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AN ESSAY ON JURISDICTION, JURISPRUDENCE, AND AUTHORITY: THE HIGH COURT OF AUSTRALIA IN *YORTA YORTA* (2001)

Shaunnagh Dorsett, Senior Lecturer, Faculty of Law, Victoria University of Wellington and Shaun McVeigh, Senior Lecturer, Faculty of Law, Griffith University

INTRODUCTION

Like the common law legal ordering of England and Wales, the ordering of British colonisation has, in many ways, been an affair of jurisdiction. It is through jurisdiction that the authority of the common and imperial laws have been asserted, and it is through questions of jurisdiction that the legal settlement of the colonies has been effected. Post-colonising and post-colonial settlements have frequently turned to constitutional orders to re-constitute normative relations between the conceptual register of nation (state)-sovereignty-territory and that of land and people. However, questions of jurisdiction remain. This is nowhere more so than in Australia where there has been no attempt at constitutional transformation. One consequence of this is that relations between indigenous law and common law of Australia continue and repeat the first colonial encounters. This essay figures jurisdiction as central to the question of the legal settlement of the land of Australia and follows the way in which questions of jurisdiction continues to give shape to those of authority, sovereignty and jurisprudence – and so to accounts of the responsibility of law.

At its broadest, jurisdiction is taken here as referring to the power and authority to speak in the name of the law.[1] It encompasses the authorisation and ordering of law as such and not simply determinations of authority within a legal regime. While such questions of jurisdiction can be addressed at the level of normative justification, in this essay attention is paid to the acts of authorisation, differentiation and representation that both distinguish law from non-law and provide the means of government through law. Concentration on these latter aspects of jurisdiction draws attention to the manner of the representational and technical ordering of the legal domain rather than doctrinal or ethical critique. It is with the broad range of devices through which the ordering of law comes to be represented rather than the specific doctrinal and administrative ordering of native title jurisprudence that this essay is concerned.[2] What is addressed in this essay is the manner in which the High Court represents itself as exercising its own jurisdiction.

In order to draw out what is at issue in maintaining the centrality of questions of jurisdiction, this essay examines of the decision of the

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[1] This definition is taken from Peter Rush. See P. Rush, "An Altered Jurisdiction: Corporeal Traces of Law", (1997) 6 *G.L.R.* 144, 150.

[2] See generally, P. Goodrich, Y. Hachamovitch, "Time out of Mind: An Introduction to the Semiotics of the Common Law" in P. Fitzpatrick, *Dangerous Supplements: Resistance and Renewal in Jurisprudence* (1991).

Australian High Court in *Yorta Yorta*, one of its more recent judgments on Native Title.[3] In *Yorta Yorta* the High Court has continued the elaboration of the legal conditions of the acquisition of the territory and land of what is now Australia that it began over a decade ago in Mabo (No.2).[4] The central conceptual, and jurisdictional, concern of the judgment in *Yorta Yorta* was the way in which "traditional laws and customs intersect with the common law".[5] The difficulty or problem with which the High Court presented itself can be represented emblematically in the way that the majority tried to hold on to the recognition of an 'intersection' of laws (or at least of normative orders) whilst at the same time refusing to recognise any possibility of there being a 'parallel' ordering of laws – indigenous or otherwise. The judgments in *Yorta Yorta* struggled, often elliptically, with how these two claims of legal ordering might be put into relation. It will be argued here that it is with questions of jurisdiction that this central issue of native title jurisprudence in Yorta Yorta can be most sharply addressed. (It is the failure of the High Court to provide much of an account of its own jurisdiction and jurisprudence that has obscured both the conditions of existence and operation of any such intersection of laws and the possibilities of responsibility for law.)

In Part One, the decision in *Yorta Yorta* is outlined and it is shown how questions of native title and legal tradition are linked to those of jurisdiction; in Part Two attention is turned to the particular use of jurisprudence made by the majority of the High Court and the way that it establishes links in the judgment between sovereignty, jurisdiction and custom; and in Part Three consideration will be given to the accounts of authority and the ethic of responsibility practiced by the High Court. At each point the judgment is turned to its representation of jurisdiction.[6]

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[3] *Members of the Yorta Yorta Community* v *Victoria* (2002) 194 A.L.R. 538 (HCA).

[4] *Mabo* v *State of Queensland (No.2)* (1992) 175 C.L.R. 1 [hereafter *Mabo (No.2)*].

[5] *Yorta Yorta*, above n.3, 548.

[6] While much has been written on native title, little of this corpus considers questions of jurisdiction and representation. For the three articles that do concern jurisdiction see S. Dorsett, "Since Time Immemorial': A Story of Common Law Jurisdiction, Native Title and the *Case of Tanistry*", (2002) 26 *Melb. Uni LR* 32, P. Rush, "An Altered Jurisdiction: Corporeal Traces of Law", above n.1, S. Dorsett, S. McVeigh, "Just So: 'The Law Which Governs Australia is Australian Law'" (2002) 13 *Law and Critique* 289. For accounts which consider in some way the relationship between native title and the common law/Australian nation see, for example, *Fejo* v *Northern Territory* (1998) 195 CLR 96, 128; N. Pearson, "The Concept of Native Title at Common Law" in G. Yunupingu (ed), *Our Land is Our Life: Land Rights – Past, Present and Future* (1997), 154; N. Pearson, "Principles of Communal Native Title", (2000) 5 *Indigenous Law Bulletin* 4; L. Strelein, "Conceptualising Native Title", (2001) 23 *Sydney Law Review* 95. For general works on native title see the Special Edition of *Law and Critique* marking the 10th anniversary of the decision in *Mabo (No.2)*: (2002) 13 *Law and Critique* and the Special Issue of the *Australian Feminist Law Journal*, entitled "Divining the Source: Law's Foundation and the Question of Authority": (2003) 19 *AFLJ*. For works which discuss other facets of *Yorta Yorta* see A. Reilly, "From a Jurisprudence of Regret to a Regrettable Jurisprudence: Shaping Native Title from *Mabo* to *Ward*", (2002) 9 *E-law* 1; L. Strelein, "Members of the Yorta Yorta Aboriginal Community v Victoria [2002] HCA 58 (12 December 2002): Comment" (2003) 2(21) *Land, Rights, Laws : Issues Of Native Title* 1, S. Young,

1. Native Title and The Decision in *Yorta Yorta*

Until 1992, the common law of Australia did not recognise the doctrine of aboriginal rights. In this respect, Australia lagged significantly behind other jurisdictions, such as Canada, New Zealand and the United States, in which courts had already begun to the task of reconciling indigenous rights to land with colonial regimes.[7] In *Mabo (No.2)*, the High Court held that while the acquisition of sovereignty over the Australian continent was non-justiciable, it could consider the domestic consequences of that acquisition, and that a form of indigenous rights to land could be recognised at common law. The rights and interests recognised by the common law were to be known as 'native title'. In the twelve years since the initial recognition of native title in *Mabo (No.2)*, there has been significant litigation with respect to technical issues of the scope and nature of native title rights, and the extinguishment of those rights.[8] Regardless of the questions before the High Court in these cases, however, at the heart of each lies a concern with delimiting relations between the rights of Indigenous Australians and those of the colonising power. For the High Court, what seems to be at stake is the sovereign authority of the Australian Nation. While glimpses of this concern can be seen in earlier determinations of the High Court, it is only in the recent decision in *Yorta Yorta* that the High Court finally attempts to provide an account of the relations between sovereignty, the common law and indigenous law.

Yorta Yorta concerned an application for a determination of native title with respect to an area which straddled the New South Wales/Victorian border. The *Yorta Yorta* commenced their claim in 1994, and it was one of the first claims lodged under the *Native Title Act*.[9] Section 223(1) of the Act defines native title, and much of the argument before all courts centred around the correct interpretation of this section and in particular of the word 'traditional'. The relevant section states that native title is "communal . . . rights and interests . . . where (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples. . .". The word 'traditional' in this subparagraph raised questions as to what did it mean for laws and customs to be 'traditional'? How much could they change or 'evolve'? What evidence was required of their transmission across the generations?

"The Trouble with 'Tradition': Native Title and the Yorta Yorta Decision" (2001) 30 *UWALR* 1. K. Anker, "Law in the Present Tense: Tradition and Cultural Community in *Members of the Yorta Yorta Aboriginal Community* v *Victoria* (2004) *MULR* 1

7 See, *inter alia*, *Johnson* v *M'Intosh* 8 Wheat. 543, 21 U.S. 543 (1823), *Cherokee Nation* v *Georgia*, 5 Pet. 1, 30 U.S. 1 (1831), *Worcester* v *Georgia*, 6 Pet. 515, 31 U.S. 515 (1832), *The Queen (on the prosecution of McIntosh)* v *Symonds* (1847) N.Z.P.C.C. 387, *Te Runanganui o Te Ika Whenua Inc Society* v *Attorney-General* [1994] 2 NZLR 20 and most recently *Ngati Apa, Ngati Koata* v *Ki Te Tau Ihu* [2003] 3 N.Z.L.R. 643, *R.* v *Delgamuuwk* v *British Columbia* (1997) 153 D.L.R. (4th) 193.

8 See, for example, *The Wik Peoples* v *State of Queensland* (1996) 187 CLR 1, *Fejo* v *Northern Territory* (1998) 195 CLR 96, *Commonwealth* v *Yarmirr* (2001) 184 A.L.R. 113, *Ward* v *Western Australia* (2000) 191 A.L.R. 1.

9 *Native Title Act* 1993 (Cth).

At first instance, Olney J found that native title did not exist on the grounds that native title had been extinguished by reason of loss of connection with the land. In so deciding, of crucial importance was the issue of the extent to which the *Yorta Yorta* still observed their traditional laws and customs. In order to succeed it was necessary for the *Yorta Yorta* to show that they were still a 'traditional society'. To prove this what was required was an historical account of the laws and customs of the *Yorta Yorta* at the time of European contact. Native title could only survive if these laws and customs continued to be observed by the claimants.[10] According to Olney J, the *Yorta Yorta* were unable to demonstrate that their contemporary practices demonstrated a continuous link back to the laws and customs of the original inhabitants. Thus, these practices did not have "the character of traditional laws acknowledged and traditional customs observed" as required by the common law and statutory definitions of native title.[11] As a result, their title had been 'washed away' by the 'tide of history'.[12]

The Majority of the Federal Court of Appeal, Beaumont and Katz JJ upheld the trial judge's decision, but in so doing rejected the so-called 'frozen rights' approach, according to which rights remain frozen in time, unable to evolve or change in response to white culture and laws. While Black C.J. dissented, holding that Olney J had erred in applying too restrictive an approach to the concept of 'traditional', all members of the court were in substantial agreement that the traditional laws and customs that form the foundation for native title may adapt and change. The majority stated that:

> "The test of whether a law acknowledged, or a custom observed, is a traditional law or custom is . . . principally an objective test. The primary issue is whether the law or custom has in substance been handed down from generation to generation; that is, whether it can be shown to have its roots in the tradition of the relevant community."[13]

As with the courts below, the High Court's judgment centred on the meaning of 'tradition'. Both the majority and the minority proceeded from an understanding that native title constitutes the point of intersection between two laws, or normative systems: aboriginal law and common law.[14] Therefore, "[a]n application for determination of native title requires the location of that intersection, and it requires that it be located by reference to the Native Title Act".[15] As put by the majority, "it is critically important to identify what exactly it is that intersects with the common law. Is it a body of traditional law and custom as it existed at the time of sovereignty? Is it a body of law and custom as it exists today but which, in some way, is connected with a body of law and custom that existed at sovereignty?"[16]

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[10] *Members of the Yorta Yorta Community* v *Victoria* [1989] FCA 1606, [3-5].
[11] *ibid.*, [128].
[12] *ibid.*, [126]. For an interesting critique of Olney J's decision see V. Kerruish, C. Perrin, "Awash in Colonialism", (1999) 24 Alt. L.J. 3.
[13] *Members of the Yorta Yorta Community* v *Victoria* (2001) 180 A.L.R. 655, 688 (FFC).
[14] *Yorta Yorta* (HCA), above n.1, quoting from *Fejo* v *Northern Territory* (1998) 195 CLR 96, 128.
[15] *ibid*.
[16] *ibid.*, 549.

However, as will be seen, the majority and minority disagreed on what might be termed the spatial and temporal logics of native title.

For the majority, the key point of departure lay, and continues to lie, with the assertion of sovereignty by the British Crown. It is because of the nature of sovereignty that the rights and interests recognised in land must be related to those that existed before assertion of sovereignty by the British Crown. As such the majority position can be summarised:

> "The native title rights and interests which are the subject of the Act are those which existed at sovereignty, survived that fundamental change in legal regime, and now, by resort to the processes of the new legal order, can be enforced and protected. It is those rights and interests which are 'recognised' in the common law."[17]

For the Majority, although there are two normative systems one must be dominant. The logic of state sovereignty requires this. Further there can be no 'parallel law-making':

> "Upon the Crown acquiring sovereignty, the normative or law-making system which then existed could not thereafter validly create new rights, duties or interests. Rights or interests in land created after sovereignty and which owed their origin and continued existence *only* to a normative system other than that of the new sovereign power, would not and will not be given effect by the legal order of the new sovereign."[18]

Since rights and interests created by indigenous normative systems after sovereignty cannot be given effect to, traditional laws and customs, and hence native title, must irrevocably be tied to pre-sovereign practices. The result for the interpretation of section 233 *Native Title Act* is that the meaning of 'traditional laws and customs' is constrained to include only those laws and customs which can be sourced in a pre-sovereign normative system. This does not, of course, necessarily lead to any implication that custom cannot change or 'adapt' over time. It does, however, for the majority entail evidence of transmission of a 'body of law' (rather than specific customs) from generation to generation:

> "When the society whose laws or customs existed at sovereignty ceases to exist, the rights and interests in land to which these laws and customs gave rise, cease to exist. If the content of the former laws and customs is later adopted by some new society, those laws and customs will then owe their new life to that other, later, society and they are the laws acknowledged by, and customs observed by, *that later society*, they are not laws and customs which can now properly be described as being the existing laws and customs of the earlier society. The rights and interests in land to which the re-adopted laws and customs give rise are rights and interests

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[17] *ibid.*, 560-1.
[18] *ibid.*, 552.

> which are not rooted in pre-sovereignty traditional law and custom but in the laws and customs of the new society."[19]

For the majority, the inquiry to be made is as to "the relationship between the laws and customs now acknowledged and observed, and those that were acknowledged and observed before sovereignty, and to do so by considering whether the laws and customs can be said to be the laws and customs of the society whose laws and customs are properly described as traditional laws and customs."[20]

For the Kirby and Gaudron JJ (in dissent), questions of sovereignty and the intersection of laws were treated in a somewhat different manner. However, the question of the continuity of community was also important: "[c]ontinuity, including continuity of community, is a matter that bears directly on the question whether present day belief and practices can be said to constitute acknowledgement of traditional laws and observance of traditional customs."[21] It is not, however, in of itself a pre-requisite for a determination of native title. Continuity was inherent in the word 'traditional'. Quoting from the Macquarie and Oxford Dictionaries:

> "As a matter of ordinary usage, the word "traditional" does not necessarily signify rigid adherence to past practices. Rather, it ordinarily signifies that that which it describes has been handed down from generation to generation, often by word of mouth."[22]

For the Gaudron and Kirby JJ, this meant that in order for laws and customs to be identified as traditional "they should have their origins in the past and, to the extent that they differ from past practices, the differences should constitute adaptations, alterations, modifications or extensions made in accordance with the shared values or the customs and practices of the people who acknowledge and observe those laws and customs."[23] Continuity is, therefore, a question of fact. Groups may disperse and regroup.[24] The real question is whether "there have been persons who have identified themselves and each other as members of the community in question."[25]

Callinan J also looked to the dictionary definition of 'traditional'. According to Callinan J, 'traditional' requires a high degree of continuity, ". . . intergenerational transmission, acknowledgement and observance."[26] Like Gaudron and Kirby JJ, Callinan J does not refer to the problem or even possibility of parallel laws. In fact, his judgment provides little guidance as to how change and modification is to be considered by the court. He suggested that either of two approaches were possible. One could "start with the situation then and trace the development until now with due regard to the evolutions of the traditions in question." Or "it may well be possible to start

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[19] *ibid.*, 554.
[20] *ibid.*, 555.
[21] *ibid.*, 568.
[22] *ibid.*, 568-9.
[23] *ibid.*, 569.
[24] *ibid.*, 570.
[25] *ibid.*
[26] *ibid.*, 591.

with the present and look backwards to see if the former is in truth a current manifestation of the latter."[27] However, while Callinan J does not deny that change can occur, it appears that his Honour would not be willing to allow much change before a custom or law was no longer 'traditional'. Some guidance as to his approach may be gleaned from the following:

> "The matter [of how far custom may evolve] went uncontested in *Yanner* v *Eaton*, although I myself may have questioned whether the use of a motorboat powered by mined and processed fuel, and a steel tomahawk, remained in accordance with a traditional law and custom, particularly one of alleged totemic significance."[28]

McHugh contented himself with saying that he continued, as he had in *Yarmirr*, to disagree with the approach of the majority to both the source of the definition of native title and the scope of recognition, but that the appeal should fail as there was no error of law on the part of the trial judge.[29]

In sum the tests of 'traditionality' are used by the High Court as a threshold for the recognition of aboriginal laws and customs. In this respect at least the High Court uses the *Native Title Act* as a device to establish the conditions for the recognition of other laws and customs as well as the exercise of its own jurisdiction. For the majority this question of jurisdiction is determined once and for all with the assertion of sovereignty by the British Crown. There is only one intersection of laws, and only be one law of the territory. For the minority the question of recognition of traditional laws and customs is to be determined in the present. The minority did not feel the need to address questions about their own jurisdiction. The interpretation of the term 'traditional' appears to have been established by the criteria 'ordinary' language. While of course reference to dictionary meanings is an established aid to statutory interpretation, such interpretation remains set within a legal ordering of meaning. It is this ordering of jurisdiction that is addressed in the next section.

2. Jurisprudence and Jurisdiction

As with the decision in *Mabo (No.2)* a bare summary misses much of the force of the judgment. At the centre of its discussion of tradition lie a number of threshold disputes about sovereignty, authority and territorial legal order that circulate around the question of the jurisdiction of the law of Australia. In order to reveal these disputes, we now turn to consider how the majority establish sovereignty as the criteria for the intersection of laws and how questions of jurisdiction come to be represented.

Rhetorically, the majority decision in *Yorta Yorta* is striking for taking up a University jurisprudence – the positivism and analytical language philosophy of 'Oxford Jurisprudence' – to give form to its deliberations. At issue here is not so much the continued merit of the jurisprudence deployed, but more the uses to which this body of work is put in the judgment. For all that the Majority advises the reader that such work should be treated with great

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[27] *ibid.*, 591-2.
[28] *ibid.*, 592.
[29] *ibid.*, 572.

caution, as indeed the reader should, their disavowals did not prevent them from using it to perform a number of tasks within the judgment.

'Oxford jurisprudence', it might be recalled, started out in the nineteen fifties by developing semantic accounts of the ordinary use of legal language. Its major innovation was to equip the language of positivist jurisprudence with ways to re-describe the practices of municipal or state law. For Herbert Hart such accounts were to be considered more clarificatory than normative in aspiration.[30] The clarification, as practiced by Hart, generally consisted in analysing the ways in which legal discourse related to wider forms of social and ethical life.[31] Hart's analysis of legal practices centred on two ways of delimiting law. The first was the elaboration of sovereign authority in terms of the recognition practices of legal officials and the functioning of institutional systems of rules.[32] The second, equally important, was the delimitation of the context in which these descriptions of rule were established. The first context set for the recognition of law was the movement from pre-legal systems into mature, civilized, legal systems. For Hart this context was 'genetic' or speculative and in this Hart followed a long tradition of Enlightenment jurisprudence that explained the present by means of a progressive 'evolutionary' history.[33] As others have pointed out the temptation to treat genetic arguments as factual history has bedevilled modern jurisprudence.[34] The second context, more obliquely, was the historical move from colonial to post-colonial legal orders.

For the majority in *Yorta Yorta* the clarification of Oxford jurisprudence was deployed to explain how to take into account 'some fundamental principles' in relation to the 'recognition' of native title rights and the 'normative systems' that pre-dated and survived the Crown's acquisition of sovereignty and radical title.[35] In brief the majority in *Yorta Yorta* employed Hart's jurisprudence as a guide to the mastery of the social practices and rules of recognition of its own law, and hence the recognition of other laws.[36]

The lesson that the majority were keen to transmit through jurisprudence was how what it called two cardinal facts should be understood:

> "[f]irst, [that] the laws and customs and the society which acknowledges and observes them are inextricably interlinked. Secondly, [that] one of the incontestable consequences of the change in sovereignty was that the only native title rights or interest in relation to land or waters which the new sovereign order recognised were those that existed at the time of change in sovereignty."[37]

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30 H.L.A. Hart., *The Concept of Law* (2nd ed. 1994), "Introduction".
31 *ibid.*, Ch. 1.
32 *ibid.*, Ch. 6.
33 *ibid.*, Ch. 5; P. Stein, *Legal Evolution: The Story of an Idea* (1980).
34 The move from pre-legal to legal order is genetic in the sense that it is speculative or heuristic rather than a historical reality or fact. See, for example, P. Fitzpatrick, *The Mythology of Modern Law* (1992).
35 *Yorta Yorta* (HCA), above n.3, 550.
36 *ibid.*, 551.
37 *ibid.*, 555.

It is precisely the incontestable quality of these facts and their meaning that was in dispute in *Yorta Yorta*. In this section a number of links between the 'intersection of laws' and jurisdiction are followed: first, through the linking questions of the imbrication of law and custom with the order of sovereignty; and then, second, through the way in which disputes in common law about questions of jurisdiction have become facts and evidence. Finally, consideration is given to the consequences of these gestures for the representation of 'parallel' laws (or at least of the representation of the impermissibility of parallel laws).

Sovereignty

Questions of sovereignty and possession continue to vex all claims of native title. Despite their claims that any examination of native title must proceed from the *Native Title Act*, it is clear that the majority commenced with the consequences of sovereignty, and that their views on sovereignty coloured subsequent interpretations of the provisions of the Act.

In *Yorta Yorta* the narrative of sovereignty was presented in stark terms. The assertion of sovereignty by the British Crown 'necessarily entailed' that thereafter there could be "no parallel law-making system in the territory over which it asserted sovereignty. To hold otherwise would be to deny the acquisition of sovereignty and . . . that is not permissible."[38]

Thus, for the majority there is an inevitable link, or a 'necessary entailment', between sovereignty, legal system and territory. The status of this 'necessary entailment' is not easy to establish. On the one hand it might be a statement of law, albeit one that is made without reference to any direct authority. On the other hand the claim could be understood as being of a logical or axiomatic nature. The assertion of sovereignty, and the authority of law, it might be thought from the above, can only be accomplished in terms of an absolute (legal) occupation/dominion of a territory. Sovereignty is a matter of authority, and of submission to authority, and it is inextricably linked to territory. While it is clear, to the majority, that no parallel-law making system can survive, it is not so clear what kind of intersection of normative orders can be managed in the aftermath of such recognition.

A beginning can be made by examining how the majority of the High Court deliver their account of sovereignty. In the *Concept of Law*, Hart takes up the question of the recognition (or permission) of sovereignty by seeking a relation between legal discourse and other forms of social and political practice. For the most part Hart takes for his examples the conventional (empirical) 'recognition practices' of officials and presents legal order as a socio-logic of acts of state.[39] Many have noted the somewhat paradoxical, self-authorising, form this account of sovereignty takes: those who do the recognising are only authorised to do so by the system they recognise. Such formulations also commit legal officials (such as judges) to the government

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[38] *ibid.*, 552.

[39] Hart's discussion of Sovereignty is analytical. The rule of recognition overcomes what Hart views as the formal weakness of John Austin's account of law, *viz*: (i) problems of temporality and (ii) fictions of consent. The introduction of the rules of recognition allows Hart to explain the transmission or inheritance of law. See Hart, above n.30, Ch. 6.

of what is or is not to be recognised. For Hart, and the High Court, this act of government is predominantly temporal and functional. In one aspect these acts of government are a formal corollary of the recognition practices: legal officials recognise their law. But the temporal ordering of laws also arises from a decision about how to recognise laws. This organisation of the boundaries of jurisdiction could be arranged in any way that marks a boundary or limit of law. For Hart this question is answered speculatively in the genetic transition from the pre-legal (or primitive) orders to mature or civilised legal orders.[40] One system of laws takes the place of, or succeeds, another. But such borders could be arranged differently, for example as a juxtaposition of laws, or as parallel laws. Abstract as Hart's formulations of sovereignty and legal order might be, they can be taken, both within Hart's jurisprudence and that of the majority of the High Court in *Yorta Yorta*, as articulating a set of social practices. Such practices of law have their own time and place. Not only do the practices of sovereignty have a history, but so too does the concept of sovereignty.

One significant attempt to give a historical understanding of political-legal sovereignty can be found in the historical jurisprudence of Carl Schmitt.[41] For Schmitt, the political and legal form of sovereignty received its decisive formulation in the seventeenth century. In this formulation, sovereignty is tied to territory, and exercised over a definite people. Chief amongst the objectives of nation state formation was the ending the sectarian wars of religion. The *Treaty of Westphalia* in 1648 has often been treated as the political culmination of this project. The *Treaty* was one of the first instruments to embody the links between the emerging notions of sovereignty and of territory. Concluded to end the thirty years war, the Holy Roman Emperor gave sovereign independence to princes who remained formally within the empire, and guaranteed the inviolable nature of state territory. By the end of the eighteenth century, "the notion of national sovereignty over well-defined territory had come to the fore in political practice as well as in the theory of jurisprudence."[42] The legal form of the political notion of territorial sovereignty could be found in the jurisprudence of *jus publicum Europaeum.* Its jurisprudential elaboration centred on a tradition of state directed civil jurisprudence initiated in the work of Hobbes, Grotius, and Pufendorf.[43] This political-legal settlement of European territorial states also provided for the colonisation of the rest of the world. For present purposes two points are worth noting. First that these accounts represent the State as in need of no further justification beyond that of reason of State. This is so not simply because of an intrinsic axiomatics, but

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[40] Despite Brennan J's assertion that such questions of civilisation have been removed from common law thought, it has continued to prove difficult for the common law to think with out such a terminology. For an argument that Brennan J himself continued to argue through the language of civilisation see H. Patapan, *Judging Democracy: The New Politics of the High Court* (2000).

[41] C. Schmitt, "The Land Appropriation of a New Word", (translation of Chapter II, "Die Landnahme einer neuen Welt", in *Der Nomos der Erde im Völker echt der Jus Publicum Europeaeum*, (2nd ed. 1974, originally published (1950)), (1996) 109 *Telos* 29.

[42] J. Gottman, *The Significance of Territory* (1973), p.17.

[43] For a further discussion of Schmitt in this context see S. Dorsett, S. McVeigh, "Just So: 'The Law Which Governs Australia is Australian Law'" above n.6.

because of the particular political legal formulation of the State. Second, the link between sovereignty and territory was an integral part of the political-legal settlement of Europe and then the colonies.

For the majority in Y*orta Yorta* the temporal aspects of sovereignty remain beyond question. The link between sovereignty and recognition clearly relates questions of sovereignty to those of authority or jurisdiction of the Court. It is the sovereign that has the authority to recognise interests in land. Where there is a change of, or acquisition of, sovereignty, only the new sovereign can recognise such interests, including native title. The spatial aspects of sovereignty and its relation to territory receive less direct attention. This may be because, for them, it also remains beyond legal dispute: sovereignty and territory are irrevocably tied together as a jurisdiction. The particular spatial formulation of the territorial state also has a particular history, Schmitt, for example, points to the way the seventeenth century political settlement of Europe involved its 're-spatialisation' into sovereign territorial states. The State became territorial – and based on the appropriation of land – because it was concerned to defend a specifiable population. Outside of the land-based states of Europe, the New World was deemed ready for acquisition through the assumption of land.[44] It is the colonial project, centred on the appropriation of land, that links sovereignty and territory to land. Sovereignty and territory became geographically inseparable with the land of the new colony. This involved the imposition of one law (the common law) figuratively and spatially on top of an other (indigenous law).[45] In Brennan J's terms, the common law became the "law of the territory".[46]

If there can be no parallel-law making, so what then, if anything, is left of the old law? As will be seen in the next section, if there is no law, then in the common law formulation (as well as that of Hart) all that remains is 'custom'.

Custom and Law

Recognition of customs and traditional laws is central to the native title regime. In decisions since *Mabo (No.2)* it has become apparent to the Courts that what is being engaged is indeed another normative order – however it is understood. What was in dispute in *Yorta Yorta* was the criteria, the time, and the place of this intersection or recognition. What is clear is that any such recognition of another normative system is only to be permitted if it does not break the nexus between sovereignty and territory.

For the majority in *Yorta Yorta*, the most salient consequence of the assertion of sovereignty by the British Crown was that the normative system which existed prior to the assertion of sovereignty could not thereafter validly create new rights. Rights or interests in land created after sovereignty and which owed their origin and continued existence only to a normative system other than that of the new sovereign power would not be given effect by the legal order of the new sovereign. This is so because the assertion of

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[44] See generally, C. Schmitt, "The Land Appropriation of a New World", above n.41.
[45] It is this history that Hart's genetic account of modern law repeats and that the High Court renders axiomatic.
[46] *Mabo*, above n.4, 36.

sovereignty by the British Crown necessarily 'entails' that there could be no parallel law-making system in the territory over which it asserted sovereignty. If only a sovereign order can make law, and post-sovereignty there is only one (the new) sovereign order, it then follows, according to the logic of the majority, that the only rights or interests in relation to land or waters originating otherwise than in the new sovereign order are those that find their origin in pre-sovereignty law and custom.[47] Laws and customs can only have meaning if they continue on, as an entailment of those laws and customs prior to the acquisition of sovereignty by the British Crown.[48] While there is a certain order to this argument, it ignores the history of the common law's own relationship to other 'normative systems'. It also ignores the reality for many indigenous Australians who lived, some for over a century or more, according to their own laws, unaware of the imposition of this new legal regime over the land, and unaware that they no longer had internal law-making capacity. It also ignores those who continue to live by other laws that those of the Australian legal system. Finally, it also means that the judgment fails to properly deliberate on the central doctrinal issue of the case: how the rights of native title can recognise indigenous law and custom, let alone its evolution and change.

If there can be no parallel-law making, what then is the status of these laws and customs? What happens to these normative systems? Once (arguably for the majority) legal in nature, what becomes of them post-sovereignty? This is never directly addressed. Rather, the majority speaks of rights and interests and of an "identified body of law and customs" that are the creatures of a particular society that exists as a group and which acknowledged and observes those law and customs (axiomatically and empirically).[49] Then it is claimed that in order to exist rights and interests must continue to be acknowledged and observed.[50] Despite the use of the phrase 'traditional *laws* and customs', there can only be one legal system. What was 'law', post-sovereignty is now custom. Again while the majority represent such a situation as axiomatic, or as fact, such an approach has is in accordance with that of the early modern common law dealings with land in colonial Ireland.

While the entire story of the legal settlement of Ireland cannot be related here, it may be remembered that in the *Case of Tanistry*, referred to by Brennan J in *Mabo (No. 2)*, it was held that the laws of the Irish had been 'abolished' on establishment of the common law. Further, any remaining indigenous interests in land could only be recognised if they could be proved

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47 *Yorta Yorta* (HC), above n.3, 560-1.

48 The majority decision is suffused with a rhetoric of property: consider also the 'chain of possession' metaphor: *ibid.*, 562. The language of the possession of rights and interests is run into the language of common law proof of title to property.

49 *Yorta Yorta*, *ibid.*, 553.

50 In the Hartian model of observance the transition has sacral overtones: customs, as primary rules are taken up in the formation of a legal system through the 'union' of primary and secondary rules structured around a sovereign order of norms. See generally Hart, *The Concept of Law*, above n.30, Ch. 5.

under the usual rules by which custom was established.[51] These were continuity, reasonableness, and existence since time immemorial (*i.e.* before British sovereignty). While the parallels with *Yorta Yorta* are obvious, *The Case of Tanistry* considered these questions as ones of custom rather than an axiomatic consequence of sovereignty.

The principle that there can be no parallel law-making renders it difficult to envisage how the changes and evolutions of these customs that inevitably must occur in the wake of white occupation could be reflected in native title. While the majority denies that customs and traditions are 'frozen', its formulation of custom and tradition as tied to pre-sovereign formations inevitably lead towards a native title which is disarticulated from the normative system in which the High Court claims it is sourced. In one jurisdiction law and tradition change and evolve. In the other, they remain tied to an earlier era.

In sum, the High Court – with the aid of its jurisprudence - has reproduced questions of law and history as axiomatic categories and reported them as fact. It has turned both Australian and Aboriginal law into questions of factual reporting. Aboriginal law is not recognised as 'law', by the Australian legal system but as custom. Any understandings of custom and tradition must, for the majority, be formulated in the shadow of its own sovereignty**.** The talk of sovereignty and a sovereign order of norms by the majority of the Court has also displaced other important juridical concerns: notably that of jurisdiction. It is the High Court's conflation of sovereignty, in particular territorial sovereignty, with jurisdiction that allowed the majority to hold out the position of acknowledging indigenous normative systems on the one hand, and denying their contemporary efficacy on the other.

Jurisdiction

While the phenomenon of territorial sovereignty has, as outlined above, been with us for some time, the conflation of jurisdiction with sovereignty and territory is relatively new. As legal historians are well aware, 19th century courts did worry about the limits of jurisdiction. Despite the *Judicature Acts*, the common law has never entirely removed itself from its origins as a jurisdictional institution. It was not until the end of the 19th century that sovereignty, people and territory became one as a legal category. Yet the notion of jurisdiction clearly shadows the majority judgment in *Yorta Yorta*. Only missing is the discipline of jurisdiction, substituted by the phrase 'normative orders'.

While it has been axiomatic for common law jurisprudence that a nation can only have one sovereign order, it has also always been a feature of 'our' law that more than one jurisdiction or body of law (normative system if you will) can co-exist within that order. Until the seventeenth century a plethora of bodies of law co-existed in England. As that time, as Prest puts it:

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[51] *The Case of Tanistry* (1608) Davis 28, at 31-32; 80 ER 516, at 519-520. For the English translation see Sir John Davies, *A Report of the Cases and Matters in Law, Resolved and Adjudged in the King's Courts in Ireland*, Dublin, Printed for Sarah Cotter, under Dick's Coffee House, in Skinner Row, 1762, 78, 87. On this point see S. Dorsett, "'Since Time Immemorial': A Story of Common Law Jurisdiction, Native Title and the *Case of Tanistry*", above n.6.

> "There was little . . . coherent about that fragmented chaos of overlapping (and frequently conflicting) jurisdictions – national, regional and local courts, ecclesiastical and secular courts, courts occasional and permanent, courts dispensing English common law, Roman civil law, canon law and a bewildering variety of local customary law, courts of considerable antiquity and courts newly erected or asserted, courts swamped with business and courts moribund for lack of suitors."[52]

These overlapping and contradictory jurisdictions continued to be a feature of the English legal landscape for the next two centuries. Although many did fall into disuse, by the time of the settlement of Australia there were still numerous jurisdictions operational in England. In the late eighteenth century, at the time of the importation of the common law into Australia, that body of law was still only one of many. As Arthurs points out, in this period there were still over three hundred local courts which exercised civil jurisdiction, as well as arbitrators, domestic tribunals and administrative tribunals. Many of these courts did not apply common law, but administered distinctive sub-systems of local and special law. Altogether these bodies disposed of many more cases than the Westminster Courts.[53]

On importation to New South Wales, the common law became, at least as far as the colonists were concerned, the pre-eminent law of the new colony. Further, it was no longer split between the three central common law courts and other local courts as in England, but in fact achieved a degree of centralisation which was not be accomplished in England until the reforms of the late 1800s. It was, of course, not the only body of law to be imported. It is easy to forget that both equity and admiralty jurisdiction were also operational in early Australia.

Nor was it clear from the outset that these bodies of English law would be the only law of the colony. Contrary to Brennan J's assertion in *Mabo (No.2)* that the common law became the "law of the territory (and not merely the personal law of the colonists)",[54] there was an initial spate of cases in which it was recognised by the Supreme Court of New South Wales that common law did not automatically apply to Indigenous Australians.[55] These judgments were rendered in the language of jurisdiction. Did the common law courts have jurisdiction over Indigenous Australians? In *Ballard*, for example, although Forbes C.J. described Aboriginal institutions were

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[52] W. Prest, "Lawyers", in W. Prest, (ed.), *The Professions in Early Modern England* (1987), 65.

[53] See generally H. Arthurs, "Special Courts, Special Law: Legal Pluralism in Nineteenth Century England", in G. Rubin, D. Sugarman, *Law, Economy and Society: 1750-1914: Essays in the History of English Law* (1984).

[54] *Mabo (No.2)*, above n.4, 36.

[55] See, for example, *R.* v *Ballard*, unreported decision of the Supreme Court of New South Wales, 13 June 1829, *per* Forbes CJ and Dowling J. A transcript of the notebook of Dowling J has been provided by B. Kercher, in (1998) 3 *A.I.L.R.* 412. The notebook is to be found at *Proceedings of the Supreme Court*, Vol.22, Archives Office of New South Wales, 2/3205, 98; *R.* v *Lowe*, unreported decision on 18 May 1827, reported in the *Australian*, 23 May 1827. This case can be found at <www.law.mq.edu.au/scnsw>.

"shocking . . . to our notions of humanity and justice", he was not prepared to find that the common law courts had "cognisance" of a crime committed by one Aboriginal upon another.[56] Forbes C.J. came to the same conclusion several years later in *R.* v *Boatman* or *Jackass and Bulleyes*.[57] Similarly, in *Bonjon*, Willis J found that the common law had no jurisdiction over crimes committed by Aborigines *inter se*.[58] According to Dowling J, in the *Boatman* case, the question of whether there was jurisdiction over the aboriginals was "a subject . . . of deep importance to the colony".[59]

For common lawyers trained in England in a time when a number of jurisdictions still co-existed with the common law, it was clear that the relations between bodies of law was a matter of jurisdiction. Further, it was not axiomatic that only one body of law could exist under the body of singular sovereignty. For these early judges it was possible to envisage a legal order in which multiple jurisdictions existed in one physical space. In other words, sovereignty did not 'necessarily entail' that there could only be one law-making system. Nor was Australia the only jurisdiction in which this position was reached. In a similar period courts in Canada, New Zealand and the United States reached similar conclusions. All recognised the continuance of indigenous laws, despite the acquisition of sovereignty by the British.[60]

Despite this beginning, by the mid-nineteenth century, the common law settled down into a comfortable uniformity. In contrast to these early cases, later judges determined that Aboriginal law was not law.[61] Once aboriginal law was determined not to be law, it became axiomatic that the common law (along with equity) was *the* law of the colony.[62] Once this unitary view of the common law had taken hold, the language of jurisdiction, evident in the early Australian cases, simply died away. There were no multiple bodies of law. Therefore, there was no longer any need to understand or conceptualise the relationship between them in any terms, let alone those of jurisdiction. In Australia, from the mid-nineteenth century the language of jurisdiction was reserved for questions concerning the jurisdiction of a particular court, or for

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[56] *ibid.*, at 413-4.

