is central to overseeing the Act's implementation. Though the Commissioner cannot formally compel or prevent specific actions, she can issue recommendations to public bodies, including the Welsh Government, regarding their impact on sustainability.[138]

Widely acknowledged as a landmark initiative, the detail of the Act is not without its critics. In particular, as Haydn Davies has argued, it only imposes on authorities a relative duty 'to endeavour to achieve' its goals, not a duty to secure well-defined results.[139] As such it runs the risk of functioning merely as a means of signalling Welsh virtue, fine talk to compensate for Cardiff's still limited legislative capacity.[140] Against this, however, must be set recent developments, notably the success of the current Commissioner in objecting to the construction of the M4 relief road through environmentally significant wetlands near Newport in 2019.[141] More broadly, the Act has reinforced the more holistic approach to health, which includes, but also goes beyond clinical care and traditional public health, consistent with the promotion of equivalent 'One Health' approaches in Wales.[142]

Equality

The value of equality is implicit in the foregoing discussion of solidarity and sustainability. In both cases we observed historic and

135 WBFGA 2015, s 5.

136 See, further, R Jones, 'Governing the future and the search for spatial justice: Wales' Well-being of Future Generations Act' (2019) 197 Fennia 8.

137 WBFGA 2015, ss 3–5. See H Davies, 'The Well-being of Future Generations (Wales) Act 2015: duties or aspirations?' (2016) 18 Environmental Law Review 41.

138 WBFGA 2015, s 20.

139 Cf Davies (n 137 above) 47.

140 Evans et al, 'Introduction' (n 119 above) 9.

141 The Planning Inspectorate, 'M4 corridor around Newport (M4CAN) inspector's report on public local inquiries' (Welsh Government, 21 September 2018).

142 See, for example, Learned Society of Wales, 'One health Wales: the importance of People's Wellbeing and Planetary Health Western Mail Column' (21 June 2017).

contemporary trends extending the category of 'who counts', beyond the wealthy and beyond the present generation, respectively. Of course, the definition of equality, and of the duties that attend it, are contested among philosophers and practitioners. Against the thin conception of 'equality of opportunity' can be set the maximalist 'equality of outcome'.[143] Both differ from the now well-articulated understanding of 'equity' which directs that policymakers and legislators be guided by the different health needs of different groups in allocating resources.[144] Considerations of health equity are applicable both within Wales and across the UK. Thus, persistent disparities in life-expectancy and ill-health divide even neighbouring regions such as Cardiff and the former mining valleys. This is a challenge for the fair distribution of resources for health promotion as between regions internally. Equally, Wales as a whole has the highest percentage of the population over 70 and the highest rate of smoking in the UK, as well as the worst incidence of asthma in Europe.[145] In its turn, this casts a harsh light on the current funding settlement between Wales and the UK Treasury, based on the so-called Barnett formula, which is not calculated with reference to this greater health need.[146]

Further guidance, and a firmer normative basis for the value of equality, is provided by the international and domestic human rights materials which were considered above as sources of current Welsh health law. Thus, the principle of non-discrimination is enshrined in the ICESCR.[147] As the Committee responsible for that treaty made clear in its General Comment on the right to health, this is a non-derogable obligation of states (including the UK and through it the Welsh Government) – that is, it binds the authorities even in emergency situations, such as pandemics.[148] The principle is common to most human rights instruments, including the UN CRC, which, as we saw, is (in part) directly enforceable in Welsh law.[149] The Equality Act 2010 imposes a more detailed and enforceable equality duty on public bodies, including health boards and NHS trusts, to avoid and eliminate

143 K Saito, 'Social preferences under risk: equality of opportunity versus equality of outcome' (2013) 103(7) American Economic Review 3084–3101.

144 S Nesom, '5 things you should know about gender equality in Wales' (Wales Centre for Public Policy, 5 December 2018).

145 See Hayward (n 5 above) 75.

146 Wales Governance Centre, 'Barnett squeezed? Options for funding floor after tax devolution' (Wales Governance Centre, December 2016).

147 Committee on Economic, Social and Cultural Rights, General Comment No 3: The Nature of States Parties' Obligations (art 2, para 1 of the Covenant) (1990).

148 See further, S Sekalala and J Harrington, 'Communicable diseases, health security and human rights' in L Gostin and B Mason Meier, *Foundations of Global Health and Human Rights* (Oxford University Press 2020).

149 See preamble to Convention on the Rights of the Child 1989.

unlawful discrimination and safeguard the rights of people with a protected characteristic, for example race, gender, disability, sexual orientation.[150] Significantly, given the correlation between social deprivation and ill-health in Wales, discrimination based on economic status was not included among the protected grounds, however.[151]

Cardiff administrations have made high-profile commitments to equality, collaborating with the World Health Organization on assessment tools for measuring progress towards health equity for example.[152] Nonetheless, as in the case of sustainability, there is a risk that commitments remain 'short on detail, light on action', 'aspirational' rather than substantive, as has been argued of the high-profile *Advancing Gender Equality in Wales Plan* of 2020.[153] A more focused and critical approach was taken by Professor Emmanuel Ogbonna and colleagues, commissioned by the Welsh Government's BAME COVID-19 Advisory Group to report on the disparate impact of the pandemic in 2020.[154] The Ogbonna report identified structurally determined inequality in health provision and outcomes, as well as the disproportionate participation of minority staff in 'frontline' occupations, as key causes of this skewed outcome. Explicitly drawing on the MacPherson report into the murder of Stephen Lawrence,[155] it indicated that a lack of ethnic minority representation among NHS leaders and health decision-makers and a failure to engage with all service users and communities in Wales amounted to 'institutional racism'.[156] The report and the Welsh Government *Action Plan* based on it constitute a further important source of Welsh health values, foregrounding, as they do, active anti-racism over passive multiculturalism and attending carefully to the intersectional nature of discrimination in health, particularly as regards women of colour.[157]

150 Equality Act 2010, s 149.

151 See B Hepple, *Equality: The Legal Framework* (Hart 2014) ch 1.

152 M Honeyman et al, *Digital Technology and Health Inequalities: A Scoping Review* (King's Fund and Public Health Wales 2020); 'New agreement between WHO/Europe and Welsh Government launched to accelerate action on health equity' (WHO, 5 November 2011).

153 Welsh Government, 'Advancing gender equality in Wales plan' (March 2020); M S Jones, 'Neo-liberal feminism in Wales' in Evans et al (n 119 above) 27–42, 32; A Parken, 'Putting equality at the heart of decision-making, Gender Equality Review (GER) Phase One: International Policy and Practice' (Wales Centre for Public Policy, July 2018) 9.

154 Ogbonna et al (n 130 above).

155 Sir W Macpherson of Cluny, *The Stephen Lawrence Inquiry: Report of an Inquiry by Sir William Macpherson of Cluny* (The Stationery Office 1999).

156 Ibid [1]–[5], 6.1.

157 Welsh Government, *An Anti-racist Wales: The Race Equality Action Plan for Wales* (2021).

The three values picked out here – solidarity, sustainability and equality – do not exhaust the field of course. The familiar canon of autonomy, beneficence, non-maleficence and justice will no doubt feature too in coming discussions of ethical practice and law-making in a devolved Wales.[158] Indeed, we can be confident that they already do, as a result of shared British institutions (eg the General Medical Council) and curricula (eg in law schools and medical schools). Nor have we specified these three values in anything like the detail required for philosophical argument or legal reasoning. That will be an important task. But, as we have suggested, it is one which is beyond the scope of this article. Rather, we have used the discussion to suggest Welsh distinctiveness, on the one hand, and the variety of sources, past, present, legal, cultural, which might inform a more systematic study of values, on the other. In this respect we draw support from the work of Alasdair MacIntyre on metaethics.[159] For him, the labour of identifying, arguing about and changing values is one of engagement with tradition. Careful study of context, attending to the particularities of time and place, is essential to identifying or reconstructing an ethic. Like MacIntyre, we see tradition as anything but fixed, essentialist or uncritical. Nonetheless, like him we argue that the elaboration of values must start from somewhere at some time. As such, we diverge from those more universalist views on the source of values, associated with liberal bioethics, which dominated the writing of British medical law from the 1980s onwards.[160]

CONCLUSION

'For Wales, see England.'[161] The notorious entry in the *Encyclopaedia Britannica* has echoed through the legal disciplines until recently. In our case, an unacknowledged Anglo-British frame set the terms of scholarship in health law. The commonplaces that sustained the field, ideas of medical progress and tragic scarcity of resources, the gentleman practitioner, the sovereign patient and so on, drew on

158 See T Beauchamp and J Childress, *Principles of Biomedical Ethics* (Oxford University Press 2009).

159 A MacIntyre, *Whose Justice? Which Rationality?* (Duckworth 1988) 349ff. For an insightful introduction, see D Solomon, 'MacIntyre and contemporary moral philosophy' in M C Murphy, *Alasdair MacIntyre* (Cambridge University Press 2003) 152–175.

160 J Montgomery, 'Law and the demoralisation of medicine' (2006) 26(2) Legal Studies 185–210.

161 *Encyclopaedia Britannica*, 9th edn (1889).

a wider elite culture, specific to the UK in the post-war decades.[162] As we have suggested, those commonplaces can no longer be taken for granted. Their rhetorical potency is waning, the frame broken by constitutional, institutional and cultural developments. Devolution has seen the creation of four health systems in the UK, each subject to the direction of different political masters and administrative cadres, who are themselves accountable to four different polities. Diverse political and professional traditions in health have been revived, as shown by the emphasis on public health and non-market forms of care delivery in Wales. In place of a single UK health law, then, we can observe the emergence of separate corpora of Welsh, Scottish, Northern Irish and English legislation. Each is necessarily subject to interpretation and application in a distinct body of case law, regardless of jurisdiction. Of course, all four retain a considerable family resemblance, due not least to the continuing UK-wide application of key statutes, but also to the shared past of a common NHS and even longer-standing public health practices. Indeed, as COVID-19 has demonstrated, common health threats, porous borders and population mobility mean that significant overlaps in policy and law will continue to be essential to effective health promotion. Nonetheless, convergence and coordination will be achieved increasingly from four separate starting points, rather than being imposed from the centre.

The challenge for health law scholars at this juncture, we would argue, is threefold. First, in embracing this newly apparent plurality, they need to pursue careful analysis, synthesis and criticism of each body of statutes and relevant case law in its own terms and in comparative perspective with reference to developments across the UK, but also internationally. This will be essential as an aid to interpretation, a spur to law reform and a guide to citizens, professionals and policymakers seeking clarity as to rights, duties, powers and liabilities. Second, scholars will need to attend to jurisdictional disputes and overlaps, to tangled hierarchies and heterogeneous sources of norms which may impede both health promotion and the rule of law. The presence of 'jagged edges' arising from uneven or incomplete allocation of powers is likely to be an enduring phenomenon. Moreover, grasping these struggles exceeds the capacity of purely doctrinal methods. Socio-legal and law and humanities approaches will be indispensable in grasping the implications of normative pluralism and contested territoriality for British health governance. Third, renewed attention to values, their content and their relation to legal developments, will be required in order to give coherence to extant materials, as well as enabling evaluation and reform. We have suggested that such values are best

162 See further, Harrington (n 117 above) ch 1.

identified through engagement with inherited practices and traditions, as well as contemporary legal and policy materials. This is always an active, critical and contingent process, one encapsulated for our context in the words of historian Gwyn A Williams: 'Wales is an artefact which the Welsh produce. If they want to. It requires an act of choice.'[163]

163 Williams (n 133 above) 304.

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The law of bare life†

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ABSTRACT

2020 proved to be a remarkable year. Not the least remarkable was the realisation that, in a moment of perceived crisis, the instinctive response of the UK Government was to sweep away various so-called rights and liberties which might, in a calmer moment, have been presumed fundamental, and to rule by means of executive *fiat*. The purpose of this article is to interrogate both the premise and the consequence. Because, on closer inspection, there is nothing at all remarkable about how the Government reacted, for the same reason that there was little that was unprecedented about the experience of COVID-19. History is full of pandemics and epidemics, and government invariably acts in the same way. The first part of this article will revisit a particular theory of governance, again proved by history; that which brings together 'bio-politics' and the jurisprudence of the 'exception'. The second part of the article will then revisit a prescient moment in British history; another disease, another panicked government, another lockdown. In the third, we will reflect further on the experience of COVID-19 and wonder what might be surmised from our foray into the past.

Key words: Agamben; bio-politics; Schmitt; contagious diseases; COVID-19.

INTRODUCTION

As victory is proclaimed, however warily, in the 'war' against COVID-19, we are invited to reflect upon a very strange couple of years.[1] Of course, we could decline the invitation, as Dryden famously did of the 'great plague' of 1665. Preferring in his poem *Annus Mirabilis* to breeze over the buboes and focus on a series of naval victories over the Dutch. As for the 'Great' Fire of London, which followed very hot on the heels, an opportunity for the king to rebuild a city of 'more precious mould'.[2]

† First published in NILQ COVID-19 Supplement 72(S1) (2021) 186–211.

1 For a commentary on the deployment of militarised rhetoric to help regulate popular fears in moments of perceived crisis, see J Bourke, *Fear: A Cultural History* (Virago 2005) x–xi, and also 311.

2 J Dryden, '*Annus Mirabilis*' in K Walker (ed), *John Dryden: A Critical Edition of the Major Works* (Oxford University Press 1987) l.1169, at 69. There is brief allusion, at l.1066, to the 'spotted deaths' which preceded the fire, a divinely ordained punishment for the sin of regicide. Nothing more.

Samuel Johnson would later wonder at the tone, assuming that Dryden was just glad that things had not got worse.[3]

Less easy this time. A fascinated media, an enchanted populace, an economy laid waste, a death toll running to hundreds of thousands, and still climbing.[4] People will demand answers. A judicial inquiry into the handling of the COVID-19 crisis is scheduled for summer 2022. Whilst its ambit is still to be determined, it is reasonable to suppose that it will be mostly concerned with the evidence of assorted politicians and civil servants, along with myriad modellers, virologists and National Health Service (NHS) trust executives. All to tell their particular stories and, in many cases, make their excuses.[5] For which reason there will probably be a fair number of lawyers hovering in the background too.

There will be fewer historians and philosophers. Which is regrettable, because there are ways, other than the algorithmic, to model a crisis. There is human nature to be accounted, and there is the past. Both of which militate against the thought that we might be surprised by much of what has happened over the last year. If there is one thing which history tends to prove, time and again, it is the predictability of the allegedly unpredictable.[6] History is littered with pandemics

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3 At least not yet. By the time that *Annus Mirabilis* was rolling off the presses in early summer 1667, the Dutch had avenged the defeats of the previous year. Sailing up the Medway as far as Chatham, where the Royal Navy was in dock, having run out of money, and thus sailors, firing 13 warships and towing away the flagship *The Royal Charles*.

4 Precise numbers are difficult to discern. As to the overall economic cost, the Centre for Economics and Business Research estimated a drop in UK 'gross value added' of £251 billion for the year running from the first lockdown in March 2020. The official COVID-19 death-rate, as of May 2021, stands at 126,000. Though the figure remains highly contestable; for reasons to which we will return. No less elusive is the likely number of lives lost as a consequence of 'lockdown', which will be counted for years to come – damage to mental health, increased substance-abuse and alcoholism, cancelled elective surgery. NHS figures suggest 36,000 cancelled cancer operations alone over the 12 months from March 2020. For a sobering set of commentaries on the latter, see the special edition of the Journal of Public Health 42(4) published in December 2020, entitled 'The Collateral Damage of Covid-19'.

5 The evidence given to the Commons Science and Technology Select Committee by Prime Minister Johnson's former 'chief of staff', Dominic Cummings, on 26 May 2021, is suggestive. An opening apology followed by seven hours blaming everyone else.

6 See here, from the slightly different perspective, of anticipating financial crises, N Ferguson, *The Ascent of Money: A Financial History of the World* (Allen Lane 2008) 342–344.

and epidemics, from ancient times to modern.[7] In the second part of this article we will drop back a century-and-a-half to revisit one such moment; another disease, another panicked government, another overwrought lockdown.

In truth, we hardly need to go that far. In terms of debunking the myth of the unpredictable, a generation will do. COVID-19 is the third coronavirus to reach pandemic or epidemic proportions this century, to which can be added various other viral epidemics, most obviously influenza.[8] The chances of another was even gamed, to test our preparedness. Operation Cygnus, in 2016, concluded that the UK was ill-prepared to respond to a public health crisis of the kind which was, as many advised, 'inevitable'.[9] And so it proved. An early report from the National Audit Office, in May 2021, supposing that the often-frenetic response of Government through much of 2020 stemmed from a longer-term failure to build-in risk management 'resilience'. In the absence of which, Government was left 'firefighting' the crisis 'from day to day'.[10]

With consequences that were as predictable as the virus itself. Including the *de facto* suspension, by executive *fiat*, of various civil liberties and human rights which might, in a calmer moment, have been assumed to be 'fundamental'; from the right to protest, to the right to see family, to the right to sit on a park bench with a takeaway coffee. All very strange, dystopian indeed. But, again, no surprise. It is what government always does because it is never prepared, and it always panics. And then, in the absence of any planned mitigation, resorts to measures designed to reduce public life to its barest state. For however long it takes.

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7 See L Moote and D Moote, *The Great Plague* (Johns Hopkins University Press 2004) 5–10, 271–278, noting the prevalence of plagues through history. And also the tendency of each generation to assume, for reason of 'unprecedented' scale, that their plague was somehow 'greater' than any that had gone before.

8 After SARS and swine flu, in 2003 and 2009–2010 respectively.

9 Cygnus was gamed for a flu pandemic. On the inevitability of a viral pandemic in the 'near' future, see L Borysiewicz, 'Plagues and medicine' in J Heeney and S Fridemann (eds), *Plagues* (Cambridge University Press 2017) 85.

10 National Audit Office (NAO), 'Initial learning from the government's response to the Covid-19 pandemic', published 19 May 2021, at 32. Amongst the most significant consequences of the lack of planning, the NAO noted, were: a failure to identify those in greatest need of shielding; the consequence of mass disruption of schooling; absence of ready facilities to administer employment support; lack of mechanisms to provide emergency financial support for local authorities; the likelihood of fraud in loan administration and public procurement contracts; and tensions in the relationship between the NHS and social care services.

BIO-POLITICS AND BARE LIFE

Before we revisit our particular history, of lockdown in Victorian England, we might contemplate some of the philosophical implications of this 'bare' life. In order to do so we will need to situate it within the broader compass of what has become known as bio-politics. After which we will turn our closer attention to the jurisprudential corollary of life lived barely.

Bare life

The idea of 'bare life' is the focus of Giorgio Agamben's *Homo Sacer*, posited as the alternative to what might be variously termed the 'political', or even the 'good', life. A polarity which Agamben retrieves from classical Greece, but which finds a more modern articulation in the first volume of Michel Foucault's *History of Sexuality*. A concern with existence as simply that. There is an immediate resonance with Hobbes's idea of 'natural man', who contracts his way into a more secure political state. We will return to Hobbes shortly. As we will Agamben. For now, though, we should take a closer look at Foucault's variant. For which reason we must also, as a necessary preliminary, contemplate his theories of disciplinary power, and the relation of knowledge and power. The aligned 'techniques', as he termed them, of modern 'governmentality'.[11]

Something which has, of course, a facilitative and a constitutive dimension. In the final part of the first volume of the *History of Sexuality*, Foucault identified the seventeenth century as the moment when politics turned its attention to 'disciplining' the 'body as a machine'. After which it evolved into a closer interest in the 'mechanics of life' and 'biological processes'. A 'series of interventions and regulatory controls: a biopolitics of the population'.[12] The purpose of which was to control not just the quality of life, but the extent and the 'utility'.[13] Amongst the many things born during the 'classical period', by which Foucault means the Enlightenment, is the idea of 'public' health.[14]

Something else, is the prison. The subject of what is perhaps Foucault's most renowned piece of sociological history, *Discipline and Punish*. Looking for a definitive expression of modernity's aspiration to 'discipline' the 'body', Foucault alighted on Jeremy Bentham's

11 M Foucault, *The History of Sexuality: Volume 1* (Penguin 1990) 141.

12 Ibid 139. For a comment on the significance of this moment in the evolution of Foucault's thinking and the development of 'bio-politics' as critique, see B Golder and P Fitzpatrick, *Foucault's Law* (Routledge 2009) 21.

13 Foucault (n 11 above) 144.

14 For the purpose, Foucault argues, of servicing emergent capitalism. See ibid 140.

'Panopticon'.[15] In its refined form a penitential model, though conceived to be of broader application across a range of public 'spaces'. Hannah Arendt famously extended the logic to the concentration camp.[16] Factories too, schools and monasteries, and, of course, hospitals.

It is no coincidence that Foucault came to the Panopticon whilst searching for the origins of an institution which was designed for the express purpose of regulating 'public health'; the mental 'hospital'. In the second part of this article, we are going to focus our attention more closely on the emergence of certain public health 'techniques' in the nineteenth century; designed more closely still to 'discipline' instances of sexual 'irregularity'. For present purposes, though, we might revisit what Foucault had to say about the 'bio-politics' of plague. Because it was here that he located the immediate stimulus for the development of these associated 'public' health 'techniques'.

Along with leprosy. The critical difference being that where lepers were cast out, plague victims were locked in the 'confused space of internment'.[17] Which, at once, made dealing with plague not just a medical issue, but a political and geographical one, necessitating, if it is to be effective, a common 'disciplinary' endeavour, scientific and juridical.[18] As he observed in *The Birth of the Clinic*, a 'medicine of epidemics could exist only if partnered by a police'.[19] And it had to be effective; the acid test of the 'disciplinary' state. Not just any 'public' health crisis; but the definitive crisis. Which that state, if it is to retain any credibility in terms of securing its citizenry, must be able to resolve. Whatever it takes.

There was, then, a common denominator between these different 'disciplinary' institutions. Each sought to internalise an 'other'. Whereas, in centuries past, they might be cast out, returned to their 'natural' status, literally an 'out-law', in modernity the plague-ridden are now retained within the disciplinary 'gaze' of the state.

15 M Foucault, *Discipline and Punish: The Birth of the Modern Prison* (Penguin 1977) 195–228.

16 The definitive statement is found in H Arendt, *The Origins of Totalitarianism* (Harcourt Brace Jovanovich 1973) and *Eichmann in Jerusalem: A Report on the Banality of Evil* (Penguin 2006). A further commentary, on point, is H Arendt, 'Social science techniques and the study of concentration camps' (1950) 12(1) Jewish Social Studies 49–64. For Agamben's intimation, see G Agamben, *Homo Sacer* (Stanford University Press 1998) 119–120, 166–168.

17 See Foucault (n 15 above) 232–2, and also *History of Madness* (Routledge 2009) 5–6.

18 Foucault (n 15 above) 172–173, 183–185. See S Elden, 'Plague, panopticon, police' (2003) 1(3) Surveillance and Society 240, 241–243; and also M Wagner, 'Defoe, Foucault and the politics of plague' (2017) 57 Studies in English Literature 501, 502–503.

19 M Foucault, *The Birth of the Clinic: An Archaeology of Medical Perception* (Routledge 1973) 25.

[20] Returned to the condition of 'bare life', perhaps. But not cast-out, at least not in the prosaic sense. Agamben cites the original idea of *homo sacer* in 'archaic' Roman law; the 'sacred man' who 'may be killed and yet not sacrificed'.[21] Still within the ambit, but reduced to nothing.

The facilitative and constitutive dimensions of bio-political 'technology' are, of course, mutually sustaining. It is not just the body which is 'disciplined'. So too is the 'mind'.[22] The mentally ill 'cured', the criminal 're-formed'. Something which brings us to Foucault's writings on the relation of knowledge and power, and the idea of 'governmentality'.[23] The ways in which government permeates the subject.[24] There is, as Foucault argued at the outset of *Discipline and Punish*, 'no power relation without the correlative constitution of a field of knowledge, nor any knowledge that does not presuppose and constitute at the same time power relations'.[25] Modern government is not simply a set of functioning institutions. It is far subtler, a series of interlinking and constantly mutating 'networks of power'.[26] Their movements oiled by discursive tensions which are themselves constantly mutating, with varying degrees of violence; the 'battle among discourses', for the privilege of telling the 'truth'.[27]

Plenty here for jurists to contemplate of course.[28] Not least the suggestion that the 'domain of law' should be 'viewed' henceforth 'not in terms of a legitimacy to be established, but in terms of methods of subjugation that it instigates'.[29] The very 'idea of justice in itself is an idea which in effect has been invented and put to work in different

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20 See Foucault (n 17 above) 439–442, discussing the like treatment of the mad and the criminal.

21 Agamben (n 16 above) 8, 71–78, 104–105.

22 See Elden (n 18 above) 248–249.

23 Again introduced at the close of the first volume of *Sexuality*, Foucault (n 11 above) 143–144.

24 See Golder and Fitzpatrick (n 12 above) 31, suggesting that 'governmentality' can be seen as a disciplinary precursor of 'bio-politics'.

25 Foucault (n 15 above) 27.

26 See M Foucault, 'Politics and the study of discourse' in G Burchell et al (eds), *The Foucault Effect: Studies in Governmentality* (Harvester 1991).

27 In A Sheridan, *Michel Foucault: The Will to Truth* (Tavistock 1980) 134. See also A Hunt and G Whickham, *Foucault and Law: Towards a Sociology of Law as Governance* (Pluto 1994) 11–14.

28 Even if Foucault seemed reluctant to describe a comprehensive legal philosophy. More a case of recovering 'fragmentary reflections on law', according to Golder and Fitzpatrick (n 12 above) 2–4, and also 17. For a comment on Foucault's resistance to prescriptive theory, see J Miller, *The Passion of Michel Foucault* (HarperCollins 1993) 200–202.

29 M Foucault, 'Two lectures' in C Gordon (ed), *Power/Knowledge: Selected Interviews and Other Writings 1972–1977* (Harvester 1980) 96.

societies' as the 'instrument' of particular interests.[30] To 'arrange things in such a way that, through a certain number of means, such and such ends may be achieved'. Law as a classical 'technology' of power.[31] Politics in the raw.

At this point we might return to Agamben, broadly accepting Foucault's 'genealogy'. First, the confirmation of 'bio-politics' as the grounding idea, and experience, of modernity; the 'growing inclusion of man's natural life in the mechanisms and calculations of power'.[32] Second, the confirmation of the broader sweep; of the dissonance in modernity between 'bare', and what he prefers to term 'good', life.[33] Here, though, Agamben stretches the thesis. So that 'bare life' is not simply reserved for the identifiable 'out-law'. But becomes definitive of politics more generally. A 'regression', as Foucault intimates, from the aspirations of Aristotelian political ethics.[34] A politics that 'knows no value ... other than life' itself.[35] Life lived at its barest, the ultimate Benthamite calculus, concerned not with what is 'right', still less the 'good' or the joyous. Merely with the 'health', the functionality, of the 'body'. The desire to live crushed by the 'sacredness of life', as Walter Benjamin would later put it.[36] In his *Rime of the Ancient Mariner,* Bentham's contemporary, Samuel Taylor Coleridge, termed it 'life-in-death' and represented it in the shape of a plague-ridden 'spectre-bark'.[37]

Here again we are brought back to the relation of knowledge and power, the ability to 'discipline' the political mind. Each society has its own composite 'regime of truth', fashioned by its discursive 'networks', purposed to enhance compliance.[38] And a corresponding, and elided, discursive regime of fear. The consequence of this is plain enough. It might be a fear of a warring neighbour, or some murderous terrorists,

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30 M Foucault, 'Debate with Chomsky' in P Rabinow, *The Foucault Reader* (Pantheon 1984) 6.

31 Foucault (n 26 above) 95. See Hunt and Whickham (n 27 above) 40–42.

32 Agamben (n 16 above) 119–120, approving the sentiment of Foucault in *Sexuality* (n 11 above) 145.

33 Agamben (n 16 above) 7–10.

34 Foucault (n 11 above) 145

35 Agamben (n 16 above) 10.

36 *Zur Kritik der Gewalt*, discussed in *Homo Sacer*, Agamben (n 16 above) 66.

37 In S Coleridge, *Complete Poetical Works* (Oxford University Press 1969), lines 193, 202, at 194–5. For a discussion of Coleridge's implicit critique of Benthamism and his use of the plague metaphor in the *Rime*, see D Lee, 'Yellow fever and the slave trade: Coleridge's *The Rime of the Ancient Mariner*' 65 (1998) English Literary History 675, 686–687; and I Ward, 'A painted ship and a painted ocean: *Gregson v Gilbert* revisited' in C Battisti and S Fiorato (eds), *Law and Humanities: Cultural Perspectives* (DeGruyter 2019) 243–244.

38 Foucault (n 29 above) 121.

or a nasty virus. But there will always be a fear of something, and we have to be afraid, terrified of the 'spectre'.[39] Otherwise there is no need for a state, at all. As Hobbes noted. It is why individuals are prepared to covenant their natural liberties to a 'sovereign', in return for the promise of security and a set of relatively constrained 'civil liberties'.[40] Which might, at any given moment, be suspended or abrogated, and which brings us to the idea of the 'state of exception'.

States of exception

Homo Sacer serves as a groundwork for an essay which Agamben published eight years later, *State of Exception*.[41] The title is intended to resonate with the writings of the controversial Nazi *kronjurist* Carl Schmitt. Schmitt first ventured a nascent theory of the 'exception' in his essay *On Dictatorship* in 1921. But it found fuller expression, the following year, in *Political Theology*. The opening line of which read 'Sovereign is he who decides on the exception.'[42] Schmitt thinks of it as a stress-test. When, in a moment of 'conflict', the relative strength of a sovereign-state is discovered. It does not, therefore, describe a moment of anarchy, a return to the Hobbesian 'state of nature'. Quite the opposite. 'There is no rule that is applicable to chaos.' It is, rather, a 'rule' designed to determine the stress. Which makes it an ultimate constitutional rule; the 'moment' indeed where a constitution 'proves' itself:

> The exception is that which cannot be subsumed; it defies general codification, but it simultaneously reveals a specifically juridical formal element: the decision in absolute purity. The exception appears in its absolute form when it is a question of creating a situation in which juridical rules can be valid.[43]

The power to make the determinative 'decision', to reshape 'juridical regulation' in the critical moment, thus defines sovereignty in 'absolute purity'.[44] An evident, and not coincidental, resonance with Foucault's idea of 'disciplinarity', and the incarceration of the 'out-laws'. Cast outside, but also kept within the 'framework of the juristic'.[45]

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39 See Bourke (n 1 above) 1, 24.

40 Agamben (n 16 above) 104–109. For a comment on this parallel, in the closer context of Foucault's writings on plague, see Wagner (n 18 above) 511.

41 G Agamben, *State of Exception* (Chicago University Press 2005). Originally published in Italy in 2003.

42 C Schmitt, *Political Theology* (MIT Press 1985) 5.

43 Ibid 16.

44 Schmitt quotes Kierkegaard: 'The exceptional will place everything in a much clearer light than the universal itself.' See Ibid 12–14, further discussed in Agamben (n 16 above) 16.

45 Schmitt (n 42 above) 13.

Agamben, interestingly, is reluctant to draw such bright lines. The 'state of exception is neither external nor internal to the juridical order'. For which reason the 'problem of defining it concerns precisely a threshold', where 'inside and outside do not exclude each other but rather blur with each other'.[46] The critical insinuation here being that the 'state of exception' cannot, *contra* Schmitt, be said to be securely embedded within the law. It is, in fact, a state of political 'force', the 'violence' of which is obfuscated.[47] Deliberately. Commonly by means of a sustaining, and suitably terrifying, rhetoric of 'necessity'.[48] How sharply we appreciate that this 'necessity' is a matter of impression will depend on how scared we are by the projected threat to our security. By the perception of '*tumultum*'; which is not just how scared we might be, but how scared government is that we are not as scared as we need to be.[49] The 'battle of discourses'.

There is a temptation to assign Schmitt's thesis, in turn, to history. Consonant with a peculiarly dark moment, to find a shocking realisation in the experience of Nazism.[50] A temptation both enhanced, and undercut, by his broader discussion of alternative theories of dictatorship. We noted before that Schmitt had advanced a preliminary version of his theory of the 'exception' in his earlier *On Dictatorship*. In which he suggested that there were two kinds of dictatorship; the 'commissarial' and the 'sovereign'. The first suspends the ordinary rule of law for the period of an identifiable crisis. The latter has a more permanent form; in effect making rule by executive 'decision' the norm.[51] As we search for resonances with the 'force' of law in 2020, the distinction necessarily intrigues.

Not least because, as Agamben argues, liberal democracies are not immune from dictatorial governance. There is, on the contrary, an 'inner solidarity between democracy and totalitarianism', which 'legitimates' necessary moments of 'violence'.[52] What we might know, more familiarly, as majoritarian tyranny. The tendency of 'democratic' politics to seek refuge, in moments of crisis, in the seeming security of 'absolute' executive governance. With the cultivated support of a

46 Agamben (n 41 above) 23.

47 Ibid 50–1, 53, 62.

48 Agamben (n 41 above) 24–26, 30.

49 Ibid 42–43.

50 For a commentary on Schmitt and Nazism, see J Bendersky, 'The expendable *Kronjurist*: Carl Schmitt and National Socialism 1933–36' (1979) 14 Journal of Contemporary History 309–328; and also G Schwab, 'Schmitt scholarship' (1980) 4 Canadian Journal of Political and Social Theory 149–155.

51 The distinction is discussed by Agamben in *Homo Sacer* (n 16 above) 38, and *State of Exception* (n 41 above) at 33–36. For further commentary, see G Schwab, *The Challenge of the Exception* (Greenwood 1979) 30–37.

52 Agamben (n 16 above) 10.

suitably terrified populace. A thesis which Schmitt advanced in a series of essays prophesying the failure of Weimar Germany; and the ease with which liberal democracy can mutate into 'sovereign' dictatorship. Most notably, perhaps, *The Crisis of Parliamentary Democracy*.[53] In which he argued that the Weimar 'crisis' was endemic, and could only be resolved by a fundamental rewriting of the Constitution.[54]

A good point, perhaps, for us to revisit a rather different moment, and a particular text, which fascinated Schmitt.[55] And fascinates Agamben.[56] The publication of Thomas Hobbes's *Leviathan* in 1650. A specific response to the establishment of the English Republic a year earlier, inaugurated with a spectacular 'act of violence', the execution of King Charles I. And a tacit re-constitution.[57] In autumn 1650, the new Republic imposed a fresh Oath of Engagement, demanding the fidelity of all citizens, in return for which, it would re-secure their civil rights. Hobbes wrote *Leviathan* to give a generation of distressed property-owning royalists the excuse they needed. Hardly the first usurpation in English history, Hobbes reminded his readers. Hardly the first re-constitution either, or the first time a new oath had been designed to supersede a former. The birth of legal positivism, delivered of a very chill pragmatism.

And suggesting another pathology. In which all states are constituted by recurring moments of violence and 'exception'. And another, more famous still, in which all citizens are hauled out of their original 'state of nature', and then contract away their liberties in return for the protection of a sovereign. Taking a longer glance back through the history of political thought, Agamben wonders, along with Foucault, if this was the moment when the philosophy of the 'good life' was

53 See C Schmitt, *The Crisis of Parliamentary Democracy* (MIT Press 1988) 14–17, arguing that the essence of democracy is identity rather than liberty; for which reason there is nothing incompatible between democracy and dictatorship.

54 Schmitt had in mind Article 48 of the Weimar constitution, which reserved the authority to determine a moment of 'exception' to the Reich President. A power which was immediately compromised by the need for parliamentary approval. A fatal weakness, he suggested, common to liberal democracies. Schmitt (n 42 above) 11. For further commentary on Schmitt and Article 48, see Schwab (n 51 above) 37–43.

55 Schmitt (n 42 above) 33. The idea that he might be thought the 'Hobbes of the twentieth century', as George Schwab has supposed, would accordingly have appealed. See Schwab, 'Introduction' to *Political Theology* (n 42 above) at xiv.

56 Agamben (n 16 above) 106–109, discussing the 'state of nature' as a 'state of exception'. A subject which Agamben has treated at greater length in a short essay on revolution entitled *Stasis: Civil War as a Political Paradigm* (Edinburgh University Press 2015), concluding, at 34–35, that the entire philosophy of *Leviathan* is that of disciplining the 'body'.

57 A formal reconstitution would only come in December 1653, with the enactment of the Protectoral Instrument of Government.

abrogated.[58] When the 'sovereign' state took over from God's divinely ordained 'lieutenant' as the guarantor of 'bare life'. Benjamin's thesis again. And Schmitt's. We might note the specific title of *Political Theology*. The 'theory' of the modern state as a secular 'theology', replete with an 'omnipotent' sovereign in place of an 'omnipotent' God.[59] Concerned with our well-being only insofar as it consolidates our obedience.

Something, again, for us to ponder, as we take the rather shorter glance back through the history of 2020. The threat is, of course, different. In 1650 it was fear of God which animated the 'exceptional' moment. What drove Schmitt's Germany towards Nazism was a fear of Jews.[60] For us, in summer 2020, it was fear of a virus; or, more particularly, the possibility that it might overwhelm our public health services. We are about to drop back a century-and-a-half to revisit another resonant moment, another disease and another panicked government. But before we do so, we might note the presence of a familiar visitor to our history. The person who awaits us, indeed, in the first pages of *State of Exception*.

There is no surprise in discovering that Agamben posits the alleged terrorist as the epitomic *homo sacer*, counter-terrorist 'law' as a classic example of 'exceptional' law. The inmates of the concentration camp established at Guantanamo Bay in early 2002 finding themselves in the much the same position as the inmates of Auschwitz and Buchenwald. Where 'bare life reaches its maximum indeterminacy'. The familiarly 'disquieting' presence placed outside the law, and within. It is difficult to imagine a more striking example of what Agamben terms the 'empty centre' of liberal legalism, the 'space of exception', where ideas of 'right' and the rule of law have no meaning.[61]

A metaphor which resonates very obviously with that deployed by Lord Steyn in his caustic denunciation of Guantanamo. A 'black hole', a place of such magnetic power that nothing can escape, and from which no one can be retrieved, an 'utterly indefensible' affront to the

58 Along with Leo Strauss too: see his *The Political Philosophy of Thomas Hobbes: Its Basis and its Genesis* (Chicago University Press 1963) xvi, 108, 129–130, 158–161. For Agamben's surmise (n 16 above), see 106–113.

59 Schmitt (n 42 above) 36.

60 The 'enemy', upon whom Schmitt, with a sad predictability, turned in 1935, coming out in support of the Nuremberg Laws. In his later writings, Schmitt dwelt at length on politics as the 'concrete' engagement of 'friend' and 'enemy'; again deriving inspiration from Hobbes. See C Frye, 'Carl Schmitt's concept of the political' (1966) 28 Journal of Politics 813–830; and also Schwab (n 51 above) 51–5, 134–138.

61 Agamben (n 16 above) 131, and (n 41 above) 3–4.

collected principles of due process, human rights and the rule of law.[62] Rhetoric echoed in courtrooms on both sides of the Atlantic. Justice Stevens, for example. In the case of *Boumediene v Bush*, confirming that the provisions of the US Constitution were precisely 'designed to survive, and remain in force in extraordinary times'.[63] Lord Hoffmann in the case of the 'Belmarsh detainees', suggesting that the 'real threat to the life of the nation' was the pretence that terrorism justified the suspension of basic civil liberties and human rights.[64]

In his seminal discussion of the 'rule of law', Lord Bingham likewise posited counter-terrorist 'law' as a defining example of executive over-reach. The sharpest representation of the 'encroachment by the state into what had been regarded as the private domain of the citizen'.[65] Reaching back into history for a couple of prescient cautions, Bingham alighted on John Selden and Thomas Jefferson. In the former case, speaking to Cicero's supposition that the priority of government must be the 'security' of its citizens. There was 'not any thing in the world more abused than this sentence'. It was Selden who drafted the Petition of Right in 1628, to counter the despotic aspiration of Charles I.[66] And Jefferson who re-drafted it a century-and-a-half later, to shape a nascent American Constitution.[67] He 'who would put security before liberty deserves neither'.[68] Thomas Jefferson was not inclined to live life barely.

LIFE IN BABYLON

Time now for our piece of historical modelling. In summer 1885, a series of articles appeared in the *Pall Mall Gazette* entitled *The Maiden Tribute to Modern Babylo*n. The author was an investigative journalist named William Thomas Stead. The *Maiden Tribute* was about the

62 J Steyn, 'Guantanamo Bay: the legal black hole' (2004) 53 International and Comparative Law Quarterly 1–15.

63 553 US 723 (2008). Quoted in T Bingham, *The Rule of Law* (Penguin 2010) 149.

