

NORTHERN IRELAND LEGAL QUARTERLY

Can Human Rights Put An End to Social
Strife? - The MacDermott Lecture
(*Chief Justice Beverley McLachlin*)

Civil Liability For Foul Play In Sport
(*Neville Cox*)

Implementing European Agricultural Law in
Northern Ireland and the Republic of
Ireland: A Common Policy?
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Refugees, The Rule Of Law And Executive
Power: A(nother) Case Of The Conjuror's
Rabbit?
(*Peter Billings*)

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CAN HUMAN RIGHTS PUT AN END TO SOCIAL STRIFE?

*The Right Honourable Chief Justice Beverley McLachlin, P.C.,
Chief Justice of Canada*

*The MacDermott Lecture 2003**

INTRODUCTION

What hope does the law offer to communities and societies that are divided by strife? Can the legal protection for human rights foster peace? These are questions that many societies who seek to overcome conflict ask themselves. These are natural questions. When individuals in society hurt and threaten each other, we look to the law to right the matter. So it is natural that when individuals as members of groups hurt and threaten each other – what we call social conflict – we should similarly look to the law for answers. Yet while the law deals reasonably well with individual-based conflicts, it has often proved much less successful in dealing with broad social conflicts. Why is this? Does it mean that the law can do nothing to prevent social strife? And if the answer to that question is no, what precisely can the law do? These are the questions I would like to explore with you tonight.

I will suggest that the law does have a role to play in reducing social strife, particularly the branch of the law we call human rights. This role, I will suggest, involves three distinct processes. The first process is preparatory. To enable the law to do its work, we must set up the conditions in which it can function by acknowledging past wrongs, sharing conflicting narratives, and seeking reconciliation: the therapeutic function. The second process involves providing legal structures through which differences can be worked out and accommodations made: the regulatory function. The third process uses the law to concretise and communicate the values of a civil society: the discourse function. Before we get to the precise ways the law can help alleviate social strife, however, it may be useful to briefly consider the anatomy of social strife and the role of the law in maintaining social harmony.

First, let us consider the anatomy of social strife. Individual conflict in society is unavoidable. Human activities inevitably bring people into conflict with one another. Human beings are profoundly social; they can define themselves only by reference to others. Yet at the same time they are individual, competing with others, interacting with others, sometimes seeking to dominate others in the human equivalent of Robert Ardrey's territorial imperative. The law seeks to control and regulate these interactions. Criminal law, family law, tort law, contract law, administrative law – these and many more branches of the law deal with the day to day interactions and conflicts between individuals and their agencies. The law, in sum, represents the principle of order in social relations. It permits us in peaceful fashion to work out the accommodations essential to civil society.

* Delivered at Queen's University Belfast, 27 May 2003.

Social strife involves a different order of conflict. It involves not the inevitable conflict of individual-to-individual, but conflict among individuals as members of social groups. This is not individual conflict, but group-based conflict. And because it is group-based, social conflict is more difficult to moderate than individual conflict. The group identity confers its own morality, its own language and stories, its own sense of righteousness. Violence and force may be justified – indeed glorified – in the name of the greater group aspiration.

Group belonging is good. The identity and self-worth of individuals is rooted in the groups to which they belong – their race, religion and gender, to mention only a few. The goal of civil society is to permit individuals to flourish as members of their group or groups; for the complex reality is that each individual finds himself grounded in a number of groups. Achieving this goal requires two things. First, the individual must be permitted to realize his or her identity or aspirations as a member of a group: validation, not suppression. Second, civil society must provide a peaceful way of working out the group-based conflicts that inevitably arise: peaceful accommodation, not conflict. Social strife occurs when these requirements are not met. It is the pathology of group identity gone wrong. The positive virtues of religion, race or clan become the destructive vice of a diseased and dysfunctional body politic.

This brings us to the role of the law in maintaining social harmony. The law as it developed to the middle of the 20th century was concerned primarily with individual-based conflict. Group-based conflict was largely outside its domain. Or perhaps, more accurately, to the extent that governments sought to use the law to moderate groups-based social strife, it generally failed. Typically, the group-based ethic, endowed with its own “superior” morality and the force of numbers, was prepared to defy the law. Consequently, the principle of order, essential to a civil society, was never successfully extended to group-based social strife. The mechanisms of 19th century law, geared to individual-based conflicts, stood impotent before group-based conflicts. This is not to deny that group-based social uprisings were often crushed in the name of the law, or its deformed cousin “law and order.” Rather, it is to say that the normative force of the law as a principle of order and accommodation was not effective: repression, yes; legal order, no.

The challenge for civil society was – and remains – to find a way for the law to bring the same order and accommodation to social strife as it does to individual conflict. I hasten to say that just as individual conflict can never be eliminated, so group-based social conflict cannot be eradicated. Conflict is a natural outgrowth of diversity, and cannot be eliminated short of enforced hegemony. We are not concerned with elimination of social strife, but management. The goal is not a definitive resolution but a process of mutual accommodation. Accepting that in every society, diverse groups must live together, the aim is to find a way to permit them, with all their differences, to speak across what separates them and live together in harmony.

The group-based nature of social strife requires a group-based legal response. The failure of 19th century law is that it provided an individual-based response, predicated on the assumption, too often false, that each nation-state represented a single homogeneous ethnic or religious group. To respond to

the reality of the group-diverse modern state, a group-tolerant legal norm is required. The law of human rights which emerged in the aftermath of the Second World War provides such a norm. The ethic of human rights is grounded in equal respect for all individuals, regardless of the group to which they belong. At the same time, it acknowledges the source of individual identity in group allegiances by forbidding discrimination on group-based grounds. If this be so, we have at hand a legal concept that may help to moderate group-based conflict and avoid the pathology of social strife.

My country, Canada, is a country of many groups and cultures. The modern Canada was created in the marriage of two colonies – one French-speaking and Roman Catholic; the other English-speaking and Protestant. The country's founding premise – a shaky one in the eyes of many sceptics – was that different peoples could realise their aspirations and live in harmony within a single nation. The mechanism for the realisation of this premise was the law. This included the law of the Quebec Act of 1774, which guaranteed to the French Catholics of Quebec the right to retain their language, religion and the French Civil Law; the law of our first Constitution, the British North America Act of 1867, which provided language, religious and educational guarantees to French and Anglo minorities wherever they might be; the law of the *Charter of Rights and Freedoms* of 1982, which confirmed and strengthened linguistic rights, gave constitutional protection to Aboriginal rights and formally recognized the multi-cultural character of the modern Canada; the law of equality and anti-discrimination that runs through our human rights statutes and is enshrined in section 15 of the *Charter*. Canada has had its conflicts, to be sure. We are not immune to the pathology of group-based civil strife, as attested by the political rebellions of the 19th century, FLQ terrorism in the 20th century and the 1990 stand-off of the Mohawk community of Kanesatake. But in the main, we have resolved our group-based differences through respect and accommodation – a respect and accommodation grounded in legal protection.

The most divisive political issue facing Canada – the question of Quebec secession – has been characterized by civility. With the exception of the brief FLQ campaign, proponents and opponents of secession have engaged each other in perfectly peaceful debate. The issue of whether the province should form an independent state has been twice submitted to the Quebec electorate without notable incidents. The legal question of whether Quebec can secede unilaterally from Canada has even been debated before the Supreme Court of Canada.¹ The Court's advisory opinion on this issue has been generally accepted by all sides of the debate.

I believe that Canada has generally been spared conflict because of a commitment to democracy, justice and the rule of law, but also because of culture – a culture of respect, tolerance and accommodation of difference grounded in the law. The result is a country in which individuals are free to affirm and celebrate their particular group identities and where conflicts, by and large, are worked out peacefully, without bloodshed. The *Canadian Charter of Rights and Freedoms* stands as the ultimate expression and legal

¹ See *Reference re Secession of Quebec* [1998] 2 SCR 217.

manifestation of a culture of respect, tolerance and accommodation of difference.

Against this background, let me return to the processes by which the ethic and legal practice of human rights can moderate group-based differences and prevent social strife.

Coming To Terms With The Past: Truth And Reconciliation

The first step in coming to grips with social strife is preparatory. Societies that have been exposed to social strife must establish the conditions under which the laws and the language of human rights can do their work. Society, like individuals, are burdened by their pasts. The more troubled the past, the more difficult the way forward. Just as individuals must come to grips with their past before they can change their lives, so societies must reconcile themselves with their histories before they can move toward a just present and a peaceful future. Only when a society understands what has gone wrong in its past can it move forward to developing a culture of respect and accommodation.

One searches in vain for a universal formula for achieving the conditions that permit the healing of historic wounds. Each society must find its own way. Yet experience suggests that a society seeking to move beyond a past of civil strife after a history of violence and human rights abuse can do two things. First it can in some broad sense acknowledge the truth. Second, it can move to reconcile that truth with its present values and aspirations.

Facing the truth and reconciling victims and abusers who have opposed each other in bitter and violent conflicts is no easy task. As 19th century philosopher Wilhelm Dilthey pointed out, we make our meanings and infuse our identities by continually narrating the stories of our lives.² Each group's narrative becomes its inner reality, a reality that makes it difficult to acknowledge the quite different narrative and reality of the other group. The depth of suffering, animosity and indeed hatred that may result from conflict must not be underestimated. Yet, if there is to be any hope for a peaceful future, societies that have experienced conflict must earnestly attempt to share their conflicting narratives and reconcile with each other. Without reconciliation, the memory of the conflicts and abuses of the past may well hold sway over the present and haunt the future. As Shira Herzog observes:

“The history of protracted conflicts teaches that memory, fear and pain do not disappear – but they can be balanced by the promise of a better future.”³

Acknowledging the Truth

Before a society can move to eliminate social strife, it must in some broad sense acknowledge the truth of its past. This acknowledgment must be based in an acceptance of the fundamental tenet of human rights doctrine – that every individual is entitled to equal respect and dignity and that discrimination and persecution are evil.

² See, eg, W. Dilthey, *Hermeneutics and the Study of History* (Princeton: Princeton University Press, 1996).

³ *The Globe and Mail* (May 13, 2003, A15).

By acknowledging the truth of the past, I do not mean to suggest that a society can, or should try, to describe and pin down with historical accuracy, all or even most of the wrongs and conflicts that make up its past of social strife. We never can recapture the past, no matter how much we try or how much we spend. And the very process of reconstructing past wrongs in meticulous detail if taken too far can fuel rather than assuage the group sense of grievance. I mean only that in some broad sense people on both sides of endemic conflict must begin to share their stories or narratives and acknowledge the wrongs of the past.

Many societies that have undergone the transformation from social conflict or authoritarian rule to peaceful democratic governance have used truth commissions to develop an official account of past human rights abuses: Argentina, Chile, El Salvador and South Africa to mention only a few.⁴ The truth commission's purpose is to describe the overall pattern of human rights abuses over a given period, to the end of enhancing the understanding of conflicting narratives. However, truth commissions are not the only way for societies to come to grips with their past. For example, commissions of inquiry may assist in uncovering specific instances of abuse. Here in Northern Ireland, inquiries are underway into alleged past abuses. In Canada, such commissions have been used to ascertain the truth about the dark chapters of our past and present. One such example is the 1991 Royal Commission on Aboriginal Peoples.

At this point, a difficulty must be acknowledged. Truth seeking can go on forever. We can never uncover every abuse, examine every alleged wrong. Tribunal fatigue and, ultimately, contempt for the entire process is a real danger. Endemic, debilitating social guilt is also a risk. Therefore, care must be taken to structure the process in a way that achieves closure within a reasonable time. The aim is not to discover historical fact, nor to establish guilt. It is rather to confront and acknowledge the dark corners of the past.

However one achieves this acknowledgement: whether by truth commission, inquiry or some other means of coming to grips with the past, establishing the truth is only a first step.⁵ Truth without reconciliation does little in moving a society beyond conflict. To achieve social reconciliation and ultimately respect for human rights, more than mere examination of the past is required.

⁴ P.B. Hayner, *Unspeakable Truths* (New York, 2001); P.B. Hayner, "Fifteen Truth Commissions – 1974 to 1994: A Comparative Study" (1994) 16 *Human Rights Quarterly* 597; J.M. Pasqualucci, "The Whole Truth and Nothing But the Truth: Truth Commissions, Impunity and the Inter-American Human Rights System" (1994) 12 *Boston Univ Int'l L.J.* 321; T. Buergenthal, "The United Nations Truth Commission for El Salvador" (1994) 27 *Vand. J. Transnat'l L.* 497; *The Azanian Peoples Organization (AZAPO) et al v The President of the Republic of South Africa et al.*, CCT 17/96 (S.A. Const. Ct.); D. Dyzenhaus, *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (Oxford, 1998), pp 1-6.

⁵ *Ibid.*

Reconciliation

Reconciliation is site-specific. What achieves reconciliation in one situation may fail in another. The catharsis of facing the truth of the past may itself promote reconciliation. We are told how witnesses at South African Truth Commission hearings weep and forgive, even as they recount the most horrifying atrocities. Reconciliation demands that members of groups in conflict come to see the other, no longer as their enemy, but as their fellow citizen. To do this, they must look beyond their own narrative and acknowledge the conflicting narrative of the enemy. Enemies may not become close friends, but through sharing narratives, they can make the other person's suffering part of their own story. But beyond this cognitive exercise, reconciliation demands an act of acceptance and social will. Abusers and victims alike must come to see that their society recognizes the wrong that has been done and is resolved to move on. Both these goals can be furthered by the simple act of acknowledging the truth.

Sometimes, however, more will be required to achieve reconciliation. One possibility is an apology, an expression of sincere and profound regret, to the victims of past conflict. An official public apology "has the potential to set the record straight and restore dignity to the person or group harmed, under full, public scrutiny".⁶ Apologies, we are learning, are sometimes the key that unlocks the door to healing and reconciliation.

A true apology entails acknowledgment of the wrong done, acceptance of responsibility for the wrongdoing, an expression of sincere regret and profound remorse and the assurance or promise that the wrong done will not recur.⁷ The sincerity and import of an apology may be seriously undermined if it is used as an occasion to provide explanations or excuses for the wrongdoing.

In Canada, official apologies have twice been used to address some of the darker periods of our history. During the Second World War, the Canadian government classified all people of Japanese ancestry as "enemy aliens", detained 22,000 of them in internment camps, and confiscated and sold their property. In 1988, in open Parliament, Prime Minister Brian Mulroney acknowledged the wrongfulness of the government's actions and offered Japanese Canadians a formal and sincere apology for the injustices they had suffered.⁸

The second apology was for Canada's wrongs towards its original inhabitants, the First Nations peoples. The wrongs included removal from traditional lands, denial of access to natural resources and paternalistic governmental administration. In 1998, Canada issued a formal statement of reconciliation, acknowledging, that "attitudes of racial and cultural superiority led to a suppression of Aboriginal culture and values" and that past actions resulted in "the erosion of the political, economic and social

⁶ S. Alter, "Apologising for Serious Wrongdoing: Social, Psychological and Legal Considerations" (Law Commission of Canada, Ottawa, 1999).

⁷ See N. Tavuchis, *Mea Culpa: A Sociology of Apology and Reconciliation* (Stanford: 1991) p vii.

⁸ Canadian House of Commons Debates, September 22, 1988, pp 19499-19500.

systems of Aboriginal people and nations.”⁹ The Government formally expressed “to all aboriginal people in Canada [its] profound regret for past actions of the federal government which have contributed to [the] difficult pages in the history of our relationship together.”¹⁰

A victimized community is also entitled to the reassurance that injustice will not be repeated and that rights will in the future be respected. In the apology to Japanese Canadians, Prime Minister Mulroney gave a “solemn commitment and undertaking to Canadians of every origin that such violations will never again in this country be countenanced or repeated.”¹¹ Likewise the Statement of Reconciliation with Aboriginal Canadians recognizes the importance of ensuring “that the mistakes which marked our past relationship are not repeated.”¹²

Official apologies like the ones delivered to the Japanese Canadian community and Aboriginal Canadians mark a break with the past and a desire to begin a new relationship based on respect and accommodation. Sincere apologies offer the hope of forgiveness.¹³ The act of asking forgiveness has healing potential; and forgiveness, should it follow, may establish full reconciliation: the “act of forgiving can reconnect the offender and the victim and establish or renew a relationship; it can heal grief; forge new, constructive alliances; and break cycles of violence.”¹⁴

The challenge is to provide complete and sincere apologies for serious wrongs and inhumanities, without trivializing the technique of apology. Virtually all groups can recount wrongs committed against their members at some time in the historic past. If the apology is to retain its force as an agent of reconciliation, it must be reserved for exceptional, sustained abuses – abuses that truly constitute a dark blot on the nation’s history.

Beyond apology, lie the thorny issues of reparations and dealing with the perpetrators of past abuses. The task of devising compensation for wrongs done to previous generations is challenging. Those who suffered the wrong are no longer with us; how then can money – insofar as money ever can – make up for these abuses? Canada struggled with this in devising the reparations that accompanied its apologies to Japanese Canadians and Aboriginal peoples.

Individuals of Japanese ancestry whose rights were restricted were offered monetary compensation. Moreover, an educational, social and cultural fund for the Japanese Canadian was established and an offer of citizenship was extended to persons of Japanese ancestry who were expelled or who had

⁹ The Hon Jane Stewart, Minister of Indian Affairs and Northern Development, “Statement of Reconciliation”, January 7, 1998 <http://www.ainc-inac.gc.ca/nr/spch/1998/98j7_e.html>.

¹⁰ *Ibid.*

¹¹ *Op cit* n 8, p 19500.

¹² The Hon Jane Stewart, Minister of Indian Affairs and Northern Development, “Statement of Reconciliation”, *op cit*.

¹³ S. Alter, *supra*; N. Tavuchis, *op cit* p viii.

¹⁴ M. Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston, 1998) p 14.

their citizenship revoked.¹⁵ Likewise, upon delivering the Statement of Reconciliation to Aboriginal Canadians, the Minister of Indian Affairs and Northern Development announced a \$350 million commitment to community-based healing as a first step to deal with the legacy of physical and sexual abuse at residential schools.

The quite different question of what to do with those who have committed human rights abuses raises difficult and contentious issues. Three options present themselves: prosecution, the removal from office of tainted state officials, and amnesty.

It might be argued that, in an ideal world, officials responsible for violations of human rights will be removed from office, and those who have committed criminal acts will be prosecuted and brought before justice by way of fair and impartial trials and, if found guilty, sentenced and punished in accordance with the law. Yet, in many situations, neither prosecution nor lustration are practical options for a society trying to maintain a fragile peace. Some societies have decided to accord amnesty to individuals responsible for even the most grave human rights violations. Each society coming to terms with past conflict must address the question of whether to follow the path of just retribution or forgiveness. In dealing with this issue and the question of reparations, each society must examine not only the requirements of its domestic law, its obligations under international law, the relevant political context, local circumstances, the nature and extent of the conflict and the gravity and duration of the human rights abuses,¹⁶ but also its common values and needs.

Credible Legal Structures

Human rights protection is not simply a matter of coming to terms with the past. If a divided society is to overcome conflict, credible legal structures are necessary to ensure that human rights abuses cease and are not repeated. Society must provide a mechanism for resolving ongoing group-based conflicts. The credible legal structures that are the hallmark of a civil society must be extended beyond the sphere of individual conflict to group-based conflict.

This means that in addition to an independent and impartial judiciary to administer justice in accordance with law, the laws must provide legal protection for the fundamental human rights of individuals and groups. Rights may be enshrined in a written constitution, as has been done in Canada and the United States. Alternatively, human rights may receive non-constitutional legislative protection. Examples of this approach include the United Kingdom Human Rights Act 1998 and the New Zealand Bill of Rights Act 1990. The fact that a Bill of Rights has not been enshrined does not mean that it lacks constitutional force. For example, the United Kingdom Human Rights Act, coupled as it is with a treaty-based

¹⁵ See J Orange, "Bolstering the Argument for Redress for the Comfort Women: The Japanese Canadian Settlement as Precedent" (1998) *International Insights* 27, pp 34-35.

¹⁶ See, eg, *The Azanian Peoples Organization (AZAPO) et al v The President of the Republic of South Africa et al*, *op cit*.

commitment to conformity of the law to the European Convention on Human Rights Convention, effectively operates as a constitutional document.

Some states have neither explicit constitutional nor comprehensive legislative protection for human rights. That does not mean that they have no legal protection for human rights. Indeed the common law or *jus commune* of many countries includes rules and presumptions that may offer extensive and effective protection for human rights. The Australian constitution, for example, does not include an express Bill of Rights. Similarly, the Commonwealth Parliament has yet to adopt any comprehensive federal human rights legislation. Nevertheless, few would argue that human rights are less well protected in Australia than they were, for example, in the former Soviet Union which ironically included extensive protection for individual rights and freedoms in its constitution.¹⁷ This said, the dominant model for recognizing group-based rights and dealing with the conflicts they engender, is the written Bill of Rights with constitutional force.

The legal protection of human rights involves most obviously protection of the fundamental individual rights and freedoms. These rights inhere in every person by reason of the fact that they are human beings. Many social conflicts are marked by numerous and grave violations of basic individual freedoms by both state agents and non-state actors. As a result, it is imperative to offer legal protection for the basic right to life, liberty and security. Legal protection of basic individual rights, coupled with a commitment to the Rule of Law and an independent and impartial justice system, ensures an immediate cessation of abuses and provides victims with the much needed concrete assurance that their suffering will never again be repeated.

The importance of an independent and impartial justice system in making the transition from a society of civil strife to a society of peaceful accommodation cannot be over-emphasized. The success of the venture hinges on the state being perceived as the neutral broker of difference. Police forces must act fairly in maintaining the peace and investigating violence. Prosecutors and defence counsel must conduct their activities with high professionalism. And above all, the judiciary, the final safeguard of freedom and justice, must be perceived to be absolutely independent and impartial. The role of the lawyer or judge in a society driven by civil strife may be difficult and dangerous, as you in Northern Ireland are all too aware. But it remains vital, if peace is ever to be achieved.

I have been speaking of the mass infringement of individual human rights in times of social strife. However, we must remember that the source of the conflict usually lies in group concerns. The legal protection of group rights may provide a useful tool in addressing the origins of conflicts and in preventing their recurrence. Group rights are rights that we possess on account of membership in a particular group or community. Humans, we know, are social beings. As a result, individual identity is closely related to membership in groups based on shared culture, beliefs, language and history. In order for the individual to achieve full self-actualization, we must respect

¹⁷ See Chap 7 of the *Constitution of the Union of Soviet Socialist Republics*, adopted on October 7, 1977.

his or her membership in the groups that participate in defining his or her identity. Group rights safeguard human dignity by protecting every individual's right to retain membership in the identity communities that define oneself. Such membership is empty unless the identity community is healthy and capable of ensuring its survival. The function of recognizing group rights is to give vulnerable identity communities the tools necessary to ensure that they survive and flourish.

The protection of language rights in Canada is an example of how the legal protection of group rights can assist in maintaining peaceful co-existence in a diverse society. Language is an essential element of both individual and group identity.¹⁸ At the individual level, it shapes the way we think and the way we perceive the world. Language also has communal dimensions. Language is a fundamental element of human culture¹⁹ and, like religion, can be the glue that holds a minority community together.

Although many languages are spoken in Canada, we have two official languages – English and French. The official recognition of English and French reflects the primary role that English and French speaking immigrants played in building our country. Thus, our Constitution recognises that English and French are the official languages of Canada and have equal status, rights and privileges.²⁰ The Constitution guarantees the right to use English and French before Parliament, and the federal courts,²¹ as well as the legislative assemblies and courts of the provinces of Quebec, New Brunswick and Manitoba.²²

Minority language communities find support in the linguistic educational rights guaranteed in section 23 of the *Canadian Charter of Rights and Freedoms*, which guarantee their right to have their children receive primary and secondary education in their language. By enshrining linguistic educational rights in our Constitution we have recognised the importance of schools for the preservation, development and promotion of minority languages and culture. Schools are essential to ensuring the future of a linguistic minority community. They protect against assimilation. They are focal points for communities. And they promote the health and cultural vibrancy of minority communities.

The legal protection of group language rights in Canada has ensured that the Canadian linguistic tradition is grounded not in conflict or suppression, but in respect and accommodation. Every country must find its own way to recognise its particular group. I note with interest that the Northern Ireland Human Rights Commission has included proposals for language rights and rights concerning identity and communities in its consultation document on a Bill of Rights for Northern Ireland.²³

¹⁸ See Ford, *Quebec (Attorney General)* [1988] 2 SCR 712 at pp 748-749.

¹⁹ See *Mahe v Alberta* [1990] 1 SCR 342 at p 362.

²⁰ S 16 of the *Canadian Charter of Rights and Freedoms*.

²¹ See s 133 of the *Constitution Act 1867*; and ss 17, 18, and 19 of the *Canadian Charter of Rights and Freedoms*.

²² *Ibid.*, and s 23 of the *Manitoba Act 1870*.

²³ Northern Ireland Human Rights Commission, *Making a Bill of Rights for Northern Ireland: A Consultation Paper by the Northern Ireland Human Rights Commission* (Belfast, 2001), pp 24-28 and 79-83.

The Discourse Of Rights

Finally, legal norms founded in human rights communicate the values of a civil society. They provide space for social discourse; and they express society's commitment to the inherent dignity of all human beings and the right of all to live in peace together.

First, the language of rights provides a place of discourse. Using shared principles and values given expression by the law, speakers and audiences are empowered to express, receive, and understand each other's discourse. The language of rights provides a framework in which people holding competing perspectives can work out peaceful accommodations.

Framing claims in the shared language of rights permits individuals and groups who may not have shared experiences to understand the perspective of the other. Martha Minow suggests that the rights discourse may be viewed as "a medium for speaking across conflicting affiliations, about the separations and connections between individual groups and the state."²⁴ Rights claimants implicitly invest themselves in a larger community, even when seeking to change it.²⁵ A rights claim thus initiates a form of communal dialogue;²⁶ "[it]draws each claimant into the community and grants each a basic opportunity to participate in the process of communal debate."²⁷ This is important for societies divided by strife. As Professor Minow puts it:

"The very fact of summoning "community" through a language of rights may expose the divisions within the community – and even beyond it. Rights then can be understood as a kind of language that reconfirms the difficult commitment to live together even as it enables the expression of conflicts and struggles."²⁸

The language of rights does not only communicate, but transforms. Rights language enables the expression of conflicts and struggles, but it also transforms them from physical conflict into verbal dispute.²⁹

Second, the language of human rights, over and above providing a means to resolve differences, contains its own message – the inherent dignity of every human being. This is the message of the *Universal Declaration of Human Rights* which in the first paragraph of its preamble crisply proclaims that:

". . . recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace and the world, . . ."³⁰

The discourse of rights tells us that all human beings have equal moral worth and are equally deserving of consideration and respect; that each human

²⁴ M Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (Ithaca, 1990), p 310.

²⁵ *Ibid*, p 294.

²⁶ *Ibid*, p 295.

²⁷ *Ibid*, p 296.

²⁸ *Ibid*, p 309.

²⁹ *Ibid*, p 293.

³⁰ GA Res 217 A (III), UN Doc A/810, at p 71 (1948).

being is entitled to choose his or her own vision of the good life; and all members of the human family should be treated as ends, not means. The concept of dignity thus emphasizes our common humanity.

CONCLUSION

In conclusion, allow me to return to the question originally posed: can human rights put an end to social strife? The short answer to this question is that legal protection for human rights is, in itself, insufficient to put an end to all strife. However, accompanied by political will and the resolve of the community and its leaders to effect compromise and achieve peace, the law of human rights can provide the basis for a civil society in which disparate groups can live together in peace.

Just as human rights abuses are the hallmark of inter-group conflict, so respect for human rights is a necessary element of any viable solution to a situation of social conflict. Respect for human rights may assist a community to come to terms with the past. It may provide the basis for credible legal structures to prevent future abuses. And it may found a discourse of rights, through which we develop the accommodations of the future. In these ways, human rights serve as a bridge, a bridge between a troubled and divided past and a future founded on peaceful co-existence, and a bridge spanning the conflict-gouged chasms that separate one part of society from another.³¹

But bridges, we know, are sedentary objects. By themselves they do not transport us. We must be willing to cross the bridge. Too often, we do not move out on the bridge because of fear. Fear that the past is too powerful to overcome. Fear that we will fail in building the structures required for accommodation. Fear finally, and most profoundly, that in acknowledging the other, we ourselves may be somehow diminished. Fear, in a word, that the bridge will not hold.

To that, there is but one response. The bridge must hold. It has held in my country for 350 years. And it can hold in other countries, given the chance.

³¹ See the epilogue to the 1993 interim *Constitution of the Republic of South Africa*, Act 200 of 1993.

CIVIL LIABILITY FOR FOUL PLAY IN SPORT

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INTRODUCTION

In the summer of 2002 the autobiography of Roy Keane, the captain of Manchester United Football Club and formerly of the Republic of Ireland soccer team, was published.¹ The book was ghost written by controversial soccer pundit and journalist Eamonn Dunphy, and had been eagerly awaited, not least because it was anticipated that it would contain comments about the events of May and June 2002 which saw Keane sent home from the World Cup in Japan following a major argument with Irish soccer manager Mick McCarthy.²

When extracts from the book were serialized in *The News Of The World*, however, public and media focus centred on comments made by Keane about a soccer match between Manchester United and arch-rivals Manchester City in April 2001. Late in that game, Keane had committed what was by common consensus a horrific foul on Manchester City player Alfe Inge Haaland (against whom he had had something of a vendetta for a number of years), for which he was immediately dismissed from the field of play by referee David Elleray, and as a result of which he served the prescribed period of suspension (four matches) under English Football Association Rules. In his autobiography, Keane referred to the Haaland incident in the following terms:

“Alfie Haaland has been mouthing off...[prior to an earlier game between the two teams] I hadn't forgotten Alfie. Bryan Robson told me to take my time. You'll get your chance Roy. Wait.

Another crap performance. They're up for it. We're not . . . I'd waited almost 180 minutes for Alfie, three years if you looked at it another way. Now he had the ball on the far touchline. Alfie was taking the piss. I'd waited long enough. I fucking hit him hard. The ball was there (I think). Take that you cunt. And don't ever stand over me again sneering about fake injuries...I didn't wait for Mr. Elleray to show the card. I turned and walked to the dressing room.”³

The controversy generated by this statement (which was considerably starker when presented as the exclusive focus of one serialization than it was in the overall context of the book) was enormous, because of the inference that Keane had deliberately and calculatingly set out to assault and to injure

* I am grateful to Professor William Binchy and Judy Goldman for their help in respect of this article.

¹ *Keane, The Autobiography*, (Michael Joseph, Penguin Books, 2002).

² See Humphries, “Only one Certainty; We're the poorer without Roy”, *Irish Times*, 27 May 2002, and “Keane to Depart from Saipan”, *Irish Times*, 24 April 2002.

³ *Keane, The Autobiography*, p 231.

Haaland. This was compounded by the fact that Haaland had played very little competitive soccer since the incident, and according to some, was on the verge of a premature retirement brought about by injury (although there was considerable doubt as to whether the injury which was ending his career had been caused by Keane's tackle). As a result, in October 2002 Roy Keane was banned for five matches by the FA and fined £150,000, after being found guilty on two charges of bringing the game into disrepute by publishing the impugned comments in the book, a decision which incidentally sits uneasily with the protection afforded to freedom of expression under the Human Rights Act, 1998.⁴

Two responses of the many that were forthcoming are of particular note. In the first, Mr. Bob Russell MP, Liberal Democrat representative for Colchester, announced that he had written to the Greater Manchester Police calling on them to institute a criminal prosecution for assault against Roy Keane. Mr. Russell argued that the fact that a particular action occurred on a sports field should not of itself afford it immunity from the operation of the criminal law.⁵ Secondly, Mr. Haaland and his employer Manchester City FC announced that they would be bringing civil proceedings against Mr. Keane and his employer Manchester United FC, claiming damages both for the impact on Mr. Haaland's career and, from the club's perspective, for the loss of his services.⁶ In February 2003, however, the club announced that it would not be pursuing such legal action because of problems in proving that Mr. Haaland's career threatening injuries were the result of the tackle in question.⁷

Nonetheless, the incident does raise the interesting legal questions of the extent to which violent 'on field' behaviour by one participant towards another *will* and *should* generate both criminal and civil liability. The question of criminal liability for foul play has been addressed elsewhere.⁸ We will now consider the circumstances in which one participant in a contact sport can and should be held civilly liable for injury caused to a co-participant as a result of foul play, focusing both on the conceptual issues

⁴ See Hannigan, "FA Find Keane Guilty on Two Charges of Disrepute", and Humphries, "A Victim of the Machine", both in *Irish Times*, 16 October 2002.

⁵ See Brennan, "Keane's Book Tackles First Day Sales Record", *Irish Examiner*, 28 August 2002, and "Keane May Face Criminal Enquiry Over Tackle", *Times*, 14 August 2002. In fact it emerged that police had already questioned Keane in respect of the incident at the time but decided that there was not strong enough evidence to prosecute him. See "New Questions For Keane", *Times*, 28 August 2002.

⁶ See "Haaland to sue Keane over Tackle as Clubs Square Up", *Times*, 17 August 2002, and "Keane may face legal action over book", *Irish Times*, 13 August 2002.

⁷ Taylor, "Game over for Haaland", *Irish Times*, 14 February, 2003.

⁸ See McCutcheon "Sports Violence, Consent and the Criminal Law" (1994) 45 *NILQ* 267 (hereafter McCutcheon), at 269; Trichka, "Violence in Sport: Criminal Assault or Part of the Game" (1993) 3(2) *Journal of Legal Aspects of Sport* 88; Gardiner, "Juridification of the Football Field: Strategies for Giving Law the Elbow" (1994-95) 5 *Marquette University Law Review* 188; Hanson and Dernis, "Revisiting Excessive Violence in the Professional Sports Arena: Changes in the Past Twenty Years?" (1996) 6 *Seton Hall Journal of Sports Law* 127, at 136; Gardiner, "Not Playing the Game; Is It a Crime?" (1993) *Solicitors Journal* 628.

surrounding the question and also on the contemporary approach of the courts in England and Ireland thereto.

CIVIL LIABILITY FOR ON FIELD VIOLENCE

When one considers the number of incidents of violent foul play causing serious injury that occur on a weekly basis, it is perhaps surprising that the criminal law is not used to regulate behaviour on the field of play more often, although this may be explained both by a rooted view within sport that what happens on the sports field should be dealt with by sports governing bodies, and also by the fact that there are significant practical obstacles to taking criminal actions, notably in garnering evidence and proving the requisite *mens rea*.⁹ It is arguably even more surprising, given the excessively litigious nature of western society, that there are not more civil actions taken in respect of injuries occasioned on the field of play (although it should be remembered that a great many such actions settle before trial).¹⁰ Sport provides an array of potential parties to a tort action, from players,¹¹ to clubs,¹² to referees,¹³ to spectators,¹⁴ to coaches or sports teachers,¹⁵ to

⁹ See “Prosecuting Sports Field Violence, a British Perspective” (1997) 7(2) *Journal of Legal Aspects of Sport* 81; and James, “The Prosecutor’s Dilemma” (1995) 3(3) *Sport and The Law Journal* 60.

¹⁰ See, *inter alia*, *Cleghorn v Oldham* (1927) 43 TLR 465. Generally see Beloff, Kerr and Demitrou, *Sports Law* (1998, Hart Publishing), p 111ff; Gardiner & Felix, “*Elliot v Saunders: Drama in Court 14*” (1994) 2(2) *Sport and the Law Journal* 1; Duff, “Civil Actions and Sporting Injuries” (1994) *NLJ* 639; McCutcheon, 283; McArdle, *From Boot Money to Bosman; Football, Society and the Law* (2001, Cavendish) (hereafter McArdle), 260-270; Griffith Jones, *Law and The Business of Sport* (1996, Butterworths), chapter 1; Barnes, *Sports and the Law in Canada*, (3rd ed, 1996, Butterworths, Toronto and Vancouver) (hereafter Barnes), pp 269ff; Gardiner *et al*, *Sports Law*, (2nd ed., 2001, Cavendish, London.), pp 693ff; Moore, *Sports Law and Litigation*, (1997, CLT Professional Publishing), chap 5.

¹¹ See *Brewer v Delo* [1967] 1 Lloyd’s Rep 488; *Cleghorn v Oldham* (1927) 43 TLR 465; *Wooldridge v Sumner* [1963] 2 QB 43; *McComiskey v McDermott* [1974] IR 75; *Condon v Basi* [1985] 2 All ER 453; *Caldwell v Maguire* [2001] EWCA Civ 1054, [2001] ISLR 224; *Pitcher v Huddersfield Town FC*, unreported, Queen’s Bench, 17 July, 2001. For American analysis see Laing, “Liability of Contact Sports Participants” (1994) 66 *Wisconsin Law Review* 12, and Lazaroff, “Tort and Sports; Participant Liability for Injuries Sustained During Competition” (1990) 7 *University of Miami Entertainment and Sports Law Review* 191.

¹² *Watson & Bradford City FC v Gray & Huddersfield Town*, unreported, Queen’s Bench, 26 October 1998; *McCord v Swansea City FC*, unreported, Queen’s Bench, 19 December 1996.