[57] *R.* v *Boatman or Jackass and Bulleyes*, J. Dowling, 23 February, 1832, *Proceedings of the Supreme Court of New South Wales*, Vol. 64, Archives Office of New South Wales, 2/3247, available at <www.law.mq.edu.au/scnsw>.

[58] R. v *Bonjon* (1841), published in (1998) 3 *A.I.L.R.* 417. This report is based on that of the *Port Philip Patriot* of 20 September 1841. It was also published in the *Port Philip Herald* of 21 September 1841. See B. Kercher, "*R.* v *Ballard*, *R.* v *R. Murrell* v *Bonjon*" (1998) 3(3) *A.I.L.R.* 410.

[59] *R.* v *Boatman or Jackass and Bulleye*, 10 Feb. 1832, Supreme Court of New South Wales, J. Dowling in J. Dowling, *Select Cases*, Archives Office of N.S.W., 2/3466, reproduced at <www.law.mq.edu.au/scnsw>.

[60] See *Connolly* v *Woolrich* (1867) 17 R.J.R.Q. 75, 1 C.N.L.C. 70 (Que. S.C.), affd. sub nom. *Johnstone* v *Connelly* (1869) 17 R.L.R.Q. 266, 1 C.N.L.C. 151 (Que. C.A.); *The Queen (on the prosecution of McIntosh)* v *Symonds*, above n.7; *Cherokee Nation* v *Georgia*, above n.7; *Worcester* v *Georgia*, above n.7.

[61] See, for example, *R.* v *Cobby* (1883) IV N.S.W.R. 355.

[62] See, for example, *Attorney-General* v *Brown* (1847) 1 Legge 312, 318; *Randwick Corporation* v *Rutledge* (1959) 102 C.L.R. 54.

conflicts of laws problems. The notion that jurisdiction attached to bodies of law was lost.[63]

The decision to recognise native title in *Mabo (No. 2)* was conducted without any reference to the notion of jurisdiction, or even to the fact that the recognition of native title itself 'necessarily entailed' a recognition of other (non-common law) bodies of law. Rather, the unitary view of law built up over the previous century was not only maintained, but reinforced. *Terra nullius*, arguably never a doctrine of Australian law until that case,[64] was overthrown, but no mention was made of the indigenous legal systems which must therefore have existed if Australia was in fact not a legal vacuum. This position became, however, increasingly hard to maintain, culminating in the discussion by the High Court in *Yorta Yorta* of 'other normative systems'.

Throughout the High Court decisions since *Mabo (No.2)*, the language of the court has continued to be that of sovereignty, not jurisdiction. In *Mabo (No.2)* itself, questions of sovereignty were raised in the context of the British Crown's acquisition of the continent of Australia. This in itself says nothing about the internal ordering of that sovereign nation. However, subsequent cases have been at pains to reinforce that as sovereignty resides in the Australian nation, there is only one law of the land: the common law (of Australia).[65] This understanding confuses the need of the ordering of modern states to point to a supreme internal legal authority with authority and the capacity to decide and determine within a limited sphere. As outlined above, multiple jurisdictional authorities have long been recognised within the tradition and history of the common law as compatible with single sovereignty.[66]

If it is accepted that multiple jurisdictional entities are no threat to sovereignty, the 'normative orders' acknowledged in *Yorta Yorta* can be identified as jurisdictional entities: bodies of law which co-exist with the common law under the auspices of the one sovereign nation.[67] It also becomes far from axiomatic that the intersection between these jurisdictions and the common law took place only once. As discussed, typically, within common law such intersections have been understood and justified – made just - in terms of the history of an institutional and conceptual practice. The common law historically co-existed with many other bodies of law, but reserved to itself the authority – jurisdiction – to determine the ways in which rights in that other jurisdiction would be recognised and enforced

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[63] See P. Rush, "Deathbound Doctrine: Scenes of Murder and its Inheritance", (1997) 16 *Studies in Law, Politics and Society* 71.

[64] For an excellent analysis of the chimera of *terra nullius* see D. Ritter, "The "Rejection of Terra Nullius" in *Mabo*: A Critical Analysis", (1996) 18 *Syd.L.R.* 5.

[65] See, for example, *Walker* v *New South Wales* (1994) 69 A.L.J.R. 111; *Coe* v *Commonwealth* (1993) 68 A.L.J.R. 110.

[66] A modern example is the ongoing recognition of the autonomy of the laws of Native American Nations. This includes both the capacity to make laws, and to make judicial determinations with respect to these laws. It also includes some legal capacity over non-indigenous peoples who live on Native American land. Such legal autonomy is not seen as inconsistent with the sovereignty of the United States.

[67] Or, for that matter, parallel bodies of law or jurisdictions that are recognised by the common law without engaging questions of sovereignty linked to territory.

within its own sphere. In contemporary terms: the common law can co-exist with indigenous laws, but asserts the jurisdiction to determine the limits of recognition and enforcement of rights from that other jurisdiction within itself.[68] Further, historically, this was never a 'once and for all' recognition. Intersections (to use the High Court's language) happened not once, but on an ongoing basis. Autonomous bodies of law co-existed with the common law. Only when a conflict occurred would rights and interests be determined – according to the shape they had at that time, not at some arbitrarily determined earlier time.

Finally, if the court's vision of one unitary legal system is allowed, then however native title is categorised, it must also be recognised as a creature of the common law of Australia or, if it is preferred, the Australian legal system and its norms. If the Court recognises only one sovereign territory and one jurisdiction, any affirmation of law must be a part of the Australian legal order by way of that recognition. The complex mechanisms of recognition are a part the Australian legal system and its jurisdiction. The act of recognition of 'laws and customs' – of taking authority to exercise a jurisdiction – is an act of law. Recognition of custom is a part of long established common law practice that can be traced back at least as far as the colonial settlement of Ireland and the *Case of Tanistry*. Quite apart from misrepresenting the legal history of the common law, the insistence that the link between sovereignty and territory is an axiomatic fact and not the work of jurisdiction, both denies the possibility of giving an account of other jurisdictions (or normative orders) within Australia and prevents there being any coherent account of the Australian common law settlement of the nation.

In *Yorta Yorta* both the majority and the minority acknowledge the existence of other 'normative systems' but whereas the majority simply deny the law-making capacity of indigenous normative orders post-sovereignty, the minority confine themselves to stating that the common law is limited to recognition and protection of 'native title', which in turn owes its existence to these other normative systems. The problem with such an approach is that while it does not specifically deny the authority and law-making capacity of indigenous normative orders, it leaves them in limbo, failing to accord them any status and failing to articulate any way of understanding the relationship between the common law and these normative orders. As a result, both the majority and minority displace questions of jurisdiction: the majority by denying the capacity of any aboriginal jurisdiction to function post-sovereignty and the minority by, in essence, acknowledging aboriginal jurisdictions (native title derives from traditional laws and customs which continue to evolve and adapt post-sovereignty) and then ignoring these jurisdictions.

This section has examined some of the ways in which the judgment of the majority in *Yorta Yorta* has produced an account of its own jurisdiction. It has done so by staging the legal settlement of the land of Australia in terms of a succession of laws. Once the British Crown asserted sovereignty, the 'traditional laws and customs' of aboriginal peoples cease to be the laws of the territory except in so far as they are acknowledged by the laws of the

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[68] See M. Hale, (C. Gray, ed.), *The History of the Common Law of England, and An Analysis of the Civil Part of the Law* (1971) (1713).

Australian legal system and its ordering of questions of sovereignty, law, custom and territory. What was gained, for the majority, was an evidential measure of the recognition of aboriginal laws framed in terms of the following of tradition. In the absence of an analysis of jurisdiction what is rendered opaque is the possibility of establishing an intersection of laws as opposed to an assumption or subsumption of earlier law.[69] This still leaves open the question of whether the High Court in *Yorta Yorta* managed to maintain the order of its own jurisdiction.

3. Authority and Jurisdiction

The insistent message behind any native title claim is that there is another, parallel, legal ordering to what is presently the recognised law of territory of Australia. In *Yorta Yorta* the majority repeated the formula of *Mabo (No.2)*: questions of sovereignty were not justiciable, there is no other law of the territory. They also treated as a fact that there is only one sovereign jurisdiction over the territory of Australia. Earlier parts of this essay have considered the effects of the first claim on the second. Here some comments will be made about the representation of authority and authorship of these laws and the account of responsibility that is engendered.

The most direct use of jurisprudence made by the Court would appear to be in the polemical formulation of the authority of the Australian legal system. The majority decisions in *Mabo (No.2)* were notable for seeking to found the authority of the Court at some distance from the State, perhaps in the domain of human rights, a spiritual relation to land, or even the feeling of the community.[70] These grounds in a sense might be viewed as part of the inheritance of a natural rights jurisprudence. The Court did so, it was suggested in *Mabo (No 2)*, in response to the injustice of the settlement of Australia, or at least some of it. In the end, however, in *Mabo (No.2)* the High Court positioned itself not as the defender of natural right but as the guardian of the common law of Australia.[71] By contrast the High Court in *Yorta Yorta* has gestured towards a state order of law both in its insistence that native title is now to be understood solely as a product of legislation, and in its formulation of sovereign jurisdiction.

The tradition of positivist jurisprudence that Hart naturalised as ordinary legal language does at least have the merit of insisting that legal authority be articulated in terms of a concrete order of domination articulated through a territorial and ascriptive concept of state.[72] It also has the merit of aligning current High Court authority with its own institutional history: in whatever way common law and State government might be related, the law of the colonies in Australia had a firm basis in requirements of Imperial government. The task and function of British colonial and then Australian Commonwealth government has not been primarily moral but statist: the concern has been with the establishment and maintenance of civil power and civil order. The operational medium of such power was not moral but

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[69] For analytical account of this predicament see Rush, above n.63, 79-86.

[70] For example *Mabo* (No.2), above n.4, 33 on international law and human rights (Brennan J); *ibid.*, 61 on natural law (Deane And Gaudron JJ).

[71] *ibid.*, 68-69 on the difference between the common law and acts of State.

[72] See for example, D. Saunders, *The Anti-Lawyers*, Routledge, 1999, Ch. 1.

political-legal. A State-based jurisprudence at least offers a clear site or position from which the High Court can articulate its laws.

In *Mabo (No.2)* one consequence of trying to ground law in ethics was the displacement of both the force of law and the juridical order of representation. In order to ground the common law in contemporary values of human rights and contemporary understanding of history, it was necessary to dis-aggregate reason of state and common law. In so doing the Court could provide little account of the exercise of authority in relation the practices of its own jurisdiction.[73] The majority in *Yorta Yorta* have re-aligned the common law with state sovereignty but have still struggled to develop any account of their jurisdiction.[74] However the uses to which Hart's jurisprudence were put in the judgment seem designed as much to deflect as to assert such claims of authority. Having raised questions of jurisprudence, of the experience and use of law and custom, the majority then denied that the "jurisprudential questions that [they] have identified" are of import.[75] They further announced that despite the foregoing discussion of Hart and Austin, it may not be productive or fruitful to even attempt to "search for parallels between traditional law and traditional customs on the one hand and Austin's conception of a system of laws, as a body of commands or general orders backed by threats which are issued by a sovereign or subordinate in obedience to the sovereign."[76] Not to search for parallels in a common law legal order that might once have claimed to judge by reason of analogy, or by finding parallels, might suggest a loss of faith in legal order.

It might be imagined that such an account of the authority of law would sensitise the High Court to the fact that what was at issue in *Yorta Yorta* was the manner in which to address itself to another law. Given the analysis presented in this essay the use of jurisprudence by the majority in the High Court seems to have distracted itself from giving any account of the internal jurisdiction of the government of law. In figuring the relation between territory and other laws as ones of fact or evidence of the continued recognition (or not), the internal ordering of the common law has itself been reduced to a reiteration of the 'ordinary meaning' of legislation. Beyond this the character of the performance of sovereign authority remains unarticulated by the High Court. McHugh's plaintive comments in *Ward* (and again in *Yorta Yorta*) about the inability of the common law to provide redress for indigenous claimants remain as an appeal to moral conscience and responsibility rather than a call for responsibility for the order of law.[77]

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[73] See Rush, above n.6, 146–150.

[74] It is possible that for the minority this question was confused with the appropriate uses of legal resources to interpret the *Native Title Act* 1993.

[75] *Yorta Yorta* (HCA), above n.3, 552.

[76] *ibid.*, 551.

[77] "The dispossession of the Aboriginal peoples from their lands was a great wrong. Many people believe that those of us who are the beneficiaries of that wrong have a moral responsibility to redress it to the extent that it can be redressed. But it is becoming increasingly clear – to me, at all events – that redress can not be achieved by a system that depends on evaluating the competing legal rights of landholders and native-title holders. The deck is stacked against the native-title

CONCLUDING COMMENTS

In this essay attention has been given to the ways in which the High Court has represented its own laws and jurisdiction. If *Mabo (No.2)* can be interpreted as having re-established, albeit in a minimal manner, a technology of jurisdiction that recognised the continuation of other 'laws and customs' within a territory, the majority in *Yorta Yorta* can be taken as having given sharper emphasis to questions of jurisdiction by figuring issues of aboriginal 'laws and customs' as being concerned with the intersection of laws. However, as the analysis presented here has attempted to show, these questions of jurisdiction have been limited – if not entirely effaced - both in terms of the authority and authorship of law and in terms of the specific relationship between sovereignty, territory and land. The majority in *Yorta Yorta* in effect refused to offer an account of its jurisdiction except by displacing the intersection of laws on to the moment of a past assertion of sovereignty. In this sense the High Court has not yet touched on the possibilities of recognising a parallel or intersecting legal order. It has simply refused itself permission to recognise such a possibility. (In all this the High Court has handed down a sorry judgment.)

The purpose of this essay has not been to establish the general grounds of a critique of legal order but to follow the jurisdictional ordering of a legal judgment that directly addresses the legal settlement of Australia. If there are generalisations to be made from this analysis it would be in terms of the repetition of a number of gestures of jurisdictional delimitation: the persistence of common law refusal of recognition of the status of indigenous laws; the importance of the internal ordering of the technologies of recognition; and the restricted articulation of the modes of authorisation of law. The consideration of jurisdiction here has also raised at various points a number of linkages between jurisdiction and responsibility.[78]

Finally if a decision were made to develop a juridical understanding of the settlement of Australia, the possibility of re-settlement, postcolonial or otherwise, would continue to depend on the relationships of jurisdiction, if not also sovereignty and territory. This is so regardless of the constitutional formation of the state polity.[79] It would remain a matter of responsibility for the technology or discipline of a jurisdiction.

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holders whose fragile rights must give way to the superior rights of the landholders whenever the two classes of rights conflict.": Ward, above n.8, 156-7. These concerns can be contrasted with those of Callinan J. Contrary to McHugh J, he recognises responsibility and points out in detail the ways in which the dispossession of indigenous people restricts and prevents the recognition of their laws and customs: *ibid.*, 591ff. See S. Zizek, "Superego by Default", (1995) 16 *Cardozo Law Review* 925 for comments on authorship of laws.

[78] For example, M. Weber, 'Politics as Vocation' in H. Gerth and C.W. Mills (eds.), *From Max Weber: Essays in Sociology* (1947).

[79] C. Douzinas, "The Metaphysics of Jurisdiction" in S. McVeigh, (ed.), *Jurisprudence of Jurisdiction*, forthcoming (1995).

"THE MORALLY AMBIGUOUS CROWD": THE IMAGE OF A LARGE LAW FIRM IN "ANGEL"

Anthony Bradney, Professor of Law, University of Sheffield

INTRODUCTION

Clifford Chance may imagine itself to be the largest law firm in the world but it is small compared with Wolfram and Hart, the law firm that appeared in the first episode of the television programme "Angel" and featured regularly thereafter during its five series.[1] The series, set mainly in Los Angeles, pits Angel, a 200 year old vampire, together with his friends who work at Angel Investigations, against a series of adversaries, including Wolfram and Hart, in a basic clash of good and evil.[2] This article will examine the way in which large law firms are portrayed in this series.

Although similar to other large law firms in many respects, Wolfram and Hart exists on a grander scale. The series is mainly concerned with the Los Angeles office of Wolfram and Hart but the firm, like Clifford Chance, has "offices in every major city in the world".[3] However, unlike Clifford Chance, Wolfram and Hart's offices extend beyond this world, since it exists in more than one dimension.[4] Moreover, rather than being a firm with only a relatively short history, Wolfram and Hart has lasted for at least a thousand

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[1] "City Of. . .", 1001. (In this article I will follow the convention used in much of the academic literature about "Buffy the Vampire Slayer" of first giving the series number and then the episode number for each programme when referring to particular episodes.) "Angel" is a spin-off from the better-known series, "Buffy the Vampire Slayer". "Buffy the Vampire Slayer" has already generated a considerable academic literature that includes discussion of the place of law in the series (see further A. Bradney "The Case of Buffy the Vampire Slayer and the Politics of Legal Education" in S. Greenfield and G. Osborn (eds.) "Readings in Law and Popular Culture" Routledge (In press), W. MacNeil "'You Slay Me!' Buffy as Jurisprude of Desire" (2003) 24 Cardozo Law Review 2421, A. Bradney "'I Made a Promise to a Lady': Law and Love in BtVS" (2003) 10 Slayage: The Online International Journal of Buffy Studies <http://www.slayage.tv/> and A Bradney "Choosing Laws, Choosing Families: Images of Law, Love and Authority in 'Buffy the Vampire Slayer'" (2003) 2 Web JCLI <http://www.ncl.ac.uk/~nlawwww/>. "Angel" ran for five series with a total of 110 episodes which, in the USA, were first broadcast between May 10th 1999 and May 19th 2004. This article is based on an analysis of the scripts for all of these episodes that are available on a variety of websites and on the videos sold in the United Kingdom.

[2] For a description of the characters and plot of "Angel" see R. Kaveney "She saved the world. A lot: An introduction to the themes and structures of *Buffy* and *Angel*" in R. Kaveney (ed.) "Reading the Vampire Slayer" (2004) (2nd ed.) Tauris Parke Paperbacks pp.58-77.

[3] "A Hole in the World", 5015. One episode, "The Girl in Question" (5020), largely focuses on the Rome office of Wolfram and Hart.

[4] "Through the Looking Glass", 2021; "Loyalty", 3015.

years.[5] Nevertheless, despite its much greater size and longevity, Wolfram and Hart exhibits many of the features that are common to both Clifford Chance and other large law firms. Thus, for example, its lawyers have started out as high achievers at law school.[6] Progress within the firm is competitive with frequent reviews.[7] Salaries are high.[8] Even senior employees face dismissal if their results are not good enough.[9] The firm does *pro bono* work and it provides extensive health care facilities for its employees.[10] Comparisons between the fictional Wolfram and Hart and other large law firms should not be exaggerated. When people are sacked from Wolfram and Hart "they use actual sacks".[11] Employment contracts that lawyers sign with the firm extend beyond death.[12] A lot of it's "clients are demons, and . . . almost all of them are evil".[13] Notwithstanding this, in many matters Wolfram and Hart represents a reasonable fictional approximation of a large law firm; not least in the fact that it is "a business" with "a bottom line".[14]

Hitherto the analysis of the portrayal of large law firms in popular culture, like the analysis of law and lawyers in popular culture in general, has been an underdeveloped area of academic enquiry.[15] In the main enquiry into the work of lawyers in general and large law firms in particular has been enquiry into what these firms and lawyers actually do. However, the separate question of public perceptions about them and their work cannot be ignored because such perceptions inform public debate about the place of lawyers in society. What lawyers, particularly lawyers in large law firms, do in their work is an important question. What they are thought to do is another equally important question. The perceived legitimacy of the lawyer's role turns on the answer to both these questions. Whilst the former question has received some consideration the latter has received scant attention.[16] This is unfortunate in relation to the analysis of the role that large law firms play in society because, as Flood has argued in relation to stories about lawyers, at

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[5] "Rain of Fire", 4007. Holland Manners says of Wolfram and Hart "[o]ur firm has always been there. In one form or another" ("Reprise", 2015). Elsewhere the firm is said to have been founded in 1791 ("Harm's Way", 5009).

[6] "Blind Date", 1021; "Dead End", 2018.

[7] See, for example, "Reprise", 2015 and "Dead End", 2018.

[8] "Sleep Tight", 3006.

[9] "Deep Down", 4001.

[10] "Blood Money", 2012; "Dead End", 2018.

[11] "Reprise", 2015.

[12] "Reprise", 2015; "Home", 4022.

[13] "Conviction", 5001.

[14] "Conviction", 5001.

[15] For a recent example of work done on law and popular culture see S. Machura and P. Robson (eds.) Law and Film (2001) 28(1) Journal of Law and Society.

[16] The literature on large law firms is mainly American; see, for example, R Nelson "Partners With Power: The Social Transformation of the Large Law Firm" (1988) University of California Press and M. Galanter and T. Palay "Tournament of Lawyers: The Transformation of the Big Law Firm" (1991) University of Chicago Press. However, some work has been done in the United Kingdom; see, for example, R. Lee "Firm Views: Work of and Work in the Largest Law Firms: Research Study No 35" (1999) The Law Society.

times, "the unreal becomes a stand-in for the real".[17] The picture of Wolfram and Hart painted in "Angel" both reflects and reinforces popular images of, amongst other things, the moral nature of those who work in such enterprises. These images in turn have their impact on a variety of issues from the trust accorded to such firms when it comes to matters such as self-regulation to the question of who might wish to work for such firms. This is not to argue that viewers of "Angel" are naïve, simply accepting whatever images of lawyers in large law firms that are put before them. The whole question of the reception of television series by their audiences is a complex matter and it is clear that audiences can be sophisticated in the way in which they respond to images and arguments that they view.[18] However, for the purposes of this article, it is sufficient to note that the images of lawyers in a large law firm to be found in "Angel" are of interest because they are part of the cultural mélange that constitutes the context in which a variety of individual and social decisions about law and lawyering are made. "Angel" is of particular interest because, unlike many other programmes and films about lawyers, it takes a largely negative view taken of the lawyers that appear within it.[19]

Lawyers' Work in "Angel"

When Wolfram and Hart are first introduced into "Angel" they describe themselves as a "full service law firm. . . It is our job to see to it that our clients lives run more smoothly".[20] Their client in the first episode of "Angel", Russell Winters, is a wealthy businessman with property holdings for whom they are arranging a merger with Eltron, a mutual trust. Winters tells Angel "I pay my taxes. I keep my name out of the paper, and I don't make waves. And in return I can do anything I want." The "anything" extends beyond his business deals. Besides being a businessman, Winters is also a vampire who murders young women. Alongside their other work for him Wolfram and Hart organise alibis for him so as to conceal his murders. After Angel has rescued Winters' latest intended victim from him, the firm employs private investigators to search for Angel. When Angel confronts Winters, Wolfram and Hart's representative tells Angel they will take action against him for harassing their client. After Angel has killed Winters the lawyer's immediate reaction is not to report the matter to the police but is, instead, to arrange an internal meeting in Wolfram and Hart to discuss the fact that there is "a new player in town", specifying that the senior partners in the firm should not be notified. This first episode typifies many of the ways in which lawyers' work is to be portrayed in the series. The firm is

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[17] J. Flood "Shark Tanks, Sweatshops, and the Lawyer as Hero? Fact as Fiction" (1994) 21 Journal of Law and Society 396 at p.402.

[18] See further J. Tulloch "Television Drama: Agency, Audience and Myth" (1990) Routledge Part Three.

[19] Thus Greenfield notes the "historically generally positive screen image of lawyers (S. Greenfield "Hero or Villain: Cinematic Lawyers and the Delivery of Justice" (2001) 28 Journal of Law and Society 25 at p.26). On the general portrayal of law and lawyers in film generally see S. Greenfield and G. Osborn "Where Cultures Collide: The Characterisation of Law and Lawyers in Film" (1995) 23 International Journal of the Sociology of Law 107.

[20] "City Of. . .", 1001.

aggressive in pursuit of its ends, hierarchical, willing to engage in a wide range of legal and illegal activities, and entirely ruthless.

As a "full-service law firm", Wolfram and Hart is wholly unconcerned with obedience to ethical codes of conduct for lawyers or, indeed, the law itself. In "Blind Date" Lindsey McDonald, a lawyer with Wolfram and Hart, is congratulated by a fellow employee for the successful defence of a client, Vanessa Brewer, accused of murder. "I cannot believe you got her off on all charges. Not since *Ostrosky* v *California* have I seen such devious legal manoeuvring."[21] Both Lindsey and the firm at large know Brewer to be guilty of the charges and also know that other clients of theirs will want to use her services in the future. Although they ignore codes of conduct themselves, Wolfram and Hart are happy to use such codes aggressively in pursuit of success in litigation. Thus, in "Five by Five", Lindsey tells an opposing lawyer, "[w]itness tampering is a serious allegation, councilor. And I will be filing a grievance for this remark with the ABA this afternoon".[22] Another lawyer in Wolfram and Hart, Lilah Morgan, tells a client, "I am a lawyer. I don't care about the law".[23] Moreover, Wolfram and Hart is not only unconcerned about obedience to either rules of conduct or law; it is also unconcerned about its clients if its clients' interests clash with its own. Wolfram and Hart are happy to arrange for an important client, Tony Papazian, to break out of prison but when, instead of quietly disappearing, he tries to murder the police officer in open public, the firm terminate their relationship with him, not because his behaviour is wrong, but because Wolfram and Hart "can't risk that kind of exposure".[24] Law, rules of conduct and client loyalty do not motivate Wolfram and Hart; self-interest does.

Many of Angel's adversaries are evil in the ordinary sense that they, for example, seek illicit wealth or that they take pleasure in inflicting pain on others.[25] Despite one character's description of them as "[a] law firm technically. . . more like 'Evil Incorporated'", Wolfram and Hart's position is more complex.[26] Lawyers from Wolfram and Hart do engage in actions that are evil in a very simple sense. Lilah Morgan, for example, hires men to kidnap and rape a girl she believes she can train as an assassin for Wolfram and Hart, believing such treatment will make the girl "stronger".[27] Equally, the firm seeks wealth. In "Blood Money" the firm does *pro bono* work for the East Hills Teen Centre, a shelter for runaway teenagers, as part of a plan to steal two million dollars.[28] More generally, however, Wolfram and Hart's relationship with that which is immoral and evil is more complex than this.

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[21] "Blind Date", 1021.
[22] "Five by Five", 1018.
[23] "Lullaby", 3009.
[24] "Sense and Sensitivity", 1006.
[25] See, for example, Lee DeMarco in "The House Always Wins" (4003) and Billy Blim in "Billy" (3006).
[26] "Blood Money", 2012. Cordelia says as between lawyers and demons "[f]ine line, if you ask me" ("The Ring", 1016). In another episode Cordelia tells Angel and Darla, another vampire, "you were just soulless blood-sucking demons, they're lawyers" and Angel replies "[s]he's right. We were amateurs" ("The Trial", 2009).
[27] "Untouched", 2004.
[28] "Blood Money", 2012.

In "Blind Date" Holland Manners lectures his subordinate, Lindsey, on the firm's role:

> "It's not about good and evil – it's about who wields the most power. And we wield a lot of it here and you know what? I think the world is better for it."[29]

The firm is not so much immoral as amoral; concerned only with playing an endless game. In "Reprise" Manners tells Angel "winning [for Wolfram and Hart] doesn't enter into it. We – go on – no matter what."[30] Similarly, Linwood tells his subordinate Lilah,

> "[m]y beautiful wife and I raised two and a half million tonight in the fight against cervical cancer. Tomorrow, I'll stall FDA approval of Parsonal, a very promising treatment for it. Unfortunately one of our clients has a competing drug – not nearly as good but – they're our clients. We're in a war you can never win, Lilah, full of sticky moral quandaries. The side you should choose should always be mine."[31]

Lilah, like Manners, consistently denies the existence of simple moral goods:

> "[F]unny thing about black and white – you mix it together and you get grey. And it doesn't matter how much white you try and put back in, never gonna get anything but grey."[32]

In the final episode of the fourth series, "Home", whilst persuading Angel to take up Wolfram and Hart's offer of control of their Los Angeles office, Lilah urges on Angel the "value of compromise.[33] In a very early episode, "The Ring", Lilah tells Angel "[s]ometimes you have to compromise."[34] To Angel's retort, "[l]ook the other way you mean when Wolfram and Hart are involved?" Lilah responds, "I prefer to think of it as picking battles you can wine". The firm never acknowledges any deontological notion good or evil. Hamilton, a liaison between Angel and the Senior Partners when Angel does take over management of the Los Angeles branch of Wolfram and Hart, advises Angel, "[t]hink about profits. It's profits that let you keep this plucky little boatload of good above water".[35] Even when attempting to bring about an apocalypse the firm acts in a business-like manner, seeking an alliance with a demon because the "[p]artners feel it might speed things along and save a few bucks".[36]

The picture painted of Wolfram and Hart is one of a large powerful bureaucratic corporation. Its clients are almost always evil. Those it represents range from crooked members of Congress and Senate to crime lords and demons.[37] However, is it itself necessarily evil? In "Home", having lost a series of confrontations with Angel and his associates, Wolfram

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[29] "Blind Date", 1021.
[30] "Reprise", 2015.
[31] "Forgiving", 3017.
[32] "Habeas Corpses", 4008.
[33] "Home", 4022.
[34] "The Ring", 1016.
[35] "Time Bomb", 5019.
[36] "*Habeas Corpses*", 4008.
[37] "Billy, 3006; "Power Play", 5021; "Sense and Sensitivity", 1006; "Loyalty", 3015.

and Hart try to buy off Angel and his associates by offering them control of the Los Angeles branch of the firm. Lilah says to Angel, "[t]hink of what you can do with the resources of Wolfram and Hart at your fingertips, the difference that would make."[38] It is, she suggests, an opportunity to "beat they system from inside the belly of the beast". Eve, Angel's liaison with the Senior Partners when he agrees to take over the Los Angeles office, tells Angel and his friends, "you're on the inside now, and you can stop the worst of it. Maybe find some new solutions to some old problems".[39] The idea implicit in these suggestions is that the firm itself is morally neutral; those who control it determine its moral direction. However, the careers that lawyers have in the firm and in particular the subsequent role of Charles Gunn, one of Angel's friends who becomes a lawyer when they take over the Los Angeles office, contradicts this idea.

Working for Wolfram and Hart

"Angel" examines in some detail the motivation of three lawyers who work for Wolfram and Hart, Lindsey McDonald, Lilah Morgan and Charles Gunn.[40]

Lindsey McDonald comes from a poor background:

> "I'm talking dirt poor – no shoes – no toilet. Six of us kids in a room, and come flue season it was down to four. I was seven when they took the house. They came right in and took it – And my daddy was being nice, you know? Joking with the bastards while he signed the deeds."[41]

His motivation in working for the firm is money and status:

> "Either you got stepped on you got to stepping and I swore to myself that I was not going to be the guy standing there with a stupid grin on my face – while my life got dribbled away."

He was picked to work for the firm because he was seen to have a "potential for seeing things how they are". He works hard for the firm and displays great talent. However, despite his ability and success he is ambivalent about whether he can in fact see "things how they are". In "Blind Date" Manners, Lindsey's superior, tells Lindsey

> "It's your age. You're a young man. You've hitched your wagon to our star. Oh, and it's a bright star. But now you are starting to feel a little 'Is that all there is.'"

Later Lindsey, when says that he wants "my own life", Manners counsels him to accept that "[n]o-one has their own life. We are all part of something larger". In return for accepting total commitment to the "something larger", Wolfram and Hart, Lindsey is offered "a thundering raise and ungodly profits". Lindsey accepts and becomes a junior partner with a "six-figure

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38 "Home", 4022.
39 "Conviction", 5001.
40 A number of other lawyers appear in the programme, several in more than one episode, but their psychology is not explored in same depth.
41 "Blind Date", 1021.

salary and a full benefits package".[42] His subsequent work for the firm gains him the reputation of being "a guy who understands the big picture".[43] Nevertheless, there continues to be an ambivalence in his relationship with Wolfram and Hart. He allows his personal feelings, including both his animosity for Angel and a developing attachment to the vampire Darla, to affect his judgement; something for which he is censured on several occasions.[44] When the firm seek to entrap Angel they keep Lindsey only partially informed of the plan because they do not fully trust him.[45] At the same time Lindsey finds himself detached from life. Faced with potential death, when Wolfram and Hart's plan goes wrong, Lindsey finds that he "just doesn't mind" about either the prospect of his own death or that of lawyers who work for Wolfram and Hart.[46] "Is that all there is" remains his question. Further promotion to the position of Co-vice-president Special Projects does little to improve Lindsey's relationship with the firm.[47] Although the firm's policy is not to kill Angel, Lindsey nevertheless tries to engineer this, using his new position and the resources of Wolfram and Hart. Learning of his actions, the firm tells him he is regarded as "expendable".[48]

Lindsey is not a heroic figure. He does have qualms about the firm's intention to have three children killed and is willing to conspire against the firm to prevent this happening.[49] However, more usually the firm's actions leave him morally untroubled. In the few days before his final resignation from Wolfram and Hart, he is happy to suggest a way of protecting the assets of Western Pacific Power, a public utility who have, in his words, "looted 3.5 billion [dollars] since deregulation".[50] A day later he outlines a strategy to enable Lycor, a company that has sold carcinogenic chocolate, avoid being sued. His inability to work for the firm lies in his unwillingness to accept that he does not have a "life of his own" and his desire for independence not any general repugnance for the firm's actions.

When Lindsey finds that Darla does not and cannot reciprocate his feelings for her but has had sex with Angel, Lindsey attacks Angel. However, whereas previously he has used his training as a lawyer in his confrontations with Angel, arguing that lawyers they should always fight Angel on their "own turf", this time he attacks Angel physically; his anger is purely personal, not a reflection of his employment, his new attitude being signalled by the fact he is no longer the be-suited lawyer but is, instead, dressed in jeans and cowboy boots, driving not a company car but a pick-up truck.[51]

A talented musician, whose skill is such as to draw the admiration of Angel's friends even though they dislike him personally, Lindsey has been unable to continue performing after loosing his right hand in a fight with Angel.[52]

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[42] "Judgement", 2001.
[43] "Untouched", 2004.
[44] "Reunion", 2001; "Dead End", 2018.
[45] "Darla", 2007; "Reunion", 2010.
[46] "Reunion", 2010.
[47] "Redefinition", 2011.
[48] "Blood Money", 2012.
[49] "Blind Date", 1021.
[50] "Dead End", 2018.
[51] "Sanctuary", 1019; "Epiphany", 2016.
[52] "DeadEnd", 2018; "To Shanshu in LA", 1022.

When Wolfram and Hart arrange for him to have a hand transplant he is able to perform again in public. Soon after this he leaves the firm, even though he has just been offered further promotion, because he is "bored with this crap".[53] Subsequently he leaves Los Angeles in his pick-up truck with just a duffel bag and a guitar case. In the end he has decided, "[t]he key to Wolfram and Hart: don't let them make you play their game – you gotta make them play yours".[54] An individualistic, creative figure, Lindsey finds that working in the world of Wolfram and Hart, even with the money they pay him, still leaves him feeling his life is being "being dribbled away".

By contrast with Lindsey McDonald, Lilah Morgan remains with Wolfram and Hart until and even after her death.[55] Like him she comes from a high-achieving academic background, having been law review editor whilst at law school, and her career matches his up until his departure from the firm.[56] Lilah, even more than Lindsey, exemplifies the ruthlessness of the way in which Wolfram and Hart work. In "Judgement" she tells someone,

> "[y]ou have every right to review the contract. . . Of course if you don't sign we'll sue your ass of and kill your children. Just kidding, Donald. No-one wants a law suit."[57]

In "Lullaby" she says, "[t]his [doing a translation] shouldn't be fun, what it should be is done by morning – or I'll have your family killed."[58] When she secures promotion she decapitates her predecessor.[59] Like Lindsey, Lilah sometimes lets her personal feelings affect her judgement at work. In "Billy", Lilah kills an important client of Wolfram and Hart because he has had her beaten up.[60] She has attachments outside the firm. In the fourth series of "Angel" Lilah pursues an affair with Wesley Wyndham-Price even though he is adversary of Wolfram and Hart. It is Wesley, not she, who eventually ends the affair and she continues to show affection for him even after the affair has finished.[61] Equally Lilah pays for her mother to live in a clinic and tries to comfort her mother, who appears somewhat senile, when her mother 'phones her at work.[62] However, notwithstanding all of this, Lilah is more fully committed to Wolfram and Hart than Lindsey. She explains to Angel,

> "I have been doing this [being a lawyer] a damn long time. I have had to be better, smarter, quicker than every man in Wolfram and Hart. . . It's a survival thing. I made a lot of devil's bargains and I stuck to them. As a result, I live somewhat dangerously, and quite comfortably. My mother, who no longer recognises me, has the best room at the clinic. I get up every morning, put on my game face and do what I have

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53 "Dead End", 2018.
54 "Dead End", 2018.
55 "Calvary", 4012; "Home", 4022.
56 "Dead End", 2018.
57 "Judgement", 2001.
58 "Lullaby", 3009.
59 "Deep Down", 4001.
60 "Billy", 3006.
61 "Habeas Corpses", 4008; "Home", 4022.
62 "Sleep Tight", 3016; "Loyalty", 3015.

> to do. . . The game face – the one that I worked so hard to get – I became that years ago."[63]

Lilah is a lawyer for Wolfram and Hart and, notwithstanding her attachments elsewhere, she has little in her life outside of being a lawyer for Wolfram and Hart. Whilst her affection for Wesley is genuine it does not prevent her from manipulating him during their affair in her attempts to fight Angel on Wolfram and Hart's behalf.[64] Lilah's accepts Manners dictum that one has to acknowledge that one is part of "something larger" and is wholeheartedly a lawyer for Wolfram and Hart, uncomplainingly accepting that her employment with them continues even after her death. "I knew what I signed up for."[65]

The career of Charles Gunn, one of Angel's friends, offers the clearest indication of the inherent moral nature of Wolfram and Hart. In the first series of "Angel" Gunn appears as a young man who is living on the streets and fighting vampires.[66] In the second series he starts to work for Angel Investigations.[67] Unlike Angel's other friends Gunn has neither supernatural talents nor exceptional intelligence or knowledge. He is there when there is a need for "muscle".[68] When Angel takes over the Los Angeles office of Wolfram and Hart Angel's various friends from Angel Investigations are given control of divisions within the office. Gunn expects to be assigned to be in charge of security in accordance with his perception of his talents.[69] In fact Wolfram and Hart's doctors use surgery to "enhance his mind with a comprehensive knowledge of law" and he becomes a lawyer.[70] Angel and his friends are apprehensive about this change although Gunn sees the matter more positively, protesting that "[l]ook it's me here. They didn't evil me up. All I got stuck in my head was the law." Gunn is thus different to Lindsey and Lilah in that he becomes a lawyer in Wolfram and Hart having spent years fighting the clients who Wolfram and Hart represent. Gunn goes to work for Wolfram and Hart hoping to change its moral direction from within, believing that, "sometimes you gotta work the system before it works you".[71]

Making immediate use of his new legal knowledge, Gunn is able both to secure a mistrial for Corbin Fries, a crime lord, who has threatened to set off a bomb if he is convicted and also delay the date for the retrial, meaning that Fries will have to reduce the scale of his criminal activities whilst he awaits retrial. Gunn "save[s] the day, without ever resorting to violence".[72] In subsequent episodes Gunn continues to use his legal skills to help Angel.[73] In "The Cautionary Tale of Numero Cinco", after Angel has signed documents that Gunn has drafted, he tells Angel

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63 "Sleep Tight", 3016.
64 "Slouching Towards Bethlehem", 4004.
65 "Home", 4022.
66 "War Zone", 1020.
67 "Untouched", 2004.
68 "Are You Now or Have You Ever Been", 2002.
69 "Home", 4022.
70 "Conviction", 5001.
71 "Damage", 5011.
72 "Conviction", 5001.
73 "Just Rewards", 5002.