64 *A v Secretary of State for the Home Department* [2004] UKHL 56, paras 36, 97, 222, 226. For commentary, see A Tomkins, 'Readings of *A v Secretary of State for the Home Department*' (2005) Public Law 259, 263–264; and T Poole, 'Harnessing the power of the past? Lord Hoffmann and the *Belmarsh Detainees Case*' (2005) 32 Journal of Law and Society 534–561.

65 Bingham (n 63 above) 157.

66 Selden was one of a number tasked by the House of Commons with drawing up a petition of 'grievances'. Foremost of which was the attempt to raise 'ship money' tax by prerogative, an emergency justified by the fact that there were a lot of 'pirates' about. As was usually the case.

67 For a discussion of Jefferson's influence on the drafting of the American Constitution, see L Kaplan, 'Jefferson and the Constitution: the view from Paris 1786–89' (1987) 11 Diplomatic History 321–335.

68 Bingham (n 63 above) 136.

'horrible realities' of child prostitution in the capital. Various accounts, including one in which Stead was able to 'purchase' a thirteen-year-old girl for just £5. A publishing sensation; ratcheted by Stead's assurance that his next scoop would be about 'Princes of the Blood'. Two days after the appearance of the first of Stead's articles, it was reported that 250,000 were gathered in Hyde Park demanding that the government do something. Josephine Butler sensed 'revolution'.[69] The Home Secretary wrote to Stead begging him to stop. W H Smith, presently Secretary of State for War, pulled the *Gazette* from his news-stands. Too little, far too late.[70]

Dr Acton's suspicions

There was nothing unusual in what Stead had done. Identify a 'scare' and work it; the gist of tabloid journalism.[71] And Victorian England was rarely without a workable 'scare'. Rarely without a rampant disease either; typhoid, tuberculosis, cholera, scarlet fever, whooping cough. Fortunately, it had lots of doctors and scientists. Some were brilliant. John Snow, who traced the cause of the 1854 cholera outbreak in London. William Budd who developed the theory of 'contagious' disease. Joseph Bazalgette, an engineer by training, who built the sewer network that would dramatically reduce the spread of cholera. Their brilliance has endured. That of others has not. Take, for example, William Acton. In his particular moment perhaps the most famous doctor in England, and the most dangerous. William Acton specialised in sexual diseases.[72] In so doing, engaging an area of medicine which fascinated his contemporaries, and sold a lot of books.

Long books, with very long titles. Such as *The Functions and Disorders of the Reproductive Organs in Childhood, Youth, Adult Age, and Advanced Life: Considered in their Physiological, Social, and Moral Relations*, published in 1862. The second last word is

69 Quoted in J Walkowitz, *Prostitution and Victorian Society: Women, Class, and the State* (Cambridge University Press 1980) 246.

70 Doubts as to the veracity of some of Stead's accounts would only later emerge. See S Robinson, *Muckraker: The Scandalous Life and Times of WT Stead* (Robson 2012) chs 6 and 7.

71 See here Bourke (n 1 above) xi, and 326–230, noting the prevalence of child-abuse 'scares' in modern journalism.

72 He had trained as a gynaecologist in Paris. It has been suggested that much of Acton's writing on prostitution and sexually transmitted diseases was derivative, taken from Duchatelet's *De la prostitution dans la ville de Paris*, published in 1836. For an overview of Acton's career, and reputation, see I Crozier, 'William Acton and the history of sexuality' (2000) 5 Journal of Victorian Culture 1–27. For a broader commentary on the coincidence of science and sexuality 'scares' in Victorian England, see E Rosenman, *Unauthorized Pleasures: Accounts of Victorian Erotic Experience* (Cornell University Press 2003) 28–32.

worth noting. In the main a treatise about masturbation; Acton's more particular fascination. But not his only one. Another, first published five years earlier, was *Prostitution Considered in its Moral, Social, and Sanitary Aspect, in London and Other Large Cities and Garrison Towns, with Proposals for the Control and Prevention of Attendant Evils*. We might spot the same word here, the fifth. A few other words too; garrison, control and evils. We will return to these shortly. In sum, William Acton viewed prostitution as a peculiarly dangerous form of sexual 'incontinence'. A 'revolting irregularity'.[73] Which needed to be regularised.

Hardly, in the moment, an unusual view. An 'erotic age of anxiety', it has been said; the anxiety being mostly discovered in the behaviour of women.[74] A land of 'falling angels', it was commonly surmised. None of whom fell quite so far as the prostitute or represented quite such a threat to political, and moral, order.[75] The 'darkest, the knottiest, and the saddest' of social problems, according to the social critic William Rathbone Greg.[76] Writing at the close of the century, Havelock Ellis would confirm that it was a 'remarkable fact that prostitutes exhibit the physical and psychic signs associated usually with criminality in more marked degree than even criminal women'.[77] Gladstone famously spent his evenings wandering the streets of London trying to retrieve 'falling' women. As did Dickens, who devoted much of his spare time to running a prostitute refuge in Shepherd's Bush.[78] Dickens assumed a less censorial perspective, even supposing that a prostitute might be reformed, by training her up in an alternative profession, and showing some kindness.

Acton was not so sure. And certainly not inclined to take any risks. Prostitution represented an existential threat to the health, physical and moral, of the nation. And its empire; something to which we will

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73 W Acton, *Prostitution Considered in its Moral, Social, and Sanitary Aspects* (John Churchill 1870) 449. The second edition essentially expands the first, incorporating additional 'observational' material. References are to this edition, unless otherwise stated.

74 See Rosenman (n 72 above) 7.

75 See M Wiener, *Reconstructing the Criminal: Culture, Law and Policy 1830–1914* (Cambridge University Press 1994) 16–17.

76 From his essay 'Prostitution', published in the Westminster Review in 1850. Quoted in I Ward, *Sex, Crime and Literature in Victorian England* (Hart 2014) 121.

77 H Ellis, *The Criminal* (Scribner 1890) 221. Quoted in Wiener (n 75 above) 239.

78 Urania Cottage, funded by his then friend Angela Burdett Coutts, the fabulously wealthy heir to the Coutts banking fortune. They would later fall out spectacularly, when it was discovered that Dickens had been conducting a decade-long affair with a young actress named Ellen Ternan. Coutts switched her philanthropic energies to the British Goat Society and the funding of various overseas bishoprics.

turn shortly. 'What', the doctor wondered, 'is a prostitute?' A question to which he already knew the answer:

> She is a woman who gives for money that which she ought to give only for love; who ministers to passion and lust alone, to the exclusion and extinction of all the higher qualities … She is a woman with half a woman gone, and that half containing all that elevates her nature, leaving her a mere instrument of impurity; degraded and fallen she extracts from the sin of others the means of living, corrupt and dependent on corruption, and therefore interested directly in the increase of immorality.[79]

We might note this word again, albeit in the negative key; immorality. Acton did not see himself as just another scientist, or indeed just another essayist. He was a guardian of the nation's morals, a sage, of the foreboding, and indeed forbidding, kind. A curator too, it has been supposed, of the composite 'mythologies' and misogynies of Victorian England.[80] Which convinced him that the real reason why women turn to prostitution has nothing to do with sex; being rarely 'troubled with sexual feeling of any kind'. And everything to do with venality. The 'natural instinct, the sinful nature' of women, 'idleness, vanity, and love of pleasure'.[81]

An insight gained from another of Dr Acton's interests, in literary criticism. Very evident in the first edition of *Prostitution Considered*.[82] Replete with long passages on the dangers of reading novelists who empathise with these 'instincts'. Such as Dickens, whose depiction of Nancy's death in Oliver Twist had apparently brought a young Queen Victoria to tears. Acton preferred the manlier reflections of Pope and Tennyson. Pope knew a 'harlot' when he saw one, incapable of 'one gen'rous Thought'.[83] Tennyson too:

> She like a new disease, unknown to men,
> Creeps, no precaution used, among the crowd,
> Makes wicked lightenings of her eyes, and saps
> The fealty of our friends, and stirs the pulse
> With devil's leaps, and poisons half the young.[84]

A pointed, and prescient, metaphor.

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79 Acton (n 73 above) 166.

80 M Spongberg, *Feminizing Venereal Disease: The Body of the Prostitute in Nineteenth-century Medical Discourse* (New York University Press 1997) 46.

81 Acton (n 73 above) 165.

82 See Walkowitz (n 69 above) 46.

83 A Pope, *To a Lady*, from *Moral Essays*. Quoted in S Claggett, 'Victorian prose and poetry: science as literature in William Acton's *Prostitution*' (2011) 33 Prose Studies 19, 28.

84 A Tennyson, *Idylls of the King*, 'Guinevere', lines 514–518, quoted in Acton (n 73 above) 166.

Less literature in the second edition of *Prostitution Considered*, less need. By now Acton had seen it all himself, days spent in the company of police officers checking out brothels and chatting with 'local government medical officers'. The 'fervent imagination' replaced by 'hard memory', a 'corroborative evidence' that was overwhelming.[85] And which left the doctor with just one compelling recommendation. Eschewing the possibility that prostitution might be eradicated by persuasion, Acton advised a strategy of surveillance and regulatory intervention.[86] In practical terms, targeted lockdowns, reinforced by criminal law. We might term it 'whack-a-mole'. He termed it 'recognition': 'Any scheme of legislation, having for its object the regulation of prostitution, must have as its starting point the recognition of it as a system.'[87]

Not always easy, especially with prostitutes of the asymptomatic variety; 'clandestine', as Acton termed them.[88] Still out, wandering the streets, when they were supposed to be inside, isolating. Which is why strategies of 'recognition' were so important; testing and tracing. To discover the most morally corrupted, the most sexually deviant and, for reasons of their dissimulation, the most dangerous and the most needing of regulation. The subject of the first volume of Foucault's *History of Sexuality*. The application of 'techniques' originally used in response to plague epidemics now repurposed to regulate sexuality.[89] Discursive as well as structural, for 'power's hold on sex' more generally 'is maintained through language, or rather through the act of discourse that creates, from the very fact that it is articulated, a rule of law'.[90] In its 'purest form', this power finds expression in legislative interventions intended to control sexual activity.[91]

Which is where Acton came in. Not because he was intrinsically brilliant, or indeed the converse. But because, as a 'man of science', he lent validity to the 'official fantasy'.[92] One of the emergent breed of 'doctor-judges' identified by Foucault. Working the illusion that they knew the 'truth', about sex and everything else that seemed to be going wrong. He certainly seemed to know lots about masturbating teenagers, and 'degraded' prostitutes. And numbers. Acton was also an

85 Not that overwhelming in truth. In terms of 'hard' evidence, just the testaments of a couple of police officers and some anecdotal conversation. See Acton (n 73 above) 71.

86 See S Marcus, *The Other Victorians: A Study of Sexuality and Pornography in Mid-nineteenth-century England* (Transaction 2009) 3–4.

87 Acton (n 73 above) vii–iii, 99.

88 Ibid 155–160.

89 Foucault (n 11 above) 3–8, 17.

90 Ibid 83.

91 Ibid 25, 33.

92 See Marcus (n 86 above) 1–2

early-day 'modeller'. Of the revisionist kind. Estimates for the number of prostitutes working in London, or anywhere else in England, at the time, were necessarily hazy. The Society for the Suppression of Vice suggested around 80,000 in the capital. A figure accepted by *The Lancet*. And by Acton. The lower limit, suggested by the Metropolitan Police, was nearer to 8,000. Which might have gained something in reassurance, but lost much in terms of titillation.

Another to prefer the upper limit was Bracebridge Hemyng. The young barrister, and later short-story writer, invited by Henry Mayhew to write an appendix on 'Prostitution' for the second edition of his *London Labour and the London Poor*, published in 1861. Hemyng knew how to paint a lurid picture, of East End streets teeming with child prostitutes, destined to contract a venereal disease within a 'week or two' of being pimped on the streets.[93] A prologue to Stead's *Tribute*. As to numbers, Hemyng went for the 80,000 option. At least. It is 'not improbable that it is below the reality rather than above it'. All his readers needed to know was that the 'magnitude' was truly 'frightful'.[94]

Hemyng was another of the new 'judges of normality', like Acton. For reason of their self-certified expertise, invited to assume a quasi-executive role in the 'discipline' of modern government.[95] Acton likened himself to the 'mysterious medicine man of yet wilder tribes', necessarily 'aloof from the life' of ordinary folk.[96] And thus best positioned to discipline them. Very much like Dr Hans Reiter, editor of a collection of essays entitled *State and Health*, published in 1942. Another expert in sexually transmitted diseases, chief medical officer for Mecklenberg-Schwerin, who spent most of the Second World War torturing inmates at Buchenwald concentration camp.[97] Reiter was quite sure that the greater responsibility of medicine was to serve the state, for the 'greater health of the people'. The epitome of the bio-politician it might be said. It is by Agamben. His workplace the 'fundamental biopolitical paradigm'.[98] The place where, to borrow again from Foucault, the 'strangers' are determined, and then

93 B Hemyng, 'Prostitution in London' in H Mayhew, *London Labour and the London Poor* (Penguin 1985) 475.

94 Ibid 476.

95 Foucault *Sexuality* (n 11 above) 57, and *Discipline* (n 15 above) 304. For commentary here, see Hunt and Whickham (n 27 above) 11–12, 50–1.

96 Quoted in Walkowitz (n 69 above) 85.

97 Captured by the Red Army, Reiter was tried at Nuremberg, where he confessed to various 'experiments' conducted in the camp. Interned briefly, and then released, his prospective value as an expert in germ-warfare outweighed other considerations. For a series of essays on Reiter's career and his subsequent trial, see volume 32(4) of Seminars in Arthritis and Rheumatism.

98 Agamben (n 16 above) 144–146, 182.

detached.[99] *Homo Sacer* closes here, in the concentration camp, life reduced to its very 'barest'.

Hans Reiter exists at the grimmer end of his professional spectrum. A little further along than William Acton; though not, perhaps, that much further.[100] Acton, like Reiter, was a man of the moment, who seized it. Taking advantage of a present sense of crisis to promote himself, and his prejudices. Shamelessly and dangerously, with tragic consequences.[101] We might conclude of doctors more generally, as Thomas Carlyle did of politicians. Some are indeed brilliant; others just seem, in the fleeting second, to be so. History writes them as charlatans. Carlyle had Disraeli in mind, the 'Hebrew conjuror'.[102] It is for each generation, in whatever passes for a democracy, to make its choice. And then, when it really comes to the crunch, amidst a pandemic perhaps, hope that it has chosen someone capable, rather than a clown. Or a shameless self-promoter, or a vicious sadist. We have, though, arrived at a dark place. Time for some fresh air. A trip to the seaside perhaps.

Sex and the navy

Not that fresh in truth. Or that light. The back lanes of Portsmouth docks. A risky place to be, the chances of a mugging ever-present, the still greater chances of picking up a nasty rash. There were laws in place to deal with both risks; none of which were much use. We will leave the muggings aside, and concentrate on the rashes. Which returns us to the 'evils' of prostitution. Such as it was, the common law of 'prostitution' limited itself to the crime of importuning for purposes, which might result in a fine of up to £2. Which hardly any prostitute could pay, and hardly any magistrate bothered to enforce. A negligence that attracted increasing condemnation as a particular concern started to grow in regard to the possible consequence of all the rashes.[103]

Which was to threaten the very foundations of empire. Venereal disease, gonorrhoea, syphilis; everyday hazards for anyone who consorted with prostitutes, as any of Acton's devoted readers would

99 Foucault (n 17 above) 206.

100 A man whose 'slipshod' research, along with his blind prejudice and overweening self-confidence, inflicted misery on thousands of women. See Spongberg (n 80 above) 50.

101 See Marcus (n 86 above) 2–8.

102 In his essay *Shooting Niagara and After?*, a bitter condemnation of the 1867 Reform Act. Quoted, and discussed, in S Heffer, *Moral Desperado: A Life of Thomas Carlyle* (Weidenfeld & Nicolson 1995) 358–60.

103 Harriet Martineau, for example, ascribing the seeming rise of prostitution to the 'negligence' of the police and magistracy. In her essay 'The Contagious Diseases Act as applied to garrison towns and naval stations', quoted in Ward (n 76 above) 125.

have known. But there was a particular 'at risk' category who needed extra protection. We might term it 'shielding'. Sailors. Of which, if it was to maintain its empire, the Royal Navy needed lots. Preferably healthy, not riddled with sexually transmitted diseases. Numbers, as ever, were hazy. But the evidence of assorted local magistrates, and harassed naval officers, was enough.[104] Certainly for William Acton. Who, fortunately, had a solution:

> Diseased prostitutes can no longer be permitted to infest the streets and spread contagion and death at their good pleasure. They cannot be kept off the streets except by being placed in confinement, and curing their diseases seems to be the necessary accompaniment of restraining their liberty.[105]

Against those who would prefer a more nuanced, even sensitive, strategy, Acton had this to say: 'A little tinkering here and there, may here and there produce some good.' It will not stop an epidemic. That will require 'regular machinery, carrying out some well-considered, universally accepted and definite scheme'.[106] A lockdown. No time for dithering either, still less sympathy. *Prostitution Considered* closed with another literary allusion. To the labours of Hercules; 'let loose upon the filthy stalls the cleansing waters'.[107] Or, more prosaically, some cleansing legislation.

Suitably alarmed, Parliament passed a first Contagious Diseases Act in 1864. To be followed by two more, in 1866 and 1869. The provisions of the 1864 Act permitted police, in 11 naval ports, to seize suspected prostitutes, so that they might be examined for evidence of a sexually transmittable disease. And then, if need be, and it usually was, to place them in 'lock-hospitals' for up to three months. Acton suggested longer, and wider. But it was a start. In 1866 the provisions were extended to a number of northern cities, where prostitution was anyway considered thoroughly undesirable. Along with all the drinking and the partying. The temperance movement was very supportive.

As was a Parliamentary Commission, established in 1868, to consider the efficacy of the existing measures. Not everyone was sure. The Chief Medical Officer, Sir John Simon, advised against radical 'extension', not least because they did not seem to be making much difference. Not though Dr Acton, whose opinions would be quoted more extensively than any other 'expert witness' in the resulting report; and far more than that of the Chief Medical Officer. Do nothing, Acton intimated, and the consequence would be apocalyptic. Lots of vicars agreed. A

104 See Walkowitz (n 69 above) 48–49, on the largely anecdotal evidence.

105 Acton (n 73 above) 240.

106 Ibid 267.

107 The allusion being to the cleansing of the Augean stables. Acton (n 73 above) 302.

third consolidating Act was duly passed in early 1869, widening the reach of provisions across the country to 18 'subject districts'.[108] We might term it 'tier-ing'.

The 1869 Act also extended the period during which a woman discovered to be infected might be interned, to nine months, and recommended an improvement in the quality of moral and religious instruction offered in the lock-hospitals. A holistic approach which earned Greg's strident approval. Not, he confirmed, the moment to listen to cavillers moaning on about civil liberties. The 'same rule of natural law which justifies the officer in shooting a plague-stricken sufferer who breaks through a *cordon sanitaire* justifies him in arresting and confining a syphilitic prostitute who, if not arrested, would spread infection all around her'.[109]

Some did though cavil. Florence Nightingale famously. Dissenting congregations too, Methodists, Quakers and Unitarians amongst the loudest. But most vociferous were early-day women's movements. The Ladies National Association produced a series of pamphlets replete with lurid accounts of forced vaginal examinations. Testaments to 'instrumental rape'.[110] Scattered insinuations too, including the idea that the greater cause of venereal disease in the Royal Navy was rampant homosexuality. And the very simple fact, already intimated by the Chief Medical Officer, that lockdown seemed to be making little difference anyway. The prostitutes still needed the money. The sailors still wanted the sex.

Acton dug in. Speaking to the Medical Officers of Health in 1869, he reiterated his belief that those women being swept off the streets 'we might almost call unsexed', very nearly un-human. The critical moment, noted by Foucault, the prelude to detachment and 'confinement'. When someone is adjudged to be a 'stranger', and reduced to the barest life.[111] As to the risk that the wrong women might be somehow caught up in the net; a 'remote possibility', trumpeted up by a 'shrieking sisterhood'.[112] A perception written into the second edition of *Prostitution Considered* which appeared the following year. The intimations of 'hard memory', all the evenings spent traipsing the streets of London with local constables, peering into the 'haunts of

108 For the extent of Acton's influence in the passage of all the Acts, the 1869 one in particular, see Walkowitz (n 69 above), suggesting, at 80, that Acton was the 'principal propagandist' for legislative intervention; and Claggett (n 83 above) 19–20.

109 Quoted in Walkowitz (n 69 above) 44–45.

110 See ibid 201–204.

111 See Foucault (n 17 above) 206.

112 Quoted in Walkowitz (n 69 above) 87.

prostitutes' and challenging 'painted' ladies.[113] Never had the stables been filthier, the need for the Contagious Diseases Acts greater. There would be no repeal, at least not for a while.

Another Commission, set up in 1871, did concede the case for ending compulsory vaginal inspections. But it would be another decade before anyone acted on it. The Acts would be eventually suspended in 1883. And then repealed, three years later. Attention had anyway drifted.[114] Courtesy of William Thomas Stead. The disease had not vanished, of course. Nor the prostitutes. But the empire was still intact, even if its sailors were not always. And Parliament had reconciled itself to what had been apparent to many for a long time. Speaking in Parliament, during the debates which led to the establishment of the 1871 Commission, the radical MP Jacob Bright had presented some alternative medical opinion. Most notably that of the Inspector-General of Army Hospitals, Frederic Skey. The 'public mind is alarmed, it has been coloured too highly'. William Acton, Bright concluded, was 'probably the most illogical man who ever put pen to paper'.[115]

Three years later came another report, entitled *An Exposure of the False Statistics of the Contagious Diseases Act*, written by an association of reformatory and refuge managers. It supposed that the 'regulationists' had systematically doctored the figures; pretending that the lockdown was doing far more good than was really the case.[116] Lies, damned lies, and statistics. A quote commonly associated with Mark Twain, who attributed it, in turn, to Disraeli.[117] The provenance might be uncertain, but the prescience is not.[118]

CONCLUSION: HISTORY REPEATING

'Those who cannot remember the past are condemned to repeat it.'[119] So, famously, said the philosopher, George Santayana. The moral might seem simple enough; that history is a resource which can prevent us from making the same mistakes. Except that, as Santayana intimated,

113 Acton (n 73 above) 22–26.

114 We might though note a further consequence of the repeal. Its success emboldened the National Association to enjoin a wider campaign, to end a still longer 'state of exception', that which denied women the vote. See Walkowitz (n 69 above) 1–6, and also 254–255, suggesting that the repeal campaign energised a 'revolt of the women' against 'state intervention'.

115 HL Deb 20 July 1870, cols 574–587.

116 See Walkowitz (n 69 above) 111.

117 M Twain, *Autobiography* (California University Press 2010) 1.228.

118 Hardly the first time, during a public health crisis, that figures might have been over, or indeed under, inflated. Published mortality bills during the 'great' plague of 1665 were almost certainly so. See here Moote and Moote (n 7 above) 81, 121.

119 G Santayana, *The Life of Reason: Reason in Common Sense* (Scribner 1905) 284.

what history really reveals is our propensity to keep repeating them. So what might we recollect from our brief journey back into the 'bare life' of mid-Victorian England?

We have already premised a couple of conclusions. First, be wary of those who would claim that a particular, and current, crisis is unprecedented. The fact-situation might be different, and the crisis genuine. But it is unlikely to be unprecedented. And the more urgently we are told that something is, and thus warrants the most dramatic of regulatory interventions, the more sceptical we should be. The more ready to interrogate what Agamben terms the 'empty centre' of the narrative.[120] Where, under the guise of the 'exceptional' moment, we will find, invariably, the 'force of law'. And hear, just as invariably, the rhetoric of 'violence', all the statistics, the blood-curdling imagery. The 'imaginary landscape' of 'fear'.[121] A related observation, vivid in our brief history of the contagious diseases scare, is to know your sage. The ghost of William Acton stalks every ministerial briefing.

Our second ready conclusion is a variant. Plagues are predictable, and so is the way that government will respond. This is not the place to debate the 'legality' of COVID-law.[122] It is, rather, to recognise the underlying pathology. Government in 2020 reacted in precisely the same way as government reacted in 1864. And, for that matter, during the 'great' plague which Dryden dodged.[123] It deployed a narrative of unprecedented crisis, declared a 'state of exception', and issued a series of executive orders, authorised, however vaguely, by statute, for the purpose of locking people down, or up. The fact that these powers were, on rare occasion, nodded through a cowed Parliament should not fool us. For the duration of the pandemic, as Lord Sumption has recently argued, the UK Government assumed 'coercive powers over its citizens on a scale never previously attempted', and did so, not only with a 'cavalier disregard' for the rule of law, but with 'minimal parliamentary involvement'.[124]

Sumption has been a consistent critic of 'COVID-law' and policy. A 'monument of collective hysteria and government folly'.[125] Further evidence that government, when placed under pressure, instinctively presumes to rule in disregard of the law. Reducing the UK, for much of 2020, to little more than a 'police state'; where elderly dog-walkers

120 Agamben (n 41 above) 86–88.

121 Foucault (n 17 above) 361.

122 For an interesting, if early, overview, see K Ewing, 'Covid-19: government by Decree' (2020) 31 Kings Law Journal 1–24. For a more recent one, see J Sumption, *Law in a Time of Crisis* (Profile 2021) 220–225.

123 Moote and Moote (n 7 above) 53–55, 116–117.

124 Sumption (n 122 above) 225, 228.

125 Ibid 218.

can be berated for having strayed too far from home; where sitting on a park-bench nibbling a hob-nob can result in a fixed-penalty fine; where young women holding a vigil for a murder victim can be violently dispersed by police 'snatch-squads'.[126] Hardly a testament to the health of the nation.

The conclusion is stark and unarguable. When COVID-19 arrived in the UK in spring 2020, Government responded by assuming the powers of a commissarial dictatorship. Whether or not the existential threat to the security of the nation was such as to legitimate the effective suspension of the 'rule of law' is a different question. Another for coming historians to ponder. But the bar, we might think, should be set high. Higher perhaps that the figure of 0.2; the percentage of the population in the UK whose deaths might be attributable, in part at least, to COVID-19.[127] The question of proportion; with which

126 For Sumption's commentary on life in a 'police state', see ibid 228–230. The elderly dog-walkers were discovered in the Peaks, miles from anyone, thanks to a police drone, and then 'shamed' on various media by the local, evidently bored, constabulary. Reports of careless bench-sitters are legion. The vigil in question was held in memory of Sarah Everard, at Clapham Common in March 2021. Shocking images of burly male police officers piling into slightly built young women, quietly stood, were beamed around the world within hours. Rather obviously resonant of similar images of police officers beating-up suffragettes a century ago. History will likely judge the events at Clapham Common similarly. There were so many more examples of variously idiotic and disturbing COVID-policing in the moment, but a special mention, perhaps, for the West Mercia Police, who felt obliged, in the midst of a very bleak mid-winter, to remind any prospective snow-ballers that their intended activity was not amongst those which fell under the hazy rubric of 'reasonable exercise'.

127 Taken as a raw percentage of the population. The sustainability of this figure is bound to remain a matter of contention for some time yet. Not least because we do not, and probably never will, know how many of those whose death certificates recorded a positive COVID-19 test actually died as a consequence of contracting the virus. The excess mortality rate, the most reliable statistic, suggests an overall increase, across the calendar year 2020, of around 7%; a rate that steadily reduced to 1% in the autumn, before rising again towards the end of the year. The consequential supposition, that a significant proportion of COVID 'deaths' were in fact attributable to mortality 'displacement', is argued in C Heneghan et al, 'Interpreting excess mortality in England: week ending 9 October 2020' (Centre for Evidence Based Medicine, 23 October 2020). And also J Aburto et al, 'Estimating the burden of the Covid-19 pandemic on mortality, life expectancy and lifespan inequality in England and Wales: a population-level analysis' (2021) 75(8) Journal of Epidemiology and Community Health, suggesting that a more credible figure for deaths caused as a direct consequence of contracting the virus during 2020 is closer to 63,000, which, if true, lowers the present bar further; from 0.2 to 0.1% of the population. On the difficulty of estimating COVID-19 related deaths, other than using 'excess mortality' figures, see T Beaney et al, 'Excess mortality: the gold standard on measuring the impact of COVID-19 worldwide?' (2020) 113 Journal of the Royal Society of Medicine 329–334.

Foucault closed his *History of Madness*. How, in an age of pretended reason, could 'so slim an eventuality come to hold such a power of revelatory dread'?[128]

And the question which Agamben has asked, repeatedly, in a series of provocative reflections on the particular experience of COVID-19. Suggestive certainly; the summer of 2020 as a moment of 'exception', during which the imperatives of 'bio-politics' swept away the pretences of liberal democracy. Schmitt's dark prophesy, of 'scientific thinking repressing the essentially juristic-ethical'.[129] In a first sense, simply abrogated. The familiar 'tendency', in a crisis, to 'use the state of exception as a normal paradigm of government'.[130] And in a second, overwhelmed. The irresistible 'force' of the 'great fear'. The 'situations of collective panic for which the epidemic provides once again the ideal pretext'. A paradigmatic 'object of anxiety'.[131] Not merely fear in the raw, but mutating cultures of shame and 'esteem' too; face-masks, vaccine 'passports', clapping for carers.[132] But rooted in fear, always. The reason why Parliament passed a series of Contagious Diseases Acts in the 1860s. And the reason why it has approved successive Coronavirus Acts in 2020. The 'force of law' cracking the veneer of legality.

Facilitated, of course, by our subscription to a particular philosophy of life which is 'bare'. Where all that matters is survival, at whatever cost. In a later 'clarification', Agamben wrote:

> The first thing the wave of panic that's paralyzed the country has clearly shown is that our society no longer believes in anything but naked life. It is evident that Italians are prepared to sacrifice practically everything – normal living conditions, social relations, work, even friendships and religious or political beliefs – to avoid the danger of falling ill. The naked life and the fear of losing it, is not something that brings men and women together, but something that blinds and separates them ... And what is a society with no other value than survival?[133]

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128 Foucault (n 17 above) 543.

129 Schmitt (n 42 above) 48.

130 G Agamben, 'The invention of an epidemic' (2020) published in (*Quodlibet,* 26 February 2020). Translated in 'Coronavirus and philosophers' (2020) in European Journal of Psychoanalysis.

131 M Peters and T Besley, 'Education, philosophy and viral politics' in M Peters and T Besley (eds), *Pandemic Education and Viral Politics* (Routledge 2020) 5.

132 In 1665 it was wearing toad-amulets, available at all reputable alchemists. In the 1870s it was the possession of 'certificates of health' stamped by a local magistrate. Prostitutes in possession of such certificates commonly charged extra and styled themselves 'Queen's women'. Something else that is predictable about a public health crisis is the emergence of new market-opportunities.

133 G Agamben, 'Clarifications' (2020) in 'Coronavirus and philosophers' (n 130 above).

As we begin to reflect on the experience of COVID-19, the instinctive reaction will be to blame someone; careless Chinese scientists, panicked government ministers, media fear-mongers, algorithm-obsessives. The likely cast for the coming judicial inquiry; in spirit, if not always in person. But there is a darker intimation in Agamben's 'clarification', which widens the net of complicity. To us.

First, because we refuse to accept the reality that life, lived at liberty, is full of 'uncontrollable risk'.[134] Second, because we are so 'sorely', and so easily, scared.[135] Third, because we are so eager to believe that the risk, and the fear, might be exorcised; in days past by a man of the cloth, these days by a member of the Scientific Advisory Group for Emergencies.[136] But it will never be so, for the reason that Franklin Roosevelt famously articulated. We cleave to fear, not just as a psychological, but as an emotional and cultural experience. There is 'nothing so much to be feared as fear itself'.[137] The 'war' against the virus, like the 'war against terrorism', or the war against syphilitic prostitutes, is simply the latest externalisation of an inner struggle which is definitive of the human condition. As Agamben puts it, 'The enemy isn't somewhere outside, its inside us.'[138]

Unsurprisingly, Agamben's critique has attracted plenty of attention, mostly hostile. Too 'far-fetched'. Too heartless. The complaint of a 'selfish' libertarian.[139] Liberal democracy has its place. But it must, when a crisis looms, step aside; for the greater interest. An argument which depends, of course, on accepting that liberal democracy is not, itself, the greater interest. Something to think about. As Lord Sumption again observes: 'So remarkable a departure from our liberal traditions surely calls for some consideration of its legal and constitutional basis.'[140] It says something that such a view might be

134 As Ulrich Beck termed it in his *Risk Society: Towards a New Modernity* (Sage 1992). Precisely the same conclusion ventured, in the closer COVID-context, by Lord Sumption (n 122 above) 233. We live in an 'age obsessed with escaping from risk'.

135 Bourke (n 1 above) 24, 56.

136 Ibid 369, commenting on the role which science has played in spinning the illusion that we can live without risk.

137 Ibid 184, 368–372.

138 Agamben (n 133 above).

139 See, for example, Sergio Benvenuto, concluding that 'lockdown' measures represent the 'lesser' of 'evils', in 'Welcome to seclusion' (*Antinomie*, 5 March 2020), translated in 'Coronavirus and philosophers' (n 130 above). For more balanced commentaries, see M Peters, 'Philosophy and pandemic in the postdigital era: Foucault, Agamben, Zizek' in Peters and Besley (n 131 above) 72–77; and also G Delanty, 'Six political philosophies in search of a virus: critical perspectives on the coronavirus pandemic' (LSE 'Europe in Question' Discussion Paper 156/2020) 6–8.

140 Sumption (n 122 above) 218–219.

considered somehow aberrant. Then again, as history time and again confirms, fear depresses thought. It is, as Agamben acknowledges, a 'bad counsellor'. Much the same was supposed in the wake of '9/11'. That to think about the causes of terrorism was to somehow sustain it; when precisely the converse is true.[141]

There may, or may not, be a rationale for 'COVID-law'. But there is no rationale for doing as Dryden might have us do. For this, put simply, is 'how freedom dies'.[142] Of course, to think against the grain requires courage. And, commonly, the assistance of time. The colder light of day, in which historians tend to write their histories. We can only surmise what they will say of the 'great plague' of 2020, or the 'great scare' as it may well, in time, be renamed. A 'hard case' undoubtedly, which tested a lot of things to their limit; health services, government, us. They may be kind; though probably not. In the meantime, we can suppose a couple more prospective conclusions. They will surely notice just how easily we were terrorised into embracing a 'state of exception'. And how readily we accepted a philosophy of life that was so 'bare'. Whether they will be much surprised is a different matter.

141 See here T Honderich, *After the Terror* (Edinburgh University Press 2002) 10–11, 59–61; and M Ignatieff, *Lesser Evil: Political Ethics in an Age of Terror* (Edinburgh University Press 2005) 167–168.

142 Sumption (n 122 above) 231.

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The 'chilling effect' of defamation law in Northern Ireland? A comparison with England and Wales in relation to the presumption of jury trial, the threshold of seriousness and the public interest defence†

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ABSTRACT

This article compares defamation law in England and Wales with that of Northern Ireland and analyses whether the current law in Northern Ireland is having a 'chilling effect' on free speech. At the time of writing, the Northern Ireland Assembly is formally considering adopting legislation based on the Defamation Act 2013 which reformed the law in England and Wales. The article aims to contribute to that debate in Northern Ireland, but it should also be of broader interest as an analysis of the effectiveness of the Defamation Act 2013. The article focuses on three key areas of reform, in both the Defamation Act 2013 and the Northern Ireland Defamation Bill: the presumption of jury trial, the threshold of seriousness, and the public interest defence. It demonstrates that the different approach of the law in Northern Ireland in these areas did not simply occur with the enactment of the 2013 Act, but rather that it started several years before that with a divergence from developments in the common law in England and Wales. The article argues that the difference has been entrenched by the changes in the 2013 Act, and that, in relation to each of those areas, the law in Northern Ireland is now on a singular course and one that can be seen to have a definite 'chilling effect' on free speech.

Keywords: Defamation Act 2013; Northern Ireland; freedom of expression; presumption of jury trial; serious harm; public interest defence.

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INTRODUCTION

In 2013, when England and Wales (E&W) adopted the Defamation Act, Northern Ireland decided not to follow suit. In apparent representation of the Northern Ireland Executive, the Minister of Finance and Personnel at the time, Sammy Wilson, declared that there were 'no plans to review the law on defamation'.[1]

The decision proved immediately controversial, both at the national and international level. The purpose of the Defamation Act 2013 (the 2013 Act) was to address concerns about the 'chilling effect' of the existing law in E&W on free speech and to ensure a fair balance between the rights of both parties.[2] Since Northern Ireland had always relied on the defamation law issuing from the busier courts in E&W,[3] and had now suddenly cut itself off from that source of development, many worried the Northern Irish legal system would be frozen at a point where it would continue to have a chilling effect on free speech. Northern Ireland's denial of reform, it was argued, would 'interfere with the fundamental rights, not only of those who seek to publish information and opinions on matters of public interest and concern, but everyone living within Northern Ireland and the rest of the UK'.[4]

Amidst the public outcry, a Member of the Northern Ireland Legislative Assembly, Mike Nesbitt, sought to introduce a Private Members' Bill proposing the reform achieved in the 2013 Act. While this met similar resistance at Stormont, the move was enough to trigger the Northern Ireland Department of Finance to ask the Northern Ireland Law Commission to 'consider the Defamation Act 2013 in E&W, and to consult on the question of whether the Act should be introduced in Northern Ireland'.[5] Mr Nesbitt was asked to postpone his Private Members' Bill until after the Commission had delivered its report.

After consultation with key stakeholders and a thorough review, the Commission published its report in November 2014, with a subsequent report on the subject published in August 2016 by Dr Andrew Scott of

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1 Letter from the Minister of Finance and Personnel, Sammy Wilson, to Lord McNally, 26 June 2013.

2 Comments of the Lord Chancellor, HC Deb Tuesday 15 March 2011, vol 525, Draft Defamation Bill.

3 On the general relation, see B Dickson, *Law in Northern Ireland* (Hart 2013) at 3; and G Anthony, 'Northern Ireland as "a legal jurisdiction"', submission to the Commission for Justice in Wales, at [12]. This has certainly been the case in relation to defamation law, and the Northern Irish courts have made frequent reference to the jurisprudence of the EWHC, EWCA, and UKSC in this area of law.

4 Lord Lester, HL Deb Thursday 27 June 2013, volume 746, Defamation Act 2013: Northern Ireland.

5 Northern Ireland Law Commission, 'Defamation Law in Northern Ireland, Consultation Paper (NILC 19, 2014) (hereafter NILC 2014) 1.

the London School of Economics, who had chaired the Commission's review. Both stated that 'problems do apply', that there was some chilling effect of the law in Northern Ireland on free speech, and that 'the law of defamation wrongly restricts the proper exercise of freedom of expression in Northern Ireland'.[6] On that basis, the report recommended reform largely reflecting the Defamation Act 2013, with some qualifications in relation to the harm test, the honest opinion defence, jurisdictional issues and the mode of trial.[7]

The moment for reform stalled, however, with the subsequent suspension of the Northern Ireland Assembly from 2017 to 2020. When the Assembly was restored in January 2020, some resistance to reform remained. Nonetheless, in May 2021, Mr Nesbitt's Bill received the necessary legislative consent from the Secretary of State for Northern Ireland, and, a month later, the Defamation Bill was formally introduced for debate in the Assembly.[8] If Northern Ireland's precarious political system does not collapse before then, the Assembly should decide within the next several months as to whether defamation law in Northern Ireland will be amended to reflect that now in E&W.

This article aims to contribute to that debate by examining the degree to which Northern Ireland's current defamation law *is* having a chilling effect on free speech, and whether the proposed measures of reform would be effective in addressing that. Despite Andrew Scott's conclusions and recommendations in 2016, the issue is still one which is hotly contested in Northern Ireland. The Finance Committee, which has been charged with investigating this matter on behalf of the Assembly, has been confronted with a range of different opinions from key stakeholders in this area; from seasoned lawyers, who argue that there is no chilling effect in Northern Ireland and that reform is not warranted, to a leading investigative journalist, as well as the Legal Director of the BBC warning that the law in Northern Ireland is having such an effect and that reform is essential in the interest of the people of Northern Ireland and beyond.[9]

Just what is the difference then between defamation law in E&W and the law in Northern Ireland today? How well has the Defamation Act 2013 performed in addressing the chilling effect? Surprisingly, the question has received little scholarly attention. The Scott Report was issued at a relatively early stage in the progress of the 2013 Act and

6 NILC 2014 (n 5 above) x; A Scott, 'Reform of defamation law in Northern Ireland', (Northern Ireland Department of Finance 2016) (hereafter Scott Report 2016).