¹³ *Smoldon v Whitworth*, unreported, Court of Appeal, 17 December 1996.

¹⁴ *Callaghan v Killarney Race Company Limited* [1958] IR 366; *Wooldridge v Sumner* [1963] 2 QB 43; *Wilks v Cheltenham Home Guard Motor Cycle and Light Car Club* [1971] 2 All ER 369; *Payne & Payne v Maple Leaf Gardens* [1949] 1 DLR 369; *Karpow v Shave* [1975] 2 WWR 159.

¹⁵ *Woodroffe-Hedley v Cuthbertson*, unreported, Queen’s Bench, 20 June 1997; *Morrell v Owen* (see 1 (2) *Sport and the Law Journal* p 5); *Brady v Sunderland Association FC*, unreported, Court of Appeal, 17 November 1998; *Kane v Kennedy*, unreported, High Court, 25 March 1999; *Ralph v London County Council*, unreported, King’s Bench, 11 February 1947; *Van Oppen v Clerk to the*

governing bodies¹⁶ – although this article is purely concerned with inter-participant liability. Moreover, the extent of liability in such cases may potentially be enormous in that apart from typical damages for pain and suffering and loss of earnings, a plaintiff may well seek to claim damages for ‘loss of chance’ – where, for example, a young athlete with huge potential whose career has been ended by the negligence of another seeks to recover damages on the grounds of the possibility that had he not been so injured he might have gone on to become a world champion in his sport, with all the glory and financial reward that that would entail.¹⁷

Obviously, a blunt application of tort law without regard to specific circumstances would sound a death knell for the future of competitive contact sport, in that every rugby tackle or every punch in a boxing match could ground an action in assault, every tackle in a soccer match which caused the opponent to suffer even a minor injury could ground an action in negligence and frankly, every sporting event at which spectators, participants and referees were present could be a breeding ground for a host of interesting defamation actions!¹⁸ Thus as in all areas of tort law, in deciding whether a particular action on the sports field should attract civil liability, the courts will ask whether it was reasonable in the circumstances, and the nature of sport means that what would normally be unreasonable – running into someone and knocking him to the ground for instance – will be deemed to be perfectly reasonable when committed in the context of a fast moving competitive contact sport like rugby.¹⁹

Equally the courts, cognizant of the interests of severely injured plaintiffs have insisted that this does not mean that anything goes in sport. Just as the criminal law will be used to deal with those assaults which exceed the limits of toleration,²⁰ so also the civil law will step in where there have been

Bedford Charity Trustees [1989] 3 All ER 389; *A (a minor) v Leeds City Council*, unreported, Queen’s Bench, 2 March 1999 (see 2 (3) *Sports Law Bulletin*, p 5).

¹⁶ *Callaghan v Killarney Race Company Limited* [1958] IR 366; *Watson v BBC* [2001] 2 WLR 1256; *Murray v Harringay Arena* [1951] 2 All ER 320; *Hall v Brooklands Auto Racing Club* [1932] All ER 208.

¹⁷ Beloff, Kerr and Demitrou, *Sports Law* (1998, Hart Publishing) (hereafter Beloff), pp 127-128. See also *Chaplin v Hicks* [1911] 2 KB 786. Thus in *Watson v Gray*, *supra* n 12, the player successfully claimed damages on the grounds that his injury prevented him from fulfilling his playing and earning potential by playing in the English Premiership. See 2(3) *Sports Law Bulletin*, p 5. See also Moore, “Assessing Damages for Professional Footballer’s Blighted Career” (1999) 7(2) *Sport and the Law Journal* 41. Similarly in *Mulvaine v Joseph* (1968) 112 *SJ* 927, an American golf professional whose hand was injured as a result of the defendant’s negligence recovered damages for loss of the opportunity to compete in golf tournaments, win prize money and gain prestige and experience.

¹⁸ See for example Lewis, “Defamation of Sports Officials” (1999) 38 *Washburn Law Journal* 780.

¹⁹ See Griffith-Jones, *Law and the Business of Sport* (1997, Butterworths) (hereafter Griffith-Jones) at pp 3-4. Thus in the Canadian case *Agar v Canning* (1965) 54 *WWR* 302 (at 304) it was concluded that “The conduct of a player in the heat of the game is instinctive and unpremeditated and should not be judged by standards suited to polite intercourse.”

²⁰ See Beloff at p 130; Gardiner and James, “Touchlines and Guidelines: The Lord Advocate’s Response to Sports Field Violence” [1997] *Criminal Law Review* 41; Miller, “Criminal Law and Sport in Scotland: The Lord Advocate’s Instructions

trespasses to the person, or acts of negligence or nuisance leading to significant harm.²¹ Very few cases are taken on a trespass basis, largely because of the interpretation of the rules of trespass given in *Letang v Cooper*²² that a trespass must be intentional, and the consequent evidentiary problems that this rule poses for a plaintiff in a sports case.²³ For present purposes, therefore the most important tort governing sports injuries is that of negligence.

NEGLIGENCE AND CIVIL LIABILITY ON THE FIELD OF PLAY

Analysis on a negligence model throws up three important primary questions.

- First, in a sporting situation what duties of care arise, and what is the scope of these duties?
- Secondly, and perhaps most controversially, what is the standard of care to be expected in any such situation?
- Thirdly, what defences will apply, and particularly what is the impact of the consent of the participants to engage in sporting activity?

Duty Of Care On The Sports Field

As any student of law will know, the dominant common law statement of principle in the construction of duty of care was given by Lord Atkin in *Donoghue v Stevenson*:²⁴

“The rule that you are to love your neighbour becomes in law you must not injure your neighbour; and the lawyer’s question, who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be liable to injure your neighbour. Who then in law is my neighbour? The answer seems to be –

of 10 July 1996 to Chief Constables” (1996) 4(2) *Sport and the Law Journal* at p 40 and “Prosecuting Sports Field Violence, a British Perspective” (1997) 7(2) *Journal of Legal Aspects of Sport* 81; Anderson, “Violence, Sport and the Law: An Application to Gaelic Games” (1999) 7(2) *Sport and the Law Journal* 51.

²¹ Felix, “Sports Injuries and Civil Liability” 1(1) *Sports Law Bulletin*, p 8.

²² [1965] 1 QB 232.

²³ See Kevan, “Sports Injury cases: Footballers, Referees and Schools” (2001) *Journal of Personal Injury Litigation* 138, at 140. See however, *Lewis v Brookshaw*, (1970) 120 *NLJ* 413. See McMahon & Binchy, *The Irish Law of Torts*, (3rd ed, Butterworths, 2000) (hereafter McMahon & Binchy), chap 22; McArdle at p 163; and Felix, “Sports Injuries and Civil Liability” 1(1) *Sports Law Bulletin*, 8. In Ireland, on the other hand, the rule has generally been that a trespass may be committed either intentionally or negligently, although the principle in *Letang v Cooper* recently received some degree of judicial endorsement in the Irish High and Supreme Courts. See *Devlin v Roche* [2002] 2 *ILRM* 192. For analysis see Byrne & Binchy, *Annual Review of Irish Law 2001* (Roundhall, 2002), at p 435.

²⁴ [1932] AC 562. For analysis see Jones, *Textbook on Torts*, (8th ed, Blackstone Press, 2002) pp 31ff; McMahon & Binchy, chap 6; Lunney & Oliphant, *Tort Law*, (Oxford University Press, 2000) chap 3.

persons who are so closely and directly affected by my act that I ought reasonably to have them in my contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.”

In England, the tendency to approach questions of duty of care by reference to broad conceptual statements of principle²⁵ has been eschewed in favour of a more pragmatic incrementalist approach, whereby new categories of duty are assessed by analogy with existing categories.²⁶ In Ireland, on the other hand, the courts have traditionally preferred a ‘general principle’ approach,²⁷ focusing on broad concepts of proximity and foreseeability as the building blocks of duty of care - although recent developments may have altered this trend.²⁸ In both jurisdictions, and indeed throughout the common law world, however, the concept of duty of care is ultimately a device for limiting the scope of one person’s liability for his or her action, both in terms of the category of persons to whom a duty is owed, and also in terms of what is required to be done in the fulfilment of that duty.²⁹

On this basis, whereas virtually all persons connected with sport – participants, supporters, referees, governing bodies, coaches, doctors and so on – are capable of owing and being owed duties of care, the scope of such duties will necessarily be restricted. For example, if in the course of a cricket match, the batsman hits the ball and in doing so (accidentally) injures a fielder, there would be no question of his being sued.³⁰ He is after all merely competing in a lawfully organised sport and operating within the normal rules and practices thereof. Hence he is under no duty of care not to

²⁵ *Anns v Merton London Borough Council* [1978] AC 728; *Junior Books v Veitchi* [1983] 1 AC 520.

²⁶ *Governor of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* [1985] AC 210; *Leigh & Sullivan v Aliakmon Shipping Co Ltd* [1986] AC 785; *Yuen Kun-Yeu v AG of Hong Kong* [1987] 2 All ER 705; *Caparo Industries plc v Dickman* [1990] 2 AC 605; *Murphy v Brentwood District Council* [1991] 1 AC 398. Generally see Jones, *Textbook on Torts*, (8th ed, 2002, Oxford University Press), at pp 31ff.

²⁷ The judgment that has provided the lead for virtually all subsequent case law in this area is that of McCarthy J in the Supreme Court in *Ward v McMaster* [1988] IR 337.

²⁸ In *Glencar Exploration plc & Andaman Resources plc v Mayo County Council* [2002] 1 ILRM 481; Keane CJ held that the judgement of McCarthy J in *Ward v McMaster* did not represent the position in respect of duty of care at Irish law, and suggested that an incrementalist approach of the kind favoured in the English courts should be adopted in Ireland. See Byrne & Binchy, *Annual Review of Irish Law 2001* (Roundhall, 2002), at pp 554ff. This approach was given some degree of support in *Fletcher v Commissioner of Public Works* [2003] IESC 8.

²⁹ *McMahon & Binchy*, at p 115.

³⁰ See for example *Feeney v Lyall* [1991] SLT 151, for the view that a golfer who drove the ball straight down the fairway was not in breach of duty to another golfer who had wandered onto the wrong fairway and was invisible to the defendant when playing his shot. On the other hand, a golfer who hits another participant with his ball may possibly be in breach of a duty of care to that other, despite having acted within the rules of his sport. See for example *Pearson v Lightning*, CA, 1 April 1998, noted in 1(3) *Sports Law Bulletin*, p 3. Golf is an exception to the general rule that actions within the rules of the game will not attract liability.

hit the opposing fielder. Any suggestion that he *does* owe such a duty of care in the above scenario is defeated by the twin arguments that he is engaging in routine behaviour consistent with the playing of a lawful sport, and also that by consenting to stand in a notoriously dangerous fielding position, the fielder has voluntarily assumed the normal risks inherent therein. Importantly, this is not to say that the injured fielder's voluntary participation in the activity is a defence on which the batsman may rely if he is found to be in breach of a duty owed to the fielder (although this may become relevant in other cases). Rather it is one of the reasons why the batsman owes the fielder no duty to avoid causing him harm in that manner in the first place.³¹ It is for the same reason that a cause of action does not necessarily arise every time someone gets struck by a ball on a golf course.³² Conversely in a situation where for example, there has been a particularly violent foul on a soccer field, the court may impose liability on the participant who causes harm, on the grounds that the other participant cannot be taken to have assumed the risk that his opponent will act in a negligent or reckless manner, and therefore, that that opponent has a duty not to cause harm by reason of such a violation.³³

Participation and consent to injury

The precise level of assumption of risk attributable to a player by his voluntary participation in a fast moving contact sport is uncertain; neither is there any particularly satisfactory rule for determining the same. Thus some writers have recommended that the question be resolved by the application of nothing more than a common sense based analysis of the facts of any particular case, focusing on factors like the nature of the game, the nature of the act and the surrounding circumstances, the degree of force used, the degree of risk of injury and the state of mind of the defendant.³⁴

In attempting to find a more general rule for determining the extent of player consent, some have suggested that one assumes the risks inherent merely in the playing of the game within its rules – which activity is in practice immune from both criminal prosecution and civil actions anyway. This approach creates problems, however, because in theory activity within the

³¹ See Griffith-Jones, at p 7; and from an Australian perspective, Yeo, "Accepted Inherent Risks Among Sporting Participants" (2001) 9 *Tort Law Review* 114. See also *Murphy v Steeplechase Amusement Co. Inc.*, 166 NE 173 (1929).

³² See for example Williamson, "Some Legal Aspects of Golf" (1995) 3(1) *Sports Law Journal* 9; and Lunney, "A golfer is not a gentleman" (1998) 6(2) *Sport and the Law Journal* 4; Vieira, "Fore may be Just Par for the Course" (1994) 4 *Seton Hall Journal of Sports Law* 181; Tomner, Sawyer & Hypes, "Legal Issues in Golf; a 25 year litigation history" (1999) 9(2) *Journal of Legal Aspects of Sport* 125; Lang, "Lawsuits on the Links" (2000) 72(6) *New York State Bar Association Journal*.

³³ McEwan, "Playing the Game: Negligence in Sport" (1986) 130 *SJ* 581.

³⁴ See Beloff, p 130; McArdle, p 156; Williams, "Consent and Public Policy" [1962] *Criminal Law Review* 74, at 81. This is not unlike the approach followed in the Canadian case of *R v Cey* (1989) 48 CCC (3d) 480. For criticism see Gardiner and James, "Touchlines and Guidelines: The Lord Advocate's Response to Sports Field Violence" [1997] *Criminal Law Review* 41; Gardiner, "Juridification of the Football Field: Strategies for Giving Law the Elbow" (1994-95) 5 *Marquette University Law Review* 188, at 204.

rules of the game *may* be subject to both criminal prosecution and civil liability.³⁵ Moreover, allowing a private body, by creating the rules of sport, thereby to determine the legality of an action, would fly in the face of the rule of law.³⁶ Finally, it is difficult to ignore the reality that in practice, players *do* consent to more than merely contact within the rules of the game; it is simply unclear how much more.

As such, a second approach is to say that a player voluntarily assumes risks inherent in activity within both the rules and the ‘playing culture’ of the sport, (defined in *Rootes v Shelton*³⁷ as the ‘rules, customs or conventions’ thereof)³⁸ – an approach that has the undoubted advantage of fitting in with what is probably the injured player’s perception of the situation.³⁹ In an assessment of the role of the criminal law in sport, Simon Gardiner has argued that those actions which violate the rules of sport, while keeping within its playing culture, should be met by penalties both within the game and by the relevant sports governing body, but should not attract criminal sanction.⁴⁰ It is only when an action violates both the rules and the playing culture of the game, such that there is no question of consent on the part of the injured party⁴¹ – typically a violent off-the-ball incident – that the criminal law should be used.⁴² In this light, Canadian courts have concluded that by reason of the traditional violence in ice-hockey, one may be taken to have consented to being hit in the face during a match,⁴³ but not to being subject to attacks which are unprovoked and violent and not related to the play.⁴⁴

While this approach has obvious merits, the lack of concrete definition of the playing culture of sport will pose problems for the courts as they seek to

³⁵ *R v Bradshaw* (1878) 14 Cox CC 83. See “Prosecuting Sports Field Violence: A British Perspective” (1997) 7(2) *Journal of Legal Aspects of Sport* 81.

³⁶ McCutcheon, p 273.

³⁷ [1968] ALR 33.

³⁸ The playing culture is also defined in *Elliot v Saunders* (unreported, 10 June 1994) as “. . . a frequent or familiar infraction of the rules of a game that can fall within the ordinary risks of the game accepted by all the participants.”

³⁹ See Hanson and Demis, “Revisiting Excessive Violence in the Professional Sports Arena: Changes in the Past Twenty Years?” (1996) 6 *Seton Hall Journal of Sports Law* 127, at 134; Forman, “Boxing in the Legal Arena” (1996) 3 *Sports Lawyers Journal* 75, at 83.

⁴⁰ Gardiner and James, “Touchlines and Guidelines: The Lord Advocate’s Response to Sports Field Violence” [1997] *Criminal Law Review* 41.

⁴¹ Forman, “Boxing in the Legal Arena” (1996) 3 *Sports Lawyers Journal* 75.

⁴² See also Gardiner, “Not Playing the Game; is it a Crime?” (1993) *SJ* 68; Gardiner, “Juridification of the Football Field: Strategies for Giving Law the Elbow” (1994-95) 5 *Marquette University Law Review* 188, at 200ff; Gardiner, “The Law and the Sports Field” [1994] *Criminal Law Review* 513; McArdle, at 156.

⁴³ *R v Maki* [1970] 14 DLR (3d) 164; *R v Green* [1970] 16 DLR (3d) 137. Generally see Barnes, pp 255-269.

⁴⁴ *R v Aussem* (1997) Ont. C.J.P. Lexis, 136, 1997 WCBJ 424117, 36 WCB (2d) 453; *R v Leyte* (1973) 13 CCC (2d) 458; *R v Watson* (1975) 26 CCC (2d) 150, *R v Maloney* (1976) 28 CCC (2d) 3232; *R v St Croix* (1979) 7 CCC (2d) 122. See reports at 1 (4) *Sport and the Law Bulletin* 14. Generally see McCutcheon, at p 274ff.

determine the extent of the implicit consent of the participants.⁴⁵ As with the view that one consents to actions within the rules of the game, this approach is also at variance with legal principle in that it enables those persons who play sport and hence who determine its playing culture, thereby to decide on the legality of an action. It should be further asked why the playing culture of a particularly violent sport (like for instance ice-hockey in the USA or Canada⁴⁶) should be able to afford legal immunity to something, which, however regularly it occurs, is fundamentally illegal and uncivilised and may lead to public disturbances – like for instance a mass brawl of players.⁴⁷

As far as civil liability is concerned, the courts have tended to adopt a variant of the ‘playing culture’ approach to the assumption of risk issue. Thus in *Elliott v Saunders*,⁴⁸ the court concluded that frequent or familiar infractions of the rules of a game could fall within the ordinary risks of the game accepted by all the participants, and hence that players did not owe each other a duty not to cause such infractions,⁴⁹ but that a player could not be taken to have consented to harmful actions from an opponent that are reckless or intentional,⁵⁰ nor indeed those that are simply negligent in the face of a particularly obvious risk. Importantly as we shall see, ‘negligence’ in this context entails negligence as to the risk of causing harm, and not merely negligence as to the risk of committing a foul. The difficulty, as we shall see below, lies in putting this theoretical analysis into practice.

An individuated duty of care for sportspeople?

In Ireland, the Supreme Court went even further in *McComiskey v McDermott*,⁵¹ taking the unusual step of creating an individuated duty of care for participants in sporting events.⁵² At issue in this case was the question of whether a rally driver owed a duty of care to a co-participating passenger in

⁴⁵ Thus the Central Council for Physical Recreation, in its submission to the Law Commission, commented that “If the courts are to decide whether an activity is lawful by means of objective criteria and not by means of the rules of a particular game then there is also a danger that the offending player would not be tried by reference to what was acceptable to his sport, but by reference to the opinions on the sport in question by a judge and a jury who may never have played the sport.” See Anderson, at 102.

⁴⁶ *State v Forbes* (No. 6328, District Court Mann, July 19 1975), discussed by Trichka, “Violence in Sport” (1993) 3(2) *Journal of Legal Aspects of Sport* 88. This can be compared, however, to the Canadian case *R v Assam* (1997) Ont. C.J.P. Lexis 136, 1997 WCBJ 424117, 36 WCB (2d) 453. Generally see Barnes, at 251-319.

⁴⁷ See *Consent and Offences Against the Person*, Law Commission Consultation Paper 134, at 66.

⁴⁸ Unreported, Queen’s Bench 10 June 1994.

⁴⁹ McArdle, at p 156.

⁵⁰ See *Bourque v Duplechin*, 334 So. 2d 210 (1976) LA, for the view that “A participant does not assume the risk from fellow players acting in an unexpected or unsportsmanlike way with a reckless lack of concern for others participating.” See also Drowatzky, “Assumption of Risk in Sport” (1992) 2(1) *Journal of Legal Aspects of Sport* 92.

⁵¹ [1974] IR 75.

⁵² *McMahon & Binchy*, pp 136-137. A similar test was created by Edmund Davies LJ in *Wilks v Cheltenham Home Guard Motor Cycle and Light Car Club* [1971] 2 All ER 369, when he referred to “a reasonable man of the sporting world.”

the car, following an accident in which the latter was injured. Here the driver had been driving in difficult circumstances consistent with a rally driving competition, along a muddy and narrow course – admittedly on a public road – at an average speed of thirty-five miles per hour. He turned a corner at speed and spotted an obstruction on the laneway ahead and downhill from where he then was. Realising that he could not stop he drove his car into a ditch, where it overturned causing injury to the plaintiff (the navigator). The plaintiff's claim (accepted by Walsh J) was that the driver owed the same duty to the plaintiff navigator as to any other driver on the road, and whereas the consent to participation of the plaintiff in this case might be a defence to the claim, it could not affect the scope of the duty in the case.⁵³ The majority (Griffin and Henchy JJ), however, accepted the defendant's claim that, in all the circumstances of the event, this was not the correct test to apply but rather that:⁵⁴

“. . . The duty of care owed by the defendant to the plaintiff was to drive as carefully as a reasonably careful competitive rally-driver would be expected to drive in the prevailing circumstances.”

It is not clear whether this analysis was peculiar to the sport in question, or whether a similarly tailored duty of care would in any future case be deemed to apply for participants in all sports, or possibly all fast moving sports.

Standard Of Care

In their assessment of civil liability for sports field violence, English courts have tended to focus less on questions of *duty* of care, and more on questions of *standard* of care. Thus the relevant question is not “was the defendant's behaviour sufficiently reasonable that he did not owe a duty of care not to engage in it?” but rather, “was his behaviour sufficiently reasonable that there was no question of him violating the standard of care that he owed to another person?” In Irish law, the standard of care⁵⁵ for the purposes of the tort of negligence requires one to act as would a reasonable person *in the circumstances* of the particular case.⁵⁶ Plainly this is a rather general standard, and in seeking to apply it to specific cases, the courts have isolated a number of factors that are relevant, namely:⁵⁷

- The probability of an accident – with the courts concluding that the higher the risk of an accident, the higher the standard of care that would be required.

⁵³ [1974] IR 75, at 82. This appears to be the case in English law. See *Nettleship v Weston* [1971] 2 QB 691.

⁵⁴ *Ibid* at 89.

⁵⁵ See Felix, “The Standard of Care in Sport” (1996) 4(1) *Sport and the Law Journal* 32.

⁵⁶ Thus the court in *McComiskey* held (*per* Henchy J at 89) that, “the law of negligence lays down that the standard of care is that which is to be expected from a reasonably careful man in the circumstances. Because the particular circumstances dictate the degree of care required, decisions in other cases are frequently of little guidance.”

⁵⁷ See McMahan & Binchy, pp 154ff.

- The gravity of the threatened injury.
- The social utility of the defendant’s behaviour.
- The cost of eliminating the risk. Thus if a situation is reasonably socially useful and the cost of eliminating the risk would be prohibitive, the courts will favour the action.

Application of these factors to the sporting situation provides no clear answer to the question of when a tackle on a soccer field, for instance, will be regarded as negligent at law. Plainly the activity *is* one (particularly where we are dealing with a contact sport) where the probability of an accident – indeed of a serious accident leading to grave injury – is high. On the other hand, the activity has undoubted social utility, and the unpredictable nature of competitive sport where there are inherent risks means that the cost of eliminating such risks would be enormous in social terms, for it would involve the complete dismantling of all contact sports and some non-contact sports.⁵⁸

Accordingly, in sports related cases the courts focus on whether in all the circumstances in which the specific incident occurred, the behaviour of the person causing the harm was reasonable. In Canada⁵⁹ (or, uniquely in the USA in Wisconsin), where a similar approach is followed, the courts in practice have regard to a range of relevant circumstances including:⁶⁰

- The sport involved – including the question of whether it is a contact or a non contact sport.
- The rules and regulations of that sport.
- The generally accepted customs and practices of the sport, including types of contact and level of violence generally accepted.
- The risks inherent in the game.
- The presence of protective equipment or uniforms.
- The facts and circumstances of the particular case, including the ages and physical attributes of the participants, as well as whether the accident is caused in the heat of the moment or in a quiet passage of play.

⁵⁸ Gardiner and Felix, “*Elliott v Saunders: Drama in Court 14*” (1994) 2(2) *Sport and the Law Journal* 1, at 3 for the view that “[T]he appeal of contact sports . . . comes from their unrestrained qualities, unpredictability, exploitation and sheer physicality. The involvement of the law and courts put these all at risk and would create a climate where players would shy away from physical contact.”

⁵⁹ *Agar v Canning* (1965) 54 WWR 302; *Unruh v Webber* (1992) 98 DLR 4th 294 (Supreme Court) where the court said that the standard of care involved asking “what would a reasonable competitor in his place do or not do?” In *Zapf v Muscat* 11 BCLR 3d 296, the defendant was found liable in circumstances where he was deemed to be “at best careless and at worst reckless”. See Moore, “Has Hockey been checked from Behind North of the Border” (1998) 5 *Sports Lawyers’ Journal* 1, at 20 for the view that the standard of care in these cases is deliberately set at a low level because of the presence of mandatory insurance but that such decisions represent a major threat to the future of Canadian amateur ice hockey.

⁶⁰ See also Beloff, at p 114; Moore, *ibid* 1.

- The participants’ respective skills.
- The participants’ knowledge of the rules and customs of the game.
- The costs and availability of precautions.⁶¹

In England, the first application of this general tort standard to an inter-participant litigation occurred in *Condon v. Basi*.⁶² Here the plaintiff and defendant were on opposing teams in a soccer match. After 62 minutes the defendant attempted to tackle the plaintiff by sliding in from a distance of about three or four yards with his boot studs showing about 12-18 inches off the ground. This slide tackle was late, that is to say after the plaintiff had passed the ball, and as a result of it the plaintiff’s leg was broken, and he sued the defendant for negligence. In a short judgement for the plaintiff the Court of Appeal concluded that the appropriate standard of care to be applied in sporting cases was that of the reasonable man in all the circumstances, which circumstances would include the passion, speed, intensity and unpredictability of competitive contact sport.⁶³ Furthermore, the court stressed that in assessing whether civil liability should lie in respect of an action on the sports field, regard should be paid to the question of how egregious a breach of the rules of sport (if any) was involved. Thus as Beloff notes:⁶⁴

“The clear implication from *Condon v Basi* is . . . that a breach of the rules is virtually a necessary albeit not a sufficient requirement for liability to attach . . . Not every foul will constitute a tort; but something short of a foul will not do so.”

Finally, the court also concluded that the standard of care expected of sportsmen would differ depending on the level at which the game was played, with “. . . a higher degree of care required of a player in a first division football match than of a player in a local league football match.”⁶⁵ It is unclear why this should be the case, given that the difference between the two types of player relates to their playing ability and not their appreciation of the safety concerns of sport. This distinction has been rejected in subsequent case law.⁶⁶

⁶¹ Moore argues, *ibid* at 24, that the drawbacks of this test include excessive verdicts, increased litigation and a chilling effect on participation in sport.

⁶² [1985] 2 All ER 453, [1985] 1 WLR 866. For analysis see McEwan, “Playing the Game; Negligence in Sport” (1986) 130 *SJ* 581.

⁶³ Interestingly, the court did not do as the Irish Supreme Court had done in *McComiskey v McDermott* and tailor the standard specifically to the “reasonable soccer player in all the circumstances” (although it may convincingly be argued that such tailoring will inevitably occur if *all* the circumstances are taken into account).

⁶⁴ See Beloff, at 114, and Griffith-Jones, at 11. See also *Gilsenan v Gunning* (1982) 137 DLR (3d) 252 for a conclusion in a skiing case that there was no negligence in the circumstances because the action was within what was deemed to be the ‘Customs of the Slopes’.

⁶⁵ Alistair Duff, “Reasonable Care v Reckless Disregard” (1999) 7(1) *Sport and the Law Journal* 44.

⁶⁶ Beloff, at 116, suggests that whereas the standard of care should remain the same in all cases and as a matter of principle, equally the level at which the sport is

It has been suggested that a more appropriate approach to the question of standard of care in 'sports cases' would be to reformulate the general standard totally and impose liability only where one player acts with reckless disregard for the safety of another – an approach favoured for example in all but one American states.⁶⁷ It is argued that such a test draws a more satisfactory balance between the legitimate claim of the severely injured plaintiff and the needs of competitive contact sport, which is fast and furious and often replete with split second acts of negligence.⁶⁸ Given, however, that in order to prove negligence in the circumstances of a competitive and fast moving sport, a plaintiff will, as a matter of evidence, necessarily have to show that the defendant's conduct amounted to recklessness,⁶⁹ it is arguable that such a change in approach would make little difference to the law in practice, but rather might constitute a somewhat unpalatable acceptance by the courts that sport is somehow above the law. Equally as shall be discussed later, a more fundamental question may have to be asked as to whether the tort of negligence itself has any role to play where one player has injured another while engaged in a bona fide attempt to play the game.

Whichever test is used, the courts have tended to impose liability only in the most exceptional circumstances - and with considerable concession to the needs and nature of sport and especially to the fact that decisions made on the field of play tend to be split second in nature and not conducive to rational underpinning. On the other hand, the courts are rather more prepared to find negligence on the part of *governing bodies of sport*, in respect of their advance planning for events or for the running of sport – essentially on the basis that such organisations can make their plans in the calm of a boardroom and with due time for consideration thereof.⁷⁰

being played will be one of the circumstances of the event from which standard of care will be deduced.

⁶⁷ Felix, "The Standard of Care in Sport" (1996) 4(1) *Sport and the Law Journal* 32; Duff, "Reasonable Care v Reckless Disregard" (1999) 7(1) *Sport and the Law Journal* 44; Duff, "Reasonable care v Reckless Disregard Revisited" (2002) 10(2) *Sport and the Law Journal* 156; Narol, "Sports Participation Litigation; the Emerging Reckless Disregard Standard" (1991) 1 *Seton Hall Journal of Sports Law* 29; McArdle, at 162; Felix, "Sports Injuries and Civil Liability" 1 (1) *Sports Law Bulletin* 8. This standard was also applied in English cases involving liability of participants for injuries to spectators. See *Wooldridge v Sumner* [1963] 2 QB 43; *Wilks v Cheltenham Home Guard Motor Cycle and Light Car Club* [1971] 2 All ER 369.

⁶⁸ See *Oswald v Township High School District*, 84 Ill App. 3d 723, 406 N.E. 2d, 157.

⁶⁹ This was the approach taken in *Caldwell v Maguire & Fitzgerald* [2001] EWCA Civ 1054, [2001] ISLR 224. See generally Narol, "Sports Participant's Litigation; The Emerging Reckless Disregard Standard" (1991) 1 *Seton Hall Journal of Sports Law* 29.

⁷⁰ See *Watson v BBC* [2001] 2 WLR 1256; *Agar v Hyde* (2000) 201 CLR 552; *Cowan v O'Freaghaille* [1991] 1 IR 389. In March 2003, the Court of Appeal imposed liability for negligence on a rugby referee in respect of a decision taken during a break in play, while saying that very different considerations would have arisen had the decision been taken during the course of play; see *Vowles v Evans* [2003] EWCA Civ 318, [2003] All ER (D) 134.

This article is about inter-participant liability, and in summary we may say that under both Irish and English law, the duty of one sporting participant to another is limited *inter alia* by the fact that s/he is engaged in a lawful if dangerous activity and by the fact that his or her opponent is voluntarily taking part in an activity with foreseeable risks. Whatever the limit and scope of such duty, however, s/he is required to fulfil that duty by acting reasonably in all the circumstances of the sport in which s/he is engaging – which in practice will mean not acting with reckless disregard for the well being of a fellow participant.⁷¹ Moreover, the fact that s/he is playing within the rules or customs of the game (including for example the custom in golf that if your golf ball is heading for another player you warn them through shouting out ‘Fore!’⁷²) will be strongly persuasive – if not conclusive – evidence either that s/he owed no duty to fellow participants not to engage in that particular action or else that s/he was not in breach of any duty that might arise.⁷³ Finally, if s/he is so in breach, then the related question of whether there are any defences that might apply arises – an issue that will be dealt with now.

Defences

The two primary defences to a negligence action are contributory negligence and voluntary assumption of risk. From an Irish perspective the impact on the sports field of the revised doctrine of contributory negligence (more accurately comparative negligence – whereby damages are reduced proportionately to the plaintiff’s responsibility for his own harm) under section 34 of the Civil Liability Act 1961, is as yet somewhat untested in the sporting context.⁷⁴ Equally, as the English Court of Appeal noted in *Smoldon v. Whitworth*,⁷⁵ the mere fact that someone consents to playing in a dangerous sport (and indeed in a dangerous position on the field – the front row of the rugby scrum for example) will not mean that contributory negligence can be successfully pleaded against him, if he is harmed by the negligence or recklessness of another. It is only where he himself helped to bring about the injury that the defence will work. Thus the fact that a golfer is voluntarily present on a golf course will not constitute contributory negligence where another player negligently drives his ball and injures him. However, had the injured party been standing on the wrong fairway/in the line of play or not paid due attention to what was going on around him, contributory negligence could be deemed to exist.⁷⁶

The defence of *volenti non fit injuria* – essentially a claim that the plaintiff consented to the infliction of the harm that he suffered - also underwent fundamental reconstruction in Ireland under the terms of the Civil Liability Act 1961, such that it may now be of virtually no value in a sporting context.

⁷¹ See Beloff, p 113.

⁷² Lunney, “A golfer is not a gentleman” (1998) 6(2) *Sport and the Law Journal* 4.

⁷³ In *Rootes v Shelton*, (at p 34) Berwick CJ argued that adherence to the rules would be merely one circumstance in which the general question of whether a duty existed and the standard of care breached would be inferred.

⁷⁴ See McCaskey & Biedzynski, “A Guide to the Legal Liability of Coaches for a Sports Participant’s Injuries” (1996) 6 *Seton Hall Journal of Sports Law* 7, at 52.

⁷⁵ (1997) ELR 249; [1997] PIQR 133.

⁷⁶ *Feeney v Lyall* (1991) SLT 156, at 159. See Beloff, p 122.

Under section 34(1)(b) *volenti* only applies where the defendant can show that before the impugned act the plaintiff agreed to waive his legal rights in respect of it. Moreover according to Walsh J in *O'Hanlon v. ESB*,⁷⁷ such agreement involves:

“Some sort of intercourse or communication between the plaintiff and the defendants from which it could reasonably be inferred that the plaintiff had assured the defendants that he waived any right of action he might have in respect of the negligence of the defendants.”

Absent such agreement, the plaintiff's consensual participation in, for example, a violent game of rugby, would not activate the defence of *volenti* where he is seriously injured by reason of a foul by an opponent, in that he has not consented to negligence or recklessness from an opponent. A mechanism that has been used in the United States as a result, is to require players to sign releases (surrender for consideration of a right to sue), disclaimers (disavowance of future responsibility of the defendant) or other exculpatory agreements (where one party expressly agrees to accept a risk of harm arising from another's conduct). Equally such clauses have inevitably attracted suspicion on the part of those asked to sign them.⁷⁸

In *McComiskey v McDermott*, the car in which the parties were driving had a notice in its window which read 'all passengers travel at their own risk'. It was claimed that, because the plaintiff had voluntarily become a passenger in the car aware of this notice, the doctrine of *volenti non fit injuria* should apply. This suggestion was, however, rejected on the basis that the plaintiff was aware that when the car had been bought the sign was already in it.⁷⁹ Nonetheless Griffin J intimated that in an appropriate case, getting into a car where there was such a sign on the dashboard might invoke the *volenti* exception.⁸⁰

It may be argued that under the formula in *O'Hanlon v ESB*, it is legitimate to see the requisite 'intercourse or communication' as occurring implicitly – as for example where one player signs up to play for a team in the knowledge that he will be playing against another team in the context of a contact sport. In practice, however, even if such an argument were accepted, parties could be taken to consent only to the risks inherent in playing a game within its rules or at best within its playing culture,⁸¹ and in practice no duty of care arises in respect of activity within such parameters anyway.⁸² Accordingly

⁷⁷ [1969] IR 75, at 91-2.

⁷⁸ See McCaskey & Biedzynski, "A Guide to the Legal Liability of Coaches for a Sports Participant's Injuries" (1996) 6 *Seton Hall Journal of Sports Law* 7, at 54; McArdle, p 165.

⁷⁹ [1974] IR 75, at 87.

⁸⁰ *Ibid*, at 94.

⁸¹ See Duff, "Reasonable Care v Reckless Disregard" (1999) 7(1) *Sport and the Law Journal* 44.