> "[a]s CEO and president of Wolfram and Hart, you have just bankrupted a company that dumps raw demon waste into Santa Monica bay, banished a clan of pyro warlocks into a hell dimension, and started a foster care programme for kids whose parents have been killed by vampires. Not bad for a day's pay."[74]

Angel and his other friends continually question whether they were wise to take control of Wolfram and Hart's Los Angeles office but Gunn is the most optimistic of them in his attitude to the change. "[W]e've done more good here in a month than Angel Investigations did in a year" he tells Angel in "The Cautionary Tale of Numero Cinco" whilst later, in "Damage", he says

> "we've been able to do some serious good while we're here. Lives saved, disasters averted, with all our fingers and souls still attached. End of the day I'm thinking we made the right choice".[75]

Gunn, however, slowly begins to take on the values of the firm. In "Soul Purpose" Gunn and the others discuss the best way to deal with Lucien Drake, a warlock and cult leader:

> "Gunn: . . . a cult this big has alliances, connections. If we confront them directly, it could be very bad for business.
>
> Wesley: But if we eliminate their leader covertly.
>
> Gunn:…then they spend the next billing cycle fighting themselves to hack out the new pecking order.
>
> Angel: Uh-huh…So are we doing this because it is right…or because it is cost-effective?
>
> Gunn: Uh, well, a little of both actually."[76]

Gunn has taken to heart Eve's stricture to remember, when thinking about Wolfram and Hart, that "[w]e're a business, and we have a bottom line".[77] More than this, Gunn feels his new knowledge and talents as a lawyer have given him a status he did not previously possess. When Angel threatens to resign from Wolfram and Hart after a client of theirs, who Gunn has been advising, murders five nuns in order to escape this dimension Gunn argues that they cannot and should not leave the firm. When Angel challenges him as why he is taking this view, "[a]nd I am sure that legal brain upgrade they gave you has got nothing to do with this", Gunn acknowledges, "[w]e all got something out of this".[78] Later, when he finds he is loosing his legal knowledge, because the brain implant he has been given was only temporary, he finds that he does not want to "go back to who I was".[79] In return for a permanent implant, which make him not "the ignorant street muscle. . . the high-school dropout" but instead "Charles Gunn, Attorney at Law", he agrees to help get a shipment of merchandise, currently being held at

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[74] "The Cautionary Tale of Numero Cinco", 5006.
[75] "The Cautionary Tale of Numero Cinco", 5006; "Damage", 5011.
[76] "Soul Purpose", 5010.
[77] "Conviction", 5001.
[78] "You're Welcome", 5012.
[79] "Smile Time", 5014.

customs, into the country. He does this knowing that "there would be consequences" to his agreement lying beyond dealing with the customs problem.[80] The consequences soon turn out to be, amongst other things, the death of his friend and former lover, Winifred Buckle.[81] Whilst Gunn realises his error and, in the remaining episodes of the series, uses his legal knowledge to fight Wolfram and Hart, the argument seems to be clear; in working as a lawyer for Wolfram and Hart Gunn lost sight of the distinction between good and evil.[82] In the final episodes of "Angel" Gunn is to return to being the heroic figure, eventually dying fighting as a street warrior.[83]

In different ways these stories about lawyers in Wolfram and Hart seem to demonstrate the impossibility of acting morally or even of achieving self-satisfaction if one works in a large law firm. Even Lilah, who appears most content with the job, can do this only at the expense of being nothing other than a lawyer whose dominant purpose in life is to "wield the most power".[84] Attempting to subvert the system from within fails because,

> "[a] place like that [Wolfram and Hart] doesn't change. . . not from the inside. Not from the out. You sign on there, it changes you. Puts things in your head. Spins your compass needle round till you can't cross the street without tripping the proverbial old lady and stepping on her glasses."[85]

Even though Angel thinks he made,

> "[m]ade some devil's bargain to take over this company. Thought you'd you use it to fight the evil of the world from inside the belly of the beast. Trouble is you're too busy fighting to see you and yours are getting digested."[86]

In the first series Angel told Lindsey, "you sold your soul for a fifth-floor office and a company car."[87] In the final series Cordelia Chase, who has worked for Angel Investigations, tells Angel that

> "[t]hey seduced you with all their fancy facilities, manpower. They threw a whole bunch of money at you, plied you with expensive toys and penthouses with spectacular views. . ."[88]

Dismissing his assertion that "we've done some great work here [at Wolfram and Hart]", Cordelia tells him that has become "CEO of Hell, Incorporated". In a world divided into good and bad large law firms are inherently bad and, even if some of the people who work for them are themselves not evil, "just opportunistic. They'll go with the flow", the direction of that flow is always,

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80 "Underneath", 5017.
81 "A Hole in the World", 5015.
82 "Underneath", 5017; "Time Bomb", 5019.
83 "Not Fade Away", 5022.
84 "Blind Date", 1021.
85 "Soul Purpose", 5010.
86 "Just Rewards", 5002.
87 "Blind Date", 1021.
88 "You're Welcome", 5012.

in the end, going to be evil.[89] Lawyers, at least lawyers in large law firms, are "the morally ambiguous crowd".[90]

Wolfram and Hart and Large Law Firms

The sheer fictionality of "Angel" may make it seem far-removed from the concerns of real-life large law firms. Real-life large law firms, unlike Wolfram and Hart, do not employ mind readers or demons or raise vampires from the dead.[91] Such law firms typically have corporations as clients rather than the individuals that Wolfram and Hart represent. Large law firms, unlike Wolfram and Hart, do not have a lot of criminal law business.[92] Television programmes that purport to be real-life accounts of the work of lawyers might be relevant to how lawyers are perceived by society at large, it could be argued, but "Angel" is nothing more than entertainment. However, against this it is necessary to consider the dramatic weight that the Wolfram and Hart must carry in the series. The firm is the counter-balance to Angel, an immortal vampire with supernatural strength, who is a "champion of the hapless human race", who believes the world to be "harsh and cruel" but who nevertheless lives in the world as though it were "what it should be, to show it what it can be", who does things because they are "the right thing to do…in spite of the fact that there is no shiny reward at the end of the day…other than the work itself" and who "still believes in being a hero".[93] That, in a popular television series, a large law firm can be seen as being both a plausible opponent for, and a moral opposite to, such a figure says something about both power that such firms are commonly thought to possess and the place that their mores are assumed to occupy in the viewers' consciousness.[94] Moreover, close examination of the programme shows that there is much in the behaviour of Wolfram and Hart and its lawyers that matches concerns that have been expressed about lawyers.

Whatever else it is, Wolfram and Hart is a business.[95] The relationship between the notion of law firms as professional partnerships and law firms as businesses has long been the subject of debate and disquiet. As long ago as

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89 "Conviction", 5001.

90 "Reprise", 2015. "Angel" is not unique in coming to this conclusion. Morawetz notes that lawyer jokes "imply that both lawyers *and* the profession itself are corrupt *ab initio*, and that neither is capable of salvation" (T Morawetz "Teaching Professionalism: The Issues and the Antinomies" in K Economides (ed.) "Ethical Challenges to Legal Education and Conduct" (1998) Hart Publishing p 228).

91 "Blind Date", 1021; Origin", 5018; "To Shanshu in LA", 1022.

92 See R. Lee "Firm Views: Work of and Work in the Largest Law Firms: Research Study No 35" (1999) The Law Society p.23. See also J. Lewis with J. Keegan "Defining Legal Business: Understanding the work of large law firms: Research Study No 27" (1997) at p.3.

93 "City of. . .", 1001;"Deep Down", 4001; "The Cautionary Tale of Numero Cinco", 5006.

94 In so doing the series plays with and subverts a more traditional image of lawyers as being akin to vampires. On Dracula as a lawyer and the role of lawyers in "Dracula" see A. McGillivray "He Would Have Made a Wonderful Solicitor: Law, Modernity and Professionalism in Bram Stoker's *Dracula*" in W. Wesley Pue and D. Sugarman "Lawyers and Vampires: Cultural Histories of Legal Professions" (2003) Hart Publishing.

95 "Conviction", 5001.

the 1920s Frankfurter, amongst others, lamented the rise in the USA of large firms that took business practice as their organisational ideal.[96] In the current era, in a study of large law firms, Galanter and Palay have argued both that "[f]irms have become more openly commercial and profit-oriented, 'more like business'" and that, because of this, "legal elites. . . must address more informed, cynical and critical publics without. . . the mantle of altruistic professionalism".[97] Such concerns also come from within the legal profession. Seneviratne notes that "[t]he majority of the legal profession [in the 1970s] did not consider law to be a business and felt a concern with markets and greater productivity would kill the idealism of the legal profession."[98] Large law firms themselves seem to be aware of such criticism. Many engage in *pro bono* activities; so does Wolfram and Hart.[99] Wolfram and Hart's *pro bono* work masks an attempt to steal two million dollars. Boon and Abbey have argued that large law firms use *pro bono* work as part of an attempt "to recapture practices strongly identified with emergence of professionalism" and thus to "re-establish or reinforce the integrity of the legal profession in the public mind"; indeed the Solicitors' *Pro Bono* Group's chief executive has been quoted as suggesting that engaging in *pro bono* work is a way of regaining public respect.[100] Whether, given the tiny fraction of large law firms' resources that are invested in such work, this is a more or less cynical attitude than that of Wolfram and Hart is a moot point. For the purposes of this article it is enough to note the resonance that the commercial attitudes of Wolfram and Hart have with those of real-life large law firms.

Wolfram and Hart's concern to act in a business-like manner is one point of contact with real-life large law firms; so is their lawyers' attitudes towards morality. Wolfram and Hart's lawyers consistently deny the relevance of ethics to the work that they do. This denial is either based on the premise that there are no clear ethical choices to be made or that ethics are irrelevant

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[96] J. Auerbach "Unequal Justice: Lawyers and Social Change in Modern America" (1976) Oxford University Press, pp.139-144. See also M. Galanter and T. Palay "Large Law Firms and Professional Responsibility" in R. Cranston (ed.) "Legal Ethics and Professional Responsibility" (1995) Clarendon Press at p.193.

[97] M. Galanter and T. Palay "Tournament of Lawyers" (1991) University of Chicago Press p.51 and p.75. See also Galanter and Palay (1995) *op.cit.* at 190.

[98] M. Seneviratne "The Legal Profession: Regulation and the Consumer" (1999) Sweet and Maxwell p.4.

[99] "Blood Money", 2012. The Solicitors' *Pro Bono* Group "includes 40 per cent of the top fifty law firms" (A. Boon and A. Whyte "'Charity and Beating Begins at Home': The Aetiology of the New Culture of Pro Bono Publico" (1999) 2 Legal Ethics 169 at p.183. See also Galanter and Palay (1995) *op.cit.* at p 198 and S. Browne "A Survey of *Pro Bono* Activity by Students in Law Schools in England and Wales" (2001) 35 The Law Teacher 33.

[100] A. Boon and R. Abbey "Moral Agendas: *Pro Bono Publico* in Large Law Firms in the United Kingdom" (1997) 60 *Modern Law Review* 630 at pp.631. See also D. Nicholson and J. Webb "Professional Legal Ethics: Critical Interrogations" (1999) Oxford University Press p.77. There are other motivations for engaging in *pro bono* work including the fact that corporate clients insist on law firms doing it as part of their own bid to demonstrate "corporate citizenship" (Boon and Whyte *op.cit.* p.190); "Clients put pressure on law firms to do *pro bono* work" The Lawyer 15th March 2004.

to their work.[101] Here again art mirrors reality. In Griffiths-Baker's study of the application of conflict of interest rules by solicitors she notes that large law firms regularly assert that the Law Society's rules on such matters are too simplistic for the commercial complexities of their large corporate clients whilst de Groot-van Leeuwen's conclusion, drawn from her interviews with Dutch lawyers, is that lawyers "escape from ethical reflection by phrasing all problems they encounter in purely legalistic terms".[102] Even the use by lawyers of professional codes of conduct can, on occasion, be seen as itself being an example of lawyers denying the application of ethics to their work.

> "[Young attorneys] deal with moral ambiguity by relying on professional ethics rather than personal codes. As long as their behaviour breaks none of the canons of professional responsibility, they are absolved of guilt."[103]

Wassertrom, in his analysis of legal ethics, argues that,

> "the lawyer-client relationship renders the lawyer at best systematically amoral and at worst more than occasionally immoral in her dealings with the rest of humanity."[104]

As Wolfram and Hart put it the large law firm's job is simply "to see to it that our clients lives run more smoothly".[105] There are, of course, differences between what Wolfram and Hart will do for their clients and what other law firms will see as being proper. Wassertrom, for example, observes that "[a] lawyer cannot bribe or intimidate witnesses to increase the likelihood of securing an acquittal" but Wolfram and Hart see no such limitations on their work.[106] Nevertheless, there is once again a resonance between the behaviour of Wolfram and Hart and concerns about the behaviour of large law firms.

Lindsey leaves Wolfram and Hart because he is "bored with this crap".[107] Clifford Chance and other large law firms seem to have similar problems with their employees. In Lee's analysis of large law firms he observes that "[t]here was a continual report from the partners interviewed that they were witnessing a change in attitude in the modern generation of solicitors coming through the system" with increasing numbers of solicitors leaving firms because they found the life-style unacceptable.[108] Part of the reason for this

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[101] See, for example, "Habeas Corpses", 4008 and "Blind Date", 1021.

[102] J. Griffiths-Baker "Serving Two Masters: Conflict of Interest in the Modern Law Firm" (2002) Hart Publishing pp.123-131; L. de Groot-van Leeuwen "Lawyers' moral reasoning and professional conduct, in practice and education" in Econimides *op.cit.* p.238

[103] R. Gramfield "The Politics of Decontextualized Knowledge: Bringing Context into Ethics Instruction in Law School" in Economides *op.cit.* p.312. Gramfield's work is based on interviews of both lawyers working in large law firms and lawyers working in other situations (Gramfield *op.cit.* p.308).

[104] R. Wasserstrom "Lawyers as Professionals: Some Moral Issues" in J. Callahan (ed.) "Ethical Issues in professional Life" (1988) Oxford University Press p.58.

[105] "City of. . .", 1001.

[106] Wasserstrom *op. cit.* p.60; "City of. . .", 1001.

[107] "Dead End", 2018.

[108] Lee *op. cit.* pp.52-53. See also R. Lee "'Up or Out' – Means or Ends? Staff Retention in Large Firms" in P. Thomas (ed.) "Discriminating Lawyers" (2000) Cavendish Publishing.

lies in factors like long working hours but, more widely, Kronman has argued that in the context of ,

> "the explosive growth of the country's leading law firms, which has changed forever the practice of lawyers in them and created a new, more openly commercial culture"

that there thus arises "a crisis of morale. It is the product of growing doubts about the capacity of a lawyer's life to offer fulfilment to the person who takes it up."[109] Notwithstanding the high salaries they offer, large law firms do not automatically attract the recruits that they need. Galanter and Palay note that in the 1960s the number of law graduates seeking to enter large law firm practice in the USA "dropped precipitously", partly because graduates sought other occupations that gave them deferment from the Vietnam War draft and partly because of "disdain for corporate practice".[110] Once again large law firms are aware of such problems. In his study of the US firm that he calls Spencer, Grace and Robbins, Lazega notes that:

> "[i]n the presentation of the firm to prospective law students, and in partners' discourse about their firm, it was stressed that members cared about their personal and family life."[111]

How deeply felt such sentiments are is a matter for conjecture. Holland Manners tells Lindsey

> "your hard work isn't all they [the senior partners] notice. It's also important to have healthy attachments outside the office. Now I know our roles here don't allow much time to socialize. Find the time."[112]

Despite this comment Manners' stress on the importance of Lindsey being fully committed to "the larger whole" of Wolfram and Hart seems to be a much more accurate description of his view of the life of a lawyer in a large law firm.[113]

> "[P]eople within contemporary practice organizations think of themselves (and are treated) less as independent professionals and more as instruments or employees of organizations."[114]

Having just had a pistol held to her head in the course of her employment, Lilah find that her superior Linwood's main concern it to reprimand her for not keeping him fully informed of developments rather than to express concern about her safety.[115] A partner in Spencer, Grace and Robbins reports that, notwithstanding the firm's rhetoric, "[y]ou get very little emotional reward or support [within the firm]".[116] Once again the connections between

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[109] A. Kronman "The Lost Lawyer" (1993) Harvard University Press p.4 and p.2.
[110] Galanter and Palay (1991) *op. cit.* pp.55-56.
[111] E. Lazega "The Collegial Phenomenon: The Social Mechanisms of Cooperation Among Peers in a Corporate Law Partnership" (2001) Oxford University Press p.70.
[112] "Reunion", 2010.
[113] "Blind Date", 1021.
[114] M. Kelly "Lives of Lawyers: Journeys in the Organizations of Practice" (1996) University of Michigan Press p.2.
[115] "Forgiving", 3017.
[116] Lazega *op. cit.* p.98.

Wolfram and Hart and real-life large firms are clear. Sennett has suggested that one of the problems of contemporary life lies in the worry that a parent cannot:

> "offer the substance of his work life as an example to his children of how they should conduct themselves ethically. The qualities of good work are not the qualities of good character."[117]

This problem is not limited to large law firms but it is nonetheless a question for large law firms. It may only be lawyers in Wolfram and Hart who "pull . . . [their] firstborn out of company care to offer it up [as sacrifice]" when appraisal comes round but in Lee's study of large law firms "the balance between family life and working life was a topic which everyone freely discussed as a matter of concern".[118]

"Angel", Lawyers, Large Law Firms and Self-Regulation

The picture painted of Wolfram and Hart and those that work for it in "Angel" is of consequence for all lawyers. Lawyers, like other professional groups, occupy an unusual position in society. Their assertion of a right to self-regulation is reflective of a more general contention that the nature of their work is, in significant ways, different to modes of production found more generally within society. Their work, it is said, is done, at least in part, for the public good and involves some end that is important in itself.

> "[T]he continuing legitimacy of a profession's social role derives from the nature of the good which it secures for citizens and on its effective ness in securing that good. Health is the good pursued by the medical profession and, it is usually asserted, justice is the good pursued by the legal profession."[119]

The provision of such goods involves those who provide them in considering more than the commercial interests of either themselves or their clients; on this basis a whole range of professional privileges are therefore said to be justified.[120] Such suggestions are not accept lightly and, even if accepted, are, as is illustrated by the current "Review of the Regulatory Framework for Legal Services in England and Wales", subject to continual re-examination.[121] The rise of the large law firm has added to doubts about the veracity of the proposition that the work of lawyers is different from other work done in the commercial sector.[122] The impact that large law firms have had on debate is two-fold. First, because they are organized differently from either small law firms or lone practitioners a series of specific questions about how they relate to the professional ideal arise. Secondly, their size and commercial value means that they "present a powerful image of legal

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117 R. Sennett "The Corrosion of Character" (1998) W. Norton p.21.
118 "Reprise", 2015: Lee *op. cit.* p.59.
119 A. Boon and J. Levin "The Ethics and Conduct of Lawyers" (1999) Hart Publishing p.22.
120 Boon and Levin *op. cit.* p.50.
121 "Report of the Review of the Regulatory Framework for Legal Services in England and Wales" (The Clementi Report) (2004).
122 See, for example, Galanter and Palay (1995) *op. cit.* p.193.

practice which influences the perception of the public and policy makers".[123] Thus the image of large law firms can easily become the image of lawyers in general. This image may not be accurate, Maimoon, McEwen and Mather comment on the "sharp cleavage between attorneys with corporate or business clients and those with individual clients", but, nevertheless, it cannot be ignored.[124] For this reason the portrayal of Wolfram and Hart in "Angel" is of consequence to all lawyers and all law firms. The Law Society of England and Wales recently ran an advertising campaign which was designed to enhance the image of the profession under the slogan "my hero, my solicitor".[125] The example of Wolfram and Hart as the evil large law firm elides easily into the proposition that all law firms are, if not evil, at least untrustworthy and certainly not heroes. An age that finds Wolfram and Hart a more plausible characterisation of lawyers than Atticus Finch from "To Kill a Mocking Bird" may not be one that will continue to accept the legitimacy of lawyers' claims for self-governance.

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[123] Boon and Levin *op.cit.*. p.77.

[124] R Maimoon, C. McEwen and L. Mather "The Future of the Legal Profession in Practice" (1999) 2 Legal Ethics 71 at pp.73-74.

[125] 6th September 2004 <http://www.lawsociety.org.uk/newsandevents/pressreleases.law>

CONDITIONAL FEE AGREEMENTS IN NORTHERN IRELAND: GIMMICK OR GODSEND?

Annette Morris, Lecturer, Cardiff Law School*

The Access to Justice (Northern Ireland) Order 2003 provides the legislative platform for the introduction of conditional fee agreements (CFAs) in Northern Ireland.[1] CFAs were first allowed by a Conservative Government in England and Wales in 1995.[2] They were initially introduced to complement legal aid by facilitating access to justice for those who neither satisfied the eligibility criteria, nor could afford to fund their claims privately. Whilst in opposition, the Labour Party dismissed CFAs as a "gimmick".[3] In Government, however, it has capitalised on the development of a CFA market to justify the withdrawal of legal aid from certain categories of claim.[4] The Access to Justice Act 1999 provided for the withdrawal of legal aid for claims relating to negligently caused personal injury and death, excluding clinical negligence claims, on the assumption that they could be funded by CFAs instead.[5]

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1 SI 2003/435 (N.I.10), articles 38 and 39.

2 Section 58 of the Courts and Legal Services Act 1990 (c.41) declared that CFAs relating to proceedings specified by order of the Lord Chancellor would "not be unenforceable by reason of its being a conditional fee agreement". The Lord Chancellor specified in the Conditional Fee Agreements Order 1995 (SI 1995/1674) that CFAs could be enforceable in claims relating to death, personal injury and insolvency and for proceedings before the European Court of Human Rights. The Conditional Fee Agreements Order 1998 (SI 1998/1860) replaces the 1995 Order and allows CFAs in all civil claims, except specified family proceedings.

3 Abel, *English Lawyers Between Market and State: The Politics of Professionalism* (2003), at p.294.

4 It largely justified this on the basis of unsustainable increases in legal aid expenditure. Net expenditure on legal aid in England and Wales had increased by 115% within six years, from £682 million in 1990-1991 to £1,477 million and legal aid in civil cases almost tripled: *Access to Justice with Conditional Fees – A Lord Chancellor's Department Consultation Paper* (1998), at para.1.4. In Northern Ireland, legal aid expenditure had increased from £12.9 million in 1990-1991 to £28.85 million in 1997-1998: *Public Benefit and the Public Purse – Legal Aid Reform in Northern Ireland* (1999), at para.1.3. See further: Zander, "The Government's Plans on Legal Aid and Conditional Fees" (1998) 61 M.L.R 538; Moorhead, "Conditional Fee Agreements, Legal Aid and Access to Justice" (1999) 33(2) U.B.C.Law Review 471 and Capper, "Personal Injury Litigation – The Case for Legal Aid" (2002) 53 N.I.L.Q 137, at p.138.

5 Schedule 2, para.1 of the Access to Justice Act 1999 (c.22) excludes public funding for claims relating to "allegations of negligently caused injury, death or damage to property, apart from allegations relating to clinical negligence." Clinical negligence claims remained within the scope of legal aid because it was feared that the CFA market at the time would not be able to cope with their complexity and expense: *Access to Justice with Conditional Fees, ibid.*, at para.3.16. There are now

CFAs will initially complement, rather than replace, legal aid in Northern Ireland, although it is not clear whether legal aid will be available regardless of the availability of CFAs or only in those cases where a CFA would not be viable.[6] The Access to Justice (Northern Ireland) Order 2003 does provide, however, for the withdrawal of legal aid from certain categories of claim at a later stage.[7] It seems inevitable, therefore, that the Government will be looking to shift responsibility for the funding of personal injury claims from the state to the CFA market once it is sufficiently developed.

The introduction of CFAs in Northern Ireland signifies the Government's belief that they have been a successful means of funding claims and a viable alternative to legal aid in England and Wales. It has done little, however, to establish this. During the consultation process leading to the Order, the Government stated on more than one occasion that it could draw both on experience of and research into CFAs in England and Wales.[8] It failed, however, to provide any evidence from England and Wales in support of its' reforms and whilst, on occasion, it made vague claims that CFAs were working well and had extended access to justice, these were unsubstantiated.[9]

The implementation of the Order began with the establishment of the Northern Ireland Legal Services Commission in September 2003, which is responsible for the administration of legal aid and for the implementation of remaining reforms required by the Order.[10] Whilst it is currently focusing on the legal aid reforms,[11] it is expected to turn its attention to the introduction

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moves, however, to refuse legal aid for such claims where they could be conducted on a CFA basis instead: Legal Services Commission, *A New Focus for Civil Legal Aid – Encouraging Early Resolution, Discouraging Unnecessary Litigation* (2004), at para. 4.23. See also, "Miracle Cure or Truly Terrifying?" (2004) 31 Litigation Funding 2.

6 *Public Benefit and the Public Purse, op. cit*, n.4 above, at para.8.10.

7 Article 12(6).

8 *Public Benefit and the Public Purse, op.cit.*, n.4 above, at para. 8.4; Rosie Winterton, Parliamentary Secretary, Lord Chancellor's Department in evidence to the Northern Ireland Grand Committee, Hansard (House of Commons), 24 October 2002, at col. 003 and in evidence to the Third Standing Committee on Delegated Legislation, Hansard (House of Commons), 23 January 2003, at col. 006.

9 Rosie Winterton, Parliamentary Secretary, Lord Chancellor's Department in evidence to the Northern Ireland Grand Committee, *ibid.,* at col. 007 and Lord Bach, Parliamentary Secretary, Lord Chancellor's Department in evidence to the House of Commons Northern Ireland Affairs Committee: *Legal Aid in Northern Ireland,* Fourth Report of the Northern Ireland Affairs Committee (2001), para.24 of Minutes of Evidence.

10 The Commission, which is an executive non-departmental body, assumed responsibility for the administration of legal aid from the Law Society of Northern Ireland on 1 November 2003. It comprises ten members, with predominantly a civil service background. Concern has been expressed that the Commission does not contain solicitors with recent experience of private practice: Bailie, "Coming Soon. . ." The Writ, October 2003, at p.4. Until the implementation of the legal aid reforms, the Commission will continue to administer legal aid in accordance with the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 (SI 1981/228 (N.I.8)) and the Legal Aid (Financial Conditions) Regulations (Northern Ireland) 2003 (SR 2003/88).

11 Articles 10-20 of the Order provide for the separation of the legal aid budgets for civil and criminal legal services. Whilst the budget for criminal legal services will

of alternative funding mechanisms, including CFAs, shortly.[12] The intervening period provides a useful opportunity to examine the operation of CFAs in England and Wales and to consider whether experience to date does indeed suggest that CFAs should be introduced in Northern Ireland. This paper concentrates on these two issues. In noting that the CFA market's capacity to facilitate access to justice is still unclear, as are the wider implications of CFAs, it is argued that the Government should proceed cautiously until more is known in these respects. In addition, whilst experience in England and Wales should inform the CFA debate in Northern Ireland, it cannot replace the need for empirical research into personal injury litigation and the economic capacity of the legal market to assess the viability of CFAs within the jurisdiction.

Part One: The Operation Of Conditional Fee Agreements With Recoverability In England And Wales

CFAs allow lawyers to act for personal injury claimants on, what is commonly referred to as, a 'no win, no fee' basis. Under a CFA, if a claimant loses her claim, she is not liable to pay her lawyer for the work completed on her behalf. If, however, she wins, she is liable to pay not only her lawyer's normal fees, but also an uplift of them. The amount of the uplift, which is called the 'success fee', is agreed between the lawyer and the claimant at the time of entering the CFA and is expressed as a percentage of the lawyer's normal fees. It is intended to reward the lawyer for taking the risk of not being paid and for funding the claim until its conclusion. They have most commonly been used to fund personal injury claims and their development has been assisted by the emergence of after-the-event legal expenses insurance (ATE insurance).[13] This provides costs protection in the event of losing, as whilst a losing claimant is not liable to pay her own lawyer under a CFA, she remains liable to pay the other side's costs in accordance with the 'loser pays' principle.

In seeking to encourage the use of CFAs, the Government introduced the concept of 'recoverability' within the Access to Justice Act 1999. Success fees and ATE insurance premiums are now recoverable from losing defendants (or, in reality, their liability insurers) in the same way as claimants' lawyers fees and disbursements.[14] This is "an interesting attempt

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continue to be determined on a demand-led basis, the budget for civil legal services will be capped and targeted towards priority cases. The Commission is currently undertaking research to establish the level at which the budget should be capped and to determine which cases are of sufficient priority to receive legal aid: Northern Ireland Legal Services Commission, Corporate Plan: 2004-2007 (2004).

12 Corporate Plan, *ibid*.

13 For further information on the operation of CFAs in their early stages, see Yarrow, *The Price of Success: Lawyers, Clients and Conditional Fees* (1997); White and Atkinson, "Personal Injury Litigation, Conditional Fees and After-the-Event Insurance" (2000) 19 C.J.Q 118; Yarrow and Abrams, *Nothing to Lose? Clients' Experiences of Using Conditional Fees* (2000) and Yarrow, *Just Rewards?* (2000).

14 Section 58A(6), Courts and Legal services Act 1990 (as amended by section 27, Access to Justice Act 1999) and section 29, Access to Justice Act 1999 respectively. See further: Lord Chancellor's Department Consultation Paper,

to squeeze public provision into a private model approach", as these costs had previously been met from claimants' damages in winning claims.[15]

The proposed introduction of CFAs in Northern Ireland has provoked widespread concern and controversy for a number of reasons.[16] Personal injury claims are a central feature of civil justice in Northern Ireland with, on average, just over 40,000 claims pursued each year.[17] As CFAs are not subject to financial eligibility criteria, they appear to facilitate access to justice on a universal basis. There is some scepticism, however, about whether access to justice can or should be met by the vagaries of a CFA market.[18] There are also concerns about the wider implications of CFAs. CFAs are considered undesirable because they create a conflict of interest between lawyers and their clients, as lawyers have a direct interest in the outcome of the claim, which might encourage under-settling or other ethically dubious behaviour.[19] It has also been suggested that CFAs lead to an increase in the number of claims pursued[20], to an explosion of unregulated claims management companies[21] and to increased legal costs and insurance premiums[22]. It is these issues which are explored below in relation to

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Conditional Fees: Sharing the Risks of Litigation (1999) and the Government's response (2000).

15 Moorhead, "CFAs: A Weightless Reform of Legal Aid?" (2002) 53 *N.I.L.Q.* 153, at p.154.

16 This was acknowledged by the Government: Northern Ireland Court Service, *The Way Ahead – Legal Aid Reform in Northern Ireland* (2000), at p.11. As an alternative to CFAs, the legal profession called for the establishment of a publicly-funded contingency legal aid fund (CLAF). This would have met plaintiffs' legal costs and whilst this would require an initial injection of public funds, it would, it was suggested, have become self-financing, as the fund would be replenished by costs recovered in winning cases. See further: Report by the Lord Chancellor's Legal Aid Advisory Committee on *The Viability of Establishing a Contingency Legal Aid Fund or Conditional Fees in Northern Ireland* (2001); Capper, *op. cit.*, n.4 above and Capper, "The Contingency Legal Aid Fund – A Third Way to Finance Personal Injury Litigation" (2003) 30 Journal of Law and Society 66. The Government rejected the proposed publicly-funded CLAF, although article 40 of the Access to Justice (Northern Ireland) Order 2003 contains a legislative power to introduce a privately funded CLAF. Whilst it did not explain its' rejection in relation to Northern Ireland, it has since explained its aversion to a publicly funded CLAF in England and Wales: Department for Constitutional Affairs, *Making Simple CFAs A Reality* (2004), at p.33.

17 Data on the number of claims has been obtained from the Compensation Recovery Unit (Northern Ireland). Pursuant to the Social Security (Recovery of Benefits) (Northern Ireland) Order 1997 (SR 1997/1183 (N.I.12)), the Unit recovers from the 'compensator' – the defendant or insurer – amounts equivalent to social security benefits paid as a result of an accident, injury or disease. In ensuring that all due sums are recovered, compensators are obliged to notify the Unit of all personal injury claims, details of which are entered onto the Unit's database.

18 See further Capper, *op.cit.*, n.4 above, at pp.137-142.

19 The Way Ahead, *op. cit.*, n.16 above, at p.21. See also Capper, *op. cit.*, n.4 above, at pp.145-6.

20 Lord Laird, Hansard (House of Lords), 6 February 2003, col. 355.

21 Law Society of Northern Ireland's submissions to Northern Ireland Assembly, which are attached to the Assembly's Ad Hoc Committee Report on the draft Access to Justice (Northern Ireland) Order 2002 (2002).

22 Capper, *op. cit.*, n.4 above, at p.144.

England and Wales. As CFAs will operate with recoverability in Northern Ireland and are intended, in the long term, to be a replacement for legal aid for certain types of claim, this paper focuses on the operation of CFAs with recoverability in England and Wales since the implementation of the Access to Justice Act 1999.

Are Conditional Fee Agreements Facilitating Access To Justice?

Access to Justice and Market Incentives

Considering whether CFAs facilitate access to justice raises the inevitable question: what constitutes 'access'? Answering this question is difficult because, as Cappelletti notes, "[e]veryone has his own conception by what is meant".[23] The term is used as shorthand for a "bundle of problems and a variety of goals"[24] and it generates a "constant debate about how much access to provide and what kind of justice should result".[25] As Moorhead and Pleasence explain,[26] the concept is grounded in the notions that there should be equality before the law and that "the possession of rights is meaningless without mechanisms for their effective vindication".[27] Rather than seeking to define 'access', Cappelletti identifies various 'barriers' which potentially inhibit the achievement of it.[28] In the context of a claim for personal injury compensation, three such barriers are:[29]

- the ability to secure legal advice and representation, which traditionally depends on the ability to pay for the service;
- the ability to pay disbursements, which are central to the progression of the claim, including fees for expert opinions and court fees;
- the ability to pay defendants' legal costs in the event that the claim is lost.

The 'no win - no fee' aspect of CFAs generates the false perception that they remove all potential financial barriers to pursuing a claim, and as a result, achieve equality before the law. This is only true, however, to the extent that claimants' ability to secure legal advice and representation no longer depends on their ability to pay lawyers. The ability to pay disbursements and to meet defendants' legal costs are still live issues. For CFAs to facilitate access to justice, the CFA market must respond to remove the barriers identified, as otherwise many claimants will be precluded from pursuing their claims because they do not have the financial means to do so. The

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[23] Cappelletti and Garth (eds.), *Access to Justice, Volume 3: Emerging Issues and Perspectives* (1979), at p.8.
[24] *ibid.*, at p.7.
[25] Cappelletti *et al* (eds.), *Access to Justice and the Welfare State* (1981), at p.2.
[26] Moorhead and Pleasence, "Access to Justice after Universalism: Introduction" (2003) 30 Journal of Law and Society 1.
[27] Cranston, 'Rights in Practice' in Sampford and Gilligan (eds.) *Law, Rights and the Welfare State*, (1986).
[28] *Op. cit.*, n.23 above.
[29] For further information on why justiceable issues are not always pursued, see Genn, *Paths to Justice: What People Do and Think About Going to Law* (1999) and Pleasence *et al*, *Causes of Action: Civil Law and Social Justice* (2004).

extent to which the barriers are removed depends, in turn, on the extent to which:

- lawyers respond to the incentive of recovering success fees in winning cases and agree to act on a conditional fee basis;
- insurers respond to the incentive of recovering premiums by providing ATE insurance to cover the risk of paying opponents costs where the claimant loses;
- lawyers, ATE insurers or other third parties invest in claims by assisting claimants with the cost of disbursements and ATE premiums in exchange for a return on that investment.

Political Spin v *Economic Reality*

The Government has suggested that the market will respond to incentives in 'good' cases, stating that the "great advantage of the conditional fee system" is that "if you have a good case there is no reason why you should not get justice".[30] In referring to a good case, it is generally accepted that the Government is referring to cases with prospects of success above fifty *per cent*. Aligning the extent to which the market will respond with the legal merits of a claim is, however, both over-simplistic and misleading. CFAs involve a number of risks and uncertainties, as follows:[31]

- whether the claim will be won;
- the work and expense that will be required to win the claim;
- the amount of the fee that will be recovered for the work conducted, as this is decided retrospectively at the end of the claim;
- whether a fee will be recovered for the work done on the claim, even if the claim is won;
- the amount of time that will pass before any fee is recovered.

Only some of these are related to whether the case is good in the Government's terms. In deciding whether to act on a CFA basis, lawyers must assess these risks and consider whether they are able and willing to take them and their decisions will largely depend on two factors. Firstly, whether the risks justify the potential returns and secondly, whether the firm's financial position allows the lawyer to take the risks.

Under legal aid, personal injury lawyers secured a relatively constant and stable stream of income as they could claim payments on account for their work and were paid whether claims succeeded or failed.[32] In this context, the likely length and cost of claims were largely irrelevant. In stark contrast, as lawyers working on a CFA basis do not receive any payments for their work

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[30] Lord Bach, *op. cit.,* n.9 above.

[31] Kritzer, "Seven Dogged Myths Concerning Contingency Fees" (2002) 80 Washington University Law Review 739; Kritzer, *Rhetoric and Reality. . .Uses and Abuses. . .Contingencies and Certainties: The American Contingent Fee in Operation* (1996).

[32] Although they were generally paid less in losing cases.

until the claim is concluded, if they are paid at all, CFAs pose significant cash flow difficulties for them and the potential length and cost of claims are of central importance.[33] Lawyers must consider whether their firm's cash flow allows them to invest the time and money necessary in a claim, including disbursements, for its full duration. If the claim could take some time to resolve or is complex and will require considerable investment, the firm's cash flow may not permit the lawyer to take the claim, even if it is good.[34]

In addition, the lawyer must also consider whether the firm can absorb the cost of losing a claim. Lawyers often refer to building a 'war chest' in CFA cases to meet the cost of those cases that lose and they are entitled to charge success fees of up to 100 *per cent* of their normal fees to achieve this.[35] If lawyers suspect there may be insufficient money in that war chest to absorb the cost of losing cases, again, lawyers may have to refuse to pursue the claim on a CFA basis. The size of the war chest largely depends on the amount of success fees recovered from other cases. This, in turn, depends on the amounts recovered in winning cases and the success rate of the firm. The decision about whether to support a case is not made in isolation, but with reference to the firm's financial position, its current profile of cases and its past experience. If, for example, a firm has recently lost a large claim, this may affect the extent to which the firm can take risks in new cases in the near future. ATE insurers have to consider similar risks and uncertainties but, of course, it is defendants' costs that are relevant to them.