7 Scott Report 2016 (n 6 above) appendix 1. See also below, note 10.

8 The Bill is currently at the Committee Stage of debate, see Northern Ireland Assembly, Defamation Bill.

9 See eg the oral briefings before the Finance Committee of Paul Tweed, Sam McBride and David Attfield.

could not know then how the different provisions of the Act would be tested by facts and developed by the courts. Certainly, there has been little empirical research on the question since. Thus, it is an important question to ask; especially at this juncture, when Northern Ireland has both the opportunity to reform and the benefit of seven years of experience of the 2013 Act in E&W.

In order to examine this issue, this article will focus on three key areas of the law, each reflected in specific provisions in both the Defamation Act 2013 and the Northern Ireland Defamation Bill. These are the reversal of the presumption of jury trials, the threshold of seriousness and the public interest defence.

There are, of course, other important areas of defamation law that the 2013 Act sought to address, and which the Northern Ireland Defamation Bill must consider. However, beyond the need to limit the field of study in the interest of empiricism, there are good reasons to focus on those three areas of the law. What we can say now with the benefit of hindsight is that in some ways the Defamation Act 2013 tried to do too much. Where it appears most problematic is arguably in relation to those issues which were difficult to gauge in 2013, and where there has been rapid technological and social development; most notably, in relation to the liability of operators of websites.[10]

At the same time, where the 2013 Act *can* be seen to have made a difference, and where it appears more effective, is where it codified and advanced the subtle changes that were already taking place in the common law in E&W in the several years preceding 2013. That is certainly the case in relation the presumption of jury trials, the threshold of seriousness and the public interest defence; areas from which Northern Ireland had already been diverging before E&W put them on a statutory footing in 2013. Although these areas continue to generate significant debate in Northern Ireland, analysis will show that the 2013 Act has made definite advances in those areas, and that they each now mark a clear point of divergence with Northern Ireland.[11]

In order to map out the difference between the two jurisdictions, the article will examine the law comprised in relevant statutes and case law and will focus in this regard on the timeframe from 2014, when the legislative reform came into force in E&W, until November 2021

10 For this reason, Andrew Scott proved prescient in avoiding the issue in his draft Bill (n 6 above). See also the Defamation and Malicious Publication (Scotland) Act 2021, which also avoids s 5 of the 2013 Act.

11 The study does not hold E&W up as ideal in terms of striking the balance between the rights involved in defamation law. That is always likely to be a work in progress, and some may argue that the Defamation Act 2013 does not go far enough to address the 'chilling effect' on free speech. However, the analysis will show that in those three areas at least, the law in E&W has made some advance in balancing the rights involved.

– although, as stated, it is necessary also to track some of the roots of those legislative developments in the case law in E&W in the years running up to the 2013 Act.

Of course, E&W typically produce a higher number of defamation cases than Northern Ireland. From 2014 to 2020 there were a total of 140 defamation claims issued in Northern Ireland, only 17 of which resulted in a judgment.[12] From 2014 to 2019 there were 1218 defamation claims issued in London alone,[13] and at least 305 judgments on defamation claims in E&W from January 2014 to May 2021.[14] Nonetheless, even if comparatively small, Northern Ireland does have its own vibrant practice of defamation law, and one can map out a very distinct approach in both the relatively high number of cases that are settled early there, and in those cases where judgments have been entered.

The next section will begin by examining the difference in relation to the role of jury trials in defamation cases in the two jurisdictions. The third section will examine the different approaches to the use of a harm test in each jurisdiction, and the fourth will examine the difference in relation to the public interest defence in both jurisdictions.

The comparison will show that the law in Northern Ireland is embarking upon a different path and will be seen in each respect to disproportionately advantage plaintiffs and therefore have a definite chilling effect on free speech. The article will conclude by reflecting on the normative and practical implications of Northern Ireland's singular development of defamation law in this regard.

JURY TRIALS

Both section 11 of the 2013 Act and clause 11 of the Defamation Bill for Northern Ireland provide for a reversal of the presumption of jury trial in defamation claims. The provision has perhaps not received the

12 Queen's Bench Writs and Civil Bills Disposed with a cause of action of Libel or Slander, provided by Northern Ireland Courts and Tribunal Services, 18 May 2021, FOI 023/21: 57 were 'settled terms endorsed', 21 'settled out of court', 11 'struck out', 31 'withdrawn', 3 with default judgments entered against them. As noted by the Northern Ireland Law Commission, many complaints never reach the stage of the initiation of proceedings, noting similar figures in the three years previous to its report in 2014: see NILC 2014 (n 5 above) at 2.07.

13 Royal Courts of Justice Tables, published on 7 June 2020.

14 This is based on the excellent database of judgments maintained by the editor of Inforrm, Table of Medial Law Cases.

scholarly attention it deserves,[15] but it should be recognised that the presumption of jury trials has a profound effect on the development of defamation law and balance of rights between the parties.

Even before the 2013 Act definitively reversed the presumption of jury trial, the law in E&W had already recognised problems with jury trials in defamation cases and had put in place mechanisms to limit their use. In the Supreme Court decision of *Joseph v Spiller*, Lord Phillips warned that 'defamation is no longer a field in which trial by jury is desirable', noting that the 'issues are often complex and jury trial simply invites expensive interlocutory battles ... which attempt to pre-empt issues from going before the jury'.[16] In reflection of a growing awareness of these problems, there was already by that stage widespread practice in the courts in E&W to employ, where possible, an exception to mandatory jury trial under section 69 of the Senior Courts Act 1981.[17] In 2013, before the Defamation Act 2013 had even come into force, the authors in *Gatley on Libel and Slander* concluded that the 'trial of defamation actions by judge and jury is already a rarity, and is about to fade away into history'.[18]

These developments in the common law were the basis of the proposal for a reversal of the presumption of jury trial in the 2013 Act. More than three-quarters of the respondents to the consultation supported the proposed change, and it also received support from the Joint Committee on the draft Bill. In the committee debate, the Under-Secretary of State for Justice explained the rationale for the provision:

> In practice, few defamation cases actually involve juries, and a substantial majority are heard by judges alone. However, the retention of the right to jury trial creates practical difficulties and adds significantly to the length and cost of proceedings. That is because of the role that juries, if used, have to play, such as in deciding the meaning of allegedly defamatory material. It means that issues that could otherwise have been decided by a judge at an early stage cannot be resolved until trial, whether or not a jury is ultimately used. That means that proceedings take longer and cost more than they should.[19]

Although juries had traditionally been retained in this specific area of civil law in the hope of retaining some role for the ordinary member

15 For example, in his survey of 'Three errors in the Defamation Act 2013', Descheemaeker notes it only as 'one of several' other factors that could be mentioned: E Descheemaeker, 'Three errors in the Defamation Act 2013' (2015) 6 Journal of European Tort Law 24, 47.

16 [2010] UKSC 53 [116].

17 *Gatley on Libel and Slander* (12th edn, Sweet & Maxwell 2013) at 34.1.

18 Ibid 34.1, n 7: 'At the time of writing (September 2013) it is believed that only two defamation cases have been tried by jury in E&W during the last four years.'

19 Mr Jonathan Djanogly (Parliamentary Under-Secretary of State for Justice), Public Bill Committee, Session 2012–2013.

of the public, in E&W at least, it was clear the presumption was not having the desired effect. A provision to reverse the presumption of jury trial was adopted under section 11 of the Defamation Act 2013.[20]

Northern Ireland has not followed any of these developments. The presumption of jury trial remains in place in Northern Ireland, guaranteed by section 62(1) of the Judicature (Northern Ireland) Act 1978.[21] The party setting down the action must specify the mode of trial he or she prefers,[22] and plaintiffs generally opt for trial by jury – which will be explained in the next section as a matter of strategy. Defendants can attempt to thwart this and apply for a judge alone trial of course, but they have to be quick to do so, and the procedure is somewhat cumbersome.[23]

What is more, the Northern Ireland courts have not followed the practice that existed in E&W before the 2013 Act of limiting the use of jury trials. Beyond the use of the traditional exception in relation to public interest defence (below, page 30), the author could only find one alleged instance of such an exception being recognised in Northern Ireland since 2013.[24]

Northern Ireland's divergence on this matter is all the more conspicuous since the Northern Ireland Law Commission had warned in its 2014 report that the continued presumption of jury trials in defamation cases was aggravating the costs of proceedings and was enticing parties to settle.[25] Reflecting the concerns voiced in relation to the law in E&W some years earlier, the Northern Ireland Law Commission recognised the presumption of jury trial as the key factor in explaining why 'very few cases ever reach full trial' in Northern Ireland and noted, in this regard, that 'in recent years an increasingly high proportion of those that do [ie few] are tried by judge alone'.[26]

In its report, the Commission also noted that the problem weighs heaviest on defendants. 'It was clear', it said, 'that the prospect of a costly trial by judge and jury is an important factor weighing in defendant-

20 This amended s 69 of the Senior Courts Act 1981 and s 66(3) of the County Courts Act 1984 that formerly provided for trial by jury in all but a narrow range of specified circumstances.

21 The section provides that, if any party to the action so requests, an action in which a claim is made in respect of defamation shall be tried with a jury.

22 Rules of the Court of Judicature (RCJ) (Northern Ireland) 1980, order 43, r 4(1).

23 The defendant has seven days to respond to the plaintiff's choice of mode of trial: ibid. This is arguably not so cumbersome for those who can afford adequate legal assistance, but it is worth noting that no legal aid is available in defamation proceedings.

24 In the case of *AB Ltd and Others v Facebook Ireland Ltd*, cited to the author, but which is subject to reporting restriction and therefore cannot be confirmed.

25 NILC 2014 (n 5 above) at 2.26 and 4.03.

26 Ibid. Again, a problem that remains in place today: 'Queen's Bench Writs and Civil Bills Disposed with a cause of action of Libel or Slander', provided by Northern Ireland Courts and Tribunal Services, 18 May 2021, FOI 023/21.

publishers' decisions as to whether to fight cases or to settle'.[27] It was on that basis that the Scott Report recommended a reversal of the presumption of jury trial in Northern Ireland, with some caution about the cultural value of juries in Northern Ireland (something that will be analysed further below at page 32). However, the Commission's recommendations were never adopted, and the presumption remains in place in Northern Ireland.

Thus, the prospect of jury trial hangs over the defendant like Damocles' sword. Faced with the risks and uncertainty of a long and costly jury trial in the courts – which will be shown to remain, on the balance of things, disposed more towards the interests of plaintiffs – most defendants simply consider it a better strategy to settle early.

However, the full scale of the problem with jury trials cannot be appreciated until we also consider the issues of a threshold of seriousness and the public interest defence.

THE THRESHOLD OF SERIOUSNESS

The first section of the 2013 Act introduced a new harm test to defamation proceedings in E&W, requiring claimants to demonstrate, where possible, actual harm to reputation. Clause 1 of the Northern Ireland Defamation Bill seeks to do the same. Damages are currently presumed in defamation proceedings in Northern Ireland, and the test applied there is substantially lower – although, as will be seen, the divergence between the two jurisdictions in this respect occurred as early as 2010, and not in 2014 when the Act came into force.

As Lord Sumption pointed out in *Lachaux*, section 1 of the 2013 Act has hardly proved 'revolutionary'.[28] Once again, the roots of the development can be found in the common law in E&W in the years before the 2013 Act. Nonetheless, the provision continues to generate some debate, and questions remain about its scope and effect in E&W, and indeed whether it is prudent for Northern Ireland to adopt a similar provision. The issue is therefore worth careful study.

In *Thornton v Telegraph Media Group*, Tugendhat J provides an excellent history of the creeping recognition of the need for a threshold of seriousness in determining defamatory meaning.[29]

The origin of the principle is traced to Lord Atkin's statement in *Sim v Stretch*:

> I do not intend to ask our Lordships to lay down a formal definition, but after collating the opinions of many authorities I propose in the

27 NILC 2014 (n 5 above).

28 As per Lord Sumption, *Lachaux v Independent Print* [2019] UKSC 27 at [17].

29 *Thornton v Telegraph Media Group* [2010] EWHC 1414 (QB).

> present case the test: would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?[30]

However, Lord Atkin's formulation in *Sim v Stretch* 'illustrated but did not define' the threshold.[31] While the standard of 'the estimation of right-thinking members of society' had always been influential, with the passing of the Human Rights Act 1998, other elements of the principle came to the fore; the incremental approach based on the facts of each case and the need to nonetheless always include a base-line harm test.[32]

Justice Tugendhat connected this with the Court of Appeal's decision in *Jameel v Dow Jones* (2005). In that case, the Court of Appeal did not consider the presumption of damage that had long been a principle of English law of defamation to be incompatible with article 10 of the Convention, but they did recognise that any claims involving 'minimal actual damage' should be struck out as 'an abuse of process' if they would constitute an interference with freedom of speech.[33] It was this principle which 'prompted a renewed interest in whether there is a *threshold of seriousness*'[34] – which, as will be seen, is something germane to, but ultimately different from, striking out claims with minimal publication as an 'abuse of process'.

In *Thornton*, the principle in *Jameel* was construed more broadly as a recognition 'that it was appropriate to have regard to article 10 of the Convention in deciding whether the claim should proceed at all'.[35] Tugendhat J was able to point to several cases in the years following *Jameel* that adopted this broad construction,[36] and it was stated that 'each of the three judges who are currently hearing most of the defamation cases are applying the principles of *Jameel* with some frequency, and in a number of different but related contexts in defamation actions'.[37]

In particular, the *Jameel* principle proved the impetus for a new 'threshold of seriousness'. In *Eccelston v Telegraph Media Group Ltd*, Sharp J held that the allegation complained of did not reach the 'level of seriousness' required to be actionable.[38] In *Daniels v BBC*, the allegation complained of did 'not pass the necessary threshold

30 [1936] 2 All ER 1237 at 1240.

31 *Thornton* (n 29 above) at [86].

32 In Tugendhat's judgment in *Thornton*, he emphasises the words 'formal definition', 'test', at [67].

33 *Jameel (Yousef) v Dow Jones & Co Inc* [2005] QB 946 at [40].

34 *Thornton* (n 29 above) at [61]. Emphasis added.

35 Ibid.

36 Ibid at [62], noting *Kasckhe v Osler* [2010] EWHC 1075; *Brady v Norman* [2010] EWHC 1215; and *Lonzim plc v Sprague* [2009] EWHC 2838.

37 *Thornton* (n 29 above) at [63].

38 [2009] EWHC 2779 (QB) at [20]. See also *Gatley* (n 17 above) at 2.4; *Thornton* (n 29 above) at [83].

of seriousness'.[39] In *Dell'Olio v Associated Newspapers*, the words complained of did 'not elevate the matter to the level of seriousness required to overcome the threshold of seriousness required'.[40]

Yet, it was Tugendhat J's decision in *Thornton* that entrenched these developments and set them in a definite direction:

> [W]hatever definition of defamatory is adopted, it must include a qualification or 'threshold of seriousness', and that such is now required by the development of the law recognised in *Jameel (Yousef) v Dow Jones & Co Inc* [2005] QB 946 as arising from the passing of the Human Rights Act 1998: regard for article 10 and the principle of proportionality both require it.[41]

After careful scrutiny of the facts in the case, the judge concluded that none of the alleged meanings overcame the threshold level of seriousness.[42] The case firmly established the principle that a statement would only be defamatory if, on the facts, it showed a tendency to 'serious' harm.[43]

Admittedly, *Thornton* did not present a completely straight line to the current interpretation of section 1 of the 2013 Act. The extent to which the threshold of seriousness was phrased in terms of 'substantiality'[44] proved somewhat misleading and, ultimately, led to the difficulties that the Court of Appeal faced in its interpretation of section 1 in *Lachaux*.[45] Looking back now, though, we can see that 'substantiality' is an empty formula, much indeed as 'seriousness' is. The real advance with *Thornton* was to establish a principle that

39 [2010] EWHC 3057 (QB).

40 [2011] EWHC 3472 (QB) at [32].

41 *Thornton* (n 29 above) at [90].

42 Ibid at [97] to [106].

43 *Gatley* (n 17 above) at 2.1, n. 16.

44 It does not appear until para 95 of the judgment, and in ambiguous terms as the 'lowest threshold [of seriousness] that might be envisaged'.

45 *Lachaux v Independent Print* [2017] EWCA Civ 1334. The Court of Appeal read *Thornton* (n 29 above) as introducing a 'threshold of seriousness, phrased in terms of substantiality' (at [30]), and used the distinction (substantial/serious) as the basis for an interpretation of s 1, 'hardening up on the test of substantiality proposed by Tugendhat J in *Thornton*' (at [44], [52]). This allowed for little change in relation to the role of inference of harm, which of course was overruled by the Supreme Court decision in *Lachaux* (n 28 above). The Supreme Court held that s 1 'raises the threshold of seriousness above that envisaged in *Jameel (Yousef)* and *Thornton*', without detailing how exactly it did that, but (wisely) focused instead on the requirement that it is to be 'determined by reference to the actual facts about its impact and not just to the meaning of the words' (*Lachaux* [2019] n 28 above at [12]). The EWCA judgment had been labelled '*Thornton* plus', see C Sewell, 'More serious harm than good? An empirical observation and analysis of the effects of the serious harm requirement in section 1(1) of the Defamation Act 2013' (2020) 12 Journal of Media Law 47, 53. However, from the perspective of the above analysis, it was more like '*Thornton* minus'.

what is defamatory must be judged on the facts of each case, but that it must always include a threshold of seriousness so as to justify the interference with the article 10 right to freedom of expression.

Moreover, *Thornton* also established that 'a tendency or likelihood' of harm is sufficient to meet the threshold.[46] But the allowance for such an inference of harm should not be exaggerated. An inference of harm can hardly be excluded altogether from defamation claims, and in the judgment itself it appears subsidiary to the need for a threshold of seriousness based on the right to freedom of expression.[47] Moreover, if the presumption of damages was still formally adhered to, it was emptied of much of its substance in one deft judicial stroke:

> If the likelihood of adverse consequences for a claimant is part of the definition of what is defamatory, then the presumption of damage is the logical corollary of what is already included in the definition.[48]

As a corollary to this, and going hand-in-hand with the exceptional use of jury trial in E&W at the time, a 'modern practice' was evolving, whereby an 'increasing number of decisions' were engaging the threshold of seriousness at a preliminary stage in proceedings.[49] In *McAlpine v Bercow*, the judge (Tugendhat again!) stated that nothing less than an 'overriding objective to achieve justice' required that the harm threshold should be determined at as early a stage in the litigation as is practical.[50]

Reflecting these developments, the12th edition of *Gatley on Libel and Slander*, published a year before the 2013 Act came into force, presented the general common law approach to the threshold of seriousness in the following terms:

> Whether the threshold of seriousness has been met is a multi-factorial question, that must be viewed in light of the rights in art.8 and art.10, and that will require the court to consider matters such as the nature and inherent gravity of the allegation, whether the publication was oral or written, the status and number of publishees and whether the allegations were believed, the status of the publishers and whether

46 *Thornton* (n 29 above) at [93].

47 Indeed, it receives only a brief note at ibid [93].

48 Ibid at [94].

49 *Gatley* (n 17 above) at 34.11 and 30.14. The cases cited are *British Chiropractic Association v Singh* [2010] EWCA Civ 350; *Cook v Telegraph Media Group Ltd* [2011] EWHC 1134 (QB); *Miller v Associated Newspapers Ltd* [2011] EWHC 2677 (QB); *Cammish v Hughes* [2012] EWCA Civ 1655; *Auladin v Shaikh* [2013] EWHC 157 (QB); *Waterson v Lloyd* [2013] EWCA Civ 136; *Cruddas v Calvert* [2013] EWCA Civ 748; *Bercow v Lord McAlpine (No 2)* [2013] EMLR 1342; *Fox v Butler* [2013] EWHC 1435 (QB); *Flood v Times Newspapers Ltd* [2013] EWHC 2182. See also, *Dell'Olio v Associated Newspapers Ltd* [2011] EWHC 3472 (QB) at [27]

50 *McAlpine v Bercow* [2013] EWHC 981 (QB) at [33], [37].

> this makes it more likely that the allegation will be believed, and the transience of the publication.[51]

It is worth reflecting on those words because, while not exact, they suggest something close to the eventual interpretation of section 1 of the 2013 Act.

The aim of section 1 was to raise 'the bar for bringing a claim so that only cases involving serious harm to the claimant's reputation can be brought' and to 'build upon' the common law approach, and particularly the substantial threshold in *Thornton*.[52]

The provision proved relatively straightforward in relation to section 1(2), governing claims by bodies that trade for profit – the requirement that the harm complained of has 'caused or is likely to cause the body serious financial loss' clearly suggested empirical demonstration, for example, through accounts, financial statements, or revenue figures.[53] However, the requirement for individual claimants in section 1(1) that the publication in question 'has caused or is likely to cause serious harm to the reputation of the claimant' proved, in Warby J's words, 'beguilingly simple'.[54] There were initial questions about the extent to which a claimant should prove actual harm under section 1. There were questions too about the continuing role, if any, for inference of harm in judging defamation claims.[55] Moreover, there was an 'open-question' as to what extent the section 1 threshold of seriousness could be applied at a preliminary stage in defamation proceedings.[56] Generally, these have now been resolved.

Initially, on passing of the Act, courts had recognised that determining serious harm under the Act would involve a shift away from the meaning of the words to a focus instead on the facts and the actual effect of publication on individual claimants.[57] Nonetheless, the

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51 *Gatley* (n 17 above) at 2.4.

52 Defamation Act 2013, Explanatory Notes, at [11]. See also *Gatley* (n 17 above) at 2.1.

53 See eg *Undre v London Borough of Harrow* [2016] EWHC 931; *Gubarev v Orbis* [2020] EWHC 2912.

54 Warby J in *Doyle v Smith* [2019] EMLR 15 at [116].

55 In *Ames v The Spamhaus Project Ltd* [2015] EWHC 127 (QB) at [55] it was noted that, even if courts should remain wary of inferences of harm, it was difficult in some cases for a claimant to present tangible evidence that a statement has caused serious harm to reputation.

56 As per Warby J, in *Hamilton v News Group Newspapers Ltd* [2020] EWHC 59 (QB) at [8].

57 *Theedom v Nourish Training Ltd* [2015] EWHC 3769 (QB); *Sobrinho v Impressa Publishing SA* [2016] EWHC 66 (QB); *Economou v de Freitas* [2018] EWCA Civ 2591; *Allen v Times Newspapers* [2019] EWHC 1235 (QB); *Doyle v Smith* [2019] EMLR 15.

matter was not settled until the Supreme Court addressed the issue in *Lachaux*.[58] There, Lord Sumption put it thus:

> ... section 1 necessarily means that a statement which would previously have been regarded as defamatory, because of its inherent tendency to cause some harm to reputation, is not to be so regarded unless it 'has caused or is likely to cause' harm which is 'serious'. The reference to a situation where the statement 'has caused' serious harm is to the consequences of the publication, and not the publication itself. It points to some historic harm, which is shown to have actually occurred. This is a proposition of fact which can be established only by reference to the impact which the statement is shown actually to have had.[59]

The Supreme Court further stated that the provision 'likely to cause' referred to 'probable future harm' and should be decided on the same factual basis.[60] Reflecting the earlier decision in *Thornton*, the Supreme Court held that inferences of harm still had a role to play in defamation claims. That is, inferences of serious harm may still be drawn from the evidence as a whole,[61] and, according to the Supreme Court, 'inherent probabilities' continue to have some value in combination with the meaning of the words, the situation of the claimant, and the circumstances of publication.[62]

However, what is important is that the inference of harm has been definitively relegated to the background of a matrix of more objective factors and a requirement that the claimant demonstrates actual harm. This approach has been followed in subsequent cases,[63] and in the majority of cases the application of the new threshold of seriousness has not proved problematic.[64]

Moreover, the Supreme Court in *Lachaux* held that, if it were practical to do so, section 1 could be applied at preliminary stages in proceedings, and that such a practice would not conflict with the

58 At first instance in the case, Warby J held that it was 'now necessary to prove as a fact on the balance of probabilities that serious reputational harm has been caused by, or is likely to result in future from, the publication complained of': *Lachaux v Independent Print* [2015] EWHC 2242 (QB) at [45]. As stated above, the Court of Appeal overruled, allowing prominence for inference on harm: *Lachaux* [2017] (n 45 above) at [82].

59 *Lachaux* [2019] (n 28 above) at [14].

60 Ibid at [14] and [15].

61 As per Warby J in *Turley v Unite the Union* [2019] EWHC 3547 at [107].

62 *Lachaux* [2019] (n 28 above) at [14], [21].

63 *Yavuz v Tesco Stores Ltd* [2019] EWHC 1971 (QB); *Fentiman v Marsh* [2019] EWHC 2099 (QB).

64 In *Turley* (n 61 above) at [114], for example, Nicklin J demonstrated the relative ease of applying the *Lachaux* test in relation to online defamation, where social media and other visible commentary constituted clear evidence of 'tangible adverse consequences', and supported the claimant's contention that serious harm was caused by the publication in question.

different rules pertaining to specific damages in libel and slander claims.[65] The interpretation has not proved as problematic as some had predicted. The fear that such a practice would generate 'expensive mini-trials',[66] or place an 'onerous burden' at a preliminary stage,[67] now appears somewhat exaggerated.[68] On analysis, courts can be seen to be quite adept at managing the costs and complexity involved in the application of the section 1 serious harm test, and have proved reasonable in deciding on an ad hoc basis whether it is possible or necessary to apply the test at a preliminary stage.[69]

In his oral briefing on the Defamation Bill before the Northern Ireland Finance Committee, Andrew Scott argued that the Supreme Court decision in *Lachaux* 'leads us to a position where evidence of actual harm has to be pled by the parties', and 'therefore it is the sort of thing that has been determined by the courts at the final trial, rather than at the preliminary stage'. It is not, he argued, 'serving as a gateway provision or an early hurdle' as it was intended. He further stated that 'the irony here' is that the English courts have to revert to the common-law mechanism of 'striking out claims as an abuse of process'.[70]

Of course, the procedural threshold will, by its nature, always prove more suitable to a preliminary stage of proceedings. However, there have been cases where the issue of serious harm has been effectively foregrounded in proceedings, without descending into expensive

65 *Lachaux* [2019] (n 28 above) at [19].

66 Scott Report 2016 (n 6 above) at 2.95.

67 A Mullis and A Scott, 'Tilting at windmills: the Defamation Act 2013' (2014) 77 Modern Law Review 87, 106.

68 G Phillipson, 'The "global pariah", the Defamation Bill and the Human Rights Act' (2014) 63(1) Northern Ireland Legal Quarterly 149–186, at 169.

69 In *Hamilton* (n 56 above), Warby J said there would be cases where the court 'can sensibly try, at the preliminary stage, the issue of whether the publication complained of satisfied the serious harm requirement under s 1 of the Defamation Act 2013'. In *Day v Chivers* [2020] EWHC 3522 (QB), after a preliminary trial on natural and ordinary meaning, in which 'a considerable amount of witness evidence' was already presented, the s 1 test was adjourned for later hearing. In *Ager v CDF Ltd* [2019] EWHC 2830 (QB), the parties agreed at the preliminary stage to limit the question to whether the words were 'defamatory at common law' (at [12]). The only case where the s 1 test can be seen to have introduced some notable complexity is *Sakho v World Anti-Doping Agency* [2020] EMLR 14, where the factual serious harm test had to be applied at a more preliminary stage in complex relationship with other issues, and was nonetheless considered a 'live issue' in the proceedings. But *Sakho* is an odd case, where the serious harm test had to be contemplated at the preliminary stage in order to answer the question raised about the meaning of republications which were not sued upon, but which were relied upon in support of the claim against the original publication.

70 Northern Ireland Assembly, Committee for Finance, Hansard 3 November 2021.

mini-trials. *Anna Turley v Unite the Union* is one such example;[71] *Nwakamma v Umeyor* is another.[72]

It would hardly be prudent to engage a threshold of seriousness in dealing with the more basic preliminary matters. Again, the issue will come down to whether it would be practical to address the question early, rather than any formal rule about its place in proceedings.

Moreover, the procedural threshold and substantive threshold should not be conflated. The value of section 1, at whichever point it is tried, lies in assuring parties that the claim will not only be subject to scrutiny under the procedural threshold (eg in relation to limited publication, or misleading the court), but that it will also be subject at some point to a substantial threshold (eg as in whether a widely circulated publication alleging the plaintiff was a 'gold digger' in fact caused serious harm). It is the psychological impact on the parties of that added dimension of scrutiny that addresses the chilling effect on free speech in defamation law, and which will ensure a fairer balance between the parties.

There are of course some lingering questions and uncertainty about the scope of section 1, but nothing more than can be reasonably expected of any significant legal development. Admittedly, one of the enduring complexities relates to the continued role of 'inherent tendency' in the section 1 serious harm test.[73] However, the diffuse and obscure nature of reputation and the practical difficulties of proving serious harm in some cases may mean the principle can never be ruled out. A

71 *Turley* (n 60 above). There had been a previous hearing in that case, on an amended defence on two grounds: withdrawal of admission of breach of the Data Protection Act 2018 and application for strike out on the grounds that there had been an abuse of process by the claimant in 'misleading the court': [2019] EWHC 2997 (QB).

72 [2020] EWHC 3262 (QB). This was not the first time the courts were burdened with a 'disproportionate number of cases' issuing from the parties involved. The defendant had successfully sued the claimant for libel in 2015; something that may have entered into the decision in 2021 that the claimant had failed to meet the threshold of seriousness under s 1. See below at page 32.

73 *Lachaux* [2019] (n 28 above). See also, *Morgan v Times Newspapers Ltd* [2019] EWHC 1525 (QB) [2019] 22; *Cooke v MGN Ltd* [2014] EWHC 2831 at [43]; *Theedom* (n 57 above) at [15]. Related but different to this is a question of the relevant moment of harm. In *Lachaux* [2019] (n 28 above), Lord Sumption stated that in general the relevant moment would be at the moment of communication of the defamatory statement, but that if for some reason it does not occur at that moment, 'subsequent evidence' will be considered as evidence of harm. Obvious cases are those in which there is a percolation or 'grapevine effect' of the defamatory statement (ie where later events made the original statement more damaging), but in *Hodges v Naish* [2021] EWHC 1805, Parkes QC posed an interesting question about cases where later developments render the original statement less damaging, where an original cause satisfies s 1, 'only to vanish a moment later, like a firefly on a summer night' (at [165]).

defining principle about the proper balance between evidence of harm and inference of harm in this context will only come – if at all – as the question is refined before the courts. The development of section 1 has at least achieved some objectivity (reliance on facts), and hardly causes more ambiguity than the reliance on the more subjective principle of 'inference of substantial harm' that preceded it.

Ultimately, section 1 should be seen first and foremost as a codification of developments in the common law (principally *Thornton*), and as one that does raise the bar slightly to expedite adjudication of claims and address in some measure the chilling effect on free speech.

There are clear differences with the law in Northern Ireland in this regard.

To begin with, cases rarely reach the stage there where there is an opportunity for application of a threshold of seriousness there. With the continued presumption of the role of juries, Northern Ireland observes the Fox's Act 1792, which guarantees the constitutional importance of the jury as the trier of fact, and which therefore reserves the question of defamatory meaning to juries.[74] Thus, the judge's role is limited to determining whether the statement complained of is reasonably *capable* of bearing the meaning attributed to it in the complaint.[75] Northern Irish courts will cite in this regard the principle in *Gillick Brooks Advisory Centres* that '[t]he proper role of the judge ... is to delimit the range of meanings of which the words are reasonably capable',[76] and *Jameel v Wall Street Journal* (2003) where it was stated:

74 *Parmiter v Coupland* (1840) 6 M & W. For a more recent statement, see *Jameel v Wall Street Journal* [2003] EWCA Civ 1694. See also, F A Trindade, 'When is a matter considered "defamatory" by the courts?' (1999) Singapore Journal of Legal Studies 1, at 5. For recent statement of the legal principle in Northern Ireland, see eg *Winters, Mackin and KRW Law v Times Newspapers* [2016] NIQB 12 at [9]; *Doherty v Telegraph Newspapers* [2000] NIJB 236: 'The judge must be careful not to pre-empt the function of the jury'; *Neeson v Belfast Telegraph* [1999] NIJB 200: 'this matter is very much one for the jury'. Regarding the general distinction between questions of fact and law, see *British Chiropractic Association v Singh* [2010] EWCA Civ 350 at [13], where a noted result of the distinction is that the meaning eventually decided upon by the jury is shielded from attack on appeal save where it has crossed the boundary of reasonableness.

75 Under RCJ Order 82, rule 3A, either party may apply at any time in the proceedings for an order determining whether or not the words complained of are capable of bearing a particular meaning or meanings attributed to them in the pleadings. There is an incentive for both plaintiff and defendant to do so early; for the defendant, to strike out the claim, or for a claimant to strike out a defence of justification, see eg *Stokes v Sunday Newspapers Ltd* [2015] NIQB 53 at [2].

76 [2001] EWCA Civ 1263 at [7].

> ... it must be remembered that the judge is taking it upon himself to rule in effect that any jury would be perverse to take a different view on the question. It is a high threshold of exclusion. ... The judge's function is no more and no less than to pre-empt perversity.[77]

This question is deemed 'logically anterior'[78] to the general question of whether the statement is defamatory, which formally includes the question about the threshold of seriousness.[79]

Obviously, this is a much lower threshold than a serious harm test. It is a 'high threshold of exclusion' in the opposite direction to the threshold of seriousness: it will only bar those cases where it would be perverse to consider the words complained of defamatory.

What is more striking though is that the threshold applied in judge alone cases in Northern Ireland reflects the law in E&W *before the developments in the common law there from 2010 onwards*. While the courts may cite *Thornton* as an authority, there is little appreciation for the principle in that case, or the substance of that line of jurisprudence outlined above.

There is of course recognition of the *Jameel* procedural threshold in Northern Ireland. In the 2009 case of *McDonell v Adair*, for example, Justice McCloskey referred to the *Jameel* principle and struck out the claim on the grounds that it did not amount to a 'real and substantial tort'.[80] However, the case is rather limited to its facts. Like *Jameel* the issue in McDonnell was really one of publication.[81] In fact, the publication was even more limited than it was in *Jameel*, confined as

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77 EWCA Civ 1694 at [14]. See eg *EC v Sunday Newspapers* [2017] NIQB 117 at [52], citing the prescription of judge's role in jury trials in *Jameel v Wall Street Journal* [2003] (n 74 above); *McAirt v JPI Media NI Ltd* [2021] NIQB 52 at [16]. A ruling under RCJ Order 82, rule 3A still provides some threshold, albeit a limited one. In *McAirt*, Scoffield J held that the 'vast majority' of the plaintiff's pleaded meanings were not 'capable of being borne by the words complained of', and 'the limited remaining meanings' which could be borne by the words (ie that the plaintiffs were members of a group directed by an ex-IRA member) were dismissed under s 8 of the Defamation Act 1996 as having no prospect of success (at [28]).

78 *Gatley* (n 17 above) at 3.13.

79 One can question whether it really is so logically anterior; the issues of 'capable meaning', 'single meaning' and 'defamatory meaning' are blurred, and their distinction is something of a judicial construct. For example, the judge will still exercise 'his or her own judgment in light of the principles laid down in the authorities' (*Gillick* (n 76 above) at [7]). In practice, this includes relying on the principles used in determining the actual single meaning of the words complained of (often cited as the test in *Jeynes v News Magazines Ltd* [2008] EWCA Civ 130 at [14]; *Skuse v Granada Television Ltd* [1996] EMLR 278; *Koutsogannis v Random House Group Ltd* [2020] 4 WLR 25).

80 [2009] NIQB 93 at [16] and [28].

81 Ibid at [27].

it was to one other person, who had typed the letter containing the statement complained of.

Beyond this, however, there is no evidence of any proper recognition in Northern Ireland of the substantial threshold: the determined regard to freedom of expression with a 'multi-factorial' approach in relation to the threshold of seriousness that was in operation in the common law in E&W between 2010 and 2014.

In *Coulter v Sunday Newspapers Ltd*, for example, the *Thornton* 'minimum threshold of seriousness' is mentioned as one of several legal 'principles' to guide the judge 'sitting alone without a jury'.[82] However, it found no real application in the case. After a brief analysis of the facts, the judge in *Coulter* was satisfied with an 'overall impression on reading the article' that it referred to the claimant as 'scrooge', that one would 'expect a mean callous individual' on the basis of reading it, and considered it therefore to 'substantially affect in an adverse manner the attitude of other people towards the plaintiff'.[83] On appeal, there was no contest in relation to a threshold of seriousness, and the Court of Appeal makes no mention of it in reviewing and agreeing with the judge's determination of meaning at first instance.

Moreover, in distinction to the common law in E&W from 2010 to 2014, there is little evidence of the 'modern practice' of engaging the threshold of seriousness at an early stage of proceedings in Northern Ireland, or recognition of the 'overriding objective of justice' that requires that the threshold of harm should be determined as early as is practical. In *Stokes v Sunday Newspapers Ltd*, for example, the plaintiff applied both for the action be tried by judge alone and for a meaning ruling, so that the defence of justification could be struck out.[84] Even though Stephens J agreed the action should be tried by judge alone (because the *Reynolds* defence had been raised, see below at page 30), the judge still considered that at that 'stage of proceedings the role of the court is to delimit the range of meanings of which the words are reasonably capable of bearing' and could only go so far as to admit that, at some point in the future, 'an application for the trial of a preliminary issue as to the meaning or as to the imputation conveyed by the statement complained of, could well be appropriate'.[85]

Although the Northern Ireland legal system *claims* to follow the approach of the common law in E&W up until the adoption of the 2013 Act, one can find no application of such in relation to the threshold of seriousness. If there have been judicial decisions in Northern Ireland which are subject to reporting restrictions, but which can

82 [2016] NIQB 70 at [9] [15], emphasising the word 'substantially'.
83 Ibid at [9], [21], citing *Skuse* [1996] EMLR 278 as authority.
84 *Stokes* (n 75 above).
85 Ibid at [19].

nonetheless demonstrate that Northern Ireland does in fact fully recognise those developments in the common law in E&W before 2014, the Northern Ireland Department of Justice should release them in the interests of clarity.

However, the evidence clearly suggests that Northern Ireland does not in fact recognise the developments in E&W from 2010 onwards. It is no answer, moreover, to claim that Northern Ireland recognises *Jameel* and makes provision to strike out such claims as an abuse of process. Northern Ireland would be guilty of an egregious chilling effect on free speech if it did not at least recognise as an abuse of process any claim based on procedural impropriety or minimal publication. However, that can hardly be equated with the advances made in relation to defamatory meaning and a threshold of seriousness that were realised in the common law in E&W from 2010 onwards, and which were deemed also necessary by courts there to adequately protect freedom of expression.

With the codification and advance that section 1 has made on that line of jurisprudence, Northern Ireland is now clearly set on a very different course in that regard.

THE PUBLIC INTEREST DEFENCE

Section 4 of the 2013 Act provides for a public interest defence. Clause 4 of the Northern Ireland Defamation Bill seeks to do the same. The current law in Northern Ireland reflects the decision handed down by the House of Lords in 2001 in the case of *Reynolds v Times Newspapers Ltd*.[86] Once again, however, the real divergence between E&W and Northern Ireland in this regard can be seen to begin in the several years prior to the adoption of the 2013 Act.

The public interest defence in *Reynolds* constituted a significant development of the traditional qualified privilege. It recognised that there will be situations where a careful defendant may make a mistake on the facts in reporting on a matter of public interest, and that, where they have acted responsibly in doing so, they should have a viable defence in promoting such public interest speech.

Initially, however, the courts in E&W were 'reluctant' to give proper effect to the public interest defence as it was formulated by the House of Lords in *Reynolds*.[87] They would tend to insist upon 'strict compliance' with the requirements of responsible journalism listed by Lord Nicholls

86 [2001] 2 AC 127.

87 E Barendt, 'Reynolds revived and replaced' (2017) 9 Journal of Media Law 1.

in *Reynolds* and treat that as something of a non-exhaustive 'checklist', or series of hurdles, for the defendant to overcome.[88]

However, from at least 2007 onwards, the appeal courts in E&W attempted to address the restrictive reading that Reynolds was receiving in the lower courts, and to promote a more 'sensitive' and flexible approach that would give greater weight to public interest and freedom of expression.[89]

In *Jameel* (2007),[90] the House of Lords emphasised that 'the 'Nicholl's factors' must be approached in a practical and flexible manner with due deference to editorial discretion.'[91] The traditional framework of the privilege in terms of duty and interest was considered 'unhelpful' in this regard,[92] and the House carefully distinguished *Reynolds* as 'a different jurisprudential creature from the traditional form of privilege from which it sprang',[93] and 'not as narrow as traditional privilege'.[94] Employing a more fact-sensitive approach,[95] they then overruled the 'narrow ground' on which the lower courts denied the defence in the case.[96]

In *Flood v Times Newspapers Ltd* the Supreme Court emphasised the point again that 'the creation of the *Reynolds* privilege reflected a recognition on the part of the House of Lords that the existing law of defamation did not cater adequately for the importance of the article 10 right to freedom of expression'[97] and stressed that 'not all the items in Lord Nicholl's list in the *Reynolds* case were intended to be requirements of responsible journalism'.[98] Avoiding any statement of general principle beyond this, Lord Phillips warned that '[e]ach case turns

88 Ibid 1. See also on the 'restrictive reading' of *Reynolds*, Phillipson (n 68 above) at 161, n 97; or on how the early approach 'emptied the defence', E Descheemaeker, '"A man must take care not to defame his neighbour": the origins and significance of the defence of responsible publication' (2015) 34 University of Queensland Law Journal 239, 248. Cases cited as example: *Gilbert v MGN* [2000] EMLR 680 and in *Jameel v Wall Street Journal Europe Sprl* [2004] EMLR 196. See also *Pinard v Byrne* [2015] UKPC 41 and, another Privy Council case, *Bonnick v Morris* [2003] 1 AC 300.

