

# NORTHERN IRELAND LEGAL QUARTERLY

The Use Of International Law In The Domestic  
Courts Of The United Kingdom –  
The MacDermott Lecture (*Rabinder Singh QC*)

The House of Lords and the Shaping of the Supreme  
Court (*Mark Ryan*)

*Commorientes*, Joint Tenancies and the Law of  
Succession? (*John Mee*)

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(Case Note: *Chester v Afshar* [2004] 4 All ER 587)  
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The Mental Capacity Act 2005 (England and Wales) –  
A New Legal Framework for Decision-Making  
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## THE USE OF INTERNATIONAL LAW IN THE DOMESTIC COURTS OF THE UNITED KINGDOM

*Rabinder Singh QC*

*The MacDermott Lecture 2005\**

### Introduction

While international law might traditionally have been confined to regulating relations between States, its scope today is ever expanding. One example of that expansion is the extent to which – more and more – international law is being invoked before domestic courts by individuals, corporations and non-governmental organisations. Certainly international law remains by and large about the affairs of States, but it is also, and increasingly, aimed at non-State entities and individuals – whether because of international human rights treaties, environmental regulation, or international criminal law rules, to name but three developments since World War II.

In recent years the United Kingdom's courts have seen a number of high profile domestic cases involving international law arguments. We shall see that the courts' receptiveness to international law arguments has been mixed, and that the mixed reaction has revolved around the courts' concerns about two principal issues. The first is the question of international law's proper place in domestic law: that is, the extent to which it is correct to invoke international law in the first place. And to the extent that international law was correctly invoked in the case at hand, the second issue becomes relevant, namely, whether other considerations preclude the court from ruling on the questions that the international law arguments raise. The second issue might be described as being one of justiciability, and has tended to lead to the exercise of judicial restraint.

### The Proper Place of International Law in UK Domestic Law

Beginning with the first issue – the place which international law properly occupies within the domestic legal system – we must appreciate that international law, as a law made principally by and between States, does not provide norms that can be automatically pleaded before domestic courts. There are two main sources of international law: treaty law and customary international law. Parties in national courts have first to negotiate their way around various principles before they can safely call international treaties or customary international law into service in their domestic cases. The principles are varied and complex, but certain recent cases provide useful illustrations of the most important principles and help to explain the interaction of international law and domestic law.

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If we start with the classic source of international law – treaties – we see that treaties which the Executive enters into at the international level do not without more become part of our domestic law, and cannot be relied upon directly as sources of legal rights. This “dualist” position – as it is sometimes called – means that any rule or principle of international law can only have effect within the domestic legal system if it is expressly and specifically ‘transformed’ into municipal law by the use of an appropriate constitutional machinery, such as an Act of Parliament.<sup>1</sup>

The prerogative power of the Crown, which in the United Kingdom possesses the constitutional authority to enter into treaties, cannot be impugned by the courts.<sup>2</sup> The position is as Lord Oliver of Aylmerton described it in *J H Rayner v. Department of Trade and Industry*:

‘[A]s a matter of the constitutional law of the United Kingdom, the royal prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights on individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament. Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation’.<sup>3</sup>

A knock-on effect of what Lord Oliver has described is that while the treaty or its relevant provisions might be directly transformed by a specific statute – think for instance of how the rights in the European Convention on Human Rights have been ‘brought home’ by the Human Rights Act 1998<sup>4</sup> – it is the specific statute to which courts will thereafter give effect.<sup>5</sup>

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<sup>1</sup> See generally Malcolm Shaw, *International Law*, (2003) 5<sup>th</sup> Edition, p.129. Terminology may lead to confusion in this context: it has become commonplace for English lawyers to refer to the need for a treaty to be “incorporated” but international lawyers use the term “transformation” to contrast it with the doctrine of “incorporation”, which makes rules of customary international law automatically part of the common law and does *not* require enactment by Parliament: see further *Trendtex Trading v Bank of Nigeria* [1977] 1 QB 529, 554 (Lord Denning MR).

<sup>2</sup> See *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 418. The exercise of the prerogative power to enter into a treaty is considered beyond judicial review, so that the desirability of entering into a treaty cannot be challenged in the courts (see *R v Secretary of State for Foreign Affairs ex p Rees-Mogg* [1994] QB 552).

<sup>3</sup> [1990] AC 418, 550. See too *Halsbury’s Laws of England*, ‘War and Armed Conflict’, Vol. 49(1), 4<sup>th</sup> Edition, para.517.