An understanding of the actual risks involved and the way in which those risks are approached by the CFA market reveals that CFAs are much more complex than political spin suggests.[36] It is the economic merits, not the legal merits, of the claim that are relevant. Lawyers and insurers consider claims in terms of the risks they pose. The ability to achieve access to justice in personal injury claims now depends, not on the financial position of the claimant, but on the financial ability of both lawyers and ATE insurers to engage in risk. Whilst KPMG's model of an entrepreneurial firm predicted that CFAs would be profitable for small, medium and large firms within three years,[37] Shapland *et al's* survey of solicitors' firms raised cause for concern.[38] Their research suggested that CFAs would work well for straightforward cases, such as road traffic accidents and simple accident at work claims, but not for those cases involving significant questions of liability and serious injury, as lawyers would find it difficult to invest the

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[33] Mark Harvey, leading personal injury solicitor and costs expert, estimates that the impact on firms' cash flow could be as much as £500 per claim, which, he states, in a busy practice would mean a potential loss of between £30,000 to £80,000 in a single year: Harvey *Guide to Conditional Fee Agreements* (2002), at p.7.

[34] Shapland *et al* found that a significant number of respondents had refused CFAs because of the impact of cash flow on their practice: Affording Civil Justice (1998), at p.4.

[35] Conditional Fee Agreements Order 2000 (SI 2000/823).

[36] Claimants also find CFAs complex and difficult to understand: Yarrow and Abrams, *op. cit.*, n.13 above. The Government is seeking, however, to simplify CFAs, see: *Making Simple CFAs a Reality, op.cit.*, n.16 above.

[37] KPMG, *Conditional Fees Business Case* (1998).

[38] Shapland *et al, op. cit.*, n.34 above.

time and money necessary in such claims.[39] Both small and specialist firms, it was predicted, would find it particularly difficult to adapt.[40]

Of course, access to justice also now depends on the willingness of the market to engage in risk because "the decisions we make are as much conditioned by our wish to take risk as our assessment of chance".[41] Lawyers can take a number of different approaches to conditional fee work. They may:[42]

- take a mix of cases, some with low risk but relatively certain returns and some involving more risk but with higher potential returns;
- seek to minimise uncertainty by being extremely selective in the types of cases handled, and in particular, by focusing on routine cases which involve less uncertainty about the outcome, relatively predictable investment costs and achievable returns, such as road traffic accident claims;
- be relatively non-selective and minimise their investment in most cases with the aim of achieving lots of small recoveries with relatively little investment.

Not all of these approaches involve engaging with risk to secure optimal access to justice. In considering whether CFAs are facilitating access to justice, therefore, it is necessary to consider the extent to which lawyers and ATE insurers are both able and willing to engage in risk.

The CFA Market in England and Wales: 2000-2004

Whilst evidence suggests that approximately 2,363,233 personal injury claims were commenced between 1st April 2000 and 31st March 2004,[43] the number of these claims pursued on a CFA basis is unclear because data on funding is not collated centrally. [44] Given the withdrawal of legal aid, a significant proportion of these claims must have been funded on a CFA basis, although before-the-event legal expenses insurance (BTE insurance) is playing an increasingly important role in facilitating access to justice and may even be more common than CFAs, particularly in road traffic accident

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[39] *ibid.*, at p.79.

[40] *ibid.*, at pp. 83-84.

[41] Higham, "Does Justice Play Dice? Can Lawyers Predict the Chances of Success in Litigation?" (2003) 12(1) Nottingham Law Journal 20, at p.25.

[42] *Op. cit.*, n.31 above.

[43] Excluding clinical negligence claims. Data on the number of claims has been obtained from the Compensation Recovery Unit, which is collated pursuant to the Social Security (Recovery of Benefits) Act 1997 (c.27). See further, n.17 above.

[44] Some information is available from the Legal Services Research Centre's first national periodic survey of justiceable problems conducted between July and October 2001. Advice relating to personal injury was provided on a CFA basis twenty seven *per cent* of the time, although it was noted that this percentage is likely to have risen, as the survey extended back to before the withdrawal of legal aid for such claims: Pleasence *et al*, *op. cit.*, n.29 above, at p.82. Lack of information on CFAs is a general problem, as important data is now held by the fragmented market of liability insurers, ATE insurers, claimant lawyers and claims intermediaries and is often subject to commercial confidentiality.

claims.[45] A market research company has suggested that ATE insurers are insuring approximately 200,000 cases per annum and The Accident Group alone had pursued at least 250,000 CFA cases by May 2003.[46] Approximately 75,000 legal aid certificates were issued annually in personal injury claims before its withdrawal[47] and so the evidence suggests that the CFA market is supporting a larger number of claims than legal aid did before its withdrawal.

It does not appear, however, that CFAs have led to a sustained 'explosion' in the number of claims, as often alleged by the media and liability insurers.[48] Data on the number of claims pursued prior to April 2000 is unavailable and so it is not, therefore, possible to identify trends in claims numbers before and after the introduction of CFAs in 1995 or CFAs with recoverability in 2000. Since April 2000, the number of claims has, in fact, been fluctuating:

The number of personal injury claims commenced in England and Wales (excluding clinical negligence claims): 2000-2004[49]

	Accident Claims	Disease Claims	Total
2000/2001	601,230	123,800	725,030
2001/2002	604,353	74,183	678,536
2002/2003	607,573	91,147	698,720
2003/2004	550,077	213,045	763,122

The significant increase in disease claims in 2003/2004 is likely to relate to the Government's compensation scheme for coal-related respiratory disease, rather than CFAs.[50] The increase in accident claims between 1999 and 2003 does coincide with the introduction of CFAs, although it may not solely be attributable to CFAs, as it appears that the increases may be part of a general trend.[51] In addition, the number of accident claims fell in 2003/2004, which

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[45] See Genn, *op. cit.*, n.29 above, at p.167; Pleasence *et* al, *op.cit.*, n.29 above, at p.82 and Fenn and Rickman, *Cost of Low Value Road Traffic Accident Claims 1997-2002: A Report Prepared for the Civil Justice Council* (2003).

[46] Master O'Hare, "Costs: Latest News" (2003) 153 N.L.J 782, at p.792.

[47] Pleasence and Maclean, "Can Solicitors Pick Winners?" (1999) 149 N.L.J 138.

[48] These allegations are made within the context of the "compensation culture" debate. See further: Furedi, *Courting Mistrust: the hidden growth of a culture of litigation in Britain* (1999); Lee, *Debating Matters – Compensation Crazy: Do We Blame and Claim Too Much?* (2002); Institute of Actuaries, *The Cost of Compensation* Culture (2002); Better Regulation Task Force, *Better Routes to Redress* (2004) and the Department for Constitutional Affairs' response to the Better Regulation Task Force report, *Tackling the "Compensation Culture"* (2004).

[49] *Op. cit.*, n.17 above.

[50] The Department for Trade and Industry operates this scheme for those injured whilst working for British Coal. See further: <http://www.dti.gov.uk/coalhealth/index.htm>.

[51] Data on the number of clinical negligence claims, for example, shows that there has been a significant increase in the number of such claims since the late 1970s: Department of Health, *Making Amends – A Consultation Paper Setting Out Proposals for Reforming the Approach to Clinical Negligence in the NHS* (2003), at p.58. Similarly, the number of claims reported to the Compensation Recovery

may suggest that recent increases are unsustainable, and if they continue to fall, will certainly raise cause for concern about the capacity of CFAs to facilitate access to justice.

The fact that the CFA market has, to date, supported a large number of personal injury claims does not, of course, mean that it is a viable alternative to legal aid. Comprehensive information on the approach of the CFA market is, as yet, unavailable. The early indications are, however, that Shapland *et al's* concerns were justified, as it appears that CFAs are facilitating access to justice for only some of those claimants who would previously have been eligible for legal aid - those with claims which are perceived to be lower risk claims in the context of the CFA market.

Lawyers have reported that "the way to make money out of CFAs" is to have "a regular throughput of small, easy cases".[52] Such cases are attractive because they tend to be cheaper to pursue, and as they conclude quickly, provide steady cash flow.[53] They are also reported to offer good return for little risk.[54] Cash flow appears to be a particular problem for small firms[55] and a number of them have abandoned personal injury work, though it is not clear how many have done so or what the effect on the geographical availability of services has been.[56]

The need to secure a steady influx of 'bulk standard' cases for cash flow purposes has, however, caused problems in itself because it is expensive to generate these claims through advertising. Some solicitors share the costs with other solicitors by joining advertising networks.[57] Another approach is to work with claims intermediaries, which 'farm' claims through mass advertising and direct marketing and then refer them onto solicitors. The presence of such companies in the market has caused considerable concern, as they are unregulated[58] and are perceived to operate unethically. Concern has, for example, been expressed about the pressurised marketing tactics used by such companies.[59] In addition, Claims Direct was heavily criticised

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Unit (Northern Ireland) increased from 25,178 in 1994/1995 to a peak of 43,407 in 1998/1999, though by 2003/2004 it had fallen to 32,803: *op.cit.*, n.17 above.

52 Goriely *et al*, *More Civil Justice? The Impact of the Woolf Reforms on Pre-action Behaviour* (2002), at p.21.

53 It appears that there is a correlation between the level of damages and costs: *ibid.*, at p.177.

54 *ibid.*, at pp.20-21. During their research on legal costs in employers' liability claims, Fenn and Rickman drew the tentative conclusion that damages are falling in CFA cases in comparison with non-CFA cases, which also suggests that CFAs are more common in relation to lower value claims: Fenn and Rickman, *Costs of Low Value Employers' Liability Claims 1997-2002* (2003).

55 *Op. cit.*, n.52 above, at p.19.

56 *ibid.*, at p.24.

57 For example, InjuryLawyers4U is "a consortium of leading personal injury solicitors" established to "promote direct access for injured people to the solicitors who will deal with their case": http://www.injurylawyers4u.co.uk/.

58 Better Regulation Task Force, *op. cit.* n.48 above, at p.20.

59 National Association of Citizens Advice Bureau, *Door to Door: CAB Clients' Experiences of Doorstep Selling* (2002). The Government is now consulting on how to tackle to this problem, which is not exclusive to the claims intermediary market: Department of Trade and Industry, *Doorstep Selling and Cold Calling* (2004).

when it was discovered that it required claimants to unexpectedly pay substantial legal costs, leaving them with only a small fraction of their compensation[60] and The Accident Group is reported to have pursued fraudulent claims.[61] Both of these companies have now collapsed, as their business models were unsustainable, [62] although many smaller such companies continue to operate.[63] The Government has now accepted that the sector should be regulated but has given it, through the Claims Standards Federation, one last chance to self-regulate and improve standards.[64]

Securing a steady stream of income from lower risk cases does not seem, however, to necessarily allow solicitors to support the higher risk claims. Yarrow's CFA survey, conducted prior to, but published after, the withdrawal of legal aid, found that whilst solicitors did not tend to rule out offering CFAs in particular categories of case, high risk and expensive disbursements were provided as reasons for excluding cases.[65] Solicitors have also reported difficulties in taking riskier cases since the withdrawal of legal aid and have noted that many cases, particularly cutting edge cases, are not receiving funding.[66] It seems that specialist firms find it difficult to find the resources to invest in the higher value, higher risk, complex caseloads which they usually attract.[67] Whilst disbursement loans, which are now available to claimants, are of some assistance, they do not, therefore, appear to be alleviating solicitors of the financial burden which CFAs place on them. There is also some evidence that solicitors are averse to taking risks.[68]

The impact of CFAs on barristers is unclear. In Yarrow's early study there was very little evidence that solicitors were unable to find barristers to take on CFA cases.[69] In 2001, however, Goriely *et al* found that solicitors were making less use of counsel and whilst there were several reasons for this, one was that barristers were finding CFAs financially difficult.[70] Barristers are likely to be finding CFAs financially difficult for a number of reasons. As barristers are sole practitioners, they are unable to spread the risks posed by CFAs across several fee-earners, as solicitors' firms usually can. In addition, as a large majority of personal injury cases settle, those that go to court and

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60 This was revealed by BBC One's Watchdog programme on 26 October 2000.

61 *Op. cit.*, n.48 above, at p.21.

62 See further: Better Regulation Task Force, *op. cit.*, n.48 above; Datamonitor, *UK Personal Injury Litigation 2003 – Where Does the Industry Go From Here?* (2003), at p.92.

63 On the future of the claims intermediary market, see: Datamonitor, *ibid*., at p.130; A.Parker, "Where there's blame. . ." (2004) 154 N.L.J 914.

64 *Tackling the "Compensation Culture", op.cit.*, n.48 above, at p.5. The regulation of claims management companies was not dealt with in the context of Sir David Clementi's review of the Regulatory Framework for Legal Services in England and Wales.

65 Yarrow, *op. cit.*, n.13 above, at p.5.

66 *Op.cit.*, n.52 above, at pp.20-21.

67 *ibid.*

68 See Yarrow, *op. cit.*, n.13 above; White and Atkinson, *op. cit.*, n.13 above, and Goriely *et al*, *op. cit.*, n.52 above.

69 Yarrow, *op.cit.*, n.13 above, at p.12. Although Yarrow did find that barristers were used relatively infrequently in CFA cases, possibly because the CFA cases selected were straightforward and did not require a barrister.

70 *Op. cit.*, n.52 above, at pp.52-54.

involve the instruction of a barrister tend to be complex claims where the risk of losing, and receiving 'no fee', is higher. Barristers do not, therefore, have the same opportunity as solicitors to attract a large number of 'small, easy cases'. Further, as leading personal injury barrister, Nigel Cooksley QC, states:

> "If you lose a case at trial, a hundred uplifts on [for example] advices or particulars of claims on settled cases won't cover that. It is difficult for the Bar to make ends meet and it makes our income extremely volatile".[71]

In response to these difficulties, the Bar Council has called for barristers to be paid as disbursements[72], although it has also been suggested that barristers should be allowed to pool risk across chambers.[73]

It seems, however, that even if lawyers are willing to work on a CFA basis in higher risk claims, considerable difficulty can be experienced in securing ATE insurance for such claims.[74] Solicitors are understandably reluctant to proceed without the costs protection provided by such insurance and ATE insurers have thereby become the 'gatekeepers' of access to justice.[75] There are now approximately thirty ATE insurers offering a variety of insurance products.[76] Many offer to defer the payment of the premium until the end of the case and some even waive the premium if the case is lost (so called, magic bullet schemes).[77] This certainly assists many claimants with the up-front costs of CFAs and relieves them, and their solicitors, of some of the financial burden of CFAs. Some ATE insurers offer insurance on a delegated authority basis through panels of solicitors. This generally means that cases taken by solicitors on their panel are automatically insured, although it has been reported in 2000 that ATE insurers have sought success rates as high as 95 *per cent* from panel solicitors.[78] Other ATE insurers underwrite cases individually, although it seems that claims with prospects of success between 50 and 60 *per cent* are difficult, if not impossible, to

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[71] Robins, "Bar's Anti-CFA Feeling Grows" (2003) 23 Litigation Funding 2.

[72] "Barristers seek CFA exemption" (2003) 26 Litigation Funding 1.

[73] Graham-Campbell, "Silk Purse from the Bar's Fear" (2004) 30 Litigation Funding 16. See also, Kunzlik, "Conditional Fees: The Ethical and Organisational Impact on the Bar" (1999) 62 M.L.R 850.

[74] For a recent outline of the difficulties see Ward, "Just a little bit of lateral thinking" (2004) 31 Litigation Funding 8 and Datamonitor, *op. cit.,* n.62 above.

[75] Society for Advanced Legal Studies Report on the Ethics of Conditional Fees (2001), at para.3.104.

[76] During Master O'Hare's review of the ATE insurance market, he was informed that there were 26 ATE insurers and a further 30 claims intermediaries and referral agencies which were also involved in the ATE market: *Callery* v *Gray* [2001] 4 All ER 1, at p.20. For further information on the ATE products available, see 'How the Products Compare' section in each bi-monthly issue of Litigation Funding.

[77] For example, Abbey Legal Protection's Accident Line Protect policy. See further: Robins, "A Magic Bullet?" (2000) 6 Litigation Funding 6.

[78] Moorhead, *op.cit.,* n.4 above, at p.485. Lawyers risk being removed from the panel if they do not achieve targets set by ATE insurers. This raises ethical concerns, on which see *op. cit.,* n.75 above.

insure.[79] It also seems that ATE insurers are reluctant to insure certain types of claims involving, for example, psychiatric injury, stress, deep vein thrombosis, repetitive strain injury,[80] industrial disease[81] and pharmaceutical products.[82] In this sense the ATE market is probably indiscriminate. Insurers often approach their business on the basis of categories, rather than determining actual risk in individual cases. Good cases can, therefore, be excluded from cover because they belong to risky categories.

For the moment, therefore, it does not appear that CFAs achieve equality before the law, as the extent to which the potential financial barriers are removed depends on the nature of the claim. Whilst CFAs generally work well in relation to low risk cases, it does not appear at this stage that CFAs are a viable alternative to the legal aid system which it replaced, as evidence suggests that claimants with higher risk claims are experiencing difficulties in pursuing their claims. It should be noted, however, that the extent of this problem is unclear, as comprehensive information is not yet available. It may be that the CFA market as a whole can respond to facilitate access to justice, but that claimants must locate that part of the market which is able and willing to help. The fact that the local solicitor on the claimant's high street in Aberystwyth is unwilling or unable to take her case on a CFA basis does not mean that a solicitor in Swansea would react in the same way. As noted, it very much depends on firms' individual financial characteristics at the relevant time. Access to justice in the CFA market depends to a significant extent, therefore, on the advice given by the solicitor initially consulted and on the persistence of the claimant.

Preliminary Problem or Fundamental Flaw?

As only limited information on the CFA market is available, it is unclear how much of the problem relates to the financial inability of the market to deal with higher risk claims and how much relates to risk aversion. Nor is it clear whether the problem is a permanent feature of the market or a short term issue relating to its immaturity. It has certainly been difficult for those operating within the market to date, as they have, to a certain extent, been operating within a skills and information vacuum.

It is, for example, taking some time for lawyers to develop the risk management skills necessary to run a successful CFA practice. Research conducted prior to the withdrawal of legal aid suggested that lawyers' skills were lacking in this area and that many failed to monitor their progress on the risks they were taking.[83] In deciding whether their firm can afford to take risk on a particular claim, lawyers must be able to assess: the claim's prospects of success; how much it will cost to support; how much it would cost if it lost and how long it might take to conclude. The lawyer must then

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[79] Gilbert, "The ATE Legal Expenses Insurance Marketplace: An Overview" (2004) J.P.I.L 99, at p.101.

[80] "Facing the Future of Funding" (2004) 30 Litigation Funding 2, at p.7.

[81] Rohan, "Clients in sickness and in health" (2002) 20 Litigation Funding 4.

[82] Ward, *op.cit.*, n.74 above.

[83] BDO Stoy Hayward, *Conditional Fee Agreements: A Survey Compiled by BDO Stoy Hayward* (1999); Shapland *et al*, *op.cit.*, n.34 above, at p.8; White and Atkinson's study revealed that whilst lawyers thought they were good at risk assessment, ATE insurers did not, *op. cit.*, n.13 above, at pp.129-130.

translate the assessed risk into a success fee. It seems, however, that whilst lawyers are generally quite good at assessing prospects of success, they are not as good at assessing the other risks[84]. In particular, it seems that lawyers have difficulty predicting likely costs[85] and setting success fees.[86] David Marshall, a leading personal injury lawyer and CFA expert, stated in 2001 that after "years of writing, lecturing and working on CFAs, at last I believe that I now understand how to set success fees properly".[87] This gives some indication of how lawyers with less expertise might have fared.

In addition, if lawyers and ATE insurers are to manage risks effectively, they must understand those risks. The problem to date is that relevant information has been unavailable. Information on the cost and length of claims has been in short supply,[88] as has data on success rates in personal injury litigation. Whilst success rates in some areas of personal injury litigation are high, they are perhaps not as high as is often assumed. Whilst Fennell's study suggested that the success rate in road traffic accident cases was ninety eight *per* cent, [89] recent data from the Compensation Recovery Unit suggests a lower success rate of eighty eight *per cent.*[90] Lack of clarity on this issue has caused problems for, for example, The Accident Group which made business decisions on the assumption that the failure rate of the cases they were supporting would be approximately four *per cent*, but it was, in fact, just over thirty *per cent.*[91]

As noted earlier, in deciding whether to work on a CFA basis or insure a CFA case, lawyers and ATE insurers consider whether the risks justify the potential return and whether their financial position allows them to take the risk. It was not clear at the outset, however, what the returns would be. Winning claimants are entitled to recover reasonable success fees and premiums and this is determined retrospectively at the conclusion of a claim either by agreement between the parties or by order of the court. When recoverability was introduced, there was no guidance on the reasonableness of success fees and premiums in different types of claim, as it was expected

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84 *Op. cit.*, n.47 above.

85 *ibid.;* Rohan, "Weighing Up the Odds" (2004) 31 Litigation Funding 12.

86 Yarrow concluded that "the majority of low risk cases have an uplift which appears too high while about half the high risk cases have an uplift which is too low.", *op. cit.*, n.13 above, at p.87; Shapland *et al* believed that "firms had not appreciated how one lost case might wipe out the success fees won on a large number of cases, particularly if that lost case were to involve a high level of costs", *op. cit.*, n.34 above, at p.56.

87 Marshall, "Playing the Percentages" (2001) 14 Litigation Funding 11. See also Marshall, "Calculating the Price of Success" (2004) 29 Litigation Funding 12.

88 This was particularly so because new civil procedure rules were introduced at the same time as the withdrawal of legal aid and the introduction of recoverability. Information on both aspects is now emerging, see: Fenn and Rickman, *op. cit.*, n.45 and n.54 above and Goriely *et al*, n.52 above.

89 Fennell, *The Funding of Personal Injury Litigation* (1994).

90 Marshall and Morris, "Resolving a burning fees issue" (2003) 26 Litigation Funding 12.

91 *Sharratt* v *London Central Bus Co. and other cases (No.2) (The Accident Group Test Cases)* [2004] 3 All E.R. 325. See also Datamonitor, *op. cit.*, n.62 above, at pp.95-96. This reflects, in part, the selection of cases by The Accident Group, in addition to overall success rates in personal injury litigation.

that this would, in time, be provided by the courts. In the interim, however, the market was essentially operating in a risk-based business blindfolded.

CFAs involve what are referred to in the insurance business as 'long tail' risks. The outcome of risks taken do not become clear until claims are concluded, which can take some time. [92] It is still not clear, for example, what success fees lawyers need to recover to make CFAs both financially viable and attractive in higher risk cases or whether they have, on the whole, been recovering enough success fees or premiums to date to meet their liabilities. Judges have experienced considerable difficulties in assessing the level of recoverable success fees and premiums. On the one hand they must ensure that what they allow makes CFA work both economically viable and attractive, on the other they must ensure that they do not allow lawyers and ATE insurers to recover too much.[93] Success fees in low value road traffic accident and employers' liability claims have, however, now been fixed by the market itself on the basis of empirical research and these are likely to prove more accurate.[94]

It is also unclear whether the ATE insurance market is sustainable in the long term in competition with BTE insurance. The Court of Appeal decided in *Sarwar v Alam*[95] that claimants should not generally be able to recover the cost of ATE insurance where a BTE legal expenses insurance policy is in place because it is unreasonable to incur the extra cost. Insurers have in recent years flooded the market with BTE insurance by attaching it free of charge, or at little cost, to other insurance policies. As the principle underlying insurance is that the 'many pay for the few', it is not clear whether ATE insurers' can, in the long term, secure a sufficiently large market share of profitable cases to make ATE insurance viable.[96]

Until the relevant skills and information emerges, it seems likely that lawyers and ATE insurers will either be over-cautious or make expensive mistakes, which may have a detrimental impact on access to justice. There is certainly some evidence that this has already happened. The Court of Appeal recently held that only half of The Accident Group ATE insurance premium could be recovered from losing defendants[97] and this decision contributed to its collapse. This had a significant effect on The Accident Group's

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[92] By 2002, for example, Accident Line Protect – the longest running conditional fee linked scheme – had yet to see all of the cases insured in 1996 conclude: Hartley, "Conditional Fee Agreements Insurance: Lessons from Scotland – An Insurers Perspective" (2002) J.P.I.L 399.

[93] See further: *Callery* v *Gray (No's 1 &2)* [2002] 3 All E.R. 417; *Sharratt, op. cit.*, n.91 above. For a critique of the judicial approach to success fees and ATE premiums, see: Zander, "Where are we now on Conditional Fees? – or why this Emperor is Wearing Few, if any, Clothes" (2002) 65 M.L.R 919; Zander, "Where Are We Heading with the Funding of Civil Litigation?" (2003) 22 C.J.Q 23 and Friston *et al*, "Costs Law Brief" (2005) 155 N.L.J. 214.

[94] Part 45, Civil Procedure Rules.

[95] *Sarwar* v *Alam* [2001] 4 All E.R. 541; [2002] 1 W.L.R. 125. See further: Peysner, "Turning into Trouble" (2001) 10(2) Nottingham Law Journal 64.

[96] David Lock, Parliamentary Secretary, Lord Chancellor's Department at the time recoverability was introduced has expressed concern on this point: Lock, "Funding Faces Tough Future" (2001) 16 Litigation Funding 6.

[97] *Sharratt, op. cit.*, n.91 above.

underwriters, some of which have now withdrawn from the ATE insurance market.[98] It is likely to be some time yet before the market achieves the stability it needs to become a reliable facilitator of access to justice.

Considerable instability in the market has also resulted from the 'costs war' which has dominated and over-shadowed the CFA market since the introduction of recoverability. The corollary of recoverability is the right of liability insurers to challenge the level of CFA-related costs claimed by seeking a court assessment. Liability insurers have, however, consistently challenged the circumstances in which they should have to pay CFA-related costs, and the amounts they should pay, on a wide range of grounds, although their challenges have centred on the level of recoverable success fees[99] and ATE premiums[100] and the enforceability of CFAs[101]. On the latter, liability insurers argued that if a solicitor had not complied with the client care requirements laid down in the Conditional Fee Agreement Regulations 2000, the CFA was unenforceable. In that event, a winning claimant could not recover their legal fees from them, as in accordance with the indemnity principle, a winning claimant cannot recover from the liability insurer more than she is liable to pay her own lawyer. This led to consistent 'fishing expeditions' whereby liability insurers sought to establish whether claimant lawyers had complied with the relevant regulations. Whilst some of the challenges stemmed from genuine uncertainties within the CFA system, such as the level of recoverable success fees, challenges relating to the enforceability of CFAs have generally been regarded as "destructive".[102]

As claimant lawyers and liability insurers were unable to agree costs, a significant number of cases went to court, and as decisions in lower courts were appealed, the majority of CFA cases were stayed pending the appeal court decisions. It was estimated, for example, that 150,000 cases were awaiting the House of Lords decision in *Callery v Gray*[103] on the reasonableness of success fees and ATE premiums. In short, the payment of claimant lawyers' fees and ATE premiums ground to a halt as each new challenge was surmounted and this continued for four years. Whilst the impact of the satellite litigation has not been measured, it has increased the cash flow difficulties posed by CFAs, which in turn, is likely to have affected lawyers' willingness and ability to take on, and invest in, new claims. The Association of Personal Injury Lawyers has reported that between forty to sixty *per cent* of its 5000 members' caseloads were affected by liability insurers' enforceability challenges and that it was having a serious effect on their cash flow. It was also noted that the delay and uncertainty caused by satellite litigation was having a damaging effect on those claimants that had

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98 NIG, Goshawk and HBOS withdrew from the market as a result: Datamonitor, *op. cit.*, n.62 above, at p.95. The Accident Group's collapse is reported to have cost Goshawk £38 million: Senior, "Accident Group Collapse Costs Goshawk £38m" The Times, 27 September 2003 (http://www.timesonline.co.uk).

99 *Callery, op. cit.*, n.93 above.

100 *Callery, ibid.; Sharatt, op. cit.*, n.91 above.

101 *Sharratt, ibid.; Hollins* v *Russell and other appeals* [2003] 4 All E.R. 590.

102 Baroness Scotland of Asthal QC, Parliamentary Secretary at the Lord Chancellor's Department at Association of Personal Injury Lawyers' Annual Conference, Brighton, 9 May 2003.

103 *Op. cit.*, n.93 above, at p.428 *per* Lord Hoffman.

paid, or borrowed money to pay, for disbursements on such things as medical reports and any ATE insurance premiums.[104]

Whilst senior judicial figures have called for the removal of recoverability to end the problems, [105] efforts have instead concentrated on removing the grounds of dispute. For example, to end disputes on success fees, the Civil Justice Council has, with the assistance of the CFA market, fixed the level of recoverable success fees for some road traffic accident and employers' liability claims.[106] In addition, to address disputes surrounding enforceability, the Department for Constitutional Affairs has introduced new regulations to abrogate the indemnity principle[107] and is currently consulting on the removal of most client care provisions from regulations and shifting them instead to the professional rules.[108] Whilst satellite litigation has slowed down for the moment, there are still fears that insurers will find new grounds to challenge CFA costs claimed.[109] It is not yet clear, therefore, whether recoverability is a viable concept in the long term as liability insurers may still use it to undermine the operation of the CFA scheme.

Are Conditional Fee Agreements Leading To The Under-Settlement Of Claims?

As Levin and Boon state, a "central tenet of professional practice is that a lawyer should promote the interests of the client and avoid situations where those interests conflict either with the lawyer's own interests or with those of another client".[110] One of the main objections to CFAs is that they challenge this premise, as they lead to the creation of a marketplace where economic interests are central.[111] The predominant concern, which was raised in Northern Ireland, is that lawyers might under-settle a claim rather than risk 'no fee'. In addition, as Moorhead notes, there is a strong emphasis in the CFA system on closing cases to secure cash flow.[112] The perception is that the interests of claimants, lawyers and ATE insurers are synonymous to the extent that they all want to achieve a recovery of compensation, as this

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104 *Sharratt, op. cit.*, n.91 above, at pp. 606-607.

105 Whilst speaking at the Association of Personal Injury Lawyers' Conference in November 2002: (2002) 99 (44) Law Society Gazette 3. This has, however, been rejected by the Government: "Lord Chancellor Rules Out Abolishing Recoverability" (2003) 26 Litigation Funding 1.

106 *Op. cit.*, n.94 above.

107 Conditional Fee Agreements (Miscellaneous Amendments) Regulations 2003 (SI2003/1240). See also: Rohan "Light at the end of the CFA tunnel" (2003) 25 Litigation Funding 2, "Seeing CFAs in a good lite" (2003) 28 Litigation Funding 2.

108 *Making Simple CFAs a Reality*, *op. cit.*, n.16 above. See Robins "Breaking the Stranglehold of CFAs" (2004) 32 Litigation Funding 4, at p.5.

109 At a recent meeting of leading CFA market lawyers and insurers, hosted by the Department for Constitutional Affairs, views differed on the extent to which liability insurers would continue to challenge CFA-related costs claimed: "Roundtable Thrashes Out Indemnity" (2004) 32 Litigation Funding 1.

110 Boon and Levin, *The Ethics and Conduct of Lawyers in England and Wales* (1997), at p.267.

111 For a comprehensive account of the ethical risks posed by CFAs, see Society of Advanced Legal Studies report, *op. cit.*, n.75 above.

112 Moorhead, *op. cit.*, n.15 above.

ensures that claimants are compensated, lawyers are paid and ATE insurers do not have to pay defendant's costs. These interests, however, diverge in relation to the amount of the compensation recovered, as whilst this remains important to the claimant, it may not to the others.[113]

The extent of the risk of under-settlement is certainly a matter for debate. In relation to contingency fee arrangements in place in the United States, Kritzer's research has suggested that lawyers regularly overlook their own short-term economic interests to protect their reputation. If they under-settle, not only could insurers see them as a 'soft touch' in the bargaining process, but it may also affect the number of clients seeking their assistance.[114] In contrast, however, Thomason's research suggested that reputation did not prevent under-settling.[115] In England and Wales, the impact of retaining or gaining a good reputation amongst claimants is unclear, but the central role of ATE insurers adds a further dimension to the debate. As lawyers and claimants will be keen to retain ATE insurance cover, ATE insurers can exert considerable control over whether offers of settlement should be accepted. Whatever the good intentions of lawyers, ATE insurers, which are more remote from the claimant and do not have professional duties to act in claimants' best interests, may indeed have less regard for battling on to achieve a higher settlement. The significant role of ATE insurers is of particular concern given that lawyers have questioned ATE insurers' judgement and the quality of the personnel making these crucial decisions.[116]

Whatever the risks may be, however, there is not yet any evidence to suggest that CFAs compromise the claimants' ability to achieve fair settlements, though this is not to say that it is not happening in practice. Yarrow and Abrams have noted that it is very difficult to establish, especially for claimants, whether conflicts of interests influence solicitors' handling of cases and negotiation of settlement.[117] Whilst solicitors participating in their study recognised the potential conflict of interest when negotiating settlements, they "did not think it was difficult to give objective advice."[118] Fenn *et al's* empirical analysis of the impact of different forms of funding on personal injury litigation, conducted prior to the removal of legal aid, found that different funding mechanisms did not appear to have a significant influence on the amount of settlement.[119] In fact, CFAs appeared to produce

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[113] For a general discussion of the economic incentives of different funding arrangements and costs rules, see: Bevan *et al, Contracting for Legal Services with Different Cost Rules* (Lord Chancellor's Department Research Series, 1999).

[114] Kritzer (2002), *op. cit.,* n.31 above, at pp.773-776.

[115] Thomason, "Are Attorneys Paid What They're Worth? Contingent Fees and the Settlement Process" (1991) 20 Journal of Legal Studies 187, at p.222. Moorhead notes that "the fee arrangements which Thomason studies are not "pure" contingency fees arrangements , but rather, they contain regulated contingent fees and a mixed contingent fee and hourly rate approach which may take it closer to a conditional fee-type model": *op. cit.*, n.4 above, at p.482.

[116] "Tea Lady Turned Down Our AEI" (2000) 8 Litigation Funding 11; Robins, "Who Assesses the Assessors?" (2000) 9 Litigation Funding 7.

[117] *Op. cit.*, n.13 above, at p.112.

[118] *ibid.*

[119] Fenn *at al, The Impact of Sources of Finance on Personal Injury Litigation: An Empirical Analysis* (Lord Chancellor's Department Research Series, 2002), at p.38.

higher compensation awards than other funding mechanisms, including legal aid.[120] More recently, however, Fenn and Rickman's analysis of employers' liability claims after the removal of legal aid has led them to tentatively conclude that damages in CFA cases are lower than non-CFA cases.[121] This may provide some evidence of under-settlement, although in view of the fact that lower-value claims tend to be lower risk claims in the context of CFAs, it seems more likely that the finding relates to the nature of cases lawyers most commonly agree to conduct on a CFA basis. The evidence on the issue of under-settlement is, therefore, mixed and inconclusive.

Have Conditional Fee Agreements Increased Costs?

CFAs with recoverability are financially attractive to both claimants and the Treasury because the system shifts the cost of personal injury litigation away from them towards defendants and their liability insurers.[122] A crucial question, however, is: are CFAs better value than legal aid? In comparing the assumed costs of individual cases under each system, Moorhead concludes that "CFAs are more expensive, not cheaper"[123] because they involve the additional costs of success fees and ATE insurance premiums:

> "Only if insurance premiums and success fees are kept very low will the cost of CFA funded litigation be similar to the cost of legal aid funded personal injury litigation. The likelihood is that CFA funded litigation will be considerably more expensive than legal aid funded litigation."[124]

Comprehensive data on the costs of CFAs is not, however, available and so it is not yet possible to compare the costs of CFAs and legal aid.[125] Fenn and Rickman's recent research on legal costs in individual cases has, however, raised cause for concern.[126] They collated and analysed costs data from a variety of sources in road traffic accident and employers' liability claims below £15,000. They discovered an increase in legal costs overall, and in particular, in relation to non-litigated cases between 2000-2002.[127] Total costs[128] in non-litigated claims between these dates had increased by approximately 50% in both types of claim.

What was surprising, however, was that Fenn and Rickman did not attribute these increases to the recoverability of success fees and ATE insurance premiums. Their data allowed them to compare costs in CFA and non-CFA

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120 Fenn *et al, The Impact of Conditional Fees on the Selection, Handling and Outcomes of Personal Injury Cases* (Lord Chancellor's Department Research Series, 2002), at p.49.

121 *Op.cit.,* n.54 above.

122 Moorhead, *op. cit.,* n.15 above, at p.159.

123 *ibid.,*at p.161.

124 *ibid.,*at p.164.

125 Fenn and Rickman note that data on costs and damages in road traffic accident claims from around April 2002 in RTA cases is highly unstable due to fluctuations in the volume and duration of settled claims and cannot be relied upon: *op. cit.*, n.45 above.

126 *Op. cit.*, n.45 and n.54 above.

127 Fixed costs have now been introduced for low value road traffic accident claims to address this problem. See further, Part 45 of the Civil Procedure Rules.

128 Combined base costs, disbursements, success fees and ATE premiums.

cases. In relation to road traffic accident claims they concluded that there was little difference between CFA and non-CFA claims with respect to agreed base costs and disbursements and that success fees and ATE premiums remained a relatively small part of overall costs recovered from insurers. The data relating to employers' liability claims revealed that statistically there was not a significant difference between the overall costs of running a claim on a CFA (including additional liabilities) and a non-CFA basis. If anything, it was noted, CFA costs seemed slightly lower. As a result, they concluded in respect of both types of claim that evident increases in legal costs since 2000 could not "readily be ascribed to recoverability rules introduced in April 2000".[129] Instead, they suggest that the increase has been caused by the Civil Procedure Rules, which were introduced around the same time and appear to have led to the front-loading of costs.[130]

These findings are difficult to understand in view of the additional costs of success fees and ATE insurance premiums that are incurred in CFA cases. Perhaps the key lies in Fenn and Rickman's tentative finding that whilst costs in CFA and non-CFA cases had risen in a similar fashion, damages in CFA cases appeared to have fallen. The risk is that CFA cases are concentrated in low value claims because they pose less financial risk to lawyers and are more affordable in terms of the investment of time and money required. In other words, rather than suggesting that CFAs cost the same as other forms of funding, Fenn and Rickman's data could reflect choices about the type of claims conducted on a CFA basis. If damages are lower in CFA cases, then it could be said that CFAs are indeed more expensive. If the same costs are paid but the damages are lower, this suggests that it could cost more to deliver each pound of compensation under CFAs than other funding mechanisms.

The cost implications of CFAs are, therefore, still unclear, although further data on this issue is expected from Fenn and Rickman in 2005. Unsurprisingly, therefore, it is difficult to assess the impact of CFAs on the level of insurance premiums. Premiums for employers' liability insurance have increased significantly recently, and in response, the Department for Work and Pensions has reviewed the reasons for these increases. The Association of British Insurers submitted that CFAs had increased the cost of employers' liability insurance by twenty five to thirty *per cent*[131] and Zurich suggested that their premiums had increased by eight *per cent* to meet the added cost[132]. The Department of Work and Pensions found, however, that

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[129] *Op. cit.,* n.45 and n.54 above.