⁸² For the view that the general reluctance of injured players to litigate may stem from a misunderstanding of the *volenti* doctrine see Duff, "Civil Actions and Sporting Injuries" (1994) *NLJ* 639; Grayson, at p 30. See from a US viewpoint Drowatzky, "Assumption of Risk in Sport" (1992) 2(1) *Journal of Legal Aspects of Sport*, p 92.

the impact of the *volenti* doctrine on the sports field will be very limited,⁸³ both in Ireland and also in England, where the courts have consistently pointed out that whereas one may consent to actions that are part and parcel of the game, there is no question of one consenting to negligence on the part of another participant, or indeed a referee.⁸⁴

Vicarious Liability

Finally as we assess the general principles that are relevant to the question of civil liability for foul play on the sports field, the potential impact of vicarious liability should be noted.⁸⁵ Because clubs, or governing bodies or schools, for example, will tend to have more resources than players or teachers or coaches, and will in all probability have insurance policies covering such situations, they may be the more appropriate defendants in any action of this nature.⁸⁶ However, vicarious liability only applies in situations where the employee acts in the furtherance of his employment,⁸⁷ and it is likely that this will not cover instances where injury is intentionally inflicted in a manner that bears no relation to the playing of the sport (and hence to the employment of the sportsman), for instance where one player in a soccer match punches another in an off the ball incident.⁸⁸

The Roy Keane saga is indicative of the tactical problems that arise for clubs in this respect. As we have seen, Alfe Inge Haaland and Manchester City FC were at one stage considering litigation against Roy Keane and Manchester United. Had the matter gone to trial, and had the latter club decided to stand loyally behind its captain, and argued that there was no intentional infliction of injury, then it would have opened itself up to a vicarious liability claim. If it wished to avoid such a claim, it would have had to argue that Keane's tackle on Haaland was neither negligent nor reckless in respect of causing injury, or alternatively to have claimed that the injury inflicted was *intentional* (and therefore the action was not one that could properly be regarded as arising in the course of his employment), thereby leaving Roy Keane facing a serious bill for damages, considerable stigma within the sporting world, and a real chance of criminal prosecution.⁸⁹ Indeed it would also leave Manchester United FC facing pressure to sack its captain and arguably its most important player for gross misconduct on the field of play. In practice because a club's insurance policy will tend to cover legal

⁸³ Beloff, at 122-124; Gardiner and Felix, "*Elliott v Saunders: Drama in court 14*", (1994) 2(2) *Sport and the Law Journal* 1; Duff "Reasonable Care versus Reckless Disregard" (1999) 7(1) *Sport and the Law Journal* 44; McCaskey & Biedzynski, "A Guide to the Legal Liability of Coaches for a Sports Participant's Injuries" (1996) 6 *Seton Hall Journal of Sports Law* 7.

⁸⁴ *Smoldon v Whitworth* (1997) ELR 249, at 267. See generally *Nettleship v Weston* [1971] 2 QB 691 for the view that in England the *volenti* defence will only be activated in circumstances where there is a clear agreement to waive rights.

⁸⁵ Gardiner and Felix, "*Elliott v Saunders: Drama in court 14*" 2(2) *Sport and the Law Journal* 1.

⁸⁶ Beloff, pp 128-129.

⁸⁷ *McCready v Securicor* [1991] NI 229.

⁸⁸ *Watson & Bradford City FC v Gray and Huddersfield Town*, unreported, Queens Bench 26 October 1998. Generally see Duff, "Civil Actions and Sporting Injuries" (1994) *NLJ* 639, at 640.

⁸⁹ Beloff, p 129

expenses connected with negligent (though not intentional) harm caused by employees, it is likely that a club like Manchester United would take the former of the actions outlined above.

Similarly it may well be the case that in the professional context, one participant may owe a duty of care not just to his opponent but also to that opponent's club. Thus in *Watson v Gray*,⁹⁰ the defendant was sued not only by the player whose career was interrupted but also by his club, who claimed a violation of the tort of unlawful interference with contract. Equally in this case the plaintiff club accepted that in order to make out this particular tort, it would have to establish recklessness on the part of the defendant rather than mere negligence and its failure to do so resulted in its case being lost.⁹¹

INTER-PARTICIPANT LITIGATION

It will be remembered that in *Condon v Basi*, the Court of Appeal had concluded that the duty/standard of care required of one participant *viz a viz* another was to act reasonably in the circumstances,⁹² and that a higher standard of care might be required of a player competing at a high level of the game, than would be of a normal run of the mill Sunday league player.⁹³ The next major English case in this area was that of *Elliot v Saunders*.⁹⁴ Here, during a major English soccer match, Paul Elliott of Chelsea FC, and Dean Saunders of Liverpool FC, were challenging for a fifty-fifty ball on the halfway line. Elliott dived in with a flying tackle, hoping to divert the ball away, and a split second later, Saunders, in his attempt to intercept the ball, caught Elliott on the side of his knee, severing his cruciate ligaments and ending his career. Elliott claimed that Saunders deliberately stamped on him, and Saunders claimed that it was Elliott's tackle that was dangerous and that he was merely acting in self defence.

The case is illustrative of the difficulty in establishing liability in respect of a split second incident occurring during the playing of a fast moving sport. A great deal of video evidence (rejected by Drake J as being too two dimensional) and competing expert testimony was presented to the court. However, as far as the judge was concerned, the determining factor was that the match referee had responded to the incident by giving a free kick *against Elliott*. Drake J was simply unprepared to override the referee's decision on the basis of the additional evidence presented before him in the court. Equally, he did reject the proposition, suggested in *Condon v. Basi*, that the standard of care would be different at different levels of sport, concluding

⁹⁰ Unreported, Queen's Bench 26 October 1998. See case notes at 1(6) *Sports Law Bulletin*, p 3 and also 2 (1) *Sports Law Bulletin*, p 5.

⁹¹ See Kevan, "Sports Injury cases: Footballers, Referees and Schools" (2001) *Journal of Personal Injury Litigation* 13, at 142-143.

⁹² See Duff, "Civil Actions and Sporting Injuries" (1994) *NLJ* 639, at 640.

⁹³ For criticism of both these conclusions see Duff, "Reasonable Care v Reckless Disregard" (1999) 7(1) *Sport and the Law Journal*; McEwan, "Playing the Game; Negligence in Sport" (1986) 130 *SJ* 581.

⁹⁴ Unreported, Queens Bench, 10 June 1994. See Gardiner *et al*, *Sports Law*, (2nd ed, Cavendish, London, 2001), at p 699; Gardiner & Felix, "*Elliot v Saunders*: Drama in Court 14" (1994) 2(2) *Sports Law Journal* 1; Felix, "The Standard of Care in Sport" (1996) 4(1) *Sport and the Law Journal* 32.

that the question of whether a particular foul gave rise to liability was a matter to be decided in all the circumstances of a particular case.⁹⁵ Most importantly, the court stressed that a simple mistake by a player, even one that caused serious injury, would not ground liability. Rather the action would have to be so outrageously negligent (even, it may be suggested, reckless) that it blatantly exposed the opponent to the risk of injury. One way of approaching the issue is to say that the negligence must go not to the question of whether a foul was committed, but as to the question of whether injury, of the type that *did* occur, would likely occur. As we shall see these two questions may be indivisible.

The courts seemed to depart from this approach - which is key if sport is to be able to proceed without being stifled by fears of litigation - in immediately subsequent case law. In *McCord v. Swansea Football Club*,⁹⁶ a professional footballer recovered damages (for the first time in an English court) in respect of injury sustained in an 'on-the-ball' incident. Here the plaintiff (a 24 year old professional soccer player with Stockport County) and the second named defendant were involved in a fifty-fifty ball situation; the plaintiff got to the ball a fraction sooner than the second named defendant (measured at one fiftieth of a second) and struck it, whereupon the second defendant's right foot struck the plaintiff's right calf breaking both his bones, causing him considerable pain and ending his career. Like Drake J in *Elliott v Saunders*, Kennedy J studied a video tape of the incident but felt that it was of little evidential value. Moreover, the court was once again subjected to a good deal of conflicting testimony from experts, players, and other witnesses, including former Welsh soccer manager Bobby Gould, who described the tackle as 'disgraceful', and felt that it was intended to injure the plaintiff. On the basis of this testimony Kennedy J found that the plaintiff had been guilty of a "serious mistake or misjudgement,"⁹⁷ and that even making allowances for the speed at which this contact sport was played, the tackle was ". . . inconsistent and unmistakably inconsistent with [the second defendant's] taking reasonable care towards the plaintiff." Kennedy J was keen to point out that this was an exceptional case and that most injuries caused by foul play on a sports field would not be the subject of successful litigation. Moreover, lest any other player assume moral superiority over the defendant, he stressed that "[T]here are very few professional footballers who will assert that they have never fallen below the high standards rightly expected of them."⁹⁸ Whether or not Kennedy J intended to open up the possibility of increased litigation in this area, the real significance of the case lies in the fact that the court was prepared to find liability on the basis merely of a 'serious mistake or misjudgement' - a significant change in approach from that adopted in *Condon v Basi* and *Elliot v Saunders*.⁹⁹

⁹⁵ Unreported, Queens Bench, 10 June 1994, at p 5 of the transcript.

⁹⁶ Unreported, Queen's Bench, 19 December 1996. For analysis see note at (1997) 5(1) *Sport and the Law Journal* 5; *Sports Law Administration and Practice* (March/April 1997) p 7.

⁹⁷ *Ibid.*, at p 10 of the transcript.

⁹⁸ *Ibid.*

⁹⁹ This principle was carried through in *Riddle v Thaler* 1(1) *Sports Law Bulletin* 3, where the defendant - a former Great Britain rugby league scrum half - was ordered to pay in excess of £4,000 in damages and £20,000 in costs for breaking

This change was continued in the next major case, *Watson v Gray*,¹⁰⁰ where the High Court, *per* Hooper J, in a judgement upheld by the Court of Appeal, again imposed liability for a late tackle during a soccer match. Here the plaintiff had been tackled by the defendant and had suffered a ‘career interrupting’ though not a ‘career ending’ injury. The tackle in question was a split second late, but was nonetheless seen as dangerous because ‘forceful and high’. As a result of the tackle the defendant was ‘yellow carded’, but giving testimony afterwards, the referee in the game accepted that he should have been sent off. Once again the plaintiff succeeded on the basis both of the testimony of witnesses and of video evidence, to which the court in this case was far more amenable than had been the case in the *Elliott* and *McCord* cases. What is significant is that, in dismissing the action brought against the defendant by the plaintiff’s employers, the court had concluded that whereas the action by the defendant was negligent, it was not excessively so – and particularly, it could not be regarded as having been reckless.

Liability was also imposed in *Leatherland v Edwards*,¹⁰¹ a case involving uni-hockey (a game played on a small tarmac pitch at a very fast pace, and with a fundamental rule that the ball should not rise above the ground and that sticks should not go above waist height). In this case the plaintiff was hit in the eye by the defendant’s stick when the latter raised it dangerously high. The defence admitted that the action was a violation of the rules of the game but claimed that it did not amount to negligence in the legal sense. The court disagreed and found that there had been a serious and dangerous breach of a safety rule of the sport, in a situation where it was reasonably foreseeable that such breach would cause serious injury.

More recently, however, the courts appear to have moved back to a less intrusive position. In *Caldwell v Maguire & Fitzgerald*,¹⁰² the appellant was former professional jockey Peter Caldwell who had been injured while riding in a two mile novice hurdle race at Hexham. The two defendants plus a fourth jockey, Derek Byrne, had been leading the field after the second last hurdle of the race. Approaching a left hand bend, the two defendants took a line that allowed no room for Mr. Byrne’s horse – behaviour that would typically constitute careless racing. In order to avoid a collision, Mr. Byrne’s horse veered sharply to the right and into the line taken by Peter Caldwell’s horse. As a result, Mr. Caldwell was brought to the ground and suffered a career ending injury.

The Court of Appeal accepted that the activities of the defendants constituted careless riding¹⁰³ – indeed they had been suspended for three days following a stewards’ inquiry. It refused to conclude, however, that such carelessness

the jaw of an opponent while tackling him in a manner which would not be particularly unusual in rugby matches (he had been acquitted on a criminal charge).

¹⁰⁰ Unreported, Queens Bench, 26 October 1998. See Jan Levinson, “Foul! Tackling the Problem of Violence in Sport” *Sports Law Administration and Practice* (November/December 1998) 7.

¹⁰¹ Unreported, Queens Bench, 28 November 1998. See 2 (1) *Sports Law Bulletin* 5.

¹⁰² [2001] EWCA Civ 1054; [2001] ISLR 224.

¹⁰³ *Ibid*, at para. 33.

could of itself generate legal liability, approving the conclusion of the High Court judge that in order to establish breach of duty, the plaintiff would essentially have to show reckless disregard on the part of the defendants, (with *reckless* disregard in this context representing merely an indication of the practicalities of the evidential burden in the case).¹⁰⁴

The Court of Appeal took a contrary view to that adopted in the *McCord* and *Watson* cases, concluding that it was not possible to characterise as negligence, “momentary carelessness”, “error of judgement”, “oversight” or “a lapse which any participant might be guilty of in the context of a race of this kind.” Indeed the court saw this as indicating that such incidents were a constituent element of “all the circumstances of the case” from which both the duty and the standard of care might be judged. Thus Judge LJ concluded that “accidents and the risk of injury, sometimes catastrophic, both to horses and jockeys are an inevitable concomitant of every horse race”¹⁰⁵ and the mere fact that a horse is ridden in the breach of the rules of racing does not *per se* establish liability.

A similar line of reasoning was adopted by the court in *Pitcher v. Huddersfield Town Football Club*.¹⁰⁶ Here, during a professional soccer match, the plaintiff and the second named defendant were running together for a ball, towards the first named defendants team goal, with the plaintiff slightly in front of and to the left of the defendant. The plaintiff passed the ball and a split second later (measured at 0.2 of a second) the defendant ‘lunged’ at him with his left leg and struck him on the outside of his right knee, causing an injury so serious that he could no longer play professional football. Once again, the court heard evidence from a wide range of expert witnesses, but here it refused to find the defendant liable, concluding that:¹⁰⁷

“Mistimed tackles do occur; players do make contact with other players without reaching the ball. If they do and the referee sees it, it will lead to a free kick. The rules are designed to discourage late tackles. They are, however, a common feature of the game and they do not lead automatically to a sending off. There must be something more [to generate legal liability]...I am satisfied this was not something more; this was a misjudged attempt to get to the ball...I am not prepared to say on the balance of probabilities that this tackle was anything more than an error of judgement nor am I prepared to find that [the defendant] was guilty of negligence.”

This passage seems to encapsulate the current position in England,¹⁰⁸ and in light of the approach in *McComiskey v McDermott*, in all probability it also

¹⁰⁴ *Ibid*, at para. 11.

¹⁰⁵ *Ibid*, at para 32.

¹⁰⁶ Unreported, Queens Bench, 17 July 2001.

¹⁰⁷ *Ibid*, at p 22 of the transcript.

¹⁰⁸ In *Gaynor v Blackpool FC* [2002] 7 CL 432, a county court imposed liability on a player for a reckless tackle that broke the plaintiff’s leg. The court expressly followed the precedent in *Caldwell v Maguire*, but it is submitted that its decision sits uneasily with that precedent, and may be of limited legal authority. See Ryan, “Winner all Right? Liability in Tort for Injury in Sport” (2003) 6 *Trinity College Law Review* 155.

represents the position which an Irish court would take should an appropriate case arise. The judicial differentiation between a tackle that in playing terms constitutes even serious foul play, and a tackle that in legal terms activates the tort is of pivotal importance. Breach of the standard of care generally, after all, involves a person acting unreasonably *in all the circumstances*. Yet in *Watson* and indeed in *McCord*, the court in giving judgement against a tackle which was only a split second late in the context of a fast moving game, ignored the circumstances and seemed to be heading towards a negligence *simpliciter* standard. Despite Kennedy J's protestations in *Watson* that his decision would not open floodgates, this is precisely what it might have done. Misjudged and mistimed tackles occur routinely within contact sport, and it is a matter of extreme good fortune for those involved in such incidents when serious injuries do not occur as a result. Yet all persons competing in such sport are aware of these facts, and such awareness combined with the social utility of such activities *must* impact on the creation and operation of duties therein.

DISTINGUISHING FOUL PLAY AND INTENTIONAL FOUL PLAY – FROM NEGLIGENCE TO TRESPASS.

The move away from the approach in *McCord v Swansea* and *Watson v Gray*, as witnessed in decisions like *Caldwell v Maguire & Fitzgerald* does, however, carry a broader implication, namely that apart from the situation where one player injures another by his failure to know or understand and hence to apply the safety rules of sport, the tort of negligence has simply no application to contact sports, although it may be relevant in the context of non-contact sports.

As has been noted, if a player who fouls an opponent is to be found liable under the tort of negligence, his conduct must be unreasonable in that it creates a risk not just that the safety rules of the game will be violated, but also that serious injury will occur. Yet the reality of contact sport is such that where safety rules are at issue, the two types of risk are indivisible. After all, the nature of safety rules – created to protect sports participants from injuries – is such that their violation generates an inevitable risk of injury to a fellow participant. It is also true that every time a contact sport player interacts with an opponent, there is a risk that he may violate such a safety rule, in that however skilled he is, there remains the risk, given all the circumstances, that he will make a fractional misjudgment of timing and commit, for example, a foul tackle. Thus in cases like *Pitcher v Huddersfield Town*, and *Watson v Gray* the foul tackle that was the subject of the litigation was estimated to be late by only 0.2 of a second.

A combination of these two factors leads to an inexorable conclusion, namely that wholehearted participation in all of the dimensions of a contact sport carries a foreseeable risk, however slight, of causing serious injury. So for example, every time one participant in a contact sport takes the decision to effect a challenge on another there is a risk that he will make an error and commit a foul, and a further risk that this will lead to injury. Moreover, this conclusion is sufficiently obvious that all participants in contact sports can be taken to be aware of it – even if it is not something that is at the forefront of their minds during the game.

From the standpoint of the tort of negligence, however, this is hugely significant. As we have seen the standard of care required of participants in sport is that they act reasonably in the circumstances. The circumstances of contact sport include, however, not only its fast moving and often hyper-competitive nature, but also the awareness on the part of participants that in principle every challenge or tackle that they make carries with it a risk of causing serious injury. Hence it is not excessively dogmatic to conclude that by engaging in such an action, (and thereby ignoring such a known risk) a player is acting unreasonably and indeed with reckless disregard for the safety of his opponent. In other words in principle *every* tackle in a contact sport – even one that does not cause harm – is a negligent action because the player knows that it *might* have resulted in a foul that caused harm. And in principle, every time such a negligent act does cause harm, then it should be capable of being the basis of a successful action in negligence.

Of course were the courts to adopt such an approach, this would kill contact sport, and that would be a bad thing as far as public policy is concerned. To avoid deeming the playing of contact sport to be by definition a negligent action, however, then the law must accept that by definition it is *not* a negligent action – irrespective of the fact that it inevitably creates the risk of injury. What this entails as far as the question of civil liability for on field violence is concerned, is that whenever one player (for example) challenges for a ball in the context of a *bona fide* playing of the game (*i.e.* with the exclusive aim of successfully tackling his opponent while not violating the safety rules of the game) and by accident he commits a foul and causes injury, he should be deemed not to have acted negligently, no matter how clumsy or ill advised the (foul) tackle was, because even grievous mistakes of this kind are part and parcel of the game.¹⁰⁹ A player should instead only be held civilly liable where he intentionally fouls (as distinct from intentionally injures) another player, and does so for reasons outside the objectives and spirit of the game – be it the desire to soften up an opponent, to exact revenge, to commit a professional foul, to prevent another player scoring, or simply to occasion injury. This was the case for example in *Parry v McGuckin*,¹¹⁰ in which a footballer was held liable for the commission of a foul tackle in which, according to the weight of evidence he had deliberately ‘gone for man and ball’ and had set out to cause injury.¹¹¹

¹⁰⁹ In similar vein, from a duty of care analysis, we may conclude either that a contact sport participant owes a clear duty to all other participants not to engage in any on the ball challenges, because the (foreseeable) risk of causing injury is sufficiently high that this should be the case, or alternatively that the fact that players consensually engage in an activity aware that they may suffer injury as a result of wholehearted participation by another player, means that that other player owes no duty not to cause injury by such wholehearted participation.

¹¹⁰ Unreported, High Court, 22 March 1990.

¹¹¹ In *Brady v McMahon* (decision of the Master of the High Court, 12 December 2002) in the context of an application for discovery in a civil action for an injury occasioned on the field of play, the Master appeared to endorse this approach holding that:

“In cases involving sporting injuries, I would suggest that the man in the street would judge that all players know and accept the risk of sporting injuries up to and including so-called professional fouls. . . The same cannot be said of an on pitch *assault* (emphasis added). Of course the assaulter is liable.”

Approaching the issue from this perspective also provides a satisfactory answer to the question of the limits of assumption of risk in contact sports. We have seen earlier that an approach that says that a player only assumes the risks of activity within the rules of the game is unrealistic and could seriously chill the playing of sport, whereas an approach that says that he assumes the risks of and indeed consents to activity within both the rules and the playing culture of the game may legitimise unsavoury and anti-social actions that occur within a sport with a notoriously violent playing culture. If the civil law concerns itself only with an intentional violation of the safety rules of sport that is underpinned by a motivation unconnected to the playing objectives or spirit of the game, then the approach to assumption of risk that this would foster would satisfy both of these policy centred concerns. A player would be deemed to consent to and assume the risks inherent in all activity on the field of play other than that which:

- is intentionally outside the safety rules of the game;
- is underpinned by a motivation unrelated to the playing of the game; and
- involves the intentional or reckless infliction of physical harm on an opponent – as all foul play inevitably does.¹¹²

This approach gives a good deal of leeway to sport, in the sense that it does not allow for routine violations of the rules of the game to be seen as torts, yet it also makes an important concession to public policy by prohibiting acts that are wrongful, in the sense of being intentionally and maliciously caused. Therefore, to take the example of a ‘high tackle’ in rugby football, such an action would not generate civil liability where the perpetrator simply (and however negligently) made a mistake in his attempt to effect a lawful tackle, but would do so where the tackler knowingly tackled high, in an attempt to injure or intimidate his opponent.

This understanding of the role of tort law on the field of play spawns one further inevitable consequence, namely that inter-participant claims of this nature should be brought not under the heading of negligence, but rather under the heading of trespass to the person – and specifically the tort of battery.¹¹³ The difference between the two torts, and the reason why trespass is more suited to the sports field than negligence is perhaps best explained by a brief statement of the elements of the latter. In theory, a trespass involves a wrongful act¹¹⁴ causing direct harm to the plaintiff, whereas an act of

The precise impact of this decision remains uncertain, especially as the Master did not refer to any decided case law in making his decision. For analysis see Cox, “Sports law” in Byrne & Binchy, *Annual Review of Irish Law 2002* (Round Hall, 2003).

¹¹² Obviously an exception to this rule arises in the case of boxing but this presents concerns beyond the scope of this article.

¹¹³ Generally see Jones, *Textbook on Torts* (8th ed, 2002, Oxford University Press), 507; McMahon & Binchy, *The Irish Law of Torts*, chap 22; Lunney & Oliphant, *Tort Law: Text and Materials* (Oxford University Press, 2000), 29.

¹¹⁴ See Gregory, “Trespass to Negligence to Absolute Liability” (1951) 37 *Va LR* 459.

negligence involves a wrongful act that creates a risk of harm to another.¹¹⁵ From the sporting perspective this is a most important distinction. As we have seen the playing of *all* contact sport creates a *risk* of injury to an opponent. In order for liability to be imposed the action of the player should extend beyond the creation of a risk, to the direct occasioning of harm.

Moreover, whereas the tort of trespass is actionable *per se*,¹¹⁶ nonetheless it requires a contact with the plaintiff that extends beyond the normal sort of jostling that one might expect on a busy street.¹¹⁷ There is no completely sound explanation as to why this should be the case beyond the obvious demands of public policy,¹¹⁸ but it is certainly arguable that the victim of a trespass may not consent to the same, and that by voluntarily walking in a busy street, one implicitly consents to the inevitable resulting jostling.¹¹⁹ Similarly, of course, it might be argued that, for example, every rugby tackle is a trespass to the person, being an intentional and direct contact. But it has been concluded that players can not be seen as consenting to the type of foul play that should be capable of generating civil liability – namely direct contact with another person intentionally in violation of the safety rules of the game, which is underpinned by a motivation unrelated to the simple playing of the game.

Finally, in England and probably in Ireland the act must be intentional (albeit probably not necessarily hostile),¹²⁰ although the trespasser need only intend to commit the trespass, and not necessarily to cause any particular harm as a result.¹²¹ As was mentioned earlier, the intentional element of the tort of trespass is the principal reason why in practice, sports related cases are almost always brought under the heading of negligence. It has been submitted, however, that intention to breach the rules should be seen as an essential element of any sports field action that will generate civil (or indeed criminal) liability. Accordingly trespass may be the appropriate heading under which to bring such a claim. Apart from the fact that such a rule and such an approach would accord more fully with the reality of the situation from the perspective of the player, it also has the advantage of stressing the

¹¹⁵ See McMahon & Binchy, at p 619; Jones, at p 507. Thus if I throw a log onto the road and it hits someone thereby causing direct injury there is a trespass to the person, whereas if I throw the same log onto the road and it obstructs the highway and injures someone, I have caused no direct harm to the person and hence an action against me should be taken in negligence. *Reynolds v Clarke* (1725) 1 Str 634, 636.

¹¹⁶ McMahon & Binchy, at 616; Jones, at 507.

¹¹⁷ *Cole v Turner* (1704) 6 Mod 149; *Wilson v Pringle* [1987] QB 237 (CA); *F v West Berkshire Health Authority* [1990] 2 AC 1; *R v Brown* [1994] 1 AC 212; *R v Broadmoor Special Hospital Authority*, *Times*, 5 November 1997.

¹¹⁸ In *Collins v Wilcock* [1984] 3 All ER 374, it was suggested that trespasses to the person would not include those contacts that could be seen as “. . . falling within a general exception embracing all physical contact which is generally acceptable in the ordinary conduct of daily life.”

¹¹⁹ *Wilson v Pringle* [1987] QB 237 (CA); *Hegarty v Shine* (1878) 4 LR IR 288.

¹²⁰ *Fowler v Lanning* [1959] 1 QB 426; *Wilson v Pringle* [1986] 2 All ER 440; *Letang v Cooper* [1965] 1 QB 232; *Stubbings v Webb* [1993] AC 498; *Devlin v Roche* [2002] 2 ILRM 192. For analysis see Byrne & Binchy, *Annual Review of Irish Law 2001*, 435.

¹²¹ *O’Conghaile v Wallace* [1938] IR 526. See McMahon & Binchy, 615.

objective of the law as far as sport is concerned, namely to combat intentionally violent play rather than to curb the legitimate competitive instincts of players by targeting errors of judgement.¹²²

CONCLUSION – HAALAND V KEANE

This then is the backdrop against which Alfe Inge Haaland may attempt to sue Roy Keane – although all the indications are that such an action (which will definitely not be taken by Manchester City FC) is unlikely to be taken by Mr. Haaland, largely because of the fact that however bad Keane’s tackle was, it was not the cause of the injury that looks to have ended Mr. Haaland’s career.

Had such causation been present and an action taken, then it is submitted that the case may well have been too close to call. Many people talking about Keane’s autobiography were under the impression that he had admitted attempting to injure Haaland, or indeed attempting to end his career. In fact he did neither. He admitted:

- (a) to having had a vendetta against Haaland – something that was well known anyway;
- (b) to having hit him hard – which carries a particular colloquial meaning within sport – such that it is quite possible in a tackle in soccer to ‘hit someone hard’ while keeping within the rules of the game;
- (c) to having been less than sorry about the injury – something that is plainly not in violation of any law.

None of these things by themselves could support a legal action of the kind threatened – especially in view of the fact that Mr. Keane’s ghost writer had maintained that he had used considerable poetic license in writing that part of the chapter – an admission that would carry more weight in a courtroom than it did at the FA disciplinary hearing in respect of the publication of the book (as distinct from the tackle itself). Indeed in a courtroom, Keane himself could claim that the comments were just bravado, and that in fact he had not intended to anything more than effect a legitimate tackle. The point is that the book would certainly not of itself prove the argument that Mr. Haaland was trying to make and hence that the case would have to focus primarily on the tackle and only secondarily on the comments made therein.

In this respect, the tackle was plainly a bad one. Keane was immediately sent off (admittedly by a referee who was not averse to sending Keane off!) and commentators were united in their view of its rashness – especially as most such commentators were all too aware of the fact that there was bad blood between Keane and Haaland. On the other hand, in Keane’s favour, it can be pointed out that this *was* an on the ball incident which was not much worse than many tackles witnessed annually on playing fields up and down the country, and, whatever he said in the book, the ball *was* there when Keane went for the tackle - which was only fractionally late. It is submitted that whether the case was taken in negligence (by reference to the decision in

¹²² See Gearty, “Tort Liability for Injuries Incurred during Sports and Pastimes” (1985) 44 *CLJ* 371, at 372.

Caldwell v Maguire) or in trespass as outlined in the last section, the case would turn on the question of Roy Keane's intentions as he tackled Haaland – and specifically whether he intended to make contact with the latter, or whether his exclusive objective was winning the ball and he simply made a mis-judged challenge. In this respect the comments in the book would obviously be used in evidence against him. Whether they would be sufficient to persuade a court that the foul committed by Keane was in fact intentional – and that his objective was to get man and ball – is a matter for conjecture.

As has been mentioned, it seems unlikely at the time of writing that such an action will now be taken and certainly it is virtually inconceivable that Keane will face criminal prosecution. He is perhaps somewhat fortunate in this regard. All of the above analysis is indicative of the fact that players of sport at all levels, as well as coaches, referees and organizers must exercise an appropriate level of care if they are to avoid unwanted litigation. Sport, like any other area of social activity is within the jurisdiction of the law, and a moment's response to the onset of a 'red mist'¹²³ might have unforeseen and deeply unfortunate consequences.

¹²³ In his column in the *Daily Telegraph* (22 September 2001) Roy Keane admitted that in hitting out at Newcastle United captain Alan Shearer, for which he was sent off, he had acted foolishly. He said that he was trying to control himself but that on occasion "the red mist descended," at which point "50,000 people would not be able to stop me bursting into a fit of rage."

IMPLEMENTING EUROPEAN AGRICULTURAL LAW IN NORTHERN IRELAND AND THE REPUBLIC OF IRELAND: A COMMON POLICY?

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INTRODUCTION

Many parallels can be drawn between the agricultural industries of Northern Ireland and the Republic of Ireland. In terms of agricultural production, climatic and geographical factors dictate that grassland livestock farming predominates in both areas.¹ A common history of land reform has also created similar agricultural structures.² Farms in Northern Ireland and the Republic of Ireland are largely owner-occupied, family run businesses. Average farm sizes are similar, being 34.5 hectares in Northern Ireland and 29 hectares in the Republic of Ireland.³ These compare to average farm size of 59.3 hectares within the United Kingdom as a whole and 18.1 hectares within the European Community.⁴ In economic terms, agriculture's role within the economy has been gradually diminishing throughout western Europe. However, agriculture continues to play a more important economic role within both Northern Ireland and the Republic of Ireland than in many other areas.

In terms of policy regulation, the agricultural policies of both areas have been subject to the Common Agricultural Policy ('the CAP') since Northern Ireland and the Republic of Ireland joined the then European Economic Community in 1973. In the light of the similarities that exist between the agricultural industries of Northern Ireland and the Republic of Ireland, this article sets out to examine whether the introduction of the CAP can be said to have resulted in the operation of a truly common policy in both areas. The article begins by examining the development of the CAP and also the manner in which the initial policy operated. It then highlights the fact that this initial policy has been the subject of major reforms. In the light of these reforms the article proceeds to study the manner in which the current policy operates in both Northern Ireland and the Republic of Ireland. Finally the article concludes with a consideration of the possible effects of further recent reforms upon this 'common' policy.

¹ Collectively beef and dairy farming account for 64% of all agricultural production in Northern Ireland and 67% of agricultural production in the Republic of Ireland—see European Commission, *The Agricultural Situation in the European Union 2001 Report* (2002), para 3.1.15.

² See JCW Wylie, *Irish Land Law* (3rd ed, 1999), p 27.

³ In respect of Northern Ireland, see Northern Ireland Statistics and Research Agency, *Northern Ireland Annual Abstract of Statistics 2000* (2000), p 156. In respect of the Republic of Ireland, see European Commission, *supra* n 1, para 2.0.1.2.

⁴ European Commission, *supra* n 1, para 2.01.12.

Creating A Common Agricultural Policy

The CAP developed gradually in the 1960s as a consequence of decisions taken within the Council of Ministers.⁵ The EC Treaty itself merely committed the original Member States to the future establishment of a common policy on agriculture and set out the objectives that this policy should strive to meet.⁶ Under Article 33 of the EC Treaty the following objectives were established:⁷

- “ (a) to increase agricultural productivity by promoting technical progress and by ensuring the rational development of agricultural production and the optimum utilisation of the factors of production, in particular labour;
- (b) thus to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture;
- (c) to stabilise markets;
- (d) to assure the availability of supplies;
- (e) to ensure that supplies reach consumers at reasonable prices.”

In reality, both these objectives and the CAP that subsequently emerged were strongly influenced by the pre-existing national agricultural policies of the original Member States.

Article 34(1) of the EC Treaty provides for the CAP to operate through the “common organisation of agricultural markets.” Additionally, Article 34(1) states that, depending on the product involved, this could be achieved in one of three ways:

- “ (a) the adoption of common rules on competition; or
- (b) the compulsory co-ordination of pre-existing national market organisations; or
- (c) the creation of a European market organisation.”

The approach favoured by the European Community (‘the Community’) was to establish European market organisations (‘common organisations’) for particular agricultural produce. Each common organisation was established by a Council regulation, creating Community wide rules designed to govern production and trade in that particular agricultural commodity. As noted recently by McMahon, these regulations were based upon three basic principles: common prices, common financing by the Community budget and the requirement that Member States would give preference to Community produce over that from third countries.⁸

⁵ See A Fearn, “The History and Development of the CAP 1945-1990” in C Ritson and DR Harvey (eds), *The Common Agricultural Policy* (2nd ed, 1997), pp 18-21.

⁶ See arts 3 and 33 (ex art 39) of the EC Treaty.

⁷ For an analysis of these objectives see J A McMahon, “The Common Agricultural Policy: From Quality to Quantity” (2002) 53 *NILQ* 9 at 10.

⁸ *Ibid*, at 14.

The manner in which individual common organisations operated varied from commodity to commodity. For produce that was particularly important within the agricultural economies of the original Member States, such as cereals, dairy produce and beef, the regulations that established these common organisations set out comprehensive provisions.⁹ For example, in relation to cereals, Council Regulation 120/67 provided for the Council of Ministers to annually set three separate prices that would then apply within each Member State.¹⁰ A maximum price, the 'target price', established the maximum price that market prices should reach within the Community. Market prices that exceeded this target price would be regarded as being unreasonable, for both consumers and producers.¹¹ The target price was then linked to a 'threshold price', which represented the minimum price at which produce could be imported into the Community. Agricultural commodity prices within the Community were generally higher than those that prevailed upon world markets. This stemmed from a decision taken by the Council of Ministers in 1964 to establish common Community prices for cereals at a relatively high level, in excess of world prices.¹² Decisions taken by the Council in relation to other common organisations also followed this example.¹³ Subsequent annual reviews of the agricultural prices fixed by the Council also maintained this disparity. In this situation, the danger existed that the price of imported produce would undercut that of Community produce. To prevent this from happening the Council of Ministers annually established the 'threshold price.' This threshold price was set at a level that equalled the target price. Once the threshold price had been established the European Commission then had the task of fixing import levies that were to be added to the price of imported produce. These levies brought the price of that produce up to the level of the threshold price. Not only did this prevent imported produce from undercutting the price of Community produce, it also acted as a safety value for Community market prices. In the event that Community market prices should threaten to exceed the target price established by the Council of Ministers, they would then be restrained by the fact that these prices would then exceed that of imported produce. Finally the Council of Ministers also set an annual 'intervention price.' This was intended to represent the minimum price at which farmers would be able to earn a reasonable income. Member States were required to designate national bodies, known as 'intervention bodies', who would then purchase produce at the intervention prices, to provide either a floor for market prices or a market for produce that farmers had otherwise been unable to sell. The intervention system was also supported by a system of export refund payments. Given that Community prices were generally above world prices, export sales were only likely to be achieved at the lower world price. Exporters were therefore paid export refunds to compensate them for the

⁹ In respect of cereals see Council Regulation 120/67 (OJ [1967] 2269), in relation to dairy produce see Council Regulation 804/68 (JO [1968] L148/13) and in relation to beef see Council Regulation 805/68 (JO [1968] L148/24).

¹⁰ JO [1967] 2269. See further FG Snyder, *Law of the Common Agricultural Policy* (1985), p 74; JA Usher, *Legal Aspects of the European Community* (1988), p 53; and JA McMahon, *Law of the Common Agricultural Policy* (2000), p 47.

¹¹ In accordance with the requirements of art 33(1)(e) of the EC Treaty.

¹² R Fennell, *The Common Agricultural Policy: Continuity and Change* (1997), p 30.

¹³ *Ibid.*

difference between Community prices and this lower export price. The European Community refunded Member States in respect of the expenditure that they had incurred in making eligible intervention and export refund payments.