<sup>4</sup> The text of the Convention rights are set out in Schedule 1 of the Human Rights Act 1998 and given effect largely by sections 3 and 6.

<sup>5</sup> See also the statement of Lord Hoffmann in *R v Lyons and Others* [2003] 1 AC 976, para.47, discussed immediately below: ‘[I]t is firmly established that international treaties do not form part of English law and the English courts have no jurisdiction to interpret or apply them . . . Parliament may pass a law which mirrors the terms of the treaty and in this sense incorporates the treaty into English law. But even then, the metaphor of incorporation may be misleading. It is not the treaty but the statute which forms part of English law’ (para.27). See also, in the context of an appeal from the Court of Appeal of Northern Ireland, *In re McKerr* [2004] 1 WLR 807, para.25 (Lord Nicholls of Birkenhead); para.48 (Lord Steyn); para. 63 (Lord Hoffmann); para.74 (Lord Rodger of Earlsferry); and para. 90 (Lord

The implications are important. Lord Hoffmann has said the following in *R v Lyons and Others*:<sup>6</sup>

“International law does not normally take account of the internal distribution of powers within a State. It is the duty of the State to comply with international law, whatever may be the organs which have the power to do so. . . . In domestic law, however, the position is different. The domestic constitution is based upon the separation of powers. In domestic law the courts are obliged to give effect to the law as enacted by Parliament. This obligation is entirely unaffected by international law.”<sup>7</sup>

The facts in *Lyons* concerned the convictions in the Guinness trial, convictions which had depended, to a large degree, on answers that the accused had given to DTI inspectors armed with statutory powers to compel answers. In two separate judgments the European Court of Human Rights held that their right against self-incrimination under Article 6 of the Convention had been violated; their trials were thereby rendered unfair. However, those judgments did not result in the quashing of the convictions. That is a matter for national law. The applicants, understandably, sought the quashing of their convictions, arguing that the English courts were organs of the state and therefore obliged to give effect to the state’s international obligations, in particular the obligation to give effect to a judgment of the European Court of Human Rights. The House of Lords disagreed. It held that the admissibility of the evidence which had been lawfully introduced against the defendants according to the domestic law at the time of their trial could not be impugned under the European Convention on Human Rights. Lord Hoffmann, while expressing admiration at the resourcefulness of counsel’s argument, held that its ‘foundations rest upon sand’. The statutory language governing the admission of the evidence was clear: it permitted no room for the application of international law standards.

The effect of this traditional dualist position regarding treaties is that there is very little room for the legal practitioner to draw upon the treaty in a municipal case.<sup>8</sup> Very little room, however, does not mean no room at all. So long as a statute does not clearly trump the application of international law, there are certain situations where an unincorporated treaty may still find its use in an advocate’s legal arsenal, by and large through its ‘indirect’ effect in domestic law. For a start, the presumption of compatibility in UK law secures a place for unincorporated treaties in the sphere of domestic law. There is a presumption that where there is an ambiguity, domestic law will be interpreted in a way which does not place the United Kingdom at odds

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Brown of Eaton-under-Heywood). *Cf. R (S) v Secretary of State for the Home Department* [2004] 1 WLR 219, para.66 (Lord Rodger of Earlsferry).

<sup>6</sup> [2003] 1 AC 976, para.47.

<sup>7</sup> Para.40.

<sup>8</sup> Note, however, that it has recently been suggested that the dualist approach may require “critical re-examination” in the context of human rights treaties: *In re McKerr* [2004] 1 WLR 807, para.50 (Lord Steyn).

with its international obligations. As Lord Bridge of Harwich explained in *Brind*:<sup>9</sup>

“[I]t is already well settled that, in construing any provision in domestic legislation which is ambiguous in the sense that it is capable of a meaning which either conforms to or conflicts with the Convention, the courts will presume that Parliament intended to legislate in conformity with the Convention, not in conflict with it.”

Subsequent developments suggested that ambiguity is in fact not needed but rather that there is a presumption that Parliament does not intend by general words to infringe human rights, in the absence of express language or necessary implication to the contrary. This is sometimes called the ‘principle of legality’: see *R v Secretary of State for the Home Department, ex p. Simms*.<sup>10</sup> Even now that the Human Rights Act is in force in the UK, this doctrine has a continuing role to play in relation to the numerous international human rights treaties which have been ratified but not incorporated by statute into domestic law, e.g. the 1989 UN Convention on the Rights of the Child. In the recent case of *A v Secretary of State for the Home Department*, in which the House of Lords held that the UK’s derogation from Article 5 of the ECHR was unlawful, Lord Bingham of Cornhill referred at length to international materials which he accepted were “not legally binding on the United Kingdom”<sup>11</sup> and yet which he found to be illuminating in answering the questions before the House. Such materials are sometimes called “soft law” and I predict that our higher courts will become increasingly receptive to their use in the future.