[130] The Civil Procedure Rules and the Pre-Action Protocol for Personal Injury Cases are intended to increase the number of early settlements through improved exchange of information at the earliest possible stage. It is believed that this has led to increased legal costs to be incurred in the early stages of claims (often referred to as the 'front-loading' of costs): Goriely *at al, op.cit.,* n.52 above, at p.172.

[131] Office of Fair Trading, *An Analysis of Current Problems in the UK Liability Insurance Market* (2003), at para. 9.31.

[132] *ibid.*

the available evidence was inconclusive and that further analysis was required to assess the impact of CFAs following the removal of legal aid.[133]

Part Two: Should Conditional Fee Agreements Be Introduced In Northern Ireland?

Does experience in England and Wales suggest that CFAs are a viable mechanism for funding the majority of personal injury claims in Northern Ireland? In short, no, or perhaps more accurately, not yet. Whilst CFAs are certainly more than a 'gimmick', they are far from being the 'godsend' that they appear to be in theory. CFAs do seem to be facilitating access to justice in lower risk claims but not necessarily higher risk claims. It appears that, to some extent, this is due to the immaturity of the market and the instability caused by both the information and skills vacuum and the 'costs war'.

Northern Ireland could certainly have a more positive experience of CFAs in the early stages, compared with England and Wales. Firstly, it could avoid a repetition of the satellite litigation which has taken place to date. Court decisions, which would apply in Northern Ireland, have, for example, clarified how the scheme should operate, such as when it is reasonable to enter a CFA or to take out ATE insurance and the circumstances in which CFAs are enforceable. In addition, new CFA regulations, which seek to remove grounds of dispute, could be replicated.[134] It is not yet clear, however, whether new grounds of dispute will emerge or not, although the very existence of the recoverability mechanism provides the opportunity for challenges to continue in the future. Secondly, subject to the provision of adequate training, lawyers, ATE insurers and judges would start with a much clearer understanding of how CFAs work and how, for example, success fees and premiums should be calculated.

The fact that the introduction of CFAs may run more smoothly does not, however, mean that CFAs would facilitate access to justice effectively for even low risk cases in Northern Ireland for three reasons. Firstly, there are approximately 1650 solicitors operating within 500 private practices and approximately fifty *per cent* of these have sole principals. Overall, just under ninety *per cent* are in partnerships of three principals or less.[135] It is feared that these small firms would find it difficult to absorb the financial risks posed by CFAs.[136] The evidence from England and Wales suggests that small firms indeed struggle with CFAs, and in particular, with the cash flow problems posed by them. If small firms find it difficult to work on a CFA basis in England and Wales, this has a detrimental impact on the geographical availability of legal services, which is regrettable. Access to justice is not necessarily affected, however, if claimants can gain access to

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[133] Department for Work and Pensions, *Review of Employers' Liability Compulsory Insurance: First Stage Report* (2003), at pp.47-55.

[134] *Op. cit.*, n.107 above.

[135] Law Society of Northern Ireland's submissions to the Northern Ireland Assembly, which are attached to the Assembly's Ad Hoc Committee Report on the draft Access to Justice (Northern Ireland) Order 2002 (2002).

[136] Capper, *op.cit.*, n.4 above, at p.144; Association of Personal Injury Lawyers' response to the Northern Ireland Court Service consultation on the draft Access to Justice (Northern Ireland) Order 2002 (2002).

the larger firms in the jurisdiction, which are able and willing to take their claims. Plaintiffs in Northern Ireland, however, may experience more difficulty, as those larger firms do not exist. The Government has argued that solicitors' tradition of speculative funding and funding of disbursements in Northern Ireland would stand them in good stead for CFAs.[137] This may be so but solicitors' ability to take and absorb financial risks would change without a stream of income from closed legal aid cases in both winning and losing cases, as they receive at present. In addition, the introduction of a pre-action protocol in personal injury cases, which was recommended by the Civil Justice Reform Group, may lead to the front-loading of costs, as in England and Wales.[138] Solicitors may find the resulting increased costs and disbursements in the early stages of a claim harder to sustain.

Secondly, evidence suggests that barristers find it difficult to work on a CFA basis. The effect of this on the conduct and outcome of claims in England and Wales may not, however, be as significant as in Northern Ireland where solicitors, as general practitioners, rely heavily on counsel for drafting and specialist advice. If barristers are unable to work on a CFA basis, solicitors could pay their fees as disbursements but this would add significantly to the cash flow problems experienced by solicitors in working on a CFA basis and may not be sustainable.

Thirdly, it has not yet been established that the Northern Ireland market is attractive to the 'gatekeepers' of civil justice – ATE insurers. The current market of approximately 40,000 cases may be too small, unless insurers operate their business in conjunction with, rather than separate from, England and Wales. In addition, whether they are acting rationally in doing so or otherwise, ATE insurers have particular regard for the skills of the solicitors who are conducting the claims they are insuring. They usually seek evidence of specialist skills in the personal injury field before providing insurance on a delegated authority basis and lawyers' skills can be a reason for refusing the provision of insurance in individually underwritten cases.[139] This could be a problem in Northern Ireland, which is dominated by general, rather than specialist, solicitors.

It is simply unclear whether CFAs could support the majority of personal injury claims in Northern Ireland. The fact that civil disputes in Northern Ireland "tend to involve relatively small amounts and to be less complex than those in England and Wales" [140] does not mean that the needs of those with higher risk cases, which must exist in the jurisdiction, should be ignored. One of the main problems is that we know very little about personal injury litigation in Northern Ireland and the economics of solicitors' firms and barristers. Very little information emerged during the Civil Justice Reform Group's review of civil justice on, for example, the cost of personal injury claims. These costs are hidden in practice by the existence of fixed costs,

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[137] The Way Ahead, *op.cit.*, n.16 above, at p.21.
[138] *Op. cit.*, n.129 above.
[139] *Op. cit.*, n.79 above.
[140] Civil Justice Reform Group, *Review of the Civil Justice System in Northern Ireland* (1999), at para. 2.15.

which operate on a swings and roundabouts basis.[141] The Group concluded that ". . . there [was] little up-to-date factual (as opposed to anecdotal) evidence of the nature and resolution of civil disputes in Northern Ireland".[142] With fixed costs, plaintiff lawyers do not have to submit detailed bills of costs and they do not record the time spent on, or the cost of, individual claims.[143] Whilst some information on success rates is available, this relates to the 1970s and up-to-date information would obviously be preferable.[144] Until the risks involved in CFA work can be quantified and until the economic capacity of solicitors and barristers are understood, it is not possible to say whether CFAs could work in Northern Ireland. Without this information, it is not possible to say at what level the civil legal aid budget should be capped, as the extent to which legal aid should continue to be available to facilitate access to justice in personal injury claims will be unclear. An understanding of the capacity of the market will also be vital if legal aid is to be refused by the Commission in those cases where CFAs are believed to be available. If legal aid is refused in cases where there are actually no real prospects of conducting them on a CFA basis, then access to justice will be detrimentally affected. The Commission should, therefore, conduct or commission research into both the characteristics of personal injury litigation and the economic capacity of the current legal market. It may find that CFAs would only be viable with some consolidation within the legal services market. Alternatively, it may be that for CFAs to be viable, lawyers and ATE insurers must be able to recover significantly higher success fees and premiums than in England and Wales.[145]

Whilst there is insufficient evidence at this stage to justify replacing legal aid in personal injury claims with CFAs, should this preclude the introduction of CFAs to complement legal aid? A combination of legal aid and CFAs would be problematic in that it would discriminate against the poorest members of society. Whilst many claimants that pursue CFA funded personal injury claims do not have to make any financial contributions, those who are

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[141] "The Group undertook two surveys in an attempt to assess the cost of civil litigation in Northern Ireland, the first with the assistance of the Legal Aid Department and the second with the assistance of the Law Society of Northern Ireland and Crown Solicitor's Office – the randomly selected cases reviewed failed to offer a scientific basis for assessing the cost of litigation: *ibid*, at para. 5.4.

[142] *ibid.*, at para. 2.17.

[143] On fixed costs, see: His Honour Judge Hart QC, "Complexity, Delay and Cost – The County Courts in Northern Ireland" (2002) 53 N.I.L.Q 125.

[144] "The number of claims [for damages for personal injury] in relation to the size of population was slightly greater in Northern Ireland than in the rest of the United Kingdom. A higher proportion of claims [96 *per cent* as compared to 86 *per cent*] resulted in payment, and the average sum paid [£699 as compared to £566] was greater.": The Royal Commission on Civil Liability and Compensation for Personal Injury (1978), vol. II, at para. 514.

[145] The Association of Personal Injury Lawyers has, for example, suggested allowing success fees of up to 200 *per cent* of lawyers' normal fees: APIL Response to Northern Ireland Court Service Consultation on the Draft Access to Justice (Northern Ireland) Order 2002 (2002).

eligible for legal aid often do.[146] Having said that, if CFAs are introduced, legal aid should continue to be available as a safety net.

In addition, much is still unclear about the wider implications of CFAs and so whilst there is not a clear case for accepting them, there is not a clear case for rejecting them either. It does not appear that CFAs have led to a sustained increase in the number of personal injury claims. Any increase in the number of claims is, however, not necessarily problematic, as this suggests that claimants are able to achieve access to justice. CFAs do appear to have facilitated the growth of claims intermediaries, which have, to a certain extent, engaged in unethical practices. The Government has now, however, turned its' attention to the regulation of the claims intermediary sector.

The extent of any under-settlement, if it is taking place at all, is also unclear. The paradox, however, of the economic incentives within the CFA system may be that they generally encourage lawyers and ATE insurers to act in the interests of groups of claimants rather than individual claimants. As previously explained, the extent to which lawyers and insurers are able to engage in the CFA market depends on their ability to manage financial risk across a profile of cases. If decisions on the level of settlements in individual claims are taken to preserve financial health and stability, this increases the chance that they will be financially able and willing to support other CFA claims. In addition, care must be taken not to exaggerate the potential problem of under-settlement. In relation to the under-settlement of claims, the Society for Advanced Legal Studies' Working Party on Ethics and Lawyer Fee Arrangements has stated:

> ". . . it is not enough to establish that undesirable incentives are capable of arising under CFA-funded litigation. Some assessment of their prevalence and significance must be made in comparison with alternative fee arrangements, and weighed against the potential benefits offered by CFAs as a means of ensuring access to justice."[147]

Legal aid also posed a risk of under-settlement, as lawyers may have preferred to settle claims and receive higher fees rather than fight on for more compensation and risk losing and receive lower fees. In addition, the risk of under-settlement is probably just as great, if not greater, under informal speculative funding arrangements, which are common in Northern Ireland. As CFA expert, Peysner, has noted, "[t]he difficulties are just different not necessarily worse".[148] The CFA system should not be compared to an idealistic vision of a world where lawyers fight to the bitter end to achieve the highest possible compensation award for their clients. Genn's research on the bargaining process in personal injury litigation, demonstrated that the level of settlements achieved are already influenced by an economy

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[146] See further: Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 and the Legal Aid (Financial Conditions) Regulations (Northern Ireland) 2003, *op.cit.*, n.10 above.

[147] *Op. cit.*, n.75 above, at para. 2.54.

[148] Peysner, "Weakest link" (2001) 12 Litigation Funding 4.

of skills and resources.[149] Further, the civil procedure rules require that the time and money spent on claims is proportionate to their value and importance.[150] In a system dominated by the negotiation of out of court settlements, claimants may frequently receive less than they may be legally entitled to, and in this sense, CFAs may not be the 'evil' of personal injury litigation, but instead, make a bad system worse.

The limited information available to date suggests that the additional costs of success fees and ATE premiums associated with CFAs have not significantly increased claims costs overall. Whilst, in theory, CFAs should be more expensive than other funding mechanisms, because of the additional costs of success fees and ATE premiums, they may not be in practice due to the way in which lawyers select or conduct CFA cases. The cost implications of a CFA market which does support higher risk claims may be quite different, and indeed, significantly more expensive.

Due to concerns about the limitations of and difficulties experienced by the CFA market in England and Wales in its first few years of existence, valid questions have been raised about whether CFAs should be replaced by, for example, contingency fees.[151] As the market does now appear to be settling down, there are certainly grounds to continue with CFAs to see if their performance improves in the longer term, as significant reform in this area at this stage would lead to further upheaval and disruption. After four years of instability and uncertainty, this may be too much for the market to bear. CFAs should not, however, be introduced in Northern Ireland until more is known about their capacity to facilitate access to justice and their wider implications.

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[149] Genn, Hard Bargaining: Out of Court Settlements in Personal Injury Actions (1987).

[150] Civil Procedure Rules, Part 1, rule 1.1(c).

[151] See further: Better Regulation Task Force, *op. cit.*, n.48 above; Zander (2003) *op. cit.*, n.93 above; *op. cit.*, n.80 above; (2004) 101 (13) Law Society Gazette 26.

THE NOTION OF SOVEREIGNTY AND ITS PRESENTATION WITHIN PUBLIC LAW: A CRITIQUE ON THE USE OF THEORY AND CONCEPTS

Barbara Mauthe, Law School, Lancaster University*

INTRODUCTION

Theory is the dominant method for the presentation of knowledge within public law. Theories may be criticised, altered and developed yet little consideration is given as to why theory is employed in the way that it is, how theory may impact on the analysis concerned or even whether alternative approaches may be more effective. Accordingly, this paper seeks to address these questions by focusing on a key area within public law analysis, that of the notion of sovereignty.

The notion of sovereignty has been selected as the focus of investigation because it is an area of recent debate and it is preferable to focus on a single notion in order to identify the diversity of theoretical approaches and issues that a single notion can raise. Accordingly, the paper falls into a number of sections. Initially the notion of sovereignty will be considered in terms of theory and will draw upon the work of three particular public lawyers, Wade[1], Allan[2] and MacCormick.[3] The notion of sovereignty will then be evaluated as a concept. Here the writers Walker[4] and Loughlin[5] will be examined. The paper will then attempt to identify an alternative approach to the presentation of the notion of sovereignty. Theory and concepts will be used as evaluative tools but the manner of their deployment will be reassessed in the light of the earlier findings. The paper will conclude by offering a number of observations on the use and application of theory and concepts in relation to the notion of sovereignty in particular and the application of theory and concepts in general within public law.

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* I would like to thank Chris Willmore and Dave Cowan, both of Bristol University, for their comments on an earlier draft of this paper. The draft was also presented in the Public Law stream at the 2004 SLSA conference.

1 See H. W. R. Wade, 'The Legal Basis of Sovereignty' (1995) *Cambridge Law Journal* 172; *Constitutional Fundamentals* (1980); 'Sovereignty – Revolution or Evolution?'(1996) 112 *Law Quarterly Review* 568.

2 T. S. R. Allan *Law, Liberty and Justice* (1993); 'Parliamentary Sovereignty: Law, Politics and Revolution' 113 *Law Quarterly Review* (1997) 443.

3 N. MacCormick *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (1999).

4 N. Walker 'Late Sovereignty in the European Union' in N. Walker (ed.) *Sovereignty in Transition* (2003), 3.

5 M. Loughlin 'Ten Tenets of Sovereignty' in N. Walker (ed.) *Sovereignty in Transition* (2003a), chap. 3; *The Idea of Public Law* (2003b), chap. 5.

Public Law And Theory

Within the realm of public law theory has always been the dominant method for identifying and attributing meaning to phenomena. It is used as a means of representing certain undertakings which are perceived to be particular, or 'internal', to public law.[6] Theory is also used to interpret events which have been viewed as changing the nature of public law, such as regulatory theory[7] or the theory of juridification.[8] In addition to this contextual development and deployment of theory, public law also draws upon theories which, it could be argued, are 'external' to its analysis. Such theories may be viewed as being legal in nature although the origin of these theories may not lie within public law analysis *per se*.[9] Even theories which can be viewed as being 'external' to legal analysis, in that they originate from a non-legal discipline, have been used.[10] Public law also incorporates theories developed by individuals, both lawyerly[11] and non-lawyerly in their origins.[12] Given this strong and diverse tradition it is not surprising that sovereignty is a notion which has been the subject of much theoretical examination. Accordingly, it is proposed to examine how theory has been used to present the notion of sovereignty.

The Notion Of Sovereignty And Theory

In respect of the notion of sovereignty it is possible to identify a number of ways in which theory is used as method of explanation.

a. Sovereignty As A Theoretical Phenomenon

The classic presentation of sovereignty is as a particular theoretical phenomenon. This approach can be found in the work of Wade.[13] Wade argued that that there could be no substantive limits placed on the legislative powers of Parliament and that ultimately the only real limitation was that Parliament could not detract from its own sovereignty.

In constructing a theory of sovereignty Wade draws on three sources: firstly, the works of earlier constitutional writers, such as, Coke,[14] Blackstone[15] and

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6 Such as the rule of law or the separation of powers.

7 See J. Kay, C. Mayer and D. Thompson (eds.) *Privitisation and Regulation-the UK Experience* (1986).

8 See M. Loughlin 'Law, Ideologies and the Political-Administrative System', (1989) *Journal of Law and Society*, Vol. 16, page 21; *Legality and Locality: The Role of Law in Central-Local Government* (1996); 'The Restructuring of Central-Local Relations' in J. Jowell and D. Oliver (eds), *The Changing Constitution* (4th ed, 2000), 137.

9 Examples of such theories are those of legal positivism and natural law.

10 Such as autopoiesis and functionalism.

11 Such as Dworkin.

12 Such as Foucault and Habermas.

13 See n.1 above (1955) 172.

14 E. Coke, The First Part of the Institutes of the Laws of England (1628); The Second Part of the Institutes of the Law of England (1641); The Fourth Part of the Institutes of the Law of England Concerning the Jurisdiction of the Courts (1644).

15 W. Blackstone, *Commentaries on the Laws of England, Book the First: The Rights of Persons* (1765).

most notably Dicey.[16] These writers are part of a formalist tradition within public law[17] where law is represented as being 'strictly neutral' and that the 'purity of constitutional law' depends on a strict separation of law from politics.[18] Secondly, Wade also uses case law as a source.[19] Again, this is a feature which can be found within the formalist tradition. Finally, Wade draws on legal jurisprudence. Here Wade initially drew upon Salmond's notion of the 'ultimate legal principle'.[20] Wade identified a common law "rule" concerning sovereignty that is distinguishable from all other rules of common law.[21] The "rule" relating to sovereignty is an exception because it cannot be altered by statute and the source for the rule is historical rather than legal. It is the ultimate rule of the system in that those who operate the legal system accept it as a 'truism' and the 'ultimate political fact'. Although Wade's analysis was challenged by other constitutional writers,[22] it was not until the passing of the European Communities Act 1972 and the decision *R* v *Secretary of State for Transport, ex parte Factortame Ltd (No. 2)*[23] that Wade shifted his view. Wade commented that whilst the House of Lords may 'turn a blind eye to constitutional theory' and that the decision may be 'unsatisfying to the academic mind, it at least provides a further example of the constitution bending before the winds of change, as in the last resort it will always succeed in doing.'[24] For Wade the change represented a 'technical revolution' which is inevitable when 'political necessity' causes 'judges, faced with a novel situation, elect to depart from familiar rules'.[25] Since one of one of Wade's three methodological features was excluded by the judiciary, namely that of constitutional theory, Wade had to accommodate any change to the theory by drawing upon the remaining two. Initially, case law[26] was deployed, albeit from a non-UK source, but ultimately legal jurisprudence was used. Jurisprudentially, Wade justifies the change by deploying Harts analysis on the 'rule of recognition'.[27] Hart, in a debate on sovereignty, had argued that the 'ultimate rule of recognition' cannot be validated by any other legal rule or norm but exists through the 'complex and normally concordant practice' of judges. Accordingly, Wade is able to detect that the 'new' rule of recognition possesses an authority which was absent in the old rule of recognition – a change which the judges

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16 A. V. Dicey, *An Introduction to the Study of the Law of the Constitution*, (10th ed., 1960), 27.

17 See M. Loughlin, *Public Law and Political Theory* (1992).

18 See n.1 above (1980) at pp.1–2.

19 *Vauxhall Street Estates Ltd* v *Liverpool Corporation* [1932] 1 KB 733; *Ellen Street Estates Ltd* v *Minister of Health* [1934] 1 KB 590; *British Coal Corporation* v *The King* [1935] AC 500.

20 Sir J. Salmond, *Jurisprudence* (1947) 155.

21 See n.1 above (1955) at 187-189.

22 Such as Sir I. Jennings *The Law of the Constitution* (1967), R. F. V. Heuston *Essays in Constitutional Law* (1964) and G. Marshall *Constitutional Theory* (1971). Generally see P. Craig 'Parliamentary Sovereignty of the United Kingdom After *Factortame*' (1991) 11 *Year Book of European Law* 221.

23 [1991] AC 603.

24 See n.1 above (1996) 568 at 575.

25 *ibid* at 574.

26 *Harris* v *Minister of the Interior* 1952(2) S.A. 428; [1952] 1 T.L.R. 1245, discussed in (1955) *Cambridge Law Journal* 172.

27 H.L.A. Hart, *The Concept of Law* (2nd ed. 1994).

were able to recognise.[28] It is interesting that Wade uses legal jurisprudence as the most forceful support for the shift in position given that the other features within the original theory, those of constitutional theory and case law, had been the strongest. This may be partly explained by the fact that the work of the constitutional theorists and the use of case law drew on the formalist tradition, whilst Wade's use of legal jurisprudence was innovative and possibly gave increased weight to the theory at the time.

Ultimately, it can be argued that Wade's analysis represents sovereignty not just as a theoretical explanation of a particular phenomenon but also as an observational term, that is, something which is. Furthermore, the theory and the observation are unified, in that when Wade writes of sovereignty it is synonymous with Parliament, Parliament's capacity to create law and the fact that Parliament does create law. However, this convergence of theory and observation works as long as there is no change. When one of the features of the theory is challenged through the passing of entrenching legislation, such as the European Communities Act 1972, then a problem occurs. Since it is the observation which causes the divergence, it is the construction of the theory which becomes the focus of concern. Wade reconciles the difference between the theory and the observation by asserting that there has been a failure on the part of the judiciary to recognise a particular observation within the original 'rule of recognition'. This unobserved observational information helps to preserve the integrity of the theory. If however, the unobserved information had been represented as 'bad history', that is a flaw within the observation: this would have cast doubt on the validity of the analysis. Ironically, underpinning the entire analysis is yet another theory, the separation of powers. The separation of powers provides an explanation as to the structure, institutions and functions within which Wade's analysis occurs and makes the analysis both plausible and confirmable.

It could be argued that, to present the notion of sovereignty as a theory is a useful method for the explanation of observations as they function within a structure. However, there are a number of inadequacies that need to be acknowledged, such as the requirement of another theory in order to achieve a full explanation along with the difficulty in accommodating new information, in that change can only occur within the parameters or observations of the theory. Change which takes place outside or beyond those parameters can never be included because it will ultimately be beyond observation and, if it is included, then the representation which the theory explains will cease to exist. At the same time sovereignty, as theory, can also be used to exclude certain types of information, such as the political. Ultimately, presenting sovereignty as a theory is not a very powerful method for proving the existence of the phenomenon.

b. Sovereignty, Theory And Realism

An example of where theory is used to construct a view of sovereignty which is 'realistic' can be found in the work of Allan.[29] In contrast to Wade, Allan argues that legal sovereignty possesses a component of political morality and

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[28] See n.1 above (1996) 568 at 574.
[29] See n.2 above (1993) 282-286.

in order to include such an element, Allan uses theory, in particular the work of Dworkin.

Dworkin is doubtful about the idea of a legal theory that views what matters as a valid proposition of law can only be determined by reference to its 'pedigree'.[30] Instead, Dworkin argues that in 'hard cases' where relevant legal rules are ambiguous, vague, inconsistent or just absent and consequently do not provide a clear answer to a legal dispute, then judges will look 'behind the rules' to the principles that underlie and justify them. For Dworkin, the law includes not just rules, but also underlying principles and beyond these, more abstract principles, all of which fit together into a coherent whole.[31] If, it is then found that a particular rule or principle is incompatible with these deeper principles then it must be rejected as a mistake. Dworkin argues that judges do this when they overrule common law doctrines which have been laid down in earlier cases. In these situations judges are not radically changing the law but merely correcting an error in the application of the deeper principle.[32]

Allan argues that Dworkin's theory can be applied to fundamental constitutional rules, including Hart's 'rule of recognition'.[33] For Allan, 'the fundamental rule that accords legal validity to Acts of Parliament is not itself the foundation of legal order beyond which the lawyer is forbidden to look.'[34] Instead, Parliamentary authority ultimately derives from deeper principles that are indistinguishable from the deepest principles within the common law. Furthermore, argues Allan, 'the sovereignty doctrine must be understood in the light of a moral or political theory of the polity',[35] such as democracy, the rule of law and equal citizenship.[36] Accordingly, constitutional rules, including parliamentary sovereignty, must be repudiated if they are inconsistent with those deeper principles.[37]

It is suggested that Allan's use of theory to construct a theory of sovereignty which is realistic raises a number of questions. Firstly, whilst there are merits to Dworkin's analysis as an explanation of the common law, it has been questioned as to whether Dworkin's theory of the common law is applicable in a constitutional context.[38] Dworkin presents his theory as an 'interpretation' of how judges decide cases in a common law system and claims that his theory can be confirmed from the way judges act and speak as is they are guided by principles.[39] But, argues Goldsworthy, whilst the facts do not have to be altered to fit Dworkin's theory, its application to cases of a

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30 R. Dworkin *Taking Rights Seriously* (1977) chap. 2.
31 *ibid.*, at chaps. 2 -4.
32 See J. Goldsworthy *The Sovereignty of Parliament: History and Philosophy* (1999) at p.247.
33 See n.2 above (1997) 443 at 444.
34 See n.2 above (1993) at 265-6.
35 See n.2 above (1993) at p.280 drawing on n.30 above (1977) Chap. 4 and R. Dworkin *Laws Empire* (1986).
36 See n.2 above (1997) 443 at 445.
37 See n.2 above (1993) at page 146 and (1997)443 at 445.
38 See R. Dworkin *Freedom's Law: The Moral Reading of the American Constitution* (1996) chap. 10
39 See n.30 above (1977) Chap. 4, esp. 86-7, 112, 115-116. See also n.35 above (1986) Chaps. 1, 3 and 7.

constitutional nature is not so apparent.[40] In such instances judges seldom talk of applying 'political' or' moral' principles and where such issues do arise, judges may specifically defer to Parliament.

Secondly, Allan's realism is based on objective facts, which can be identified as the outcomes of judicial decision making in the context of constitutional law. If these objective facts match the outcome of judicial decision making, in the context of the common law, then there must be realism. How this convergence comes about does not matter, it is only the fact that there is a convergence which is relevant. Furthermore, given the diversity of contexts within which these areas of law operate, then there must exist some deep principles which facilitates the convergence. Accordingly, to argue that Allan's analysis is inaccurate would be preposterous since it would suggest that the convergence of common law and constitutional law was either impossible, which it is not since it occurs, or that the convergence is random. Observations indicate otherwise, and these observations are facts. Accordingly, it cannot be co-incidence, but must represent reality and ultimately accuracy since the convergence did occur.

The problem with the realist approach is that it does contain an element of reflexivity.[41] For example, if judges make decisions based on deep principles, then the deep principles will then be communicated to others who represent these principles as reality, yet the system within which the principles operate and the existence of the principles per se, may not converge. So in the short term there is idealism instead of reality, but with the potential for reality in the future as the process of communication continues and expands. In some respects theory as realism is static in that it is passive and may possesses weight but is ultimately unmoving in terms of the development of any analysis. There is also a requirement to go beyond the empirical content of the theory to a belief in the theory itself. It is acceptability of the theory itself which then provides the belief in the phenomenon that the theory attempts to explain. Accordingly, if the theory is not believed, then the phenomenon does not exist. Furthermore, knowledge of the theory, reveals more about the nature of things beyond that with which the theory is concerned. Certainly, Allan's presentation on the notion of sovereignty reveals as much about the nature of liberal democracy within the UK.

c. Sovereignty And The Unification Of Theory

The unification of theory in order to present a theory of sovereignty can be found in the work of MacCormick.[42] MacCormick argues that law is an institutional system of rules and norms and in every system there will exist some way for determining what are the authoritative norms. In that way each system will posses a self-referential quality. Traditionally, these institutional systems have been perceived as being territorially concentrated in the form of a state and there has a tendency to equate the state with law. MacCormick describes this interrelation of coercive power with the

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[40] See n.32 above.

[41] Generally see G. Teubner *Law as an Autopoietic System* (1993); N. Luhman 'Law as a Social System' *Northwestern University Law Review* (1989) 136.

[42] See n.3 above.

normative order as 'state-law' but argues that such a perception has the effect of distorting legal theory, particularly in reference to sources of authority. Where a state has law which regulates citizens and political activities, then there is s system of 'Law-State', or *Rechtstaat.* A 'well ordered Law-State or *Rechtstaat* is not subordinate to any political sovereign outside or above the law' and this shows 'that sovereignty is neither necessary to the existence of law and state nor even desirable'.[43] Hence, MacCormick's conclusion, that there has been a movement 'beyond sovereign state'[44] to the 'the era of post-sovereignty'.[45]

Unification, as a method for the presentation of the notion of sovereignty within MacCormick's analysis occurs at two levels: firstly, in respect of theory and secondly, on respect of the notion of sovereignty. In respect of theory, the basis of MacCormick's analysis is the 'institutional theory of law'[46] which seeks to combine a 'normativist conception of institutions with a particular form of legal positivism'.[47] It is argued that institutions posses a normative core which provide the aims and values to be deployed in respect of their competency and behaviour. These norms operate both internally and externally, but they are also organising and justificatory in nature. They also represent a form of deliberation and control which occurs through social action and interaction with other institutions. MacCormick represents the institutional theory of law as a means of 'unifying' positivism with Dworkin. As MacCormick states, the institutional theory of law recognises the 'explicite and the implicite legal ideal connections between the norms of the legal system, i.e. with legal principles, the teleological background of the law and with policies in the sense of *Dworkin*'.[48] In respect of the notion of sovereignty there is a unification of the diverse perceptions of sovereignty. There are the linear perceptions of sovereignty as legal and political, or sovereignty as internal and external, but also hierarchical perceptions as sovereignty operating at various territorial levels of regions, states, Europe and the international. The unification of this diversity occurs through the operation of norms, that is, sovereignty as a form of 'political morality'[49] which provides a form of limitation on the operation of power. MacCormick's analysis does offer explanation and increased understanding of the notion of sovereignty in that it demonstrates a multitude of varieties of sovereignty, except that all these variations operate on the basis of a single, shared feature, that of institutional norms. In other words, the approach provides an explanation by way of subsumation. That is, if it is considered why sovereignty operates in a particular way, then it is because of the underlying norms.

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[43] *ibid.,* (1999) at p.129.

[44] *ibid.,* (1999) at p.133 and N. MacCormick 'Beyond the Sovereign State' (1993) *Modern Law Review* 1.

[45] *ibid.,* (1999) Chap. 8.

[46] Also known as 'institutional legal positivism' or 'new institutionalism'. See D.N MacCormick and O. Weinberger *An Institutional Theory of Law: New Approaches to Legal Positivism* (1986); O. Weinberger *Law, Institutions and Legal Politics: Fundamental Problems of Legal Theory and Social Philosophy* (1991).

[47] O. Weinberger *Law, Institutions and Legal Politics: Fundamental Problems of Legal Theory and Social Philosophy* (1991) at p.111.

[48] See n.46 above (1986) at p.113 (authors italics).

[49] See n.3 above (1999) at p.130.

There are, however, some problems with using theory to unify diverse explanations of particular phenomena in that whilst it may provide some understanding of a notion, such as sovereignty, in terms of why it operates in a particular manner, it does not explain how. But then, given the wide range of parameters which are being unified does this matter? There is also the presumption that the same values or norms will operate throughout the various features which are being unified. However, should one dimension choose to adopt different norms or values, due to the occurrence of a crisis, then the notion of sovereignty descends into schisms, in other words, a dimension which exists beyond mere division.

Ultimately, the problem with using theory as unification is the method used to create unity. This can be achieved either, by determining or displaying a degree of interconnectedness, or by way of reduction. Whilst reduction can produce a rigid theory, interconnectedness allows for flexibility but the structure of the theory must be very broad in order to allow for the inclusion of an assortment of phenomenon. In respect of MacCormick's analysis interconnectedness is used. However, it could be argued that, the various notions of sovereignty which are being connected within MacCormick's analysis are too diverse that the outcome is not unification but the creation of something entirely different, an alternative model of sovereignty, that of post-sovereignty.

d. Summary

The above examination on sovereignty and the use of theory reveals that whilst Wade, Allan and MacCormick are examining the same phenomenon, using different methods and approaches, the outcome of their analysis is quite diverse, almost unconnectable. The statement may seem obvious, but it raises the question, is this diversity a consequence of differing approaches to the phenomenon under investigation or the nature of the phenomenon being evaluated? In scientific analysis constant testing of a phenomenon is conducted in order to prove the existence and features of the phenomenon. Furthermore, testing will be undertaken using different methods and conditions in order to verify its existence and features. In other words, the focus of study is actually quite fixed, it is the methods for testing which will vary. If diverse results are produced, then the reasons for the differences will be explored, methods revised and altered to accommodate the new findings but, if ultimately, the particular phenomenon cannot be found to exist, then the theory may be abandoned.[50]

In the context of public law analysis in relation to the notion of sovereignty, it has been shown that there is a history of differences being explored, revisionism and methods altered. Whilst this may indicate the use of diverse approaches for the testing of the notion, the actual mechanism for testing is actually quite fixed - that of theory. Ironically, given the diversity of analysis surrounding the notion of sovereignty there has begun to emerge some discussion on abandoning the phenomenon.[51] It is an argument which

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[50] Consider for example, theories such as, the world is flat, the earth revolves around the sun and creationism.

[51] For a critical assessment of this argument see B. Van Roermund in N. Walker (ed.) *Sovereignty in Transition* (2003) at p.33.

originated within modern political science[52] and it is interesting to note that, within this discipline, the notion of sovereignty has also received mixed treatment. Within political science there also occurred a proliferation of the senses in which the notion is used, for example, state sovereignty and national sovereignty[53] although some of the senses have become 'blurred', for example, popular sovereignty, popular state sovereignty, shared sovereignty and divided sovereignty.[54] The 'abandonment thesis' came about because of the perception that the notion of sovereignty had become too ambiguous, too nuanced and even 'a barrier to analysis'.[55] There are also arguments against abandonment and it has even been suggested that the notion of sovereignty does not receive sufficient attention because the focus of analysis has been conditioned by other phenomena, such as the state[56] or democracy.[57]

The possibility of public lawyers abandoning the notion of sovereignty is an option but, it is also worth considering the various alternatives that are available. One option is to search further and wider for theories that can be used to evaluate sovereignty. This approach possesses merit as it represents a continuation of the form adopted by Allan and MacCormick. The problem is, how far and how wide should the search be conducted for ultimately, if the theories employed are too remote then the outcome could lack strength as an explanation of the phenomenon of sovereignty. There is also the danger that the focus of analysis will become the critique rather than the phenomenon under investigation. A further alternative is to construct a higher, or meta-theory of sovereignty. This approach also possesses merit given the tradition within public law for hierarchally constructed theories.[58] But, there are problems in respect of the element of distance between the meta-theory and the original theory.

All these approaches presume that theory is the only, or best, mechanism for the presentation of knowledge. Yet, when a phenomenon, such as sovereignty, produces such a wide range of theory it may be more appropriate to consider using a different mechanism for the presentation of knowledge. In other words, rather than abandon the notion of sovereignty, why not abandon the current method used to present the notion and employ an alternative, such as concepts.

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[52] See S. I. Benn 'The Uses of Sovereignty' *Political Studies*, 3:2 1955, p.122.
[53] See E. H. Carr *The Twenty Years Crisis 1919-1939* (1978); see also n.52 above
[54] See M. Newman *Democracy, Sovereignty and the European Union* (1996).
[55] See C. Lord 'Sovereign or Confused? The "Great Debate" about British Entry to the European Community Twenty years On' (1992) *Journal of Common Market Studies* 30:4, (1992) p.420**;** P. Lynch 'Sovereignty and the European Union: Eroded, Enhanced, fragmented' in L. Brace and J. Hoffman (eds.) *Reclaiming Sovereignty* (1997) pp.43-44.
[56] See J. Bartelson *A Genealogy of Sovereignty* (1995).
[57] See D. Held *Political Theory and the Modern State* (1989).
[58] For example, the theory of constitutional pluralism. See N. Walker 'The Idea of Constitutional Pluralism' (2002) 65 *Modern Law Review* 371.

The Nature Of Concepts

There are many explanations as to 'what' is a concept.[59] A basic definition is that a concept is an abstract representation which attempts to use words to portray reality.[60] The terms concepts and theory are occasionally used interchangeably but, as methods for the presentation of knowledge, they are quite distinct particularly in relation to the positioning of knowledge. Consider the example of Rufus the Siamese cat. If Siamese cat is a concept then there will exist certain pre-defined information which will be associated with the concept of a Siamese cat, such as, the fact that Rufus should have blue eyes. If he does not have blue eyes, then he will be something other than a Siamese cat. However, it is also possible for Siamese cat to exist as a hypothesis. If Siamese cat is a hypothesis, then the theory which proves that Rufus is a Siamese cat will attempt to identify what the features of a Siamese cat are. It may be thought that Siamese cats will have blue eyes, but it must first be established that blue eyes are a feature of Siamese cats, only then can it be concluded that Rufus is indeed a Siamese cat. The feature of blue eyes cannot be assumed, it must be found. In other words, the distinction between a concept and a theory lies with where knowledge is positioned. For theory, knowledge is to be discovered, even if that knowledge is thought to exist, whilst for a concept knowledge already exists, it is pre-defined.

This may give the impression the concepts are quite rigid and fixed but pre-defined knowledge can also be 'open-textured'. Consider again the blue eyes of Rufus the Siamese cat. There are many shades of blue, eyes can be numerous shapes, some eyes cannot see colour whilst others may need the assistance of glasses. Accordingly, it is proposed to consider how sovereignty can be presented as a concept.

The Presentation Of Sovereignty As A Concept

The presentation of sovereignty as a concept within public law is quite recent and can be found in the work of Walker[61] and Loughlin[62]. Just as the analysis of sovereignty in terms of theory was found to contain certain features, features can also be found to exist in respect of sovereignty and its presentation as a concept. For example, both Walker and Loughlin commence their analysis with a definition. Walker defines sovereignty as:

> "the discursive form in which a claim concerning the existence and character of a supreme ordering power for a particular polity is expressed, which supreme ordering power purports to establish and sustain the identity and status of the particular polity ***qua*** polity and to provide a continuing source and vehicle of ultimate authority for the juridical order of that polity."[63]

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[59] Generally see M. Weitz *Theories of Concepts* (1988).
[60] Generally see W. B. Gallie 'Essentially Contested Concepts' in M. Black (ed.) *The Importance of Language* (1962); P. Thagard *Conceptual Revolutions* (1992).
[61] See n.4 above.
[62] See n.5 above.
[63] See n.4 above at p.6 (authors italics).