89 E Barendt, 'Balancing freedom of expression and the right to reputation: reflections on Reynolds and reportage' (2013) 63 Northern Ireland Legal Quarterly 59, 68.

90 *Jameel v Wall Street Journal* [2007] 1 AC.

91 *Gatley* (n 17 above) at 15.8.

92 *Jameel* [2007] (n 90 above) at [50].

93 Ibid [46]. Citing the earlier approach of the Court of Appeal in *Loutchansky v Times Newspapers Ltd (Nos 2–5)* [2002] QB 783 at [32]–[35].

94 Ibid at [35], [46], [50].

95 *Gatley* (n 17 above) at 15.13.

96 *Jameel* [2007] (n 90 above) at [35], [46], [50].

97 [2012] UKSC 11 at [46].

98 Ibid at [75].

on its own facts',[99] and on the facts of that case the Court of Appeal's more traditional approach was overruled and the defendant was judged to have satisfied both the 'subjective' and 'objective' requirements of responsible journalism.[100] Lord Phillips concluded that the journalists in question had been 'reasonably satisfied' that the allegations were true, or that there were reasonable grounds to suspect such.[101]

The 'high water mark'[102] of the development of the defence in the common law can be found in the Court of Appeal's decision in *Yeo v Times Newspapers Ltd*.[103] There, Warby J followed *Jameel* and *Flood* in adopting a more fact-sensitive approach that recognised editorial judgment and freedom of expression. By that stage it was considered 'not necessary to ask whether every aspect of the [journalistic] process was carried out to perfection'.[104] Thus, even where there was 'room for improvement' in journalistic practice, and even though the journalist in question failed to give the claimant ample opportunity to put his side of the story – something, which would, on principle, have vitiated 'responsible journalism' under the restrictive approach[105] – it was not enough, on the facts of that case, to deny the defendant the privilege.[106]

Despite these advances, however, the line between traditional privilege and *Reynolds* was still not considered to be 'sharply drawn'.[107] The protracted and highly complex formulation of the defence in the common

99 Ibid. See also at [80] discussing duty to verify in relation to *Chase* levels of meaning: 'No such hard and fast principles can be applied when considering verification for the purpose of *Reynolds* privilege. They would impose too strict a fetter on freedom of expression.'

100 Ibid [80], [99].

101 Ibid [99].

102 Barendt (n 87 above) 13. The Defamation Act 2013 was already in force by the time of the decision in *Yeo*, but because the article complained of had been published some six months before the Act came into force, the cases was decided on the common law.

103 [2015] EWHC 3375. Heard by the Privy Council, the case was governed by the common law and not the 2013 statute.

104 Ibid at [134].

105 *Gatley* (n 17 above) at 15.12: 'This is perhaps the core *Reynolds* factor.'

106 In *Yeo (*n 103 above), even though the judge deemed there may have been 'room for improvement' in the journalistic process, this was not enough to render it 'an irresponsible journalistic process' for the purposes of denying the defence, at [171].

107 *Gatley* (n 17 above) at 14.3.

law was considered somewhat ambiguous and 'unpredictable'.[108] That indeed appears to have been the primary motivation for the codification of the defence in section 4 of the 2013 Act.[109]

The Act provided for a public interest defence in 'simpler and more accessible language'.[110] The concise legislative statement has certainly given defendants greater confidence in the defence and provided a 'powerful symbolic value' to public interest speech and its protection in law.[111]

Some early commentators argued that section 4 did not 'add anything new' beyond this,[112] or that it 'simply codified' the advances made in the common law in E&W before the Act.[113] It was deemed 'likely' that the first *Reynolds* requirement that the subject matter is one of public interest was codified in section 4(1)(a), while the further two elements of the defence ('reasonable to include the material complained of' and the standard of 'responsible journalism') were 'subsumed in the assessment of whether the publisher had a reasonable belief under s.4(1)(b)'.[114] That, on the face of it, seems reasonable enough, and it can be supposed also that the shift in focus in *Jameel* and *Flood* to a flexible approach that takes account of 'all circumstances', and makes adequate allowance for 'editorial judgment', came to be reflected in section 4(2) and (4) respectively.

However, three key differences between *Reynolds* and the statutory defence must be noted. First, any reference to the Nicholls factors was 'excised' from the section.[115] While the factors continue to have some relevance to interpretation of the provision, their formal exclusion from the law has rendered them more contingent to the defence and has obscured them further into a background of a broader horizon of circumstances that the court must now consider. Second, even if

108 Barendt (n 89 above) 66. Barendt concludes, '*Reynolds* clearly does not remove the chilling effect of libel law', ibid. The common law struggled to jettison the duty-interest framework of the defence. In *Loutchansky* (n 93 above) 'at the end of the day the court has to ask itself the single question whether in all the circumstances the duty-interest test or the right to know test has been satisfied', at [23]. In *Jameel* [2007] (n 90 above), Lord Bingham states, 'I do not understand the House to have rejected the duty-interest approach', at [30]. Even with the recognition of a need for flexibility and a more sensitive application of the Nicholls list, the focus largely remained on the defendant's conduct: Descheemaeker (n 88 above) 246.

109 Explanatory Notes, para 29.

110 Phillipson (n 68 above) 170: 'some modest merit'.

111 NILC 2014 (n 5 above) at 3.53.

112 Phillipson (n 68 above).

113 Descheemaeker (n 88 above) 239. However, Descheemaeker admits the Act 'brought in two complications': the 'repudiation' of the Nicholls checklist, and 'elimination' of the focus on 'responsible' journalism (at 240) – two substantial changes, whatever way you look at it.

114 *Gatley* (n 17 above) 15.5.

115 Ibid 15.8.

the three elements in *Reynolds* are subsumed under section 4(1)(b), the difference would lie in the *weight* given to those elements in application of the rule. Finally, Parliament deliberately omitted any reference to 'responsibly' in section 4, replacing it instead with the word 'reasonable' – a signpost, as will be seen, to a change of some consequence.[116]

Together, these differences have provided a basis for definitively moving beyond the traditional focus on 'defendant's conduct' toward a new focus on the defendant's 'reasonable belief', which will be seen to achieve a more 'objective' judicial approach to the defence. The courts in E&W now appear more cautious about imposing their own judicial construction of journalistic standards, and will now refer to a broader range of factors in relation to the defence, including the press's own standards.[117]

One of the first cases to reach appeal on the issue of section 4 and test the provision was *Economou v De Frietas*.[118] The defendant was a 'citizen journalist' who had failed to incorporate the claimant's side of the story, and the key issue was whether the defendant's belief that publishing the story was in the public interest could be considered reasonable: that is, the objective limb of 4(1)(b). The claimant had argued that the *Reynolds* factors remained key to determination of reasonableness under the provision, knowing that the defendant's failure to invite comment would fall afoul of the traditional standard. However, Sharp J rejected the claimant's argument.[119] The *Reynolds* factors were deemed to retain some relevance,[120] but the judge said the weight given to those factors would vary from 'case to case', that the emphasis should now be instead on 'practicality and flexibility', and that, ultimately, 'all will depend on the facts'.[121]

The correct approach was summed up as 'flexibility in the requirement to have regard to the circumstances of the case'; a 'requirement to make allowance for editorial judgment'; and recognition of 'the fact that there is little scope under article 10(2) of the Convention for

116 Lord McNally to Grand Chamber, 19 December 2012.

117 This reflects broader trends and developments in international human rights jurisprudence. See eg *Selistö v Finland* [2005] EMLR 8 at [59]: 'it is not for the Court, any more than it is for the national courts, to substitute its own views for those of the press as to what techniques of reporting should be adopted by journalists'.

118 [2018] EWCA Civ 2591. Previous cases often related to publications that occurred before the Act came into force, and were therefore to be decided under the common law defence, see eg *Sooben v Badal* [2017] EWHC 2638 (QB), which also involved the question of the standard applicable to amateurs, rather than professional journalists.

119 *Economou* (n 57 above) at [102].

120 Although it was noted that '[t]he statute could have made reference to the *Reynolds* factors in this connection, but did not do so': ibid at [110].

121 Ibid at [110]. On the 'unusual facts of this case', the defendant's conduct did not fall below the standard, see ibid [112].

restrictions on freedom of expression'.[122] Most importantly, this was framed as a judicial distinction between section 4(1) and the *Reynolds* defence:

> The statutory formulation in section 4(1) obviously directs attention to the publisher's belief that publishing the statement complained of is in the public interest, whereas the Reynolds defence focused on the responsibility of the publisher's conduct.[123]

In *Serafin v Malkiewicz*, the Supreme Court again drew out this distinction.[124] Delivering the judgment, Lord Wilson warned that the statutory defence cannot be 'equiparated' with those of the *Reynolds* defence.[125] The latter, he explained, remained rooted in a concept of qualified privilege and was thereby 'laden with baggage which, on any view, does not burden the statutory defence'.[126] *Reynolds* was considered to remain relevant to interpretation of the statutory defence. However, not only was a reference to a checklist deemed 'inappropriate', but the judge warned that 'acting "responsible" is now also best avoided'.[127]

As such, the *Reynolds* factors may remain relevant in English law, but they are now placed in a broader horizon of circumstances. With that, the focus on the 'responsibility' of the defendant's conduct has been dropped from both statute and practice, and has been replaced with a more objective standard of 'reasonableness', within which the defendant's conduct is only one of a broader range of factors.

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122 Ibid at [105].

123 Ibid at [86]. Later, in *Serafin* [2020] UKSC 23, Lord Wilson questioned whether the contrast 'is misconceived', arguing that Sharp LJ omitted reference to the requirement that the publisher's belief would have to be 'reasonable' (at [68]). However, it seems clear from the judgment as a whole that what Sharp LJ meant was that the distinction achieved by s 4 was a relaxation on the focus on the defendant's conduct and a focus on a broader ranger of factors.

124 *Serafin* (n 123 above).

125 Ibid at [72].

126 Ibid at [73]

127 Ibid at [75]. In *Onwude v Dyer, Godlee and BMJ Publishing Group* [2020] EWHC 3577 (QB), Parkes QC noted Lord Wilson's 'warning' in *Serafin* and distinguished the new statutory defence as focusing on the requirement of the defendant's 'reasonable belief' in public interest, against a traditional defence that was founded on the defendant's 'conduct', at [143]. In *Lachaux* [2021] EWHC 1797 (QB) at [152], Nicklin J, after careful analysis of the balance between article 8 and 10 rights, agreed with the approach in *Serafin*, and accepted that the requirement under the new statutory defence for the court to have regard to 'all the circumstances' called for a more objective standard. On the facts of that case, and reflecting developments in the law of privacy (*Sicri v Associated Newspapers Ltd* [2020] EWHC 3541), this included the value of the defendant's own code of practice, and admitted 'greater allowance to editorial judgment' if the publication is shown to be in compliance with that code, at [154].

If one compares these developments in E&W with Northern Ireland, one finds a clear difference in the approach to the public interest defence.

When the defence is asserted in Northern Ireland, which it rarely is, the courts cite *Reynolds* as a leading authority.[128] But it is not the *Reynolds* defence that emerged in the common law in E&W from 2007 onwards. Rather, it reflects more the restrictive reading that the defence received in the lower courts there in the years immediately following the *Reynolds* decision, and which the appeal courts in E&W tried to correct.

Indeed, the defence has been so emptied of its substance in Northern Ireland that there has been no reported instance of a successful *Reynolds* defence there.[129]

Of course, there was never any formal declaration of a divergence with the common law in E&W before 2014, and Northern Irish courts do recognise that the *Reynolds* factors should not be treated as a 'checklist', for example.[130] However, in distinction to the common law approach in E&W now, there is a discernible tendency in Northern Ireland to focus heavily on the third element of *Reynolds*, the standard of 'responsible journalism', and for the courts there to impose their own normative views on the standard, without regard for the range of circumstances, or the allowance for editorial judgment.

As late as 2014, for example, confidence in the recognition of *Reynolds* was apparently so low in Northern Ireland that in *Loughran v Century Newspapers Ltd* the defendant's failure to seek comment from the plaintiff was considered a complete bar to any potential public interest defence, and a defence was mounted instead on qualified privilege pursuant to section 15 of the Defamation Act 1996.[131] The issue then turned on 'malice', which was reserved for the jury, and with the prospect of protracted litigation on that basis, the defendant became nervous and settled. This was despite the fact that the publication had

128 See, for example, *Stokes* (n 75 above) at [28].

129 The only real judicial affirmation of the *Reynolds* defence, or the potential thereof, comes in refusals to strike out the pleaded defence. In *Stokes v Sunday Newspapers Ltd* (n 75 above), for example, Stephens J refused to strike out the *Reynolds* defence on the ground that failure to seek comment vitiated responsible journalism. The judge noted that, on the facts of the case, it could be determined on evidence at trial that to do so may have endangered a third person. The case was settled before any such determination could be made, however.

130 Ibid at [31].

131 [2014] NICA 26.

shades of reportage,[132] despite the fact that the journalist in question was very much acting as a 'watchdog barking' to wake the public up to an important public interest story,[133] and despite the fact that the journalist had shown some responsibility and care to try and ensure the veracity of the allegation.[134]

In *Coulter v Sunday Newspapers Ltd*, the *Reynolds* defence *was* raised, and the court agreed that the publication complained of was in the public interest.[135] However, the court approached the second element of *Reynolds* (the question of whether it was reasonable to include the particular matter complained of) as if it was subsidiary to the third element of 'responsible journalism'.[136] Having loaded so much on this question of responsible journalism, there was none of the careful analysis of a broad range of circumstances that courts in E&W would now engage in that regard. After only a brief analysis, which focused mainly on 'the degree of stress and harm to the plaintiff' and the 'seriousness of the allegation', it was concluded that the defendant's failure to verify 'did not amount to responsible journalism'.[137] Furthermore, without any reference to editorial judgment, the defendant's failure to meet the court's standard of responsible journalism was automatically taken to mean that they had not established that it was reasonable to include the particular matter complained of in the article.[138]

When the defendant appealed, arguing that the trial judge had erred in the application of the *Reynolds* defence, the Northern Ireland Court of Appeal admitted that the judge had 'failed to fully address the

132 The defendant's journalist had relied on a Northern Ireland Audit Office report, which on page 70 contained an implication of the plaintiff's involvement in a project that was subject to issues of mismanagement and potential fraud. The journalist cross-referenced this with other official notices to confirm the involvement of the plaintiff in the relevant project at the relevant time; not altogether erroneously as it turned out, but erroneous as to the degree of the plaintiff's involvement in any mismanagement or fraud. The journalist did not seek comment from the plaintiff, which may have revealed the mistake. It was not perhaps a 'true reportage' case, however, there is some authority to suggest that in such a case with 'strong similarities with reportage', the duty to verify the implications will be attenuated: see Lord Philips in *Flood v Times Newspapers Ltd* [2012] 2 AC 273 at [43].

133 As distinction of the *Reynolds* defence as per Ward LJ in *Charman v Orion Publishing Ltd* [2007] EWCA Civ 972 at [49].

134 As n 132 above. Perhaps not enough, on the facts, but it is likely that the same factual pattern in E&W, occurring even in the year before the 2013 Act, would have at least led to an assertion of a *Reynolds* defence.

135 [2016] NIQB 70.

136 Ibid [82]–[83]: 'The answer to this issue may be informed by the question as to whether the publisher has met the standards of responsible journalism. I will address that issue before returning to the second issue.'

137 Ibid [84]–[86].

138 Ibid at [94].

issue as to whether it was reasonable to include the particular material complained of and to consider the important concept of editorial judgment'.[139] However, somewhat paradoxically, the Court of Appeal then immediately concluded that:

> ... given the forthright criticism that [the trial judge] visited upon the article as a whole in the course of his judgment, we consider that we could have implied from the judgment that had he given distinct and separate consideration to this second issue either before or after turning to responsible journalism, he would undoubtedly have concluded that it was unreasonable to contain the full extent of the particular material complained of.[140]

Thus, the Northern Ireland Court of Appeal saw no issue in the restrictive application of the *Reynolds* test of 'responsible journalism'. There was no further analysis of facts or circumstances extraneous to the narrow focus of the judgment at first instance, and the court was willing to imply from that brief analysis that the defendant had fallen afoul of the latter two elements of the *Reynolds* defence. The appeal on the public interest defence issue was denied.

In *EC v Sunday Newspapers Ltd* the 'problem for the defendant' again lay in the standard of responsible journalism under *Reynolds*.[141] Admittedly, the defendant in the case, a weekly tabloid, is not known for the highest standards of journalism, and the publication in question may arguably not have passed even the reformed defence under section 4 of the 2013 Act. However, what is noteworthy is the court's approach of relying heavily on the Nicholl's factors in dismissal of the defence.[142] In that respect the court focused on the 'serious attack on the reputation of the plaintiff' and concluded that the defendant's failure to invite comment from the plaintiff vitiated the standard of responsible journalism and excluded the defence.[143]

As a point of interest, the court appeared more willing to recognise the importance of public interest speech under the heading of privacy law. While Colton J omitted any reference to editorial discretion in relation to the *Reynolds* defence, the judge was more definite in finding that 'there was a "public interest" story to be written in the context of this case'[144] and made greater acknowledgment in relation to the article 8 claim that 'the court is not a newspaper editor', and that the court 'should not unduly restrict the discretion vested in editors as to

139 *Coulter v Sunday Newspapers Ltd* [2017] NICA 10 at [48].
140 Ibid.
141 *EC v Sunday Newspapers* (n 77 above) at [74].
142 Ibid at [73].
143 Ibid at [74].
144 Ibid at [131].

how they present their stories'.[145] The judge even cited in this regard Strasbourg jurisprudence that addressed national defamation law in relation to article 10,[146] as well as Lord Brown's statement about allowance for editorial judgment in *Flood*.[147] Yet, none of this was mentioned in relation to the *Reynolds* defence, which, in comparison, was curtly disposed of.[148]

The cases also reveal a subtle yet important relationship between the threshold of harm and the application of the public interest defence in Northern Ireland. In both cases, the courts emphasised the serious nature of the allegations in question ('the degree of stress and harm to the plaintiff' and the 'serious attack on the reputation of the plaintiff') in addressing the question of whether the defendant had met the standard of responsible journalism. In *Reynolds* itself, of course, the seriousness of allegations was one of the 10 factors listed as relevant by Lord Nicholls, stating that the 'more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true'.[149]

Yet, the true significance of this relationship lies in the way in which the continued presumption of damages in defamation actions impacts upon the application of the *Reynolds* defence. Even if section 4 itself already codified the developments in the common law in E&W in the run-up to the Act to shift the focus away from the defendant's conduct towards a more objective standard, the abolition of the presumption of damages through section 1 of the Act also makes a necessary contribution to a more fact-sensitive and objective approach in determining the standard of 'reasonableness' under section 4(1)(b).

The continued presumption of harm in Northern Ireland, on the other hand, causes some problems in relation to the judicial concept of responsible journalism for the *Reynolds* defence. In short, if the threshold of seriousness is only based on judicial inference and

145 Ibid at [133].

146 Citing at [133] the statement about editorial judgment in *Selistö v Finland* [2005] EMLR 8 at [59].

147 *EC v Sunday Newspapers* (n 77 above) [133] and [134].

148 Privacy law, in general, has received a more robust development in Northern Ireland in recent years, perhaps more in line with the development of that branch of law in E&W. However, this bold development of privacy law in Northern Ireland may be motivated by the very concern for the dignitary interests of plaintiffs that underpins the comparatively stunted development of defamation law there. On distinction between misuse of private information and defamation in Northern Ireland, see *McAirt* (n 77 above) at [39].

149 *Reynolds* (n 88 above) 205. However, it was also recognised, in the English common law at least, that 'investigative journalism tends to result in serious allegations', and that the 'seriousness of the allegation may also support the journalist's contention that there is a public interest in the making of the allegation': *Flood v Times Newspapers* [2009] EWHC 2375 at [149].

cannot be tested on facts, then reliance on the 'seriousness of the allegation' in relation to the *Reynolds* defence must also be based on judicial inference. That clearly eschews the more fact-sensitive and circumstantial approach to the defence that is favoured in E&W.[150]

There is, finally, another important dynamic at play here, between the continued presumption in favour of a jury trial and the operation of the public interest defence in Northern Ireland. There is no clear rule about the respective role of judge and jury in relation to the *Reynolds* defence. However, it is well recognised that the defence raises complex factual issues that may leave juries 'mystified', that it is therefore unsuitable for trial by jury, and should, as far as possible, be tried by judge alone.[151] In *Jameel* (2005), for example, Lord Phillips MR pointed out that:

> The division between the role of judge and that of the jury when *Reynolds* privilege is in issue is not an easy one; indeed it is open to question whether jury trial is desirable at all in such cases.[152]

The principle is well-recognised in Northern Ireland. In *Stokes v Sunday Newspapers Ltd* the judge cited the principle as stated in *Jameel* and *Flood* before ruling that the 'complicated factual issues' and 'consideration of meanings' engaged by the *Reynolds* defence necessitated a trial by judge alone.[153]

Nonetheless, difficult questions about the role of judge and jury in relation to the *Reynolds* defence remain. There is no doubt that the complex factual questions engaged by the Reynolds defence would prove difficult for juries. But if juries are to be valued as ordinary, right-thinking members of the community, then their exclusion from cases involving a *Reynolds* defence should require judges to adopt a more objective and fact-sensitive approach to the defence (just as they have now in E&W).

If there is to be a sudden blurring of the traditional distinction between judge and jury – while it is retained, for example, in relation to defamatory meaning – it would seem to place greater responsibility

150 Of course, the relationship between meaning and *Reynolds* is reasonably well established (*Bonnick* (n 88 above) at [25]; *Flood* [2012] (n 97 above) at [50]). Yet, in relation to the specific issue of serious harm and the public interest defence, serious harm *is* somewhat 'logically anterior' to the general issue of meaning. Here, we are talking about the role of harm in the milieu of factors considered by the court in deciding whether the requisite standard of responsible journalism has been met, or whether the journalist has reasonably believed the publication to be in the public interest. This is still a relatively grey area, allowing for a different approach in Northern Ireland.

151 *Gatley* (n 17 above) at 15.22.

152 *Jameel (No 2)* [2005] 2 WLR 1577, at [70]. See also *Flood* [2012] (n 97 above) at [49].

153 *Stokes* (n 75 above) at [42]–[53].

on the judge to consider a broad range of circumstances and to be more cautious in imposing a judicial construction of the defence. The limited case law on the *Reynolds* defence in Northern Ireland does not, however, demonstrate any judicial reflection on this. Even when the unsuitability of the trial of *Reynolds* by jury is addressed in *Stokes*, for example, the defence is still framed in terms of a need for a focus on the 'seriousness of the allegation' and reliance on the Nicholls factors.[154]

Of course, as the authors in *Gatley on Libel and Slander* point out, these difficult issues about the role of judge and jury in relation to the public interest defence are 'substantially reduced in importance in the context of the general move toward trial by judge alone in the Defamation Act 2013'.[155]

In summary, the public interest defence constitutes another important point of divergence in the law between E&W and Northern Ireland. In E&W, the common law prior to 2014 and the adoption of section 4 of the 2013 Act have firmly established a more objective standard of reasonableness in relation to the defence, which clearly bolsters the defence and addresses the chilling effect on this important type of speech. In Northern Ireland, the courts adopt the restrictive reading of the *Reynolds* defence, focusing primarily on the question of 'responsible journalism', measuring such in more limited criteria of presumed harm and the defendant's conduct, and with less reflection on the risks of imposing a judicial construction in this regard. Once again, the difference will be compounded as the two jurisdictions evolve along their distinct paths.

CONCLUSION

In conclusion, comparing the law in E&W with the law in Northern Ireland in these three key areas reveals a clear divergence between the jurisdictions, and a definite chilling effect of the law on free speech in Northern Ireland. The presumption of jury trials in Northern Ireland is causing defamation cases to settle and, thus, undermining the intended purpose of juries. There appears little appreciation of the substantial threshold of seriousness, and now a clear divergence from the serious harm test. The courts in Northern Ireland adopt a restricitve reading of *Reynolds*, to such a degree that the defence has been emptied of its substance.

In each area, the divergence did not start simply with the enactment of the Defamation Act 2013 but, instead, can be seen to have started several years before that Act came into force.

154 Ibid [44] to [53]. The Nicholls factors are particularly prominent in this regard at [52].

155 *Gatley* (n 17 above) at 15.22.

The growing difference between the jurisdictions, and the chilling effect in these areas, can be solved with legislative action. It is recommended that the Northern Ireland Assembly adopts reform in relation to each of the areas addressed above, in reflection of the relevant provisions under the 2013 Act.

Based on the analysis above, it is recommended that Northern Ireland modernises its rules on the mode of trial in defamation claims and reverses the presumption of jury trials. The problem with juries is not simply that their promise is hardly realised; it is that the mere prospect of a jury trial postpones the vital threshold of seriousness and threatens the prospect of protracted costs and litigation.

That clearly has an effect on causing defendants to settle early on unfavourable terms. The presumption of jury trial has the paradoxical effect in this regard of limiting the role of juries. That is why the courts in E&W considered it sensible to limit the use of juries in the run up to the 2013 Act, and why section 11 of the Act definitively reversed the presumption.

It is recognised, however, that the reversal of the presumption of jury trials is a sensitive issue. Juries were traditionally valued in defamation law for providing 'the perspective of the ordinary, right-thinking member of the community'.[156] In *theory*, they do promise some potential democratic value in the high-flying and moneyed environs of defamation courts. In Northern Ireland in particular, juries hold a special place in the national psyche. In his report on the Northern Ireland Law Commission's consultation on libel law reform in Northern Ireland, Andrew Scott hints at the 'historical and constitutional importance of the jury trial in the Northern Irish context'.[157] Obviously, this refers in part at least to Northern Ireland's troubled past. One may think of the dark reputation of the 'Diplock courts' that were introduced under the Northern Ireland (Emergency Provisions) Act 1973, and the perception that the practice allowed for the expedition of criminal trials of suspected terrorist without the right to jury trial or much of the due process we would now expect under current standards of criminal justice or human rights jurisprudence.[158]

However, one must question the continued presumption of jury trials in *defamation* cases in Northern Ireland. Even if provision is made for them, juries will rarely be employed in practice, their prospect will cause cases to settle early, and the presumption can be gamed by

156 NILC 2014 (n 5 above)at 4.07

157 Scott Report 2016 (n 6 above) at 2.121

158 See Carol Daugherty Rasnic, 'Northern Ireland's criminal trials without jury: the Diplock experiment' (1999) 5 Annual Survey of International and Comparative Law 1, 239. The use of Diplock courts has been abolished by the Justice and Security (Northern Ireland) Act 2007.

plaintiffs to postpone any application of a threshold test. Despite the provision for juries in defamation claims in Northern Ireland, it is already judges who decide the majority of factual issues in defamation claims, and the presumption mostly operates now as a fig leaf for that uncomfortable truth.

It is recommended also that the Northern Ireland Assembly should adopt a threshold of seriousness, much like that reflected in section 1 of the 2013 Act.

Judging by the discussions in the Northern Ireland Assembly, there is some anxiety about adopting a threshold of seriousness in defamation law. On analysis, though, such anxiety seems unnecessary. Such a fact-sensitive approach to the threshold of seriousness will not suddenly deny plaintiffs justice and leave reputation unprotected in Northern Ireland. It will not suddenly allow people to get away with publishing 'lies' about others. It has been tested all the way up to the Supreme Court, and it is now clear what it involves to a large extent; it raises the threshold to claims slightly and, in doing so, undoubtedly strikes a fairer balance between the parties in defamation claims.

If one looks at the very recent libel case of *Foster v Jessen*,[159] for example, one can test out the modest effect that a section 1 type threshold of seriousness would have in Northern Ireland. In that case, if the harm could not have been inferred from the facts, the test would likely have been easily satisfied by the evidence that was already presented in the plaintiff's application for summary judgment.[160]

Perhaps the only case that has been knocked out on section 1 in E&W since 2014, which might have been allowed to proceed in Northern Ireland, is the case of *Nwakamma v Umeyor*.[161] In Northern Ireland, the meaning of the words complained of there may, arguably, have been judged enough to have an inherent tendency to cause harm to reputation, but the court's careful analysis of facts under section 1 revealed the statement was published only to a very small number of people, that it appeared no one believed the allegations, and the claimant's accounts on examination were found to be unconvincing and exaggerated.[162]

Arguably, one of the only cases that has *succeeded* in Northern Ireland since 2014, which might have been knocked out by section 1

159 [2021] NIQB 56. See also, M P Hanna, '*Foster v Jessen*: a comment on law and online defamation in Northern Ireland' (2021) 72 Northern Ireland Legal Quarterly 115.

160 In the case, the plaintiff herself attended court to give evidence of the harm suffered.

161 *Nwakamma* (n 72 above).

162 Ibid [79]. Indeed, that is also what should happen under a proper *Thornton* reading.

in E&W, is *Coulter*. But even there it is not clear, as the plaintiff could (possibly?) have proved as a proposition of fact that the allegation that he was a 'scrooge' did constitute a serious harm to his reputation.

Even if the effect of a section 1 serious harm test is relatively modest, and even if it only filters out a slim band of cases, it is nonetheless necessary to strike a more precise and equal balance between the parties to a defamation action and to express a public commitment in that regard to equal protection of the right to reputation and the right to freedom of expression.

Finally, in relation to the public interest defence, it seems imperative for the Northern Ireland Assembly to take action to protect this important type of speech and to signal to the people of Northern Ireland that it considers this type of speech to be of utmost importance.

The chilling effect on public interest speech should be of particular concern to the people there. The political structures that were established as part of the peace process there mean that its citizens must rely heavily on the conduct of government and public administration. Moreover, the long shadow of the conflict also necessitates robust protection of public interest speech. Peace was only secured by power-sharing between two extremes of sectarian division, and the political system is still prone to the factious, guarded and hidden arrangements on that basis. As a consociationalist democracy in a post-conflict society, public interest speech and the involvement of ordinary citizens in governance is vital to the peace and prosperity of Northern Ireland.

There are also logistical issues of the media in Northern Ireland that must be considered. Much of the broadcast and print media in the province is owned by parent companies located in Dublin, London, or other parts of the United Kingdom. Somewhat remote from the Northern Irish public, they may not feel so invested in a public interest there that they would risk their money, and take their chances, in a Northern Irish legal system that still adopts a restrictive approach to the public interest defence.

It also worth considering that providing a bolder public interest defence, indeed providing for any viable public interest defence, may be a way of encouraging publishers to act more reasonably in how they investigate and communicate news. For example, it was demonstrated above how section 4 of the Defamation Act 2013 has been interpreted by courts in E&W as necessitating a more objective approach to determining journalistic standards, and the courts have made more use of press codes in adjudicating whether the standard of reasonableness has been met under section 4.[163]

163 See n 127 above, recognising, of course, that press codes are not fully dispositive of the range of factors that must be considered.

In Northern Ireland there are newspapers that refuse to subscribe to a recognised press code. The Northern Ireland Assembly could use this opportunity to develop a public interest defence that would include a provision stating that, so long as the defendant was not a citizen-journalist, and they did not subscribe to a recognised press code, that a recognised press code would be relevant to determining what is 'reasonable' conduct under the defence. Such a provision would not constitute a chilling effect on free speech and is in line with the judicial interpretation of section 4 of the 2013 Act, in so far as it wishes to recognise reasonable editorial judgment and move away from judicial inference of journalistic standards.

At any rate, there are opportunities now for Northern Ireland to learn from the experience of reform in E&W and to even make advances upon it. What is clear, however, is that, in relation to the areas analysed above, the current law in Northern Ireland is contributing to a chilling effect on free speech, and should therefore at least enact legislative reform to address those issues.

If the proposed legislative reform is rejected by the Northern Ireland Assembly, then the common law in Northern Ireland should address the issue by properly recognising the developments in relation to each of the three areas that was achieved in the common law in E&W before the 2013 Act came into force.

If the courts in Northern Ireland decline to do that, then they should declare divergence from that body of law in E&W in the interest of clarity.

There do not appear to be any sensible alternatives to those three options.

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Against the act/omission distinction†

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ABSTRACT

The act/omission distinction is widely thought of as being of foundational importance in the substantive criminal law of liberal states. While acts can be proper targets for criminal offences, it is thought that we should only exceptionally criminalise omissions. I argue against this piece of criminal law orthodoxy by showing that if we are careful to fairly compare acts and omissions qua targets for criminalisation, then none of the standard arguments in favour of the act/omission distinction convince. In fact, on close examination, there is little reason to think that an omission cannot perform the role played by the conduct element in the structure of a criminal offence, just as well as an act can.

Keywords: acts; omissions; criminalisation.

INTRODUCTION

Should acts *tout court* generally be considered better targets for criminalisation than omissions *tout court*? Plenty has been written on this question, both by those who think that the answer is yes,[1] and those that disagree.[2] But, with some notable exceptions,[3] interest in it

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1 T Honoré, 'Are omissions less culpable' in *Responsibility and Fault* (Hart 1999) 41–66; A P Simester, 'Why omissions are special' (1995) 1 Legal Theory 311.

2 J Glover, *Causing Death and Saving Lives* (Penguin 1977) 92–112; J Bennett, 'Morality and consequences' in S M McMurrin (ed), *The Tanner Lectures on Human Values* (University of Utah Press 1981) 45–116; M Tooley, 'Abortion and infanticide' (1972) 2(1) Philosophy and Public Affairs 37, 59–60; J Kleinig, 'Criminal liability for failures to act' (1986) 49(3) Law and Contemporary Problems 161.

3 For instance, S Sheffler, 'Doing and allowing' (2004) 114(2) Ethics 215; S Mathis, 'A plea for omissions' (2003) 22(2) Criminal Justice Ethics 15; V Tadros, 'Criminal omissions: culpability, responsibility and liberty' in *Criminal Responsibility* (Oxford University Press 2005) 182–211.

had waned by the start of the twenty-first century, possibly in lockstep with increasing worries about overcriminalisation. After all, if we are worried about the criminal law reaching into aspects of our lives that should probably be outside its domain, then we have fewer reasons to question such limits upon criminalisation as are imposed by the act/omission distinction (AOD), whatever its normative pedigree.

However, in a recent article,[4] I have argued that the criminal law can survive and thrive without the AOD, by adopting what I call the 'Remark-able Conduct Requirement' (RCR). Moreover, I suggest that the RCR limits the boundaries of the criminal law even more effectively than does the AOD. But while offering an alternative to the AOD, in that article I refrained from offering any argument against, or even addressing the normative defences of, using the AOD to structure the criminal law.[5] If the RCR is a plausible alternative to the AOD, then this injects fresh life into the independently interesting debate about its place in criminal law.

In this article therefore, I return to the question of whether the AOD deserves its foundational place in criminal law theory and doctrine and argue that it does not. My argument proceeds through the following steps: section two is methodological – in it I offer suggestions for ensuring that any criminalisation-focused comparison between acts and omissions is fair and instructive. In section three, I argue that omissions are as capable of performing the role played by the conduct element in the structure of a criminal offence as acts are, and so, unless we are offered a convincing reason to systematically distinguish between acts and omissions in criminalisation theory, we should not. Finally, in section four, I examine the main reasons offered in support of employing the AOD in criminalisation decisions and show that they fail to convince. This conclusion should push us to reconsider the AOD's place in criminalisation theory orthodoxy, whether or not the reader is convinced that the RCR is a good replacement for it.

STREAMLINING THE AOD ANALYSIS

For any comparison of the normative significance of acts and omissions *tout court* to convince, it must compare like for like. Extraneous and contingent considerations should not be allowed to skew our thinking. In this section, I explain what this entails.

My interest here is in the AOD's role in questions of criminalisation. This context shapes the analysis in various ways.

4 M Dsouza, 'Beyond acts and omissions: remark-able criminal conduct' (2021) 41(1) Legal Studies 1.

5 Ibid 3.

What qualifies as an 'omission'

Context shapes what qualifies as an omission.[6] To see how, note first that the terms 'act' and 'omission' are ordinary language terms, and theorists on both sides of the debate on the significance of the AOD to criminalisation theory agree that, in ordinary language, not all non-doings are omissions. [7] For instance, it would be odd to say that I omitted to see infra-red light. Likewise there is something odd about accusing me of 'omitting' to log into a WiFi network if I don't realise that one is available. Nor does it make sense to say that I omitted to do my morning meditation if I never start my day with meditation. That holds true even if I have good reasons to start my day with meditation. Nobody – including those who think omissions are as plausible as acts qua candidates for criminalisation – argues that mere non-doings (i.e. non-doings that are not properly called 'omissions') are as plausible as acts qua candidates for criminalisation. We should therefore distinguish between mere non-doings and true omissions, so that we compare only the latter with acts. The most established way of doing so was first proposed by Feinberg,[8] then adopted by Kleinig,[9] and developed further in my own recent work.[10] On this view,

S omitted to do α if and only if:
(1) S did not do α;
(2) S had the opportunity to do α;
(3) S had the ability to do α;
(4) S had good reason to believe that he had the opportunity and ability to do α; and
(5) α was reasonably expected of S, because
  (a) S, or those in S's position, ordinarily do α; or
  (b) S had a responsibility to do α; or
  (c) S was obligated to do α; or
  (d) α was in some other way morally required of S.[11]

Here, conditions (2) to (4) relate to S's practical capacity to do the thing she allegedly omits to do. They explain why S does not 'omit' when she fails to see infra-red light, or fails to log into a WiFi network

6 In Dsouza (ibid) 7–9, I argue that the context also shapes what amounts to an 'act' (though I prefer 'commission'). However, for this article, a commonsense understanding of what amounts to an 'act' will suffice.

7 A Ashworth, *Positive Obligations in Criminal Law* (Hart 2013) 31; Simester (n 1 above) 319–320; Honoré (n 1 above) 47; Glover (n 2 above) 95; Dsouza (n 4 above) 3–7.

8 J Feinberg, *Harm to Others* (Oxford University Press 1984) 159–163.

9 Kleinig (n 2 above) 165.

10 Dsouza (n 4 above) 2–3.

11 Kleinig (n 2 above) 165.

she does not realise is available. These conditions also apply in the criminal law – even if we assume that S's non-doings in these cases are 'conduct', there is a real sense in which they are non-voluntary[12] and therefore incapable of satisfying the criminal law's voluntary conduct requirement. This claim does not conceptually rule out inadvertent omissions – it is possible to be practically capable of doing something while absent-mindedly failing to exercise that capacity. This kind of non-doing may well be an omission, provided condition (5) is satisfied.[13]

Condition (5) – the 'reasonable expectation' requirement – reflects the fact that we use the word 'omission' to pick out non-doings that belie an expectation. In principle, the expectation may come from law, contract, morality, or simply an established routine,[14] but here is where context matters – in determining whether condition (5) is satisfied, we should refer to expectations that are contextually salient.[15] Different sets of expectations are relevant depending on the context in which we are inquiring about whether a given non-doing is an omission. We are interested in questions of criminalisation, and 'on any plausible normative theory of criminalisation, [it is] societal expectations… [that guide] thinking about what should be criminalised'.[16] Accordingly, the contextually salient expectations are those of the ordinary member of society, who will know the moral norms and routines prevalent in the agent's society. Additionally, where the agent has special role-responsibilities, the ordinary member of society will also know the expectations that we have of the sub-community of persons occupying the role being essayed by the agent. Non-doings that constitute deviations from these expectations, and that meet the other conditions identified above, are omissions. But non-doings that are not deviations, either because they comply with the relevant expectations, or because there are no relevant settled expectations, are not omissions.[17] Since, in the criminalisation context, the relevant settled expectations can include even those arising from societal routines, the resulting sense of the term 'omission' carries no necessary pejorative connotations – it picks out note-worthy, but not necessarily even *prima facie* blameworthy non-doings.[18]

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12 Ibid 164–166. Dsouza (n 4 above) 4. See also V Chiao, 'Action and agency in the criminal law' (2009) 15 Legal Theory 1, 16–18.