The presumption of compatibility may operate in various ways before the UK courts, whether to assist in clarifying the common law,<sup>12</sup> or in the interpretation of legislation,<sup>13</sup> or in determining the lawful remit of executive discretion.<sup>14</sup> And, in appropriate cases, the presumption allows for an unincorporated treaty to be used as a guide to UK judges of the correct path their decisions ought to take; that is, as an influence upon judicial discretion and in shaping the common law concept of “public policy”.

*Kuwait Airways Corporation*<sup>15</sup> may now be regarded as the leading authority on this subject. After its invasion of Kuwait on 2 August 1990, the Iraqi regime passed resolutions proclaiming Iraqi sovereignty over Kuwait. Upon seizing Kuwait Airport, Iraqi forces removed ten commercial aircraft belonging to Kuwait Airways Corporation and flew them to Iraq. Thereafter Iraq passed resolution 369 which purported to transfer ownership of the commercial aircraft to Iraqi Airways Company. Kuwait Airways

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<sup>9</sup> *R v Secretary of State for the Home Department ex p. Brind* [1991] AC 696 at 747.

<sup>10</sup> [2000] 2 AC 115, 131 (Lord Hoffmann).

<sup>11</sup> [2005] 2 WLR 87, para.63.

<sup>12</sup> See *R v Mid Glamorgan Family Health Service ex p. Martin* [1995] 1 WLR 110, 118 H, per Evans LJ.

<sup>13</sup> See *R v Secretary of State for the Home Department ex p. Venables* [1998] AC 407 at 499, per Lord Browne-Wilkinson.

<sup>14</sup> See *R v Secretary of State for the Home Department ex p. Norney* [1995] Admin LR 861 at 871, per Dyson J.

<sup>15</sup> [2002] 2 AC 883.

Corporation brought proceedings in England for return of the aircraft or payment of damages, and the matter came before the House of Lords. One of the defences raised by Iraqi Airways Company was that resolution 369 was to be recognised as a foreign ‘act of state’ – a governmental act affecting property which was recognised under Iraqi law – and which was to be respected. The manner in which Kuwait Airways Corporation responded to this defence was to rely on the UK’s obligations, pursuant to an unincorporated treaty, the UN Charter and its prohibition on the use of force, and the resolutions of the Security Council condemning the invasion of Kuwait as a breach of international peace and security. Lord Steyn’s description of the counter-argument by Iraqi Airways that no reliance could be placed on unincorporated treaties, was terse:

“Marching logic to its ultimate unreality, counsel for IAC submitted that the UN Charter and Security Council Resolutions are not incorporated into our law and must be disregarded.”<sup>16</sup>

Coming to the opposite conclusion, Lord Steyn held that it would be ‘contrary to the international obligations of the United Kingdom were its courts to adopt an approach contrary to its obligations under the United Nations Charter and under the relevant Security Council Resolutions’ and that it thus followed that ‘it would be contrary to domestic public policy to give effect to Resolution 369 in any way’.<sup>17</sup> In similar vein Lord Nicholls of Birkenhead said:

“The leading example cited in this country . . . is the 1941 decree of the National Socialist Government of Germany depriving Jewish émigrés of their German nationality and, consequentially, leading to the confiscation of their property. Surely Lord Cross of Chelsea was indubitably right when he said that a racially discriminatory and confiscatory law of this sort was so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all: *Oppenheimer v Cattermole* [1976] AC 249, 277-278. When deciding an issue by reference to foreign law, the courts of this country must have a residual power, to be exercised exceptionally and with the greatest of circumspection, to disregard a provision in the foreign law, when to do otherwise would affront basic principles of justice and fairness . . . Gross infringements of human rights are one instance . . . But the principle cannot be confined to one particular category of unacceptable laws.”<sup>18</sup>

The decision of the House of Lords on the “extraordinary facts”<sup>19</sup> in *Kuwait Airways* suggests that in certain cases litigants may indeed rely upon an unincorporated treaty as a source of international law before a domestic UK court, and that such a source acts as a guide to the development of judicial

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<sup>16</sup> Para.114.

<sup>17</sup> *ibid.*

<sup>18</sup> At 1078-1079.