It is then claimed that implicit in this definition is 'that sovereignty involves a 'speech act'[64] – a '*claim* to ordering power'.[65] For Loughlin, sovereignty 'is to be understood as a representation of the autonomy of the political, and as providing the foundational concept of the discipline of public law'.[66]

Both writers also provide a context, or justification, for their definition. Walker, for example, is dismissive of the arguments against the abandonment of sovereignty but concedes that sovereignty has been aggravated by numerous developments within public law, most notably membership of the European Union. These developments have resulted in sovereignty moving from a Westphalian phase to a post-Westphalian phase. Part of these changes has entailed a change in the use of sovereignty as a form of *meta-language*, traversing and linking the *object-language* of the domains of political science, law, international relations, etc. Sovereignty's use as a form of *meta-language* remains, 'a plausible mechanism to help make sense of the social world, as well as forming part of the discourse and self-understanding of social actors'[67] but, the challenge is to reconceptualise sovereignty in the context of the European Union. Walker argues that the 'basic conceptual apparatus of sovereignty can be adapted to understand the new order'.[68] A number of approaches have been attempted but the most viable is that of 'constitutional pluralism'.[69] Within this theoretical framework Walker then constructs a notion of 'late-sovereignty' where the key features are those of continuity, distinctiveness, irreversibility and transformation. Walker concludes that the task of 'political and constitutional theory in conditions of late sovereignty is not to imagine, or to anticipate, a world in which new political values and virtues flourish in the absence of sovereignty, but to imagine and anticipate ways in which such values and virtues may flourish *through* the operation of sovereignty'.[70] Further 'sovereignty-dependent' features are then identified as being a reflexive and publicly approbated constitutional discourse, a broad jurisdictional scope, interpretive autonomy, institutional depth and breadth, citizenship and representative mechanisms.

Loughlin argues that the representation of sovereignty within public law has been fraught with difficulty. The reasons for the difficulties range from the inability of commentators to recognise public law as a practice with its own distinctive methods and objectives, the attempts by political scientists and lawyers to 'fix the concept of sovereignty within a formal, analytical and positivist frame',[71] or their attempt to 'devise some transcendental principles of right conduct which legal and political behaviour must be subject'.[72] In other words, Loughlin is critical of attempts to construct a notion of sovereignty within a defined theoretical framework, whatever the

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64 *ibid*.
65 *ibid*.
66 See n.5 above (2003a) at p.56.
67 See n.4 above at p.10.
68 See n.4 above at p.19.
69 See n.58 above.
70 See n.4 above at p.31.
71 See n.5 above (2003a) at p.56.
72 *ibid*.

perspective, as sovereignty is 'quintessentially a political concept'.[73] Loughlin then proceeds to identify ten tenets which present are 'ideas that have been translated into concrete practices' and represent 'the essence of the modern concept of sovereignty'.[74] The tenets can be summarised as follows: sovereignty is a fact of the modern state and political relationships do not derive from property relationships. Public powers differ from private power, is official in nature and is the product of political relationships. Sovereignty is an expression of public powers and it is relational in nature. Rights are not antagonistic to sovereignty but a product of the expression of sovereignty. The system of public law is an expression of sovereignty and finally, public law is not solely a matter of positive law.

Finally, it is suggested, that a key feature which underlies both Walker's and Loughlin's analysis on sovereignty as a concept is the relationship of the concept to theory. Accordingly, in order to understand further how the notion of sovereignty can be represented as a concept, it is necessary to explore further this connection.

The Relationship Between Concepts And Theory

Both Walker and Loughlin contain within their definitions of sovereignty a premise that concepts are integral to theory. Where they differ is in the nature of the relationship. For Walker the relationship between the concept of sovereignty and theory is quite explicit. A concept of sovereignty is devised which, is not itself strictly theoretical but, is firmly placed within the context of theory, that of constitutional pluralism. Constitutional pluralism is itself positioned within a further theory, that of legal pluralism. The perception of sovereignty is that it ranks within a hierarchy of constructs. Sovereignty, as a concept within this hierarchy of constructs, occupies a position which is subsidiary to that of theory but is ultimately part of theory. In other words, it is theory which forms the basis for the presentation of knowledge and concepts are merely an explanatory tool within this mechanism. This linking of the notion of sovereignty with the theories of constitutional pluralism, and ultimately legal pluralism, may be viewed as desirable in respect of the overall presentation of knowledge in the realm of public law. However, by firmly entrenching the concept of sovereignty within theory, or theories, there are implications in terms of the representation of the notion of sovereignty.

Firstly if, as identified above, for a concept to exist there must be some form of pre-defined knowledge, then entrenching a concept within theory is not unacceptable. There are, however, consequences attached to deploying concepts in such a manner. In terms of Walker's analysis it means, that ultimately, the true meaning of sovereignty can only be found within the wider context of the theory of constitutional pluralism and ultimately the theory of legal pluralism and not within the definition that Walker offers. In other words, any analysis which includes Walker's definition of sovereignty would be incomplete unless the wider parameters of the concept were both acknowledged and included. This is not an immediate flaw but a potential flaw in respect of long term deployment of the concept of sovereignty.

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[73] *ibid.*
[74] *ibid.*

Secondly, the theory of constitutional pluralism is a 'new' theory developed to address perceived inadequacies within current constitutional analysis.[75] However, by addressing the inadequacies within one area of analysis, it does not necessarily follow that the inadequacies identified within another will also be resolved. Furthermore, any differences between the various areas of analysis could be made more acute if the areas are then ranked, not in terms of merit of investigation, but in terms of a hierarchy of mechanisms used to present the investigation. In other words, not only should any analysis which includes Walkers concept of sovereignty include an acknowledgement and explanation in terms of the theory in which the notion of sovereignty is entrenched, there should also be some acknowledgement and explanation concerning the choice of mechanism used to present the notion. Whilst public lawyers do acknowledge the former, the latter is generally unrecognized.

Yet, by entrenching sovereignty within a new theory, such as constitutional pluralism, this does offer the opportunity for the re-evaluation of established knowledge and/or the inclusion of new knowledge regarding the notion. Consider, for example, the 'political' element excluded by Wade, but included by Allan, approved by MacCormick and now argued by Walker (and Loughlin) to be intrinsic to any analysis in respect of the notion of sovereignty. However, it is suggested, that this assimilation of knowledge is not automatic even if a theory is specifically represented as possessing attributes which will allow for the inclusion of new material.[76] The process for inclusion is incremental and dependent upon some sort of consensus concerning the weight to be accredited to the new material. This explains the 'history' of the political element in relation to the legal presentation of the notion of sovereignty. It also explains why some views are excluded, for example feminist analysis. It is ironic that within the public law material used for this paper there is no discussion regarding feminist critiques on sovereignty, yet within political analysis, such discussions are well established. Arguably, feminist critiques could be incorporated through existing new theory, such as the theory of constitutional pluralism, or even the development of further new theory but, the fact remains, for such an approach to be included it must first be invited in as it cannot enter freely. Even once invited in, its future remains uncertain.

Regarding Loughlin's presentation on sovereignty as a concept, it can be argued that Loughlin widens the knowledge that sovereignty as a concept can represent, but a consequence of this widening, is that rather than particularizing the instances where the concept can be used, such as in the context of theory or even a particular theory, the concept becomes separated or set apart from theory. The outcome is that Loughlin's concept, albeit one that is interesting, is in reality a model – a framework used to present in isolation and in a systematic form in respect of a specific phenomenon in a specific situation.

Accordingly, it is suggested that public law analysis on sovereignty as a concept possesses the same potential for conflict, confusion and inadequacy as the analysis on sovereignty and theory. However, whilst such grounds

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[75] See n.58 above.
[76] *ibid.*

were used to justify the abandonment of theory in respect of the notion of sovereignty, it is suggested that the use of concepts in respect of the notion of sovereignty merits further exploration. The justification for this further investigation relates to the fact that, when contrasted with the use of theory within public law, the use of concepts as a primary mechanism for the presentation of knowledge is unexplored. Accordingly, it is proposed to explore how the notion of sovereignty could be presented in terms of concepts.

The Notion Of Sovereignty And Concepts

The use of concepts to present theory in respect of a notion, such as sovereignty, may appear to be improbable for a number of reasons. Firstly, it could be argued that concepts must either be premised in theory or attached to theory. Certainly, concepts cannot exist in isolation from theory because their nature (the requirement for predefined knowledge) entails a theoretical element. However, does this feature necessitate that a concept must be tied to a single theory? Could not a concept facilitate a connection between several theories, even when those which appear to be too diverse and possibly even incompatible or unconnectable?

Secondly, whilst public lawyers are familiar with theory as a method of for the presentation of knowledge, they are unfamiliar with using concepts in this manner. This argument is certainly true in relation to issues of a public law nature, but outside of public law, public lawyers do think in terms of concepts. Consider the notion of the universe, or even that of a bird or a tree. Just stating these terms will bring forth all sorts of information and understandings concerning the form and nature of these objects. In other words, public lawyers are used to thinking about concepts, but not in the context of public law because they have been 'trained' to think otherwise, in terms of theory. This 'training', it is suggested can be and, should be challenged.

Thirdly, it could be argued that only theory can be used to portray complex structures. This assertion stems from the limited role that concepts have been given within current public law analysis. If concepts are used and portrayed as descriptive mechanisms, subsidiary to theory then they will always be perceived as being limited as methods for the presentation of theory. However, consider again the notions of the universe, bird or tree. Each of these notions gives rise to a complex structure of meaning. The universe, for example consists of stars and planets. Stars can be further subdivided into types attached to which planets can, or cannot, be found. Planets form part of solar systems which are then classified as to types. Within this system there will be a number of theories concerning the origin of the universe and its behaviour. In other words, concepts can be used to create complex structures. It can even be argued that a single concept can facilitate the inclusion of a much wider range of material than any single theory. Concepts, for example, can incorporate the depth of analysis as found within theory, but in contrast to theories, concepts can traverse across many theories at the same time without creating a hierarchy of knowledge. Concepts can connect theories that on the face of it appear to be unconnectable, such as the analyses of Wade and Walker in the context of sovereignty. This can be done by closing the field of application for the

concept, *i.e.* the notion of sovereignty, but at the same time opening up the concept to divergent interpretations.

Finally, it could be argued that to depart from the established mechanism for the presentation of knowledge within public law could destroy the validity of any material which currently exists. There is a risk that the material, norms and values contained within current theoretical analysis will become lost, undermined even overwhelmed. Given that the focus of this analysis has been the methods used for presentation and not what sovereignty is, then any changes to the question of what is sovereignty will only become apparent when that particular question is addressed. In such a study, material which is accurate should survive in spite of the conditions under which it is tested.

The question then is which concepts could be used to evaluate the notion of sovereignty? The most obvious choice would be those concepts already found to exist within public law analysis, such as law, politics, state, democracy, citizenship, etc. However, it is suggested that, in selecting these concepts there is a risk of transferring the existing predefined knowledge already attached to these concepts along with the incumbent problems found to relate to the theories within which these concepts were used. Furthermore, it could even be argued that some concepts actually represent a fallacy in the context of public law. Consider for example, the concept of the state. There has not evolved, in the context of the UK, an effective theory of the state, a facet which has been attributed to the existence of the Crown.[77] Even the usage of the term 'Crown' is uncertain. It has been used by the judiciary to refer to the Monarch personally, or to the executive itself[78] and even to the government.[79] In other words, the concept of the state may be applied to the executive, which performs many of the function of the state, yet in the context of sovereignty, it is parliament which is considered. It is suggested that the dilemma has arisen because the executive has never been the focus of conflict, either political or historical. Accordingly, public law has not been able to create a body of case law, or even draw upon a body of coherent statute law, in order to develop any understanding surrounding either the existence of the executive or its attributes. Where case law and statute do exist in respect of the Executive the focus of lawyers has been that of limitation,[80] whist in respect of Parliament the focus has been the absence of limitation, [81] a facet that lends itself to the notion of sovereignty.

Accordingly, it is proposed to draw upon a number of concepts which will provide scope, simplicity, consistency and accuracy. These concepts are ideology, structure and space. It is not proposed to present an in-depth presentation of sovereignty using these concepts, since it was not the aim of this study to consider the issue of what sovereignty is. Instead, it is proposed to demonstrate how such an analysis might be undertaken through the use of

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[77] See K. Dyson *The State Tradition in Western Europe* (1980) at pp.37-42. Also see T. Daintith and A. Page *The Executive in the Constitution: Structure, Autonomy and Internal Control* (1999) Chaps. 1 and 2.

[78] *M* v *Home Office* [1994] 1 AC 377 at 395 *per* Lord Templeman.

[79] *Town Investments Ltd* v *Department of the Environment* [1978] AC 359 at 381 *per* Lord Diplock.

[80] The basis of judicial review.

[81] The basis of discussion on parliamentary sovereignty.

a few key concepts. Here the works of the various theorists will be considered along with how alternative approaches to the notion of sovereignty may also be included

a. Ideology

No specific definition is offered in respect of the concept of ideology but, it is suggested that ideology can symbolize numerous things, such as legitimation, integration and socialization.[82] In terms of the notion of sovereignty, the concept can be found to exist in a number of forms. In respect of Wade's analysis, it could be argued, that the 'ideological' does not exist because of the desire to separate the legal from the political, yet underpinning this separation lie certain values regarding the role of law and politics which could be regarded as being ideological in nature. In contrast to Wade, the ideological component within Allan's analysis is more apparent and is a direct consequence of drawing upon the work of Dworkin, whereas with MacCormick the link with the political is achieved through the institutional theory of law. It is suggested that a common feature shared by the theorists as regards the concept of ideology is that of neutrality. There is a distinction, however, in where this neutrality can be found. Wade for example, neutrality lies in respect of the notion of law. For Allan, neutrality stems from Dworkin's arguments that political decisions occur independent from any conception of the good life or what gives value to life.[83] With MacCormick, neutrality is represented through norms. Each perception of neutrality represents a particular view of liberalism. For Wade, the notion of sovereignty represents a form of liberalism where the state cannot impose any restrictions, not even upon its institutions; whereas Allan accepts that restrictions can be imposed as the meaning of the values used possess legitimacy whilst MacCormick espouses an form of nationalist liberalism where the potential excesses of nationalism are moderated through institutional frameworks, especially as these frameworks operate not just at a national level, but also a pan-national level through institutions such as the EU. Central to all three perceptions of liberalism is the notion of the state, although this is manifested in terms of institutions because of the absence of a refined representation of the state within public law.[84] For Wade, parliament is central and is seen to possess an authority and legitimacy above all other institutions within the state, whereas for Allan, it is the judiciary and for MacCormick, the executive. Each draws upon a specific vision of a liberal democracy whereby communal need is expressed through a specific institution. Both Loughlin and Walker attempt to move legal analysis beyond the statist perception of sovereignty which dominates Wade, Allan and MacCormick. As a consequence, it could be argued that the ideological element is more apparent. For Walker, the ideological occurs through 'sovereignty dependent features' such as citizenship and representation whereas Loughlin refers to features such as rights ands power. However, would it not be more appropriate to unify these features through the concept of ideology rather than sovereignty, especially as it is sovereignty which is

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[82] Generally see M. Freeden *Ideologies and Political Theory: A Conceptual Approach* (1998).
[83] R. Dworkin 'Liberalism' in *A Matter of Principle* (1986) at p.191.
[84] See above.

being explained? The concept of ideology can then facilitate the explanation.

Ideology could also be used to distinguish between different forms of power, not just the private and public power included by Loughlin but also feminist critiques along with Foucault's[85] argument that sovereignty is a medieval institution in which absolute control is exercised over subjects through an open and explicit display of violence. In other words, going beyond positive law to include other theoretical approaches is much simpler to achieve through a concept, such as ideology, than by constructing a new theory.

b. Structure

A notional definition of structure is that it relates to framework, the various components within the framework, how these components relate to one another and how things, in general, are organized within the framework. Structure, as a concept, can be found to exist within all the various theorists examined and can be found to assume three forms, although the level of consideration along with the context may vary.

Firstly, structure can be seen to relate to the institutional arrangements of the UK constitution and ultimately the relationship with the EU. It is suggested that such approach dominates the analysis of Wade, Allan and MacCormick, albeit in different levels and dimensions. Secondly, the concept of structure also concerns the relationship which the differing forms of sovereignty seek to achieve, such as MacCormick's 'divided sovereignty' or the relationship between law and politics focused upon by Allan and the use of Dworkin to achieve such a connection. This approach can be contrasted with that of Loughlin, who whilst acknowledging the relationship between the legal and political also asserts that sovereignty must be distanced from a particular theory, that of positivism. Finally, structure can also relate to how explanatory mechanisms, such as theory, concepts and models are used. Consider, for example, the relationship between theory and concepts employed by Walker.

Whilst this diversity may seem apparent and therefore unrevealing in terms of the concept of structure, it is suggested that by using the concept of structure it is possible to offer a number of critiques concerning sovereignty which would otherwise be difficult to achieve in terms of the particular analyses offered. For example, the concept of structure enables the identification of a historical dimension in terms of how public lawyers have sought to address the notion of sovereignty. This 'historicism' also provides the basis for a comparative critique between the theorists. Finally and possibly, most significantly, by focusing on the concept of structure it is possible to include alternative theories which are not part of current public law analysis, such as feminist critiques. Here sovereignty, evaluated through the concept of structure, can be seen to represent a command-obedience framework which can be construed as patriarchal, hierarchal and exclusionary in nature in terms of women's lives.[86] A further approach,

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[85] See A. McHoul and W. Grace *A Foucault Primer* (1993) at pp.62-63.

[86] Generally see C. A. MacKinnon *Towards a Feminist Theory of the State* (1989); K. B. Jones *Compassionate Authority: Democracy and the Representation of Women* (1993); J. Hoffman *Gender and Sovereignty* (2001).

currently not considered by public lawyers is that of Giddens theory of structuration. Giddens argues that structure is a set of historically contingent and mutable rules whose origin and development are dependent upon agency.[87] In terms of the notion of sovereignty, there is a connection between the internal dimension of the state and the external dimension of international relations. This dualism is however, not separate but interdependent and is not just a product of history but also other features, such as resources and power. It is suggested that Giddens analysis represents and alternative critique to MacCormick's use of the institutional theory of law with its emphasis upon institutions and norms or Allan, Walker and Loughlin's focus upon the relationship of the political to the legal. Giddens is a sociologist and the inclusion of sociological perspectives within public law is currently limited.[88] However, by using the concept of structure such material could be incorporated.

c. Space

A feature which dominates much of the analysis on sovereignty has been the struggle to accommodate the changes in the legal and political order of UK at a regional, national, and international level which is represented as being consequential to membership of the EU. Furthermore, this breadth of change is condensed into a single notion of sovereignty, be it MacCormick's 'post sovereign state' or Walkers 'late sovereignty'. Public lawyers are in effect separating or creating 'boundaries' between legal and political factors from the geographical.[89] The essence of sovereignty is territory and regions yet law and politics are viewed as forces which act upon these factors rather than viewing geography as another form of power which can act upon law and politics. It is suggested that the concept of space can accommodate the shifts in knowledge that the membership of the EU has brought about but also widen legal analysis on a number of levels and at the same time facilitate the introduction of other critiques.

Firstly, the concept of space can offer explanation in terms of particular places, locations, or as Walker states 'polity', be this at international level, state level or at the level of a community, or individual citizens, facets already acknowledged as part of legal analysis on sovereignty. However, the concept of space is more 'open textured' in that it can go beyond regional or territorial confines, avoid the property relationships that Loughlin wishes to exclude from issues of sovereignty to include facets such as culture, ethnicity, gender, sexuality and even objects such as workplaces, buildings,

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[87] Generally see A. Giddens *The Constitution of Society: Outline of the Theory of Structuration* (1984).

[88] There are attempts to link law with sociology but the direction for such a connection is generally driven by sociologists rather than lawyers and occurs within the realm of jurisprudence rather than public law. For example see R. Banakar *Merging Law and Sociology: Beyond the Dichotomies in Socio-Legal Research* (2003). See further R. Cotterell 'Why Must Legal Ideas be Interpreted Sociologically' (1998) 25 *Journal of Law and Society* 171 and the response by D. Nelken 'Blinding Insights? The Limits of a Reflexive Sociology of Law' (1998) 25 *Journal of Law and Society* 407.

[89] Generally see N. K. Blomley *Law, Space, and the Geographies of Power* (1994); D. Cooper *Governing Out of Order: Space, Law and the Politics of Belonging* (1998); J. Holder and C. Harrison (eds.) *Law and Geography* (2003).

shops, cars etc. Accordingly, space can accommodate a group who may relate to territory in one way, institutions and/or processes in another way and objects in yet a different way. In other words, space can accommodate a range, depth and complexity of situations beyond that of law or politics or even theories such as constitutional pluralism.

Secondly, space can offer an alternative explanation of techniques for control. For example, political and legal techniques for control can be expressed through rules, the ideological and even the symbolic. Such controls may be perceived as operating in respect of space, yet space can also in turn impact upon the political and the legal through the resources available in a particular tract of land, how a particular tract of land is used or viewed, its terrain and even the climate. So whilst a nation or people may have a particular view of 'sovereignty' which will be expressed in legal and political terms, the spatial dimension may actually be directing how and why legal and political controls assume the manner and form that they do. It could even be argued, that whilst public law analysis has focused upon the tension between the legal and political in terms of the notion of sovereignty (and hence the shift from Westphalian sovereignty and the creation of a number of forms of sovereignty) the real debate on sovereignty is that of the geographical, as expressed through resources, terrain, climate, etc factors which are influencing the development of the EU and the notion of sovereignty.

d. Summary

Given that sovereignty is essentially a political notion, and that much of the debate within legal analysis has been the tension between the legal and the political dimensions and how to reconcile such diverse disciplines, it is suggested the method presented above, represents a possible solution, particularly when contrasted with the attempts to reconcile this tension through the use of theory. Furthermore, by using concepts as the basis for examination, it has also been shown that there exits the potential to include alternative approaches, such as feminist critiques, sociology and critical geography.

CONCLUSION

The aim of this paper was to examine how public lawyers use theory and concepts. In respect of theory, it was argued that this represented the dominant method for the presentation of knowledge within public law yet little consideration is given to how such a form can direct, and even be directed by a theorist, in terms of the outcome of an analysis. The notion of sovereignty was selected as the focus of examination having established that it was a phenomenon which merited consideration within public law. The particular theorists examined were those of Wade, Allan and MacCormick. It was found that, despite focusing on a single notion, the work of the theorists were diverse and possibly even unconnectable. It was not argued that this diversity was undesirable, but that possibly theory was not the best mechanism for the presentation of a notion as complex as that of sovereignty. The notion of sovereignty was then considered as a concept. Here two particular writers were considered, Walker and Loughlin. The analysis offered by Walker and Loughlin were also found to be diverse, suggesting

again, that representing sovereignty as a concept could not accommodate the diversity of analysis which the notion of sovereignty represented.

However, as part of the examination on theory and concepts, the nature of theory and concepts were also considered. It was found that although theories and concepts perform a similar function in respect of the presentation of knowledge, they differ in terms of the manner in which this knowledge is presented. Knowledge, in terms of theory, must be discovered although such knowledge may be suspected, whilst for concepts, knowledge is pre-defined. It was also argued there are no 'rules' regarding methods for the presentation of knowledge within public law, only entrenched practices. Accordingly, it was suggested that concepts, rather than theory could form the basis for analysis in respect of the notion of sovereignty. Sovereignty was then evaluated using a few key concepts, those of structure, ideology and space. These concepts facilitated the inclusion of all the theorists considered. They also encapsulated much of the tensions within legal analysis regarding the notion of sovereignty and avoided the problems identified in respect of representing sovereignty as either a theory or a concept. Furthermore, it was found that using concepts as the basis for analysis could widen the ability of public law to include alternative perspectives.

Finally, it is not suggested that public lawyers should abandon theory as a method for the presentation knowledge. Theory possesses great merit as a tool but its function/role needs to be understood and its limitations acknowledged. Furthermore, as the domain of public law expands and becomes more complex it may be necessary to expand the tools by which knowledge is presented.

TRUSTS OF THE FAMILY HOME: THE IMPACT OF *OXLEY* V *HISCOCK*

Dr Lorna Fox, Department of Law, University of Durham

INTRODUCTION

The regulation of ownership interests in the family home through the law of trusts has been the subject of considerable discussion for many years, much of which has focused on the inadequacies of trust law when it comes to dealing with the issues raised by family property disputes.[1] Although the proportion of partners who expressly opt for joint ownership, or make express declarations of trust concerning the beneficial ownership of the family home, has increased exponentially in recent decades, a sufficiently significant number of cases remain in which ownership disputes subsequently emerge and must be resolved by the application of the principles of informal trusts (resulting trusts, constructive trusts, and proprietary estoppel) to attract the continuing attention of academic critics and law reformers. Critics typically focus on the over-dependence of resulting and constructive trusts on direct financial contributions,[2] or on an express common intention between the partners.[3] Various options for reform have been considered in England and Wales,[4] Ireland,[5] and Northern Ireland,[6]

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[1] There is a wealth of scholarly writing on the inadequacies of current trust law principles when determining interests in the family home, particularly since the decision in *Lloyd's Bank Ltd* v *Rosset* [1991]1 AC 107: see, for example, Gardner, 'Rethinking Family Property' [1993]109 *LQR* 263; see also Halliwell, M, 'Equity as Injustice: the Cohabitant's Case' (1990)20 *Anglo-American Law Review* 500; Mee, J, *The Property Rights of Cohabitees* (1999, Oxford: Hart Publishing); Barlow, A and Lind, C, 'A matter of trust: the allocation of rights in the family home' (1999)19 *Legal Studies* 468. The limitations of existing trust law principles for determining interests in the family home were acknowledged in the Law Commission's paper on the property rights of 'home-sharers': *Sharing Homes* (2002).

[2] A requirement which is thought to penalise partners (often women) who either make indirect contributions to bills and other household expenses, or who make non-financial contributions through labour in the home and childcare; see Gardner, 'A woman's work. . .' [1991]54 *MLR* 126-129; cf Probert, 'Trusts and the modern woman – establishing an interest in the family home' [2001]13 *Child and Family Law Quarterly* 275.

[3] Couples often fail to satisfy the express common intention requirement because they tend to deal with one another in an informal way, either because they don't 'turn their minds' to the prospect of a future dispute over their shared home, or because they do not believe that, in the context of their relationship, they have any need of legal protection, see below, n.18 and associated text.

[4] In *Sharing Homes: A Discussion Paper* (2002), the Law Commission reported on its deliberations, but did not make recommendations; rather it set out a scheme that had been considered involving a statutory trust, which would have conferred beneficial ownership interests based on a wide range of contributions, for a broad category of homesharers. This followed the Law Commission's earlier proposals for the introduction of a system of statutory co-ownership between spouses: *Family Property Law*, Law Com WP No 42 (1971), *First Report on Family Property: A New Approach*, Law Com No 52 (1973), *Third Report on Family Property:*

but none have resulted in legislation. In the absence of substantive legislation, efforts to address the deficiencies of the law in this area in England and Wales now appear to have been re-focused on reducing the number of cases where recourse is made to the law of trusts by extending the court's jurisdiction to re-distribute property between same-sex couples who have registered as civil partners,[7] as well as a more general review of the law relating to cohabitation.[8] However, while these initiatives would have the effect of reducing the volume of case law determined under the general law of trusts, a number of cases[9] must still be resolved according to the 'default positions'[10] of ordinary trust law, as was the case in the recent decision in *Oxley* v *Hiscock*.[11]

The decision in *Oxley* v *Hiscock* marks an interesting development of the case law pertaining to Trusts of the Family Home. The decision, which principally turned on the question of *quantifying* shares when a cohabiting partner has successfully established an interest under a common intention constructive trust, indicates once again the efforts of the Court of Appeal to bring greater fairness and flexibility to bear in this area of property law. In many respects, the decision of the Court of Appeal can be seen as part of a more general trend, following on the heels of the decision in *Le Foe* v *Le Foe*,[12] and *Sharing Homes*.[13] In *Le Foe* v *Le Foe*, the court adopted a more flexible approach regarding the types of contributions that may give rise to an implied common intention constructive trust. This was welcomed by the Law Commission in *Sharing Homes*, when it suggested that, alongside the development of wider legislative powers of distribution in the context of relationship breakdown between non-married (including same-sex) couples, the English courts should develop more flexible judicial principles to govern

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Matrimonial Homes (Co-ownership and Occupation Rights) and Household Goods, Law Com No 86 (1978), *Family Law: Matrimonial Property*, Law Com No 175 (1988), and the intervening, but unsuccessful, Matrimonial Homes (Co-ownership) Bill 1980.

5 The Irish Law Reform Commission has recently issued a Consultation Paper on *The Rights and Duties of Cohabitees* (LRC CP 32-2004), which includes consideration of the difficulties associated with the application of trusts law in the area of family property.

6 In Northern Ireland, the Law Reform Advisory Committee (Northern Ireland) attempted to address the difficulties associated with trusts of the family home in its Consultation Paper (1999) and Final Report (2000) on *Matrimonial Property*, but again this did not result in legislation. See Fox, L, 'Co-ownership of Matrimonial Property: Radical Proposals for Reform' (2001)52 *NILQ* 20-53.

7 See Civil Partnerships Bill 2002 (HL Bill 41); Civil Partnership Bill 2004 (HL Bill 132).

8 See Law Society, *Cohabitation: the case for clear law* (2002, London: Law Society).

9 For example, where opposite-sex (or same-sex) partners either could marry (or register), but choose not to, or can't marry (or register) because either (or both) is still married to (or in a registered partnership with) another.

10 See Miles, J, 'Property law v family law: resolving the problems of family property' (2003)23 *Legal Studies* 624 at 626.

11 [2004] EWCA Civ 546.

12 [2001]All ER 325 (HC); [2001]EWCA Civ 1870 (CA).

13 *Op. cit.*

the acquisition of interests in property under implied trusts.[14] One of the themes of the Law Commission's paper was the difficulties inherent in striking a balance between certainty and fairness in the field of trusts of the family home.[15] This issue was highlighted once again in *Oxley* v *Hiscock*: while judicial policy appeared, until recently, to be overwhelming dominated by the importance of achieving certainty in this area,[16] the decision in *Oxley* v *Hiscock* provided further evidence of a growing judicial tendency to prioritise fairness when determining disputes involving trusts of the family home.

The Facts of *Oxley* v *Hiscock*

In *Oxley* v *Hiscock* the disputed property was 35 Dickens Close (the 'Dickens Close' property) and had been the shared home of Mr Hiscock and Mrs Oxley. The property was registered in Mr Hiscock's name, but had been purchased in 1991 for the purpose of housing Mr Hiscock, Mrs Oxley and her children from a former marriage. The parties lived together in the property from 1991 until their relationship ended in 2001, by which time the mortgage had been discharged and the property had been sold for £232,000. The Dickens Close property was not, however, their first shared home, and in order to unravel the parties' beneficial interests in that property, it was necessary to go back to the beginning of their cohabiting relationship. Since trusts of the family home are both triggered by, and quantified according to, the parties respective contributions to the property and their common intentions regarding beneficial ownership, the whole history of their property sharing relationship was reviewed by the court.

Mr Hiscock and Mrs Oxley met in 1985, when Mrs Oxley was a secure tenant of her house in Bean, Kent (the 'Bean property'). At that time, Mr Hiscock worked in Kuwait, but he stayed with Mrs Oxley in the Bean property whenever he was in the United Kingdom. In 1987, Mrs Oxley exercised her right to buy this property, valued at £45,200. The property was conveyed into Mrs Oxley's name, but she was not in a position to provide the whole purchase price. Rather, her right-to-buy discount of £20,000 reduced

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[14] "The possibility of judicial development of the law does however remain, and. . . we shall discuss whether there are particular ways in which reform could be advanced by the courts. We shall first consider how the other leading common law jurisdictions – Australia, Canada and New Zealand – have dealt with the problem – and how their courts have applied and developed doctrines such as the constructive trust. . . for the most part these jurisdictions have adopted a somewhat more expansive approach to constructive trusts than that apparent in England and Wales. . . We shall however make suggestions for the continuing development of the common law by the English courts."; *Sharing Homes*, *op. cit.*, para.4.3.

[15] The Law Commission compared the strict approach adopted in the English courts with the more flexible systems that have developed in the Commonwealth jurisdictions, and suggested that: "[t]here is no doubt that the broader approach of these [Commonwealth] jurisdictions tends to lead to greater uncertainty and unpredictability than the current English law, but this may be a necessary consequence of fairness. . . the courts should seek to be more flexible in their approach." *Sharing Homes*, para.4.23.

[16] The decision of the House of Lords in *Lloyd's Bank Ltd* v *Rosset*, *op. cit.*, tended towards certainty rather than flexibility: see Gardner, *op. cit.*, who described this as a 'bright-line' approach to the development of the law.

the amount due to £25,200, and the balance was provided by Mr Hiscock by way of a loan to Mrs Oxley. Despite his contribution, rather than conveying the property into their joint names, the property was conveyed into her name alone in order to safeguard the right to buy discount,[17] and Mr Hiscock's contribution was protected by way of a charge over the property. In 1991, the Bean property was sold for £61,500.

These facts provided the background to the dispute that came before the court concerning the Dickens Close property, which was purchased in 1991 for £127,000. The parties' respective contributions to the purchase price of the property is a crucial issue when it comes to determining whether a claimant has acquired an interest under a family home trust, and when calculating the extent of that interest. With regard to the Dickens Close property, both partners made some financial contribution – Mr Hiscock paid a total of £60,700 towards the deposit, £25,200 of which came from the sale of the Bean property, and Mrs Oxley paid £36,300, which represented her share of the Bean property. The balance of the purchase price (£30,000) was provided by a mortgage, which the court presumed had been discharged in equal shares. Curiously, the Dickens Close property was registered in Mr Hiscock's sole name despite advice from their solicitor that the property should be in their joint names. Mrs Oxley directed the solicitor that the conveyance was to be to Mr Hiscock alone, adding that:

> "Your comments on any claim I might have to 35 Dickens Close have been noted, and I appreciate your concern. However, I am quite satisfied with the present arrangements, and feel I know Mr Hiscock well enough not to need written legal protection in this matter."[18]

After they separated in 2001, Mr Hiscock and Mrs Oxley decided to sell 35 Dickens Close, and buy two properties, one for each to live in. The Dickens Close property was sold for £232,000, of which £41,200 was paid to Mrs Oxley. In November 2002, Mrs Oxley sought an order under section 14 of the Trusts of Land and Appointment of Trustees Act 1996 for a declaration that the proceeds of the sale were held by Mr Hiscock on trust for the parties in equal shares.

Putting the Case in Context

Before proceeding to consider the reasoning and the outcome in *Oxley* v *Hiscock*, it is useful to consider briefly the trusts context in which family home disputes are addressed. Two questions must be considered: the criteria governing the *acquisition* of an interest in the property, and the *extent* of any such interest.

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[17] The tenancy was regulated by the Housing Act 1985, which required that a tenant who had purchased property under the right-to-buy provisions, but who subsequently disposed of that property within three years, could be required to repay part of the discount (s.155).

[18] See *Oxley* v *Hiscock, op. cit.*, para.9.

(a) Acquiring an interest in the family home: a whistle-stop tour

Proprietary interests in the family home may be acquired under general property law either expressly or impliedly. Although statistics on the proportion of matrimonial homes which are expressly held by partners as joint legal or equitable owners are unavailable, it is generally accepted that the proportion of partners opting to become express joint legal owners of the matrimonial home has significantly increased in recent decades, particularly since the landmark and high profile case of *Williams & Glyn's Bank Ltd* v *Boland*,[19] which prompted Lord Scarman to suggest (extra-judicially) that:

> ". . . we should encourage young married people to go round the corner to the solicitor, or, if we could establish one, the legal clinic, to talk about the legal problems of marriage just as they go to the medical clinic to discuss the medical problems associated with what is euphemistically called family planning."[20]

It is interesting to note, however, that although Mrs Oxley did receive legal advice recommending that the property was placed in their joint names, she declined to do so on the basis that she: ". . . fel[t] I know Mr Hiscock well enough not to need written legal protection in this matter." Her response is testament to the persistent need for recourse to the law of trusts in order to resolve family home disputes, even when the partners have received legal advice at the time of the conveyance.

Where there is no express agreement to share ownership, partners may attempt to establish an implied trust. Non-owning partners may acquire an equitable interest in the property under: an implied resulting trust, on the basis of financial contributions to the purchase price of the property;[21] an implied constructive trust, which is based on *either* the common intention of the parties that beneficial ownership shall be shared (by agreement, arrangement or understanding) along with detriment suffered by the non-owning partner, *or* direct financial contributions to the purchase price of the property;[22] or by proprietary estoppel, where the requirements of representation, reliance and detriment must be present. When an interest arises under one of these informal trusts, rather than by a joint conveyance or express declaration, the further issue of shares in the property must also be addressed.

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[19] [1981]AC 487.

[20] 437 HL Deb (5th Series) col.652 (15 December 1982) Lord Scarman.

[21] When a partner acquires an interest under a resulting trust, the portion of the equitable estate acquired will be proportionate to the amount of the financial contributions.

[22] See *McFarlane* v *McFarlane* [1972] NI 59; *Lloyd's Bank plc* v *Rosset* [1991] 1 AC 107. Although the decision in *Le Foe* v *Le Foe* [2001]2 FLR 970 suggested that the courts may be moving towards a more flexible approach regarding contributions – at least indirect financial contributions – to the acquisition of an interest in the matrimonial home under a constructive trust, this approach has not yet been endorsed by the Court of Appeal.

(b) Quantifying interests in the family home: the impact of Midland Bank plc v Cooke

In the last ten years a significant distinction has emerged in the field of trusts of the family home, between the resulting trust and the constructive trust, in relation to the way in which the quantum of shares in the beneficial interest is calculated. The principles for quantifying the claimant's share under a resulting trust are straightforward: a direct contribution to the purchase price of property will give rise to a presumed resulting trust, normally in proportion to the amount of the contribution. On the other hand, the principles governing the quantification of interests under common intention constructive trusts have, in recent years, developed to become more flexible, more concerned with achieving a fair outcome, and, as a result, less predictable. An agreement, arrangement or understanding to share the beneficial interest AND detriment OR a (probably direct)[23] financial contribution will give rise to a common intention constructive trust. However, in a number of cases involving common intention constructive trusts, the court has taken a more flexible approach towards quantum.