Not all common organisations made the same comprehensive provision for farmers. Some provided a more limited range of measures in order to protect farm incomes. For example, in the case of eggs and poultry meat, the price of cereals, which form a major component of the feedstuffs for poultry, formed the bedrock for these common organisations.¹⁴ The common organisations for eggs and poultry meat did not provide any mechanism for internal price support. Instead they provided for a variable levy to be attached to the price of imported produce. This levy was calculated on the basis of a comparison, between the price on the European Community and world markets, of the cost of the amount of grain that would be required to produce a specific quantity of either eggs or poultry meat.

A Common Price Policy?

The common organisations operated on the basis that the Community would fix common prices that would apply uniformly throughout the Community. In reality, however, in the absence of a common currency, it was necessary to convert these prices into national currencies. Initially the European Community expressed agricultural prices in 'units of account'. The unit of account was an accounting device, providing a mechanism through which common prices could be calculated. One unit of account was worth 0.88867088 grammes of fine gold, the official value of the US dollar.¹⁵ Each unit of account was then translated into national currencies on the basis of the official exchange rate of each currency.¹⁶ This system therefore provided genuinely common commodity prices throughout the Community. Unfortunately this common price regime only remained in place until 1969. In that year, as a result of political turbulence, the French Franc was devalued and the German Mark re-valued.¹⁷ For domestic political reasons the French and German governments, however, refused to immediately adjust their agricultural commodity prices to reflect these currency changes. Instead they agreed to gradually readjust these prices. This period led to the introduction of 'green currencies' in which the official exchange rates of the French and German currencies differed from the currency rates that were used to calculate the price of agricultural commodities. Also during that time, the Member States individually began to abandon the system of fixed exchange rates and adopted floating exchange rates for their currencies.¹⁸ They likewise refused immediately to adjust agricultural commodity prices

¹⁴ The common organisation for poultry eggs was first established by Council Regulation 122/67 (JO [1967] 2293) and that for poultry meat was first established by Council Regulation 123/67 (JO [1967] 2301). See further Snyder, *supra* n 10, p 87; Usher, *supra* n 10, p 85; and McMahon, *supra* n 10, p 50.

¹⁵ Council Regulation 129/62 (JO [1962] 2553), Art 1. See Usher, *supra* n 10, p106 and Snyder, *supra* n 10, p 106.

¹⁶ *Ibid*, art 2.

¹⁷ See E Neville-Rolfe, *The Politics of Agriculture in the European Community* (1984), p 254.

¹⁸ *Ibid*, p 256.

to reflect changes in the official valuation of their currencies. Consequently, when the United Kingdom and the Republic of Ireland joined the Community, 'green currencies' were widely used.¹⁹ This remained the situation until relatively recently. In the 1980s and 1990s the Community introduced a number of legislative measures designed to reduce the gap between 'green currencies' and official market rates.²⁰ The introduction of the single currency in 1999 meant that the twelve participating Member States would no longer need to convert Community prices into national currencies. However, for the three Member States not participating in the Euro, agricultural commodity prices were to be converted into national currencies at official market exchange rates.²¹ This finally spelt the end for 'green currencies'.

The stark reality is that the 'green currencies' originally utilised by Member States prevented CAP production policy from developing into a genuinely common policy. Instead they provided a mechanism whereby the Member States were able to pursue national agricultural policies within what was supposedly a common European policy. For example, by devaluing their 'green currency' rates, countries could increase the amounts received by farmers in their national currencies. Technically Member State's 'green currency' rates were fixed by the Council of Ministers, on the basis of a proposal submitted by the Commission. In practice however, individual Member States would indicate to the Council whether and to what extent they wished to amend their 'green currency' rate.²²

The fact that individual Member States converted agricultural prices into national currencies at differing 'green currency' exchange rates also had the potential to cause grave trade distortion within the Community.²³ The Community took direct action in an attempt to prevent this. A series of taxes and subsidies, known as monetary compensatory amounts ('mcas') were introduced in agricultural trade between Member States.²⁴ These mcas were based upon the difference between agricultural prices when converted into national currencies at market exchange rates and at 'green currency' rates. Countries whose 'green currency' rates were above market rates (and who consequently had lower agricultural prices) would grant mcas as a subsidy on imports but apply them as a tax levied on exports ('negative mcas').²⁵ Conversely, countries whose 'green currency' rates were below market rates had higher agricultural prices. In these situations, mcas were charged as a

¹⁹ Indeed Council Regulation 222/73 (OJ [1973] L27/4) made provision for such 'green exchange rates' to be created for in relation to the United Kingdom and Republic of Ireland as a result of their accession to the European Community.

²⁰ See JA Usher, *EC Agricultural Law* (2nd ed, 2001), p 120 and McMahon, *supra* n 10, p 83.

²¹ Council Regulation 2799/98 (OJ [1998] L349/1).

²² Snyder, *supra* n 10, p 110.

²³ See D Colman and R Roberts, "The Common Agricultural Policy" in MJ Artis and N Lee (eds), *The Economics of the European Union* (1994), p 96.

²⁴ Initially introduced by Council Regulation 974/71 (OJ [1971] L106/1), they became a compulsory part of the CAP under Council Regulation 2746/72 (OJ [1972] L291/148).

²⁵ Snyder, *supra* n 10, p 112.

tax levied on imports and granted as a subsidy on exports ('positive mcas').²⁶ These mcas remained a feature of the CAP until 1993.²⁷ In that year, through Council Regulation 3813/92, mcas were abolished.²⁸ It was no coincidence that the abolition of mcas at that time followed the establishment of the single market.

The practical impact of 'green currency' rates was that Member States were able to prioritise differing national policy objectives. One of the clearest examples of this can be seen in relation to the policies adopted in the Republic of Ireland and Northern Ireland. Historically both the Republic of Ireland and Northern Ireland have been net exporters of agricultural produce. In the case of the Republic of Ireland, the CAP offered the prospect of higher agricultural prices and, through the operation of intervention purchasing and export refunds, guaranteed markets. Such outcomes fully accorded with the government policy of expanding agricultural exports.²⁹ In contrast, in Northern Ireland, government policy adopted a different view of the CAP. From the time of the accession of the United Kingdom to the Community until the introduction of the Northern Ireland Assembly in 1998, Northern Ireland had been governed by direct rule. Although Northern Ireland was an agricultural exporting region, central government policy was based upon the needs of the United Kingdom as a whole. Since the United Kingdom as a whole was a large importer of agricultural produce, government policy generally prioritised the maintenance of lower produce prices.³⁰

In the period up to March 1979, when the Republic of Ireland joined the Exchange Rate Mechanism, the Republic of Ireland and the United Kingdom maintained parity in relation to the market rates of their currencies. However, this was emphatically not the case in relation to their green currency exchange rates. Throughout the 1970s devaluations of the green pound in the Republic of Ireland ensured that green pound exchange rates in the Republic of Ireland were consistently below those that existed in Northern Ireland. For example, one commentator points out that in 1977 agricultural prices were 25 per cent higher in the Republic of Ireland than in the United Kingdom.³¹ Indeed, during this period the devaluation of the 'green pound' in the Republic of Ireland was actually the largest source of price increases for agricultural produce, having greater impact even than increases in common prices agreed by the Council of Ministers.³² Ironically, as a consequence of a change of government policies in both the United

²⁶ *Ibid.*

²⁷ However, the Council of Ministers did take steps in the 1980s to reduce the discrepancies between national green currency rates and the corresponding levels of mca taxes and subsidies. See McMahon, *supra* n 10, p 85 and Usher, *supra* n 20, p 123.

²⁸ OJ [1992] L387/1.

²⁹ See S Sheehy, JT O'Brien and S McClelland, *Agriculture in Northern Ireland and the Republic of Ireland* (1981), p 16.

³⁰ See W Grant, "The Politics of the Green Pound 1974-1979" (1991) 19 *JCMS* 313 at 315.

³¹ D Norton, "Smuggling under the Common Agricultural Policy: Northern Ireland and the Republic of Ireland" (1986) 24 *JCMS* 297 at 299.

³² SJ Sheehy, "The Common Agricultural Policy and Ireland" in PJ Drudy and D McAleese (eds), *Ireland and the European Community* (1984), p 85.

Kingdom and the Republic of Ireland, this position was reversed in the early 1980s. During this period domestic agricultural prices were higher in Northern Ireland than in the Republic of Ireland.

In Northern Ireland and the Republic of Ireland, perhaps the most noticeable effect of the differing values of green currency rates and of the operation of mcas, was the encouragement that this gave to cross border smuggling of livestock.³³ When green currency rates were lower, so that agricultural prices were higher in the Republic of Ireland than in Northern Ireland, exporters of livestock from the Republic of Ireland to Northern Ireland received a mca subsidy. These livestock, which had been exported through legal channels, could then be smuggled illegally back into the Republic of Ireland, thus avoiding the mca levy that was imposed on such movements. From there the animals could again be exported through legal channels and the process repeated again. In the early 1980s, when green currency rates were higher in Northern Ireland than in the Republic of Ireland, this same process operated in the reverse direction. Additionally, the differing green currency rates also impacted upon the market itself. During the 1970s when higher agricultural prices existed in the Republic of Ireland, an incentive existed for Northern Ireland based livestock to be smuggled into the Republic of Ireland, thereby avoiding the mca levy, and sold at the higher prices prevailing in the Republic of Ireland. Consultants employed by the then Department of Agriculture for Northern Ireland predicted that this activity would lead to the closure of meat plants in Northern Ireland.³⁴ Consequently, the Council of Ministers authorised the United Kingdom government to introduce a subsidy payment, the Meat Industry Employment Scheme (MIES), in an effort to discourage livestock smuggling from Northern Ireland.³⁵ MIES increased the payment received by farmers whose cattle were slaughtered in abattoirs in Northern Ireland. All in all, as one commentator noted, “the CAP was being applied, contrary to the spirit of the EC Treaty, in a way that actually mitigated against market integration.”³⁶

Structural Problems In European Agriculture

In establishing the CAP, the Community went beyond a mere price and production based policy. Article 33(2)(a) of the EC Treaty required that, in working out the CAP, the Community should also take account of, *inter alia*:

“ . . . the particular nature of agricultural activity, which results from the social structure of agriculture and from structural and natural disparities between various agricultural regions.”

One of the principal problems faced by the architects of the CAP was that a large number of marginally viable farms were in existence within the six

³³ See Norton, *supra* n 31.

³⁴ PA Management Consultants Ltd, *Green Pound Differential and the Northern Ireland Meat Industry*. (1977) quoted in Norton, *supra* n 31.

³⁵ Council Decision, 14th March 1977 (unreported). See also Department of Agriculture for Northern Ireland, *Northern Ireland Agriculture, 36th Report of the Department of Agriculture* (1977), p 9.

³⁶ L McClements, “Economic Constraints” in D Watt (ed), *The Constitution of Northern Ireland: Problems and Prospects* (1981), p 107.

original Member States.³⁷ The European Commission, in putting forward its proposals for a common agricultural policy, noted that low agricultural incomes were often related to defective agricultural structures.³⁸ The Commission sought to develop an agricultural structural policy to tackle these issues. This agricultural structural policy became known as the 'second pillar' of the CAP. In developing this policy, however, the Community had to address a number of difficult issues. In the first place, as acknowledged by Article 33(2) of the EC Treaty, the nature and extent of agriculture's structural problems varied from region to region. Additionally, most Member States had already developed their own national policies and were reluctant to agree to the creation of a common policy. For these reasons it proved difficult for the Community to develop a truly common structural policy.

Initially, under Regulation 17/64, the Community's structural policy merely sought to co-ordinate pre-existing national policies.³⁹ The Community subsequently adopted more specific legislative measures.⁴⁰ The Community's agricultural structural policy developed from a number of directives adopted by the Council of Ministers in the 1970s. In 1972 the Council adopted three structural directives. Directive 72/159 authorised Member States to provide financial assistance for investments upon farms that were suitable for development.⁴¹ Directive 72/160 authorised Member States to make financial payments to farmers and farm-workers aged between fifty-five and national retirement age.⁴² This directive sought to encourage the amalgamation of farms owned by retiring farmers with neighbouring farms, to create more economically viable farm units or the use of the land for non-agricultural purposes. Thirdly, directive 72/161 authorised Member States to provide socio-economic education and training to farmers.⁴³ In addition to the 1972 directives, the Council, in 1975, adopted Directive 75/268 on mountain and hill farming in less favoured areas.⁴⁴ This directive sought to maintain farming and rural communities in disadvantaged rural areas and also sought to prevent damage to the countryside caused by the abandonment of agricultural land. Member States who wished to implement the directive were required to designate the areas within which it was to apply. Within these designated areas Member States were then authorised to make direct income payments to farmers or to provide financial

³⁷ B Hill, *The Common Agricultural Policy: Past, Present and Future* (1984), p 26.

³⁸ European Economic Community Commission, *Proposals For The Working Out And Putting Into Effect Of The Common Agricultural Policy, In Application of Art 43 of the Treaty Establishing the European Economic Community* (1960), p 15.

³⁹ OJ [1964] 586/103.

⁴⁰ In the interim period the Community rejected the European Commission proposal 'Agriculture 1980' (COM [68] 1000) which, in the period to 1980, aimed to reduce the number of people working in agriculture within the Community by five million and to reduce the amount of land used for agriculture, within the Community by five million hectares. See E Neville-Rolfe, *The Politics of Agriculture in the European Community* (1984), chap 9.

⁴¹ OJ [1972] L96/1.

⁴² OJ [1972] L96/9.

⁴³ OJ [1972] L96/15.

⁴⁴ OJ [1975] L128/1.

grants for farm development and diversification into tourist or craft industry programmes.

Unlike in the case of expenditure upon intervention purchasing or the payment of export refunds, Member States did not obtain a full refund of their expenditure under these directives. Typically, each of the four directives provided for Member States to receive a refund of only 25 per cent of eligible national expenditure on these measures.

The three 1972 directives were intended to be inter-linked.⁴⁵ Farmers could obtain advice about the viability of their farms. Those who stayed in agriculture could then take advantage of training schemes operated by their national administrations under Directive 72/161 and apply for financial assistance for farm developments available under Directive 72/159. Alternatively, farmers aged between fifty-five and national retirement age, who decided to leave the industry would be entitled to benefit from Directive 72/160. Similarly, farmers who amalgamated the lands of these out-goers into their farms could also benefit from financial assistance under directive 72/159 in developing the enlarged farms. In practice, however, the Member States record in implementing these directives was somewhat fractured. Indeed one commentator has noted that:

“While eventually every Member State applied Dir. 72/159, the same is not true of the other two directives. Denmark, Greece and Luxembourg did not apply the retirement Directive; Greece, Ireland and Luxembourg did not appoint socio-economic advisors; and Greece and Luxembourg did not operate farmer-training schemes under Dir. 72/161. All three Directives were dominated by a small group of countries: the UK and Germany received over half of the funds for modernisation; Germany received 70 per cent of the retirement funds, and France received 77 per cent of the funds under directive 72/161.”⁴⁶

The extent to which particular measures were adopted within individual Member States depended upon various factors. These included the efficiency of Member States’ public administrations in developing and adopting national schemes.⁴⁷ An additional factor was the willingness of national treasuries to provide the necessary financial support. The net result was that the measures introduced by the 1972 directives were in practice often not widely taken up in areas that had the poorest agricultural structures. Regional variation in the operation of Community structural policy was also accentuated by additional Community measures targeted at particular regions. For example in relation to the Republic of Ireland the Community adopted Council Directive 78/628 and Council Regulation 2195/81 which sought to encourage drainage operations in less favoured areas in the west of

⁴⁵ See Fennell, *supra* n 12, p 220.

⁴⁶ *Ibid*, p 223.

⁴⁷ *Ibid*, p 224.

Ireland.⁴⁸ Similarly, Council Regulation 1942/81 sought to stimulate agricultural development within less favourable areas of Northern Ireland.⁴⁹

The four initial agricultural structural directives introduced in the 1970s remained in operation until 1985. In that year they were replaced by Council Regulation 797/85, on improving the efficiency of agricultural structures.⁵⁰ This regulation itself was subsequently repealed and replaced.⁵¹ By the late 1990s the European Community's agricultural structural policy was set out in Council Regulation 950/97.⁵² Throughout this period, although the range of structural measures available to Member States was widened, the four measures introduced in the original directives remained at the heart of Community policy. However, the Community learned from the uneven implementation of the initial directives. Consequently, in subsequent legislation, the question as to whether to implement a particular measure remained largely at the discretion of the Member States. For example, under Council Regulation 797/85 the provision of aid for on-farm investment was the only compulsory measure that Member States were required to implement. As had originally been the case, the Community continued to provide only partial funding for these measures. The extent of the Community's contribution was, however, increased. It normally provided reimbursement of up to 50 per cent of the total cost of these measures. However, this figure was increased to 75 per cent where the expenditure had been incurred within regions designated as having objective one status.⁵³

Although agricultural structural policy became known as the second pillar of the CAP, it can be seen that, in reality, it merely provided a common framework within which Member State practice varied widely. Equally, the European Community's agricultural structural measures must also be viewed in context. In terms of European Community expenditure, agricultural structural measures played only a peripheral role within the CAP. In 1969 the European Commission had envisaged that 30 per cent of the Community's expenditure upon agriculture would have been incurred in financing structural measures.⁵⁴ In reality spending on structural measures never reached these proportions. For example in 1985 spending on

⁴⁸ See Council Directive 78/628 (OJ [1978] L206/5) and Council Regulation 2195/81 (OJ [1981] L214/5).

⁴⁹ OJ [1981] L197/17.

⁵⁰ OJ [1985] L93/1.

⁵¹ Council Regulation 797/85 (OJ [1985] L93/1) was originally replaced by Council Regulations 2328/91 (OJ [1991] L218/1) and 2079/92 (OJ [1992] L215/91) which themselves were subsequently repealed and replaced by Council Regulation 950/97 (OJ [1997] L142/1).

⁵² Council Regulation 950/97 (OJ [1997] L142/1) on improving the efficiency of agricultural structures.

⁵³ See Council Regulation 2052/88 (OJ [1988] L185/9) on the task of the Structural Funds, art 13. By virtue of art 8 of this Regulation objective one regions were those "whose per capita GDP. . . is less than 75% of the Community average." Both Northern Ireland and the Republic of Ireland were designated as objective one areas under the regulation.

⁵⁴ European Commission, "Memorandum on the Reform of Agriculture in the European Economic Community" (1969) *Bulletin Supplement 1*, p 29.

Community expenditure on structural measures accounted for only 3.5 per cent of Community spending on agriculture.⁵⁵

Reforming The CAP

Since its inception, the CAP has undergone a number of reforms. During the 1980s reforms were introduced within individual common organisations and with respect to individual structural measures. These reforms were largely driven by the Community's recognition of the fact that agricultural production was exceeding its market requirements in virtually every sector. In this position the Community's commitment to fund both the purchase of surplus produce and the payment of export refunds had a profound effect upon the Community budget. For example, by 1980 Community expenditure on the CAP was accounting for some 73 per cent of the entire Community budget.⁵⁶ Perhaps the best known reform from this period, that is still in existence today, was the introduction of the milk quota in 1984.⁵⁷ Indeed the introduction of the milk quota provides a further example of how national disparities can arise within the CAP. In this case, negotiators representing the Republic of Ireland secured additional quota rights for its farmers, on the grounds of the importance of the dairy sector within the national economy. This caused political controversy in Northern Ireland, where the United Kingdom government initially failed to secure similar concessions for farmers there.⁵⁸

In addition to the measures adopted in the 1980s, two substantive reforms have occurred more recently. These were the MacSharry reforms adopted in the 1992 and the 'Agenda 2000' reform measures adopted in 1999.⁵⁹ Unlike previous reforms, these reform packages each introduced measures that simultaneously affected a number of areas of agricultural policy. They also varied from previous reforms in that they were profoundly affected by both agricultural issues and also by broader reforms within Community policy making. In relation to the agricultural policy issues, both the 1992 and 1999 reform packages continued to reflect the Community's desire to limit the influence of the CAP upon the Community budget. Additionally they were also influenced by international negotiations concerning agricultural trade. In 1992 the MacSharry reforms sought to prepare the CAP for commitments given in international trade negotiations that later culminated in the 1994 GATT Agriculture Agreement.⁶⁰ Subsequently the 'Agenda 2000' reforms

⁵⁵ Calculated by the author from European Commission, *The Agricultural Situation in the Community 1987 Report* (1988), p T83.

⁵⁶ Colman and Roberts, *supra* n 23, p 99.

⁵⁷ See Council Regulation 856/84 (OJ [1984] L90/10) and Council Regulation 857/84 (OJ [1984] L90/13).

⁵⁸ See P Hainsworth, "The European Community as a Policy Arena in Northern Ireland" in ME Connolly and S Loughlin (eds), *Public Policy in Northern Ireland: Adoption or Adaptation?* (1992), p 93.

⁵⁹ The MacSharry reforms were named after Raymond MacSharry, the European Commissioner for Agriculture at the time they were negotiated. 'Agenda 2000' was the title of a package of reform proposals initially published by the European Commission in 1997.

⁶⁰ For a detailed analysis see T Josling, S Tangermann and T Warley, *Agriculture in the GATT* (1996).

were also partially motivated by the fact that further international discussions were due to take place. The 'Agenda 2000' reform measures were also influenced by a desire to reform the CAP ahead of the eastern expansion of the EC and by recognition of a need to reform agricultural structural policy to reflect the fact that agriculture was no longer the predominant employer in most rural areas.⁶¹ The reforms also coincided with the introduction of broader considerations that have influenced all the Community's policy areas. For example, the amendment of the EC Treaty by the Single European Act in 1986 imposed a requirement upon the Community to ensure that environmental protection requirements became a component of all substantive policies.⁶² Following subsequent amendments by the Treaty on European Union and the Treaty of Amsterdam, the EC Treaty today contains the stronger requirement:

"Environmental protection requirements must be integrated into the definition and implementation of the Community's policies . . . in particular with a view to promoting sustainable development."⁶³

Just prior to the Single European Act, the Commission itself, in conducting a comprehensive review of agricultural policy, had noted that agriculture was:

"[A] cause – and some times even as the major cause of the extinction of species of flora and fauna and of the destruction of valuable ecosystems such as wetlands, and in some cases have increased risks of ground and surface water pollution."⁶⁴

It can therefore be seen that agricultural policy reforms would have to address this issue. Similarly, the Single European Act also introduced the concept of subsidiarity, as a consideration upon which Community environmental action should be based.⁶⁵ Subsequently, following the amendment of the EC Treaty by the Treaty on European Union, subsidiarity was raised to a general principle that the Community is today required to apply "in all areas which do not fall within its exclusive competence."⁶⁶ In these areas the Community should only take action ". . . if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of scale or effects of the proposed action, be better achieved by the Community."⁶⁷ Ironically, the European Commission initially identified the operation of the common organisations as being areas of exclusive Community competence within which the principle of subsidiarity would not apply.⁶⁸ In practice, however,

⁶¹ See European Commission, *Agenda 2000: Volume 1, For a Stronger and Wider Union* and Vol 2, *The Challenge of Enlargement*, COM (1997) 2000 Final.

⁶² Art 130(r)(2) as inserted into the EC Treaty by the Single European Act 1986.

⁶³ Art 6 of the Consolidated EC Treaty.

⁶⁴ European Commission, *Perspectives for the Common Agricultural Policy*, COM (1985) 333/2 Final, p 50.

⁶⁵ Art 130(r)(4) of the EC Treaty as amended by the Single European Act.

⁶⁶ Art 5 of the consolidated version of the EC Treaty, as also amended by the Treaty of Amsterdam.

⁶⁷ *Ibid.*

⁶⁸ See Communication by the European Commission to the Council of Ministers and the European Parliament Outlining Proposals For The Application of the Subsidiarity Principle: *Bulletin EC 2/2 10* (1992), p 121.

the Community institutions have adopted a more liberal approach in addressing issues of subsidiarity in relation to the operation of the common organisations. In contrast considerations of subsidiarity have always been an element of the Community's agricultural structural policy. Here there was a need for Community legislation, to prevent market distortion through independent national measures. However, at the same time, the Community also needed to take account of the differing structural needs of various regions as well as Member State opposition to a centralised policy. In relation to the operation of the common organisations, the move to enable Member States to tailor policy measures to particular local circumstances was most pronounced within the Community's 'Agenda 2000' reforms. For example, in its proposals for those reforms, the European Commission noted that:

"A new more decentralised model has. . . to be developed which gives the Member States the means of settling a number of issues for themselves by taking better account of the characteristics of a given sector or a given set of local conditions.

But such a development in this direction needs to be carefully controlled so as to avoid any risk of distorting competition or renationalising the CAP.

This means that the greater freedom granted to Member States must be exercised within a framework of shared, clear and precise ground rules, using a Community financing system and based on rigorous controls."⁶⁹

The Common Organisations Today

The CAP today continues to make provision for agricultural production and trade through the operation of common organisations. Over twenty such common organisations presently exist, covering the principal sectors of agricultural production within the Community. However, the reforms referred to above have altered the manner in which individual common organisations operate. It has been noted that in both Northern Ireland and the Republic of Ireland beef farming and dairy farming are of central importance to the agricultural economy. Similarly in the Community as a whole beef and dairy produce account for 24 per cent of all agricultural production.⁷⁰ As can therefore be imagined, the common organisations concerning both beef and dairy produce have both been in the forefront of the reforms.

To a large extent the reforms introduced common measures that applied equally throughout the Community. The practical effect of these measures has been to reduce the level of market protection provided to farmers. For example, as part of its GATT commitment, the Community replaced variable

⁶⁹ European Commission, *Proposals for Council Regulations Concerning the Reform of the Common Agricultural Policy*, COM (1998) 158 Final, p 3.

⁷⁰ European Commission, *The Agricultural Situation in the European Union 2001* (2002), para 3.1.1.

import levies with fixed customs duties.⁷¹ Additionally, in order to reduce the gap between agricultural prices within the Community and upon world markets, the Community lowered agricultural prices such as the intervention prices set for beef and dairy produce. Similarly, the introduction of restrictions upon the availability of intervention purchasing has transformed the intervention system into a safety net that operates in adverse market conditions, rather than simply a market for surplus produce. Following these reforms, agricultural expenditure now accounts for 47 per cent of the Community budget.⁷² Farmers have been compensated by the Community for these changes, through an extension in the availability of direct payments. Such payments had originally been introduced in the 1980s for sheep farmers.⁷³ Beef farmers have also been eligible to receive a number of direct payments such as beef special premium, suckler cow premium and slaughter premium.⁷⁴ Elsewhere, arable farmers have, since 1992, been eligible to receive Area Compensatory payments.⁷⁵ From 2005 a dairy premium will be introduced for dairy farmers.⁷⁶ In each case, these payments are today made at fixed rates and in accordance with common criteria set out in the regulation establishing each common organisation. For example, in relation to beef farming, special beef premium is available to farmers twice in the life of up to ninety steer cattle. In contrast suckler cow premium is paid annually on the number of eligible suckler cows maintained by each farmer and slaughter premium is available in respect of eligible cattle that are either slaughtered or exported from the Community. The common nature of these payments is also emphasised by the fact that the regulations governing the operation of the common organisations generally provide that they are subject to Community state aid laws. This prevents Member States from introducing additional payments without first obtaining the approval of the

⁷¹ See Council Regulation 3290/94 (OJ [1994] L349/105) in particular Annex VII, art 14 and Annex VIII, art 10, applying respectively to the common organisations for dairy products and for beef.

⁷² European Commission, *The Common Agricultural Policy: 2000 Review* (2001), p 17.

⁷³ The common organisation in sheepmeat was only established in 1980, under Council Regulation 1837/80 (OJ [1980] L183/1). This common organisation was distinct from the other common organisations for livestock produce in that it did not seek to support market prices. Instead a direct payment, sheep annual premium, was paid to farmers to compensate them for the difference between average market prices and a target, 'basic', price set by the Community. Recent reform of the common organisation in sheepmeat, by Council Regulation 2529/2001 (OJ [2001] L341/3), has now replaced this system with a fixed rate payment for sheep farmers.

⁷⁴ The payment of direct payments to beef farmers is governed by Council Regulation 1254/99 (OJ [1999] L160/21). Originally beef special premium was introduced by Council Regulation 467/87 (OJ [1987] L48/1) to help beef farmers to adjust to restrictions that had been placed upon the availability of intervention purchasing. In the United Kingdom beef special premium was initially paid as a slaughter premium.

⁷⁵ The payment of Area Compensatory payments is today governed by Council Regulation 1251/99 (OJ [1999] L160/1).

⁷⁶ The intention to introduce the dairy premium in 2005 is set out in Council Regulation 1255/99 (OJ [1999] L160/48).

European Commission.⁷⁷ For example, in 1999 the United Kingdom obtained Commission approval for the implementation of the Pig Welfare Slaughter Compensation Scheme, which provided financial assistance to pig farmers in Northern Ireland after fire destroyed Northern Ireland's major pig slaughtering facility.⁷⁸ Similarly, in 2000, the Republic of Ireland also obtained Commission approval for a 'Ewe Supplementary Measure', which provided farmers in western counties with a slaughter premium for mountain ewes.⁷⁹

In addition to these common measures, the Community also adopted other reforms to meet its obligation to integrate environmental considerations into the operation of the common organisations and to take account of considerations of subsidiarity.⁸⁰ The preponderance of social, climatic and geographical conditions that exist throughout the Community ensured that both the nature of agriculture and the environmental problems associated with it also varied widely. This limited the Community's ability to effectively integrate environmental protection considerations into the operation of individual common organisations through common measures. It is principally in these areas, therefore, that national differences have arisen in the operation of the common organisations. The Community initially granted Member States discretion to link direct payments made to sheep and beef farmers with a requirement that farmers receiving these payments should respect appropriate, nationally determined, environmental obligations.⁸¹ In reality the United Kingdom and the Republic of Ireland were two of only three Member States to act upon this discretion.⁸² Subsequently, as part of the 'Agenda 2000' reforms, Council Regulation 1259/99 placed an obligation upon Member States to link all direct payments made to their farmers through the CAP with the requirement that those farmers should respect appropriate environmental obligations.⁸³ However, the Regulation provided for Member States themselves to decide upon the obligations that would be appropriate. The Regulation did, however, set out several options for these national measures.⁸⁴ Member States might make the availability of direct payments conditional upon farmers observing specific environmental conditions. Alternatively, Member States could introduce compulsory environmental commitments, such as regulatory measures, that affect all farmers irrespective of whether they receive direct

⁷⁷ For example, in relation to the common organisation in beef and veal, Council Regulation 1254/99 (OJ [1999] L160/21), see art 40.

⁷⁸ European Commission, *The Agricultural Situation in the European Union, 1999 Report* (2001), p 53.

⁷⁹ European Commission, *The Agricultural Situation in the European Union, 2000 Report* (2002), p 43.

⁸⁰ See further B Jack, "Protecting the European Environment from the Community: the case of Agriculture" (2001) 3 *Env LR* 44.

⁸¹ For special beef premium and suckler cow premium, this discretion was introduced by Council Regulation 3611/93 (OJ [1993] L30/9). In the case of sheep annual premium the discretion was introduced by Council Regulation 233/94 (OJ [1994] L30/9).

⁸² See Court of Auditors, Special Report 14/2000: *Greening the CAP*, OJ [2000] C353/1, p 10.

⁸³ OJ [1999] L160/113, art 3.

⁸⁴ *Ibid.*

payments. Thirdly the Regulation also specifies the possibility that Member States might provide financial support to farmers in return for securing the participation of those farmers upon agri-environmental management agreements.⁸⁵

In both Northern Ireland and the Republic of Ireland the measures adopted have linked the availability of direct payments to an obligation that farmers should observe specific environmental conditions. However, distinctions exist between these national measures. In Northern Ireland, for example, national legislation concerning the availability of direct payments to beef and sheep farmers seeks to prevent environmental damage being caused to land either through overgrazing or the use of unsuitable supplementary feeding techniques.⁸⁶ In relation to overgrazing, where officials of the Department of Agriculture and Rural Development ('DARD') believe that a parcel of land is being overgrazed, they can specify the maximum number of sheep and beef cattle that the farmer concerned will be allowed to keep on that land in the following year. This can also be renewed in subsequent years. This farmer will then only be entitled to receive direct payments in respect of the number of livestock that were specified in the DARD notification. Similarly DARD is entitled to reduce livestock payments in respect of beef cattle and sheep where it is satisfied that the farmer is using unsuitable supplementary feeding techniques which are causing vegetation damage, through excessive trampling or poaching by livestock or excessive rutting by vehicles. In contrast, in the Republic of Ireland, beef and sheep farmers are required to comply with a code of good farming practice, issued by the Department of Agriculture and Food ('DAF'), in return for receiving direct payments.⁸⁷ The code of practice sets out recommendations for good practice in relation to a number of areas of farm practice, not just in relation to overgrazing and the use of supplementary feeding techniques.

Council Regulation 1259/99 also provides for Member States to decide upon the penalties that would be imposed upon farmers who failed to observe stipulated environmental conditions.⁸⁸ These penalties, which could include the reduction of payments or cancellation of eligibility to receive payments, are, however, required to be appropriate to the seriousness of the ecological consequences that would result from a failure to observe these measures.⁸⁹ In Northern Ireland, identical penalties are established by individual regulations.⁹⁰ Where DARD inspectors determine that the number of

⁸⁵ Agri-environmental management agreements are examined later in this article in relation to the operation of Community structural policy within agriculture today.

⁸⁶ In relation to beef farming see the Slaughter Premium Regulations (NI) 2001 (SI 2001/199), regulations 8-9 (as amended by the Slaughter Premium (Amendment) Regulations (NI) 2003 (SI 2003/192)); the Suckler Cow Premium Regulations (NI) 2001 (SI 2001/362), regulations 5-6; and the Beef Special Premium Regulations (NI) 2001 (SI 2001/363), regulations 5-6. In relation to sheep farming see the Sheep Annual Premium Regulations (NI) 1992 (SI 1992/476) as amended by the Sheep Annual Premium (Amendment) Regulations (NI) 1994 (SI 1994/4).

⁸⁷ The Department of Agriculture and Food was also previously known as the Department of Agriculture, Food and Rural Development.

⁸⁸ Council Regulation 1259/99 (OJ [1999] L160/113), art 3(2).

⁸⁹ *Ibid.*

⁹⁰ In accordance with the Regulations detailed, *supra* n 86.

livestock kept upon a particular parcel of land exceed the number set out on a previous notification they are entitled to withhold, or demand the repayment of all or part of the premium payments for any particular year. In situations in which farmers are found to have used unsuitable supplementary feeding techniques then, where the farmer had not been penalised for this in the previous year, DARD has power to reduce their premium payments by 10 per cent. Where the farmer had also been penalised in the previous year, premium payments will be reduced by 20 per cent. However, where the farmer had also been penalised in each of the last two previous years premium payments will be withheld altogether. In contrast in the Republic of Ireland, where a farm inspection by DAF reveals a breach of the code of practice then the penalty imposed varies in relation to the nature of the breach.⁹¹ In some cases, for example where the inspection reveals evidence that slurry has been spread in a manner that creates a significant pollution risk, the code of practice provides for farmers to initially receive a warning. However, subsequent repeat of such practice would result in the farmer losing 10 per cent of the value of any direct payments that the farmer was entitled to receive. In other cases, such as where farm wastes are being collected or stored in a manner that creates a significant pollution risk, DAF will immediately impose this latter penalty. Alternatively the code of practice also provides for situations in which DAF will notify other authorities of situations that they discover, with the result that the farmer concerned may be prosecuted. This arises where the code of practice asks farmers to refrain from conduct which itself would amount to the commission of a criminal offence. This for example, would arise where inspectors discovered that livestock were not appropriately cared for.

In addition to the measures taken to introduce environmental protection requirements into the direct payment regime, the Community's recognition of the principle of subsidiarity has also had an impact on the operation of these payments. In particular, the Community has implemented three measures that have given Member States greater control over the level of specific payments. Previously, beef farmers had been eligible to obtain additional fixed premium payments in return for maintaining livestock densities that were less than or equal to 1.4 livestock units per hectare upon their farms.⁹² However, Council Regulation 1254/99 amended this to provide Member States with discretion.⁹³ They could continue to provide extensification payments to beef farmers who maintained livestock densities that were less than or equal to 1.4 livestock units per hectare.⁹⁴ Alternatively

⁹¹ Department of Agriculture, Food and Rural Development, *Good Farming Practice* (2001), p 11.

⁹² See Council Regulation 805/68 (OJ [1968] L148/24) as amended by Council Regulation 2066/92 (OJ [1992] L215/49). Livestock units are calculated by allocating the following weightings to farm animals: male cattle and heifers older than 24 months, suckler cows and dairy cows: 1.0 livestock unit; male cattle and heifers aged 6 months to 24 months: 0.6 livestock units; sheep and goats: 0.15 livestock units.

⁹³ OJ [1999] L160/21, art 13.

⁹⁴ *Ibid.* Member States were authorised to provide an extensification payment of €100 per suckler cow or cow eligible for special beef premium, to farmers who had maintained a livestock density of 1.4 livestock units or less throughout that year.