13 See, generally, Mathis (n 3 above) 21–23.

14 Kleinig (n 2 above) 164, 167, 169; Feinberg (n 8 above) 161–162; Simester (n 1 above) 320.

15 Dsouza (n 4 above) 4–5.

16 Ibid 5.

17 Ibid 4–5. See also Kleinig (n 2 above) 164, 167, 169; Feinberg (n 8 above) 161–162; Simester (n 1 above) 320.

18 Dsouza (n 4 above) 4.

There is also a second way in which context shapes our use of the word 'omission'. Our interest is in questions of criminalisation, but we can be more specific than that. Our real focus is *not* on what might be thought of as 'net criminalisation', ie the net scope of criminal liability, after defensive pleas are considered. It is narrower: is it better for an offence stipulation, and more specifically, the conduct element therein, to be framed by reference to an act, or to an omission? This means that expectations (or exemptions from expectations) whose only role is to support defensive pleas, are not salient to the context of our inquiry.

Consider this example. A lecturer does not deliver a scheduled lecture because she was unwell. Even if (in some nightmare world) we were considering criminalising teaching-related lapses by academics, we might agree that this lecturer ought not to be criminally liable. We might think that, although the lecturer was ordinarily expected to deliver the lecture, in the extraordinary circumstances of her being unwell, she was not expected to deliver the lecture. There are two ways to argue in defence of this conclusion. We can say either that:

(a) the lecturer was under no *net* expectation to deliver the lecture on this occasion, and so, in not showing up to deliver the lecture, she belied no contextually salient expectation, and performed no omissive conduct. Hers was a mere non-doing, and that is why she ought not to be criminally liable. Or
(b) the lecturer was expected to deliver the lecture, and in not doing so, she *did* perform omissive conduct. Even so, she has a rationale-based defence available to her, and *that* explains why she ought not to be criminally liable.

On the first story, the fact that a lecturer is not, on an overall view of her situation, expected to deliver a lecture when unwell is salient to the identification of omissions in the context of criminalisation theory. It is therefore relevant to the AOD debate. On the second story, the same fact is relevant solely to a plea for a rationale-based defence. It is therefore not relevant to the AOD debate.

The second story is the one that better fits with the way in which modern liberal systems of criminal law are structured. Recall that our interest is in whether the lecturer's non-delivery of the lecture should be an omission for the purposes of the conduct element of a potential offence stipulation. In previous work, I have argued that, in modern liberal systems of criminal law, offence stipulations typically track imperative expectations that narrow our liberties, whereas defences typically track the permissions that are the exceptions to these narrowings.[19] Therefore, in the context of modern liberal systems of

19 M Dsouza, *Rationale-Based Defences in Criminal Law* (Hart 2017) 47–88, especially at 86.

criminal law, when identifying omissions whose suitability for being the conduct element of a criminal offence we can fairly compare with acts,

> [o]nly considerations that *imperatively limit* our default unfettered freedom to conduct ourselves as we please are relevant when identifying contextually salient expectations. Factors that *permissively expand* (by carving out exceptions to imperative limitations) our freedom to behave as we please, relate to rationale-based defences rather than to the conduct component of the actus reus of a prima facie offence.[20]

In our example, the imperative liberty-limiting expectation applicable to the lecturer is that she deliver her lecture. Her failure to deliver the lecture is therefore properly characterised as an omission, rather than a mere non-doing. Additionally, in the special facts described, a permissive liberty-expanding exception to this expectation also applies – she need not deliver the lecture when she is unwell. This gives her access to a rationale-based defence to liability arising from her omission to deliver the lecture. But it is a mistake to say that because there was no *net* expectation for her to deliver the lecture, there was no relevant omission.

In sum then, only non-doings that

(a) are 'performed' by persons exercising their practical capacity for voluntary control, and
(b) belie a contextually salient (ie stemming from societal morality or routine) imperative liberty-limiting expectation

are 'true' omissions. In general, only this subset of non-doings is even potentially of interest to conscientious liberal legislators considering questions of criminalisation. Any fair comparison of acts and omissions should exclude all other non-doings.

Matters irrelevant to an offence's conduct element

Within the criminal law, the AOD is relevant only to an offence's *actus reus* and, more specifically, to the conduct component of the *actus reus*.[21] Accordingly, for my purposes, considerations going to other elements of an offence are extraneous. To be sure, they are relevant to overall liability outcomes and may be instructive in contexts other than an evaluation of the AOD's place in the criminal law, but, in this one, they must be excluded or neutralised (by ensuring that they affect both sides of the scale equally). Some such considerations to be excluded or neutralised include:

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20 Dsouza (n 4 above) 6.
21 Ibid 2–3.

(a) *Differences in mens rea:* an agent's advertence to, and mental attitude (intention, knowing indifference, or recklessness) towards, the conduct, consequences, or circumstances that constitute an offence's *actus reus* go to her *mens rea*, rather than to the inherent significance of the conduct-token.[22] To guard against unbalanced intuitive pulls exerted by these factors, we should ensure that the conduct-tokens being compared were performed with identical *mens rea* states.[23] Accordingly, we cannot usefully compare deliberate poisoning with careless failures to medicate, or the deliberate sabotaging of a parachute with a reckless failure to check it before offering it for use.

(b) *Factors going to defensive claims:* I mentioned previously the need to define omissions by reference only to imperative liberty-limiting reasonable expectations. Doing this allows us to keep separate from candidate conduct-tokens any considerations that support the grant of rationale-based defences. These should be excluded when comparing the intrinsic significance of various conduct-tokens. Along the same lines, we should also ensure that possible defensive claims going to responsible agency and voluntariness are weeded out from our analysis. We can do so by ensuring that each of the agents in our examples is a sane adult, who is not engaging in involuntary conduct. Intoxication-related denials of *mens rea* can be excluded by ensuring that the agents in our examples are sober (or neutralised by ensuring that they are equally intoxicated!).

(c) *Contingent systemic considerations:* it may plausibly be thought that for practical reasons, prosecuting for omissions is generally harder than prosecuting for acts. Perhaps we lack the resources to prosecute all culpable omitters, but can prosecute people who criminally offend by acting.[24] Perhaps it is easier to prove criminal acts than criminal omissions. Or perhaps a greater willingness to blame people for harmful omissions might make some feel that actively murdering someone is 'only' as bad as not

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22 As I use it, the term 'conduct-token' is neutral as to whether the agent's conduct was an act or an omission.

23 Glover (n 2 above) 95.

24 See, for instance, Simester (n 1 above) 330. One can, however, dispute this claim, or think that the issue is overstated. For instance, a selective conception of an omission might reduce the number of omitters to more manageable proportions. Connectedly, if we think of what the criminal law already does as an acceptable proxy for 'manageable proportions', it is worth noting that the criminal law is quite comfortable with prosecuting several defendants for a single offence under its expansive doctrines of accessorial liability.

contributing to the life-saving work of a charity.[25] Even if true, these claims relate to practical reasons not to criminalise, rather than the question in which I am interested, *viz* whether acts and omissions *tout court* are equally *eligible* for criminalisation. For that reason, when debating the AOD *tout court*, we should not be influenced by such practical considerations.

Unfair weights

There still remain additional factors that might unfairly weight our analysis and should therefore be excluded or neutralised from any pairs of cases used to compare acts and omissions in the context of criminalisation theory. Since these need only be stated to see why they are extraneous to the AOD *tout court*, I will not discuss them in detail. They include:

(a) *Unbalanced likelihoods of consequences:*[26] we can guard against this by ensuring that the consequences required for the offence, if any, are equally likely to follow from the conduct-token, be it an act or an omission.

(b) *Roles and relationships:* since an agent's roles may influence what we expect of her in terms of conduct,[27] it makes little sense to compare cases in which the agents stand in different relations to the victims or the consequences (if any) of the conduct-token. So for instance, comparing a parent's act with a stranger's omission (or *vice versa*) unfairly weights our analytical scales. We should frame any examples used to analyse the AOD accordingly.

(c) *Side-effects:* we should also exclude from examples facts that tend to introduce bias in our intuitive assessments because they make one way of bringing about the outcome more psychologically horrific or repulsive (or humane and compassionate) than another.[28] This is because it is simply not true that actively causing harm is inherently more horrific than passively causing it (or *vice versa*). Acts and omissions can bring about harms in equally horrific or banal ways. An act may be the compassionate alternative to an omission, despite involving direct physical contact with the 'victim' – consider consensual mercy killings, or

25 Glover (n 2 above) 110–111 discusses this extremely speculative objection and is as unconcerned about it as I am.

26 Glover (n 2 above) 98.

27 Kleinig (n 2 above) 170; Honoré (n 1 above) 65.

28 Glover (n 2 above) 99 calls these 'side-effects'. He illustrates this error by pointing to the unfairness of comparing the chancellor who cuts the budget allocation for pensions, thereby causing the death of several pensioners, with the chancellor who just takes a machine gun to the same number of pensioners. See also Bennett (n 2 above) 74.

> vets who put down beloved but seriously ill pets. But, equally, acts may be evil and horrific despite the perpetrators being remote from the victims – consider people who use drones or long-range missiles to kill others thousands of miles away. And we can easily think of cases in which, depending on the circumstances, omissions can be cruel, or compassionate, and may be perpetrated in physical proximity to, or far away from, the victim. Therefore, in comparing acts and omissions *tout court*, we should exclude or neutralise such factors.

One might object that, if we exclude all these factors, we are left only with fairly unrealistic examples – Honoré uses the term 'bizarre',[29] and Simester prefers 'thoroughly artificial' and 'extraordinary'.[30] The worry is that the strangeness of these examples might render our moral instincts untrustworthy and lead us to erroneous conclusions.[31] This is possible, but far from inevitable. The examples with which we are left should be seen as thought experiments, which do not have to be realistic to be enlightening. In fact, plenty of thought experiments have, despite their unrealistic nature, contributed significantly to philosophical progress.[32] Indeed, the extraordinariness of our thought experiments may well make our intuitive responses *more* trustworthy, since they are less likely to be influenced by received wisdom. In sum, provided that we are mindful of the limitations of our thought experiments, they can be instructive.

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29 Honoré (n 1 above) 52, 62.

30 Simester (n 1 above) 326–327.

31 Honoré (n 1 above) 63 and Simester (n 1 above) 327. Interestingly, the conclusion that both anticipate us reaching is that, insofar as the criminal law in concerned, acts and omissions are similar.

32 For example, Plato's cave, Descartes' evil demon, and Hobbes' state of nature. For a very interesting analysis of how thought experiments can be an aid to reasoning, see Daniel C Dennett, *Intuition Pumps and Other Tools for Thinking* (Penguin 2014). Besides, theorists, including many of those who have raised the objection to which I am responding, have themselves engaged in occasional bouts of 'trolleyology', some of which I reference later in this article. The most common version of the Trolley problem is fanciful enough as it is – it involves a runaway trolley hurtling down a track towards a person or persons who will be killed unless our protagonist pulls a lever to divert the trolley to another track such that it will kill others. See P Foot ,'The problem of abortion and the doctrine of double effect' (1967) 5 Oxford Review 1 at 3; J J Thompson 'The trolley problem' in *Essays on Moral Theory* (Harvard, 1986) 94. But there are plenty of even more fanciful variations of the Trolley problem that regularly feature in the literature.

A DEFAULT POSITION ON THE AOD

Based on the way in which a criminal offence is structured, we have a positive, albeit defeasible, reason to start from a position of doubt about the AOD in criminalisation theory. To see this, recall that, in doctrinal criminal law, a person is liable to a criminal conviction if she is

(a) a responsible agent (ie she meets the law's capacity conditions of age, sanity etc), who is
(b) capable of volitional conduct (so, not in an automatic state), and is
(c) exercising that capacity for volitional conduct (so, not involuntarily tripping, falling, or moving reflexively), to
(d) perform the offence's *actus reus*, with the
(e) necessary *mens rea* for it, and
(f) without any justification or excuse.

The *actus reus* – point (d) above – may include elements of conduct, consequence and circumstance.[33] The relevant question in the context of criminalisation theory is whether, in general, acts are better suited to satisfy the conduct element of the *actus reus* of a criminal offence than omissions.

We can answer this question by identifying the role that the conduct element plays in a criminal offence. Based on its place in the structure of a criminal offence, it appears that the conduct element (sometimes in combination with specified circumstances, or consequences, or both) is what makes an instance of a responsible moral agent exercising volitional control over herself, of interest to others. It does this by somehow altering the baseline state of the outside world. This baseline state is not one in which nobody does anything that affects others; that would be a wholly unnatural baseline, completely disconnected from the intensely social nature of our lives. Instead, the relevant baseline is one in which people interact with others in ways that are reasonably expected. These expectations may come from (legal or moral) duties, but they need not. Our reasonable expectations of each other may also stem from ways of interacting in society that are so commonplace as to become routine – things like forming (or not, depending on where you are) a queue, standing on the left on the escalator, mumbling an apology when accidentally brushing against someone, or nodding a head to acknowledge someone else's presence in a confined space. In other words, social etiquettes and routines can also give rise to reasonable expectations.

The similarity between the reasonable expectations I have just described and those to which we refer when identifying omissions

33 Dsouza (n 4 above) 2–3.

relevant to questions of criminalisation is unmistakeable. And it is not a coincidence. The factors that distinguish a true omission from a mere non-doing for the purposes of criminalisation questions are exactly the same factors that make any conduct of potential interest to the criminal law.[34] It is the deviations from societal understandings and patterns of interaction – what Kleinig calls 'conventional manifestations of a social milieu'[35] – that cause our world to change in ways that are interesting enough to call for further inquiry. These deviations, therefore, are capable of satisfying the conduct element of a criminal offence. Depending on the nature of the offence that we are thinking about enacting, we may also require that the conduct be performed in specified circumstances, and/or with specified consequences so as to satisfy its *actus reus*. But if there is no conduct that deviates from the natural baseline of unremarkable social interactions, there is nothing to investigate. True omissions, by definition, are deviations from the natural baseline of unremarkable social interactions. *Prima facie* therefore, they are capable – certainly as capable as acts are – of satisfying the conduct element of any offence we might wish to create.

The onus therefore should be on those that insist on systematically distinguishing between acts and omissions in criminalisation-related contexts to set out a convincing reason for us to agree with them. In the next section, I consider the main arguments that have been offered in support of the AOD.

DEFENCES OF THE AOD

Having identified what we must do to fairly compare acts and omissions in the context of questions of criminalisation, and determined that by default we should be sceptical of the significance of the AOD to questions of criminalisation, we are now ready to examine the arguments in support of systematically distinguishing between acts and omissions in criminalisation decisions. I do not propose to consider what Honoré calls 'optimising theories'[36] here, since, firstly, they are generally raised to argue against, rather that support, the AOD, and, secondly, they are built upon an implausibly utilitarian view of our duties which has largely fallen by the philosophical wayside. At any rate, no familiar liberal criminal justice system accepts the premise of such theories, *viz* that one must behave (including when making decisions about

34 This is why I argue, in Dsouza (ibid) 7–9, that not all doings are 'true' acts either though for more precision, in that context I use the term 'commissions'.

35 Kleinig (n 2 above) 169.

36 Honoré (n 1 above) 44–45. See also Tadros (n 3 above) 185–186.

what to criminalise) so as to optimise overall welfare, which in turn is calculated by adding up the individual welfares of each person.[37]

Current theoretical battles about the AOD are fought mainly on four battlegrounds, *viz* authorship/responsibility, causation, wrongness/culpability, and liberty.

A survey of these arguments suggests that they do not succeed in defeating the structural reason we have to doubt the AOD.

Authorship and responsibility

Is there a sense in which, when we author the stories of our lives by interacting with our environment and other people, we do so *primarily* through our acts, and only *secondarily* through our omissions? Several leading theorists think so (though when making this claim, they sometimes switch between the language of 'responsibility' and 'authorship'). Simester, for instance, argues that 'people normally have a sense of their own identity as individual persons in some sort of relationship to the world, whose characters are manifested in terms of what they do and do not do'.[38] He agrees with Honoré[39] that a person who does something is its 'primary (even paradigmatic) author'.[40] Scheffler[41] and Tadros[42] also concur that doing has primacy over not doing. But all four accept that we can *also* author our lives by omissions.[43] They accept, that is, that I can author both my acts and my omissions.

Simester and Tadros offer no sustained independent arguments for the supposed primacy of authoring by acting rather than by omitting. Honoré supports his position by asserting that

> [a] close study of causal language and thought suggested that the reason why movements feature so prominently in our assessment of responsibility is that we have a picture of the world as a matrix into which, by our movements and especially our manipulation of objects, we introduce changes.[44]

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37 Ibid 44–45.

38 Simester (n 1 above) 329.

39 Honoré (n 1 above) 52–53, especially at 53, where Honoré asserts that 'the difference between doing and not-doing is the notion of intervening in the world so as to bring about change; and that *at a secondary level* this notion extends to the interruption of human routines' (emphasis supplied). See also Scheffler (n 3 above) 221–225.

40 Simester (n 1 above) 329.

41 Scheffler (n 3 above) 220–224.

42 Tadros (n 3 above) 196 suggests that a person whose culpable failure to assist V results in V's death at the hands of X is 'secondarily rather than primarily responsible for the death'. See also Scheffler (n 3 above) 225.

43 Simester (n 1 above) 329; Tadros (n 3 above) 192–196; Honoré (n 1 above) 53; Scheffler (n 3 above) 218.

44 Honoré (n 1 above) 52.

Unhelpfully though, the close study to which Honoré refers, is just four pages in Hart and Honoré's *Causation in the Law*,[45] in which the proposition concerned is asserted and supported only by intuition.

Now it is true that much of our language of causation is act-normative. It is also possible that this points to some fundamental truth about how we humans view our interactions with the world, which we should build into, rather than weed out of, our analysis of our conduct. But before committing to that position, let us take a step back. Language is culturally relative. It is shaped by several factors that have nothing to do with how we, as humans, are fundamentally hardwired to make sense of our interactions with our environment.[46] Thus, words and figures of speech are unreliable indicia of fundamental truths about humans. The empirical plausibility of the claim that we usually use act-normative language to describe our conduct proves little about how we, as humans, are fundamentally hardwired to author the stories of our lives. Our language patterns might just as plausibly be shaped by the *regularity* with which we use different modes of conduct to author the stories of our lives. Perhaps (though there is room for doubt about this) we more *frequently* author our life stories by acting than by omitting. But the relative frequency with which we use one mode of authoring the stories of our lives does not establish its hardwired primacy, any more than the relative prevalence of right-handedness in humans establishes the hardwired primacy of right-handedness. It seems mistaken to assume that contingent facts about the state of our causal language yield up fundamental truths about how we author our lives.

But maybe the authorship/responsibility theorists could make do with the more modest claim that our language says something about how we are culturally hardwired in our societies to author our life stories. But even that claim seems incapable of being proved merely by the frequency with which we use certain words or phrases. We would need much more argument about what it means for something to be *culturally* hardwired (as opposed to just 'more common') in our societies, and why we should think that something like authorship of our life stories can be culturally hardwired. We would also need empirical evidence for the claim that authorship by acting is in fact so hardwired. In sum, we would need much more than is available in Honoré's argument.

Scheffler has another way of arguing for this claim. He says that:

> to see oneself as subject to norms of individual responsibility is already to draw a normatively relevant distinction … between primary and secondary manifestations of one's agency … [since it is] … to see oneself

45 H L A Hart and T Honoré, *Causation in the Law* 2nd edn (Oxford University Press 1985) 28–32.

46 Though of course such factors might *also* shape our language.

> as having reason to bring one's conduct into conformity with those norms … [and] bringing one's conduct into conformity with norms of individual responsibility is itself something that one does, and not something that one merely allows to happen. It requires marshalling the full resources of one's agency, including one's capacities for deliberation, choice, and action … If one sees oneself as subject to a standard of responsibility and holds oneself to that standard, then one sees oneself as responsible for exercising a kind of overall regulative control of one's conduct, and the exercise of such control is itself a full-fledged expression of one's agency … [F]rom the perspective of the individual agent, the internalized demand that one live up to a standard of responsibility always presents itself as a demand that one do something, namely, that one regulate the exercise of one's agency in conformity with the relevant norms.[47]

But there are a few worries with Scheffler's argument. It appears at heart to boil down to the fact that the language of *bringing* (one's conduct into conformity with norms), *exercising* (overall regulative control of one's conduct), and *regulating* (the exercise of one's agency) is active, rather than passive. But as previously noted, in itself, this fact about our language is far from conclusive. Active verbs can often be substituted with passive verbs, if not in English, then in other languages. In any case, one can also exercise regulative control of one's conduct by choosing not to do something, and one can also regulate the exercise of that agency by choosing not to exercise it, or by choosing to exercise it to do nothing.

Perhaps this last point cannot be made in respect of *bringing* oneself into conformity with norms of individual responsibility. But even there, seeing oneself as subject to the norms of responsibility must surely also entail seeing oneself as having reason not to deviate from one's existing conformity with those norms. This would suggest that *being* or *remaining* in conformity with those norms is also at least as important as bringing oneself into conformity. And *not* deviating from our existing conformity with such norms is hardly something one 'does' – it is something that one actively refrains from doing, by continuing to maintain conformity. We could say that we are at least as much human *be*ings as human *do*ings.

Not just that; unless we make the questionable assumptions that new-borns are a moral *tabula rasa,* and that all moral learning is conscious, we must have some initial conformity with these norms, and some of our 'bringing ourselves into conformity with the norms' must be done unconsciously and without the marshalling of the resources of one's agency that Scheffler associates only with doing. Seeing oneself as subject to norms of individual responsibility then seems to involve some agential doing (ie bringing oneself into conformity with the norms), some agential refraining (ie not straying from existing

47 Scheffler (n 3 above) 221–222.

points of conformity with the norms), and some non-agential drifting into and out of patterns of conformity with the norms. From this richer perspective, seeing oneself as subject to norms of individual responsibility does little to establish the primacy of *acting* to author our lives over doing the same by *omitting*.

Since Scheffler's conclusion about the primacy of commissive authoring over omissive authoring is premised on the specialness of 'doing' in accepting that one is subject to norms of individual responsibility, it falls with that premise.

But even if we reject the primacy claim, Simester suggests another way of defending the AOD on the basis of authorship. Referring to the Trolley Problem, he agrees with Malm[48] that we cannot justify pulling the lever and causing one person's (Sam's) death, even when not pulling the lever would result in another person's (Tom's) death. He, quite rightly, does not adopt Malm's reasons for reaching that conclusion – Malm's argument relates to not having a good enough reason to transfer the impending harm from Tom to Sam, and that is an argument about rationale-based defences, rather than the conduct component of the *actus reus* of an offence. Instead, he claims that the agent 'can say to Tom's parents: I do not have to justify my not saving Tom, for his death had nothing to do with me.'[49] He adds that were an agent to intervene and divert the trolley towards Sam, she would make Sam's death a part of her life, an aspect of her relationship with the world that is distinctive of her and not of anyone else. The agent would still be susceptible to moral assessment in respect of her failure to save Tom, since she could have saved Tom. However, that Sam would have died had she saved Tom 'counts as an important secondary reason: it underpins [the agent's] denial that there was a good enough reason for [her] to get involved'.[50] In this analysis, the agent's reason to get involved is not good enough because of countervailing reasons not to get involved. But it is unclear, from the perspective of authorship, why the purported presence of good reasons not to get involved is relevant. To rely on good reasons to not do something one has other reasons to do, is to rely on a rationale-based defence rather than to deny authorship entirely. If I promise to meet you for dinner, but my daughter falls seriously ill just before our appointment, I certainly have a good explanation (or rationale-based defence) for my absence at lunch, but it seems odd to deny that I authored my absence. That would be to deny that the empty chair at the dining table had anything to do with me. For this reason, I am not convinced that Simester manages to sidestep the problem he

48 H Malm, 'Killing, letting die, and simple conflicts' (1989) 18(3) Philosophy and Public Affairs 238, 246–247.

49 Simester (n 1 above) 331.

50 Ibid 331–332.

anticipated with adopting Malm's argument. Moreover, it is not clear to me why an agent who is uniquely placed to intervene and divert the trolley away from Tom, but who chooses not to intervene, does not thereby make Tom's death a part of her life to the same extent as she would make Sam's death a part of her life by intervening. Since she was, *ex hypothesi*, the only person who could have saved Tom, her choice not to do so must surely also be an aspect of her relationship with the world that is distinctive of her and nobody else.

If we treated authorship by doing as being on par with authorship by non-doing, then even accounting only for 'true' omissions, we would have a much larger pool of authors for each harm that occurs, because it is often true that more people occasion a harm by their omissions than by their acts. But fears of a worrying dilution of individual authorship are misplaced, because as both Simester[51] and Bennett[52] note, the larger the number of culpable omitters, the larger the number of wrongs committed in respect of the same harm, and different wrongdoers continue to author their own separate wrongdoings.

So what are we left with in terms of authorship? If we understand authorship by reference to how we write and recount the stories of our lives, it seems clear that we author our doings, and nobody seriously denies that we author at least some of our non-doings. And it's not just our omissions that we author – we also author our chosen non-doings of things we were not expected to do. In telling the story of my life, I can sensibly say, 'I didn't call tails, but I wish I had', or, 'I saw that lottery ticket, but didn't buy it'. In this wide sense, authorship is not very instructive – it is just a minimal, necessary but not sufficient, qualification requirement for us to be interested in an agent in respect of some conduct. It generates no reason to distinguish between our doings and our non-doings, and it certainly cannot support the distinction between acts and omissions in the criminal law's conduct requirement for the *actus reus* of an offence.

CAUSATION

Moore has a different approach to defending the AOD. He argues that while *acts* cause consequences, *omissions* do not – they are merely failures to prevent consequences.[53] This argument seems naturally confined in its application to instances in which consequences matter. Since we are interested in questions of criminalisation, this argument

51 Ibid 328–329.

52 Bennett (n 2 above) 84. Bennett pithily concludes that: 'Morally speaking, there is no safety in numbers,'

53 M Moore, *Act and Crime* (Oxford University Press 1993) 267–278. Feinberg calls this the 'restricted causation claim'. Feinberg (n 8 above) 165.

seems most suited to defending the AOD in respect of potential offences in which there is a consequence element. It would appear to have less to say about potential conduct-only offences such as dangerous driving.

But even in respect of prospective offences with consequence elements, despite its initial plausibility, the argument from causation can be set aside fairly quickly. As has been frequently pointed out,[54] while Moore's somewhat mechanical approach to causation may apply in some domains, in the law at least, the ascription of causal responsibility is a normative as well as mechanical issue. Therefore, in law (and in ordinary speech), it is perfectly commonplace for us to reserve the language of causation to pick out the most salient ingredients in the occurrence of an event – even if they are omissive – as their causes. And it is precisely when some non-doing is an omission in the sense previously described – when it belies a reasonable expectation – that it is 'salient', and worth singling out as conduct that causes a consequence. As such, the argument from causation generates no reason to distinguish between acts and true omissions in criminalisation theory.

Wrongness and culpability

A third approach to defending the AOD is to say that one who brings about harm by an act ought to be blamed more than one who brings it about by an omission. This claim is fleshed out in two ways.

The first is to argue that there is a difference in the *wrongness* of harming by acts and harming by omissions. Honoré argues that harming by an act affects our interest in security directly, whereas harming by an omission either (1) affects only a secondary, less important, interest in the expectation of improvement, or (2) affects the primary interest in security only indirectly as a failure to react to someone else's security interest-threatening acts (which Honoré calls 'worsening interventions').[55] According to Honoré, we live

> in a relatively stable (as it were, Newtonian) world, in which people and objects on the whole continue as they are unless something intervenes to change them. People reasonably attach importance to this continuity since their survival and that of others depends on it ... Security in this sense is therefore a prime human value, and any conduct that threatens to change it for the worse a prime evil ... This helps to explain ... why positive harm-doing is on the whole viewed as worse than harmful abstention, which threatens our security interests only indirectly.[56]

54 Simester (n 1 above) 315–316; Kleinig (n 2 above) 174–188; Feinberg (n 8 above) 172–181; Bennett (n 2 above) 84–86; Honoré (n 1 above) 50–51; A F Sarch, 'Knowledge, recklessness and the connection requirement between actus reus and mens rea' (2015) 120 Pennsylvania State Law Review 1, 40–41.

55 Honoré (n 1 above) 63–66.

56 Ibid 63–64.

For Honoré then, our interest in security boils down to our interest in a certain type of expected Newtonian continuity. Newtonian continuity dictates that things at rest will ordinarily continue to be at rest. By analogy, Honoré argues that we have a security interest in the world continuing as it is. Acts disturb the existing state of the world, whereas omissions do not. Hence, says Honoré, *tout court* acts are of greater interest to the criminal law than omissions.

But, of course, Newtonian continuity also dictates that things in motion will ordinarily continue in motion. In terms of Honoré's own analogy then, our security interests must also extend to the dynamic features of our world – what we are entitled to expect of others. After all, the stability of my world is also disturbed when my regular bus unexpectedly does not arrive, or my supermarket has no milk in stock.[57] To be fair, Honoré is open to this claim.[58] So let us substitute into Honoré's argument this richer picture of the world – one with both static and dynamic elements – and consider what an interest in the stability of that world would entail. Our interest in security would now include an interest in not having what Kleinig called our 'reasonable expectations'[59] belied. But, if that is the case, then the first variant of Honoré's wrongness argument relates only to non-doings that do not properly count as 'true omissions' (at least as I use the term),[60] since all omissions belie a reasonable expectation to act and, therefore, affect what Honoré calls a security interest. And, even if we take Honoré to be working with a different understanding of the term 'omission', his argument cuts across the AOD. Acts can affect an interest in the expectation of improvement (as might happen if one actively prevents a lifeguard from saving a drowning person), and omissions might sometimes plausibly affect our interest in security (as when, by not doing anything, one effectively takes away a drowning person's last chance of survival).[61]

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57 P Smith, 'Legal liability and criminal omissions' (2001) 5(1) Buffalo Criminal Law Review 69, 96–97.

58 Honoré (n 1 above) 64 accepts that omissions are threatening 'when security has come to depend on homeostatic routines'. See also Simester (n 1 above) 317–318.

59 Kleinig (n 2 above) 165.

60 And it is not at all clear to me that Honoré uses the term in a different sense. This is how he sets out his understanding of the term 'omission': 'Omissions are ... those not-doings that violate norms. Norms are divided for this purpose into ordinary norms and norms that impose distinct duties ... Omissions that violate distinct duties may be termed distinct omissions.' Honoré (n 1 above) 43. Notice that for Honoré, omissions are the violations of norms that may be either distinct norms, or ordinary norms.

61 Simester (n 1 above) 322. See also Glover (n 2 above) 96–97.

Consider the other variant of the wrongness argument that Honoré presses – that omissions are less wrong since they are failures to intervene against someone else's worsening intervention.[62] Again, if failures to act are only properly called omissions when they threaten someone's security interest by belying a 'reasonable expectation' of action, then it is simply not true that genuine omissions are 'mere' failures to respond to another's worsening intervention. They are themselves worsening interventions. And once more, even if Honoré is using the term 'omission' in some different sense, his argument does not convince, since one also omits in cases where the worsening intervention *follows* the anomalous non-doing (as when burglary follows a failure to lock a door), or where there was no prior worsening human intervention (as in a failure to rescue a drowning person).[63]

Consider now the second way of arguing that one should be blamed more when harming by act than by omission. This is the argument from culpability – the suggestion that harming by act is more *blameworthy* than harming by omission. Tadros makes this argument by asking us to consider two types of omissions cases, and arguing that in both, our moral intuitions suggest that acts are more culpable than omissions.[64]

First, Tadros compares our intuitions in cases involving killing, and letting die. He argues that because killings tend to provoke greater moral outrage than even preventable deaths, this suggests that killing (ie causing death by an act) is more culpable than letting die.[65] Even if we share these intuitions, Tadros' conclusion does not follow. The intuitions relied upon are those of third parties – persons who were not the unfortunate victims in Tadros' hypotheticals. It is not clear that third parties' intuitive feelings of moral outrage or resentment toward the putatively blameworthy agent accurately track her culpability. As Simester points out,[66] killers are more threatening *de futuro* than those that let die, and that might tend to augment our moral outrage

62 Honoré (n 1 above) 64.
63 Simester (n 1 above) 323–324.
64 Tadros (n 3 above) 186–188.
65 Ibid 187.
66 Simester (n 1 above) 321.

towards killers. But these threat perceptions do not reflect on an agent's culpability for conduct she has already performed.[67]

Perhaps instead of referring to survivors' moral outrage when assessing the protagonist's culpability, we should consider our intuitions about how much the victim may legitimately blame the protagonist. This seems relevant because at the criminalisation stage, when we stipulate an offence's *actus reus* (including its conduct component, be it an act or an omission), we are strongly motivated by, and sensitive to, the harm (if any) caused to the victim. In homicide cases, like those Tadros invokes, most would agree that the *central* victim is the deceased,[68] rather than those that survive her. Hence, we should be more interested in the victim's perspective than those of the survivors. In Tadros' comparison between killing and letting die, at the point of death, I am not confident that the victim blames D1 who intentionally drowns her, more than she blames D2 who, despite being able to rescue her safely and easily, deliberately decides not to, with the intention[69] thereby that she drown. Therefore, I find this argument unconvincing.

Let us turn instead to the other set of cases that Tadros considers. Tadros argues that we intuitively think that one who kills should feel greater regret than one who lets another kill (even if she could easily have prevented the killing), and therefore we have reason to believe that the former is more culpable than the latter.[70] Again, this does not follow. Assuming that both the killer and the non-intervener conducted themselves as they did *in order to cause the death*, it is not clear to me that they ought to feel different amounts of regret. Further, Tadros does not explain why we should think that the regret that one ought to feel mirrors one's culpability. In fact, we regret all sorts of things for

67 That said, if we are more threatened by actors than omitters, we might conclude that acts are worse than omissions on purely consequentialist grounds. My thanks to James Chalmers for this suggestion. Note that, strictly, this is not an argument about the comparative *culpability* of acts and omissions. Moreover, I doubt that this 'reactive attitude' analysis carries over into consequentialist argument – consequentialists tend to be more interested in actual consequences than felt consequences. That we *feel* more threatened by actors than omitters does not imply that we *are* more threatened by them. And finally, while we may plausibly think that actors whose conduct was accompanied by subjective *mens rea* outnumber omitters whose conduct was accompanied by subjective *mens rea*, the converse seems likely in respect of negligent agents. All in all, it is far from certain that cumulatively, actors are a significantly worse *de futuro* threat than omitters.

68 Feinberg (n 8 above) 79–83. Along similar lines, see R A Duff, *The Realm of Criminal Law* (Oxford University Press 2018) 77.

69 Recall that we can only fairly compare agents acting with the same attitudinal states towards the *actus reus* of the offence.

70 Tadros (n 3 above) 187–188.

which we do not deserve blame. I might regret calling heads instead of tails, but it seems strange to seriously blame me for calling a coin-toss incorrectly. This argument too fails to convince.

A better indicator of the protagonist's culpability might be our intuitions about how much she should blame herself. After all, why consider regret when our interest is in blame? In that spirit, consider two mothers who negligently cause the deaths of their equally beloved infants in different ways.[71] Anjana carelessly bumps into her child, knocking her over, whereas Brinda leaves her child in the car while buying groceries, but carelessly forgets to roll down a window. It is not clear to me that Anjana would or should blame herself any more or less than Brinda. (Nor for that matter is it clear to me that the infant victims, had they been capable of sophisticated moral assessments, would blame their respective mothers any differently.) In short, there is little in Tadros' intuition-based arguments to convince us that acts *tout court* are more culpable than omissions *tout court*. In fact, an intuitive case can be made for their equivalence.

Liberty

A fourth approach to defending the AOD is the argument from liberty. Prohibiting an act, the argument goes, is more liberty-respecting than prohibiting an omission, and so the norm in the criminal law ought to be prohibiting acts rather than omissions.[72] Furthermore, since duties to act are often contingent upon us noticing the circumstances in which others find themselves (such as being in imminent danger), creating such duties gives others the power to unilaterally and unexpectedly create obligations for us by, for instance, putting themselves in danger. This unfairly limits our autonomy and ability to independently plan and live our own lives and, potentially, has a chilling effect on activities, during the performance of which, one might encounter duties to act.[73] And the objection is not just to giving other people the power to impose duties upon one – even when the state forces us to act (and even if it is in service of a good goal) this undermines our wellbeing, since wellbeing depends on our goals being our own, rather than imposed upon us.[74]

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71 Note again that we are comparing like for like. In both cases, the agents occupy the same roles in relation to their victims, they have and exercise the capacity for volitional conduct, their impugned conduct is inadvertent, and it results in the same level of harm.

72 Bennett (n 2 above) 77–78, M Moore, *Placing Blame* (Oxford University Press 1997) 278–283.

73 Simester (n 1 above) 335. A Ashworth, 'The scope of criminal liability for omissions' (1989) 105 Law Quarterly Review 424, 430.

74 Simester (n 1 above) 333–334.

After all, forcing us to act in ways in which, morally, we ought to act anyway makes it harder for us to demonstrate virtue; doing something good because we are forced to do it, is not nearly as virtuous as freely choosing to do it.[75]

Now it is undoubtedly true that there are infinitely more ways to *not* do something than to do it, so it seems plausible that a prohibition on the former (ie criminalising the failure to do the thing) will be more liberty-limiting than a prohibition on the latter (ie criminalising doing the thing). But it is important to be clear about the magnitude of difference in liberty-limiting on the two approaches. The argument is (or at least, implies) that if 'X' is prohibited, then we can do everything except 'X'; and if 'Y' is required, then we can do nothing but 'Y'. But that is obviously not correct. Firstly, 'Y' is usually stated in a way that allows for several different things to count as 'doing Y'. If I see a child drowning, and I am required to offer assistance, my doing so may take the form of swimming out to save the child, or throwing a rope to her, or throwing out a buoy, or taking my boat over to her, or calling the lifeguard, or doing any other thing that counts as assisting the child. So it is not as if requiring me to do 'Y' on pain of criminal sanction for not doing so reduces my options to precisely one. And secondly (and more importantly), we cannot assume that doing 'Y' is incompatible with doing *every* other thing. I have never had to try, but I feel confident that I can lift a child out of two feet of water, while continuing to talk on the phone using my hands-free device, and holding my ice-cream in the other hand. I may not even need to break stride. I can also continue to enjoy the sun, or take in the fragrance of the nearby flowers, or do whatever else I was doing, so long as these other things are not incompatible with doing 'Y'. So requiring me to do 'Y' means that I must do one of several things that amounts to 'Y' and cannot do that subset of other things that is incompatible with doing 'Y'. The gap between how liberty-limiting a prohibition on acting is as compared to a prohibition on omitting, is already a fair bit narrower than one might have initially assumed.

Even so, it is probably true that a general approach of criminally proscribing acts rather than failures to act would leave us with a greater number of open options. But I doubt that this generates any conclusive reason to have the AOD as a foundational concept in our criminal law.

Notice that the argument from liberty is not an argument about the AOD *tout court* – it is an argument about the consequences that follow from permitting the *conviction* of people based on their acts or omissions. Treating an omission as qualifying conduct is not a sufficient condition for convicting people based on the omission. As I previously

75 Moore (n 71 above) 283.

pointed out, several other considerations supervene between an agent satisfying the conduct component of the *actus reus* of an offence and her conviction for the offence. Even if we treated all genuine omissions as satisfying the conduct component of various offences' *actus reus* elements, it is unlikely that we would significantly expand the net of criminal liability. The vast majority of cases in which we would previously acquit would probably still result in acquittals because of the absence of some other *actus reus* element, or the offence's *mens rea*, or because a defence is available. And even if empirically that were not the case, we would need some argument to demonstrate that the problem lay with how we specified the criminal law's conduct requirement, rather than how we specified the various other factors that affect a liability outcome. This point stands against each of the developments of the argument from liberty described above, since each systematically conflates 'treating omissions as conduct of interest to the criminal law' with 'convicting based on omissions'. However, for convenience, in what follows, I will not restate this objection when responding to each variant.

Another general point to bear in mind is that arguments from liberty rely on an implicit contingent claim about what consequences are acceptable to us. Nobody seriously argues that we should *never* prohibit omissions – of course an adequately liberty-respecting criminal law can prohibit *some* omissions. So the question is, how much liberty is too much liberty to forego in exchange for other values like security? The answer depends on the jurisdiction's societal mores: even western liberal democracies may differ amongst themselves.[76]

There are several different ways in which we can draft our criminal laws to achieve the desired balance between liberty and other desired values.[77] We could, for instance,

(a) adjust how much we expect of people ('Call the fire brigade!', rather than 'Run into a burning building to rescue someone!'),[78] or
(b) require different things of people depending on the roles they occupy (in burning building scenarios, we expect more of firefighters than of laypersons), or
(c) adjust the threshold for the creation of a duty to act (the duty might arise only when acting *would avert imminent serious*

76 Consider for instance, that while most common law states do not have 'Good Samaritan' laws imposing any duty to make easy rescues, many civil law continental European states have these. Yet, all are liberal states.