A landmark decision concerning the quantification of interests acquired under a common intention constructive trust was *Midland Bank plc* v *Cooke*,[24] when the Court of Appeal calculated the claimant's share in the family home by conducting a: ". . . survey of the whole course of dealing between the parties relevant to their ownership and occupation of the property and their sharing its burdens and advantages."[25] If that survey was inconclusive, then, and only then, the court could fall back on the maxim 'equality is equity'. Since Mr and Mrs Cooke were regarded as a couple who had shared everything – Mrs Cooke's contributions to their shared life included bringing up the children, working, at various stages, both part-time and full-time to pay household bills, and being a co-signatory to a second mortgage – her share was quantified at 50%. The decision in *Cooke* highlighted the difference in outcome, depending on whether the claimant was awarded an interest under a resulting trust, by which reasoning Mrs Cooke would have acquired a 6.74% share, proportionate to her direct financial contribution, or under a common intention constructive trust, which enabled the court to apply a broad-brush approach to a whole range of conduct and contributions when considering *quantum*. However, as the decision of the Court of Appeal in *Oxley* v *Hiscock* has recently indicated, a number of further issues - both practical and doctrinal – remained outstanding with regard to the application of this 'broad-brush' approach. This article argues that although the decision in *Oxley* v *Hiscock* unpacked and, to a certain extent resolved some of these issues, some significant questions remain concerning the principles governing *quantum* when an interest is acquired under a common intention constructive trust.

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[23] *Le Foe* v *Le Foe*, *op. cit.*
[24] [1995]2 FLR 915.
[25] *ibid.*, at 926, *per* Waite LJ.

The Decision in *Oxley* v *Hiscock*

(a) The decision at first instance

The case was heard, at first instance, in the County Court by Her Honour Judge Hallon. Firstly, it should be noted that the question of acquisition of an interest in property, and therefore the fact that Mrs Oxley was entitled to a share of the proceeds of sale, was not at issue. In fact, as noted above, she had already been paid £41,200 of the £232,000 raised by the sale of the Dickens Close property. Rather, the case turned on the quantification of her share. Mrs Oxley claimed that she was entitled to a half share in the property, and brought an action for a declaration to that effect under section 14 of the Trusts of Land and Appointment of Trustees Act 1996. In support of her claim, Mrs Oxley asserted several facts: that the parties had discussed marriage in 1988 but had not married due to financial disadvantages to Mr Hiscock; that they had pooled their resources as if they were a married couple; and that they had agreed to have 35 Dickens Close in Mr Hiscock's name alone in order to prevent any possible claim by Mrs Oxley's former husband, all the while having agreed between them that the beneficial ownership would be shared equally. Mr Hiscock refuted these assertions, and there was no independent evidence in support of any agreement having been made. Judge Hallon preferred the evidence of Mrs Oxley, and held that the (inferred) intention of the parties was that Mrs Oxley was to have a beneficial interest in the property.

On the issue of quantification, the judge held that, again, an intention could be inferred that the parties had agreed the proportions of their interests, based on their course of dealing. Following the authority of *Midland Bank Ltd* v *Cooke*, Judge Hallon began by looking for evidence of an express agreement between the parties as to their respective shares. Having found no evidence of an express agreement, she went on to apply the principles set out by the Court of Appeal in *Midland Bank Ltd* v *Cooke*, specifically the statement of Waite LJ that:

> ". . . positive evidence that the parties neither discussed nor intended any agreement as to the proportions of their beneficial interest does not preclude the court, on general principles, from inferring one."[26]

Judge Hallon inferred the agreement to share equally from the course of dealings between the parties, focusing particularly on their 'long term plan' to acquire a joint property, and the evidence that each of the parties had regarded both properties as 'their home'. Judge Hallon held that the course of dealing between Mr Hiscock and Mrs Oxley gave rise to an inference that they intended each to have an equal share in the property, and consequently ordered that the claimant was entitled to a half share of the proceeds of sale of the property. The defendant appealed against that order.

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[26] [1995]2 FLR 915 at 928, *per* Waite LJ.

(b) The decision of the Court of Appeal

The judgment of the Court of Appeal was delivered by Chadwick LJ.[27] Firstly, the Court of Appeal confirmed the inference of an intention that Mrs Oxley would have some beneficial interest in the property, since that was thought to be the only possible explanation of their discussion as to whose name should appear on the title in the context of a possible claim by her former husband.[28] It is interesting that the court focused on this factor, since her claim was, in any event, clearly established by her direct financial contributions to the purchase, bringing the case within the second of Lord Bridge's categories in *Lloyd's Bank plc* v *Rosset*.[29] This focus on their discussions did, however, provide an interesting signpost to the overall direction taken by the Court of Appeal. In addressing the preliminary 'threshold' question of whether Mrs Oxley had acquired any interest in the property, Chadwick LJ stated that the parties' discussion concerning the possibility of her former husband making a claim in the event of her death was: "…only explicable on the basis that they both intended – and expressed that intention to the other – that each should have a beneficial share in the property."[30] Further, this finding was described as: "[the] feature which, to my mind, provides the foundation for Mrs Oxley's claim in constructive trust or proprietary estoppel; and which distinguishes that claim from one founded on resulting trust alone."[31]

On the second question – the principles governing the quantification of interests acquired under a common intention constructive trust - the Court of Appeal conducted a thorough review of the authorities before granting the appeal on the grounds that the court cannot infer an intention to share equally unless, by looking at subsequent dealings between the parties, one could conclude that their common intention at the time the property was acquired must have been that they should each have an equal share. Crucially, the court held that the inference of an intention to share equally was only permissible if that was the only conclusion consistent with their conduct. When an intention to share equally could not be so inferred, Chadwick LJ held that the correct approach, in the absence of an express agreement, was for the court to ask:

> "What would be a fair share for each party having regard to the whole course of dealing between them in relation to the property?"

When the breakdown of contributions between Mrs Oxley and Mr Hiscock was analysed, the court found that Mr Hiscock had made a greater direct financial contribution to the acquisition of the property, of £60,700 to her £36,300. The balance of the purchase price had been paid by a mortgage, which the court regarded as having been discharged from pooled resources.

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[27] Mance and Scott Baker LJJ concurred.
[28] *Oxley* v *Hiscock, op. cit.*, para.14.
[29] [1991]1 AC 107.
[30] *Oxley* v *Hiscock, op. cit.*, para.14.
[31] *ibid*. The relationships between these three methods for the informal acquisition of interests in the family home: resulting trust, common intention constructive trust, and proprietary estoppel; would be one of the key themes to emerge from the Court of Appeal's decision in this case, and is considered further below.

Based on these figures, Mr Hiscock's contribution accounted for just over 62% of the purchase price. However, adopting the approach that shares should be determined according to what would be fair having regard to their whole course of dealing, the court held that Mrs Oxley's beneficial interest amounted to 40% of the proceeds of sale.

The Reasoning in *Oxley* v *Hiscock*

The basis of the appeal was Mr Hiscock's argument that the judge had misdirected herself in law by refusing to follow the (pre-*Cooke*) decision of the Court of Appeal in *Springette* v *Defoe*,[32] that is, that:

> "If two or more persons purchased property in their joint names and there was no declaration of trusts on which they were to hold the property, they held the property on a resulting trust for the persons who provided the purchase money in the proportions in which they provided it, unless there was sufficient specific evidence of their common intention that they should be entitled in other proportions, that common intention being a shared intention communicated between them and made manifest at the time of the transaction itself."

Counsel for Mr Hiscock argued that, notwithstanding any subjective intentions of the parties, there had been no discussion as to the extent of their respective beneficial interests at the time of purchase. Consequently, it was argued, the presumption of resulting trust had not been displaced, and the property was held for Mr Hiscock and Mrs Oxley in shares proportionate to their contributions.

In considering the appeal, Chadwick LJ conducted a very detailed exposition of the authorities in this area over the last twenty years, beginning with the decision in *Walker* v *Hall*,[33] when the court held that in determining shares under the implied trusts, there were no special rules for cohabitants, that the (less flexible) resulting trust analysis should be applied, and that there was no justification for departing from proportionate shares in the absence of an express contrary intention. The court was not prepared to infer an intention that the partners would hold in equal shares just because the property was a family home, and neither was it considered appropriate to 'top up' the claimant's share on the grounds of fairness. The decision in *Turton* v *Turton*[34] testified to a similarly restrictive approach, when the court held that the quantification of shares must be divined from the intentions of the parties at the time of the purchase, and could not be left for determination in the light of subsequent events. On the other hand, in the intervening decision in *Grant* v *Edwards*[35] the court appeared to adopt a wholly different approach by recognising the particular issues raised by implied trusts cases between cohabitants, and adopting a more flexible analysis of the 'quantum question' accordingly.

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[32] [1992]2 FLR 388.
[33] [1984]FLR 126.
[34] [1988]Ch 542.
[35] [1986]Ch 638.

In *Grant* v *Edwards*,[36] the court showed greater awareness of the reality of the family home context, by focusing on the difficulties presented when a claimant has made contributions that are substantial but difficult to identify or to quantify. Lord Browne-Wilkinson V-C drew on the law of proprietary estoppel in relation to the *quantum* question, and held that the court should give effect to the parties' common intention so far as this may be achieved with *fairness* between the parties. This introduced a new note of flexibility to the law of implied trusts, as the court held that while identifiable financial contributions were one of the factors to be taken into account, labour contributions and other unquantifiable actions could also be relevant. A few years later, in *Stokes* v *Anderson*,[37] the similarities between the common intention constructive trust and proprietary estoppel were highlighted once again, in order to justify adopting a more flexible approach to the constructive trust at the *quantum* stage. The court's concern with achieving a fair outcome was a central feature of these decisions, and this also necessitated a shift of focus, from the parties' intentions when purchasing the property, to consider instead the position between them and in respect of the property after the mortgage had been paid, or when the property was being disposed of.

The decisions in *Springette* v *Defoe*[38] and *Huntingford* v *Hobbs*,[39] on which the appellant based his argument, appeared to indicate a return to the more rigid approach of *Walker* v *Hall*[40] and *Turton* v *Turton*.[41] In both cases, the Court of Appeal attempted to re-establish the proposition that there should be no difference in the approach taken when applying the principles of resulting and constructive trusts to cohabitants in family homes. Rather, the earlier principles were re-asserted: that the court must begin by considering whether there was any evidence of an express common intention concerning quantum. Only in default of such evidence would shares then be determined in proportion to direct financial contributions. In swinging the pendulum back towards certainty rather than flexibility, this approach also aligned the common intention constructive trust more closely with the presumed resulting trust, rather than the principles of proprietary estoppel.[42]

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[36] The judgment drew on the decision in *Gissing* v *Gissing* [1971]AC 866, when the House of Lords held that, where no agreement was reached between the parties as to their respective shares in the family home: ". . . the court must first do its best to discover from the conduct of the spouses whether any inference can reasonably be drawn as to the probable common understanding about the amount of the share of the contributing spouse upon which each must have acted in doing what each did, even though that understanding was never expressly stated by one spouse to the other or even consciously formulated in words by either of them independently."

[37] [1991]1 FLR 391.

[38] (1992)24 HLR 552.

[39] [1993] 1 FCR 45. Both decisions were handed down on the same day by the same Court of Appeal panel of Dillon, Steyn and Slade LJJ.

[40] *Op. cit.*

[41] *Op. cit.*

[42] The status of these authorities was, however, queried in *Oxley* v *Hiscock*, when Chadwick LJ cast doubt on whether the position adopted in *Springette* v *Defoe* and *Huntingford* v *Hobbs* accurately reflected the state of the law by that time, para.60.

A final strand of reasoning identified from the case law was based on the decision in *Midland Bank Ltd* v *Cooke*,[43] when Waite LJ, explicitly addressing the dilemma of the conflicting case law, considered whether to infer an agreement that the parties intended to share ownership equally, or to recognise Mrs Cooke's beneficial interest in proportion to her direct financial contributions. The court's solution in this case was to undertake a survey of the whole course of dealing between the parties, taking into consideration all conduct which cast light on the question of what shares were intended. Only if that proved inconclusive, was the court to fall back on the maxim 'equality is equity'. This third strand of reasoning, like the decisions in *Grant* v *Edwards* and *Stokes* v *Anderson*, acknowledged the particular circumstances that give rise to problems when the disputed property has been a family home. Waite LJ noted that it is typical of cohabitation relationships that the partners do not fully articulate agreements concerning their shares to the family home, and suggested that:

> "It would be anomalous, against that background, to create a range of home-buyers who were beyond the pale of equity's assistance in formulating a fair presumed basis for the sharing of beneficial title, simply because they had been honest enough to admit they never gave ownership a thought or reached any agreement about it."[44]

Consequently, under the *Cooke* approach, it was held that even if parties expressly stated that they had reached no agreement, this would not prevent the court from inferring an agreement as to *quantum* on general equitable principles.[45]

These three distinct strands of authority emphasise one of the difficulties identified by Gibson LJ in *Drake* v *Whipp*, that: ". . . as is notorious, it is not easy to reconcile every judicial utterance in this well-travelled area of the law."[46] Nevertheless, in *Oxley* v *Hiscock*, Chadwick LJ attempted to rationalise the case law and, in the process, adopted a firm policy stance on a number of the issues underpinning the diverse authorities. Firstly, concerning the question of applying specific principles where the disputed property is a family home, Chadwick LJ followed the decisions in *Grant* v *Edwards* and *Stokes* v *Anderson* in recognising the particular context of relationships between cohabitants. The 'cases of this nature', to which the principles identified in his judgment applied, were those in which: the property is bought as a home for a couple who, although not married, intend to live together as man and wife; each of them makes some financial contribution to the purchase; the property is purchased in the sole name of one of them; and there is no express declaration of trust. Consequently, and again echoing the *Grant* v *Edwards* line of authority, it was held that in such cases, when there is no express evidence of an agreement as to shares: ". . .

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[43] [1995]2 FLR 915.
[44] *ibid.*, at 927, *per* Waite LJ.
[45] This was the approach adopted by Judge Hallon in the County Court in *Oxley* v *Hiscock*, *supra*.
[46] [1996]1 FLR 826 at 827.

the court must supply the common intention by reference to that which all the material circumstances have shown to be fair."[47]

In applying this test, Chadwick LJ suggested that the first, or threshold, question to be considered was whether there was evidence from which to infer a common intention, which had been communicated between the parties. Whether the constructive trust was based on an 'agreement, arrangement or understanding', or inferred on the basis of direct financial contributions, the *quantum* issue would in many cases be resolved by evidence relating what the partners had said and done at the time of the acquisition. However, when there was no evidence of any discussion between them as to the extent of the share which each was to have – or when the evidence was that there was no discussion on that point - the issue of *quantum* must still be resolved. In such cases, the Court of Appeal held that:

> ". . . each is entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property. And, in that context, 'the whole course of dealing between them in relation to the property' includes the arrangements which they make from time to time in order to meet the outgoings (for example, mortgage contributions, council tax and utilities, repairs, insurance and housekeeping) which have to be met if they are to live in the property as their home."[48]

Chadwick LJ identified three ways of reasoning towards the conclusion that the court could quantify interests according to what was considered fair in light of all the evidence: firstly, that the court could impute an agreement that the shares should be determined according to what was considered fair at the end of the relationship;[49] that the court could make an assessment of what the parties must have intended from the outset, looking at the whole course of dealing between the parties;[50] or that the court could award such an interest as seems to be fair on a proprietary estoppel basis.[51]

Here, again, Chadwick LJ adopted a clear and principled approach to the various alternatives before the court which cut through the quagmire of conflicting case law. The judge admitted that he was disinclined to impute intentions to the parties regarding shares, or to imagine what the parties must have intended at the outset based on their subsequent course of dealing, since he considered it:

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[47] *Stokes* v *Anderson*, *supra*, at 399, *per* Nourse LJ; quoted by Chadwick LJ in *Oxley* v *Hiscock*, para 65; Chadwick LJ claimed that this position was also: ". . . what Lord Justice Waite had in mind when he referred, in *Midland Bank* v *Cooke* [1995]2 FLR 915, 927G, to 'equity's assistance in formulating a fair basis for the sharing of the beneficial title' in a case where the parties 'had been honest enough to admit they never gave ownership a thought'." (para.65)

[48] *Oxley* v *Hiscock*, *op. cit.*, para 69, *per* Chadwick LJ.

[49] Based on *Gissing* v *Gissing*, *op. cit.*, *per* Lord Diplock; *Stokes* v *Anderson*, *op. cit.*, *per* Nourse LJ; see *Oxley* v *Hiscock*, *op. cit.*, para.70.

[50] Based on *Midland Bank* v *Cooke*, *op. cit.*, *per* Waite LJ.

[51] Based on *Grant* v *Edwards*, *op. cit.*, *per* Sir Nicolas Browne-Wilkinson V-C; *Yaxley* v *Gotts*, *op. cit.*, *per* Walker LJ; according to Chadwick LJ, this was also the principle underlying the decision in *Drake* v *Whipp*, *op. cit.*

> ". . . artificial – and an unnecessary fiction – to attribute to the parties a common intention that the extent of their respective beneficial interests in the property should be fixed as from the time of the acquisition, in circumstances in which all the evidence points to the conclusion that, at the time of the acquisition, they had given no thought to the matter."[52]

Chadwick LJ concluded, therefore, that the third justification: that the court should award such an interest as seems to be fair on a proprietary estoppel basis; was the most satisfactory alternative, adding that: "I think that the time has come to accept that there is no difference in outcome, in cases of this nature, whether the true analysis lies in constructive trust or in proprietary estoppel."[53]

Applying these principles to the case in hand, the Court of Appeal held, in relation to the first stage of the inquiry, there was insufficient evidence to establish that the parties had formed an intention as to shares.[54] The court conceded that, if an intention as to shares had been found as a matter of fact, the court would not go behind those facts to impose a fair division of shares. In this case, however, there was no basis for such a finding of fact, and so the inquiry moved to the second stage. Since a common intention as to shares had not been established, the pursuit of 'intention' was no longer appropriate, but, rather, the question for the court was 'what would be a fair share for each party having regard to the whole course of dealing between them in relation to the property?' In applying this principle, Chadwick LJ overruled Judge Hallon's decision to grant an order declaring that the parties owned the beneficial interest in equal shares, on the grounds that it gave insufficient weight to Mr Hiscock's larger direct contribution to the purchase price. Rather, the Court of Appeal held that a fair share for each party in all the circumstances would be 60% to Mr Hiscock, and 40% to Mrs Oxley.

The Implications of *Oxley* v *Hiscock*: Some Important Distinctions…or are they?

A major practical impact of the decision in *Oxley* v *Hiscock* was the step-by-step guidance provided by the Court of Appeal for dealing with quantification of shares under common intention constructive trusts. Where there is no evidence of intentions as to shares, the court can determine what a *fair* share would be for each party, 'having regard to the whole course of dealing between them in relation to the property'. Furthermore, as Chadwick LJ acknowledged in his judgment, this approach also has implications on the distinctions between the various species of informal trusts under which interests in the family home may be acquired. Since Lord Diplock's remark, in *Gissing* v *Gissing*,[55] that the informal acquisition of interests in the family home took place under: "A resulting, implied or constructive trust – and it is unnecessary for present purposes to distinguish between these three classes

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[52] *Oxley* v *Hiscock, op. cit.*, para.71.
[53] *ibid*.
[54] Mr Hiscock's charge over the Bean property was held to be inconsistent with an intention to hold the property jointly and equally.
[55] [1971]AC 886.

of trust. . .";[56] there has been considerable 'muddying of the waters' concerning the relationships between the presumed resulting trust, the common intention constructive trust, and proprietary estoppel,[57] in respect of informal interests in the family home. The decision in *Oxley* v *Hiscock* casts a new light on the boundaries between these categories. While some distinctions have been reinforced – between the presumed resulting trust and the common intention constructive trust – others, such as that between the common intention constructive trust and proprietary estoppel, appear to have been blurred to the point of indecipherability.

(a) Express common intention constructive trust and implied common intention constructive trust

One of the distinctions highlighted in *Oxley* v *Hiscock* was between the two genus of common intention constructive trust: that based on express common intention, where the parties have reached an 'agreement, arrangement or understanding' that beneficial ownership will be shared,[58] and the constructive trust based on implied common intention, evidenced by a direct financial contribution to the purchase price.[59] In *Oxley* v *Hiscock*, the distinction was raised by counsel for Mr Hiscock, who argued that: (a) when an express common intention constructive trust is established, the parties must have expressed intentions in respect of both the 'threshold' question – that they wished to share the beneficial ownership – and also as to the extent of their shares; and (b) that where an implied common intention constructive trust arose, the direct contributions both justified the inference of a common intention and defined (proportionately) the extent of the shares. If the Court of Appeal had accepted this argument, this would have left no scope for the court to adjust the shares, in either category, on grounds of fairness. Chadwick LJ disagreed with this argument, and held that the court was entitled to adjust the parties' respective shares in the interests of fairness, whether the constructive trust was based on express common intention or implied common intention. Where an express common intention constructive trust was established, it was necessary to show some agreement, arrangement or understanding, but *not* necessary that the agreement, arrangement or understanding extended to defining the extent of the respective shares. When a claimant relied on an implied common intention, common intention would be readily inferred from direct financial contributions. The relevant common intention, however, must merely be that each party should have *some* beneficial interest, but not necessarily in proportion to the amount of their direct contribution.[60] Thus the two questions before the court: the 'threshold' question – of whether an interest has arisen under a constructive trust; and the *quantum* question – as to the respective shares of the parties; remained distinct. However, as the decision

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[56] *ibid* at 905.

[57] See Hayton, D, 'Equitable Rights of Cohabitees' (1990) *Conv* 370; Ferguson, P, 'Constructive Trusts – A Note of Caution' (1993)109 *LQR* 114; Hayton, D, 'Constructive Trusts of Homes – A Bold Approach' (1993)109 *LQR* 485.

[58] See for example, *Eves* v *Eves* [1975]1 WLR 1338; *Grant* v *Edwards* [1986] Ch 638; and more recently, *Cox* v *Jones* [2004]EWHC 1486.

[59] *Lloyd's Bank plc* v *Rosset, op. cit.*; see, however, *Le Foe* v *Le Foe, op. cit.*, nn.22-23 and associated text.

[60] *Oxley* v *Hiscock, op. cit.*, para.40.

in *Cox* v *Jones*[61] has since confirmed, the *quantum* question is governed by the same set of principles whether the common intention constructive trust is based on express or implied common intention.

(b) Resulting trust or constructive trust?

If, as counsel for Mr Hiscock argued in *Oxley* v *Hiscock*, the court had no scope to adjust shares on an implied common intention trust, but was required to define the parties' interests in exact proportion to their direct financial contributions, then there would be little to distinguish the implied common intention constructive trust from a presumed resulting trust. However, although the facts giving rise to a resulting trust or a constructive trust in the family home may overlap,[62] recent case law has tended to emphasise the distinctions between the categories of implied trust. In *Drake* v *Whipp*,[63] Gibson LJ stated that:

> "[a] potent source of confusion, to my mind, has been suggestions that it matters not whether the terminology used is that of the constructive trust, to which the intention, actual or imputed, of the parties is crucial, or that of the resulting trust which operates on a presumed intention of the contributing party in the absence of rebutting evidence of actual intention."[64]

Although both are triggered by a direct contribution from the claimant to the purchase price of the property, the doctrinal distinctions were highlighted when the court came to quantify the claimant's share, since while a claim under a presumed resulting trust was calculated according to the 'strict proportions' rule, the Court of Appeal followed *Grant* v *Edwards*[65] to hold that that the beneficial interest under a constructive trust was not held in shares proportionate to actual contributions, but calculated according to a more flexible formula, taking account of indirect financial contributions and non-financial contributions in an effort to achieve a fair result.

Although the decision in *Carlton* v *Goodman*[66] added to the confusion once again by using the label 'resulting trust' to describe the outcome in *Midland Bank* v *Cooke*,[67] the distinction was re-emphasised in *McKenzie* v

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61 *Op. cit.*

62 As was the case in *Drake* v *Whipp* [1996]1 FLR 826 when the Court of Appeal substituted a finding of implied common intention constructive trust based on direct financial contributions for the lower court's finding of presumed resulting trust based on contributions to the purchase price.

63 *Op. cit.*

64 *ibid* at 827, *per* Gibson LJ.

65 *Op. cit.*

66 [2002] EWCA Civ 545.

67 *Op.cit.* Ward LJ acknowledged the doctrinal issues surrounding the distinction, and suggested that: "[t]he source of confusion between the constructive trust and the resulting trust. . . may be as potent as ever in view of Lord Browne-Wilkinson's suggestion in *Westdeutsche Landesbank Girozentrale* v *Islington LBC*. . . that: 'Both types of resulting trust are traditionally regarded as examples of trusts giving effect to the common intention of the parties.'"; (*Carlton* v *Goodman, op. cit.*, para.33) he concluded that: "[w]e have not heard sufficient argument to become embroiled in, still less to resolve this confusion." (para.35).

McKenzie.[68] Robert Hildyard QC, sitting as Deputy Judge in the High Court, stated that:

> "[b]oth [resulting and constructive trusts] constitute responses of equity where the parties have failed properly to document their intentions and no express provision has been made. In both cases the Court's decision whether such a trust has arisen involves an examination of the parties' intentions, based on statements, on conversations and on payments they have made. However, they are doctrinally distinct."[69]

While the resulting trust has its basis in the presumption that a person is unlikely to have paid for property without expecting some return by way of a beneficial interest in that property, the common intention constructive trust has its roots in the common intentions of both parties.[70] Judge Hildyard extended the doctrinal distinctions between the foundations of each category of trust to the principles governing quantification of shares, so that under a presumed resulting trust, the claimant's share would be 'commensurate to the value of the contribution which he or she had made and which has given rise to the presumption',[71] while constructive trusts should be quantified according to the parties' common intention. The judge acknowledged that: "[t]he difficulty arises when though their common intention to share the property beneficially is clear or can be inferred, it is not possible to ascertain what their respective shares were intended to be.";[72] but noted that although contribution may be relevant, in some cases the court has adopted a broader test of 'what is fair and just in all the circumstances'.[73]

Nevertheless, the court in *McKenzie* v *McKenzie* was reluctant to accept that the principles advanced by the Court of Appeal in *Midland Bank* v *Cooke*[74] went further, in terms of principle, than extending the range of factors from which the parties' common intention could be discerned beyond direct financial contributions.[75] The decision in *Oxley* v *Hiscock* firmly re-established the boundary between the resulting trust and the constructive trust in the family home context. Since the *quantum* principles governing common intention constructive trusts, as set out by the Court of Appeal, decisively shifted the focus of inquiry towards a more general 'fairness' approach, the implications of the doctrinal distinction between the resulting

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Nevertheless, the judge also suggested that: "*Midland Bank* v *Cook[e*]. . . itself can only be properly understood when it is appreciated that the court was satisfied that by the making of a direct contribution a *resulting trust* had been established in the wife's favour of some part of the beneficial interest and the real question for the court in that case was to determine what proportions the parties must have been assumed to have intended for their beneficial ownership."; para.32.

68 [2003]EWHC 601.

69 *ibid.*, para.68.

70 *ibid.*, para.76.

71 *ibid.*, para.89.

72 *ibid.*, para.90.

73 *ibid*.

74 *Op. cit.*

75 *McKenzie* v *McKenzie*, *op. cit.*, para.91. Judge Hildyard stated that: "I doubt that the Court of Appeal truly intended that quantification should be on any more arbitrary a basis."; *ibid*.

trust and constructive trust have been re-emphasised. Rather than treating the common intention constructive trust as a variant of the resulting trust, the court clearly distinguished the principles determining *quantum* in accordance with the underlying doctrinal basis of each type of trust.

(c) Constructive trust or proprietary estoppel?

While the distinctions between the resulting trust and constructive trust in relation to the acquisition of interests in the family home have been re-enforced, the common intention constructive trust has been re-positioned in alignment with the doctrine of proprietary estoppel.[76] Chadwick LJ's comment in *Oxley* v *Hiscock*, that: ". . . the time has come to accept that there is no difference in outcome, in cases of this nature, whether the true analysis lies in constructive trust or in proprietary estoppel.";[77] sounded a clear note of conclusion in a long line of recent case law in which the distinctions between the common intention constructive trust and proprietary estoppel have been progressively eroded.[78] Judicial statements allying the doctrines first began to emerge in the late 1980s, when Lord Browne-Wilkinson, V-C, suggested that the principles underlying the law of proprietary estoppel might provide useful guidance both in regard to the conduct necessary to constitute acting on common intention (that is, detriment) so as to give rise to a constructive trust, and in regard to the quantification of the successful claimant's beneficial interest in the property.[79] In *Austin* v *Keele*,[80] Lord Oliver, sitting on the Privy Council, described the doctrine of common intention constructive trust as 'an application of proprietary estoppel', while judgments of both the Court of Appeal and the House of Lords in the landmark case of *Lloyd's Bank plc* v *Rosset*[81] further indicated judicial sympathy with the idea that the doctrines were inter-related.[82] In *Lloyd's Bank plc* v *Carrick*,[83] Morritt LJ stated that: ". . . it is a matter of some doubt whether the principles of proprietary estoppel differ from those of that species of constructive trust which was referred to by Lord Bridge of Harwich in *Lloyd's Bank plc* v *Rosset*."; while in *Yaxley* v *Gotts*,[84] Walker LJ suggested that although: "[p]lainly there are large areas where the two concepts do not overlap. . . But in the area of a joint enterprise for the acquisition of land (which may be, but is not necessarily, the matrimonial home) the two concepts coincide."[85]

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[76] Notwithstanding Ferguson's (1993) observation that: "[c]onceptually the constructive trust is closer to the resulting trust than to proprietary estoppel. Both constructive and resulting trusts are mechanisms whereby the conduct of the parties leads by operation of law to the creation of a proprietary interest. . . Estoppel is conceptually different."; *op. cit.*, 124.

[77] *Oxley* v *Hiscock*, *op. cit.*, para.71.

[78] See, for example, *Yaxley* v *Gotts* [1999]3 WLR 1217; *Chan Pui Chun* v *Leung Kam Ho* [2002]EWCA Civ 1075; *Jennings* v *Rice* [2002]EWCA Civ 159.

[79] *Grant* v *Edwards*, *op. cit.*

[80] [1987]ALJR 605.

[81] [1989]1 Ch 350; [1991]1 AC 107.

[82] On five occasions in his judgment in *Rosset*, Lord Bridge referred to a 'constructive trust or proprietary estoppel'.

[83] [1996]4 All ER 630.

[84] [1999]3 WLR 1217.

[85] *ibid.*, at 1227.

These statements are justifiable, and in all likelihood were motivated, by the fact that although constructive trusts and proprietary estoppel have different origins and histories, both depend on equity's treatment of claimants who have relied on an informal understanding that they were entitled to property legally held by another.[86] In *Oxley* v *Hiscock*, the Court of Appeal emphasised the common features of the common intention constructive trust and the doctrine of proprietary estoppel, as earlier identified in *Grant* v *Edwards*:[87] both are triggered by a claimant who, to the knowledge of the legal owner, acted in the belief that he or she had, or would obtain, an interest in land; both involve detrimental reliance on that belief, in both cases, equity acts on the conscience of the legal owner to prevent unconscionable actions. In short, that although: "[t]he two principles have been developed separately without cross-fertilization between them…they rest on the same foundations. . ."[88]

The decision of the Court of Appeal in *Oxley* v *Hiscock*, that the principles governing quantification of interests under common intention constructive trusts should, in the absence of evidence of a common intention as to shares, be determined according to what the court considered 'fair', shifted the common intention constructive trust closer yet to the doctrine of proprietary estoppel. Chadwick LJ concluded that: "[o]nce it is recognised that [this is] what the court is doing, in cases of this nature. . . it seems to me very difficult to avoid the conclusion that an analysis in terms of proprietary estoppel will, necessarily, lead to the same result. . ."[89] It is interesting to note that Chadwick LJ's decision was characterised by his concern to accurately reflect the court's process in the delineation of principles in this area, and to avoid the use of 'legal fictions'.[90] This matter-of-fact approach suggests an attempt to encourage greater pragmatism in family home trusts, an area that has long been characterised by doctrinal confusion and lack of coherence,[91] not least in relation to the quantification of interests, where the principles have been described as: ". . . uncertain, with decisions being made which are (not entirely surprisingly) inconsistent and difficult to reconcile."[92]

Nevertheless, and notwithstanding Chadwick LJ's statement that: ". . . it may be more satisfactory to accept that there is no difference, in cases of this nature, between constructive trust and proprietary estoppel.";[93] the merging of the doctrine has not been universally accepted. In *Sharing Homes*,[94] the Law Commission considered the case for assimilation before concluding

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[86] Caroline Sawyer has suggested that this area can be regarded as 'tiresomely confused rather than interesting'; see Walker J in *Yaxley* v *Gotts* [2000]Ch 162 at 176; *Birmingham Midshires Mortgage Services Ltd* v *Sabherwal* (2000)870 P&CR 256 at 263; Sawyer, C, 'Equity's Children – Constructive Trusts for the New Generation' (2004)16 *Child and Family Law Quarterly* 31, at n.13.

[87] [1986]Ch 638.

[88] *ibid.*, at 656.

[89] *Oxley* v *Hiscock, op. cit.*, para.66.

[90] See above, n.52 and associated text.

[91] See, for example, see Glover & Todd, 'The Myth of Common Intention' (1996)16 *Legal Studies* 325; Gardner, 'Rethinking Family Property' (1993)109 *LQR* 263.

[92] Law Com, *Sharing Homes: A Discussion Paper* (2002), para. 2.109.

[93] *Oxley* v *Hiscock, op. cit.*, para.66.

[94] *Op. cit.*, paras.2.101-2.104.

that: ". . . the extent to which proprietary estoppel and the common intention constructive trust overlap remains a difficult issue."[95] In *Hyett* v *Stanley*,[96] the Court of Appeal held that the doctrines had not yet been assimilated, while, in *Lalani* v *Crump Holdings*,[97] the court held that the doctrines remained distinguishable on the basis of the evidential standards applied: the standard of proof for a constructive trust was considered to be higher than that for proprietary estoppel.[98]

It is interesting to note that when English courts have favoured the idea of merging common intention constructive trusts with proprietary estoppel, it has tended to be on practical rather than doctrinal grounds: ". . . to solve the problems presented by these cases. . .";[99] particularly in relation to quantification, in order to: ". . . produce a just result."[100] In *Stokes* v *Anderson*,[101] Nourse LJ argued that: ". . . there is no real reason for thinking that their assimilation would be unduly hindered by their separate development out of basically different factual situations."[102] Nevertheless, in *Oxley* v *Hiscock*, in common with the other cases in which the case for assimilating the doctrines was advanced, the theoretical distinctions between the constructive trust and the proprietary estoppel were not considered, nor did the judgment address the potential implications of assimilation. Furthermore, although some of the theoretical distinctions can be attributed to their separate origins, the development of each doctrine, from those origins, along different paths remains significant. For example, while the constructive trust is focused on enforcing common intention, proprietary estoppel is focused on avoiding detriment. Also, and significantly for practical purposes, the common intention constructive trust arises by operation of law in circumstances of unconscionability: once the criteria have been satisfied, the trust arises automatically.[103] On the other hand, proprietary estoppel arises to enable a claimant who has suffered detriment following reliance on a representation by the defendant to seek a remedy.[104] While the constructive trust is 'institutional', so that the court recognises a property right that has arisen automatically, estoppel is remedial, and so operates at the discretion of the court.[105]

These distinctions are crucial when it comes to considering the interests of third parties in family property. The constructive trust gives rise to an automatic beneficial interest once the elements of the trust are in place, so that the claimant's rights may predate, and so may take priority over, claims on the property by third parties. In contrast, when a proprietary estoppel is established, the claimant acquires no more than an *inchoate equity* until the

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95 *ibid*, para.2.110.
96 [2003]EWCA Civ 942.
97 [2004]All ER (D) 181.
98 This proposition was earlier raised by Ferguson, *op. cit.* at 117.
99 *Stokes* v *Anderson*, *op. cit.*, at 399.
100 *ibid*.
101 *Op. cit.*
102 *Stokes* v *Anderson*, *op. cit.* at 399.
103 *In Re* Sharpe (A Bankrupt) [1980]1 WLR 219.
104 *Westdeutsche Landesbank Girozentrale* v *Islington* LBC [1996]2 All ER 961.
105 For an illustration of the breadth of that discretion, see *Pascoe* v *Turner* [1979]2 All ER 945.

court makes an award: consequently, with proprietary estoppel the remedy can be tailored to fit the wrong, and third parties will not be affected unless their conscience is affected by the estoppel claim.[106] While the facts of *Oxley* v *Hiscock* did not involve any third party interest, the assimilation of the common intention constructive trust with the doctrine of proprietary estoppel would raise significant issues where the claimant's interest vied for priority with that of a creditor or a trustee in bankruptcy. In such a case, it would be necessary for the court to consider more fully the implications of: ". . . accept[ing] that there is no difference, in cases of this nature, between constructive trust and proprietary estoppel."[107] Whilst the commonalities between the criteria for establishing an interest under each doctrine can be advanced to justify the assimilation of the principles by which interests arising are quantified, the nature of the interest arising under the constructive trust as compared with an estoppel are not the same.[108] Consequently, it is suggested that although the courts will welcome greater scope for flexibility and fairness in determining *quantum* under a common intention constructive trust, further matters, particularly concerning the stage at which the interest arises, and its standing vis-à-vis third parties, must yet be resolved before it is legitimate to conclude that 'there is no difference' between the constructive trust and proprietary estoppel.

CONCLUSIONS

The decision in *Oxley* v *Hiscock* can be welcomed on a number of grounds. Firstly, the Court of Appeal has brought a greater degree of clarity to an area of law that has been dogged by confusion, inflexibility and stalemate.[109] One of the persistent tensions in this area has been between the goals of certainty and flexibility. Since the landmark decision in *Lloyd's Bank Ltd* v *Rosset*,[110] which set strict criteria for the acquisition of interests in the family home under constructive trusts, the tendency of the English courts has been to veer towards certainty, and this was apparently endorsed in the English Law Commission's paper *Sharing Homes*,[111] when it suggested that any development of judicial principles should be directed at achieving: ". . . greater clarity, greater fairness, and greater certainty."[112] In a subsequent chapter, the Commission went on to argue, however, that the development of implied trusts in England should follow the direction of the Commonwealth

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106 See for example, *Binions* v *Evans* [1972] Ch 359.

107 *Oxley* v *Hiscock*, *op. cit.*, para. 66, *per* Chadwick LJ.

108 These issues were raised by Ferguson, op. cit., in her 1990 response to Hayton's argument in favour of the assimilation of constructive trusts and proprietary estoppel. Although Hayton argued that the development of a remedial constructive trust would obviate these difficulties, this has not yet occurred in English law: *Westdeutsche Landesbank Girozentrale* v *Islington LBC*, *op. cit.*, at 997, per Lord Browne-Wilkinson.

109 One need look no further than the English Law Commission's Home Sharers project, which concluded after nine years of inquiry that, although it recognised the flaws of the existing law, it had not managed to formulate proposals for reform or even consultation.