Member States were also authorised to provide extensification payments to farmers who achieved more gradual reductions in their livestock densities over the period 2000 to 2002.⁹⁵

Secondly, Council Regulation 1254/99 also introduced the concept of 'national envelopes' into the common organisation for beef.⁹⁶ Direct payments are principally made upon the basis of common criteria. However, with the introduction of national envelopes, each Member State has also been allocated a specific sum of money that it could allocate to beef farmers within its borders in the manner that it felt was most appropriate to their situation. Recently Council Regulation 2529/2001 has also extended the operation national envelopes by introducing a similar measure in relation to sheep farming.⁹⁷

Finally, Council Regulation 1259/99 also introduced the concept of 'modulation'. This gave Member State's discretion to reduce the value of the direct payments that would otherwise be made to their farmers.⁹⁸ Monies saved by this reduction are then reallocated to rural development measures within that Member State. Given that the Community budget only provides a partial refund of Member State's expenditure upon rural development measures, this provision is designed to increase the funds that are available to national treasuries for these measures. Member States are entitled to deduct up to 20 per cent of the value of the direct payments that would otherwise be received by their farmers.⁹⁹

In Northern Ireland and the Republic of Ireland there are marked similarities in the manner in which both jurisdictions have implemented both extensification and national envelope payments to beef farmers. In relation to extensification payments, both DARD in Northern Ireland and DAF in the Republic of Ireland have chosen to avail of the option to make extensification payments on the graduated scale. Therefore, for example, in 2001 the value of the extensification payments made to farmers in both jurisdictions depended upon whether the livestock densities that they had maintained were below 1.6 livestock units per hectare or were between 1.6 and 2.0 livestock units per hectare.¹⁰⁰ Similarly the beef national envelopes available in both Northern Ireland and the Republic of Ireland have both

⁹⁵ *Ibid.* In 2000-2001, Member States were authorised to make payments of €33 per eligible animal to farmers who maintained a livestock density of between 1.6 and 2.0 livestock units and €66 per eligible animal to farmers who maintained a livestock density of less than 1.6 livestock units per hectare. From 2002 this alternative provision then provided for Member States to make extensification payments at the rate of €40 in respect of stocking densities of between 1.4 and 1.8 livestock units and €80 for livestock densities that were less than 1.4 livestock units.

⁹⁶ OJ [1999] L160/21, arts 14-20.

⁹⁷ OJ [2001] L341/3, art 11.

⁹⁸ OJ [1999] L160/113, art 4.

⁹⁹ *Ibid.*, art 4(2).

¹⁰⁰ Extensification payments in Northern Ireland are governed by the Extensification Payment Regulations (NI) 2001 (SI 2001/127). In relation to the Republic of Ireland see Department of Agriculture, Food and Rural Development, *Your Guide to Agenda 2000 Changes in Livestock and Arable Direct Payments* located at <<http://www.gov.ie/daff/Publicat/ag2000/agq5.htm>>.

been used to provide additional payments to farmers within the slaughter premium and suckler premium schemes.¹⁰¹ However, a clear distinction can be drawn between national practice in Northern Ireland and the Republic of Ireland in relation to the discretion to modulate direct payments received by farmers. In the Republic of Ireland the government chose not to act upon their discretion to implement this measure. In contrast in Northern Ireland, as has been the case throughout the United Kingdom, modulation has been introduced.¹⁰² Indeed the United Kingdom treasury is providing additional funding for rural development to match that raised in Northern Ireland through the operation of modulation. Modulation was initially introduced in Northern Ireland in 2001, when direct payments to farmers were reduced by 2.5 per cent.¹⁰³ This reduction was subsequently increased to 3 per cent in 2002 and 3.5 per cent in 2003. Thereafter it was intended that, from 2005, the rate of modulation will rise to 4.5 per cent.¹⁰⁴ Overall, it was anticipated that, in the period 2001 to 2006, £38 million would be deducted from direct payments in Northern Ireland and reallocated to rural development measures.¹⁰⁵

Agricultural Structural Policy Today

As a consequence of the Community's recognition that agriculture is no longer the predominant rural employer, Council Regulation 1257/99 broadened the scope of the second pillar of the CAP.¹⁰⁶ This aspect of the CAP no longer merely focuses upon the structural development of agriculture. Instead it has begun to provide support and encouragement for rural development, thus enabling assistance to be provided for projects that are outside agriculture. However, agriculture still forms an important element within this policy. Additionally the Community has sought to increase its expenditure within this second pillar of the CAP. Rural development measures today account for some 16 per cent of the total Community expenditure upon agriculture.¹⁰⁷

One major change from the Community's initial structural policy for agriculture is that the Community today views agriculture as having a multi-functional role. Beyond food production, Community rural development policy now also provides support for other objectives, such as diversification into non-food crops and the protection of rural landscapes. Indeed,

¹⁰¹ In relation to Northern Ireland see Department of Agriculture and Rural Development Press Release 537/01, "Rogers Announces Use of Beef National Envelope Funds in 2002" and located at <<http://www.dardni.gov.uk/pr2001/pr010537.htm>>. In relation to the Republic of Ireland see Department of Agriculture, Food and Rural Development, *Your Guide to the Changes in Livestock and Arable Aid Schemes* (2002), p 21.

¹⁰² See Department of Agriculture and Rural Development, *Our Services: Grants and Subsidies* (2002) located at <http://www.dardni.gov.uk/grants_and_subsidies/gas_0036.htm>.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

¹⁰⁶ See, for example, European Commission, *Agenda 2000* Volume 1: *For a Stronger and Wider Union*, COM (1997) 2000 Final, p 26.

¹⁰⁷ European Commission, *Mid-Term Review for Sustainable Agriculture*, COM (2002) 394 Final, p 9.

consistent with the Community's obligation to integrate environmental protection requirements within the CAP, this latter objective today assumes a central position within Community rural development policy.

Rural Development Plans

Council Regulation 1257/99 required Member States, or their regional authorities, to design rural development plans, outlining their rural development strategy, for a seven year period from 1st January 2000.¹⁰⁸ These plans required the approval of the European Commission. By the end of 2000 the Member States, or their regional authorities, had submitted some sixty-nine different rural development plans to the Commission.¹⁰⁹ As has been the case since the Community introduced a structural policy within the CAP, the Community budget reimburses only part of the costs incurred by national authorities in implementing these rural development plans. In areas such as Northern Ireland and the Republic of Ireland that are recognised as being either objective one areas or objective one areas in recovery, the Community currently reimburses up to 75 per cent of this expenditure.¹¹⁰ In other areas, the Community budget will only reimburse up to 50 per cent of national outlay.¹¹¹

In designing their rural development plans, Council Regulation 1257/99 sets out a menu of potential measures that national authorities could provide. Any national measures that were adopted outside of this menu would be liable to be declared illegal state aids, unless also approved by the European Commission.¹¹² One measure was compulsory, however, and had to be included within all rural development plans, this was an agri-environmental land management scheme.¹¹³

The Community's Agri-Environmental Land Management Scheme

The origins of the agri-environmental land management scheme can be traced to Council Regulation 797/85 on improving the efficiency of agricultural structures.¹¹⁴ Article 19 of this Regulation gave Member States the discretion to introduce such measures within nationally designated environmentally sensitive areas. These were required to be areas of recognised ecological or landscape importance. Member States were

¹⁰⁸ OJ [1999] L160/80, arts 40-44.

¹⁰⁹ European Commission, *The Common Agricultural Policy: 2000 Review* (2001), p 13.

¹¹⁰ *Ibid*, art 47 and see also *supra* n 53. Following the implementation of Council Regulation 1260/99 (OJ [1999] L161/1) only parts of the Republic of Ireland and no area of Northern Ireland still possess objective one status. However, under Art 6(1) of this regulation, the remaining parts of the Republic of Ireland and Northern Ireland as a whole have been designated as 'objective one areas in recovery'. As a consequence of this they will continue to be eligible to receive objective one funding until 31st December 2005.

¹¹¹ Art 47.

¹¹² See arts 51 and 52. See also *Community Guidelines for State Aid- the Agriculture Sector*, OJ [2000] C 28/2.

¹¹³ OJ [1999] L160/80, art 43(2).

¹¹⁴ OJ [1985] L95/1.

authorised to pay financial aids to farmers, within such areas, who undertook to farm in a manner that protected or improved the environment. Subsequently, Council Regulation 2078/92 placed a mandatory requirement upon Member States to implement agri-environmental land management schemes throughout their territories.¹¹⁵ This Regulation was repealed by Council Regulation 1257/99, which continues to require Member States to construct agri-environmental land management schemes. These schemes are required to promote the following objectives:

- ways of using agricultural land which are compatible with the protection and improvement of the environment, the landscape and its features, natural resources, the soil and genetic diversity;
- an environmentally-favourable extensification of farming and management of low-intensity pasture systems;
- the conversion of high nature-value farmed environments which are under threat;
- the upkeep of the landscape and historical features on agricultural land;
- the use of environmental planning in farming practice.¹¹⁶

The Regulation requires that farmers enter into agreements lasting at least five years under which they make agri-environmental commitments that go beyond good farming practice, which is expected of all farmers.¹¹⁷ In return farmers receive payments that are fixed by Member States, subject to maximum ceilings established by the Regulation.¹¹⁸

The large measure of discretion afforded to Member States, in devising rural development plans which best suited their needs, has created much variation in national practice. The Commission had anticipated that Council Regulation 2078/92 would result in each Member State introducing one agri-environmental land management scheme.¹¹⁹ Instead, it had approved some 158 different schemes by late 1998.¹²⁰ Broad differences existed between these schemes. The Court of Auditors has noted that the willingness of Member States to provide co-funding is an important factor.¹²¹ This would

¹¹⁵ OJ [1992] L215/85, art 3. Member States could either divide their territories into particular zones, within which separate measures would apply, or adopt one central measure that would apply throughout their territory.

¹¹⁶ Council Regulation 1257/99 (OJ [1999] L160/80), Art 22.

¹¹⁷ *Ibid*, art 23.

¹¹⁸ *Ibid*, art 24. Member States are required to calculate the payments on the basis of the income that farmers will forego by entering the scheme, any additional costs that will result from the environmental commitments given by those farmers and also the need to provide a financial incentive to attract farmers into the scheme.

¹¹⁹ See the evidence given by Mr Rheinhard Priebe (Head of the Agri-Environment Programme, European Commission) to the House of Commons Agriculture Committee- House of Commons Agriculture Committee 2nd Report, *Environmentally Sensitive Areas and Other Schemes Under the Agri-Environment Regulation*, Vol II, HC-45II (1997), p 273.

¹²⁰ Court of Auditors, *supra* n 82, p 18.

¹²¹ *Ibid*, p 14.

help to explain, for example, why Austria, despite having only 2 per cent of the European Union's farmland, managed to secure 21 per cent of the European Union's expenditure on agri-environmental land management schemes.¹²² Indeed the European Commission had previously noted that five Member States accounted for some 86 per cent of all Community expenditure on these schemes.¹²³

The Agri-Environmental Land Management Scheme in Northern Ireland and the Republic of Ireland

A divergence of approach is certainly evident in relation to the agri-environmental land management schemes contained within the rural development plans implemented by Northern Ireland and the Republic of Ireland. In Northern Ireland the measures available depend upon whether farms are located within areas designated as being 'Environmentally Sensitive Areas.' The Agriculture (Environmental Areas) Order (NI) 1987 gave the then Department of Agriculture for Northern Ireland ('DANI'), with the consent of the Department of Finance and Personnel, the power to designate such areas.¹²⁴ These designations could be made where DANI believed them to be desirable in order to:

- (1) Conserve and enhance the natural beauty of an area; or
- (2) Conserve the flora and fauna or geological features of an area; or
- (3) Protect buildings or other objects of archaeological, architectural or historic interest in the area.¹²⁵

There are presently five areas designated as being Environmentally Sensitive Areas:

- (i) The Mourne Mountains and Slieve Croob;
- (ii) The Antrim Coast, Glens and Rathlin Island;
- (iii) West Fermanagh and Erne Lakeland;
- (iv) The Sperrin Mountains;
- (v) Slieve Gullion.¹²⁶

Altogether these areas comprise some 20 per cent of the agricultural land area of the province.¹²⁷ All farmers located within these designated areas

¹²² *Ibid.*

¹²³ European Commission, *Report From the Commission to the Council and the European Parliament on the application of Council Regulation 2078/92 on agricultural methods compatible with the requirements of the protection of the environment and maintenance of the countryside*, COM (1997) 620 Final, p 15. The Member States concerned were Austria, Germany, France, Finland and Italy.

¹²⁴ SI 1987/458 as amended by the Agriculture (Environmental Areas) (Amendment) Regulations (NI) 1994 (SI 1994/419).

¹²⁵ *Ibid.*, art 3.

¹²⁶ See the Environmentally Sensitive Areas Designation Order (NI) 2001 (SI 2001/269).

may apply to DARD to join the Environmentally Sensitive Areas ('ESA') scheme. For farmers who are located outside these designated areas, Northern Ireland's rural development plan provides for a Countryside Management scheme to be available. This scheme was implemented by the Countryside Management Regulations (NI) 2001.¹²⁸ The scheme is available to farmers whose farms contain one of the following priority habitats or features:

- (i) semi-natural grasslands;
- (ii) wetlands;
- (iii) upland breeding wader sites;
- (iv) moorland;
- (v) lowland raised bog;
- (vi) coastal farmland;
- (vii) archaeological features;
- (viii) parkland;
- (ix) inter-drumlin loughs.¹²⁹

In contrast to the two-tier system that operates in Northern Ireland, DAF in the Republic of Ireland has introduced one agri-environmental scheme, the Rural Environment Protection Scheme ('REPS'), which is available to farmers nationwide.¹³⁰

In Northern Ireland farmers enter an ESA or Countryside Management agreement for ten years, though either the farmer or DARD may terminate the agreement after five years. In contrast, a REPS agreement has a duration of five years. Distinctions can also be drawn between the commitments required of farmers under these agreements.

In both Northern Ireland and the Republic of Ireland participating farmers are required to observe a number of entry-level commitments in return for receiving agri-environmental payments. In Northern Ireland, the ESA and Countryside Management schemes both set out general commitments that must be observed by all farmers who participate in either scheme.¹³¹ In contrast farmers participating in REPS will be required to comply with an agri-environmental plan that is drawn up specifically for their farm.¹³² This plan incorporates both general commitments that are imposed upon all participating farmers and also specific commitments that are drawn up in relation to their particular farm.

¹²⁷ Department of Agriculture for Northern Ireland, *Environmentally Sensitive Areas: Implementing Agri-Environment Regulation (EEC) No. 2078/92 in Northern Ireland* (1998), p 5.

¹²⁸ SI 2001/43.

¹²⁹ *Ibid*, reg 2 and Sch 3.

¹³⁰ See Department of Agriculture, Food and Rural Development: *The Rural Environment Protection Scheme* (1999).

¹³¹ Environmentally Sensitive Areas Designation Order (NI) 2001, art 4(1) and Sch 2; Countryside Management Regulations (NI) 2001, reg 3(2)(a) and Sch 1.

¹³² See Department of Agriculture and Food, *supra* n 130.

In addition to entry-level commitments, farmers in both jurisdictions can agree to observe additional commitments in return for receiving further payments. In Northern Ireland, the ESA and Countryside Management schemes each provide for farmers to receive further payments in return for accepting additional obligations in relation to the management of the habitats of specific fauna and flora identified in each scheme.¹³³ In the Republic of Ireland, REPS also provides for similar payments, but only in relation to areas of farmland that have been designated as being either of national conservation importance, such as National Heritage Areas and commanages, or as areas of Community importance, such as Natura 2000 sites.¹³⁴ Additionally REPS provides for farmers to receive additional payments for a number of other purposes. Farmers can receive such payments in return for agreeing to rear local livestock breeds that have been recognised by the Community as endangered species, for providing public access to their land for leisure purposes or for either converting to organic farming or agreeing to continue as organic farmers.¹³⁵ No equivalent to these latter measures is available to farmers in Northern Ireland under the ESA or Countryside Management schemes, though a separate measure does provide financial support to farmers who convert to organic farming.¹³⁶ This latter measure is also part of Northern Ireland's rural development programme.

Distinctions can also be drawn between the schemes in other ways. For example, farmers participating in REPS will be required to conduct particular capital works, such as fencing off all watercourses that are adjacent to their lands and maintaining all boundary and roadside fences, hedges and stone walls.¹³⁷ Additionally they may be required to conduct repairs to animal houses or waste storage facilities. These obligations form part of the commitments that participating farmers give in return for receiving basic payments under the scheme. Neither the ESA nor the Countryside Management schemes impose similar capital requirements upon farmers in Northern Ireland. However, both the ESA and Countryside Management schemes do make provision for additional payments to be made to farmers who agree to undertake particular projects upon their farms. Projects recognised for this purpose include the restoration of field boundaries and the erection of protective fences.¹³⁸ The different approach to capital works in both Northern Ireland and the Republic of Ireland may partially be explained by the differing levels of payment that are available to farmers who participate in these schemes. In the Republic of Ireland farmers participating in REPS currently receive a basic payment, in return for accepting entry level commitments, of €165 per hectare on farms of up to twenty hectares and €151 per hectare on holdings over that size.¹³⁹ In the latter situation these

¹³³ Environmentally Sensitive Areas Designation Order (NI) 2001, art 4(4) and Sch 4; Countryside Management Regulations (NI) 2001, reg 3(4)(d) and Sch 3.

¹³⁴ Department of Agriculture, Food and Rural Development, *The Rural Environment Protection Scheme* (1999), p 48.

¹³⁵ *Ibid.*, pp 53-61.

¹³⁶ See the Organic Farming Regulations (NI) 2001 (SI 2001/5).

¹³⁷ Department of Agriculture, Food and Rural Development, *supra* n 134, p 27 and p 33.

¹³⁸ Environmentally Sensitive Areas Designation Order (NI) 2001, reg 4(4) and Sch 5; Countryside Management Regulations (NI) 2001, reg 3(4)(d) and Sch 5.

¹³⁹ Department of Agriculture and Food, *Schemes and Services 2003* (2003), p 54.

payments are available on up to forty hectares, though participating farmers whose farms exceed forty hectares in size will be required to implement the scheme on their entire farms.¹⁴⁰ In contrast in Northern Ireland, the level of the basic payments received by farmers participating in the ESA or Countryside Management schemes varies according to whether their land is classified by DARD as being unimproved, improved or arable land. Farmers receive up to £30 per hectare in respect of unimproved land and up to £25 per hectare in relation to improved or arable land.¹⁴¹ In any case, each of these schemes imposes a ceiling of £1,500 per annum upon the payments that will be made to farmers in Northern Ireland in respect of entry-level commitments.¹⁴²

Other Aspects of Rural Development Relevant to Agriculture

Aside from agri-environmental land management schemes, other contrasts can also be drawn between the rural development plans implemented by Northern Ireland and the Republic of Ireland. Some 70 per cent of all agricultural land in Northern Ireland, and 75 per cent of that in the Republic of Ireland, had been designated as being agriculturally less favourable.¹⁴³ These areas had previously benefited from the Community's less favourable area scheme, described above. It is perhaps therefore no surprise that both the Northern Ireland Executive and the government of the Republic of Ireland chose to continue to make such payments to farmers within these areas. These payments are now implemented in Northern Ireland through the Less Favoured Area Compensatory Allowance scheme and in the Republic of Ireland by the Disadvantaged Areas Compensatory Allowance scheme.¹⁴⁴ These schemes are required to comply with a number of criteria set out in Council Regulation 1257/99. Consequently similarities can be drawn between the schemes adopted in both Northern Ireland and the Republic of Ireland. For example, both require payments to farmers to be based upon the number of hectares that they farm.¹⁴⁵ Equally they both require farmers to

¹⁴⁰ Additionally, farmers whose farms contain designated target areas, such as National Heritage Areas, Natura 2000 sites or commonages, can claim payments on up to 120 hectares where they agree to implement conservation management plans to maintain and regenerate these areas – Department of Agriculture and Food, *supra* n 130, p 48.

¹⁴¹ Environmentally Sensitive Areas Designation Order (NI) 2001, Sch 3; Countryside Management Regulations (NI) 2001, Sch 2.

¹⁴² Environmentally Sensitive Areas Designation Order (NI) 2001, art 4(5); Countryside Management Regulations (NI) 2001, reg 7(2).

¹⁴³ In relation to Northern Ireland, see R Whatmough, "Changing Economics of Hill Farming" in JH Montgomery, JH McAdam and BJ Smith (eds), *The High Country: Land Use and Land Use Change in Northern Irish Uplands* (1988), p 81. For the Republic of Ireland, see Department of Agriculture, Food and Forestry, Annual Report of the Minister for Agriculture, Food and Forestry 1996, p 40.

¹⁴⁴ In Northern Ireland the Less Favoured Area Compensatory Allowance Scheme is currently implemented through the Less Favoured Area Compensatory Allowance Regulations (NI) 2003 (SI 2003/162). In the Republic of Ireland, the Disadvantaged Areas Compensatory Allowance is a non statutory scheme. For details of the latter scheme, see Department of Agriculture, Food and Rural Development, *National Development Plan 2000-2006* (2001).

¹⁴⁵ As required by art 14 of Regulation 1257/99.

agree to farm that land for at least five years from the date of their first payment and to agree to observe good farming practices in order to protect the environment and to maintain the countryside.¹⁴⁶

Council Regulation 1257/99 does, however, also confer sufficient discretion upon Member States to enable significant differences to exist between the Less Favoured Area Compensatory Allowance scheme and the Disadvantaged Areas Compensatory Allowance scheme. For example, participating farmers in both jurisdictions are required to observe codes of good farming practice. These codes, however, are developed nationally. Equally differences exist in the manner in which areas have been designated as being agriculturally less favourable. These differences reflect the methods which had been used to designate the areas that had benefited under the Community's previous less favoured area measures. In Northern Ireland, Less Favoured Area Compensatory Allowances will be paid to farmers located in areas that have been designated as being either 'Severely Disadvantaged' or 'Disadvantaged'.¹⁴⁷ Contrastingly, in the Republic of Ireland, farmers will be entitled to receive Disadvantaged Area Compensatory Allowance if their land is located within an area that has been designated as being within one of four categories. These are that the land is 'more severely handicapped lowland', 'less severely handicapped lowland', 'mountain type grazing' or 'coastal land with specific handicaps'.¹⁴⁸ In each case, the levels of payment received by farmers vary in accordance with the nature of the designation of their land. However, the level of payment equally differs between Northern Ireland and the Republic of Ireland. In Northern Ireland farmers will receive up to £40 per hectare in respect of land that has been designated as being 'Severely Disadvantaged' and up to £20 per hectare in respect of 'Disadvantaged' land.¹⁴⁹ In contrast, in the Republic of Ireland, farmers whose lands are within areas designated as being 'severely handicapped lowland' are entitled to receive €88.88 per hectare, while those whose lands are located in areas designated as being 'less severely handicapped lowland' or as 'coastal areas with specific handicaps' are entitled to receive €76.18 per hectare. Additionally, farmers who farm land designated as 'mountain type grazing' are entitled to receive €101.58 per hectare on up to ten hectares of land and €88.88 per hectare in respect of additional land. Different provisions also apply in respect of a farmer's eligibility to such payments. In Northern Ireland, Less Favoured Area Compensatory Allowance will be paid in full on the first three hundred and fifty hectares of every farm, with payment being reduced to half the prescribed rate on the next one hundred and fifty hectares and to one-quarter of the prescribed rate in respect of any additional land.¹⁵⁰ In contrast, in the Republic of Ireland, farmers are only entitled to receive Disadvantaged Area

¹⁴⁶ *Ibid.*

¹⁴⁷ See the Less Favoured Area Compensatory Allowances Regulations (NI) 2003, reg 7 and Sch.

¹⁴⁸ Department of Agriculture and Food, *Schemes and Services 2003* (2003), p 52.

¹⁴⁹ Less Favoured Area Compensatory Allowances Regulations (NI) 2003, reg 7 and Sch. Payments of £20 per hectare will also be made in respect of common land which falls within either designation.

¹⁵⁰ Less Favoured Area Compensatory Allowances Regulations (NI) 2003, reg 7.

Compensatory Allowance on up to forty-five hectares of land.¹⁵¹ However, given the average sizes of farms in Northern Ireland and the Republic it can be observed that, in practice, farmers in the Republic of Ireland can be expected to benefit from more generous payments under this measure.¹⁵²

Elsewhere, comparisons can also be made of the extent to which the Northern Ireland Executive and the government of the Republic of Ireland have chosen to implement other discretionary measures set out in Council Regulation 1257/99 within their rural development plans. For example, the Regulation continues to make provision for Member States to implement early retirement measures and also enables them to provide financial assistance for young farmers starting off in the profession. In the Republic of Ireland DAF has availed of the opportunity to implement both measures.¹⁵³ Early retirement pensions are available to farmers aged between 55 and 66. Retiring farmers receive annual pensions of €5,403 plus €338 per hectare, up to a maximum of €13,615. The scheme is designed to encourage eligible farmers to transfer their farms to younger farmers who may also benefit from the payment of installation aid for young farmers. This latter scheme is available to farmers aged under 35 who are setting up in farming for the first time. Such farmers are eligible to receive a payment of €9,523 to help defray the expenses that they incur in so doing. In contrast, the Northern Ireland Executive has chosen not to implement either of these measures within its rural development plan. A recent report, however, has indicated that whilst farmers in Northern Ireland would welcome the introduction of both measures, a strong economic case only existed for a scheme which provided assistance for young farmers who were setting up in farming.¹⁵⁴ It may therefore be that a future rural development plan may seek to incorporate this measure.

Further Reform

On 26th June 2003 the Council of the European Union reached agreement upon a further package of reforms that will, in the near future, affect the operation of the CAP. In substance, this package continues to provide for national measures, concerning agricultural production and rural development, to operate within a common framework. In practice, however, that framework will provide even greater scope for national differences to evolve in relation to the operation of the CAP. Indeed, building upon the regionalisation of rural development planning, the new framework will also enable regional differences to evolve in the manner in which Community agricultural production measures are implemented within individual Member States.

¹⁵¹ Department of Agriculture and Food, *Schemes and Services 2003* (2003), p 37.

¹⁵² As outlined in the introduction to this art, average farm size in Northern Ireland is 34.5 hectares and in the Republic of Ireland is 29 hectares.

¹⁵³ See Department of Agriculture, Food and Rural Development, *National Development Plan 2000-2006* (2001).

¹⁵⁴ P Caskie, J Davis, D Campbell and M Wallace, *An Economic Study Of Farmer Early Retirement And New Entrant Schemes For Northern Ireland* (2002).

Direct Payments to Farmers

The measures agreed upon by the Council have developed from proposals initially put forward by the European Commission.¹⁵⁵ The legislation was published in the Official Journal on 21st October 2003.¹⁵⁶ Perhaps the most radical aspect of the Commission's initial proposals was that they envisaged that the direct payments which farmers currently receive through the operation of several common organisations, should be replaced by a single payment. Additionally the Commission proposed that this payment should be decoupled from production so that, for example, the entitlements of livestock farmers would not be linked to the size of their current livestock herds. The Commission noted that such a move towards decoupled payments would complete the shift in the focus of Community support measures, from product to producer, which had begun with the introduction of partially decoupled payments in 1992 and 1999.¹⁵⁷ Additionally, the Commission suggested that the fact that these payments were not determined by farmers present production levels would also help to integrate environmental protection considerations into the CAP.¹⁵⁸ Farmers would have less incentive to maximise their production levels, thereby removing a source of potential damage to the environment. Today Council Regulation 1782/2003 provides for a single payment scheme to be introduced by 1st January 2005.¹⁵⁹ Equally, 'where specific agricultural conditions warrant', the Regulation authorises Member States to delay the introduction of this single payment until 1st January in either 2006 or 2007.¹⁶⁰ This latter provision serves to illustrate the degree of flexibility that will be introduced by this regulation.

The single payment scheme introduced by Council Regulation 1782/2003 mirrors the Commission proposals in the sense that it is intended to apply instead of the various arable and livestock payments that are currently received by farmers. The payment is to be calculated upon an historic basis. For established farmers this means that it will be based on an average of the total payments received by those farmers, under the present payments regime, in the calendar years 2000, 2001 and 2002.¹⁶¹ Each Member State will also be required to ensure that the total amount expended upon the single payment scheme within that Member State does not exceed a national ceiling established by the Regulation.¹⁶²

The measures introduced for the new single payment scheme do, however, depart from the initial Commission proposals in several respects. It is in this area that there will be considerable scope for both national and regional

¹⁵⁵ See European Commission, *Mid Term Review For Sustainable Agriculture*, COM (2002) 394 Final and European Commission, *A Long Term Perspective For Sustainable Agriculture*, COM (2003) 23 Final.

¹⁵⁶ OJ [2003] L270.

¹⁵⁷ European Commission, *Mid Term Review For Sustainable Agriculture* COM (2002) 394 Final, p 19.

¹⁵⁸ *Ibid.*

¹⁵⁹ OJ [2003] L270/1, arts 33 and 156.

¹⁶⁰ Art 71.

¹⁶¹ Art 38.

¹⁶² Art 41.

differentiation. Member States must decide, by 1st August 2004 at the latest, whether they wish to apply the single payment scheme on a regional or a national basis.¹⁶³ In the United Kingdom, the government has announced that the scheme will be introduced on a regional basis with agriculture departments in England, Scotland, Wales and Northern Ireland each introducing their own measures.¹⁶⁴ Member States, such as the United Kingdom, which adopt a regional approach will be required to divide the national ceiling, established for the single payment scheme, into separate regional ceilings.¹⁶⁵ Thereafter regional agricultural authorities will have several options in relation to the manner in which the single payment scheme might operate within their region.

One option available is that, rather than implementing a single payment scheme that is based upon actual historic production, regional authorities may elect to calculate the payments made to farmers on the basis of a common regional rate. This would arise because Council Regulation 1782/2003 enables the single payment to be calculated by dividing the monies available amongst farmers purely on the basis of the amount of eligible land that they farm.¹⁶⁶ Equally, as a variation to this area based approach, the Regulation would authorise a situation in which the level of payment received by each farmer would vary, not only in accordance with the amount of eligible land that each farmed, but also according to the number of hectares that were under grassland, permanent pasture or other agricultural use in 2003.¹⁶⁷ This would enable national or regional authorities to place different financial values upon each land use and to calculate individual payment entitlements on that basis.

Alternatively, Council Regulation 1782/2003 would also enable national or regional agricultural authorities to introduce a single payment scheme that operates alongside slimmed down versions of present arable area payments and livestock headage payments.¹⁶⁸ This would require them to reduce the level of the payments that they would otherwise have made under the single payment scheme and to pay out the monies saved by this reduction as arable area payments and livestock headage payments. This hybrid scheme would continue to link the level of payments made to livestock farmers to their present livestock numbers. The Commission in its proposals for a decoupled single payment never envisaged such a situation.

Council Regulation 1782/2003 enables national and regional authorities to consider a variety of options. For example, they would be entitled to introduce measures that enabled them to continue paying up to 25 per cent of the portion of the national or regional ceiling for the single payment scheme that related to current arable area payments as an arable area payment.¹⁶⁹ Similarly, national or regional authorities are also entitled to retain up to 50

¹⁶³ Art 58.

¹⁶⁴ See Department of Agriculture, Food and Rural Affairs, "Third consultation on options under the CAP reform agreement."

¹⁶⁵ Art 58(3).

¹⁶⁶ Art 59.

¹⁶⁷ Art 61.

¹⁶⁸ Art 64.

¹⁶⁹ Art 66.

per cent of the portion of the national or regional ceiling that corresponds to the headage payments currently paid to sheep farmers.¹⁷⁰ They would then be able to pay these monies to farmers, on the basis of the number of eligible sheep that they owned, in a manner similar to the current sheep annual premium scheme. National or regional agricultural authorities would also be entitled to retain, to varying degrees, the direct payments currently made to beef farmers.¹⁷¹ They are entitled to retain up to 100 per cent of the portion of the national or regional ceilings that correspond to slaughter premiums paid to farmers in respect of calves. Again these monies would then continue to be paid to farmers in a manner that was equivalent to the present calf slaughter scheme. However, Council Regulation 1782/2003 also goes on to provide national and regional agriculture authorities with further discretion in relation to the payments to be made to beef farmers.¹⁷² They are entitled to retain up to 100 per cent of the portion of national or regional ceilings that correspond to suckler cow premiums and up to 40 per cent of the portion that corresponds to the slaughter premium paid in respect of adult cattle. Alternatively they may retain up to 100 per cent of the portion of the national or regional ceiling that corresponds to this slaughter premium and also 75 per cent of the portion that corresponds to payments of beef special premium. In each case, should a national or regional agriculture authority exercise its discretion to implement one of these options, then the monies deducted from the national or regional ceiling will continue to be paid to farmers in a manner which replicates the individual payment regimes currently operating under the common organisation relating to the production of beef and veal.

Indeed even beyond the provisions that are outlined above, Council Regulation 1782/2003 also enables Member States and their regions to exercise choices in relation to other aspects of the introduction of the single payment scheme. For example, Article 47(2) provides that the new dairy premium scheme, to be introduced over the period 2004-2007, will be incorporated into the single payment scheme from 2007. However, by way of derogation, Article 62 authorises Member States to include dairy premium payments within the single payment scheme, in whole or part, from 2005. Similarly, Article 69 authorises Member States to retain up to 10 per cent of the national ceiling fixed for the single payment scheme. The monies retained would then operate as a national envelope, with Member States being entitled to use these monies to make additional payments to encourage specific types of farming that are important for the protection or enhancement of the environment or for improving the quality and marketing of agricultural products.

It will quickly be apparent that these provisions provide both Member States and their regions with a very large discretion as to the manner in which direct payments should in future be made to farmers. It is very possible that in future broad differences may emerge in the practices adopted both by individual Member States and also by individual regions. At the time of writing, the respective agriculture departments in Northern Ireland and the

¹⁷⁰ Art 67.

¹⁷¹ Art 68.

¹⁷² *Ibid.*

Republic of Ireland were conducting public consultations in order to determine the options that would be most appropriate for each jurisdiction.

Cross Compliance

The recent reforms to the CAP have also sought to take steps to further integrate environmental concerns into the Community's direct payment scheme. It has previously been observed that Council Regulation 1259/99 required Member States to link all direct payments made to farmers through the common organisations to a requirement that those farmers should respect appropriate environmental obligations. Equally, the Regulation gave Member States some discretion in choosing the most appropriate method through which this might be achieved. The European Commission has suggested that considerable scope existed for further improvement in relation to the measures actually adopted by Member States.¹⁷³ In particular the Commission has noted that implementation of statutory requirements was "uneven" and that little use had been made of cross compliance mechanisms, in which farmers' eligibility to receive direct payments is linked to an obligation to observe specific environmental conditions.¹⁷⁴ Under Council Regulation, 1872/2003 all Member States, however, will now be required to implement this latter option, by introducing cross compliance measures.¹⁷⁵ Equally, these Regulations will expand the obligations placed upon farmers beyond purely environmental considerations. From 1st January 2005, in order to remain eligible to receive direct payments, farmers throughout the Community will be required to comply with particular European Community legislation concerning the protection of the environment and the identification of animals.¹⁷⁶ From 1st January 2006, these farmers will also be required to ensure that their agricultural practice also complies with several European Community measures concerning public, animal and plant health and the notification of diseases.¹⁷⁷ Additionally, from 1st January 2007, these farmers will be required to comply with European Community

¹⁷³ European Commission, *Mid Term Review for Sustainable Agriculture*, COM (2002) 394 Final, p 8.

¹⁷⁴ *Ibid.*

¹⁷⁵ Art 3.

¹⁷⁶ Art 4 and Annex III. The environmental protection legislation is Council Directive 79/409 on the conservation of wild birds; Council Directive 80/68 on the protection of groundwater against pollution by dangerous substances; Council Directive 86/278 on the protection of the environment from sewage sludge used in agriculture; Council Directive 91/676 on the protection of waters against pollution caused by nitrates from agricultural sources; and Council Directive 92/43 on the conservation of natural habitats and of flora and fauna. The animal identification legislation is Council Directive 92/102 on identification of animals; Commission Regulation 2629/97 implementing provisions for the identification and registration of cattle; and Council and Parliament Regulation 1760/2000 on the labelling of beef and beef products.