77 Ashworth (n 7 above) 35.

78 Feinberg (n 8 above) 165.

bodily harm, instead of when it *might minimise eventual minor property damage*),[79] or

(d) adjust the threshold for accepting that failures to meet an expectation to act were justified or excused. Instead of insisting that such failures are only non-culpable if acting *would* have caused the agent *serious bodily harm*, we may grant a defence even when acting might have caused her *minor property damage*. Note that this last adjustment is relevant to resulting criminal liability, and not to the AOD *tout court*. Even so, it is relevant to our discussion of the trade-off between liberty and other desired values.

In fact, in general, our net expectations of other people are fairly undemanding. Therefore, 'criminalising omissions' to meet these expectations, would not be nearly as destructive to liberty as might be feared. Moreover, the liberty-limiting implications of doing so are also probably overestimated.[80] Consider that:

(a) It is at least arguable that liberty is not always intrinsically valuable.[81] We may think that it is not valuable, or *as* valuable, to be free to engage in conduct in which we do not want to engage, or that is morally wrong. If such ideas appeal to us, then prohibiting some undesired and morally wrong omissions will have, at most, a limited effect on liberty.

(b) Duties to act (such as the duty to assist others in danger) are often shared amongst everyone who is similarly situated and practically capable of helping. Contrarily, duties not to do something are not shared like this. So, in this respect at least, duties to act are typically less demanding than duties not to act.[82]

(c) Duties to act are usually temporally limited: one is only required to act – say, to make an easy rescue – for a short time, and only when specified circumstances arise.[83] On the other hand, duties to not act are usually permanent – one is *never* permitted to kill innocents. In this respect too, the difference between how much liberty is restricted by duties to act on the one hand, and duties not to act on the other, is smaller than one might have feared.

Consider now the other objections. Is it appropriate to give other people the power to create duties for us unilaterally and unexpectedly? This worry is premised on the mistaken assumption that our positive

79 Ashworth (n 7 above) 36.
80 Ibid 35–36.
81 Tadros (n 3 above) 200–203; Feinberg (n 8 above) 206–214.
82 Feinberg (n 8 above) 158–159, 163–165.
83 Tadros (n 3 above) 196–200; Ashworth (n 7 above) 35–36.

obligations are generated only through choice.[84] In fact, we create obligations for those around us without giving them a say in the matter from literally the moment that we are born. A child's birth means that the state needs to look out for the interests of one more person and intervene if the child's health and security is not adequately protected within the family. And the birth of younger siblings immediately places elder siblings under a moral duty, or at least a reasonable expectation (in Kleinig's sense), to look out for them. These duties to each other are what make us a society rather than a plurality of individuals. What's more, we are accustomed to having others unilaterally and unexpectedly create obligations for us. Each time an emergency vehicle sounds its siren, its driver unilaterally and unexpectedly creates obligations for everybody within earshot. So does every pedestrian who starts to cross a road, even when jaywalking. It seems to me that the fact that others can create obligations for me is not so much a problem, as it is a feature of living in a community of people. Of course, like most things, if others had *too much* power over our obligations that would be problematic. But we can guard against that by suitably crafting our omissions-based criminal liability (which recall, we can *also* do by adjusting other elements required for a criminal conviction, while leaving the conduct requirement intact).

Nor does criminalising failures to do good acts deprive us of our ability to freely choose to perform those acts and thereby alienate us from the goals we serve. That argument seems to overstate the criminal law's ability to crowd out other factors that influence our choices. It is hardly as if the only reason we choose not to go around killing people is that the criminal law tells us not to – our reasons for not offending are rarely connected to our criminal laws.[85] Along the same lines, making omissions to do expected acts potentially liable to criminal consequences will not deprive us of our ability to do expected or good acts simply because they are expected or good. And our choices to do these acts will be no less good for our well-being because they happen to conform with the criminal law's expectations.

Finally, it is a mistake to think that 'criminalising omissions' to do things that we ought anyway to do makes it difficult to display virtue (at least any more than does criminalising the doing of things that we ought anyway not to do). Criminally enforced duties to act are rarely very demanding and, therefore, leave plenty of scope for displaying supererogatory virtue. Someone who thought that the criminal law contained all the moral and ethical guidance she needed would be terribly misguided indeed![86]

84 Ibid 196.
85 Ibid 204.
86 Ibid 204.

In sum then, suitably crafted omissions-based criminal liability can leave us enough open options to be adequately liberty-respecting. This conclusion casts serious doubt on the ability of the argument from liberty to sustain the AOD in the conduct component of the *actus reus* of an offence. However we frame the criminal law's conduct requirement, we can probably still tweak the other preconditions for criminal convictions to ensure that our liability outcomes are adequately liberty-respecting.

CONCLUSION

The AOD is a fairly good rule of thumb, and, so long as one does not examine it too closely, it can be used to defend tenable conclusions. I have argued in this article, however, that on a closer examination it is less plausible, at least in the context of arguments about criminalisation. Provided we are careful to

(a) avoid conflating true omissions and mere non-doings,
(b) identify true omissions in a context-sensitive manner, and
(c) design our pairs of examples for comparison so as to exclude or equalise imbalances in extraneous factors such as *mens rea* states, defensive pleas, role responsibilities, the likelihoods of consequential harms, facts that add shock-value, and contingent systemic conditions

we have little reason to believe that an act is a better candidate for the conduct element of a potential criminal offence than an omission. In fact, when we compare acts and omissions carefully, it becomes clear that:

(a) the role that the conduct element plays in a criminal offence is a limited one, and a true omission seems as capable of playing that limited role as an act; and
(b) many of the apparent advantages of preferring to criminalise acts rather than omissions actually have little to do with the selection of the conduct-token. Instead, they arise independently from differences in other factors relevant to criminal liability.

The upshot of this is that we have reason to default to the view that the AOD should not influence our selection of a conduct-token for criminalisation. Moreover, a close consideration of the main lines of argument marshalled in support of the AOD – the arguments from authorship/responsibility, causation, wrongness/culpability, and liberty – reveals no compelling reason to abandon this default position.

It follows therefore, that the AOD does not deserve its foundational place in criminalisation theory. We do need the conduct element of

the *actus reus* of an offence to transform a responsible moral agent's exercise of volitional control over her own conduct into a matter of interest to others, but instead of assuming that acts always perform this role, and omissions only exceptionally do so, we should consider each potential conduct-token on its own merits.

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‘I presume she wanted it to happen’: rape, reasonable belief in consent, and law reform in Northern Ireland†

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ABSTRACT

In Northern Ireland (NI), determinations of whether the crime of rape has occurred require consideration of the accused’s reasonable belief in the complainant’s consent (the ‘reasonable belief threshold’). Drawing on the rich body of feminist scholarship critiquing this threshold, this article makes two core contributions. First, through a thematic analysis of trial transcripts and news reports from the high-profile 2018 ‘Rugby Rape Trial’ in NI, the article illustrates how trial narratives around consent and reasonable belief in consent ‘responsibilise’ the complainant while minimising the (in)actions of the accused. Second, the article evaluates the proposal in the 2019 Gillen Review that this threshold should be reworded to take account of the accused’s *failure* to take steps to ascertain the complainant’s consent. It is argued that, while this proposal has the potential to subtly redistribute narratives of responsibility, such potential can only be realised through a change in prosecutorial practice to ensure attention to the ‘steps to ascertain consent’ provision.

Keywords: rape; reasonable belief; consent; law reform; Rugby Rape Trial; Gillen Review.

INTRODUCTION

On the 28 March 2018, the four defendants in a high-profile rape trial in Northern Ireland (NI), the ‘Rugby Rape Trial’, were acquitted on all charges.[1] The trial concerned the alleged rape and sexual assault of a 19-year-old woman by Ulster and Ireland rugby players Paddy Jackson and Stuart Olding, as well as allegations of exposure and perverting the course of justice against Blane McIlroy and Rory Harrison, respectively. The trial featured heavily in the media due to the celebrity status of the defendants and, following the acquittal, public protests took place

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1 *R v Patrick Jackson, Stuart Olding, Blane McIlroy and Rory Harrison* (Crown Court, 28 March 2018).

across NI and Ireland in support of the complainant.[2] Legal inquiries into consent during this trial sparked outrage with some claiming the defence questioning of the complainant amounted to 'victim-blaming'[3] and speculating whether a different approach to legally defining consent was needed.[4] Significantly, consent was one of a range of issues evaluated as part of a subsequent review into the investigation and prosecution of sexual violence within NI. The final report from the review, led by Lord Justice Gillen (the 'Gillen Review') was published in May 2019 containing over 200 recommendations, including proposed changes to the substantive definition of consent.[5]

The discussions in NI can be situated within the extensive body of critical rape scholarship on the treatment of complainants during the adversarial trial process. This includes the use of rape myths during cross-examination,[6] that is 'prescriptive or descriptive beliefs about rape that serve to deny, downplay or justify sexual violence',[7] and reliance on such myths by (mock) juries.[8] Rape myths can be particularly influential when it comes to determining the presence or absence of consent, as they shape expectations around how consent is communicated and understood during a sexual encounter.[9] Scholars have also illuminated the role of the substantive law, despite decades of reform, in facilitating the use of and reliance upon rape myths. For

2 Brendan Hughes, 'Rugby Rape Trial: "I Believe Her" rallies planned across Ireland' *Irish Times* (Dublin 29 March 2018).

3 Eleanor Crossey-Malone, 'The Ulster Rugby Rape Trial: no to victim-blaming and rape culture' (*Socialist Party* 7 March 2018).

4 Emma Gallen, 'This is the real meaning of #IBelieveHer for young Irish women' (*Grazia* 6 April 2018).

5 Sir John Gillen, *The Gillen Review: Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland* (Department of Justice 2019) 377.

6 Olivia Smith and Tina Skinner, 'How rape myths are used and challenged in rape and sexual assault trials' (2017) 26(4) Social and Legal Studies 441–466; Olivia Smith, *Rape Trials in England and Wales: Observing Justice and Rethinking Rape Myths* (Palgrave Macmillan 2018); Elaine Craig, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (McGill-Queen's University Press 2018).

7 Gerd Bohner, Marc-André Reinhard, Stefanie Rutz, Sabine Sturm, Bernd Kerschbaum and Dagmar Effler, 'Rape myths as neutralising cognitions: evidence for a causal impact of anti-victim attitudes on men's self-reported likelihood of raping (1998) 28(2) European Journal of Social Psychology 257–268.

8 For an overview see, Fiona Leverick, 'What do we know about rape myths and juror decision making?' (2021) 24(3) International Journal of Evidence and Proof 255–279. For research with real juries contesting belief in rape myths, see Cheryl Thomas, 'The 21st century jury: contempt, bias and the impact of jury service' (2020) 11 Criminal Law Review 987–1011. For a rebuttal, see J Chalmers, F Leverick and V Munro, 'The Dorrian Review and juries in rape cases: myths about myths?' (*University of Glasgow School of Law Blog* 2020).

9 Jacqueline M Gray, 'What constitutes a reasonable belief in consent to sex? A thematic analysis' (2015) 21(3) Journal of Sexual Aggression 337–353.

instance, criticism has been directed at the 'reasonable belief in consent' threshold, that exists across many jurisdictions, including NI.[10] This threshold requires that, to establish offences such as rape and sexual assault, the prosecution must prove not only that a complainant did not consent but that the defendant did not reasonably believe that the complainant consented. In determining whether a belief in consent is reasonable the jury can consider any steps taken by the defendant to ascertain consent, but the defendant is not obliged to take such steps.[11] It has been suggested that the reasonable belief threshold encourages a disproportionate focus on the complainant's actions and reliance on problematic sexual scripts that assume consent in the absence of physical or verbal resistance.[12] Although the tendency to focus on the complainant's actions is by no means new,[13] it has recently been situated within the neoliberal strategy of 'responsibilisation'.[14] This is where individuals are expected to manage their own risk, with those who fail to prevent the alleged rape falling outside of dominant constructions of ideal victimhood: that is, those perceived as deserving of victim status because they are 'weak' and 'blameless'.[15]

10 See eg Art 5(1)(c) Sexual Offences (NI) Order 2008; s 1(1)(c), Sexual Offences Act 2003; s 1(1)(b) Sexual Offences (Scotland) Act 2009; s 265.4.(4) Criminal Code of Canada 1985; s 128(2)(b) and (3)(b) Crimes Act 1961 (New Zealand); s 61HE Crimes Act 1900 (New South Wales).

11 Art 5(2) 2008 Order (n 10 above); Judicial College, *The Crown Court Compendium Part I: Jury and Trial Management and Summing Up* (December 2020) 20–17.

12 See eg Vanessa Munro, 'Constructing consent: legislating freedom and legitimating constraint in the expression of sexual autonomy' (2008) 41(4) Akron Law Review 923–956; Sharon Cowan, 'All change or business as usual? reforming the law of rape in Scotland' in Clare McGlynn and Vanessa Munro (eds), *Rethinking Rape Law: International and Comparative Perspectives* (Routledge 2010); Rachael Burgin and Asher Flynn, 'Women's behavior as implied consent: male "reasonableness" in Australian rape law' (2019) Criminology and Criminal Justice 1–19; Lucinda Vandervort, 'The prejudicial effects of "reasonable steps" in analysis of mens rea and sexual consent: two solutions' (2018) 55(4) Alberta Law Review 934–970.

13 See Rachael Burgin, 'Persistent narratives of force and resistance: affirmative consent as law reform' (2019) 59(2) British Journal of Criminology 296–314; Menachem Amir, 'Victim precipitated forcible rape' (1968) 58(4) Journal of Criminal Law and Criminology 493–502.

14 See David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (University of Chicago Press 2001); Maddy Coy and Liz Kelly, 'The responsibilisation of women who experience domestic violence: a case study from England and Wales' in Carol Hagemann-White, Liz Kelly Thomas Meysen (eds), *Interventions against Child Abuse and Violence against Women: Ethics and Culture in Practice and Policy* (Verlag Barbara 2019).

15 See Lise Gotell, 'Rethinking affirmative consent in Canadian sexual assault law: neoliberal sexual subjects and risky women' (2008) 41(4) Akron Law Review 865–899; Nils Christie, 'The ideal victim' in Ezzat A Fattah (ed), *From Crime Policy to Victim Policy: Reorienting the Justice System* (Springer 1986).

In response to these critiques, governments across the globe have begun to respond by way of law reform, with a visible trend towards the adoption of consent standards that encompass a communicative dimension. For example, while in NI and England and Wales attention must be paid to the complainant's state of mind when determining consent or the absence thereof for the purpose of the *actus reus* of an offence,[16] other European jurisdictions have introduced affirmative models where attention is paid to whether consent is expressed by words or action.[17] In jurisdictions across Australia, consideration has been given to whether, in determining the *mens rea*, the law should follow the approach in Canada by preventing a defendant from claiming that their belief in consent was reasonable if they did not explicitly seek consent.[18] The proliferation of law and policy in this area has given rise to a growing scholarship concerned with (i) reflecting on the failure of current consent standards;[19] (ii) attempting to 'make sense' of the new and emerging models of consent;[20] and (iii) drawing out the theoretical and practical benefits, as well as drawbacks, of reform in this area.[21]

Building on this scholarship, this article makes two original contributions. First, while there is a significant empirical literature on rape and consent,[22] this article adds to the limited body of work drawing on trial transcripts.[23] Through a thematic analysis of trial transcripts and news reports from the Rugby Rape Trial, the article illustrates how trial narratives around consent and reasonable belief in consent 'responsibilise' the complainant while minimising the (in)actions of the accused. Two core themes are identified: lack of resistance and/

16 See *R v Olubgoja* [1982] QB 320, 5

17 See eg Act on the amendment of the Criminal Code, no 19/1940, with subsequent changes (sexual offenses) 2018 (Iceland); Criminal Code (Sweden) Brottsbalk (1962: 700) as amended in 2018, ch 6, s 1.

18 See Rachael Burgin and Jonathan Crowe, 'The New South Wales Law Reform Commission Draft Proposals on consent in sexual offences: a missed opportunity?' (2020) 32(3) Current Issues in Criminal Justice 346–358; Rachael Burgin, 'NSW adopts affirmative consent in sexual assault laws. What does this mean?' (*The Conversation* 25 May 2021); s 273.2.(b) Criminal Code of Canada 1985.

19 See eg Burgin and Flynn (n 12 above); Burgin and Crowe (n 18 above).

20 See eg A Gruber, 'Consent confusion' (2016) 38 Cardozo Law Review. 415–458; Jonathan Witmer-Rich, 'Unpacking affirmative consent: not as great as you hope, not as bad as you fear' (2016) 49 Texas Tech Law Review 57–87.

21 See eg E Dowds, 'Rethinking affirmative consent: a *step* in the right direction' in Rachel Killean, Eithne Dowds and Anne-Marie McAlinden (eds), *Sexual Violence on Trial* (Routledge 2021); Rona Torenz, 'The politics of affirmative consent: considerations from a gender and sexuality studies perspective' (2021) 22(5) German Law Journal 718–733.

22 See eg Smith and Skinner (n 6 above); Smith (n 6 above); Leverick (n 8 above).

23 See eg Burgin and Flynn (n 12 above); Burgin (n 13 above).

or force during the encounter; and the dissection of the complainant's behaviour and consequently her non-ideal victimhood.[24] It will be argued that, although some legal professionals attempt to counter these narratives, they remain dominant due to the reinforcement of these narratives by the defence and a lack of attention to the accused's responsibility to ascertain the complainant's consent. Second, the article makes a unique contribution to the debates on the utility of law reform by evaluating the proposal in the 2019 Gillen Review that the reasonable belief threshold should be reworded to take account of the accused's *failure* to take steps to ascertain whether the complainant consented. It is argued that, while this proposal has the potential to subtly redistribute narratives of responsibility, such potential can only be realised through a change in prosecutorial practice to ensure attention to the 'steps to ascertain consent' provision.[25] Although the analysis in this article is focused on NI, the findings have broader significance and application in light of ongoing law reform across a range of comparative jurisdictions.[26]

At this juncture, it is important to note the methodological approach and boundaries of the research. Requests for written transcripts of NI court proceedings have to be approved by the Lord Chief Justice. Although the Rugby Rape Trial lasted 42 days, legal and procedural limitations associated with sexual offence cases meant I was only permitted to receive transcripts from seven days of the trial, covering some of the complainant's evidence in chief, some of her cross-examination and the judge's directions to the jury.[27] As the court proceedings featured heavily in the media, news reports concerning the cross-examination of the accused, as well as counsel closing speeches, have also been drawn upon. The materials were analysed using a thematic approach identifying the various ways in which contested meanings of consent and belief in consent are constructed at trial.[28] The approach utilised the dualistic technique of inductive

24 Christie (n 15 above).

25 Art 5(2) 2008 Order (n 10 above).

26 See eg New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences: Draft Proposals* (2019); Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (June 2020); Law Reform Commission of Ireland, *Report on Knowledge or Belief Concerning Consent in Rape Law* (November 2019).

27 This included respect for the complainant's right to anonymity resulting in access only being granted to files that had already been redacted.

28 See Virginia Braun and Victoria Clarke, 'Using thematic analysis in psychology' (2006) 3(2) Qualitative Research in Psychology 77–101.

and deductive thematic analysis,[29] allowing the review of the critical literature on rape to inform the initial analysis while leaving space for themes to develop direct from the data. It is acknowledged that defence counsel have a duty to test the evidence and to robustly challenge a complainant's account, and that the materials analysed in this article do not represent the entirety of the trial. Nonetheless, the article identifies lines of questioning that reinforce stereotypical assumptions about rape and contribute to what has been described as the secondary victimisation of complainants.[30] While not suggesting that the findings are representative of all rape trials, an individual case study approach has been used by feminist scholars as 'a discursive site on which to expose and contest the gendered constructions of women's experiences'.[31]

The article proceeds as follows. First, it sets out the socio-legal context of sexual violence in NI. Second, the Rugby Rape Trial and the Gillen Review are introduced. Third, it discusses the two core themes and findings from the empirical analysis of the Rugby Rape Trial, namely, the focus on force and resistance and the complainant's behaviour. Each theme is subdivided into two parts: defence narratives and counter-narratives by the prosecution/judicial directions. Fourth, it explores the extent to which the Gillen proposal on reasonable belief in consent could lead to a different trial narrative. The article concludes by reflecting on the far-reaching impact of trial narratives that rely on narrow stereotypical views of rape, responsibilise the complainant and obscure the responsibility of the accused; and highlights the need for careful intervention across multiple terrains, both legal and otherwise, if we are to trigger real and systemic change.

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29 J Fereday and E Muir-Cochrane, 'Demonstrating rigor using thematic analysis: a hybrid approach of inductive and deductive coding and theme development' (2006) 5 International Journal of Qualitative Methods 80.

30 See eg Debra Patterson, 'The linkage between secondary victimization by law enforcement and rape case outcomes' (2010) 26(2) Journal of Interpersonal Violence 328–347.

31 Ashlee Gore, 'It's all or nothing: consent, reasonable belief, and the continuum of sexual violence in judicial logic' (2020) Social and Legal Studies 2. For an indepth exploration of a range of cases from NI, see L Kennedy, 'Bearing witness: report of the Northern Ireland Court Observer Panel 2018–2019' (Victim Support NI February 2021).

THE SOCIO-LEGAL CONTEXT OF SEXUAL VIOLENCE IN NORTHERN IRELAND

Research has demonstrated that attrition – the process by which rape cases fail to proceed through the justice system – tends to be high across multiple jurisdictions.[32] In NI, according to Public Prosecution Service (PPS) statistics, although 652 rape cases were passed for prosecution in 2019/2020, a prosecution or diversion decision was only made in respect of 73 of these cases,[33] and, while the Police Service of Northern Ireland (PSNI) has recorded between 900–1000 rapes each year from 2017–2020,[34] only 10 rape convictions were secured in years 2017/2018 and 2018/2019, with a slight increase to 20 convictions in 2019/2020.[35] As these are recorded crime statistics, they do not present a complete picture. Indeed, it has long been established that rape is a notoriously underreported offence.[36] For example, a 2019 survey of unwanted sexual experiences among NI students found that while 28 per cent of respondents had experienced some degree of unwanted sexual behaviour, only 5 per cent of those who told someone about their experiences had formally reported it, with 76 per cent believing it was not serious enough to report and 41 per cent believing it was not a crime.[37] Similar findings were reported in a 2017 study of non-consensual experiences among NI students, with feelings of shame and embarrassment among the reasons for non-reporting.[38]

Although complex feelings of shame or embarrassment are common among survivors of sexual violence,[39] such feelings are heightened in the context of NI, a post-conflict jurisdiction with high levels of religiosity; a 'moral conservatism' around issues relating to sex,

32 See Jo Lovett and Liz Kelly, 'Different systems, similar outcomes? Tracking attrition in reported rape cases across Europe' (London Metropolitan University 2009).

33 Public Prosecution Service for Northern Ireland (PPSNI), *Statistical Bulletin: Cases Involving Sexual Offences 2019/20*.

34 PSNI, *Outcomes of Crimes Recorded by the Police in Northern Ireland 2015/16 to 2019/20*.

35 See PPSNI, *Statistical Bulletin: Cases Involving Sexual Offences 2018/19*; PSNI (n 34 above).

36 See David Allen, 'The reporting and underreporting of rape' (2017) 73(3) Southern Economic Journal 623–641.

37 NUS USI Northern Ireland, '1 in 4 students in NI experience unwanted sexual behaviour' (27 March 2019).

38 Eimear Haughey et al, *The Stand Together Report* (The Student Consent Research Collaboration 2017).

39 See Office for National Statistics, 'Sexual offences in England and Wales overview: year ending March 2020'.

sexuality and reproductive rights;[40] and limited sex education.[41] Further to this, a 2008 public survey of NI students found that victim-blaming attitudes were prevalent, with a significant number of respondents holding women responsible for sexual violence if they were drunk (44 per cent); flirted (46 per cent); failed to say no clearly (48 per cent); wore revealing clothes (30 per cent); had many sexual partners (33 per cent); or were alone in a dangerous/deserted area (47 per cent).[42] These views, while over a decade old, represent deep misunderstandings around sexual violence that are apparent in more recent studies. For instance, in 2018, Doyle and McWilliams reported that many participants in their study on domestic violence 'viewed sex, consensual or not, as compulsory and as part of their "duty" as a wife/girlfriend'.[43]

The foregoing cultural issues contribute to the 'responsibilisation' of women and girls. Responsibilisation refers to the 'individualisation of risks that are generated structurally, with analysis and addressing of risk factors becoming a route to creating rational and responsible citizens'.[44] Within the context of sexual violence, the existence of stereotypical views as to what constitutes a 'real'/'ideal' victim of rape, ie a chaste victim who sustains injury from being forcefully overpowered by an unknown assailant,[45] mean that women who fail to be 'responsible risk managers'[46] are blamed for what happened. The core of this article will explore how narratives of responsibilisation manifested during the Rugby Rape Trial and the extent to which recommended changes to the legislative definition of consent, as set out in the Gillen Review, can counter these narratives. Before doing so, it is necessary to provide more detail on this high-profile trial and the subsequent review.

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40 See eg Jocelyn Evans and Jonathan Tonge, 'Partisan and religious drivers of moral conservatism: same-sex marriage and abortion in Northern Ireland' (2016) 24(4) Party Politics 335–346; Graham Ellison, 'Criminalizing the payment for sex in Northern Ireland: sketching the contours of a moral panic' (2017) 57(1) British Journal of Criminology 194–214.

41 See Ann Marie Gray, Louise Coyle, Rachel Powell and Siobhán Harding, *Gender Equality Strategy Expert Advisory Panel Report* (December 2020).

42 Amnesty International, 'New poll finds that almost half of Northern Ireland students believe that a woman is partially or totally responsible for being raped if she flirts' (Amnesty International UK 30 September 2008).

43 Jessica Doyle and Monica McWilliams, *Intimate Partner Violence in Conflict and Post-Conflict Societies Insights and Lessons from Northern Ireland* (PSRP Report 2018).

44 Coy and Kelly (n 14 above) 153.

45 See eg Susan Estrich, *Real Rape: How the Legal System Victimizes Women Who Say No* (Harvard University Press 1987).

46 Gotell (n 15 above) 866.

The Rugby Rape Trial and the Gillen Review

As noted in the introduction, in March 2018 Ulster and Ireland rugby players Paddy Jackson and Stuart Olding were acquitted of the alleged rape and sexual assault of a 19-year-old woman at a house party in 2016.[47] In this case, the complainant had been on a night out with her friends in Belfast and went to an after-party at Jackson's house where the alleged rape and sexual assault occurred. The complainant testified that she had consensually kissed Jackson in his bedroom, but said 'no' to the remainder of the sexual activity, which included an act of oral sex on Olding when he entered the room.[48] The defendants claimed the encounter was consensual,[49] and Jackson argued that only digital penetration had occurred between him and the complainant as opposed to penile penetration as alleged by the complainant.[50] During the trial, which lasted nine weeks, the complainant was cross-examined over a period of eight days by four defence counsel, her bloodied underwear was admitted as evidence and misogynistic WhatsApp messages shared between the defendants following the alleged incident were exposed in court.[51]

In April 2018, the Northern Irish Criminal Justice Board commissioned a review of the law and procedure in prosecutions of serious sexual offences.[52] The review, led by Lord Justice Gillen, covered a range of issues and, of significance to this article, provided the opportunity to revisit the legislative definition of consent.[53] According to the Sexual Offences (NI) Order 2008, consent is defined as agreement by choice, where the person has the freedom and capacity to make that choice.[54] This definition is supplemented by presumptions against consent, including where violence is used or the complainant is detained or is deceived as to the nature or purpose of the act.[55] In determining the guilt of a defendant, the Order provides that consideration must be given to whether they reasonably believed the complainant consented and, in assessing reasonableness, attention should be paid to all the circumstances including any steps the defendant took to ascertain whether the complainant consented.[56] Following

47 For overview, see Killean et al (n 21 above).
48 Trial Transcript 5 February 2018 ICOS No 17/077669, 20 and 26.
49 Trial Transcript 23 March 2018 ICOS No 17/077669, 19.
50 Ibid 18.
51 See Killean et al (n 21 above).
52 Department of Justice, 'Review of Arrangements to Deliver Justice in Serious Sexual Offence Cases is Launched' (24 April 2018).
53 See Gillen (n 5 above).
54 Art 3 2008 Order (n 10 above).
55 Ibid arts 9 and 10).
56 See eg ibid art 5(1)(c) and 5(2).

an exploration of definitions of rape in comparative jurisdictions,[57] as well as a period of consultation in NI, the Review concluded that more could be done to emphasise sexual choice as an underpinning principle of consent and to shift the focus away from the complainant's behaviour and towards the defendant's.[58] A key recommendation in this respect is that the definition as to what constitutes a reasonable belief in consent should be reframed, from requiring consideration of any steps taken by the defendant to ascertain consent when assessing reasonableness, to now requiring consideration of the defendant's *failure* to take steps to ascertain consent.[59]

Drawing on a responsibilisation framework, the remainder of this article provides a detailed analysis of the operation of the current consent threshold within the context of the Rugby Rape Trial, followed by consideration of the extent to which the proposed rewording of the reasonable belief threshold offered by Gillen might impact trial narratives around consent.

ANALYSIS OF THE RUGBY RAPE TRIAL

The responsibilisation of the complainant is evident in two central narratives identified throughout the Rugby Rape Trial, primarily through defence questioning. The first focuses on a lack of physical force on the part of the defendants and a lack of physical resistance on the part of the complainant. Although not needed to satisfy the legal definition,[60] the defence narratives, particularly, rely on narrow constructions of rape. These included problematic expectations of how a rape victim should react that are embedded within social and cultural understandings of 'real rape'.[61] The second, focused on the complainant's behaviour during the encounter and her non-ideal victimhood. This narrative played out in a way to construct the complainant's actions before and during the alleged encounter as either flirtatious or confusing and thus as suggestive of consent or open to misinterpretation.

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57 These included jurisdictions focusing on: force and resistance (France, the Netherlands, Norway and some US states); 'no mean no' (Germany); and consent (England and Wales, New Zealand, Ireland, Scotland, South Africa, Sweden, Australia, Canada).

58 Gillen (n 5 above) 368–336.

59 Ibid 377. Additional recommended changes to the definition of consent include the introduction of a provision stating that passivity and a lack of resistance do not constitute consent, and the expansion of the list of presumptions against consent.

60 See *R v Malone* [1998] 2 CAR 447.

61 Estrich (n 45 above).

Force and resistance

Consent, it has been noted, is the central element distinguishing legal from illegal sexual activity. However, a significant body of research has demonstrated that the absence of consent, and even the presence of verbal refusal, often falls short of what is considered 'proof' of rape due to societal expectations that a 'real' rapist will use physical force and a 'real' victim will physically resist.[62] Such an expectation has its roots in historical legal requirements that defined rape as sexual intercourse with a woman by force and against her will, and the implicit, if not explicit, understanding that a victim must demonstrate 'utmost resistance'.[63] These high evidentiary standards were the product of a deep mistrust of female sexuality and a patriarchal understanding of rape as a wrong against female chastity and male property.[64] Although subsequent legal reforms centring consent sought to disrupt these narratives and better protect sexual autonomy, understood as the right to sexual self-determination, expectations of force and resistance persist.[65]

Defence narratives

In the Rugby Rape Trial, narratives of force and resistance[66] were evident when the defence questioned the complainant about what happened following the consensual kiss between her and Jackson in his bedroom. The complainant's account was that Jackson tried to undo her trousers, but she said no and left the bedroom intending to leave the party. She realised that her clutch bag had been left upstairs and when she returned to get it, she alleged that Jackson pushed her onto the bed and raped her, Olding then entered the room and forced her to perform oral sex. The defence questioned the complainant on her positioning when she fell onto the bed:

> Q. But, Ms.... there is no suggestion at all that *he grabbed you or pulled you* or lured you toward the middle of the bed so that you would fall back on to the middle of the bed. That's never suggested by you?
>
> A. I just said it in my statement.
>
> ...

62 See eg ibid; Burgin (n 13 above); Graeme Walker 'The (in)significance of genital injury in rape and sexual assault' (2015) 34 Journal of Forensic and Legal Medicine 173–178.

63 For a detailed analysis, see Burgin (n 13 above).

64 Joan McGregor, 'The legal heritage of rape' in Jennifer Brown and Sandra Walklate, *Handbook on Sexual Violence* (Routledge 2011).

65 Burgin (n 13 above).

66 Burgin (ibid) similarly uses the term 'narratives of force and resistance' when analysing transcripts in from the County Court of Victoria, Australia.

> Q. Ms… what happened on that occasion was the same as what happened on the other occasion, I put it to you that you began to kiss him consensually again?[67]

The defence sought to emphasise the absence of traditional conceptions of force by noting that the complainant was not grabbed or pulled. The focus on the lack of force was also evident when the defendants were questioned by their counsel. For instance, Jackson was asked if he was party to a 'violent attack' on the complainant, if he had 'pull[ed] her through the doorway' and more generally if he had ever been violent to anyone else, to which he replied he had not.[68] This line of questioning works to differentiate what occurred in this case from that of the 'real rape' stereotype as described above.

The court heard excerpts from transcripts of police interviews with the defendants where similar narratives of (a lack of) force and resistance emerged. In response to a question about what made him think the complainant was consenting, Jackson said 'I didn't force myself on her. I presume she wanted it to happen. She didn't have to stay, she could have left.'[69] In response to a similar question, Olding explained 'She didn't pull away. She kissed me back as well … she was doing it and I wasn't forcing her.'[70] These responses reflect socio-sexual scripts of women as sexual gatekeepers and consent as implied up and until a lack of consent is expressed.[71] Research has shown that such scripts factor into deliberations of criminal liability, with one participant in a mock jury study, for example, noting: 'I know he didn't hear a yes, but he didn't hear a no, it's just too much to be able to say guilty.'[72] Thus, responsibility is often placed on women to verbalise their non-consent, and a lack of communication by men, as well as a reliance on inference, is normalised. This is reinforced by the inattention, beyond asking what made the defendants *think* there was consent, to how the defendants actually sought and received consent.

The emphasis on the complainant's lack of resistance continued when she was questioned by the defence about her response to the initial consensual encounter and the second encounter.

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67 Transcript (n 48 above) 39 (emphasis added).

68 Jilly Beattie, 'Rugby star Paddy Jackson denies raping woman in his bedroom and claims she "was enjoying it"' (*Irish Mirror* 8 March 2018).

69 Conor Gallagher, 'Paddy Jackson: '"I didn't force myself on her. I presume she wanted it to happen"' (*Irish Times* 23 February 2018).

70 Ibid.

71 See eg Kristen Jozkowski and Zoe Peterson, 'College students and sexual consent: unique insights'(2013) 50 Journal of Sex Research 517–523.

72 Emily Finch and Vanessa Munro, 'Breaking boundaries? Sexual consent in the jury room' (2006) 26(3) Legal Studies 303–320, 317.

> Q. On the first occasion the evidence is that you gave him a firm 'no' and left the bedroom?
>
> A. Yes.
>
> Q. Why didn't you give him a firm 'no' this time and leave the bedroom?
>
> A. Because he wasn't taking no for an answer. Everything about me was saying no. You can't underestimate how scared you are in these situations …[73]

Suggesting that the complainant had returned upstairs to kiss the defendant, the defence argued that 'nothing was said by you nor shown by you nor rejected by you to show that you were not consenting'.[74] While the complainant had recounted verbal refusals as well as pushing the defendant's hands away, she testified that she ultimately froze during the encounter.[75] This claim is consistent with research into victim responses to sexual abuse, where, despite many believing victims will fight back, freezing is one of the most common responses.[76] In the present trial, Dr Janet Hall, the defence's own forensic medical expert confirmed, in response to questioning from the prosecution, that, rather than resist, most victims of sexual assault 'allow it to happen'.[77] However, this evidence is likely to have become lost amongst Dr Hall's testimony in response to defence questioning where she disputed the initial medical exam carried out on the complainant, discussed below, and agreed that alcohol can 'make us behave in ways we wouldn't normally behave'.[78]

The court also heard evidence that a woman from the party walked into the room during the encounter and the defence questioned the complainant on why she did not seek help:

> A. Because what was she going to do? It's one of those situations, she walked into that room, didn't actually know her. I thought she might be filming me. I turned around, registered it was a girl and turned my head the opposite direction in case she had been filming so I couldn't be identified.

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73 Transcript (n 48 above) 40.

74 Ibid 44.

75 Ibid 40–44.

76 See Anna Möller, Han Peter Söndergaard and Lotti Helström, 'Tonic immobility during sexual assault – a common reaction predicting post-traumatic stress disorder and severe depression' (2017) 96(8) Acta Obstetricia et Gynecologica Scandinavica 932–938.

77 Jilly Beattie, 'Medical expert tells Paddy Jackson and Stuart Olding Rugby Rape Trial that most victims "don't fight back"' (*Irish Mirror* 22 February 2018).

78 Ibid.

> Q. What was she going to do you ask me. She might have helped you. She might have helped you and stopped them raping you, that's what she could have done, isn't it? Isn't it? She could have said stop, couldn't she? That's what she could have done. You asked me the question. Couldn't she have said stop?
>
> A. She could have, yes.
>
> Q. And you would have been able to point to the blood and the tears, if they were there, to confirm that you weren't consenting, couldn't you?[79]

The defence attempt to cast doubt on the complainant's testimony by constructing and reinforcing a 'rational ideal',[80] that is an ideal of a rational or logical response to rape shaped by myths, eg that the 'normal' reaction is to call for help, thus failing to account for the impact of trauma and emotion. The last question in the excerpt relates to injuries sustained by the complainant during the encounter. Despite narratives of a lack of force, the complainant testified that the defendants had been rough and that Jackson had tried to force his fist inside her;[81] there was also evidence of blood on Jackson's bedsheets.[82] The doctor who examined the complainant following the incident reported that she had bruising to the elbow and kneecap[83] and a two to three centimetres internal tear, which he said had been caused by blunt force trauma but that he could not confirm whether this was consensual or not.[84] Indeed, while the absence of injury is often used to suggest that rape did not occur,[85] the presence of injury is deemed inconclusive and open to dispute.[86] In the present case, despite the defence question above linking the blood to the absence of consent, the defence argued that the source of the bleeding could not be confirmed and, rather than strengthening the prosecution's case, the fact that the complainant

79 Transcript (n 48 above) 48.
80 Smith and Skinner (n 6 above) 458.
81 Trial Transcript 31 January 2018 ICOS No 17/077669, 24.
82 Michael Donnelly and Ashleigh McDonald, 'Jackson and Olding rape trial: alleged victim's blood found on duvet from Jackson's bedroom' (*Belfast Telegraph* 21 February 2018).
83 Conor Gallagher, 'Belfast trial hears details of woman's injuries after alleged rape' (*Irish Times* 20 February 2018).
84 Ashleigh McDonald, 'Rugby Rape Trial: doctor can't say if intimate injuries from consensual or non-consensual sex' (*Belfast Telegraph* 20 February 2018).
85 See Walker (n 62 above)
86 Gethin Rees, '"It is not for me to say whether consent was given or not": forensic medical examiners' construction of "neutral reports" in rape cases' (2010) 19(3) Social and Legal Studies 371–386.

had been bleeding formed the basis for intrusive questioning and the admission of the complainant's underwear in court.[87]

While the source of the blood was disputed, the fact the complainant had been bleeding during the encounter was known to the defendants. In response to questioning by defence counsel, Jackson explained that he noticed blood on his fingers but 'thought it was something to do with her period. She didn't say anything and I didn't say to her. I thought it would have been a bit embarrassing for both of us.'[88] When asked whether he associated the blood with pain he responded in the negative and said that otherwise he 'would have stopped. I would have asked if she was okay. If there was any pain I would have helped her.'[89] Beyond this questioning by the defence, there is nothing in the available transcripts or news reports exploring this issue further. The prosecution therefore missed a key opportunity to investigate the (in)actions of the defendants when the fact of the complainant bleeding was noticed: more attention to this aspect would have enabled engagement with the legal requirement to consider any 'steps' taken by the defendant to ascertain whether the complainant was consenting.[90] The lack of attention to the (in)actions of the defendant, in comparison to those of the complainant, aptly demonstrates how 'women become responsibilised at the same time as abusers become invisible and not held to account – de-responsibilised through this process of expecting women to manage their own safety'.[91]

Counter-narratives by the prosecution and judicial directions

In terms of the construction of counter-narratives, some positive practices can be noted. For example, the prosecution challenged expert testimony presented for the defence in relation to the potential impact of alcohol on the complainant, as outlined earlier, noting that, while it is true that alcohol can reduce inhibitions and create arousal, 'What is sauce for the goose is sauce for the gander.'[92] The prosecution also skilfully attempted to counter the narratives of force and resistance by moving beyond the physical. When questioning the defendants, the prosecution suggested that due to their alcohol intake there was a danger that they could 'disregard the wishes or views of another

87 Gráinne Ní Aodha. 'Underwear had to be shown in Belfast rape trial, says Jackson's lawyer' (*The Journal.ie* 24 November 2018).
88 McDonald (n 84 above).
89 Ibid.
90 Art 5(2) 2008 Order (n 10 above).
91 Coy and Kelly (n 14 above) 154.
92 Beattie (n 77 above).

person if they get in the way of what you want to achieve'.[93] The prosecution highlighted the potential overpowering atmosphere due to the stature of the defendants in comparison to the complainant: 'Your work is physically engaging, using not only your skill but also your strength in an attempt to overpower your opponent. What match is a 19-year-old woman going to be for the pair of you if she is going to try to resist?'.[94] Such questioning is infused with a sexual autonomy analysis, recognising the complex way power differentials can create situations of vulnerability and coercion, beyond traditional notions of force, and the way this can impact an individual's ability to offer resistance or 'just say no'.[95]

During the closing speech, the prosecution built on these arguments and emphasised the defendants' lack of interest in the complainant's consent, noting that '[H]er views are not sought' and that '[T]hey knew she did not consent, but they didn't care'.[96] However, the defence kept issues of physical force and resistance alive in their closing speech by suggesting that the complainant had not been questioned thoroughly enough on these matters. Olding's barrister, for example, criticised police interviews with the complainant explaining that he would have asked: 'why she was unable to resist, why did she not say no?'; 'Why did she open her mouth – why didn't she keep her mouth closed?'; 'Why didn't she scream – the house was occupied. There were a lot of middle-class girls downstairs –they weren't going to tolerate a rape or anything like that'.[97] The reference to 'middle class' girls is extremely problematic and represents class stereotypes that led to public outcry during this case.[98] Olding's barrister also challenged the prosecution's case that the complainant had been frozen with fear, arguing that '[I]f someone performs oral sex for 5 minutes to the point of ejaculation does that not seem like consent?'[99]

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93 'Rugby Rape Trial: Stuart Olding insists he and co-accused did not try to "cover up" what happened' (*Irish News* 8 March 2018).