110 *Op. cit.*

111 Sharing Homes, *op. cit.*

112 *ibid*., para.2.114.

jurisdictions.[113] Although the Law Commission conceded that: ". . . [t]here is no doubt that the broader approach of these jurisdictions tends to lead to greater uncertainty and unpredictability than the current English law. . ."[114] it was suggested that: ". . . this may be a necessary consequence of fairness."[115] The focus on *fairness* in *Oxley* v *Hiscock* obviously enhances the flexibility of the law governing common intention constructive trusts, at least so far as the *quantum* of interests is concerned. This followed on the heels of the decision in *Le Foe* v *Le Foe*,[116] which purported to widen the criteria for the *acquisition* of an interest under an implied common intention constructive trust when Mostyn J, reading Lord Bridge's speech in *Rosset*, suggested that his Lordship: ". . . does not state the proposition he advances in absolute terms.";[117] but read a degree of flexibility into the criteria set out by Lord Bridge.[118]

The difficulties encountered by law reformers in this area[119] highlight the challenges associated with adopting a single system of property rights in relation to home sharers that can be said to: ". . . operate fairly and evenly across the diversity of domestic circumstances which are now to be encountered."[120] It has become increasingly clear that the courts, also, would welcome a greater degree of flexibility, enabling them to respond accordingly to the diverse facts and circumstances presented by contemporary family property disputes. Family home cases no longer follow a standard pattern of husband and wife (or even cohabitants) where the male provider – and property owner – works and pays the mortgage, while the female homemaker - the claimant - takes care of children and labours in the home. Modern litigation concerning trusts of the family home reflects contemporary social and family life, including diverse divisions of labour and responsibility for financial and non-financial matters,[121] and, significantly, a broad spectrum of claimants with varying awareness of the need to safeguard their interests within property sharing relationships. The courts are still faced with 'hard cases' – in *Le Foe* v *Le Foe*, the claimant had been married to Mr Le Foe for forty years, during which time he had made several fraudulent misrepresentations in order to re-mortgage the home without her consent, while hiving off funds to purchase another property for

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113 The report reviewed the law in Canada, Australia and New Zealand.

114 Sharing Homes, *op. cit.*, para.4.23.

115 *ibid*.

116 *Op. cit.*

117 *Le Foe* v *Le Foe*, *op. cit.*, para.43.

118 "In my view what Lord Bridge of Harwich is saying is that the second class of case to which he is adverting, namely where there is no positive evidence of an express agreement between the parties as to how the equity is to be shared, and where the court has fallen back on inferring their common intention from the course of their conduct, it will only be exceptionally that conduct other than direct contributions to the purchase price, either in cash to the deposit or by contribution to the mortgage instalments, will suffice to draw the necessary inference of a common intention to share the equity."; *ibid.*, *per* Mostyn J.

119 See n.4-6 and associated text.

120 *Sharing Homes*, *op. cit.*, para.1.31(1).

121 See R. Probert, 'Trusts and the modern woman – establishing an interest in the family home' [2001]13 *Child and Family Law Quarterly* 275.

himself and his mistress – and with what can be regarded as 'easier cases'. In *Oxley* v *Hiscock*, the claimant had made substantial financial contributions; she had been advised by her solicitor to secure her position by joint ownership but had refused this advice; and by the time the dispute arose the mortgage had been paid off, both partners had secured alternative accommodation, the disputed property had been sold, and there were no other debts secured on the property. Ultimately, the effect of the Court of Appeal decision was to reduce Mrs Oxley's share from 50% to 40% of the proceeds of sale, on the basis that, presuming they had contributed equally to the mortgage, her financial contributions would have amounted to approximately 38%.

Although *Oxley* v *Hiscock* could not be described as a 'hard case', the principles set out by the Court of Appeal will now, in the absence of an overruling judgment from the House of Lords, govern common intention constructive trusts pertaining to cohabitation. When 'harder' cases arise, as they inevitably will, the courts, and claimants, will welcome the greater degree of flexibility conferred by Chadwick LJ's 'fairness' criteria, which may help avoid the injustice that has often befallen non-legal title holders, particularly female partners, for whom a share of the property proportionate to their financial contribution does not amount to a fair result. *Oxley* v *Hiscock* provided a (relatively uncontroversial) opportunity for the Court of Appeal to consider the principles that should guide the courts in the future. It is unfortunate that the absence of a creditor enabled the court to avoid commenting on the implications of assimilating the constructive trust with proprietary estoppel on third parties. That, it must be presumed, is an issue which stands to be addressed in a 'hard case' in the future.

TRUST(S) AND INTENTION IN RESOLVING DISPUTES OVER THE SHARED HOME

Simone Wong, Lecturer, Kent Law School, University of Kent

INTRODUCTION

To date, the rights of unmarried home-sharers remain hotly contested, with cases like *Burns* v *Burns*[1] and *Lloyds Bank* v *Rosset*[2] being subjected to heavy criticism. There has been little political will to introduce reform in this area,[3] and disputes over the shared home continue to be resolved in England and Wales, as well as in Northern Ireland, under contract, property and/or trusts law, especially the common intention constructive trusts.[4] However, the common intention approach remains problematic because of the need for mutuality and its focus on direct financial contributions.[5] With the exception of a handful of cases such as *Hammond* v *Mitchell*[6] and *Midland Bank* v *Cooke*[7] where a more generous broad brush approach was taken, there is little evidence of any radical deviation from the test laid down by Lord Bridge in *Rosset*.

In 2002, the issue of property distribution on relationship breakdown was considered by the Law Commission[8] and the Law Society respectively.[9] Their foci were quite different, however, accounting for the contrasting approaches taken. The Law Commission's remit was wider in that it covered home-sharers, which extended to a wider range of relationships,[10] but

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[1] [1984] Ch.317.

[2] [1991] 1 A.C. 107. In that case, Lord Bridge sets out two conditions: firstly, common intention to share, whether express or inferred; and secondly, the claimant must have acted to her detriment in reliance on that common intention. Intention may only readily be inferred from direct financial contributions towards the purchase of the property.

[3] It should be noted that the Civil Partnership Bill (CPB), which provides a scheme for registering same-sex civil partnerships, was introduced to the House of Lords on 30 March 2004. The Bill was amended in the Lords to extend to family members in certain degrees of relationships. At the time of writing, the CPB has not completed its passage through Parliament. The Government has also undertaken to remove the amendments made in the Lords in order to revert the Bill to its original remit. If passed, the CPB would provide a property regime to registered same-sex couples only.

[4] *Lloyds Bank* v *Rosset*. For Northern Ireland cases, see *e.g. Re Wills (a Bankrupt)*, unreported, Ch. Div., 30 November 1992; *Britannia Building Society* v *Johnston*, unreported, Ch. Div, 13 May 1994.

[5] See, *e.g.*, Bottomley (1993) 20 J.L.S. 56; Eekelaar (1987) 51 Conv. 93; Gardner (1993) 109 L.Q.R. 263; Clarke (1992) 22 Fam. Law 72; Glover and Todd (1996) 16 L.S. 325; Lawson (1996) 16 L.S. 218; Halliwell (1991) 20 The Anglo-American Law Review 550; Wong (1998) 18 L.S. 369; Wong (1999) 7(1) F.L.S. 47.

[6] [1991] 1 W.L.R. 1127.

[7] [1995] 4 All E.R. 562.

[8] Law Commission, *Sharing Homes: A Discussion Paper* Law Com. No. 278 (2002).

[9] Law Society, *Cohabitation: The Case for Clear Law* (2002).

[10] Law Commission, *op. cit.*, n. 8 at para.1.1. The Law Commission stated that its review covered a broad range of people, including friends and relatives who

narrower since it focused only on property rights over the shared home. The Law Society, on the other hand, focused on cohabitation and the rights and obligations of cohabitees. Given the existing difficulties faced by cohabitees under the common law, the Law Society proposed a form of registration for same-sex relationships, leaving opposite-sex and unregistered same-sex cohabitation to be governed by a presumptive system. Its putative model provided courts with powers to make property adjustment orders by taking a "fair account" of the economic advantages and disadvantages of the parties.[11] By contrast, the Law Commission attempted a contributions-based property law model, which was ultimately rejected for a variety of reasons.[12] Moreover, notwithstanding the problems posed by the intention requirement and its focus on direct financial contributions, the Law Commission further concluded that intention remained relevant to the determination of disputes between home-sharers and that trusts law was sufficiently flexible to adequately deal with such disputes.[13]

However, the oft-cited reasons for rejecting the common intention approach are, firstly, the need for intention and secondly, for such intention to be "common". To overcome the existing difficulties, the Law Commission proposed the expansion of the range of qualifying contributions to found the necessary common intention.[14] It is submitted that such an expansion is simply a cosmetic way of resolving the difficulties surrounding the common intention approach. It fails to address the doctrinal issues that lie at the heart of the common intention approach and upon which the criticisms are based. For instance, while accepting that the parties' intention is important, the Law Commission does not grapple with the crucial question of how we should be thinking about "intention" and whether it should remain one "common" to both parties. It also prompts the question of whether "intention" is relevant to all, or only some, of the equitable doctrines applied in the resolution of these disputes. There presently appears to be some divergence between the common intention/rights-based approach and other remedy-based approaches such as estoppel and unconscionability, which has been adopted in Australia.[15]

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shared a home as well as unmarried and married couples (except on the breakdown of marriage).

[11] Law Society, *op. cit.*, n.9 at paras.101-102. The principle of "fair account" relied upon by the Law Society is in fact lifted from s.9(1)(b) of the Family Law (Scotland) Act 1985.

[12] Law Commission, *op. cit.*, n.8, Part III. Although the scheme provided for recognition of both financial and non-financial contributions, the Commission argued that the very nature of a contributions-based approach would bring about less flexibility, leaving courts with less discretion and room for manoeuvre than under the existing equitable doctrines.

[13] *ibid.*, at para.4.24.

[14] *ibid.*, at paras.4.25-4.26. The main difficulty lies with the qualifying contributions necessary for inferring an intention to share. The Law Commission stated that it should be equally possible to infer an intention where indirect, especially indirect financial, contributions to the mortgage had been made.

[15] A key difference between common intention and unconscionability appears to be the latter's focus on the presence of unconscionable conduct as the basis for equity's intervention and not on the parties' common intention to share.

The paper seeks to argue that because of the institutional nature of the trust, the resolution of property disputes under a rights-based approach is inextricably linked to intention. Intention in the remedy-based approach, on the other hand, may be, but is not always, relevant. Its evidential role varies: the significance of, and the way in which we think about, intention depends on whether one adopts a rights- or remedy-based approach. It is further argued that the requirement for mutuality of intention in the rights-based approach is misconceived and should be abandoned. The continued reference to "common intention" only serves to obscure the principles upon which the trusts are being imposed in these cases. The notion of "common intention" itself has to be deconstructed and reconceptualised so as to bring greater coherency to constructive trusts. Only then can we begin to develop a better understanding of the interrelationship between intention and contributions, and expand the range of qualifying contributions on a principled basis. To do this, the paper will draw upon the plethora of literature that has provided criticisms of the common intention requirement and seek to synthesise the various arguments that have been made, with a view to providing a more coherent and principled understanding of the role of intention in constructive trusts.

Rethinking Intention

Despite the criticisms levelled at the common intention approach, little attempt has been made by the courts to address them. Consequently, while some favour its retention with appropriate modifications to the definition of "common intention", others prefer its total rejection. The alternatives proposed, however, are often inclined towards a remedy-based approach.[16] For the reasons stated below, the abandonment of a rights-based approach would not be a good strategy. What is needed, rather, is greater clarity about the workings of a rights-based approach. In that respect, the Law Commission's conclusion on the importance of intention calls for a closer examination of the notion of intention and how we should be thinking about it under a rights- and a remedy-based approach.

The former will necessarily call for a narrower notion of intention because of the institutional nature of the trust. The pressing question is how that notion of intention should be formulated so as to enable the vindication of pre-existing rights, without resorting to the doctrinal confusion of *Rosset*. By contrast, a broader notion of intention can be accommodated in a remedy-based approach, since constructive trust relief is not an automatic response. This, then, raises three broad issues. The first is the wider question of whether intention should generally be relevant to the determination of beneficial ownership in a shared home. Secondly, if it is, the essence of intention and its exact role(s) needs to be specified and must be examined. This is particularly important for providing clearer distinctions between

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[16] *E.g.*, the Law Commission recommended widening the range of contributions that are capable of raising the inference of an implied intention to share. *cf.* Gardner, *op. cit.*, n.5 and Clarke, *op. cit.*, n.5, who favour rejecting intention. Gardner's alternative, however, is a modified form of unjust enrichment based on trust and collaboration. In adopting a restitutionary analysis, the imposition of a trust is clearly a remedial response rather than a vindication of pre-existing proprietary rights.

rights- and remedy-based approaches. Thirdly and relatedly, if a rights-based approach were to be adopted, does intention have to be 'common' to both parties?

Is intention relevant?

As a mechanism for vindicating rights, the role of intention in a rights-based approach goes to the very question of whether the claimant has acquired any pre-existing beneficial interest in the property. As such, intention plays a more substantial evidential role than merely establishing unconscionable conduct. Greater evidentiary demands are placed on intention as it is essential to the question of whether the claimant has acquired any share in the beneficial ownership in the property. As the Law Commission observes:

> "Intention is clearly important, as it would be wholly unsatisfactory if a person were to obtain a beneficial interest where it was made extremely clear that a particular contribution, by financial or other means, would not be met this way."[17]

The sticking point though is that, since *Rosset*, the courts have insisted on the mutuality of intention, leading many commentators to argue for the rejection of the intention requirement.

While Bottomley concedes that intention may be a "fragile thing", she nevertheless argues that it remains useful to determining beneficial rights over the family home. Intention, she argues, is sufficiently flexible to enable the specific circumstances of a particular individual, in a particular social context, to be taken into account and for injustice in individual cases to be addressed.[18] The problem thus lies in the courts' insistence on mutuality rather than on intention *per se*. More importantly, Bottomley stresses the attractions of the rights-based foundations of the common intention trust. As she explains, the rejection of a rights-based approach in favour of remedy-based narratives would risk slippage into a discourse of dependency and the kind of prejudices which have often been exhibited in judicial expectations of the "good wife".[19]

One obvious alternative would be a remedial approach and a compensatory model based on exchange and contribution. However, one danger of a remedial/compensatory model would be to encourage the award of remedies to women who are in relationships that seem most marriage-like and are perceived by judges as "good wives".[20] A rights-based approach, on the other hand, enables the parties to engage in a "rights" discourse which provides the potential for and engagement with the notion of equality. It is "a strong narrative in which we come to the court demanding a right rather than a remedy"; it enables us to engage in a "discourse of citizenship" which demands recognition of one's right to a share in the property.[21] This provides

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[17] Law Commission, *op. cit.*, n.8, at para.4.24.
[18] Bottomley, "Our Property in Trust: Things to Make and Do" in S. Scott-Hunt and H. Lim (eds.) *Feminist Perspectives on Equity and Trusts* (2001), Chap.12.
[19] See also Lawson, *op. cit*., n.5
[20] Bottomley, *op. cit.*, n.18, at p.282.
[21] *ibid.*, at pp. 282-283.

a more powerful litigation strategy than a remedy-based approach, which perpetuates the model of dependency. Seepage of equality rhetoric into judicial thinking can be seen in recent matrimonial cases like *White* v *White*,[22] *Cowan* v *Cowan*[23] and *Lambert* v *Lambert*.[24] The courts have stated that the exercise of their adjustive powers under the Matrimonial Causes Act 1973 should be guided by the principle of non-discrimination and the notion of substantive equality.[25] It remains unclear how far these principles are likely to extend to constructive trust cases. With the passage of the Human Rights Act 1998 (HRA), it is arguable that, as the emerging human rights culture develops, the courts may further build on the notion of equality when interpreting and applying the common law.[26]

By contrast, the adoption of a remedy-based approach is largely motivated by the difficulties associated with attempting to find an elusive "common intention". Doctrines such as unconscionability and estoppel are premised not on one or both of the parties' intention regarding the allocation of beneficial ownership, but on protecting against any unconscionable conduct that may arise if no recompense is provided. Constructive trust relief is thus a remedial response to unconscionable conduct. This then prompts the question of whether intention is obsolete in a remedy-based approach. It is submitted that intention is equally relevant but is substantively different from the intention called for in a rights-based approach. It serves to raise a presumption of the parties' reasonable expectations of sharing so as to establish evidence of unconscionable conduct.[27]

In unconscionability, "common intention" as understood in *Rosset* is clearly not a requirement. The doctrine aims at preventing one party from retaining the benefit of contributions made by the other party for the purposes of their joint relationship, which has subsequently failed without attributable blame.[28] It focuses on the defendant's conduct rather than his (or the parties') intention to share and on whether there is any unconscionable denial of the claimant's beneficial interest. Unconscionability therefore encompasses a broader notion of intention. Intention forms the platform for a twofold enquiry into, firstly, the way in which the parties structure their relationship (*i.e*. whether they *intended* the relationship to be a joint partnership) and, secondly, the underlying purpose of the parties' contributions (*i.e*. whether these are *intended* for their joint benefit). As Mason C.J., Wilson and Deane JJ. state in *Baumgartner* v *Baumgartner*:

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[22] [2001] 1 All E.R. 1.
[23] [2001] E.W.C.A. Civ.679.
[24] [2003] Fam. 103.
[25] Consequently, the non-financial contributions of the wife, *e.g*. domestic services, should not be discriminated against and given less weight than the financial contributions of the income-earning husband.
[26] The extension of the principle of non-discrimination and the notion of substantive equality may be particularly pertinent to the issue of gender bias in the *Rosset* test and its treatment of the indirect contributions in terms of giving rise to an inference of an implied intention to share. This particular point will be dealt with in more detail below.
[27] *Cf*. the rights-based approach, where intention, whether express or inferred, bears the higher burden of being a condition for the creation of a valid trust.
[28] *Muschinski* v *Dodds* (1985) 160 C.L.R. 583; *Baumgartner* v *Baumgartner* (1987) 164 C.L.R. 137.

> "[the parties' arrangement for the pooling of resources] was designed to ensure that their earnings would be expended for the purposes of their joint relation and for their mutual security and benefit. . . . In this context, it would be unreal and artificial to say that [the claimant] intended to make a gift to [the defendant] of so much of her earnings as were applied in payment of mortgage instalments." [29]

Thus, some sort of enquiry into the parties' intentions is necessary for ascertaining the presence of unconscionable conduct. There must be some evidence of an intention that the parties' relationship should be a joint partnership, which is supported by the pooling of, preferably financial, resources.[30] As Dal Pont observes, the focus on 'intention' is linked to the parties' reasonable expectations in relation to the pooling of resources and the rights they are to have in consequence.[31] Intention plays a presumptive role in that the presence of an intention to structure the relationship as a joint partnership will raise a presumption of a reasonable expectation to share in the benefits to be reaped from the pooling of resources. It also raises a further presumption that any contributions made are not intended to be a gift to the other party.

As such, unconscionability has the advantage of avoiding the artificiality of searching for a "common intention", which presupposes a meeting of minds by couples engaging in arm's length discussions at the outset to reach some "agreement, arrangement or understanding" about their proprietary rights in the property. Intention is nevertheless relevant as it impacts on the question of whether the defendant's conduct is unconscionable. It addresses the broader question of the nature of the parties' relationship and the treatment of their respective contributions to the joint partnership. This in turn facilitates the determination of whether there is any unconscionable retention of such contributions. The answer will be in the affirmative where the relationship is intended to be a joint partnership, thus triggering equity's intervention.

The relevance of intention in estoppel may be more obscure. Nield, for instance, argues that one important distinction between estoppel and (common intention) constructive trusts is the role of intention.[32] Reference to "common" intention in the latter accentuates the mutuality of the parties' intention, whether express or inferred.[33] By contrast, the orthodox understanding of estoppel is that the defendant's intention, unilateral or otherwise, is not relevant to grounding the claim. The defendant's unilateral

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[29] (1987) 164 C.L.R. 137 at 139.

[30] *Hibberson* v *George* (1989) 12 Fam. L.R. 725; *Tory* v *James* (1990) D.F.C. #95-095; *Public Trustee* v *Kukula* (1990) 14 Fam. L.R. 97. It should be noted that, in many of the cases, there had to be some pooling of financial resources for the claim to be successful. The lack of pooling of resources and the provision of purely domestic contributions have been less successful in grounding a claim: *Arthur* v *Public Trustee* (1988) 90 F.L.R. 203; *Bryson* v *Bryant* (1992) 29 N.S.W.L.R. 188.

[31] Dal Pont (1997) 16 Aus. Bar Review 46.

[32] (2003) 23 L.S. 311.

[33] As will be examined below, there is however some debate as to whether mutuality is indeed required.

conduct leading to the claimant's expectation of a share in the beneficial ownership of the property is sufficient. It is his inducement, coupled with the claimant's detrimental reliance, which forms the essential ingredients for giving rise to the claimant's equity. Equity will thus intervene to prevent the defendant from going back on his assurance to the extent necessary to do justice to the claimant.[34] This suggests a more limited role for intention in estoppel – the only role, if any, will be presumptive in nature and linked to the issue of unconscionable conduct. Intention may help raise a presumption of a reasonable expectation of sharing on the part of the claimant and a further presumption that her contributions are being made towards realising that expectation, rather than as a gift or a loan. In that case, intention acts as a bridge between the inducement generated and the claimant's detrimental reliance, which together construct unconscionable conduct. Given the relevance of intention, albeit in different ways, in both the rights- and remedy-based approaches, we then have to ask ourselves how we should be (re)thinking intention and the interrelationship between intention and contributions, and whether mutuality of intention is necessary.

(Re)thinking Intention and Contributions

A significant aspect of the rights-based approach is the institutional nature of the constructive trust imposed as vindication of the claimant's pre-existing beneficial interest in the property. By contrast, remedy-based approaches like unconscionability and estoppel are aimed at providing a remedy that is sufficient to compensate the claimant and satisfy her equity. As such, it is uncertain whether constructive trust relief, rather than monetary compensation, will be granted in every case. The remedy-based approach therefore does not call for as clear a proprietary nexus between contributions and specific assets as does the rights-based approach. Consequently, it is not illogical that, in the latter, something more is needed than merely establishing an equity. The claimant would need to show that there is an intention to hold the property on trust, whether express or implied, and for her to share in the beneficial ownership of the property under that trust.

Under orthodox trusts analysis, the intention to hold the property on trust is not necessary in all types of trusts. In express trusts, it is the settlor's intention to declare a trust that is central to the creation of a valid trust.[35] Intention equally has a role to play in resulting trusts. In the absence of evidence to the contrary, a presumed resulting trust will arise in favour of a claimant who makes direct financial contributions towards the acquisition of the property. The beneficial interest acquired will be proportionate to the contributions made.[36] Constructive trusts, on the other hand, are traditionally

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[34] *Greasley* v *Cooke* [1980] 1 W.L.R. 1306; *Coombes* v *Smith* [1987] 1 F.L.R. 352; *Banner Homes Group plc* v *Luff Developments Ltd* [2000] Ch. 372; *Gillett* v *Holt* [2001] Ch. 210; *Devlin* v *Northern Ireland Housing Executive* [1982] N.I. 337; *Norris* v *Walls* [1997] N.I. 45.

[35] *Knight* v *Knight* (1840) 3 Beav. 148 at p.173, *per* Lord Langdale M.R., where he stated that a valid trust would only arise where there were the "three certainties" – intention, subject matter and objects.

[36] These trusts are usually referred to as purchase money resulting trusts. See *e.g. Cowcher* v *Cowcher* [1972] 1 W.L.R. 425 (contribution towards mortgage repayments); *Springette* v *Defoe* [1992] 2 F.L.R. 388 (contribution by way of

seen as arising by operation of law. This implies, firstly, that the trust is imposed by the court based on established principles and not as a discretionary response; and secondly and more importantly, that the trust is not dependent on the parties' intentions. As Lord Browne-Wilkinson explains in *Westdeutsche* v *Islington B.C.*:

> "Equity operates on the conscience of the owner of the legal interest. In the case of a trust, the conscience of the legal owner requires him to carry out the purposes for which the property was vested in him (express or implied trust) or which the law imposes on him by reason of his unconscionable conduct (constructive trust)."[37]

Thus, under orthodox analysis, the parties' intentions are generally not relevant to the imposition of a constructive trust. Equity intervenes to enforce the trust because of the legal owner's conscience being affected,[38] rather than the presence of some intention to share.[39]

At first blush, this suggests that the *Rosset* trust creates two inconsistencies with orthodox analysis – not only is intention required for the imposition of a constructive trust, there must be mutuality of intention as well. It is, however, submitted that the only inconsistency in fact lies with the need for mutuality, not intention. The types of trusts being dealt with in *Rosset* in fact fall within the first category of cases noted by Lord Browne-Wilkinson. Glover and Todd, in their seminal piece, provide an excellent discussion on the question of whose intention is relevant to ground a claim for a beneficial share under the common intention trust. They argue that clearer distinctions should be made between intention, which can be unilateral, and *common* intention.[40] In focusing on mutuality, *Rosset* causes confusion between not only the different types of trusts but also between contract and trusts law. Firstly, it is unclear which one of two roles intention undertakes – that is whether it is an intention to declare a trust or the meeting of minds to create legal relations in contractual analysis. Secondly, the focus on direct financial contributions towards the acquisition of the property also bears similarities to the resulting trust analysis.

Consequently, the current conceptualisation of intention in *Rosset* makes it difficult to locate the precise role of intention within this type of constructive trust. By referring to "common" intention, the courts have confused the analysis of intention with a contractual analysis, where the parties must demonstrate a shared intention – a meeting of minds – to hold the property on trust. Some commentators take issue with not only the mutuality element

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discount in the purchase price); *Tinsley* v *Milligan* [1992] Ch. 310 and *Lowson* v *Coombes* [1999] Ch. 373 (contribution towards purchase price).

37 [1996] 2 All E.R. 961 at 988.

38 This basis for imposing a constructive trust is, to some extent, illustrated in cases such as *Eves* v *Eves* [1975] 1 W.L.R. 1338; *Grant* v *Edwards* [1986] Ch. 638; *Ridgeway* v *Murray* [1981] 7 N.I.J.B..

39 This approach can be seen in earlier cases, culminating in the narrower test adopted in *Rosset*. See *e.g. Pettitt* v *Pettitt* [1970] A.C. 777, *Gissing* v *Gissing* [1971] A.C. 886; *Mcfarlane* v *Macfarlane* [1972] N.I. 59; *Allied Irish Banks Ltd.* v *McWilliams* [1982] N.I. 156.

40 Glover and Todd, *op. cit.*, n.5, at pp.328-329.

but also with the intention element itself. Gardner, for instance, argues that intention is flawed as it focuses on the parties' thinking – something that is often absent and artificially constructed by the courts.[41] He therefore posits that doctrinal clarity can only be achieved by jettisoning intention and focusing instead on values such as trust and collaboration.[42]

Glover and Todd, however, argue that Gardner's reasons for rejecting the intention requirement are based on a narrow subjective conception of intention. In their view, an objective test is more appropriate as it focuses on whether a reasonable person would assume that the defendant's intention is to declare himself a trustee.[43] The excuses given are thus capable of being construed as statements of intention to hold the property on trust for both parties and as explanations for why the defendant is prevented from doing so.[44] This does not necessarily mean that any excuse or spurious statement will entitle the claimant to a beneficial interest under a constructive trust.[45] As Megarry J. states in *Re Kayford Ltd.*, ". . . the question is whether in substance a sufficient intention to create a trust has been manifested".[46] The defendant's statements or conduct must point to an irrevocable and immediate intention to hold the property on trust. This leads Glover and Todd to reject the mutuality requirement but not intention. As they explain:

> "what [the courts] should be looking for [under orthodox trusts analysis] is an intention to declare a trust, rather than to create a contract, for which common intention would obviously be necessary."[47]

"Intention to share" in these cases is therefore essentially an intention to declare a trust; the party whose intention is relevant will thus depend on the type of trust one is dealing with. In that respect, Glover and Todd argue that, in the first category of the *Rosset* trust, reference to an express intention suggests that the trust is in fact an express trust, which is unenforceable due to lack of writing.[48] It is, however, made enforceable as a result of the second condition of detrimental reliance by the claimant. This causes the defendant's conscience to be affected, thus triggering equity's intervention through the imposition of a constructive trust. The detrimental reliance requirement helps to carry the express trust outside the formalities

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41 *op. cit.*, n.5, at p.265.
42 *ibid.*, at p.286.
43 Glover and Todd, *op. cit.*, n.5, at pp.330-333.
44 See *e.g. Eves* v *Eves* (the excuse was that the plaintiff had not reached the age of twenty-one); *Grant* v *Edwards* (where the defendant claimed that it would prejudice her pending matrimonial proceedings); *Hammond* v *Mitchell* (where the defendant gave the excuse that the property had to be put in his name for tax reasons).
45 Moffat points out (at p.467) that common intention cannot be based on unarticulated assumptions of beneficial ownership and that the condition requires statements of a more specific nature. See Moffat, *Trusts Law: Text and Materials* (3rd ed., 1999).
46 [1975] 1 W.L.R. 279 at 282.
47 Glover and Todd, *op. cit.*, n.5, at p.328.
48 Law of Property Act 1925 (LPA), s.53(1)(b).

requirement and render it enforceable.[49] Accordingly, it is the defendant's intention that would be relevant.[50]

The second category (inferred intention), on the other hand, enables the claimant to acquire a beneficial interest by either a resulting or an express trust analysis. Glover and Todd argue that a presumed resulting trust analysis is apposite where the financial contributions are directly referable to the purchase of the property, *e.g.* payment towards the purchase price. Here it is the claimant's intention that is relevant; there is no need to establish either detrimental reliance or a constructive trust. However, they limit the use of the resulting trust to direct financial contributions towards the purchase price. Where other forms of direct and indirect contributions are made, they opine that the express trust analysis is more appropriate.[51] In their view, it has the particular advantage of ensuring that the claimant's interest is fixed rather than left variable at the outset. However, in seeking to ensure beneficial shares are fixed at the outset, the distinction which they make between different types of direct financial contributions causes their analysis to become narrower than is necessary. There is no dispute that where the claimant has made direct financial contributions towards the purchase of the property, she has at the minimum a beneficial interest under a resulting trust. But the provision of such contributions does not, and should not, preclude the possibility of an intention on the part of the defendant to hold the property under an express rather than a strict resulting trust.

Applying the same logic to other forms of direct contributions, it is arguable that payment towards the purchase price should be equally capable of being dealt with using the concept of an express trust. This is borne out in cases like *Midland Bank* v *Cooke*,[52] *Drake* v *Whipp*[53] and more recently, *Oxley* v *Hiscock*.[54] In all three cases, the courts held that the direct financial contributions made by the claimant undoubtedly gave her a beneficial share in the property under a resulting trust. However, the provision of such contributions may also be evidence of an intention to share for the purposes of a constructive trust, which arguably is the express/constructive trust that Glover and Todd allude to. This reasoning is not inconsistent with the general thrust of their defendant-centred express/constructive trust analysis. As such, it is the defendant's intention that is relevant and the claimant's contributions merely facilitate the inference of such an intention. The issue then turns on whether the relevant intention may be inferred from the claimant making such contributions.[55]

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[49] See LPA, s.53(2). *Rouchefoucauld* v *Boustead* [1897] 1 Ch. 196; *Bannister* v *Bannister* [1948] 2 All E.R. 133.

[50] *op. cit.*, n.5, at pp.329-334.

[51] *ibid.*, at pp.334-337. These include direct contributions such as a discount in the purchase price and payment of mortgage instalments, even though such contributions have been held to give rise to a resulting trust in cases like *Cowcher* v *Cowcher* and *Springette* v *Defoe*.

[52] [1995] 4 All E.R. 562.

[53] [1996] 1 F.L.R. 826.

[54] [2004] All E.R. (D) 48.

[55] A distinction should further be made between inferring intention and determination of the extent of the parties' respective beneficial shares pursuant to that intention. It should be noted that, with respect to the latter, the Court of

Leaving aside Gardner's objections to intention, his "trust and collaboration" approach may provide a useful basis for inferring intention in these situations. The presence of trust and collaboration may serve to raise the presumption of reasonable expectations to share the property as well as the defendant's (inferred) intention to hold the property for the benefit of both parties, rather than for his own individual benefit. The inclusion of values of trust and collaboration does not necessarily render intention, or the rights-based approach, redundant. This highlights a gap in Gardner's analysis where a shift to trust and collaboration leads to the substitution of a rights-based approach by a remedy-based (modified unjust enrichment) approach.[56] Such a move places the claimant in a potentially weaker position since the remedy to be awarded is subject to the court's discretion and may not necessarily be proprietary in nature. Glover and Todd's analysis, on the other hand, offers greater potential for rationalising the constructive trust as being rights-based rather than a remedial response. This conceptualisation of the role of intention will provide inroads to resolving the existing problematic relationship between intention and contributions.

Under the present *Rosset* formulation, there is little scope for considering indirect contributions, except as evidence of detrimental reliance. On shifting the analysis away from mutuality and focusing instead on whether there is an intention to declare a trust, clearer distinctions may be made between constructive and resulting trusts. Furthermore, the test for determining whether the requisite intention is present should not be based solely on a subjective test but, rather, on both a subjective and an objective test. The adoption of such an approach would provide greater scope for the consideration of direct and indirect contributions under an express trust analysis. Given that a constructive trust is imposed to protect against inequities arising from a defendant reneging on an express trust, the issue of whether intention may be inferred should not therefore be limited to direct financial contributions. While contributions should be referable to the intention to share, they need not provide as clear a link to acquisition of the property as in resulting trusts.[57] The extent to which intention may be inferred demonstrate the interplay between the relevant (objective) intention of the defendant and the making of contributions, whether direct or indirect, by the claimant. In such cases, the inference of an intention will depend on how the parties structure and organise their relationship, in particular the making of contributions, financial or non-financial. Arguably, Gardner's trust and collaboration approach might have some mileage here. It will enable us to move away from the referability rule and allow indirect

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Appeal in *Oxley* v *Hiscock* did not follow the broad brush approach taken in *Midland Bank* v *Cooke*. It was held that, where an intention may be inferred from the direct contributions made but there is no evidence of any discussion or agreement between the parties regarding the extent of their respective beneficial interests, the better approach is that their shares should be determined on the basis of what is fair having regard to the whole course of dealing between them in relation to the property. Consequently, in the absence of evidence to support an intention of equal sharing, a fair division resulted in the claimant in *Oxley* being awarded a 40% share, which was equivalent to the proportion of her financial contributions towards the purchase of the property.

[56] Gardner, *op. cit.*, n.5, at pp.283-286.

[57] Glover and Todd, *op. cit.*, n.5, at pp.338-339.

contributions to be taken into account in inferring the defendant's intention. On the basis of trust and collaboration, the way in which responsibilities and finances are organised by the parties will affect their reasonable expectations. This would provide a more realistic approach to addressing the question of whether there is, objectively, an intention for the shared home to be held on trust. More importantly, an evaluation of the parties' relationship from a trust and collaboration perspective provides the potential for the courts to adopt the principle of non-discrimination and the notion of substantive equality. This forms a fairer basis for determining the parties' intentions and reasonable expectations, one which will not discriminate against the party who undertakes a domestic role and the caring responsibilities in the relationship.

As has been argued elsewhere, while the HRA is unlikely to have direct horizontal effect in family property disputes, it will have some indirect horizontal effect.[58] This is likely to be in the form of the courts taking into account values such as equality and non-discrimination enshrined in the Convention. Judicial comments in cases like *White* v *White* that "there is no place for discrimination between husband and wife and their respective roles" and "whatever the division of labour chosen … or forced upon them by circumstances, fairness requires that this should not prejudice or advantage either party … relating to the parties' contributions"[59] may pave the way for the application of these principles in non-marital disputes over the shared home. With the emerging human rights discourse, the principles of equality and non-discrimination may provide further recognition of the need to reconceptualise the intention requirement. Future courts may possibly be more willing to give greater weight to the indirect financial and non-financial contributions of a claimant for the purposes of inferring intention. Again, we see the Family law courts taking a lead here. In *Le Foe* v *Le Foe*,[60] the court was willing to accept that the wife's indirect financial contributions to the mortgage was sufficient to give rise to an inference of a sharing intent.

CONCLUSION – THE WAY FORWARD

This paper has argued that there are still some advantages to retaining the rights-based/common intention constructive trust. Although some commentators strongly advocate the common intention trust be jettisoned in favour of remedy-based approaches such as unconscionability and estoppel, there are reasons for cautioning against such a move. Notwithstanding the weaknesses of the current formulation of the common intention constructive trust, one of its clear advantages is its institutional nature. A rights-based approach means that the trust reinforces the claimant's property rights and provides her with a proprietary remedy without having to rely on the discretion of judges. Remedy-based approaches, on the other hand, focus on the prevention of unconscionable conduct. The latter, at present, have the added advantage of flexibility in terms of taking into account indirect contributions. However, being remedy-based, there are the disadvantages of being subject to judicial discretion and unpredictability in terms of the

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58 Wong (2003) 11(2) F.L.S. 119.
59 [2001] 1 All E.R. 1 at 8-9, *per* Lord Nicholls.
60 [2001] All E.R. (D) 325.

outcome and the type of remedy to be awarded. Moreover, intention remains a relevant factor in some remedy-based approaches, for example unconscionability. But our understanding of intention in those situations is substantially different from that under a rights-based approach.

The key difficulties of the common intention approach lies in the confusion caused by *Rosset* and in its failing to clarify the different types of trusts at play in these cases and the role of intention in each of the separate situations. Thus, the Law Commission's proposed solution – an expansion of the qualifying contributions to enable the inference of an intention – addresses some of the difficulties posed by *Rosset* but fails to provide a defensible argument for retaining the intention requirement. What is needed is the reconceptualisation of intention so as to bring greater coherence to the existing equitable principles. In that respect, certain conclusions are made. Firstly, we should move back to an analysis which is more congruent with constructive trust principles. In that respect, the "common intention" label should be abandoned and the intention requirement in both categories of the *Rosset* trust should mainly focus on whether the defendant objectively intends to hold the property on trust. Here, the objective test should indicate an irrevocable and immediate intention to hold the property on trust. It is this that sets the constructive trust in these situations apart from those imposed in other situations such as unconscionability and estoppel. The trust is institutional and not remedial in nature, as it is premised on the defendant's intention to declare an express, albeit unenforceable, trust.

Secondly, once we accept that it is the defendant's intention that is generally the relevant intention, it provides greater scope for intention to be inferred from a wider range of contributions. Unlike cases dealing with resulting trusts, there need not be as strong a proprietary nexus based on direct financial contribution towards the purchase price. The inclusion of a wider range of contributions, whether direct or indirect, financial or non-financial, may also in part be led by the emerging human rights culture in the UK, with the courts being more willing to apply the principle of non-discrimination and the notion of substantive equality. These principles may be bolstered by values like trust and collaboration, which will encourage judges to view relationships more holistically and move away from the existing discriminatory treatment of non-financial, especially domestic, contributions.

Last but not least, the constructive trust arises as a result of the claimant having acted to her detriment in reliance on that objective intention, thereby causing the defendant's conscience to be affected and triggering equity's intervention. It is the fact that the defendant's conscience is affected that forms an essential aspect of the constructive trust and the factor that triggers equity's response in these cases. On its own, the defendant's intention to hold the property on trust is insufficient for the claimant to ground a claim since the trust would be nothing more that an unenforceable express trust by reason of the formalities requirement.

Once we begin to reformulate the constructive trust principles along these lines, it will not only pave the way for greater coherency but also remove much of the existing confusion between this rights-based approach and other equitable remedy-based approaches. Moreover, the resolution of disputes over the shared home need not necessarily be a choice of accepting, or rejecting, one approach over the other. Each has its merits and would serve

to provide claimants with alternative litigation strategies. A total abandonment of a rights-based approach, however, will cause claimants to lose a powerful litigation strategy which entitles them to a proprietary remedy as of right.