¹⁷⁷ *Ibid.* The Community legislation is Council Directive 91/414 on the marketing of plant protection products; Council Directive 96/22 prohibiting the use of particular substances in livestock farming; Council and Parliament Regulation 178/202 concerning food safety; Council and Parliament Regulation 999/2001 on the prevention, control and eradication of BSE; Council Directive 85/511 on control of foot and mouth disease; Council Directive 92/119 on swine vesicular disease; and Council Directive 2000/75 on the control of bluetongue.

legislation on animal welfare.¹⁷⁸ In each case the relevant legislation is specified in the regulation. These measures may promote greater uniformity of practice, in the sense that farmers throughout the Community will be required to ensure that their practice complies with the same Community legislation. However, Council Regulation 1782/2003 also goes further. As a further condition of receiving direct payments, farmers will also be required to maintain their lands in “good agricultural condition.”¹⁷⁹ This obligation will take effect from 1st January 2005. It seeks to ensure that farmers respect at least minimum requirements in order to achieve good agricultural conditions established by their Member State or regional authorities. The Regulation establishes a framework that identifies both the particular issues that these national conditions should seek to address¹⁸⁰ and also the nature of the standards they should require farmers to meet.¹⁸¹ Within this framework considerable scope exists for divergent practice to evolve in the manner in which these good agricultural conditions develop. Indeed this is acknowledged by the regulation, which requires that Member States in establishing these national conditions should take into account “the specific characteristics of the areas concerned, including soil and climatic conditions, existing farming systems, land use, crop rotation, farming practices and farm structures.”¹⁸²

Modulation and Degression

Council Regulation 1782/2003 will now introduce a system of compulsory modulation from 2005. This aspect of the Regulation will affect all farmers who receive more than €5,000 per annum in direct payments through the operation of the common organisations.¹⁸³ A deduction of 3 per cent will be made to these payments in 2005, rising to 4 per cent in 2006 and reaching a ceiling of 5 per cent in the period 2007-2012.¹⁸⁴ The monies saved through these deductions will then be made available to Member States as additional Community support for rural development measures.¹⁸⁵ The actual amount allocated to each Member State will be decided by applying criteria that take account of their agricultural area, levels of agricultural employment and gross domestic product.¹⁸⁶ However, each Member State is guaranteed to

¹⁷⁸ *Ibid.* The Community legislation concerned is Council Directive 91/629 on the protection of calves; Council Directive 91/630 on the protection of pigs; and Council Directive 98/58 on the protection of animals kept for farming.

¹⁷⁹ Art 5.

¹⁸⁰ These are identified in Annex IV as protecting the soil from erosion, maintaining levels of soil organic matter and ensuring a minimum level of maintenance to avoid habitat deterioration.

¹⁸¹ *Ibid.* For example, in relation to preventing soil erosion the annex requires that the national conditions should introduce standards detailing minimum soil cover, minimum land management conditions and conditions regarding the retention of terraces.

¹⁸² Art 5(1).

¹⁸³ Arts 10 and 12(1).

¹⁸⁴ Art 10(1).

¹⁸⁵ Art 10(2).

¹⁸⁶ Art 10(3).

receive at least 80 per cent of the total modulation funds that are generated there.¹⁸⁷

In addition to the deductions to be made in respect of modulation, the European Commission had also proposed that additional deductions should also be made from direct payments under a measure referred to as 'degression'. The Commission had proposed that money saved by this measure should be retained by the Community to enable it to finance future market needs and reforms and to help ensure that Community expenditure upon agriculture would stay within financial ceilings set by the European Council in October 2002. The European Commission had proposed that the degression deduction should also apply to all farmers receiving €5,000 or more per annum in direct payments. As shown in the table below, it was proposed that the percentage reduction would increase over the period 2007-2012 and that higher deductions would be made in the case of farmers who received more than €50,000 per annum in direct payments. Ultimately, however, the European Commission's proposals for a degression were not accepted by the Council.

Degression Proposals

Direct Payments	Percentage Reduction Proposed						
	2006	2007	2008	2009	2010	2011	2012
Level of Annual Payments							
€5001 - €50,000	0	1	4.5	5	5.5	6	6.5
Above €50,000	0	2	9	10	11	12	13

The reaction of the governments of the United Kingdom and the Republic of Ireland to the European Commission's proposals for the introduction of compulsory modulation and degression measures, illustrate the fact that broad distinctions continue to exist in the approach adopted by both to the CAP. As noted previously in this article, the principle of modulation has already been implemented throughout the United Kingdom. Indeed the report of the Policy Commission on the Future of Farming and Food (also known as 'the Curry Report') had recommended that, in the event that the Community had not delivered a substantial reform of the CAP, the United Kingdom should consider raising the degree of modulation to the maximum 20 per cent authorised by Council Regulation 1259/99. The United Kingdom government, however, was opposed to the European Commission's initial proposal to fix a ceiling of €300,000 upon the annual value of overall direct payments that could be made to any one farmer.¹⁸⁸ This opposition stemmed directly from the larger farm structures that exist in parts of Great Britain. It has been estimated that the Commission's proposal would have affected six hundred farmers in Great Britain, four in the Republic of Ireland and none in Northern Ireland.¹⁸⁹ In contrast to the United Kingdom government, the

¹⁸⁷ *Ibid.*

¹⁸⁸ *Government Reply to the Third Report of Session 2002-2003 from the Environment, Food and Rural Affairs Committee*, HC-615, p 6.

¹⁸⁹ In respect of Great Britain and the Republic of Ireland, see the Environment, Food and Rural Affairs Committee, 3rd Report of Session 2002-2003: *The Mid Term Review of the Common Agricultural Policy*, HC-151, p 28. In respect of

government of the Republic of Ireland has been opposed to the concept of modulation. For example, the Minister of Agriculture and Food expressed the view that “supporting farming is a better way of supporting rural villages and towns than modulation.”¹⁹⁰

Similarly, in relation to the Commission’s proposals for degression, the United Kingdom government expressed general support.¹⁹¹ Its major concern was that the Commission’s proposals for a higher rate of degression would discriminate against the United Kingdom, due to its larger than average farm structures.¹⁹² The United Kingdom government had expressed a preference for a flat rate system that would apply equally to all farmers.¹⁹³ In contrast the government of the Republic of Ireland was opposed to the proposals regarding degression.¹⁹⁴ Overall, in terms of the differing approaches of the two governments, the position was summed up as follows by the Minister of Agriculture and Food, in evidence given to the House of Commons Environment, Food and Rural Affairs Committee:

“We approach this whole matter of farming and agriculture from a slightly different perspective, because of the importance [of agriculture] to the overall economy.”

Rural Development Policy

The Community’s spending upon rural development measures has today increased to a position in which it now accounts for some 16 per cent of the Community’s total expenditure upon agriculture.¹⁹⁵ The introduction of compulsory modulation will in future lead to an even greater portion of CAP expenditure being allocated to rural development. It is against this background that the Community has sought to increase further the level of discretion that is provided to national and regional agriculture authorities in relation to rural development planning. Council Regulation 1783/2003 has amended Council Regulation 1259/99 to add to the menu of measures that these bodies may include within their rural development plans.¹⁹⁶ Council Regulation 1783/2003 will enable national authorities to introduce temporary investment support measures that assist farmers in meeting the new environment, hygiene and animal welfare standards introduced by Council Regulation 1782/2003. These payments can be made available for up to five years from the date on which the particular standards come into effect. National agriculture authorities will also be able to provide support measures

Northern Ireland, see Department of Agriculture and Rural Development, “Minister Rodgers writes about the Commission’s mid term review proposals,” Press Release 228/02, 10th July 2002.

¹⁹⁰ Environment, Food and Rural Affairs Committee, *3rd Report of Session 2002-2003: The Mid Term Review of the Common Agricultural Policy*, HC-151, p 7.

¹⁹¹ *Government Reply to the 3rd Report of Session 2002-2003 from the Environment, Food and Rural Affairs Committee*, HC-615, p 4.

¹⁹² *Ibid*, p 9.

¹⁹³ *Ibid*.

¹⁹⁴ See Department of Agriculture and Food, *Annual Review and Outlook for Agriculture and Food 2002-2003* (2002), p 74.

¹⁹⁵ European Commission, *Mid-Term Review for Sustainable Agriculture*, COM (2002) 394 Final, p 9.

¹⁹⁶ OJ [2003] L270/71.

for farmers who enter into an agreement, lasting at least five years, under which they commit themselves to providing improvements to animal welfare standards on their farms. Additionally the Regulation will also enable national authorities to provide financial support to farmers who participate in either Community or national schemes designed to promote food quality. In each case these new measures will operate within the common framework provided by Council Regulations 1782/2003 and 1257/1999. However, they will equally provide national authorities with even greater choice in developing their rural development plans.

CONCLUSION

The CAP initially developed into a policy that was composed of two distinct elements, or pillars. In the first pillar Community regulations established common organisations in an attempt to create unified market and price policies for particular agricultural commodities. The second pillar of the policy contained Community measures that were designed to tackle the structural problems which existed within European agriculture. In 1973, when Northern Ireland and the Republic of Ireland joined the Community, the regulations establishing the common organisations might, at face value, appear to have established common laws governing agricultural markets. In reality, however, the prevalence of cross-border smuggling between both areas shows that this had not been achieved. The lack of a common currency at that time, together with the existence of separate national rates of exchange for agricultural commodity prices, prevented a common policy from developing. At that time the Community's agricultural structural policy was in an embryonic state. However, national resistance helped to ensure that a 'common' structural policy never developed. Instead, in order to limit distortion in trade, the Community structural policy developed into a framework measure that provided Member States with broad discretion in tailoring this policy to national circumstances.

Today, in relation to agricultural production, separate agricultural exchange rates may have been abolished. However, the discretion given to Member States to link direct payments to appropriate environmental protection measures and to modulate these payments, means that distinctions continue to exist between measures adopted in Northern Ireland and the Republic of Ireland. The operation of national envelopes also enable distinctions to exist between Member States generally. Equally today, Community structural policy continues to provide a common framework within which Member States are afforded a broad discretion in deciding upon the individual measures that they adopt. As has been shown, this enables broad distinctions to exist between the measures adopted in Northern Ireland and the Republic of Ireland, and also elsewhere in the Community.

Looking to the future, the recent reform of the CAP would seem to have created a situation in which broad distinctions will continue to evolve in the operation of the common organisations within individual Member States. Furthermore, increasing variation can be expected within the rural development policies of particular countries and their regions. Greater scope will exist for decision-making, regarding the implementation of the CAP, to be devolved to regional levels. This may lead to a situation in which regional differences in the implementation of the CAP become increasingly common throughout the European Community.

REFUGEES, THE RULE OF LAW AND EXECUTIVE POWER: A(NOTHER) CASE OF THE CONJUROR'S RABBIT?

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“The whole topic of Crown prerogatives is veiled in a mist of doctrinal and historical obscurity, and the existence or scope of many prerogatives is not always easily determined.”¹

INTRODUCTION

In *Ruddock v Vadarlis*² the Federal Court of Australia was asked to determine several complex legal and constitutional questions. One question addressed by the court was the legality of the Australian Government's decision to deport³ putative refugees from its territorial waters around Christmas Island before any consideration of their asylum claims.⁴ Specifically, the court had to examine, *inter alia*, important questions about executive power⁵ and its relationship to statute. The majority of the court determined that the executive had, and retained, the power to deport asylum seekers sailing aboard a Norwegian container ship (the *MV Tampa*) towards Christmas island. The court decided that the executive power was not abrogated or abridged by a statutory regime (Migration Act 1958)⁶ that provided for the comprehensive regulation of entry into Australia by non-nationals.

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¹ Edeson, “The Prerogative of the Crown to Delimit Britain's Maritime Boundary” [1973] *PL* 364.

² (2001) 66 A.L.J. 25. The High Court refused to entertain an appeal against the decision of the Federal Court (*Vadarlis v MIMA* M93/2001 <www.austlii.edu.au/au/other/hca/transcripts/2001/M93/3.html> (accessed 3 July 2003). See Head, “The High Court and the Tampa Refugees” (2002) 11(1) *Griffith LR* 23.

³ The terms deportation and expulsion are synonymous; expulsion is part of the vocabulary of international law, deportation is used in the domestic context. Since the Tampa refugees were in Australian territory and this analysis is concerned with prerogative powers I shall employ the former term. By contrast, exclusion encapsulates situations of non-admission at the border. Although the Australian government did not wish to admit the Tampa refugees they were within Australian territory.

⁴ The case is, therefore, distinguishable from the policy of interdiction on the *high seas* (in relation to Haitian asylum seekers) which was upheld by the US Supreme Court in *Sale v Haitian Centers Council* 113 Sup Ct 2549.

⁵ See *infra* note 15 and associated text for details.

⁶ As amended (see Border Protection Legislation Amendment Act 1999 in the context of this case).

The case is located in the interstices of domestic law, human rights treaties, customary international law and sovereign rights. This analysis is primarily concerned with domestic (public) law although international law is also highly relevant to the discussion. The decision in *Ruddock v Vadarlis* raises questions of constitutional importance⁷ about the precise legal relationship between statute and prerogative powers, the balance of power between executive and Parliament, and the rule of law. First, how far did the unwritten powers of the Crown extend, historically, and did the residual prerogative power claimed actually exist any longer? Secondly, where statute and prerogative powers appear to regulate the same area, which source can be relied upon to validate the exercise of public power? Bound up with both of these questions is the issue of whether ‘state necessity’ is a relevant, or determining factor in such judicial analyses.

The first problem, namely, whether the power to authorise the asylum seekers’ deportation (and detention to that end) actually existed, is the type of task the courts have undertaken for several centuries.⁸ The second problem, of theoretical and practical importance, is also not new to judges, scholars and law students; fêted cases include *De Keyser’s Royal Hotel*⁹ and *ex parte Fire Brigades Union*,¹⁰ and Markesinis provided a rigorous analysis thirty years ago.¹¹ The present author’s concern is to critically address those aspects of the decision in *Ruddock* that analyse the difficult question of precisely when a prerogative power *is* abrogated or abridged by statute - *by implication*. This question is far from “trite”.¹² Indeed, as Markesinis noted, where the prerogative is not *explicitly* referred to in the statute, in terms of it being either abolished, restricted, preserved (but subject to regulation in the Act¹³) or wholly unaffected, the relationship remains “strangely abstruse”.¹⁴

⁷ For a critical examination of the implications of the case for domestic refugee law and practice in Australia, see Mathew, “Australian Refugee Protection In The Wake Of The Tampa” [2002] 96 *AJIL* 661. For an analysis of Australia’s obligations under international law and customary international law, see Bostock, “The International Legal Obligations owed to the Asylum Seekers on the MV Tampa” (2002) 14(2/3) *IJRL* 279. For an alternative view see Blay, “The case of MV Tampa: state and refugee rights collide at sea” (2002) 76 *ALJ* 12. For an analysis of the refugee law, maritime law and domestic law implications see Willheim, “MV Tampa: The Australian Response” (2003) 15(2) *IJRL* 159.

⁸ In fulfilling this task the courts have attracted criticism for some of their decisions. For example, see Edeson, *supra* n 1 and Bradley, “Police Powers and the Prerogative” [1988] *PL* 298.

⁹ *Attorney-General v De Keyser’s Royal Hotel Ltd* [1920] A.C. 508.

¹⁰ *R v Secretary of State for the Home Department, ex parte Fire Brigades Union* [1995] 2 A.C. 513. See also, *R (Mahmood and another) v Royal Pharmaceutical Society of Great Britain* [2002] 1 W.L.R. 879.

¹¹ Markesinis, “The Royal Prerogative Revisited” [1973] 32(2) *CLJ* 287.

¹² *Per* Lord Bridge in *Co Williams Construction Ltd v Blackman* [1995] 1 W.L.R. 102, at 108.

¹³ For example, the Immigration Act 1971 s 33(5) provides: “This Act shall not be taken to supercede or impair any power exercisable by Her Majesty in relation to aliens by virtue of Her Prerogative.”

¹⁴ Markesinis, *supra* n 11, at 299.

The Facts

At the behest of the Australian government, the *MV Tampa*, a Norwegian registered container ship, rescued 433 asylum seekers from a sinking fishing boat in the Indian Ocean on 26 August 2001. When the captain of the vessel changed course and headed for Christmas Island with the rescuees aboard the Australian government refused to permit the *MV Tampa* from entering Australian waters and asked her to head toward Indonesia. However, the *MV Tampa* entered Australian waters on 29 August, because the ship's captain was concerned about the potential loss of life given the condition of his passengers and the risk of travelling across open waters to Indonesia. In response the Australian Defence Force interdicted the vessel and boarded her. The asylum seekers were transferred to *HMAS Manoora* around 3 September. Legal proceedings began on behalf of the asylum seekers on 31 August. Mr Vadarlis (a solicitor) and the Victorian Council for Civil Liberties sought a restraining injunction, on the basis that, *inter alia*, the executive had no lawful authority to expel the rescuees from Australian waters.

During the course of the final hearing of the applications, which commenced on 2 September, the parties agreed that the asylum seekers aboard the *HMAS Manoora* could be taken to Nauru and New Zealand for initial processing. These arrangements were subsequently, referred to as 'The Pacific Solution'.

The Statutory Framework

Executive power is contained in Commonwealth of Australia Constitution Act 1900 section 61.¹⁵ This section "confers on the Commonwealth all the prerogative powers of the Crown except those that are necessarily exercisable by the States under the allocation of responsibilities made by the Constitution and those denied by the Constitution itself."¹⁶ Thus, prerogative powers are the historical antecedents of the 'executive' power provided for in section 61 of the Commonwealth of Australia Constitution Act 1900.¹⁷ The long title of the Migration Act 1958 provides: "an Act relating to the entry into, and presence in, Australia of aliens, and the departure or deportation from Australia of aliens and certain other persons." Section 4(1) reads: ". . . the object of this Act is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens." Section 6 established that the Migration Act was to apply to those persons in Australia but outside the migration zone (as the Tampa refugees were). Other key provisions were sections 189(2), 245F(9) and 256. Section 189(2) provided for the detention of unlawful non-citizens who were outside the migration zone. Section 245F(9)¹⁸ expanded Australia's ability to board, search and detain ships, and detain those aboard at sea. Section 256 was relevant because it provided that

¹⁵ S 61 provides: "The executive power of the Commonwealth is vested in the Queen, and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth."

¹⁶ *Davis v Commonwealth* (1988) 16 C.L.R. 79, at 93.

¹⁷ See generally, *Barton v Commonwealth* (1974) 131 C.L.R. 477, at 498 and *Davis v Commonwealth* (1988) 166 C.L.R. 79, at 93-93, 107-108.

¹⁸ Amendment added via the Border Control Protection Act 1999.

those in detention under the Migration Act could have access to certain facilities at their request, such as legal advice and visa application forms.¹⁹

Australia's protection obligations under the Convention Relating to the Status of Refugees 1951 (Geneva Convention) and its Protocol 1967,²⁰ are referred to in section 36(2) of the Migration Act.²¹ There is a right to seek asylum under international law, but no correlative duty to admit asylum seekers incumbent upon states.²² However, Article 33 (the *non-refoulement* norm) of the Geneva Convention precludes states from returning asylum seekers to a place where their life or freedom would be threatened; by reason of their race, religion, nationality, membership of a particular social group or political opinion. Furthermore, Article 31 provides that asylum seekers are not to be penalised for arriving illegally. It applies where they have come directly from the place where they were persecuted, present themselves without delay to the authorities and show good cause for their illegal entry or presence.

The Judgments

On 11 September, in the Federal Court, North J, held that there was no relevant executive power that could authorise the deportation of the asylum seekers and ordered their return to Australia for processing. Two days later the full Federal Court heard an appeal by the government.²³ The majority (Black C.J. dissenting) overturned the determination of North J., deciding that the steps taken in relation to the asylum seekers to prevent them lodging asylum claims in Australia were within the scope of executive power, and therefore lawful.

The Majority

First, French J. opined that there was no place “for any doctrine that a law made on a particular subject matter is presumed to displace or regulate the operation of the executive power.”²⁴ It was a matter of construction. As a prelude to this conclusion, the judge drew a distinction between prerogative

¹⁹ The Australian government did not invoke these provisions to detain the *MV Tampa* and those aboard precisely because it did not want the refugees to avail themselves of the procedural guarantees contained within the Migration Act.

²⁰ 1951 Convention Relating to the Status of Refugees 189 U.N.T.S. 150; and United Nations Protocol 1967 Protocol Relating to the Status of Refugees 606 U.N.T.S. 267.

²¹ “(2) A criterion for a protection visa is that the applicant is a non-citizen in Australia to whom Australia has protection obligations under the Refugee Convention as amended by the Refugees Protocol.” The refugee definition was implemented in domestic law by the Migration Amendment Act (No 2) 1980.

²² Art 14(1) of the 1948 Universal Declaration of Human Rights provides that: “Everyone has the right to seek and enjoy in other countries asylum from persecution.” U.N.G.A. resolution 217 A(III).

²³ The hearing dates are potentially significant, coinciding with the terrorist attacks in the USA. Mathew notes: “One can only speculate about the different light in which the division between legislative and executive powers may have appeared to particular judges depending on whether the court sat before or after September 11.” (Mathew, *supra* n 7, at 662).

²⁴ (2001) 66 A.L.J. 25, 70 [183].

and executive powers, notwithstanding their common historical origins. The executive power of the Commonwealth under section 61 could not be treated as a species of the royal prerogative. Section 61 was conferred as part of a negotiated federal compact expressed in a written Constitution distributing power between the three arms of government, he observed.²⁵ This seems a rather novel and unconvincing attempt to make a conceptual distinction between prerogative and executive powers.²⁶ This cannot mean that the Executive can claim, or the courts recognise and enforce, new or broader powers based on the prerogative. This would undermine the fundamental principle that: “[I]t is 350 years and a civil war too late for the Queen’s courts to broaden the prerogative.”²⁷ Moreover, in *Australian Communist Party v Commonwealth*, Williams J. considered that: “the executive power of the Commonwealth at the date of the Constitution presumably included such of the then existing prerogative powers of the King in England as were applicable to a body politic of limited powers.”²⁸

The inference here is that before Australia became a sovereign state only some prerogative powers could be exercised by the Governor General (on the advice of the Executive) or the States’ Governors. Consequently, after independence, although Australia was no longer a limited political body, only those prerogative powers that were in existence at the date the Constitution, could be utilised, not more. Thus, French J. must have meant that executive power under section 61 has a life of its own as an indigenous concept distinct from prerogative powers.

In construing the operation of statute upon executive power, French J. reasoned that close scrutiny of the statute was merited where its purported effect was to displace an executive power “intimately connected to Australia’s status as a sovereign nation-state”.²⁹ The greater the significance of the particular executive power the less likely it was that parliament would extinguish it, absent express wording or inescapable implication.³⁰ The importance of the executive power to national sovereignty was a recurring theme in French J’s judgment.³¹

Secondly, in reliance on precedents over a century old,³² French J. underlined the right of a state to exclude or expel aliens under international law.³³ He distinguished those precedents from two other expulsion cases involving Chinese immigrants³⁴ because the executive power claimed in those two cases was contrary to a statute, under which there was at least implied

²⁵ *Ibid.*

²⁶ There is of course a difference between personal prerogative powers of the Monarch (or their delegate, such as the Governor General in Australia) to dissolve the legislature for example, and executive powers such as signing a treaty.

²⁷ *BBC v Johns* [1965] Ch 32, at 79.

²⁸ (1951) 83 C.L.R. 1, at 230.

²⁹ (2001) 66 A.L.J. 25, 71 [185].

³⁰ *Ibid.*

³¹ *Infra* note 38 and associated text.

³² *Re Adam* [1837] 1 Moo P.C., 12 E.R. 889; *Musgrove v Toy* [1891] A.C. 272.

³³ The relevance of the supreme power inherent in states to refuse entry to non-nationals is explored subsequently, see *infra* at note 49 and associated text.

³⁴ *Ex parte Lo Pak* (1888) 9 N.S.W.R. 221; *Ex parte Leong Kum* (1888) 9 N.S.W.R. 254.

permission to enter the colony.³⁵ Moreover, the judge attached importance to the fact that these (apparently contradictory) cases were determined when Australia was a colony and not a sovereign state. He contended: “The scope of the executive power conferred by section 61 of the Constitution is to be measured by reference to Australia’s status as a sovereign nation.”³⁶ It is one thing to acknowledge that the scope of executive power was limited when Australia was a colony. However, quite another to intimate that subsequently, the content of executive power is wider than the content of the Crown’s prerogative powers extant at the time of the Constitution from which executive power ostensibly derived. In short, it cannot be correct that the court permitted the Australian Government to exercise executive powers that are ‘wider’ than the prerogative powers of the Crown from which they derive conceptually. It is also relevant, though not determinative, that those powers had not been exercised for *at least* a century.³⁷ Common law prerogative powers provided neither a concrete historical basis, nor contemporary legal basis, for the claimed power.

Nevertheless, French J. opined that the Constitution provided sufficiently wide powers to authorise the executive action under review:

“The power to determine who may come into Australia is so central to its sovereignty that it is not to be supposed that the government of the nation would lack the power conferred upon it directly by the Constitution, the ability to prevent people not part of the Australian community, from entering.”³⁸

Thus, the judge stressed the importance of those executive powers intimately connected to Australia’s status as an independent, sovereign, nation-state. Lane refers to ‘sheer’ executive acts, deriving from “the character and status of the Commonwealth as a national government” and cites as an example “the protection of the constitution and constitutional government [. . .] against terrorist activities.”³⁹ However, it is difficult to conceive of the threat to constitutional government in this case, thereby justifying the use of such “will-o’-the-wisp”⁴⁰ powers against putative refugees. Furthermore, by observing that section 61 “like the power to make laws with respect to defence, [it] will vary according to circumstances”,⁴¹ the judge’s dicta has a familiar ring to it. In *R v Secretary of State for the Home Department, ex parte Northumbria Police Authority*, surprisingly, a case not referred to in any of the judgments, the Court of Appeal recognised the existence of a prerogative of keeping the peace of the realm. In the, infamous, words of Nourse L.J:

³⁵ (2001) 66 A.L.D. 25, 73 [190].

³⁶ *Ibid* at 73 [191].

³⁷ Indeed, French J. acknowledged the comments of Barton J. in *Robtelmes v Brennan* (1906) 4 C.L.R. 395, at 414; the *Encyclopedia of the Laws of England*, vol 5 at p 298 provided that although the Crown could use its prerogative to expel aliens it had not attempted to do so since the Glorious Revolution (*ibid* at 74 [194]).

³⁸ *Ibid* at 173 [194].

³⁹ Lane, *Lane’s Commentary on the Australian Constitution* (LBC Information Services 1997) at 130-131, 438-439.

⁴⁰ *Ibid* at 131.

⁴¹ (2001) 66 A.L.D. 25, 74 [197].

“There is no historical or other basis for denying to the war prerogative a sister prerogative of keeping the peace within the realm. . . [t]he scarcity of references in the books to the prerogative of keeping the peace within the realm does not disprove that it exists. Rather, it may point to an unspoken assumption that it does.”⁴²

This decision has been roundly criticised, by Bradley, who argued that the judges, by recognising the existence in law of a hitherto uncertain power of the Crown, actually increased uncertainty in the law; specifically, concerning the relationship between the power and legislation and its capacity to authorise new forms of executive action. Referring to *Entick v Carrington*, he reasoned that

“the thrust of *Entick* is that the English courts should take a hard look at assertions of prerogative power and, even where a claim of state necessity is argued, refrain from providing new precedents accepting such claims.”⁴³

French J. decided that the executive power claimed by the government was implicit in section 61 and its scope was wide enough to encompass the interdiction of the Tampa.⁴⁴ Furthermore, given its centrality to notions of state sovereignty, the courts should construe legislation covering the same area narrowly. Therefore, he concluded that the Migration Act did not abrogate the executive power. The statute did not contain express words to that effect, nor did it, as a matter of construction, evince a clear and unambiguous intention to do so.⁴⁵

Beaumont J. agreed with the reasoning of French J., and added some further reasons of his own:

“In my opinion, the primary judge should have inquired whether at common law [. . .] there was a legal right in the occupants to enter Australia. If his Honour had asked this question, it would, in accordance with the settled course of authority, have been answered in the negative.”⁴⁶

Beaumont J. surveyed relevant authorities beginning with *Musgrove v Toy*,⁴⁷ where the Privy Council held that, apart from statute, an alien had no legal

⁴² [1988] 1 All E.R. 556, at 575, and *per Purchas* L.J at 566. Infamous, because it contrasts sharply with Lord Camden’s words in *Entick v Carrington* (1765) 19 St. Tr. 1030, 1067, 1073.

⁴³ Bradley, *supra* n 8, at 301.

⁴⁴ Contrast this with *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 C.L.R. 1, where the High Court made it clear that administrative detention of asylum seekers arriving by boat required specific statutory authorisation: “any officer of the Commonwealth Executive who purports to authorize or enforce the detention in custody of such an alien without judicial mandate will be acting lawfully only to the extent that his or her conduct is justified by valid statutory provision.” (at 19).

⁴⁵ (2001) 66 A.L.D. 25, 75 [201].

⁴⁶ (2001) 66 ALD 25, 52 [111].

⁴⁷ [1891] A.C. 272. Approved in *Johnstone v Pedlar* [1921] 2 A.C. 262 and *R v Carter ex parte Kisch* (1934) 52 C.L.R. 221.

right enforceable by action to enter Victoria.⁴⁸ He continued with reference to *Attorney-General (Canada) v Cain*, where Lord Atkinson, following *Musgrove*, observed, “[o]ne of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State.”⁴⁹ After citing several similar authorities,⁵⁰ he allowed the appeal by simply concluding that aliens had no right to enter Australia. Thornberry has criticised the decision in *Musgrove v Toy* owing to the absence of any authority advanced in support of the proposition that an alien has no right of entry, and the lack of any principled discussion.⁵¹ Moreover, in respect of the decision in *Attorney-General (Canada) v Cain*, he opined that “the prerogative of expulsion was produced by the Privy Council rather as a conjuror produces a rabbit. It was simply assumed that the Crown possessed the right.”⁵²

Moreover, the cases relied on by Beaumont and French JJ refer to the power possessed by states under international law. Yet as French J. recognised, the, “way in which the right to expel or to refuse entry is exercised, and whether by legislative or executive means, may vary according to the constitutional mechanisms of particular states.”⁵³ Thus, the manner in which this international law principle was given further effect should have entailed an examination of municipal law. Consideration of the relationship between the Migration Act and executive power was a vital undertaking. Accordingly, with respect, Beaumont J’s approach to the inquiry was wrong. There is a critical difference between the supreme power in every state to regulate the entry of aliens under international law and prerogative powers at common law. The vexing question of whether there was, and remained, a common law prerogative right to deport non-nationals was the correct inquiry for the court to pursue. But “the Crown can have no prerogative by the law of nations”.⁵⁴ What *may* be permissible under international law⁵⁵ has no bearing on the existence of any constitutional power.

It is paradoxical that both judges were content to employ this international law maxim whilst affording Australia’s international law obligations to refugees a cursory inspection. French J. concluded that “nothing done by the

⁴⁸ *Ibid* at 282, *obiter dicta* of the Lord Chancellor, in terms reminiscent of the ‘act of State’ doctrine.

⁴⁹ [1906] A.C. 542, at 546. It was not clear whether the references to the supreme power of each state to refuse to admit a non-national were intended to be references to the prerogative at all.

⁵⁰ *Ah Yin v Christie* (1907) 4 C.L.R. 1428, 13 A.L.R. 372; *Udny v Udny* (1869) L.R. 1 Sc. & Div. 441.

⁵¹ Thornberry, “Dr Soblen and the Alien Law of the UK” (1963) 12 *ICLQ* 414, at 424.

⁵² *Ibid*, at 425.

⁵³ (2001) 66 A.L.D. 25, 72 [186].

⁵⁴ Craies, “The Right of Aliens to Enter British Territory” (1890) 6 *LQR* 27, 36.

⁵⁵ There appears to be a consensus among scholars and judiciary that a state may exclude non-nationals under international law. However, see Nafziger, “The General Admission of Aliens Under International Law” [1983] 77 *AJIL* 804, for an illuminating critique of this proposition. The author demonstrates how the early authorities, cited in modern cases such as *Ruddock*, to support the exclusionary proposition, were based on a selective reading of the work of Vattel, Pufendorf and others.

executive *on the face of it* amounts to a breach of Australia's obligations in respect of *non-refoulement* under the Refugee Convention."⁵⁶ Meanwhile, Beaumont J, in a postscript, urged any extra-judicial assessment of executive policy in this case to be undertaken bearing in mind the obligations incumbent on states under Article 33 of the Refugee Convention. Namely, in his view, that there was no obligation under international law to resettle those rescued in a state's territory.⁵⁷ This perfunctory examination of the importance and relevance of international norms has been criticised by another member of the judiciary and laid bare by academics.⁵⁸

The Dissident

Black C.J., expressed doubt as to the continuing existence of the claimed prerogative. He pointed to judicial and extra-judicial observations that supported the proposition that prerogative powers could fall into disuse and, consequently, be considered extinguished because they had become incompatible with modern constitutional jurisprudence.⁵⁹ His historical survey of the jurisprudence and academic commentary led to the conclusion that, "by the end of the nineteenth century, in English jurisprudence, the power to exclude aliens in times of peace was not considered to be part of the prerogative."⁶⁰ It was "at best, doubtful that the asserted prerogative power continues to exist at common law: [. . .] its existence is entirely uncertain, and there are no previous modern instances of its exercise."⁶¹ Hence, although it may have been propitious for the Australian government to resuscitate an ancient prerogative power, by doing so they were breathing new life into a prerogative that had long since expired.⁶²

Haycraft's historical analysis led him to conclude that it appeared that the Crown *did* possess a prerogative right to exclude and expel foreigners.⁶³ However, there was a strong parallel current of opinion in the opposite direction. In terms that ring true over a century later, he opined:

"[I]t is hardly conceivable that a government would desire to use for such a purpose powers which have fallen out of common use, until the whole question has been discussed in Parliament, and it is known what exercise of powers, if any, Parliament considers necessary for the protection of our common interests."⁶⁴

⁵⁶ *Ibid*, at 76 [203]. See Blay, *supra* n 7, at 17 for a concurring opinion. Contrast this with the analysis by Mathew, *supra* n 7, at 665-667.

⁵⁷ (2001) 66 A.L.D. 25, 54 [126].

⁵⁸ See Nicholson C.J. whose lecture was quoted in "Current Issues" (2002) 76 *ALJ* 405; and Mathew, *supra* n 7, at 665-667.

⁵⁹ (2001) 66 A.L.D. 25, 31 [20].

⁶⁰ *Per* Black C.J., at 32 [26].

⁶¹ *Ibid*, at 33 [29].

⁶² A view supported by several academic authorities, see Craies *supra* n 54, at 29; Thornberry *supra* n 51 at 424; and Goodwin-Gill, "The Limits of the Power of Expulsion in Public International Law" (1976) 55 *BYIL* 106-7.

⁶³ Haycraft, "Alien Legislation and the Prerogative of the Crown" (1897) 13 *LQR* 165.

⁶⁴ *Ibid* at 185.

Yet, “a vanishing prerogative is a strange creature, for there is no generally accepted principle of law that a prerogative may be lost by desuetude.”⁶⁵ However, although a common law rule, *once clearly established* does not become extinct merely by disuse, it remains capable of recrudescence in propitious circumstances only when it would not be *grossly anomalous and anachronistic* (author’s emphasis).⁶⁶ Evidently the common law rule permitting the Australian Government to deport asylum seekers was not *clearly established* (as Beaumont J. contended) and reviving it in 2001 was *grossly anomalous and anachronistic*.

Proceeding on the basis that the existence of a common law power to exclude aliens in peacetime was, at best, ‘doubtful’, Black C.J. examined the scope of section 61 to determine if it was wider than its prerogative antecedent:

“It would be a very strange circumstance if the at best doubtful and historically long-unused power to exclude or expel should emerge in a strong modern form from s 61 of the Constitution by virtue of general conceptions of the “national interest” This is all the more so when according to English constitutional theory new prerogative powers cannot be created”⁶⁷

But assuming there was such a prerogative power, was it abrogated by the Migration Act 1958?

Black C.J. was content to rely upon *De Keyser’s* and *Laker Airways Ltd v Department of Trade*,⁶⁸ to support the following proposition - that “where the prerogative is relied on as an alternative source of power to action under a statute, the prerogative will be held to be displaced when the statute covers the subject matter.”⁶⁹ He then examined the question of the clarity with which an intention to displace a prerogative or executive power needs to be expressed:

“It can readily be conceded that if a power is well-used, well established and important to the functioning of executive government, a very clear manifestation of an intention to abrogate will be required, But, similarly, where an asserted power is at best doubtful, and where, if it exists at all, it does so in a field that has been the concern of parliament for a very long time, a less stringent view of the intention necessary to abrogate such a power is appropriate. Another such indication may be where the parliament has entered a field in which Australia has assumed treaty obligations and has acted to give effect to those obligations in that field and where the asserted prerogative or executive power might be capable of exercise in

⁶⁵ De Smith and Brazier, *Constitutional and Administrative Law* (Penguin, 1998), at 136. In *Re F (Mental Patient: Sterilisation)* [1990] 2 A.C. 1 at 26, Neill L.J. stated, “It seems to me that it would require clear statutory words to remove from the Crown a prerogative power which has vested in the Crown since at least 1325.”

⁶⁶ *McKendrick v Sinclair* [1972] S.L.T. 110, at 116 *per* Simon L.J..

⁶⁷ (2001) 66 A.L.D. 25, at 33 [30].

⁶⁸ [1920] AC 508; [1977] 1 Q.B. 643.