94 Ibid.

95 See Burgin (n 13 above); Eithne Dowds, 'Towards a contextual definition of rape: consent, coercion and constructive force' (2020) 83(1) Modern Law Review 35–63.

96 Jilly Beattie, 'Paddy Jackson and Stuart Olding Rugby Rape Trial hears co-accused's stories "don't add up"' (*Irish Mirror* 15 March 2018).

97 Nicola Anderson, 'Why didn't she scream? There were lots of girls downstairs who weren't going to tolerate a rape' (*Independent.ie* 22 March 2018).

98 See Seanín Graham, 'Campaign groups hit out at "middle class" women remarks in rape case' (*Irish News* 30 March 2018).

99 Jilly Beattie, 'Stuart Olding's barrister addresses jury at Rugby Rape Trial' (*Belfast Live* 21 March 2018).

Jackson's lawyer similarly queried the prosecution's case, this time with regard to the woman who walked into the room. It was agreed that Jackson asked this woman to 'join in' and the defence argued that if she had agreed, '[I]s it really the Crown's case that half the bed would have been consenting and half not?'[100] Jackson's lawyer also centred the closing speech around exaggerated understandings of 'real rape' that could be argued to be misleading[101] in nature: 'What was it that she was genuinely in fear of? She tried to leave that room. Picture the scene. A dark alley miles away from people, gagged and locked up. Eight adults?'[102] In this way the defence attempt to create a disjuncture between the complainant's account of what happened and stereotypical notions of 'real rape', often characterised by extreme violence.

Her Honour Judge Patricia Smyth QC attempted to balance the narratives during the summing up. Judge Smyth explained that the jury should 'leave behind all such assumptions' in respect of 'what constitutes rape. What kind of person might be a rapist. Or what a person who is being raped, or has been raped, would do or say.'[103] The judge went on to explain that there is no stereotype for a rape, a rapist or a victim of rape, or how people behave after they have been raped; that a victim of rape will experience trauma; that there are various reactions to rape such as freezing; and that every person reacts differently to the task of speaking about the rape.[104] Judge Smyth outlined the legal meaning of consent as someone agreeing by choice and having the freedom and capacity to make that choice. A distinction was also drawn between consent and submission, with Judge Smyth explaining that consent given enthusiastically and consent given reluctantly are both valid consent, but that submission as a result of fear is not.[105] In respect of the latter, it was noted that the prosecution does not have to prove that the fear was induced by force and there is no need to prove that the woman physically resisted or that she said that she did not consent. While such instructions aim to add clarity and speak to some

100 Lesley-Anne McKeown, '"Prosecution's case is critically flawed" –Paddy Jackson's lawyer makes closing submission in rape trial' (*Independent.ie* 15 March 2018).

101 See eg the Bar Standards Board Handbook, Version 4.6 December 2020, part 2 'The Conduct Rules', r C6: 'Your duty not to mislead the court will include the following obligations: 1 you must not: a. make submissions, representations or any other statement; or b. ask questions which suggest facts to witnesses which you know, or are instructed, are untrue or misleading.' Smith and Skinner (n 6 above) 460 argue that clarifying what is meant by 'misleading' to include rape myths may tackle their use in court.

102 Beattie (n 68 above).

103 Transcript (n 49 above) 8–9.

104 Ibid.

105 Ibid 18–19.

of the issues raised by the prosecution re fear felt by the complainant, the language of 'reluctant consent' has the potential to cause confusion. This is particularly true in a context where socio-sexual scripts often reframe women's refusal to male sexual advances as 'token' rather than real, complicating assessments of consent.[106] The judicial summary also discussed the fact that the complainant had been bleeding, but no mention was made of this being a point at which the defendants could, or should, have checked whether the complainant was consenting. In this regard, a judge's role at the point of summing up is to explain the law, summarise the relevant evidence and tell the jury how to approach the issues,[107] and so the omission of this aspect can be linked to the fact that it was not presented more thoroughly during the trial.

Complainant behaviour and (non-)ideal victimhood

Stereotypical understandings of what constitutes 'real' rape and 'real' victimhood are an extension of what Christie has termed the 'ideal' victim: an individual deemed as deserving of victim status because they are weak, doing a 'respectable project', and cannot be blamed for being where they were.[108] The ideal of respectability is particularly salient in the context of rape victimhood. While there has been a move away from the legal construction of rape as a property crime, key tenets of this conceptualisation, such as the focus on sexual purity continue to have profound implications on trial processes.[109] Further to this, complainants are assessed against normative ideals of appropriate feminine behaviour whereby women are conditioned to appreciate the risk of violence and modify their behaviour accordingly.[110] Where women fail to undertake this 'safety work',[111] they are rendered complicit in their own victimisation due to their own (bad) choices especially if they engaged in 'risky' behaviour, that is drinking, flirting or dressing provocatively.[112] Such behaviour may also be used to

106 See Eithne Dowds and Elizabeth Agnew, 'Rape law and policy: persistent challenges and future directions' in Miranda Horvath and Jennifer Brown, *Rape: Challenging Contemporary Thinking 10 Years on* (Routledge – forthcoming).

107 See Patricia Smyth, 'Sexual offence trials: the practical challenges for a judge tasked to deliver justice' in Killean et al (n 21 above).

108 Christie (n 15 above).

109 See eg Wendy Larcombe, 'The "ideal" victim v successful rape complainants: not what you might expect' (2002) 10 Feminist Legal Studies 131–148; Clare McGlynn, 'Rape trials and sexual history evidence: reforming the law on third-party evidence' (2017) 81(5) Journal of Criminal Law 367–392.

110 Fiona Vera-Gray and Liz Kelly, 'Contested gendered space: public sexual harassment and women's safety' (2020) 44(4) International Journal of Comparative and Applied Criminal Justice 265–275.

111 Ibid.

112 Gotell (n 15 above) 866.

imply consent on the part of the complainant or, where the trier of facts believes there was no consent, to suggest that the defendant nonetheless had an 'objectively' reasonable belief in consent.[113]

Defence narratives

In the Rugby Rape Trial, the defence sought to undermine the complainant's account by asking questions about her behaviour during the incident, and her character in general, that were imbued with assumptions about 'ideal victimhood', including perceptions around what is 'appropriate' versus 'risky' behaviour or 'rational' responses to rape. During cross-examination, the complainant was questioned about how she ended up at the house party and emphasis was placed on her behaviour at the nightclub prior to the party:

> Q. You had no idea where [your friend] was, did you? You see is not the truth of what happened as far as outside Ollies is concerned, you were desperate to join the footballers party?
>
> A. That is incorrect.
>
> Q. That invitation was not forthcoming and you what you saw was Paddy Jackson and you waited some time and joined his party, his group, in his taxi? You weren't invited, were you? Not one of those girls invited you to Paddy Jackson's house.[114]

The emphasis on her not having been 'invited' to the party and as having left her friends can be situated within the responsibilisation framework whereby the woman who 'acts in ways that so exceeds the norms of sexual safekeeping … becomes, in effect, a risky woman by virtue of the risk she poses to the masculine sexual subject'[115] – that risk stemming from perceived 'mixed signals' or 'sexual miscommunication',[116] opening up the potential for future rape accusations that, as infamously stated by Sir Matthew Hale in 1736, are 'easily to be made and hard to be proved'.[117]

The defence continued to focus on the complainant's behaviour by asking her about the consensual kiss in Jackson's bedroom. Acknowledging the kiss, the complainant explained that it was 'not indicative of consent for anything else'.[118] The defence nonetheless questioned the complainant on where in the bedroom it took place:

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113 See *R v Ewanchuk* [1999] 1 SCR 330; Burgin and Flynn (n 12 above).
114 Transcript (n 48 above) 11–12.
115 Gotell (n 15 above) 893.
116 See eg Jozkowski and Peterson (n 71 above).
117 M Hale, *History of the Pleas of the Crown* (Sollom Emlyn 1736) 635.
118 Transcript (n 48 above) 20.

Q. By the bed?

A. I'm not sure about that.

Q. Door open or closed?

A. I don't recall having to open a door so I presume the door was open. I'm not entirely sure on this.

Q. Ms..., Bedrooms are typically private places, aren't they? Would you agree?

A. Yes.

Q. Why did you, from downstairs at that party, where there was a toilet, a kitchen, a living room, why did you go upstairs to Paddy Jackson's bedroom, a private place?[119]

The description of the bedroom as a 'private place' seeks to construct narratives of responsibility and implied consent: what other reason would the complainant have to be in the bedroom if not for sexual activity? The defence continued to construct a narrative of implied consent on the basis of the complainant's presence in the bedroom, as well as a narrative of flirting or attraction as consent:[120]

Q. But why go to his bedroom?

A. I'm not entirely sure.

Q. You recall that text message we saw on Friday, that when you fancy someone you just can't keep your cool?

A. That is not applicable to this situation at all.

Q. So you were keeping your cool here, were you?

...

Q. It was witnessed by others that you were staring at Paddy Jackson?

A. I don't recall ever staring at Paddy Jackson.

Q. On more than one occasion, and possibly as many as three, Paddy Jackson left the living room area to go into the kitchen to fix drink for people and who would follow but you. Have you any recollection of that?

A. No, I do not.

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119 Ibid.

120 See similar narratives in Burgin and Flynn (n 12 above).

> Q. And as and when you were in the kitchen, you would continue to stare at him, you were fixed on him?[121]

The defence also suggested the complainant was attracted to celebrities and that she had been 'teasing' Jackson before going to the bedroom on the first occasion.[122] The focus on the complainant's behaviour prior to the alleged rape and sexual assault extended to her interactions with other men earlier in the nightclub. In defence closing remarks it was noted that the complainant had been tactile through the evening, touching the leg of one man and stroking the face of another.[123] The admission of such evidence is extremely problematic as it rests on the flawed logic that flirting, even with other men, is indicative of consent to future sexual activity. As noted earlier, the complainant is responsibilised at the same time the defendant is de-responsibilised: the defence are implicitly suggesting that if the complainant had acted differently, eg by not flirting, the defendant would not have assumed that she consented.[124] In this way, the defence seek to cast doubt over the complainant's 'innocence', and thus her 'victim status'.

Turning to the discussion of the complainant returning to the bedroom to get her bag after the first consensual incident, the defence sought to reframe the incident as a continuous consensual encounter:

> Q. You were of a mind to leave because in part of his behaviour, because of what he done in the bedroom, why didn't you just put your hand on the chest of drawers, and take what you had come for and go down the stairs?
>
> A. I can't remember if I checked the clutch or what, I'm really not sure.
>
> Q. He was in the room, wasn't he?
>
> A. I'm not sure. Like I said, the next thing I remember is Patrick Jackson standing at the bottom of the bed.
>
> ...
>
> Q. But you see, Ms..., it's this, as has happened on the previous occasion, you had followed him up to his bedroom?[125]

The assumption underpinning this line of questioning is that the 'rational' response would have been to leave rather than go upstairs

121 Transcript (n 48 above) 21–25.

122 Ibid 29 and 42.

123 Lesley-Anne McKeown, '"Prosecution's case is critically flawed" – Paddy Jackson's lawyer makes closing submission in rape trial' (*Independent.ie* 15 March 2018).

124 Burgin and Flynn (n 12 above).

125 Transcript (n 48 above) 37.

and, because the complainant acted otherwise, the only credible conclusion is that the sexual activity was wanted. The reliance on these wider circumstantial factors legitimises stereotypical views about appropriate socio-sexual conduct, such as those found in the NI survey noted earlier, and normalise reliance on these issues when assessing whether a belief in consent was reasonable. Indeed, Finch and Munro report that in their mock jury study participants took account of similar factors when considering whether a belief in consent might be reasonable *in all the circumstances*, with one juror arguing that because the complainant, in the fictional scenario, had gone upstairs with the defendant it could reasonably be taken from this that she consented.[126]

Ideals of socially accepted forms of rationality were also evident when the defence questioned the complainant about the fact that she recalled, during her evidence, asking Jackson to 'at least use a condom'.[127] The defence asked: '[A]re you telling the jury that during the course of the rape you were asking Mr. Jackson to use a condom?'.[128] This question is designed to present the complainant's actions as bizarre and create the foundation to frame the encounter as consensual. The characterisation of a complainant's reactions as irrational is a common defence strategy that rests on a narrow understanding of victim responses and a 'decontextualized view of risk avoidance'.[129] A complainant might ask the defendant to wear a condom as a result of the inevitability of the attack and as an attempt to reduce the possibility of STI transmission or pregnancy. As Randall notes: '[S]ometimes … women's resistance, though present, remains unseen and unrecognized, due to a limited and partial understanding of what resistance actually looks like and its many diverse and creative forms.'[130] It is thus clear from the foregoing analysis that the responsibilisation of the complainant is facilitated by a reliance on problematic views as to what constitutes 'real rape' or how an 'ideal victim' should behave.

Counter-narratives by the prosecution and judicial comments

In an attempt to address some of the claims made by the defence, the prosecution, in the closing speech emphasised the person- and situation-specific nature of consent, in that it must be given in respect

126 Finch and Munro (n 72 above) 318.

127 Trial Transcript 12 February 2018 ICOS No 17/077669, 43.

128 Ibid 65.

129 Gotell (n 15 above) 881; Smith (n 6 above) 187.

130 Melanie Randall, 'Sexual assault law, credibility, and ideal victims: consent, resistance, and victim blaming' (2010) 22 Canadian Journal of Women and Law 397–433, 420.

of each sexual encounter and each sexual partner.[131] The prosecution explained that '[T]he law of this land is that a young woman is allowed to say "no"'.[132] Reflecting on the first consensual encounter the prosecution continued, '[T]he law is not, "you let me kiss you so I can force myself upon you"... The law is not that "if I and my friend fancy he can join in and I can do as I please".'[133] These comments attempt to present the defendants' mindset, a mindset the prosecution argued was one of 'male entitlement',[134] as out of line with the current law on consent and reinforce the irrelevance of the circumstantial factors raised by the defence that rely on stereotypical assumptions about 'ideal' pre and post assault behaviour.

Similarly, Judge Smyth recounted the defences' argument that the complainant had been tactile and flirtatious with Jackson and other men throughout the night. She explained '... it would be wrong to leap to the conclusion that because she was drunk she must have been looking for or was willing to have sex or that someone else who saw and engaged with her could reasonably believe that she would consent to sex'.[135] In doing so, Judge Smyth is challenging social and cultural narratives, discussed earlier, that use a complainant's pre-assault behaviour and 'non-ideal' victimhood to bolster claims of belief in consent. Judge Smyth also reminded the jury of the defences' claim that the only reason the complainant went up to Jackson's bedroom in the first place was to have sex and asked them to bear in mind that 'a woman is entitled to say "no" and to decide what sexual activity she wants, how far she is prepared to go and what she does not want to do'.[136] While this statement again emphasises the situation-specific nature of consent, comments made earlier in the summing up potentially undermine these key principles. For instance, in discussing the dispute over why the first consensual encounter ended, with the complainant alleging Jackson had tried to take things too far and she left, whereas Jackson claims he left the room because the 'vibe' had changed as a result of the complainant teasing him about not knowing her name, Judge Smyth stated that 'your conclusions about this issue will be important when you are considering whether you are sure that [the complainant] did not subsequently consent to penetration. And if you are sure that she did not consent whether you are sure that Patrick

131 Conor Gallagher, 'Belfast rape trial told alleged attack "a throwback to days of male entitlement"' (*Irish Times* 15 March 2018).

132 Beattie (n 96 above).

133 Ibid.

134 Ibid.

135 Trial Transcript 26 March 2018 ICOS No 17/077669, 23.

136 Ibid 28.

Jackson did not reasonably believe that she consented.'[137] Tying the two scenarios together in this way may create the impression that if the first consensual encounter ended as Jackson suggested then that consent can be transferred to the second encounter, or that it might at least justify his belief in consent.

Further to this, while Judge Smyth did explain that, in determining whether the defendants reasonably believed in consent the jury must consider all the circumstances including any steps taken by the defendants to ascertain consent, this aspect is not discussed in any detail by the prosecution or in the judicial direction. The emphasis throughout the trial is primarily on what the complainant did or did not do, and in line with comparative research, how she 'removed consent instead of how accused men gained it'.[138] Now that the key themes from the analysis of the Rugby Rape Trial have been discussed, the next section considers the extent to which the recommendation made in the Gillen Review in respect to the reasonable belief threshold can impact trial narratives around consent.

THE GILLEN RECOMMENDATION ON REASONABLE BELIEF IN CONSENT: WILL IT MAKE A DIFFERENCE?

As discussed earlier, while the 2019 Gillen Review resulted in over 200 proposed legislative and policy changes, this article is concerned with the potential of the suggested reformulation of the reasonable belief in consent threshold:[139] from requiring consideration of any steps taken by the defendant to ascertain whether the complainant consented when assessing reasonableness, to now requiring consideration of the defendant's *failure* to take steps to ascertain consent.[140] However, it has already been noted that explicit attention to this threshold, and particularly any steps taken by the defendant to ascertain consent, was missing from the Rugby Rape Trial. While it is acknowledged that this finding relates only to one trial, it is consistent with court observation research from England and Wales,[141] where the requirement to take steps was only implicitly referred to in one out of 18 sexual offence cases observed. The lack of attention to this provision can be linked to the fact that the defendant does not *have* to take steps to ascertain consent – it is a consideration only (and remains so under the proposed change) – and the perception that this provision is antithetical to the

137 Transcript (n 49 above) 22.
138 Smith and Skinner (n 6 above) 451.
139 Art 5(1)(c) and (2) 2008 Order (n 10 above).
140 Gillen (n 5 above) 377.
141 Smith (n 6 above) 138.

'spontaneous' nature of sexual relations.[142] Such a perception can be linked to the presumption that the steps requirement requires verbal communication and that asking for consent is 'awkward' or 'kills the mood'.[143] While sexual communication can take many forms, including non-verbal cues,[144] the foregoing views raise questions around the real impact of Gillen's proposal.

Although Gillen's proposal is connected to an under-utilised legal provision,[145] it is suggested here that it may still have the potential to subtly redistribute narratives of responsibility and inform jury deliberations. For instance, under the current law the prosecution can ask the defendant what steps, if any, they took to ascertain consent and the defendant's response may feed into jury considerations of whether their belief in consent was reasonable. While such a question, if asked, may be framed in different ways, under the proposed law, the language of 'failure' provides the prosecution with the opportunity to question the defendant on particular instances during the encounter where further enquiries into consent could have been expected, and, where the defendant failed to do so, to ask them to account for this failure.[146] As such, the course of evidence at trial may be affected in that the prosecution and defence would seek to elicit evidence, respectively, of the absence or existence of steps that the defendant took to ascertain whether the complainant consented.

By way of example, recall earlier, where the complainant had been bleeding during the encounter, the prosecution could have questioned the defendant as follows: 'when you noticed the blood, did you ask the complainant if she was okay and if she wanted to continue with the sexual activity?' While the defendant may have responded, as he did when questioned by the defence, that he thought it would be embarrassing, the prosecution could press the point: 'So even though you knew the complainant was bleeding, you *failed* to check whether she was okay and whether she wanted to continue with the sexual activity because you decided it was better to avoid embarrassment?' This suggested questioning represents a situation where the defendant's, not the

142 Anna Carline and Clare Gunby, '"How an ordinary jury makes sense of it is a mystery": Barristers' perspectives on rape, consent and the Sexual Offences Act 2003' (2011) 32 Liverpool Law Review 237–250, 247.

143 See eg Nicole Jeffrey and Paula Barata, 'The intersections of normative heterosexuality and sexual violence: university men's talk about sexual behavior in intimate relationships' (2019) 83 Sex Roles 353–369, 361.

144 See eg Jozkowski and Peterson (n 71 above).

145 Art 5(2) 2008 Order (n 10 above).

146 This approach is reminiscent of the Canadian approach, although the latter is stronger in the sense that where a defendant failed to take steps they are unable to rely on the defence of mistaken belief in consent. See *R v Malcolm* 2000 MBCA 77 (CanLII), para 24.

complainant's, actions can be called into question and, far from 'killing the mood', it could be argued that there was a heightened responsibility on the defendant to make explicit enquiries into the complainant's consent.[147] The prosecution could also use this situation to challenge the defendants' claim that they 'presumed consent' by asking questions along the lines of: 'you have stated that you presumed the complainant consented, did the fact that the complainant started to bleed not disrupt this presumption?' Such questioning challenges discourses of 'male sexual prowess' and claims that the defendant 'just knew' there was consent.[148]

Similarly, the language of failure could be used by the prosecution when discussing the evidence relating to the woman who entered the room. It was noted that Jackson asked this woman if she wanted to 'join in', and the defence argued that this suggested the encounter was consensual. However, it could also be argued that the lack of communication with the complainant around any potential progression of sexual activity reinforces the prosecution's claim that the defendants did not care about the complainant's consent. The prosecution could have asked the defendant: 'before you asked X to join in, did you ask the complainant if she wanted another person to engage in the activity?' If the defendants said no or tried to frame it as joking the prosecution could have asked: 'so when seeking to progress the sexual activity and involve another person you *failed* to even speak to the complainant about her consent, wants or desires in that moment?' This line of questioning can disrupt stereotypical notions of female passivity and willingness to accept male sexual advances up and until the verbalisation of a 'no', and instead emphasise the importance of negotiation and communication,[149] as well as the person- and situation-specific nature of consent as discussed earlier.

If such questioning was to be advanced, it could then be included as part of the judicial summary. For example, the current summary explains that the defendant 'said that while he was penetrating [the complainant] with his fingers he saw a little blood on his fingers. He said he didn't say anything and he thought it would have been embarrassing for both of them. He said there was no sign that the blood was associated with pain in any way and if it had been he would have stopped.'[150] If, in line with the proposed new law, the prosecution

147 Such questioning aligns with Anderson's 'negotiation model': see Michelle Anderson, 'Negotiating sex' (2005) 78 Southern California Law Review 101–138.

148 Anastasia Powell, Nicola Henry, Asher Flynn and Emma Henderson, 'Meanings of "sex" and "consent": the persistence of rape myths in Victorian rape law' (2013) 22(2) Griffith Law Review 456–480, 476.

149 See Anderson (n 147 above).

150 Transcript (n 135 above) 43.

advanced the above questioning the judge could elaborate on this point by stating: 'the prosecution suggest that the fact that the defendant did not say or do anything at this point amounts to a failure to ascertain whether the complainant consented. This will be important to your consideration of whether the defendant reasonably believed that the complainant consented.'

It is not suggested that this line of questioning or additional judicial directions on the matter will change the verdict; indeed there are many factors that contribute to securing a rape conviction at trial and, further, this was not the stated aim of Gillen's proposal.[151] Rather, as Gillen suggested, the reformulated reasonable belief threshold may shift attention to the perpetrator thus contributing to an important counter-narrative. In this way, Gillen's proposal can help to rebalance the focus of the trial and disrupt dominant narratives that imply consent by highlighting the *unreasonableness* of a defendant's belief in consent.[152] However, the potential of this proposal can only be realised through a change in prosecutorial practice to ensure adequate attention to the 'steps to ascertain consent' provision, and not only when questioning the defendant. As such, if the law is to be amended, the PPS Policy for Prosecuting Rape Cases should be updated to reflect any changes and give direction to prosecutors on how best to incorporate questioning on this matter.[153] In this respect, inspiration could be drawn from materials developed by Burrowes who designed a toolkit for prosecutors in England and Wales to, amongst other things, 'balance the focus of the case on D's behaviour, motives and reasons to assist in rebutting any assertion that C consented or D had a reasonable belief in consent, as well as assess the complainant's evidence'.[154] In the context of the 'steps to ascertain consent provision' as it currently exists, Burrowes explains that this provision should be included in the prosecution's opening statement and the issue should be explored during the complainant's evidence-in-chief and in the closing address.[155] Further to this, the additional measures set out in the Gillen Review, including those relating to various 'myth busters', such as a pre-trial video for jurors, written judicial directions on rape myths and stereotypes for jurors, and intervention at Ground Rule Hearings in the absence of the

151 See Gillen (n 5 above) 368–336.

152 Gillen's additional recommended changes to the definition of consent, such as including a provision stating that passivity and a lack of resistance do not constitute consent, while already provided for in common law, may also reinforce this position. See Gillen (n 5 above) 377.

153 PPSNI, Policy for Prosecuting Rape Cases, December 2010.

154 Nina Burrowes, 'Tool kit for addressing consent and associated myths for prosecuting advocates in rape trials'.

155 Ibid.

jury if counsel propose inappropriate questioning,[156] should also be used as a means to challenge problematic narratives including those relating to force, resistance and 'ideal' victimhood outlined in this article.

CONCLUSION

Drawing on critical feminist scholarship on rape, this article applied a responsibilisation lens to trial transcripts and news reports from the Rugby Rape Trial. In doing so, the article identified two central narratives that contribute to the 'responsibilisation' of the complainant: a lack of resistance and/or force; and the complainant's behaviour and (non)ideal victimhood. The article demonstrated how problematic extra-legal factors come to dominate the trial narrative at the expense of factors – such as attention to any steps taken by the defendant to ascertain consent – that, as a matter of law, should be considered when determining whether an offence has occurred. Indeed, in contrast to Hale's infamous pronouncement that rape is an accusation easily made and difficult to refute, effective scripted defence strategies have emerged over the years built on a suspicion of female sexuality and the normalisation of a male sexuality that, while active, is noncommunicative and can 'reasonably' expect sex from behaviour and inference.[157] Such scripts minimise and obscure the defendant's responsibility for the encounter leading to the 'impossibility' of rape.[158]

Within the context of the adversarial criminal trial, such an 'impossibility' provides the foundation to discredit and undermine the complainant's lived experience which can lead to feelings of re-traumatisation in what has been described as the 'second rape'.[159] The dominant narratives constructed in the Rugby Rape Trial not only contribute to the potential secondary victimisation of the complainant, but also those who witness this treatment from the public gallery, news reports or through word of mouth. The consequence of these narratives are thus far reaching, telling those who have experienced sexual victimisation that this is not a safe space for you to bring your claim. Instead, as a wealth of literature has documented,[160] this is a space where you will be put on trial, you will be expected to demonstrate what you did to prevent the violation or explain why you

156 See Gillen (n 5 above) 214–216.

157 See eg Burgin and Flynn (n 12 above); Jeffrey and Barata (2019) (n 143).

158 Louise du Toit, *A Philosophical Investigation of Rape: The Making and Unmaking of the Feminine Self* (Routledge 2009) 97.

159 See Patterson (n 30 above).

160 See eg Smith (n 6 above); Craig (n 6 above); Burgin (n 13 above).

did not respond in the socially expected way, with extremely limited corresponding expectations being placed on the defendant in relation to how they behaved in the situation.

This article considered the extent to which the proposal contained in the 2019 Gillen Review, that the reasonable belief in consent threshold should be reworded to take account of the defendant's *failure* to take steps to ascertain the complainant's consent, could disrupt these narratives. In this respect, it has been suggested that the proposal has the potential to subtly redistribute narratives of responsibility, as the language of 'failure' provides the prosecution with the opportunity to question the defendant on instances during the encounter where the responsibility to ascertain consent was heightened. In this way, there is potential for decisions as to whether an offence has been committed to no longer turn solely on what the complainant did or did not do, but that the actions or inactions of the defendant are central to these considerations. However, it has been recognised that any changes to the law in this area are unlikely to have an impact unless there is a change in prosecutorial practice to ensure the reasonable belief threshold, and particularly, the 'steps to ascertain consent provision' are explicitly dealt with as part of the trial narrative. Moreover, due to the deeply entrenched minimisation and misunderstanding of rape and sexual violence that form the 'cultural scaffolding'[161] for the perpetration, justification and disqualification of such violence, interventions beyond the criminal justice system are required. The struggle against sexual violence requires attention to everyday micro-politics, critical reflection on our socio-sexual expectations and a willingness to challenge the narrow and stereotypical ideals of rape victimhood that create insurmountable barriers to redress and recognition for many who experience sexual victimisation.

161 Nicola Gavey, *Just Sex? The Cultural Scaffolding of Rape* (Routledge 2005).

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Sweeney v VHI [2021] IESC 58: expert witnesses in possession of confidential or privileged information

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ABSTRACT

This case commentary reviews *Sweeney v VHI*,[1] where the Supreme Court of Ireland held that an academic economist could not be retained as an expert witness by one party to a competition law action, where he had previously acted for the other party in separate proceedings and had been in receipt of confidential or privileged information. The court held that the role of an economist in competition law actions required a high degree of interaction with the client and legal team, such that privileged or confidential information would be likely to be exchanged. Where there was a real risk that such information would be disclosed, the expert should be excluded from acting for the other side in other proceedings.

Keywords: expert evidence; expert witness; economist; competition law; confidential information; privileged information; conflict of interest; independence of expert; risk of disclosure of confidential or privileged information; 'real and sensible' risk of disclosure.

INTRODUCTION

The defendant in competition law proceedings sought an order to exclude a particular economist from acting as an expert witness for the plaintiff, where he had been retained by the defendant in a similar capacity in other proceedings during the previous 10 years and was alleged to have received some commercially sensitive information.

BACKGROUND

Professor Moore McDowell, an experienced academic economist ('the economist') had been retained by the defendant, the Voluntary

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1 [2021] IESC 58.

Health Insurance Board (VHI) in various contentious competition law proceedings since 2003. One such action remained live at the time of the instant application. However, he had not had any involvement in the proceedings since 2012.

In 2015, the plenary summons in the instant proceedings was issued by the plaintiff, a promoter of a private hospital. The claim was that the VHI had a dominant position in the Irish market for private health insurance and the market for the purchasing of private medical services. It was alleged that this dominant position had been abused in failing to approve the plaintiff's hospital, contrary to section 5 of the Competition Act 2002, and article 102 of the Treaty on the Functioning of the European Union.

In October 2017, the plaintiff had his first consultation with the economist. The following month, the economist received a telephone call on behalf of the defendant, querying his involvement in the plaintiff's case.

In November 2018, the defendant issued a motion to exclude the economist from acting as an expert witness for the plaintiff, alleging that he had been provided with a significant volume of privileged and confidential information. In response, the economist swore an affidavit that he did not hold any confidential information in hard copy or electronic form and offered an undertaking not to disclose any confidential information.

High Court decision

On 28 May 2019 the High Court[2] refused to exclude the economist from giving evidence.

It was held that it was open to a court to grant injunctive relief to restrain an expert from acting for a party if he was in receipt of confidential information. The test was whether it was likely that the expert would be unable to avoid having resort to the privileged information.[3] The burden of proof was on the applicant to demonstrate that the expert was likely to misuse confidential or privileged information.[4]

An expert witness had a duty to the court to give evidence as to the facts he had observed, and to give his own independent opinion on them. The duty was the same no matter which side had instructed the expert.[5]

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2 [2019] IEHC 360 (Barrett J).

3 *Meat Corporation of Namibia Limited v Dawn Meats (UK) Limited* [2011] EWHC 474 (Ch).

4 *A Lloyd's Syndicate v X* [2011] EWHC 2487 (Comm).

5 *Harmony Shipping Company SA v Saudi Europe Line Limited* [1979] 1 WLR 1380; *McGrory v ESB* [2003] 3 IR 407.

Where an expert was in receipt of privileged or confidential information, it was open to the court to accept an undertaking from the expert not to disclose any information received.[6] Accordingly, the economist could act as expert witness for the plaintiff, subject to an undertaking not to disclose any confidential information.

The defendant appealed the refusal to the Court of Appeal.

Court of Appeal decision

On 9 June 2020, the Court of Appeal[7] allowed the appeal and granted an order excluding the economist from giving evidence.

The court agreed with the High Court that the jurisdiction to exclude an expert witness should be exercised sparingly and with caution.

Although the economist in the instant case had averred that he did not hold any confidential information, he did not deny that he had received such information, or state that he did not recall it.

The protection of privileged information had been emphasised as having constitutional status.[8]

Depending on the type of case, expert witnesses might be provided with confidential or privileged information and might be considered to equate with solicitors for the purpose of considering whether they could accept a related engagement adverse to the interests of their original clients.[9] Furthermore, there was no general rule that an expert witness could be retained by either party to litigation.[10]

Unlike a company or firm providing expert evidence or other professional services, it was not open to the economist as an individual to erect a 'Chinese wall' or 'information barrier' to maintain confidentiality.[11]

Where the information involved was not only confidential but privileged, the case for a strict approach to the risk of disclosure was unanswerable.[12] It would be impractical for the court to adopt a test of whether disclosure of privileged information was 'likely' in the sense of being probable, so the 'strict approach' was preferable.[13]

An economic expert in a competition law action was a paradigm example of a witness whose retainer necessitated the sharing of significant levels of confidential or privileged information. Unconscious or inadvertent disclosure appeared a real and obvious risk, particularly

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6 *Meat Corporation of Namibia* (n 3 above).
7 [2020] IECA 150 (Collins J, Faherty J and Power J agreeing).
8 *Martin v Legal Aid Board* [2007] 2 IR 759.
9 *Bolkiah v KPMG* [1999] 2 AC 222.
10 *Harmony Shipping* (n 5 above) distinguished.
11 *Bolkiah* (n 9 above) distinguished.
12 Ibid.
13 *Meat Corporation of Namibia* (n 3 above) distinguished.

in the pressured environment of the witness box. Even adopting the test of a 'likelihood' of disclosure, it was clear that the economist had been provided with a significant volume of privileged and confidential information, and he did not suggest that he had forgotten it.

Given the risk, the provision of an undertaking by the economist would not be a sufficient safeguard against the risk of an inadvertent or subconscious breach.[14]

As the High Court had adopted an incorrect test, it would not be appropriate to allow a margin of discretion to the original decision.[15]

Accordingly, the appeal should be allowed, and an order should be granted restraining the economist from acting as an expert witness in the proceedings.

The plaintiff appealed the decision to the Supreme Court.

Supreme Court decision

On 9 September 2021, the Supreme Court[16] dismissed the appeal and affirmed the decision of the Court of Appeal to exclude the economist from giving evidence.

The court held that the core issues in the appeal were:

i) the threshold to be surmounted by the applicant; and

ii) the nature of the evidence necessary to surmount this threshold.

The central feature of any competition law claim such as the instant case was the evidence-in-chief and cross-examination of the respective economic witnesses on the relevant issues. It followed that the role of an expert witness in a competition law claim involved a high degree of interaction between the witness, the clients and the legal team. The claim would be shaped and re-shaped on the basis of such interaction.

There was a high degree of overlap between the issues in the instant case and those in the other cases involving the economist, and it would not be possible to say that the confidential and privileged information supplied in the other cases would not be relevant to the instant case.

The jurisdiction to prevent a person from acting as an expert witness should be sparingly and cautiously exercised. In considering the cases from other jurisdictions, what distinguished cases in which relief was granted from those where it was refused was:

i) the scope and degree of involvement of the expert in the trial preparation; and

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14 *Australian Leisure and Hospitality Group Property Limited v Stubbs* [2012] NSWSC 215.

15 *Ganley v Radio Telifis Eireann* [2019] IECA 18 distinguished.

16 [2021] IESC 58 (O'Donnell J, Dunne J, O'Malley J, Baker J and Woulfe J agreeing).

ii) the extent of their exposure to privileged and confidential information, and the thinking of the client and its advisors. A person should only be restrained from acting as an expert witness if there was a 'real and sensible' risk of the disclosure of confidential information.[17] The onus was on the moving party to establish that there was such a risk.

It was not always necessary to establish with precision what confidential or privileged information had been provided to an expert if there had been a high degree of interaction between the expert, the clients and lawyers. An expert could be considered part of the litigation team, but only as an expert, obligated to give an independent opinion and owing a duty to the court to do so.[18]

It was unrealistic to suggest that the economist could continue to act for the plaintiff in the instant case and for the defendant in the other pending case, given the nature of an economist's involvement in competition claims, and the consequent risk of disclosure of confidential or privileged information. Accordingly, there was a real risk of such disclosure of such information.

Therefore, it was not appropriate for the economist to continue to act for the plaintiff, and he should not be permitted to do so.

COMMENT

This unanimous judgment of the Supreme Court, affirming a unanimous judgment of the Court of Appeal, sits a little uncomfortably with much of the other case law concerning expert witnesses both in Ireland and in other common law jurisdictions. I shall address two aspects:

i) the independent role of an expert witness; and
ii) whether an expert witness should be in possession of confidential or privileged information.

The independence of an expert witness

It has long been established that an expert witness has a duty of independence, and an overriding duty to the court. This was put forcefully in the Canadian case of *White Burgess Langille Inman v Abbott and Haliburton Company Limited*:

> Expert witnesses have a special duty to the court to provide fair, objective and non-partisan assistance. A proposed expert witness who is unable or unwilling to comply with this duty is not qualified to give expert opinion evidence and should not be permitted to do so.[19]

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17 *Protec Pacific Property v Cherry* [2008] VSC 76; *Australian Leisure and Hospitality Group* (n 14 above).

18 *O'Leary v Mercy Hospital Cork Limited* [2019] IESC 48 distinguished.

19 2015 SCC 23, [2015] 2 SCR 182, [2] (Cromwell J).

In Ireland, the duty of independence is now established in order 39, rule 57(1) of the Rules of the Superior Courts (RSC), as inserted in 2016: 'It is the duty of an expert to assist the Court as to matters within his or her field of expertise. This duty overrides any obligation to any party paying the fee of the expert.'

The high watermark of an expert witness's independence is probably *Harmony Shipping*, where Lord Denning uttered the famous words: 'There is no property in a witness.'[20] In that case, a handwriting expert had previously advised one side to litigation and was permitted to give evidence on behalf of the other side.

The underlying distinction between the lawyer and the expert is that the duty of a legal team is to assist the client to obtain the best result in the litigation. The fundamental duty of an expert witness – like any witness – is to tell the truth to the court. The testimony should not be finessed in order to assist the expert's own client. In fact, if an 'expert' presents expertise to the court in a biased manner, the expertise is of limited value to the court.