⁶⁹ (2001) 66 A.L.D. 25, at 35 [37].

a manner not conformable with the parliament's provision for the satisfaction of those obligations."⁷⁰

In support of his view that any residual discretion was abridged, the judge referred to the long title of the Migration Act 1958 and section 4(1). The latter provides that ". . . the object of this Act is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens."⁷¹ Moreover, the Act refers to Australia's protection obligations under the 1951 Geneva Convention.⁷² Black C.J. seized on the reference to the "national interest" in section 4(1) as "suggestive of a recognition by the parliament of its unquestioned power to determine comprehensively what the national interest shall be in this respect."⁷³ Further, the "national interest" includes recognition of obligations under the Geneva Convention. In conjunction with the provisions in the Border Protection Legislation Amendment Act 1999, the Migration Act provided a comprehensive regime for the control of Australia's borders and the patrol of the territorial waters. That statutory regime covered circumstances such as those affecting the asylum seekers at the relevant time. The judge was plainly of the view that the power claimed by the Executive was excluded, by implication, because the legislation evinced a very clear intention to cover the field in question exhaustively.⁷⁴ The uncertain nature of the power asserted on behalf of the executive fortified this view. The regime could have applied to the rescued people had the government "not taken a view" that it did not wish to apply the Act.⁷⁵

The judge's analysis of precisely when a statute displaces a prerogative or executive power is worthy of closer inspection. First, he agreed with French J. that the importance of the power to the functioning of executive government was a relevant factor when determining the relationship between statute and prerogative. However, he added that the power must also be well-used and well established. Second, he considered it relevant that the field had been the concern of Parliament for a very long time. Third, he opined that weight should be attached to Australia's obligations under international law, although they were not incorporated into Australian law. The use of international law to inform the development of common law *vis-à-vis* the relationship between statute and prerogative (executive) powers merits further evaluation.

The status of the 1951 Geneva Convention Relating to the Status of Refugees and its 1967 Protocol in domestic law is "tenuous".⁷⁶ The Migration Act

⁷⁰ *Ibid*, at 36 [40].

⁷¹ The wide scope of the Act was confirmed by the Immigration and Multicultural Affairs Minister, Philip Ruddock, during the second reading (House of Representatives, Parliamentary Debates, *Hansard* 22 September 1999, at 10147) (cited by Black C.J. at 40 [62]). Furthermore, there is no provision analogous to s 33(5) Immigration Act 1971 that expressly preserves the residue of discretionary authority.

⁷² In much the same way that the UK's protection obligations arising under the 1951 Convention are alluded to in s 1 1996 Asylum and Immigration Act.

⁷³ (2001) 66 A.L.D. 25, 37 [44].

⁷⁴ See de Smith, and Brazier, *supra* n 65, at 139-40.

⁷⁵ (2001) 66 A.L.D. 25, 39 [60].

⁷⁶ Mathew, "Human Rights" in Blays, Piotrowicz, and Tsamenyi (eds), *Public International Law: An Australian Perspective* (O.U.P., 1997), at 291.

1958 simply refers to persons to whom Australia has protection obligations under the Convention and sets out the procedures for the examination and determination of asylum claims. Individuals cannot invoke rights contained in either the 1951 Convention or 1967 Protocol in domestic proceedings. Nor are obligations arising thereunder, absent transformation into domestic law, binding on the government.⁷⁷ However, the High Court especially has used, in particular, human rights treaties as a tool of interpretation in respect of statutes and as a “legitimate and important influence on the development of the common law.”⁷⁸ Such an approach “is one appropriate to the times in which we live”⁷⁹ preferable to referring to analogous decisions “written often in a different world for different social conditions”.⁸⁰ Indeed, as Nafziger has concluded, the key Anglo-American cases⁸¹ decided at the turn of the twentieth century, were premised on an acceptance of nativism and racial prejudice.⁸² Furthermore, recent Canadian jurisprudence supports such a methodology:

“Since the Case of Proclamations and the Glorious Revolution the Executive’s exercise of power, including its use of the Prerogative, has been subject to the Rule of Law. It would shock the conscience today if the Executive could rely upon the Prerogative to justify actions or omissions that were illegal or contrary to our international commitments. [. . .] I am well aware that International law and international commitments cannot found a cause of action under domestic law unless they have been written into domestic law. I am also aware that, by Statute, Parliament may legalize that which might otherwise be illegal under international law or contrary to our international commitments. [. . .] International law and our international commitments are the metwand against which the legitimacy of the purported use of the Prerogative might be measured by the court.”⁸³

Hence Black C.J.’s approach to the construction of statute and prerogative powers appears defensible. There is no logical reason why an analysis of statutory provisions, as a source of public power, can involve recourse to international treaties but an analysis of the nature of prerogative powers cannot. Similarly, the source of public powers has been discarded by the courts as a controlling factor *vis-à-vis* amenability to judicial review for some time.⁸⁴

⁷⁷ *Simsek v MacPhee* (1982) 148 C.L.R. 636, at 641-2.

⁷⁸ *Mabo v The State of Queensland (No.2)* (1992) 175 C.L.R. 1, at 42.

⁷⁹ Kirby, “The Role of International Standards in Australian Courts” in Alston and Chiam, *Treaty Making and Australia* (Federation Press, 1995), at 92.

⁸⁰ *Ibid*, at 86.

⁸¹ Such as *Musgrove v Toy* [1891] AC 272; *The Chinese Exclusion Case* 130 U.S. 581 (1889).

⁸² Nafziger, *supra n* 55, at 824.

⁸³ *Per* Wright J. in *Aleksic v Canada (Attorney General)* [2002] A.C.W.S.J. 4507; 115 A.C.W.S. (3d) 252, at para 11-14.

⁸⁴ *Council for the Civil Service Unions v Minister for the Civil Service* [1985] A.C. 374, 407 (*per* Lord Scarman).

The existence of a common law right to deport and exclude aliens has curried judicial favour.⁸⁵ However, in *Schmidt v Secretary of State for Home Department*, Lord Denning observed: “The common law has now been overtaken by the Aliens Acts and the Orders thereunder.”⁸⁶ The implication is, ostensibly, that the prerogative power was in a state of abeyance. This analysis received endorsement in *R v IAT ex parte Secretary of State for the Home Department*.⁸⁷ Stuart-Smith LJ opined that: “The Act as a whole abrogates the prerogative power, save to the limited extent provided [by s. 33(5)].”⁸⁸ Jackson has argued that although read literally section 33(5) “could be used to bypass both Act and immigration rules in respect of aliens . . . it seems to have been common ground that the effect of the statutory provision was to make actions taken other than under the rules the exercise of the prerogative.”⁸⁹ Thus, prerogative powers *expressly preserved* in the 1971 Act were not to be relied on to circumvent the comprehensive legislative scheme. Those powers were only to provide a lawful basis for the (favourable) exercise of discretion outside of the legislative scheme; to supplement and not supplant the Act. The 1958 Migration Act contained no such ‘saving’ provision at the time of the Tampa incident, only retrospectively, via an amendment.⁹⁰

CONCLUSIONS

(1) *The existence and scope of the power claimed*

The Australian government claimed an uncertain prerogative-based power because it was highly convenient for them to do so. It meant they could circumvent the procedural safeguards that the asylum seekers were entitled to under the terms of the Migration Act 1958 and prevent them lodging claims for refugee status. The Federal Court (and High Court) permitted political expediency to trump legal certainty and procedural fairness, thereby undermining the protection of refugees rooted in international law.⁹¹ The weight of academic authority conflicts with the conclusion reached by the majority in the Federal Court, regarding the existence and scope of the power asserted at common law. Judicial opinions proved, at best, inconclusive on the matter. The interpretation placed upon section 61 of the Constitution by French J. was unsupported. It is striking that the Australian Parliament deemed it necessary to pass the Border Protection (Validation and Enforcement Powers) Act on 26 September 2001 to validate the action taken against the refugees aboard the *MV Tampa* retrospectively.⁹²

⁸⁵ *Schmidt v Secretary of State for Home Department* [1969] 2 Ch. 149, at 168, 172. This view was affirmed in *R v Governor of Pentonville Prison ex parte Azam* [1973] 2 W.L.R. 949, at 960.

⁸⁶ *Ibid.*, at 168.

⁸⁷ [1990] 3 All E.R. 652, at 661.

⁸⁸ *Ibid.*, at 657. See also *R v Secretary of State for the Home Department ex parte Samya and ors* [1989] Imm. A.R. 75, at 82.

⁸⁹ Jackson, *Immigration Law and Practice* (Sweet and Maxwell, 1999), at 723.

⁹⁰ Border Protection (Validation and Enforcement Powers) Act 2001.

⁹¹ See generally Mathew, “Australian Refugee Protection in the Wake of the Tampa” *supra* n 7.

⁹² S 7A confirms the power claimed by the executive to act outside of the statutory framework: “The existence of statutory powers under this Act does not prevent the

(2) The relationship between statute and prerogative

It is hoped that the navigational aids referred to by Black C.J. will be adopted in suitable cases in the future, where judges are required to address the puzzling relationship between statute and prerogative. To reiterate; when determining whether prerogative powers have been displaced by statute, *by implication*, the following factors are relevant: (1) The importance of the power claimed to the functioning of executive government, but with the caveat that the power must be clearly established and well-used; (2) Whether the area of law had been the preserve of Parliament for a very long time; and (3) International legal obligations (where relevant) carry some weight. One must view the imprecision in some of these terms in the light of the hazy subject matter they seek to direct. The terms do not determine the precise course judges should steer, rather, they are indicators that will see them heading in the right direction.

(3) Legal limbo

In *T v United Kingdom* Lord Mustill stated:

“Neither under international nor English municipal law does a fugitive have any direct right to insist on being received by a country of refuge. [. . .] The [domestic] legislation must be viewed against the background of a complete absence of any common law right, either national or international, for a refugee to insist on being admitted to a foreign country.”⁹³

Herein lies the rub. The asylum seekers aboard the *MV Tampa* existed in a legal twilight zone. They had no common law right to enter, but, equally, the Australian Government had no lawful means to deport them given the statutory framework extant at the time the Tampa was in its territorial waters. Dauvergne has opined that the absence of a right to enter a state under international law is vital. “While states would breach the Convention by expelling refugees to places where they would be in danger, they are acting well within their ‘rights’ when they force boats carrying potential refugees away from their shores.”⁹⁴ Insofar as interdiction beyond territorial waters is concerned, the author’s view has received judicial endorsement in *European Roma Rights Centre v Immigration Officer at Prague Airport*.⁹⁵ The farther

exercise of any executive power of the Commonwealth to protect Australia’s borders. . .”. Thus, it is comparable to s 33(5) of the 1971 Immigration Act. For a critical analysis of the changes made to asylum law in the aftermath of the Tampa incident, see Mathew, *ibid*, Crock, and Saul, *Future Seekers: Refugees and the Law in Australia* (Federation Press, 2002), at chap 7, and Edwards, “Tampering with Refugee Protection: The Case of Australia” (2003) 15(2) *IJRL* 192.

⁹³ [1996] A.C. 742, at 754, 758.

⁹⁴ Dauvergne, “The Dilemma of Rights Discourse for Refugees” (2000) 23(2) *UNSWLJ* 56, 60.

⁹⁵ [2003] E.W.C.A. Civ 666. The legality of immigration rules applied extra-territorially were questioned, but the court held they were not in violation of the UK’s obligations under Art 33. Nor could Art 33 be interpreted to afford putative refugees a right of access to another country. The decision parallels *Sale v Haitian Centers Council* except the court drew a line between preventing the arrival of asylum seekers (lawful) and returning them to their own country (unlawful) (at [43]).

away asylum seekers are from surrogate states, the less likely it is that international law will bite. However, where expulsion from territorial waters is concerned the matter is, or ought to have been, transformed. Where, through legislation, states have freely undertaken to respect international legal obligations, their freedom to act can be fettered by the terms of that legislation.⁹⁶ That is, as long as those international obligations remain enshrined (if not incorporated) in the national legal system. Ultimately, Dauvergne's analysis is correct. A state may take the political decision to undermine or renege upon its international treaty obligations and amend or repeal municipal law accordingly.

(4) Threat to democracy and refugee protection

In 1893 Brewer J, in *Fong Yue Ting v US*, warned, "The doctrine of powers inherent in sovereignty is one both indefinite and dangerous. . .".⁹⁷ Bradley cautioned against the dangers of judicial recognition of a hitherto uncertain power after the *ex parte Northumbria Police Authority* judgment. Again, in *Ruddock* axiomatic principles that underpin all liberal constitutions, the rule of law and separation of powers, appear overlooked. Not only is legal certainty compromised, the recognition of the power claimed by the Executive bucks the trend of subjecting prerogative powers to the will of the democratically elected legislature.⁹⁸ The nebulous executive power, given judicial recognition in the *Tampa* case, may be deployed readily against others when the will of the legislature no longer serves the needs of the government, and it is considered convenient to do so. This concern is far from fanciful given the political climate prevailing in the UK and many other Commonwealth states post September 11 2001.⁹⁹ For example, in *Refugee Council of New Zealand Inc v Attorney-General (No 1)* the High Court stated that, "The need for any state to protect its borders, and the central importance of the prerogative power in doing so, is brought into stark relief by the events of September 11."¹⁰⁰

The acid test of a liberal democracy is how it treats 'the other', especially in testing times. In response to rising numbers of asylum claimants, whom

⁹⁶ See *R v Secretary of State for Home Department ex parte JCWI* [1996] 4 All E.R. 385, at 401-2, where the right of access to the asylum determination system was implied from the terms of the Asylum and Immigration Appeals Act 1993. In *T v UK*, *supra* n 93, at 754(b), it was observed that: "Subject only to qualifications created by statute this country is entirely free to decide as a matter of executive discretion, which foreigners it allows to remain within its boundaries."

⁹⁷ 149 U.S. 698, 737 (1893).

⁹⁸ *Ex parte Fire Brigades Union* [1995] 2 AC 513, at 552.

⁹⁹ Ministers sought to justify the Government's response to the Tampa refugees as the Federal Court deliberated with reference to the link between the arrival of refugees on boats and terrorists. See Head, *supra* n 2, at 30; Crock and Saul *supra* n 92, at 38. On the 9/11 phenomenon see Thomas, "September 11th and Good Governance (2002) 53 *NILQ* 366.

¹⁰⁰ [2002] N.Z.A.R. 717 [23]. The case dealt with the legality of detaining all asylum seekers (including some who had been aboard the MV Tampa) under the Immigration Act 1987 s 128. The court determined that at common law and under international law, New Zealand had the right to regulate admission to its territory.

Western governments perceive to be vexatious generally,¹⁰¹ states have employed policies of external deterrence. These policies are blunt instruments affecting all migrants, including genuine asylum seekers, indiscriminately. This fact has been recognised at both political¹⁰² and judicial levels in the UK:

“The problems facing refugees in their quest for asylum need little emphasis. Prominent amongst them is the difficulty of gaining access to a friendly shore. [. . .] Although under the Convention subscribing states must give sanctuary to any refugee who seeks asylum (subject only to removal to a safe third country), they are by no means bound to facilitate his arrival. Rather they strive increasingly to prevent it.”¹⁰³

Interdiction is but one of a number of strategies employed by Western states to reduce the increasing numbers of asylum seekers arriving. Additionally, states have imposed visa restrictions on countries generating asylum seekers and financial sanctions on those carriers bringing migrants into their territory, where those migrants lack the requisite entry documentation.¹⁰⁴ They have also placed immigration and liaison officers at ports overseas to prevent putative refugees from reaching their intended sanctuary.¹⁰⁵ Collectively, these strategies empty the right to seek asylum of its legal, if not moral, value. Moreover, they insulate states from their commitments under the Geneva Convention and its Protocol, and other international human rights treaties.

The decision in *Ruddock* gives cause for serious concern at an international and domestic level. Firstly, regarding international refugee protection, the decision operates as another reminder of the increasingly common practice of states of barring access to determination procedures. The gulf between state practice and international treaty norms demonstrates that Western refugee-receiving states pay lip service to the right to seek asylum and international human rights standards. The practice of interdiction at sea is indicative of how states are guarding their legal sovereignty in the field of immigration and asylum robustly. Where their interests and policies conflict with international human rights law, national courts have permitted the

¹⁰¹ For an analysis of the deconstruction of refugees by politicians and the media, see Billings, “Alienating Asylum Seekers: Welfare Support in the Immigration and Asylum Act 1999” (2002) 9(3) *JSSL* 115, 116-124.

¹⁰² *Home Affairs Committee* (May 12, 1998) *per* Mike O'Brien (then Immigration Minister).

¹⁰³ See *R v Uxbridge Magistrates' Court ex parte Adimi* [2001] Q.B. 667 at 673-74 *per* Simon Brown L.J..

¹⁰⁴ See generally, Billings, “A Comparative Analysis of Administrative and Adjudicative Systems for Determining Asylum Claims” (2000) 52(1) *Admin LR* 253, and Legomsky, “An Asylum Seeker's Bill of Rights in a Non-Utopian World” (2000) 14 *Geo Immigr LJ* 619. Both papers analyse internal and external strategies for managing the increasing volume of asylum claims utilised in recent years.

¹⁰⁵ For example, the pre-clearance entry controls were introduced at Prague's Ruzyně airport on July 18 2001, pursuant to Art 7(1) Immigration (Leave to Enter and Remain) Order 2000. See *European Roma Rights Centre, supra* n 95.

former to trump the latter.¹⁰⁶ Indeed, the case functions as a microcosm of the edifice upon which refugee protection is built. The 1951 Convention represented “a compromise between the exclusive power of the state over entry into and presence in its territory, the very essence of sovereignty, and the competing humanitarian impulse to aid strangers in necessitous circumstances.”¹⁰⁷ On the one hand, states yielded their absolute control over immigration by agreeing upon formal legal criteria for defining a refugee. On the other, relinquishing total control over the admittance of non-nationals, by permitting international law to encroach into, arguably, the most jealously guarded area of state sovereignty came at a price; notably, the lack of procedural specification in the Convention or Protocol.¹⁰⁸ Increasingly, controlling the administrative process of determination does not counterbalance the erosion of state sovereignty that states perceive the Convention to constitute. Consequently, drastic measures, such as interdiction, have been pursued in order to appease public opinion in some host states. Moreover, the willingness of states to undermine applicable human rights standards may encourage and facilitate coordinated regional responses along similar lines. For coastal states in southern Europe the attraction of a formalised EU agreement on interdiction at sea, is self-evident.¹⁰⁹ Indeed, the European Commission is set to draw up a formal proposal for the launch of the Border Management Agency, possibly in 2004. The agency would coordinate monitoring of land, air and sea borders, especially in the Mediterranean.¹¹⁰

Second, the constitutional implications are profound. The majority in *Ruddock* approved archaic and poorly reasoned precedents to support its determination. Precedents that were established when the prevailing ideology was restrictive nationalism and ‘classical immigration law’ was the

¹⁰⁶ This is generally the case in respect of external policies of deterrence such as interdiction, visa requirements and the use of immigration officials overseas. However, domestic courts have frequently protected the interests of asylum seekers once inside the territory of a host state in the face of internal policies that seek to limit procedural guarantees and the availability of welfare benefits for example.

¹⁰⁷ Fitzpatrick, “Flight From Asylum: Trends Toward Temporary Refuge and Local Responses to Forced Migrations” (1994) 35 *V’bilt JIL* 13, 13-14. Also, see Hathaway, “A Reconsideration of the Underlying Premise of Refugee Law” (1990) 31 *Harv Int’l LJ* 129, 133.

¹⁰⁸ Another reason is that international law generally leaves states free to determine the manner in which they meet their international obligations. However if a state fails to fulfil its international obligations adequately then that state’s position in international law becomes affected and may lead to the charge that it is in breach of international law. See generally, Jennings and Watts, *Oppenheim’s International Law* (Longman, 1997), at 82-86.

¹⁰⁹ Indeed, the Italians already interdict Albanian migrants in the Adriatic Sea, and British and Spanish naval vessels patrol the Straits of Gibraltar. A common policy on interdiction may be conceived as part of the comprehensive policy of deflection of unwanted migrants away from a border-free Europe. (See generally, Noll, *Negotiating Asylum. The EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (Martinus Nijhoff, 2000).

¹¹⁰ “EU leaders back creation of border agency in immigration clampdown”, *Agence France Press* (October 16, 2003).

legal epiphenomenon of the times.¹¹¹ The decision serves to undermine legal certainty, an essential element of the rule of law. Furthermore, the majority's construction of the relationship between statute and executive power was regressive, indulging the Executive's claim without a judicious examination of its merits or the relevance of international law. The Executive's argument, essentially based on communal self-determination, underpinned by concerns about preserving and protecting national identity, culture, and social welfare provision in the face of rising numbers of asylum claims, was legitimate. However, the appropriate forum to air such concerns was Parliament. The fact that the legislature's approval of the interdiction of the Tampa was, subsequently, forthcoming, does not disguise the fact that the Australian Parliament was by-passed over an issue that had been its preserve for a long time.

In this episode, the Australian government retreated into the safe harbour of sovereignty whilst leaving asylum seekers at sea. The Federal Court lowered the veil of obscurity that shrouds the use of such residual discretionary and arbitrary powers further, by virtue of their deference to the Executive. Insulating Australia from refugees in its territorial waters by reliance on the weapon of primitive prerogative powers was wrong legally, and the policy behind it unethical.

¹¹¹ Schuck, "The Transformation of Immigration Law" (1984) 84(1) *Columbia LR* 1, 3.

COMMENTS AND NOTES

**SOCIAL FUND FUNERAL PAYMENTS, CLOSE
RELATIVES AND THE BURDEN OF PROOF**

*Dr Kenneth Mullan, Full-Time Chairman, Appeal Tribunals,
Northern Ireland**

In *Kerr v Department for Social Development*,¹ the Northern Ireland Court of Appeal discussed and analysed regulation 6(6) of the Social Fund (Maternity and Funeral Expenses) (General) Regulations (Northern Ireland) 1987. Regulation 6(6) is an important provision, and is often used as the basis on which to deny entitlement to a Social Fund Funeral Payment. The regulation provides that a claimant will not be entitled to such a payment where the deceased had one or more other close relatives, who were in equally close contact with the deceased, and who were not in receipt of a qualifying social security benefit, or had capital exceeding a prescribed amount.

By a majority, the Court ruled that the burden of proving whether a close relative of a deceased person is in receipt of a qualifying benefit, or has capital exceeding the relevant amount, for the purposes of regulation 6(6), lies with the Department for Social Development, rather than the appellant.

Equally importantly, the Court considered the application of regulation 7 of the Social Security (Claims and Payments) Regulations (Northern Ireland) 1987. By regulation 7(1) a claimant to benefit is under an obligation to furnish “such certificates, documents, information and evidence in connection with the claim, or any question arising out of it, as may be required by the Department.” The Court held, unanimously, that there is an obligation on all claimants to social security benefits to comply with this regulation to provide information with respect to the claim, required by the Department. Further, a failure to provide the relevant information will result in a disallowance of the claim to benefit. In arriving at its conclusions on the issue of regulation 7, the Court rejected the long-standing decision of Commissioner Mesher in R(IS) 4/93.²

Facts

Mr Hugh Kerr died on 19th July 1999. His funeral took place on 27th July 1999 at a cost of £1,172.58. An application for a Social Fund Funeral Payment was made to the Department for Social Development (the Northern Ireland equivalent of the Department for Work and Pensions) by a surviving

* The author is writing in a private capacity.

¹ (2002) NICA 31, available at <www.courtsni.gov.uk/judgments/judgments+2002.htm>.

² Available at <www.osspsc.gov.uk/pages/des.htm>.

brother of the deceased, Mr Thomas Frank Kerr. His application was refused (on the basis of a factual error, as it turned out) and he appealed to an appeal tribunal. At the date of the death of the deceased he had another brother and a sister living.

The appeal tribunal found, as a fact, that the appellant and his siblings had drifted apart, and had lost contact, and that the appellant simply did not know whether any of them was in receipt of a qualifying benefit. The appeal tribunal concluded that, while it was reasonable for the appellant to accept responsibility for the funeral expenses, it simply was not known whether any of the close relatives of the deceased was in receipt of a relevant benefit, and the same applied to their capital position. The tribunal concluded that the onus was on the appellant to show that his brother or sister was in receipt of a relevant benefit and did not have capital over the prescribed amount. As he was unable to prove those things, the consequence was that his claim failed.

On appeal before the Chief Social Security Commissioner for NI,³ it was submitted on behalf of the appellant that the tribunal was in error in its conclusion concerning the burden of proof. It was also argued that contact with the deceased could include contact after death. The Commissioner swiftly rejected the latter argument, holding that the contact required by the legislation must be contact during the lifetime of the deceased, though the taking of responsibility for a funeral can be supportive evidence of the quality and nature of a relationship during his or her lifetime.

On the issue of the burden of proof, the Chief Commissioner followed a decision of Mr Commissioner Henty in CIS/5321/98,⁴ particularly paragraph 7, and held that a claimant has to prove the basic qualifications to a social security benefit, by proving the circumstances that make him or her entitled, whilst the Department normally had to prove any exceptions such as those matters set out in regulation 6(3) of the Social Fund (Maternity and Funeral Expenses) (General) Regulations 1987.

The Chief Commissioner concluded (at paragraph 27) that once the tribunal had found all the siblings were in equally close contact then the question turned to finances and the burden of proof. It seemed to the Chief Commissioner that a burden might be on the Department if there was sufficient evidence to enable the Department to make relevant enquiries. It was clear, however, that any claimant must to the best of his or her ability give such information to the Department as (s)he reasonably can. Siblings were, on balance, expected to have some knowledge of each other and must be expected to provide basic information to the Department or at the very least show that they have taken all reasonable steps to obtain such information.

The Appeal

On appeal to the Northern Ireland Court of Appeal, counsel for the appellant submitted that whereas the claimant had to bear the burden of proving satisfaction of the entitling provisions, this shifted to the Department when it came to disqualifying provisions such as regulation 6(6). Further, he argued

³ *C1/00-01(SF)*, available at <www.dsdni.gov.uk/benefitlaw/benefitlaw.asp>

⁴ Available at <www.osspsc.gov.uk/pages/des.htm>.

that this had been correctly recognised by Mr Commissioner Henty in CIS/5321/98, and that the Chief Social Security Commissioner had been right to accept that statement of the law. He had, however, failed to apply it correctly when he affirmed the decision of the appeal tribunal, which had confused entitling provisions with disqualifying ones. Counsel further argued that there was insufficient evidence to justify the conclusion reached by the appeal tribunal and the Chief Commissioner that the appellant's siblings had been in equally close contact with the deceased.

Counsel for the Department relied on two main propositions. Firstly, regulation 6(6) of the 1987 Regulations was not a disqualifying provision but an entitling provision, expressed in negative terms, which a claimant has to satisfy by proving the matters specified in it. This conclusion was supported by the fact that it was intended as an anti-abuse provision. If the burden of proof were on the Department, a claimant would be entitled to payment of the benefit if (s)he failed to produce any evidence about his or her close relatives or deliberately withheld such evidence. Secondly, the Chief Commissioner was entitled to find that since on the evidence neither the appellant nor his brother or sister had had any contact with the deceased for twenty years, they were in equally close contact with him.

The Judgments

Judgments were delivered by Carswell LCJ, with whom Kerr J agreed, and by McCollum LJ, who dissented on one key issue.

Carswell LCJ thought that, as the legislature had not expressly specified on which party the burden of proof lay, it was necessary to attempt to ascertain that by implication or by the application of any relevant rules of construction or presumptions. His lordship thought that the orthodox principle (described by Lord Wilberforce in *Nimmo v Alexander Cowan & Sons Ltd*⁵) that "exceptions are to be set up by those who rely on them" was a useful starting point. Furthermore, a second rule that, where a matter requiring proof is particularly within the knowledge of one party and it would be unduly onerous for the other to have to prove it, the burden lies on the former, was equally constructive. Applying these principles to the present appeal, Carswell LCJ thought that:

"In the present case arguments *ab inconvenienti* can be stated on either side. It may be said that it is less onerous for a claimant than for the Department to establish the identity and whereabouts of his close relatives and the degree of closeness of contact that each had with the deceased. On the other hand, it could be very difficult indeed for him to establish that they had all been awarded relevant benefit or that the capital possessed by each did not exceed the specified amount. The latter factor, taken together with the fact that Regulation 6(6) of the 1987 Regulations takes the form of an exception, leads me to the conclusion that it was the intention of the legislature that the burden of proof of establishing that the exception

⁵ [1968] AC 107, at 130.

contained in Regulation 6(6) applies should rest upon the Department.”

His lordship thought that counsel for the Department’s argument concerning the situation which would result if a claimant withheld the evidence about close relatives required to determine his or her entitlement to funeral benefit was based on an unsound premise. He did not find it possible to accept the suggestion that in such a case the Department had no power to refuse payment. Counsel’s submission had been based on a statement in paragraph 14 of Mr Commissioner Mesher’s decision in *R (IS) 4/93*, where he had stated, *inter alia*, that it was not in itself a ground of disentitlement to income support that a claimant had failed to provide sufficient evidence to support his claim, although the result of such a failure would be that he had failed to prove some essential element of entitlement.

Counsel had argued that it followed from this statement that where the burden of proof was on the Department the claimant was not disentitled to benefit if he failed to provide the evidence. The anti-avoidance provision in regulation 6(6) could, accordingly, be rendered inefficacious by a careless or unscrupulous claimant. This, according to counsel for the Department, was a pointer to the conclusion that it was not intended that the burden of proof on the issue should rest on the Department.

Carswell LCJ thought that if Commissioner Mesher intended to hold that failure to comply with the statutory obligation to furnish evidence has no effect other than to leave the claim short of the necessary evidential foundation, he could not find it possible to agree with that conclusion, which would make regulation 7 of the Social Security (Claims and Payments) Regulations 1987 otiose. Rather, it seemed to the Chief Justice that it was intended to impose an obligation on the claimant, fulfilment of which was a condition of entitlement to claim benefit and that failure to comply with the statutory requirement entitled the Department to withhold payment on his claim.

Accordingly, Carswell LCJ held that the appeal tribunal and the Commissioner were in error in imposing the burden on the appellant of proving that the case did not come within the exception contained in regulation 6(6) of the 1987 Regulations.

McCollum LJ dissented on the important issue of the burden of proof. He was clear that “a forensic onus of proof does not exist in relation to the presentation or consideration of a claim for Social Security Benefit.” The lord justice was of the view that, in the first instance, when determining the claim the Department is not in the position of a litigant since its function, under the equivalent provision of section 8 of the Social Security Act 1998, is to decide the matter on the basis of the information provided by the applicant. Accordingly, there could not be an onus of proof upon the Department at that stage. Furthermore, the procedure for deciding a claim is an administrative one, rather than judicial.

His lordship thought that the prohibitory nature of the wording of section 1 of the Social Security Administration Act 1992 suggested that (i) unless a person establishes that his situation satisfies all the conditions relating to that benefit, whether by showing compliance with qualifying conditions or by negating the existence of disqualifying conditions, and (ii) has completed his

claim in the manner prescribed, then he is not entitled to benefit. Accordingly, he could not construe the provision in such a way as to suggest that Parliament intended that any onus lay upon the Department under section 1(1) of the Administration Act 1992 to establish satisfaction of any of the conditions relating to entitlement to benefit or to negative the existence of disqualifying conditions.

McCollum LJ added the following considerations:

- “1. It is quite impracticable for the Department to prove many of the matters, which if established, effectively disqualify a claim. For example, it could never be within the knowledge of the Department whether another close relative was in closer contact with the deceased than the responsible person. In the present case, and armed only with the names of the surviving brother and sister it would be a monumental, not to say an impossible task, for the Department to discover that neither of them nor their partners were in receipt of one or other of the qualifying benefits.
2. Regulation 7(1) of the Social Security Claims and Payment Regulations 1987 was incompatible with an intention on the part of Parliament that the Department should be required to establish facts independently of the applicant for benefit. As no sanction for failure to comply with the requirement set out in regulation 7(1) was provided, nor any means of enforcing it, the only reasonable conclusion that could be drawn was that failure to comply with it may be dealt with by refusing the claim. It appeared to be inconsistent that the Department, which was entitled to require claimants to furnish information or evidence of an unlimited nature in connection with their claims should itself be subject to the onus of proving any part of that information.
3. The provisions of section 1(1) of the Social Security Administration Act 1992 suggested that failure to establish any relevant condition (and no distinction is made between positive and negative conditions) results in non entitlement to benefit.”

Discussion

The majority decision is authority for the proposition that the burden of proving whether a close relative of a deceased person is in receipt of a qualifying benefit, or has capital exceeding the relevant amount, for the purposes of regulation 6(6) of the Social Fund (Maternity and Funeral Expenses) (General) Regulations 1987, lies with the Department, rather than the claimant. It is the experience of most appeal tribunals that in appeals arising out of regulation 6(6), the Department's submission will include details of enquiries made of the claimant/appellant as to the existence of family members, the degree of contact, award of benefit and possession of capital. The disallowance is invariably based on fact-finding on the evidence supplied by the claimant/appellant. Legally qualified panel members of appeal tribunals have occasionally directed, at appeal stage, that the Department undertake searches of its computer data-base to discover any

evidence of benefit entitlement. Such directions have usually been met with diffidence by the Department. Quite clearly, such an attitude will now have to change.

The minority view on the burden of proof issue is based, in part, on McCollum LJ's view that the establishment of entitlement to social security benefits is too onerous a task to impose on the Department, particularly where the only available information is a name. Is such a proposition acceptable in a technological age dominated by the availability of information?

The unanimous view is that there is an obligation on all claimants to social security benefits to comply with regulation 7 of the Social Security (Claims and Payments) Regulations 1987 to provide information with respect to the claim, as required by the Department. That proposition has probably never been in dispute. What is at issue is the consequence of a failure to provide the necessary information. What the Court of Appeal was saying was that a failure to provide the relevant information will result in a disallowance of the claim to benefit.

Such a conclusion was at the heart of the submission of the Secretary of State to Deputy Commissioner (as he then was) Mesher in the case of *R(IS) 4/93*, but was rejected by him as a misunderstanding of the purpose of regulation 7. The Deputy Commissioner stated the following, in concluding that regulation 7(1) is concerned with the responsibilities of the Secretary of State to collect information so that he can then submit a claim to a decision maker for adjudication:

“ . . . it is simply irrelevant whether or not the claimant has satisfied the Secretary of State under Regulation 7 (1) of the Claims and Payment Regulations or whether or not the claimant has furnished sufficient information for the Secretary of State to refer the claim to the adjudication officer. Those matters are entirely for the Secretary of State . . . Once the claim is submitted to him under section 98(1), the adjudication officer's duty is to take it into consideration and, so far as practicable, dispose of the claim within 14 days of its submission.”⁶

The Deputy Commissioner went on to hold that it was not itself a ground of disentitlement to a social security benefit that a claimant has failed to produce sufficient evidence to support the claim:

“But the result of such a failure will be that he fails to prove some essential element of entitlement.”⁷

This reasoning was unanimously rejected by the Court of Appeal. As noted above, Carswell LCJ thought that if the Deputy Commissioner intended to hold that failure to comply with the statutory obligation to furnish evidence has no effect other than to leave the claim short of the necessary evidential foundation, he could not find it possible to agree with that conclusion. That would make the provision of regulation 7 otiose. Rather, it seemed to his

⁶ *Supra* n 2, at para 13.

⁷ *Ibid*, at para 14

lordship that it was intended to impose an obligation on the claimant, fulfilment of which was a condition of entitlement to claim benefit and that failure to comply with the statutory requirement entitled the Department to withhold payment of the claim.

Are the Northern Ireland Court of Appeal and the Deputy Commissioner really that far apart? From a legal perspective they certainly are. The Court of Appeal was clear that the consequence of a failure to provide information was disallowance of the claim without more. Although it was nowhere stated, the Court appeared to be implying that no decision could be made. The Deputy Commissioner stated that failure to provide information did not run to entitlement but went to proof. A decision would be made, the decision being disentitlement.

From a practical perspective, the result might be the same. Take the following example. Claimant A makes a claim to income support, and provides no information concerning income or capital. Surely the claim can be disallowed on both legal bases. Applying the principles in *Kerr*, the claimant has failed to comply with regulation 7. Applying the principles in *R(IS)4/93*, the claimant has failed to discharge the burden of proof.⁸ The big difference is that the decision maker has a decision to make and may or may not award benefit. In the example cited above, it would be unlikely that an award would be made. Furthermore, it is important to remember, as the Deputy Commissioner pointed out in *R(IS) 4/93*, the decision maker has the power to make further investigations or call for further evidence before determining the claim.

The difference may be important, however, in those “hard” cases where there is a dispute.⁹ The decision of Commissioner Mesher enables the decision maker, or appeal tribunal, to employ the technique of “inferences of fact” to individual cases to produce a just result suitable to the circumstances of each case. The approach of the Court of Appeal, if applied, does not permit the decision maker or appeal tribunal to adopt the following constructive approach – to consider whether a demand for information has been received, whether the information has since been provided, albeit late, whether it was unreasonable/inconvenient/impossible for the request for the information to be complied with, and then to reach a decision on entitlement according to the balance of probabilities.

The decision in *R(IS) 4/93* was a decision on the old scheme of adjudication. It is arguable that the reasoning of the Deputy Commissioner rests on a separate and independent scheme of adjudication. That scheme was swept away by the 1998 and 1999 reforms.¹⁰ Is the *Kerr* analysis a re-evaluation of the post 1998 decision-making scheme? It is not possible to state that it is,

⁸ The latter conclusion is supported by the analysis of *R(IS) 4/93*, set out at M Rowland and R White, *Social Security Legislation* 2003, vol III, para 2.76 (2003, Sweet & Maxwell).

⁹ I am indebted to Nick Warren, Regional Chairman, Appeals Service for Great Britain, for drawing the significant issue in this paragraph to my attention. The formulation of the analysis is his.

¹⁰ Social Security (Northern Ireland) Order 1998 (S.I. 1998 No 1506), Social Security and Child Support (Decisions and Appeals) Regulations (Northern Ireland) 1999 (S.R. 1999 No. 162).

based, with respect to the judges, on the inadequacy of argument on the changes introduced in 1998/1999.

What is clear, however, is that there is an obvious tension between regulation 6(6) of the Social Fund (Maternity and Funeral Expenses) (General) Regulations (Northern Ireland) 1987 and regulation 7 of the Social Security (Claims and Payments) Regulations (Northern Ireland) 1987. The majority decision in *Kerr* makes it clear that the latter impose a requirement on individual claimants to provide information in support of claims to social security benefits. Failure to provide such information will result in a disallowance of the claim to benefit. On the other hand, the interpretation of regulation 6(6) of the Maternity and Funeral Expenses Regulations means that, despite what information the claimant provides in support of the claim to a Social Fund Funeral Payment, a further burden of proof lies with the Department. The answer to the conflict might lie in the submissions of counsel for the appellant before the Court of Appeal. He had argued that, while a claimant to a Social Fund Funeral Payment had to bear the burden of proving the *entitling* provisions, and was under a duty to provide regulation 7 information in support of the claim, the burden shifted to the Department when it came to *disqualifying* provisions, such as regulation 6(6). Although not fully authoritative on the point, there is some support for this proposition in the decision of the Social Security Commissioner in *CIS/5321/98*.¹¹

What is the status of the decision in *Kerr* in Great Britain? The lead decision on the effect of Superior Court decisions is *R(SB) 1/90*.¹² It is clear that decisions of the Court of Appeal in Northern Ireland are not binding on the Commissioners of Great Britain, and, hence, not on appeal tribunals, or decision-makers either. Identically-worded legislative provisions in both jurisdictions should, however, be interpreted uniformly. What the decision-making authorities make of the decision in *Kerr* remains to be seen. It is apposite, perhaps, to re-examine the decision in *R(IS) 4/93*, in light of the 1998 reforms, in any event. An opportunity to provide such a re-examination of that, and the other substantive issues arising in the case, may arise when the decision in *Kerr* comes before the House of Lords, a petition for leave to appeal having been granted.

Finally Carswell LCJ described regulation 6 of the Social Fund (Maternity and Funeral Expenses) (General) Regulations (Northern Ireland) 1987 as having been framed with the “Byzantine complexity customary in social security legislation.” These comments reflect a series of parallel remarks made by Social Security Commissioners and judges of the appellate courts over the years. The comments reinforce the difficult and complex tasks which those responsible for social security adjudication – decision makers and appeal tribunals – carry out on a daily basis.

¹¹ Available at at <www.courtservice.gov.uk/tribunals/osscc_new>.

¹² Available at at <www.courtservice.gov.uk/tribunals/osscc_new>.

NEW HOPE FOR THE CRIMINAL JUSTICE REVIEW? A COMMENTARY ON THE IMPLEMENTATION PROCESS

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INTRODUCTION

The effects of the conflict in Northern Ireland and the subsequent exercise of emergency laws and powers by the British Government contributed, over the years, to declining levels of public confidence in the independence, impartiality and fairness of the criminal justice system. The need to reform the administration of criminal justice was therefore addressed by many of Northern Ireland's political parties and both the British and Irish Governments in the Good Friday Agreement of 1998. Accordingly, the Agreement provided, *inter alia*, for:

“ . . . a wide-ranging review of criminal justice (other than policing and those aspects of the system relating to the emergency legislation) to be carried out by the British Government through a mechanism with an independent element, in consultation with the political parties and others.”¹

This led to the creation of the Criminal Justice Review; a body composed of senior British Government representatives and independent assessors. However, the capacity of the Review to propose wide-ranging reforms to the criminal justice system was, to an extent, undermined by the fundamentally limiting terms of reference it was afforded under the Agreement.² These terms conferred lead authority for the review process to the British Government, (thus compromising the degree of independence of the Review) and precluded an examination of the use of emergency laws and powers in Northern Ireland. In view of the damage to public confidence resulting from the use of emergency laws, this was a serious omission.

Within the parameters described, the Review nonetheless produced a report, in March 2000, of 294 recommendations for reform to the criminal justice system.³ This received the broad support of the communities in Northern Ireland and included a number of significant and far-reaching recommendations for reform, such as: new procedures for all judicial appointments, including the establishment of a Judicial Appointments Commission for Northern Ireland; the creation of a new, independent Public Prosecution Service for Northern Ireland; measures to promote a representative workforce in all parts of the criminal justice system; proposals aimed at placing human rights at the centre of all criminal justice service policies; and reform to aspects of youth justice. In accordance with its terms of reference and the conditional pledge by the British Government to devolve

* I am most grateful to Mr Paul Mageean and Professor John Jackson for their helpful comments on drafts of this article.

¹ *Belfast Agreement*, Policing and Justice, para 5.

² *Ibid*, Annex B, Review of the Criminal Justice System, p 24.

³ *Review of the Criminal Justice System in Northern Ireland* (March 2000).

justice and policing powers to Northern Ireland,⁴ the Review also made a number of recommendations which dealt with structures and arrangements post devolution of justice powers. Aside from the political motivations for devolution, which are beyond the scope of this article, it was generally felt that there would be greater government accountability in the area of justice and policing if these functions were administered locally.

The aim of this paper is not to offer a critique of the recommendations of the Criminal Justice Review but to consider the extent to which those recommendations have been implemented since their publication nearly four years ago. This will involve an evaluation of the main implementing measures: the Government Implementation Plan of November 2001; the Justice (Northern Ireland) Act 2002; the Updated Government Implementation Plan of June 2003; and the new Justice (Northern Ireland) Bill 2003, which at the time of writing, had just been published and received its first reading before the House of Lords.⁵

Criminal Justice Review Implementation Plan

In November 2001, one and a half years after the Report of the Criminal Justice Review, the Government made public its response in the Criminal Justice Review Implementation Plan. The Government accepted fully the majority of the Review recommendations, rejected only one,⁶ and as to the remainder, accepted them “in principle”, “with qualifications” or subject to “further consideration”. The main problem with the Plan however was that it did not stipulate the measures that needed to be taken by the various criminal justice agencies to give effect to those recommendations of the Review which the Government had accepted, nor did it impose strict target dates for full implementation of the recommendations. In this sense, the document failed to deliver the key elements of a “plan”, suggesting an underlying lack of political and institutional engagement in the review process.

The Plan referred in many instances to the need for legislation in order to implement a large number of the Review recommendations. To coincide with the publication of the Implementation Plan therefore, the Government published a draft Justice (Northern Ireland) Bill. This raised the expectation that once the Bill became law, the way would be clear for full implementation of the Review.

Justice (Northern Ireland) Act 2002

In July 2002, the Justice Bill received Royal Assent and became the Justice (Northern Ireland) Act 2002. The Act made provision for many of the Review recommendations, including those relating to: the new procedures for judicial appointments,⁷ including the creation of the Judicial Appointments Commission;⁸ the new Prosecution Service for Northern

⁴ *Belfast Agreement*, para 7.

⁵ The Justice (NI) Bill was first published on 4th December 2003.

⁶ Recommendation 46 on making it an offence to interfere with the Prosecutor.

⁷ Justice (NI) Act 2002, s 4.

⁸ *Ibid*, s 3.

Ireland;⁹ the creation of the new offices of Attorney General for Northern Ireland,¹⁰ Advocate General,¹¹ Chief Inspector for Criminal Justice¹² and Lay Magistrate;¹³ reform of the youth justice system;¹⁴ and new regulations on the use of courtroom symbols, flags and oaths of allegiance.¹⁵

However the content of the Bill had been hotly contested as it passed through Parliament and a number of recommendations which had not received the full support of the Government in the Implementation Plan, were omitted from the Act. This may be seen as the first shortcoming of the Act, in terms of its capacity to give full effect to the Review.

An example of an important recommendation which was affected in this way, was recommendation 4. This placed a requirement on “whatever machinery is devised for administering criminal justice matters after devolution” to develop a strategy for securing a workforce, across the criminal justice system, which is reflective of the community in Northern Ireland. The fact that this recommendation appears (although this is disputed by members of the Review) to place the reform solely in the context of devolution, should not have affected its inclusion in the Justice Act. Many of the provisions in the Act, as will be discussed below, were drafted on the contingency of the devolution of justice powers to Northern Ireland and these will not enter into force until that time. It is suggested instead that the reason why this recommendation was not placed on a statutory footing, was due to a degree of institutional resistance to tackling the difficult area of representation. Indeed, the fact that the Government only accepted the Review recommendation “in principle” indicates that implementation will most likely be difficult.

A second problem in terms of the substance of the Justice Act was that a number of Review recommendations, to which the Act purported to give effect, were in fact diluted or significantly altered in character during the drafting process. The most publicised example of this was the express extension of recommendation 141 on the display of symbols inside and outside of courthouses. Under political pressure, the then Secretary of State, Dr. John Reid, citing reasons of “architectural or historical merit”,¹⁶ tabled an amendment at the drafting stages of the Justice Bill so as to exempt a number of courts from the recommendations of the Review on the display of symbols inside certain designated courthouses.¹⁷ Moreover, the Secretary of State, in a complete departure from the original Review, also interpreted recommendation 141 to mean that *new* courthouses should be able to display coats of arms. This had the effect of allowing the new Laganside

⁹ *Ibid*, s 29(1).

¹⁰ *Ibid*, s 22(1).

¹¹ *Ibid*, s 27.

¹² *Ibid*, s 45.

¹³ *Ibid*, s 9.

¹⁴ *Ibid*, part IV, ss 53-65.

¹⁵ *Ibid*, part V, ss 66-67.

¹⁶ NIO Press Release, 1st March 2002.

¹⁷ The courtrooms affected were in the Royal Courts of Justice in Belfast, the courtrooms in the Armagh, Banbridge, Magherafelt and Omagh Courthouses and Court No 1 in the Courthouse in Downpatrick. The amendment came into effect as s 66(2) of the Justice Act.

Courthouse, which was subsequently opened in February 2003, to bear the Royal Coat of Arms.

Other, less publicised examples of where the Justice Act diluted the scope and effect of certain Review recommendations were: recommendation 21 on the duty of the Director of Public Prosecutions to refer all instances of police malpractice to the Ombudsman;¹⁸ and recommendation 75, which provided that the Prime Minister must make senior judicial appointments on the basis of recommendations of the First and Deputy First Minister.¹⁹ These two sections of the Act are however subject to amendment in the new Justice Bill, the detail of which will be discussed later.

However the larger issue preventing the Justice Act from giving effect to the Review, has been the significant delay to the commencement of most of its provisions. The reality is that the vast majority of the Act has not yet entered into force, despite publication over a year and a half ago. The sections of the Act which have been commenced to date are, for the most part, rather minor, such as the provisions relating to court security,²⁰ judicial pensions,²¹ criteria for lay magistrates²² and inconsequential amendments.²³ One important exception to this has been the commencement of section 45, together with schedule 8, on the new office of the Chief Inspector for Criminal Justice. This new office has been taken up by Mr. Kit Chivers, formerly HM Chief Inspector of Magistrates' Courts Service, and it will hopefully play a positive role in ensuring the efficiency of the criminal justice system in Northern Ireland and in evaluating the impact of the new reforms.

A lack of sufficient political and institutional will to engage in the process of criminal justice reform is the main reason for the poor and half-hearted implementation of the Justice Act and Review in general. There is however also another explanation for the source of delay in implementing a small number of the Act's provisions. These are the provisions which, for constitutional reasons, require the devolution of justice functions to Northern Ireland before they can be fully operational as envisaged by the Act. Such provisions, while very important, account for only a small percentage of the total of the Act and include the sections which relate to: the recommendations for appointment of members of the judiciary by the First and Deputy First Ministers;²⁴ the functioning of the proposed new offices of Attorney General for Northern Ireland²⁵ and Advocate General;²⁶ the appointment of the Director of the Public Prosecution Service by a local minister;²⁷ the new role of the Lord Chief Justice as head of the judiciary in Northern Ireland;²⁸ the abolition of the Northern Ireland Court Service,²⁹ and

¹⁸ Justice (NI) Act 2002, s 34(4).

¹⁹ *Ibid*, s 4(3).

²⁰ *Ibid*, ss 79-81.

²¹ *Ibid*, s 21.

²² *Ibid*, s 9(4), (5), (6) and (14).

²³ *Ibid*, s 85.

²⁴ *Ibid*, s 4(3).

²⁵ *Ibid*, s 22.

²⁶ *Ibid*, s 27.

²⁷ *Ibid*, s 43(1).

²⁸ *Ibid*, s 12.

²⁹ *Ibid*, s 78.

other structural arrangements post devolution of justice functions. There is no certainty as to when these sections of the Act will come into effect, given the distant prospect of the devolution of justice and policing powers to Northern Ireland. Any consequent interference to the reform process, however, should be kept to a minimum and all possible interim and preparatory measures should be taken.

In summary, therefore, it is fair to say that the Justice Act has to date provided little or no impetus to the implementation process. It is merely an enabling piece of legislation, whose terms will be brought into force when the British Government, in consultation with the criminal justice agencies, so wishes.

Joint Declaration of the British and Irish Governments

In view of the overriding need for political and institutional will in order to advance implementation of the Review, the strong statements of support for the Criminal Justice Review, in the Joint Declaration of the British and Irish Governments of 19th April 2003, offer much encouragement. The Joint Declaration set out a programme, devised by both Governments, for implementing the outstanding elements of the Good Friday Agreement. In relation to the Criminal Justice Review, the Declaration announced the Government's intention to appoint an independent Oversight Commissioner to provide independent scrutiny of the Government's decisions on the Review. This was a significant development, as up to this point the British Government had strongly resisted the creation of an Oversight Commissioner despite considerable lobbying. Lord Clyde, the former Scottish Law Lord, was subsequently appointed to the new Office in June 2003.

The Declaration also referred to "major transformational change" that would form the basis of an updated Government implementation strategy and promised the introduction of a second Justice Bill to amend the Justice (Northern Ireland) Act 2002. These measures will now be considered in turn to assess whether they bring new hope for implementation of the Criminal Justice Review.

The Updated Implementation Plan

The Updated Implementation Plan was published by the Government in June 2003. For the first time in the implementation process, the Updated Plan actually set out, in varying degrees of detail, the actions that both the Government and the respective criminal justice agencies were taking in order to give effect to the Review, and it fixed deadlines for the completion of these activities.

This new information was a particularly helpful indication of the progress that was being made by the Prosecution Service in implementing the many recommendations pertaining to it. The Plan revealed that the Review recommendations would be introduced on a gradual and progressive basis, with the use of a number of pilot projects. These projects, which bring into operation recommendations 17 and 60 on the expansion of the duties of the Prosecution Service and the decentralisation of the Service, were commenced on the 1st December 2003 in South Belfast. Whilst statutory provisions have already been made in the Justice Act to give effect to the

Review recommendations on the Prosecution Service, these pilots are operating outside of the Act, on the basis of the Prosecution of Offences (Northern Ireland) Order 1972. Similarly, the new codes of practice and ethics for the Prosecution Service, as recommended by the Review,³⁰ are expected to be published in draft form in December 2003, but the corresponding sections of the Justice Act³¹ will not be brought into force at this stage, neither does the Plan indicate when this will take place.

From the point of view of enhancing the accountability of the new Prosecution Service, the Review had recommended³² that the Service should produce an annual report. However section 39 of the Justice Act, which gives effect to this recommendation, is being interpreted by the Prosecution Service to mean that the first annual report is not due to be published until the completion of all the prosecution reforms, which according to the current schedule is December 2006. This interpretation of the provision is quite alarming and appears almost to take advantage of the long “roll-out” process of the reforms. At the launch of the Prosecution Service in October 2003, there was at least a commitment to publish an independent evaluation of the pilots in July/August 2004 and in the absence of an annual report it is imperative that this commitment is met.

The Plan indicates that it is not only the reforms to the Prosecution Service which have begun without commencement of the Justice Act, but aspects of the Review recommendations in relation to youth justice and community safety partnerships have also begun to operate in the interim on a basis other than the Justice Act. For example, the Youth Justice Agency has now replaced the old Youth Justice Board. In August 2002 a Director was appointed to head the Youth Conference Service and the pilots for youth conferencing have already begun under existing legislation. Similarly, the Review recommendations on community safety partnerships are now partly in operation, having been so authorised by the Government. This is in spite of the fact that the sections on community safety partnerships in the Justice Act have not yet been commenced.³³ While these are all positive measures towards implementing the Review, it is nonetheless desirable that the relevant sections of the Justice Act are commenced without delay.

Justice (Northern Ireland) Bill 2003

One of the most important aspects of the Updated Plan, from the point of view of advancing the implementation process, was that it included a commitment from the Government to introduce a new Justice (Northern Ireland) Bill. The purpose of this Bill is to amend those sections of the Justice Act which did not reflect the original Review recommendations and to make statutory provision for other Review recommendations that were not included in the Justice Act.

According to the terms of the Updated Implementation Plan, the Bill would contain the following provisions:

³⁰ *Criminal Justice Review*, recommendation 50.

³¹ Justice (NI) Act, s 37.

³² *Supra*, n 30.

³³ Justice (NI) Act, part 5, ss 71-72.

“the Judicial Appointments Commission will be established *prior to*, as opposed to after, the devolution of criminal justice and policing powers (thus exceeding the terms of the original Review recommendation);

there will be equal limits on the length of service for *all* members of the Commission (formerly this limit only extended to its lay members);

the Commission *as a whole*, rather than just its lay members, will be required to be reflective of the community in Northern Ireland;

it will be a key objective of the Commission to engage in a programme of action to secure a reflective judiciary in Northern Ireland, consistent with the principle of merit;

the Prime Minister will appoint the Lord Chief Justice and the Lord Justices of Appeal based on the recommendation of the First Minister and Deputy First Minister (formerly the Prime Minister was merely requested to consult with the First and Deputy First Ministers);

the Lord Chief Justice’s consent for the establishment of a tribunal to remove or suspend a member of the judiciary will be removed;

section 34 of the Justice Act in relation to the power of the Director of Public Prosecutions (DPP) to refer instances of police malpractice to the Police Ombudsman will be strengthened to place a *duty* on the Director to refer *all* such cases;

a new offence, of seeking to influence the DPP without legitimate cause, will be created;

there will be a duty on the criminal justice agencies to have due regard to relevant international and human rights standards in carrying out their functions.”

In light of the many failings associated with the implementation of the Review so far, there was a degree of concern over whether these provisions, as listed in the Plan, would actually be borne out in the drafting stages of the Bill. Unfortunately, however, at the time of writing this article, the Bill was published for the first time and once more defeated expectations. While the published Justice Bill remained true to the Updated Plan in regard to making the necessary arrangements for bringing forward the creation of the Judicial Appointments Commission and the other provisions in respect of the composition and stated objectives of the Judicial Appointments Commission, it did not preserve the nature of the amendments to the Justice Act, as stated in the Updated Plan, on senior judicial appointments, the duty on the DPP to refer instances of police malpractice to the Ombudsman, and the requirement that all criminal justice agencies should have due regard to international human rights standards. In all instances, these areas received much weaker formulations which leaned towards maintaining the status quo rather than introducing even limited reform.

In regard to the appointment of the Lord Chief Justice and Lord Justices of Appeal, the published Bill has failed to meet the expectation raised in the Updated Plan that the Prime Minister will appoint persons to these positions “based on the recommendations of the First and Deputy First Minister”.³⁴ Instead the Bill has diminished the role of the First and Deputy First Minister by requiring the Prime Minister only to “consider” any recommendation for appointment made by the First and Deputy First Minister.³⁵

Clause 6(3), on the duty of the Director of Public Prosecutions to refer matters of police malpractice to the Ombudsman, also falls short of the Review and of what had been promised in the Updated Plan. The wording of the clause in question, confers an excessive degree of discretion on the Director to decide whether a matter is one which must be referred to the Ombudsman. The degree of subjectivity involved in this assessment could make it very difficult to make the Director accountable through a judicial review challenge.

The third area where the Bill has fallen short of both the Review and the guarantee in the Updated Plan is in relation to the role of international human rights standards in the reform process. The Plan, as shown above, stated that all criminal justice agencies would be under a duty to have due regard to international human rights standards. The Bill, however, proposes a curious and convoluted formulation whereby it will be for the Attorney General for Northern Ireland to issue guidance, as and when he or she thinks fit, to the listed criminal justice agencies, on the exercise of their functions, in light of relevant international standards. This raises doubts over the genuine commitment of the Government to the application of international human rights standards in the criminal justice system in Northern Ireland.

It is also worth commenting that clause 8(8) of the Bill exempts the Prosecution Service from having any regard to human rights guidance issued by the Attorney General for Northern Ireland where that guidance would be inconsistent with a code of practice issued under section 37 of the Justice Act. It is difficult to foresee how the new and first ever code of practice for the Prosecution Service would be inconsistent with international human rights standards.

In light of these failings, the hope that the new Bill may make amends for the shortcomings of the Justice Act seems somewhat diminished. However, it is important nonetheless that the Judicial Appointments Commission proceeds in advance of devolution as agreed in the Joint Declaration and there is a chance that the three sections commented on above will be amended during the passage of the Bill. Some of the political parties have already addressed their concerns about the new Bill to Government and the Criminal Justice Oversight Commissioner may, in exercise of his terms of reference, scrutinise the passage of the Bill to ensure that it truly reflects the recommendations of the Criminal Justice Review.

³⁴ *Review of the Criminal Justice System in Northern Ireland*, recommendation 75.

³⁵ Justice (NI) Bill (4th December 2003), clause 4.

CONCLUSION

The title of this article questions whether there is new hope for the implementation of the Review. Having charted, in general terms, the progress of the Review, it is clear that the recent developments of the publication of the Updated Plan, the new Justice Bill and the creation of the Oversight Commissioner have the potential, if properly used, to give new life to the implementation process. Progress is slow, however, and resistance to change continues to impede the full delivery of the reforms. Above all, the success of the Review depends on the political and institutional will to commit to the process of criminal justice reform in a whole hearted manner.

THE LEGAL SERVICES COMMISSION – BRAVE NEW WORLD FOR LEGAL AID?

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Further to the provisions of the Access to Justice (Northern Ireland) Order 2003 the Legal Services Commission for Northern Ireland took over responsibility (from the Law Society of Northern Ireland) for the operation of the Legal Aid Scheme on 1st November 2003. Pursuant to two commencement orders,¹ most of the operative provisions in articles 3-9 and Schedule 1 of the Order, relating to the establishment of the Commission, have now been brought into force. Other than that not much of the Order has been brought into force, one exception being article 12(8-11) under which the Lord Chancellor (now Secretary of State for Constitutional Affairs) may authorise the Commission to fund services otherwise excluded under Schedule 2. Other than article 12(8-11) nothing of articles 10-20 on civil legal services, and absolutely nothing of articles 21-31 on criminal defence services and Part III on conditional fees and litigation funding agreements, has been brought into force. It seems that for the time being it is intended that the Commission manages the current Legal Aid Scheme and moves gradually towards reform over the next few years.

Expectations of significant improvement in the management of the current Legal Aid Scheme may well be high. As successive reports of the Law Society, together with accompanying reports of the Lord Chancellor's Advisory Committee, have revealed, the quality of service delivered to practitioners and recipients of Legal Aid by the Legal Aid Department has left a lot to be desired. The Commission appointed by the Lord Chancellor is certainly a body of talented persons, with considerable management experience among them. It will have a huge job to do because the Commission has inherited the staff of the Legal Aid Department with all the culture of failure and other baggage brought along. It may have to be creative, proactive, and ruthless in implementing its agenda for an improved service, particularly with regard to setting and meeting considerably more rigorous targets for turning round applications for Legal Aid and the payment of fees.

The Order itself contains very few provisions of much interest. Most of its provisions confer wide powers on the Commission to operate, within boundaries set by the Department for Constitutional Affairs, a different Legal Aid Scheme from the one which has operated in this jurisdiction since 1965. In broad outline we can probably expect a fixed budget for Civil Legal Aid, divided into two separate sub-budgets, Civil Family and Civil Non-Family. There will almost certainly be a *Funding Code* to govern decisions as to when and for whom Legal Aid is to be provided. The Code will probably contain a broader and more holistic set of factors to take into account in

¹ Access to Justice (NI) Order 2003 (Commencement No 1) Order (NI) 2003 (SR 2003/344); Access to Justice (NI) Order 2003 (Commencement No 2) Order (NI) 2003 (SR 2003/440).

deciding whether to make Legal Aid available than is currently considered under the present merits' test. There will be no fixed budget for Criminal Legal Aid as human rights access to justice Article 6 European Convention arguments have prevailed against any such idea. Disappointingly the Order contains no specific steer towards the voluntary advice sector, although the Commission's general powers in articles 10-20 may allow for some initiatives to be introduced here in the future. The essential story of the Order is one of placing the current scheme under new (and hopefully better) management and giving the latter power to introduce reforms under the general supervision of the Department for Constitutional Affairs. Clearly much devil will be in the detail of the guidelines laid down by the Department, within which the Commission will have to operate.

Part III of the Order contains provisions relating to an area of major controversy over the last few years. This concerns the funding of personal injury actions. Readers may recall² that a vigorous debate has been taking place as to whether conditional fee agreements (CFAs) should become the prime funding mechanism for these actions or whether there was any alternative that did not involve Legal Aid. The case for Legal Aid was put in this journal in the special issue devoted to "Access to Justice and Legal Aid Reform".³ The positive recommendation given to a Contingency Legal Aid Fund (CLAF) by the Legal Aid Advisory Committee⁴ is given a very firm "thumbs down" by articles 40-42 of the Order. Although "litigation funding agreements" are provided for by these provisions they depart so radically from the recommendations for a CLAF as to be completely unworkable. No "seed funding" will be provided from public funds, successful litigants would have to pay a portion of their damages into the fund, and costs would be generally recoverable against the fund by successful defendants. The Department for Constitutional Affairs is clinging on to its preferred option of CFAs through the provision made for them in articles 38-39. Whether these provisions are ever brought into force or whether the Commission will try to emulate Scotland by retaining personal injury actions within the Legal Aid Scheme, remains to be seen.

Some indication of what may happen in the short to medium term is provided by the Draft Implementation Plan for the Commission, to be discussed with the Commission on appointment.⁵ According to this during the first three years of the Commission's life preparatory work will begin on Civil Legal Services, the *Funding Code*, and the introduction of options for funding money recovery damages civil cases. A final decision on alternative funding mechanisms is not anticipated until 2005/2006. It is possible that the Commission may decide to concentrate on better management of the current

² See (2002) 53 *NILQ*, No 2.

³ See D. Capper, "Personal Injury Litigation – The Case for Legal Aid" (2002) 53 *NILQ* 137.

⁴ See Report of the Lord Chancellor's Advisory Committee in Northern Ireland, *The Viability of Establishing a Contingency Legal Aid Fund or Conditional Fees in Northern Ireland* (Northern Ireland Court Service, July 2001); D. Capper, "The Contingency Legal Aid Fund: A Third Way to Finance Personal Injury Litigation" (2003) 30 *JLS* 66.

⁵ See

<<http://www.legalservicescommissionni.gov.uk/draftimplementationplan.htm>>

system for the time being and not explore alternatives very urgently until satisfied as to what the current system is capable of delivering. As was argued in this journal last year the current system has been so badly managed for so long that it may be impossible to tell what latent strengths it could possess should it be managed better.⁶ Amongst all the debate about reform it is possible that interested parties have failed to attach sufficient weight to the possibility that Legal Aid in Northern Ireland needs better management far more than it needs reform. This may not sound like a *Brave New World* but compared to what there has been for so many years it would be.

⁶ See Capper, *supra* n 2.

BOOK REVIEW

***DIMENSIONS OF PRIVATE LAW. By Stephen Waddams
[Cambridge, CUP, 2003. Paperback (with index) 247pp].***

At conferences and seminars one of the usual ice-breakers in conversation over dinner, coffee or drinks is “[w]hat is your field?” Among private lawyers the answer may well be “Contract”, “Tort”, “Restitution”, or “Property”. This collection of essays tells us that these are inadequate responses. In fact even “Private Law” could prove to be an inadequate answer to the question. The main theme of this collection, apparently a reflection upon a lifetime’s work, is that categories and conceptualisation, for all their utility, also have their limitations. There are echoes of Dawn Oliver’s work on the Public/Private Law divide in this thesis. Categories are not attacked as such and their value as tools of analysis is acknowledged. The principal problem with them is that they cannot always be reconciled with the authorities and the historical evidence. Not all cases are exclusively “Contract”, “Tort”, “Restitution” or “Property”; or even exclusively “Public” or “Private”. One often needs to be able to appreciate how a case encompasses elements of more than one category, sometimes extremely subtly, before the court’s reasoning can be understood. Sometimes claims made about certain concepts in the law do not entirely withstand analysis when it is sought to reconcile them with the precedents. Professor Waddams makes extensive use of historical approaches to his analysis. Sometimes this is just pointing out how other authorities suggest there may be more to the issues than first meets the eye. Sometimes the factual background to a case is examined to demonstrate that the designation of the case as belonging to one exclusive category is over-simplified. No attempt is made to de-construct the subject matter. In many respects this is a formalistic attack on the limits of formalism and one which reveals a huge breadth of scholarship and awareness of the canopy of Private Law.

Although this may make the review on the long side there seems no better way than to go through the essays one by one and show what Waddams was attempting to do. Chapter 1 on the “Mapping of legal concepts” sets out the general theme discussed in the previous paragraph. Chapter 2, “Johanna Wagner and the rival opera houses” would be fascinating to students of opera in the nineteenth century as well as lawyers. This essay, previously presented as a paper to the SPTL conference at University College London in 2000 and more fully presented at (2001) 117 Law Quarterly Review 431, involves the closest examination of factual background. It examines the frequently desperate lengths to which Benjamin Lumley, manager of Her Majesty’s Theatre, Haymarket, and Frederick Gye, manager of the Royal Italian Opera, Covent Garden, were prepared to go to secure the services of the celebrated soprano, Johanna Wagner, for the 1852 opera season. Lumley first signed Miss Wagner but then Gye made her a better offer. *Lumley v*

*Wagner*¹ is known to Contract lawyers as the exceptional case where a prohibitory injunction was granted to prevent a contracting party from working for someone else. As a means of circumventing the settled rule of practice that specific performance would not be granted of a contract of employment Lumley was granted an injunction prohibiting Miss Wagner from working for anyone else. That left her with the choice between working for Lumley or not working at all. Waddams points out that this case cannot be fully appreciated without an understanding of its unjust enrichment element. The party who would have been unjustly enriched had this injunction been refused would have been Gye, a non-party. He had indemnified Miss Wagner against any damages she would have had to pay to Lumley if she breached her contract with him, and had calculated that this would still leave him with a handsome profit. This was how Lumley was able to show that damages against Miss Wagner would be an inadequate remedy. The subsequent case brought by Lumley against Gye himself, the case first recognising the tort of inducing a breach of contract,² needs to be understood in this light. It was essentially an attempt to prevent Gye from gaining at the expense of Lumley by luring Miss Wagner away from her contractual commitment to Lumley. Lumley lost at trial³ because he could not show that Gye had intentionally induced Miss Wagner to breach her contract. The evidence apparently established that Gye believed that Miss Wagner had a legitimate get out clause in her contract with Lumley. Waddams discusses the intriguing possibility that had this fact been known at the earlier demurrer proceedings the court might have cast the test for inducing a breach of contract more in terms of negligence than intention.

Chapter 3 is entitled “Liability for economic harms”. Much of this relates to third party rights under contract. To give an idea how this essay fits into the general theme of the collection the case of *Beswick v Beswick*⁴ may be considered. The widow’s suit for specific performance of the son’s promise to Peter Beswick exhibited unjust enrichment features as well as contractual. Had she been required to settle for nominal damages (as administratrix the estate had suffered no loss) the son would have been unjustly enriched because he acquired his father’s business at a lower price than would have been demanded absent the obligation to pay his mother the annuity. Chapter 4 on “Reliance” argues that the protection of reliance losses is largely a *sui generis* creation of the common law system because the principal categories (Contract, Tort, Restitution) cannot explain it. Contract is insufficient because there is no bargain and expectation is not the extent of protection. No tort is committed and there is no unjust enrichment. But many reliance cases combine some or all of these elements in part, albeit insufficient to categorise the case as belonging to one category exclusively. The Australian High Court decision in *Waltons Stores (Interstate) Ltd v Maher*⁵ may illustrate this phenomenon. There was no contract because the parties intended to reduce their agreement to writing but there had been an inchoate

¹ (1852) 1 De G M & G 604.

² *Lumley v Gye* (1853) 2 El & BL 216. (The contract Gye allegedly induced the breach of was Miss Wagner’s contract with Lumley).

³ (1854) 18 Jur 468n.

⁴ [1968] AC 58.

⁵ (1987) 164 CLR 387.

promise. There was no tort but the representations which induced Mahon to act to his detriment were certainly analogous acts of wrongdoing. The new building Maher commenced constructing for Waltons to lease was not an enrichment because the deal was abandoned long before completion but some vague enrichment aspect was present. Chapter 5, "Liability for physical harms", shows that tort liability does not always depend on fault. Examples given include road traffic accidents where compulsory insurance has at least been partly eroded fault as a significant factor in the allocation of responsibility for most loss and damage. Another is nuisance, although this argument is contestable in the sense that the use of property in ways that cause foreseeable damage may fairly be regarded as "fault".

Waddams describes chapter 6, "Profits derived from wrongs", as "a kind of test case for classification in private law". Some writers, like Goff and Jones and Maddaugh and McCamus, treat this as falling within Restitution but others, like Birks, regard the absence of any subtraction from the claimant as negating any restitutionary element. In the typical case of the fiduciary profiting from office without either stripping anything from the claimant or intercepting a benefit which ought to go to the claimant there are obvious problems about identifying what is "restitutionary" about requiring the fiduciary to account for it. What is being "restored" to the claimant? What is the fiduciary being required to "make restitution of"? At the same time this does not look like a tort because there is no compensatory element to the order of the court. Contract is capable of explaining many of these cases because the fiduciary has a contractual relationship with the claimant but this is not always so.⁶ Property may also be a satisfactory categorisation in many cases but not in all. Once again this is an area where the fiduciary's obligations depend on a mixture of all the mentioned categories. The same theme is discussed in chapter 8, "Interrelation of obligations", where Waddams contrasts the inclusive approach of Goff and Jones (everything resting at least partly on unjust enrichment) with that of others who exclude topics not resting entirely on unjust enrichment, such as maritime salvage. Another area like this is "Domestic obligations", the subject of chapter 7. In the family property/cohabitants' cases a mixture of contract, reliance, unjust enrichment, wrongdoing, property, and public policy feed into the judicial solutions adopted.

Chapter 9, "Property and obligation", covers one of the most important questions in Private Law, especially in the context of insolvency. Is the claimant's interest proprietary or merely an obligation the defendant cannot fulfil if insolvent? The remedial constructive trust makes an expected appearance here, Waddams pointing out that whatever may be thought of this device some decisions can only be rationalised on the footing that the court awarded the claimant proprietary relief. Waddams similarly questions whether tracing is merely a process when on occasions the court has imposed proprietary consequences after tracing.⁷ The overall conclusion reached in this chapter, reflecting the historical and evidence based approach of the book, is summed up in the following passage (from page 189):-

⁶ One example is where the fiduciary obligation is an equitable duty of confidence.

⁷ *E.g. Chase Manhattan Bank v British Israel Bank (London) Ltd* [1981] Ch 105.

“The two points of view (that equitable property rights are, and are not, discretionary) are sharply contradictory on the surface, but they can be largely reconciled for, from a historical perspective, each captures a different aspect of the relations between law and equity. Elements of both views could be combined in the following proposition: where there is a close connexion between a personal claim and particular property held by the defendant, and where the claimant has no adequate money remedy, the courts have sometimes imposed a trust or lien on the property, but they have not defined precisely the circumstances in which they will do so, and have withheld such declarations where they have been likely to operate unfairly against the defendant or against third parties.”

Chapter 10, “Public interest and private right”, considers the role of public policy and formal principle in the development of the law. Chapter 11, the conclusion, sums up the author’s views on the value and limits of formalism and categories.

The above summary of the contents of this book cannot possibly do justice to the breadth and depth of the scholarship contained within it. It merely gives a brief indication of the subject matter for the author’s analysis of the interplay between different categories in Private Law and how academic theory often struggles to reconcile precedents which do not fit the theory. This is a collection which would repay repeated study every time a reader had to consider any of the issues raised within it.

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