Oddly, the Supreme Court made only passing mention of order 39, rule 57(1) in *Sweeney*. The Court of Appeal's judgment mentioned it only to disapply its application to the disclosure of confidential information:

> However, the fact that an expert witness has an overriding duty to assist the court does not appear to me, of itself, to involve the abrogation of a client's entitlement to protect confidential and – especially – privileged information provided to an expert in the course of their retainer. An expert cannot be compelled to disclose privileged information, whether by reference to Order 39, Rule 57(1) or otherwise.[21]

The suggestion in *Sweeney* was that, in competition law proceedings, the economist had to be involved in the preparation of the action from an early stage, in order to assist in identifying the relevant market, whether the defendant held a 'dominant position' and whether that position had been abused. As emphasised by O'Donnell J:

> [T]he role of a witness in a competition claim normally involves a high degree of interaction between the witness and the clients, and between the witness and the legal team. The claim will often be shaped and perhaps reshaped, and the defence set and perhaps adjusted, on the basis of the interaction between the economist and the legal team, often with reference to facts and information sought from and supplied by the client.[22]

It would be difficult for an economist who has been involved in the litigation from such an early stage to be considered truly independent

20 *Harmony Shipping* (n 5 above).
21 *Sweeney* (n 1 above) [119].
22 Ibid [38].

of the instructing party. This is especially true if the economist is in possession of confidential or privileged information, and I shall return to this below.

In fact, it might be considered that an economist in that position is more in the position of an 'expert adviser' or a 'professional witness' than an 'expert witness' as envisaged by order 39, RSC.

Order 39, rule 58 makes provision in several types of action (including competition law proceedings) for the appointment of a 'single joint expert'. It may be the case, if an 'expert' has been advising a party from an early stage and is in possession of confidential or privileged information, that the court should then appoint a single joint expert – or an assessor – to give a more detached expert opinion to the court.

Possession by an expert witness of confidential or privileged information

It is questionable whether an independent 'expert witness' should be in possession of confidential or privileged information at all.

It is worth recalling the words of O'Donnell J himself (as he then was) in *Emerald Meats Ltd v Minister for Agriculture*, where he emphasised the obligation of expert witnesses to act independently and to meet to narrow their differences:

> It is only because of their expertise and assumed independence that they are entitled to offer opinion evidence on matters central to the court's determination. If this process functions properly, there should not be wide and unbridgeable gaps between the views of experts. Where there are differences, those should be capable of identification along with the relevant considerations so that the particular issue or issues which require judicial determination should be capable of ready exposition.[23]

The rationale is that, where two experts with similar professional backgrounds examine the same facts, they should come to a broadly similar opinion – if they are not seeking to assist their own clients. If their opinions are different, it should be possible to explain by reference to the facts and the expert knowledge where the differences originate.

But where one of the experts is in possession of confidential information, this may colour that expert's opinion without that expert being able to explain to the other expert – or the court – why this is so.

It is now a rule of the courts of England and Wales that an expert witness should not have access to material that is not available to the experts retained by other parties. This was put succinctly in *Imperial Chemical Industries Limited v Merit Merrell Technology Limited*:

23 Ibid [28].

> Experts of like discipline should have access to the same material. No party should provide its own independent expert with material which is not made available to his or her opposite number.[24]

Oddly, *Imperial Chemical Industries* was not cited either by the Court of Appeal or the Supreme Court.

While the RSC do not make similar requirements explicit, they do provide under order 39, rule 58(1–4) for written questions to be put by each side to the other's expert witness. They also provide for the experts to meet on a 'without prejudice' basis in order to identify 'such evidence as is agreed between them or among them and such evidence as is not agreed'.

If written questions raise matters that can only be answered by reference to confidential or privileged material, the courts will probably have to address how that balance is to be struck. Similarly, the experts meeting on a 'without prejudice' basis will be constrained in their full and frank discussions if they are not able to make reference to some of the information informing their opinion.

CONCLUSION

These difficulties identified above are not insurmountable. But any examination of the case law on expert evidence will demonstrate that a large number of the professionals giving evidence on an 'expert' basis do not properly understand their duties to the court. It is common for them to act as 'guns for hire' and to tailor their evidence to their clients' position.

The courts have generally tried to make the duties clearer, and many professionals now attend training to ensure that they understand these duties, in the manner envisaged by the Court of Appeal of England and Wales in *R v Momodou*.[25] The judgment in *Sweeney* will require careful explanation in such training so that professionals giving evidence in the courts of Ireland understand the permissible level of involvement with the client and legal team and what confidential information they may consider.

24 [2018] EWHC 1577 (TCC), [237] (Fraser J).

25 [2005] EWCA Crim 177.

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Equal pay and sex discrimination: advancing a new argument on appeal: *Department of Justice v McGrath* [2021] NICA 40, [2021] NICA 44

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BACKGROUND

In July 2010, the claimant accepted a formal offer of employment with the Northern Ireland Court Service (NICS) at the grade of Legal Officer (Deputy Principal). While the appointment process was ongoing the terms of the offer of employment (as indicated in the Candidate Information Booklet) were amended as a consequence of the devolution of policing and justice functions.

The claimant was aware of the new terms when accepting the offer of employment. In order to obtain promotion she knew she would have to 'openly compete' with others for any available Grade 7 legal posts under the 'merit principle' enshrined in the NICS terms and conditions.

In January 2017, the claimant raised a grievance regarding equal pay and promotion. Senior management within the Department of Justice (DoJ) dealt with the grievance under the Dignity at Work policy rather than under the grievance procedure. In doing so, the Tribunal held that the DoJ failed to properly address the principal issues relating to a complaint of equal pay.

The claimant subsequently issued a statutory questionnaire in June 2017. This questionnaire raised specific relevant questions in relation to the claimant's claim of equal pay, which remained unanswered by the respondents. The claimant's claim form echoed the contents of the statutory questionnaire.

The Tribunal issued its decision on 25 July 2019 finding that the claimant had been engaged by the DoJ in like work with her comparators from 7 October 2011 within the meaning of the Equal Pay Act 1970.

It said the DoJ had not proved that the variation between the claimant's contract and those of her comparators was genuinely due to a material factor which was not the difference of sex under the 1970 Act and held that the DoJ was therefore in breach of the 1970 Act and the claimant was entitled to equal pay.

In doing so, the Tribunal was keen to highlight that the DoJ had wrongly concentrated on issues of indirect sex discrimination as the claimant had established 'like work'. Judge Drennan QC explained:

> As stated in paragraph 505 of Harvey –
>
> 'Thus, as has been made clear, the trigger for the employer having to prove his case under the "material factor" defence is not disparate impact as between men and women, nor the identification of a "provision criterion or practice" that has such effect. All that is needed is proof of a difference in pay and the establishing of equal work between claimant and comparator.'
>
> Once an employee has established 'like work' or 'work rated as equivalent' to her male comparators, the rebuttable statutory presumption of sex discrimination has arisen and to defeat that presumption the respondent employer has to establish a genuine material factor defence.

The Tribunal also found that the claimant was not directly discriminated against on the grounds of sex pursuant to the Sex Discrimination (NI) Order 1976 and dismissed this part of the claim.

Specifically on the issue of the genuine material factor defence, the Tribunal concluded:

> The tribunal has no doubt that, following the abolition of fluid grading/fluid complementing, if a vacancy occurred in DSO/OSO, or elsewhere in the Department of Justice, for a substantive permanent Grade 7 (legal) that the NICS policy would require any DP or other member of staff applying to take part in an open recruitment/selection procedure. Indeed, such a policy, on the evidence, would not seem to be discriminatory. But, in the judgment of the tribunal, reliance on this promotion/selection policy/procedure for such a promotion by the respondents was in error as it does not provide a defence of genuine material factor in the circumstances of the claimant, who has established, pursuant to the 1970 Act, on the facts of this case, that she has been doing 'like work' with the work of her said comparators and is not receiving the same pay or benefits. The reliance upon what would happen in the event, if it occurred, of a substantive vacancy at Grade 7 (legal), therefore does not establish, in the tribunal's judgment, the defence of genuine material factor. It was not the cause of the disparity in this particular case. There was no such relevant recruitment selection exercise. There was a failure by the respondents to properly consider the individual particular circumstances of the claimant, who had established like work with her said comparators and therefore to ensure she received equal pay with her comparators. To temporarily promote the claimant, who has shown she was doing like work with her comparators did not establish, in the circumstances, the defence of genuine material factor. To be able to rely on such a recruitment/selection policy, relating to a hypothetical exercise for promotion to a substantive Grade 7 (legal) post, which had no application or relevance to the claimant's actual circumstances and

> her claim for equal pay, would allow the respondents to drive a 'coach and horse', in the tribunal's judgment, to her said claim of equal pay and the protections given to her under the 1970 Act. Clearly, if the claimant's work had been restricted to DP work, so that no like work could be established, then no issue of equal pay would have arisen and would have avoided the very risks relating to equal pay, envisaged by senior management at the time when fluid grading was abolished (see the series of emails in May 2010).

In light of the foregoing, the tribunal is not satisfied the first respondent has proved, as it was required to do, that the variation between the claimant's contract and those of her said comparators is genuinely due to a material factor which is not the difference of sex.

GROUNDS OF APPEAL

On appeal, the DoJ attempted to advance the following arguments:

1. Firstly, if the claimant was allocated 'Grade 7' work this only occurred as a result of the actions of Ms Donnelly (the claimant's former line manager). The findings of fact demonstrate that Ms Donnelly did so for 'reasons of her own', whilst deliberately misrepresenting the situation to Line Management.
2. However, Ms Donnelly's evidence clearly indicated that the reason for the allocation of work at the higher grade to the claimant was not due to her sex. Ms Donnelly was a female allocating work to a female. At no time was it suggested that in so doing she was discriminating against the claimant on the ground that she was a woman. As sex discrimination is a critical ingredient in any equal pay claim, if there was no evidence of sex discrimination the claim ought to have failed.
3. Having made the findings as to why Ms Donnelly acted as she did, the tribunal ought to have considered whether Ms Donnelly's actions were a 'genuine material factor' explaining the difference in pay and amounting to a complete defence to the equal pay claim.
4. Secondly, whilst the claimant was on 'temporary promotion', there is no doubt that she was performing Grade 7 work: however, this is because she was 'doing the work' of her absent colleagues – who were all Grade 7. During these periods she was paid as a Grade 7 and there was no pay disparity. Therefore, the tribunal should have discounted and distinguished between those periods of time in its judgment.
5. Thirdly, following the JEGS (Job Evaluation and Grading Support) assessment, the claimant continued to work in the OS' office [Office of the Official Solicitor] on 'temporary promotion'. In due course, the claimant would be able to apply for that post

or any other Grade 7 post in the NICS in competition with other employees within the NICS. The success of her application for promotion would stand or fall on its own merits. This is what occurred; the claimant applied for the post and was successful and remains in that post.

6 The policy on 'open competition' for promotions is a common term and condition applicable to all NICS employees irrespective of sex, religion etc. Therefore, the judgment of the tribunal – by effectively giving the claimant promotion 'in post' – has given her better NICS terms and conditions than those of her colleagues - not equal terms.

In response, the claimant argued:

1 the DoJ erred in conflating the equal pay claim and the sex discrimination claim;
2 the DoJ repeatedly failed to raise a genuine material factor defence; and
3 the DoJ's suggestion that the tribunal ought to have considered whether or not Ms Donnelly's actions were a genuine material factor defence when this was not raised by the DoJ is unsustainable.

ISSUES

The two key issues for the Court of Appeal were as follows:

1 whether the DoJ could raise a genuine material factor defence when that did not form part of its pleaded case before the Tribunal?
2 If yes, whether Ms Donnelly's actions could be regarded as a genuine material factor defence?

Decision of Court of Appeal

From the outset, the Court of Appeal was keen to clarify the nature of its role within the employment law arena in Northern Ireland. In doing so, it commented:

> The role of the Court of Appeal as the appellate tribunal for the Employment Tribunal has been the subject of detailed judicial consideration. The role was summarised by Coghlin LJ in the case of Miskelly v The Restaurant Group [2013] NICA 15[1] as follows:
>
> > [24] The tribunal constituted the appropriate industrial court instituted for the purpose of resolving relevant employment issues and this court is confined to considering questions of law arising from the tribunal decision. The tribunal has the advantage of seeing and hearing the witnesses at first instance and it is fundamental to understanding the function of this court to appreciate that it

> does not conduct a general rehearing. Article 22 of the 1996 Order provides that a party to proceedings before an industrial tribunal who is dissatisfied in point of law (our emphasis) with a decision may appeal to this court. We remind ourselves of the observations of Girvan LJ in Carlson Wagonlit Travel Ltd v Robert Connor [2007] NICA 55[2] when he said at paragraph [25]:
>
> > In this case the decision of the Tribunal must stand unless the Tribunal made an error of law in reaching its conclusions; based its conclusions on material findings of fact which were unsupported by the evidence or contrary to the evidence; or the decision was perverse in the sense that no reasonable Tribunal properly directing itself could have reached such a decision.

With regards to the genuine material factor defence, the Court of Appeal confirmed that the following is an accurate formulation of the key principles:

> Once a difference in terms is identified, a rebuttable presumption passes to the employer who must then explain the reason (the material factor) for the difference between the claimant and her comparator. It does not matter whether the explanation is a good one or whether the Employment Tribunal agrees with it. What does matter is that it is a non-discriminatory reason for the difference; in other words that it is nothing to do, directly or indirectly, with sex. In addition, *the employer must show*:
>
> (i) that this was the real reason for the difference and is not a sham or pretence, ... the reason still has to be a genuine one;
>
> (ii) that the reason was causative of the difference between the comparator's term and the term in the claimant's contract;
>
> (iii) that there is a significant and relevant difference between the woman's case and the man's case;
>
> (iv) the difference is not a difference of sex. (original emphasis)

The Court of Appeal also discussed the issue of raising new points on appeal. In this regard, it highlighted the following legal principles:

1 'First, an appellate court will be cautious about allowing a new point to be raised on appeal that was not raised before the first instance court.'
2 'Second, an appellate court will not, generally, permit a new point to be raised on appeal if that point is such that either (a) it would necessitate new evidence or (b), had it been run below, it would have resulted in the trial being conducted differently with regards to the evidence at the trial (Mullarkey v Broad [2009] EWCA Civ 2 at [30] and [49]).'

3 'Third, even where the point might be considered a "pure point of law", the appellate court will only allow it to be raised if three criteria are satisfied: (a) the other party has had adequate time to deal with the point; (b) the other party has not acted to his detriment on the faith of the earlier omission to raise it; and (c) the other party can be adequately protected in costs. (R (on the application of Humphreys) v Parking and Traffic Appeals Service [2017] EWCA Civ 24 at [29]).'
4 '[T]here is no general rule that a case needs to be "exceptional" before a new point will be allowed to be taken on appeal. Whilst an appellate court will always be cautious before allowing a new point to be taken, the decision whether it is just to permit the new point will depend upon an analysis of all the relevant factors. These will include, in particular, the nature of the proceedings which have taken place in the lower court, the nature of the new point, and any prejudice that would be caused to the opposing party if the new point is allowed to be taken.'

With regards to the points that the DoJ attempted to advance, the Court of Appeal were keen to point out that Ms Donnelly's actions were never pleaded as a genuine material factor defence and there was no attempt to make an application for permission to amend the pleadings before the tribunal.

In addition, the Court of Appeal was particularly critical of the DoJ's approach to Ms Donnelly's evidence. Indeed, the court commented:

> Notwithstanding the strong challenge by the [DoJ] to [Ms Donnelly's] evidence in cross-examination the [DoJ] now, audaciously, seeks to rely on this evidence to establish a genuine material factor defence on which to dismiss the claimant's equal pay claim, which had never been pleaded in the first case. Ms Donnelly's evidence was adduced by the claimant primarily to prove that she was doing 'like work' with her comparators. Critically, the [DoJ] now wishes to use this evidence as a basis for a genuine material factor defence. However, Ms Donnelly's evidence was not adduced, tested or considered before the tribunal *as a genuine material factor defence*. (original emphasis)

The Court of Appeal accordingly commented:

> The [DoJ's] suggestion that the tribunal 'ought to have considered whether Ms Donnelly's actions were a genuine material factor' when this was not pleaded by the [DoJ] and there was no application to the tribunal for leave to so amend the pleadings is unattractive.
>
> The Court of Appeal accordingly concluded that it was not just to permit the new point in the circumstances of this case. In arriving at this decision, they focused upon the failure of the DoJ to plead any genuine material factor in its response, its failure to reply to the statutory

questionnaire, amend its pleadings or call any evidence in respect of such any genuine material factor defence.

Ultimately, the Court of Appeal held that the conclusion of the tribunal that no genuine material factor had been established was unassailable. The Court of Appeal accordingly affirmed the Tribunal's decision and dismissed the DoJ's appeal.

COMMENT

Equal pay is an extremely complex area of employment law.

If faced with an equal pay claim, it is important that specialised legal advice is taken from an employment law solicitor.

There appear to be three key takeaways from the Court of Appeal's decision for employers in the *McGrath* case:

1 **The importance of replying to statutory questionnaires:** if an equal pay questionnaire is received, it should be responded to. Alongside this, it is important to also ensure that any concerns/grievances are dealt with under the correct policy. Taking genuine equal pay issues seriously at an early stage is likely to avoid protracted costly litigation.

2 **The importance of a good case strategy from the outset:** it is also important to see the big picture from the outset. Attention should be given to the following:

   a Is there a genuine equal pay issue?
   i Has the claimant identified a comparator (of the opposite sex) who receives a higher salary and/or benefits?

   b Does the claimant do equal work to their comparator?
   i Is there any way to distinguish the claimant's role from the named comparators?

   c Is there a genuine material factor defence that can be relied upon?
   i What is it?

   Common categories include:

   - location
   - market forces
   - protection of terms under TUPE
   - working unsocial hours or being on call
   - pay increases to retain employees
   - pay protection arrangements
   - good industrial relations
   - different collective bargaining processes/pay structures
   - union intransigence
   - productivity bonuses or performance-related pay

- length of service/experience
- recent experience
- mistake/admin error
- financial constraints.

ii Is there any documentary evidence to support any genuine material factor defence relied upon?

d Other considerations:

- What witnesses are required to support the respondent's case? Are there any issues with witness availability?
- Are any Galo adjustments required for witnesses?
- Is there a need to get expert input? (Financial reports are often required in equal pay cases in order to accurately assess loss.)
- Costs of running to conclusion
- Reputational risk of running
- Impact upon working relationship if claimant is a current employee
- Has mediation/resolution been explored?

3 **The challenges of raising new points on appeal:** pleadings are extremely important. All key points should be included. If they are not, an application to amend the pleadings should be made. If this does not occur, it will be extremely challenging to subsequently raise a new point on appeal. As a result, the following issues should be considered in advance of a substantive hearing:

a Has the claimant prepared a comprehensive statement of legal and factual issues? Is the case you are facing clear?
b Has all relevant discovery been produced?
c Are replies received sufficient? If not, consider application for specific discovery.
d Identify gaps in the claimant's statement? Have they provided sufficient information to discharge the burden of proof?
e Have all points been addressed in the respondent's statements?
f Are all relevant documents in the trial bundle?
g Would agreed facts/chronology be of assistance for hearing?

As the Tribunals in Northern Ireland get back to full capacity following the pandemic, it is likely that we will see more decisions in respect of equal pay in the months and years ahead.

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A fall between two stools: the Supreme Court confines lawful act duress

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INTRODUCTION

In *Pakistan International Airline Corporation v Times Travel (UK) Limited*[1] the Supreme Court considered lawful act duress. The Court confirmed the existence of the doctrine after many years of uncertainty. This is welcome. But the Court significantly narrowed the scope of its application to two specific circumstances: where pressure exerted by a defendant comprises a demand supported by a threat to report criminal activity, and where pressure derives coercive force from the defendant's use of 'illegitimate means' to manoeuvre the claimant into a position of weakness. As we outline below, this may prevent the law from developing in a clear and principled manner.

The case concerned two companies: Times Travel, a family-owned travel agent based in Birmingham, and Pakistan International Airline Corporation (PIAC) which is the national airline of Pakistan. In 2008, the parties contracted for Times Travel to provide tickets for PIAC flights, with Times Travel receiving commission on each ticket sale. While PIAC had similar arrangements with many travel agents, Times Travel's business relied 'almost entirely' on sales of PIAC tickets. This was sustainable because PIAC was the only airline operating direct flights between the UK and Pakistan at the time.

PIAC fell into financial trouble and failed to pay the commission on ticket sales it owed to many travel agents, including Times Travel. By 2012, Times Travel estimated it was owed £1.5m in unpaid commission fees. Rather than repaying or challenging the debt, PIAC asked Times Travel to enter a new contract for ticket sales, under which Times Travel would also agree to waive any claim against PIAC arising from the unpaid commissions. In order to induce Times Travel into signing the new agreement, PIAC significantly reduced the number of tickets it allocated to Times Travel, and threatened to terminate its commercial relationship with Times Travel entirely unless the new contract was

1 [2021] UKSC 40.

agreed. Crucially, both reducing Times Travel's ticket allocation and terminating the existing agreement were lawful acts.

Times Travel signed the new contract, thereby forfeiting any right to claim the £1.5m in unpaid commission. Sometime later Times Travel brought a claim seeking to rescind the second agreement, arguing that it was vitiated by lawful act duress. In the High Court, Warren J found that Times Travel was under duress when it signed the new contract, and that Times Travel could rescind the contract on that basis. That decision was overturned by the Court of Appeal. The matter was appealed to the Supreme Court, which found that Times Travel had not been subject to duress. The Court noted that the existence of the doctrine of lawful act duress was opaque, and its operation complex. The Court took the opportunity to clarify.

LAWFUL ACT DURESS

In *The Universe Sentinel* Lord Scarman said that for duress to be made out, two elements must be established: first, 'pressure amounting to compulsion of the will' and second, 'the illegitimacy of the pressure exerted'.[2] Where the threatened act is unlawful, the court has a clear marker of illegitimacy: traditional instances of unlawful act duress involve threats of 'loss of life or limb', battery, destruction of goods, or the wrongful detention of property.[3]

The issue in cases where the threatened act is *not* unlawful is finding a principled standard by which to draw the line between legitimate pressure and pressure which goes 'beyond what the law is willing to countenance as legitimate'.[4] This has proven complex, to the extent that Dawson has described the question as one 'which has chiefly arrested the modern development of the law of duress'.[5] Faced with this issue, some Australian courts have suggested that the concept of lawful act duress should be abandoned entirely.[6]

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2 *Universe Tankships Inc of Monrovia v International Transport Workers Federation* [1983] 1 AC 366 (HL) 400 (*The Universe Sentinel*). The 'overborne will' theory of duress has since been rejected: see, in particular, *Crescendo Management Property Limited v Westpac Banking Corporation* (1988) 19 NSWLR 40 (CA); Patrick Atiyah, 'Duress and the overborne will again' (1983) 99 Law Quarterly Review 353.

3 *Sumner v Ferryman* (1708) 11 Mod 201 [88 ER 989]; *Skeate v Beale* (1841) 11 Ad & E 983 [113 ER 688].

4 *Equiticorp Finance Ltd (in liq) v Bank of New Zealand* (1993) 32 NSWLR 50 (CA), 106 (Kirby P).

5 John P Dawson, 'Economic duress – an essay in perspective' (1947) 45 Michigan Law Review 253, 287.

6 *New Zealand Banking Group Limited v Karam* (2005) 64 NSWLR 149: cf *Thorne v Kennedy* (2017) 263 CLR 85, 114–115 ([71]–[72]) (Nettle J); Henry Cooney and Harry Sanderson, 'Illegitimate pressure in the law of duress' (2022) Lloyd's Maritime and Commercial Law Quarterly 496, 497 and the cases cited therein.

Unlike the position in Australia, English courts have generally recognised the existence of lawful act duress. But the doctrine is bathed in controversy. One note written before the final decision in *Times Travel* argued that 'the Supreme Court should jettison the concept of lawful act duress', since there would be 'no gap in the law if the doctrine were abolished'.[7] Another warned that this would cause 'despair' for those 'who believe that contract law can and should be used as a tool to set a minimum standard of acceptable behavior'.[8] The Supreme Court in some sense sought to satisfy both camps, by ensuring that the doctrine survived to protect this minimum standard, but limiting it to a more predictable set of grounds. In our view, the decision fell between two stools: it has both limited the doctrine in an unprincipled manner and failed to articulate a predictable standard within those new confines.

THE NEW TEST

The Supreme Court gave a leading judgment by Lord Hodge, with whom Lord Reed, Lord Lloyd-Jones and Lord Kitchin agreed. Lord Burrows dissented, though there was much common ground between the two groups.

Most importantly, the Court held that lawful act duress exists. They further agreed that it is comprised of three core elements. First, there must be a threat by the defendant which is illegitimate; second, the threat must have caused the claimant to enter into the contract; and, third, the claimant must have had no reasonable alternative to complying with the demand.[9] The difficult question remained how to define 'illegitimate' in the first element, which was the focus of both judgments.

Lord Hodge identified two circumstances that would constitute illegitimate threats or pressure: where a defendant used knowledge of criminal activity by the claimant to exert pressure upon them, and where the defendant used 'illegitimate means' to manoeuvre the claimant into a position of weakness to force them to waive a pre-existing claim. Lord Burrows, in dissent, considered that a demand for a waiver of a claim would amount to lawful act duress where the defendant did not genuinely believe that it had a defence to the claim (ie the demand was made in bad faith) and the defendant had created or increased the claimant's vulnerability to the demand.

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7 Paul Davies and William Day, '"Lawful act" duress (again)' (2020) 136 Law Quarterly Review 7, 12.

8 Jodi Gardner, 'Does lawful act duress still exist?' (2019) 78(3) Cambridge Law Journal 496, 499.

9 This third element is implicit in Lord Hodge's reliance on authority, and stated explicitly by Lord Burrows without disagreement from the majority. See *Times Travel* (n 1 above) [13], [15] (Lord Hodge); [79] (Lord Burrows).

MANOEUVRING AND UNCONSCIONABILITY

Lord Hodge's reference to the exploitation of knowledge of criminal activity is a relatively stable test and was not relevant to the dispute in *Times Travel*. Accordingly, His Lordship focused on the scenario where a defendant uses 'illegitimate or unconscionable acts'[10] to manoeuvre a claimant into a position of weakness, thus forcing them to waive a pre-existing claim.

Lord Hodge did not elaborate extensively on the requirements of the 'unconscionable manoeuvring' test, instead illustrating the point with two examples from case law. The first was *Borrelli v Ting*.[11] In that case a company had collapsed, and the liquidators wanted to enter into a scheme of arrangement. This needed shareholder approval from Ting, who blocked the arrangement through forgery, false evidence and by withholding information. At the last minute, Ting agreed to support the scheme of arrangement, but only if the liquidators agreed to waive any pre-existing claims against him. The Privy Council held that the settlement agreement was invalid, on the basis of what Lord Hodge now characterised as lawful act duress: Ting was legally entitled to withhold consent to the scheme, but it was 'the unconscionable or illegitimate conduct of Mr Ting which placed the liquidators in the position that they had no reasonable or practicable alternative but to enter into the settlement agreement'.[12]

The second case was the *The Cenk K*,[13] in which the defendant shipowners contracted with the claimants for the charter of a ship for the carriage of shredded scrap metal to China. The owners subsequently agreed to charter the ship to someone else in breach of the initial agreement. The owners assured the charterers that they would provide a substitute vessel and compensate the charterers for all damages resulting from the owner's failure to provide the vessel as originally agreed. The charterers relied on this promise and did not seek an alternate ship. At the last minute, the owners gave the charterers a 'take it or leave it' offer, requiring them to drop all claims against the owners for costs they would face because of the delay. The waiver agreement was held to be voidable because the owners had manoeuvred the charterers into a position where 'they had no choice but to accept' the owners' offer.[14]

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10 Ibid [13].
11 [2010] UKPC 21.
12 *Times Travel* (n 1 above) [13].
13 *Progress Bulk Carriers Ltd v Tube City IMS LLC (The Cenk Kaptanoglu)* [2012] EWHC 273 (Comm).
14 *Times Travel* (n 1 above) [15].

Applying the test as illustrated through both of these cases to the facts in Times Travel, Lord Hodge found there had been no lawful act duress. While PIAC had exerted strong commercial pressure on *Times Travel*, PIAC had not 'used any reprehensible means' to manoeuvre Times Travel into a position of vulnerability.[15]

BAD FAITH

Lord Burrows focused on a different test of illegitimacy within the law of lawful act duress. Lord Burrows thought that a demand for a waiver of a pre-existing claim would amount to lawful act duress where: the defendant made the demand in bad faith; and the defendant had created or increased the claimant's vulnerability to the demand. This second limb was similar to Lord Hodge's unconscionable manoeuvring test. It is Lord Burrows' focus upon the role of bad faith, a concept also relied upon by David Richards LJ in the Court of Appeal, that distinguishes the dissent.

Lord Burrows stressed that the concept of bad faith can be used in different senses and specified that bad faith in lawful act duress would arise where a defendant 'does not genuinely believe that it is owed what it is claiming to be owed or does not genuinely believe that it has a defence to the claim being waived by the threatened party'.[16] To illustrate this point Lord Burrows focused on *CTN Cash and Carry Limited v Gallaher Limited*.[17] In that case, the defendants mistakenly delivered cigarettes to the wrong warehouse, from which they were subsequently stolen. Believing (incorrectly) that the risk had passed to the claimants, the defendants demanded the £17,000 contract price and threatened to stop doing business with the claimants if they failed to pay. The claimants paid the £17,000, but later argued that they had done so under duress. The claim failed in the Court of Appeal. Lord Burrows explained that this was because the defendant's demand was made in good faith, given that they were genuinely mistaken about their liability for the cigarettes.

Applying his own test to the facts, Lord Burrows too rejected a finding of lawful act duress. His Lordship relied upon Warren J's finding at first instance that PIAC had not acted in bad faith given PIAC had genuinely believed that it did not owe the commission demanded, and that therefore there was no reason to set the contract aside.[18]

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15 Ibid [58].
16 Ibid [102].
17 [1994] 4 All ER 714.
18 *Times Travel* (n 1 above) [115].

A CONFUSED STANDARD

The test set out by the majority now governs the law of lawful act duress in England. With respect, it is jumbled.

The most glaring issue is whether the new test is limited to instances involving waiver of contractual rights. This is a straightforward issue of scope, yet it goes unaddressed in either judgment. According to Lord Hodge, pressure is illegitimate when the defendant's manoeuvring 'forces the claimant to waive his claim'.[19] Lord Burrows too framed his bad faith requirement in the context of 'a demand for a waiver of claims'.[20] Yet given a vast range of duress cases involve claimants seeking to set aside agreements without any element of waiver, there is an open question as to whether the new test limits lawful act duress to cases involving waiver.

One interpretation of the majority judgment is that Lord Hodge simply adapted the test to the dispute between Times Travel and PIAC, which involved a waiver, and therefore used cases with analogous fact patterns to illustrate his reasoning. But this is conjecture. A more likely interpretation is that Lord Hodge's test is specifically tied to waiver, and that the reference to cases involving waiver intentionally carved out instances of duress being used to procure a waiver of rights. Read in this light, Lord Hodge frames the test for manoeuvring as linked *in substance* with the inducement of waiver, albeit in a manner that is only ever latent within the judgment.

We see no reason for such a limitation, given there is nothing inherent to the law of waiver which might give it special classification within the law of duress. In any event, such a decision significantly narrows the operation of the doctrine. Suppose that, in *The Cenk K*, the shipowners had simply pressured the charterers into entering a new, more exorbitantly profitable arrangement for the shipowners, without procuring any waiver of rights. On Lord Hodge's test, while the defendant had deliberately manoeuvred the claimant into a position of vulnerability by means which the law would otherwise regard as illegitimate, the lack of waiver would render the pressure legitimate. This is a strange outcome. In fact, the *only* scope for lawful act duress outside of waiver cases would be where the case involved an exploitation of knowledge of the claimant's criminal activity, since that limb of Lord Hodge's test was not tied to the procurement of waiver. In our view, this muddles the enquiry: the focus should be on the nature of the pressure applied, rather than the type of rights procured by the pressure.

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19 Ibid [4].

20 Ibid [115].

A second uncertainty at the heart of Lord Hodge's reasoning surrounds the definition of unconscionability itself. Lord Hodge noted that '[u]nconscionability is not an overarching criterion to be applied across the board without regard to context. Were it so, judges would become arbiters of what is morally and socially acceptable.'[21] Despite this statement, the judgment does not provide a more certain definition of unconscionability, or outline which factual patterns will give rise to such a finding. Ambiguity surrounding the meaning of 'unconscionable' pressure has already led to incoherence within English law. In one case it was said that pressure would be unconscionable if used to procure a manifestly disadvantageous agreement.[22] Yet, in other cases, pressure has been found to be legitimate despite being used to procure entry to patently unfair contracts.[23] Confusingly, pressure has also been judged legitimate despite it being 'unconscionable' for the defendant to retain the benefit procured by the pressure.[24]

In light of the decision in *Times Travel*, it will be important for future decisions to clarify the relationship between unconscionable pressure and other notions of unconscionability throughout the law. Equitable notions of good conscience have clearly played an important role in the development of duress. But the term 'unconscionable' itself only signifies pressure prohibited in equity. Without further elaboration, the concept of unconscionability does not provide a 'test' of illegitimate pressure.[25] To develop such a test, it is necessary to examine the cases closely and identify the factual patterns and chains of reasoning that determine when pressure will be illegitimate.[26] This task was not undertaken in Times Travel.

While Lord Burrows' decision does not form the law of duress, his Lordship's approach brought no more certainty to the doctrine. One criticism of Lord Burrows' test, noted by Lord Hodge,[27] is the inherent subjectivity of the bad faith requirement. Lord Burrows addressed this last criticism on the grounds that a subjective approach within this

21 Ibid [23]. See generally Peter Birks, *An Introduction to the Law of Restitution* rev edn (Clarendon Press 1985) 177.

22 *Harrison v Halliwell Landau* [2004] EWHC 1316 (QB).

23 For a clear example, see *Alf Vaughan & Co Ltd v Royscot Trust plc* [1999] 1 All ER (Comm) 856.

24 *CTN* (n 17 above) 720 (Nicholls VC); see further Cooney and Sanderson (n 6 above).

25 One possibility is that the doctrine of duress can be subsumed within the doctrine of unconscionable dealing. See Andrew Phang, 'Undue influence – methodology, sources and linkages' (1995) (Nov) Journal of Business Law 552, 565–574. This idea has generally been rejected in Anglo-Australian law.

26 Determining when otherwise lawful pressure is illegitimate is our focus in Cooney and Sanderson (n 6 above).

27 *Times Travel* (n 1 above) [50].

area is consistent with the law on compromises generally.[28] Yet, with respect, the law of duress is a different animal. If the defendant's belief, reasonable or otherwise, was the linchpin of a successful claim for lawful act duress, it would be difficult for most claimants to succeed: the defendant could simply aver that they believed their actions to be in good faith. While courts will not accept this proposition where it is manifestly unreasonable,[29] defendants in more borderline cases will be encouraged to simply claim their belief was legitimate.

More broadly, as Lord Hodge noted, English law has never recognised a general principle of good faith in contracting.[30] To make a bad faith requirement the bedrock of the test of lawful act duress would be to rapidly expand the purview of the duty, at a time when courts remain in the process of developing it.[31]

OUTSTANDING ISSUES IN LAWFUL ACT DURESS

While we have focused on issues of contention in *Times Travel*, we have two further reservations regarding the new approach to lawful act duress which were not discussed by the Court. First, both judgments persistently referred to the doctrine as 'lawful act economic duress'. The modifier 'economic duress' is used to specify situations in which the threat is to a person's economic wellbeing. It is not synonymous with lawful act duress and merely serves to identify the type of harm a threat is directed toward.[32] Yet, beyond being of little value as a label, we argue it distracts from the proper point of focus in assessing a claim for duress. Some pressure applied to a person's economic wellbeing may consist of threatened acts that would be unlawful, and some threats of lawful acts will not be directed toward a person's economic wellbeing. In either case, the focus should be on whether the pressure was illegitimate.

Second, both judgments emphasised that to found a claim in duress it must be shown that the claimant had 'no reasonable alternative' but to submit to the defendant's demand.[33] This follows one line of English authority.[34] While this requirement was not at issue in Times Travel, it

28 Ibid [116]; H G Beale (ed), *Chitty on Contracts* 33rd edn (Sweet & Maxwell 2018) [4-051].

29 *Times Travel* (n 1 above) [18] (Lord Burrows).

30 Though see Leggatt J in *Al Nehayan v Kent* [2018] EWHC 333 (Comm)).

31 Gardner (n 8 above) 498.

32 Claudia Carr, 'Lawful act duress' (2020) 13 Journal of Equity 292, 297.

33 *Times Travel* (n 1 above) [12], [15] (Lord Hodge), [79] (Lord Burrows).

34 *B & S Contracts and Design Limited v Victor Green Publications Limited* [1984] ICR 419; *Huyton SA v Peter Cremer GmbH & Company* [1999] 1 Lloyd's Rep 620; *DSND Subsea Limited v Petroleum Geo-Services ASA* [2000] BLR 530; *Carillion Construction Limited v Felix* [2001] BLR; but see *Astley v Reynolds* (1731) 93 ER 939.

should be abandoned. This is chiefly because the requirement imposes an objective standard of moral fortitude in the face of pressure which the court has already identified as illegitimate.[35] A vulnerable person faced with illegitimate pressure may feel they have no reasonable alternative in circumstances where a hard-nosed person would stand their ground. As much has been accepted in Australia.[36] This is not to say the consideration is entirely irrelevant: the existence or absence of a reasonable alternative may have probative value in determining whether the pressure in a given case was a cause of the claimant's decision to enter the transaction.[37] As Christopher Clarke J held in *Kolmar Group AG v Traxpo Enterprises PVT Limited*: '[i]f there was no reasonable alternative, that may be very strong evidence in support of a conclusion that the victim of the duress was in fact influenced by the threat'.[38] Following this approach, the third 'requirement' of the new test should be downgraded to an evidentiary marker of causation.

THE FATE OF UKRAINE

Intervening in *Times Travel* were the State of Ukraine and The Law Debenture Trust Corporation plc (on behalf of the Russian Federation). Both are parties to an appeal in the Supreme Court regarding Ukraine's default on $3billion-worth of Eurobonds held by Russia. Ukraine alleges that Russia applied illegitimate pressure in 2013, including threats of use of force, to deter Ukraine from signing an association agreement with the European Union and to compel them to accept Russian financial support instead.

In June, the Supreme Court informed both parties it would hear *Times Travel* before giving judgment in the dispute, meaning the test of unconscionable manoeuvring will likely be used to determine the outcome in the case. Russia's trustee submitted that lawful act duress should be abolished entirely. Ukraine, conversely, argued that the doctrine existed, and that it should be determined according to a test of bad faith. Ukraine will likely be happy that the Court accepted that the doctrine exists, though discouraged that the good faith test was only accepted by Lord Burrows in dissent. It remains to be seen whether the geopolitical pressure Russia applied to Ukraine in 2013 will reach the standard of 'unconscionability' against which it will now be judged. If it does, parties will at least have a high-water mark for the amount of pressure the Court is willing to countenance as legitimate.

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35 James Edelman and Elise Bant, *Unjust Enrichment* 2nd edn (Hart Publishing 2016) 205–206.

36 *Lactos Fresh Property Limited v Finishing Services Property Limited (No 2)* [2006] FCA 748, [97] (Weinberg J).

37 *Huyton SA* (n 34 above) 638 (Mance J).

38 [2010] EWHC 113 (Comm) [92].

CONCLUSION

Times Travel will not please those wishing to do away with the doctrine of lawful act duress, nor will the decision comfort those who had hoped the doctrine could guarantee a minimum standard of commercial behaviour. First, as we have outlined, it remains unclear whether *Times Travel* only bears relevance to cases of alleged duress involving waiver. If it is so limited, one wonders whether the law might be more expansive in standard cases of contracts vitiated by lawful act duress, and why English law would unnecessarily partition concepts around the law of waiver.[39]

Even if not limited to waiver, the decision nonetheless narrows the operation of lawful act duress to two very specific instances. The Court's attempt to confine the doctrine may be encouraging to those who fear that lawful act duress has the potential to generate commercial uncertainty. These parties bear the vestiges of Lord Ratcliffe's warning that concepts in equity should not become 'a panacea for adjusting any contract between competent persons when it shows a rough edge to one side or the other'.[40] Yet the Court has doused the fires of uncertainty with petrol. Lord Hodge's test, resting as it does upon an imprecise conception of unconscionability, raises more questions than it answers. Claimants alleging lawful act duress must now scour tea leaves in order to divine the precise legal content of 'morally reprehensible conduct' and will need to take care to distinguish such behaviour from mere bad faith. Where possible, such claimants will be well-advised to look to the doctrines of unconscionable conduct and undue influence as alternatives to lawful act duress.

39 For discussion of potential differences between oral waivers and oral variations, see Harry Sanderson, 'Between a Rock and a Hard Place: "No Oral Waiver" Clauses in English Law' (2021) 37 Journal of Contract Law 122.

40 *Campbell Discount Company v Bridge* [1962] AC 600.

Articles

Commentaries and Notes