<sup>19</sup> See the description by Janeen Carruthers and Elizabeth Crawford, “*Kuwait Airways Corporation v Iraqi Airways Company*”, (2003) 52 *ICLQ* 760 at 760.

policy. Of equal importance is the Court's stance on the question of justiciability, a vitally important topic to which I will return.

Having touched on the direct and indirect effect of treaty law in the domestic sphere, we now need to ask ourselves about that second source of international rules – customary international law. Customary international law consists of rules which are not to be found in treaties but arise from a combination of state practice and what is called *opinio juris* (a sense of obligation that the practice is required rather than just voluntary)<sup>20</sup>. What is the status of customary international law before domestic courts? English courts have since the 18<sup>th</sup> Century stated that customary international law is part of the common law.<sup>21</sup> This doctrine proceeds from the idea that international law is part of the municipal law automatically without the need for the interposition of a constitutional ratification procedure: therefore no Act of Parliament is required to transform it into domestic law. The most famous exposition of this stance is that of Blackstone, who declared in his Commentaries that:

“[T]he law of nations, wherever any question arises which is properly the object of its jurisdiction, is here adopted in its full extent by the common law, and it is held to be a part of the law of the land.”<sup>22</sup>

Strictly speaking, this statement is too wide because, as we have seen, it is not true of treaties. But as far as customary international law is concerned, the doctrine has been applied in numerous cases in England.<sup>23</sup> As such, the general rule<sup>24</sup> is that customary international law is part of the common law, and this then ‘provides lawyers a hook on which to hang their public international arguments’.<sup>25</sup>

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<sup>20</sup> See generally *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2005] 2 WLR 1, para.23 (Lord Bingham of Cornhill).

<sup>21</sup> *Triquet v Bath* (1764) 3 Burr 1478.

<sup>22</sup> “Commentaries”, IV, Chapter 5, cited in Shaw, *International Law*, (2003), 5<sup>th</sup> ed., p.129.

<sup>23</sup> See Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, 7<sup>th</sup> Revised Edition (1997), 69. However, it is worth noting that since English courts look largely to English judgments as the main evidence of international customary law, in practice there is somewhat of a blurring between the incorporation and transformation doctrines.

<sup>24</sup> There are a number of situations, however, which constitute exceptions to the general rule, and in which English courts cannot apply customary international law. For example, if there is a conflict between customary international law and an Act of Parliament or judicial decision, the English Act of Parliament or judicial decision prevails. However, where possible, English courts will interpret Acts of Parliament so that they do not conflict with customary international law (Malanczuk *op. cit.* 69). It is also accepted that English courts are probably free to depart from earlier judicial precedents laying down a rule of international law if international law has changed (see *Trendtex Trading Corporation v Central Bank of Nigeria*, [1977] QB 529).

<sup>25</sup> See Sam Wordsworth, “Public International Law in the English Courts”, p.1, available at <[www.oxfordlawsoc.com/files/verdict/MT03/Sam%20Wordsworth%20Art.doc](http://www.oxfordlawsoc.com/files/verdict/MT03/Sam%20Wordsworth%20Art.doc)>.

It goes without saying, however, that any alleged rule of customary law must be proved to be a valid rule of international law and not merely an unsupported assertion. As Lord Macmillan put it in *The Christina*,<sup>26</sup> for the courts to apply a rule of customary international law, it must have ‘attained the position of general acceptance by civilised nations as a rule of international conduct, evidenced by international treaties and conventions, authoritative textbooks, practice and judicial decision’.<sup>27</sup> So, in *Pinochet*, the House of Lords – while denying immunity to Senator Pinochet as a *former* head of state – nonetheless discerned sufficient evidence of state practice and *opinio juris* to conclude that under customary international law a state is entitled to expect that its *servant* head of state will enjoy a measure of immunity from the jurisdiction of the courts of other states.<sup>28</sup>

Of course, the evolving nature of customary international law and associated difficulties of proof provide at one and the same time an opening and a risk. Lawyers are provided with an opening to be creative in making arguments involving customary international law. But in the background is the attendant risk that such creativity will not be matched by the court’s conclusion on the status of the rule that has been called into service, or by the court’s willingness to go where no other court might have gone before. An example of this difficulty is provided by the *Abbasi* case – another decision which we shall return to in our discussion of justiciability. Mr Abbasi, a British national who was captured by US forces in Afghanistan, was until this year detained at Guantanamo Bay in Cuba. He and other detainees had found it impossible to obtain any relief before the US courts to establish definitively their status and to challenge continued detention. The applicants sought by judicial review in England to compel the Foreign and Commonwealth Office to exercise its international law power of diplomatic protection and to make representations on Mr Abbasi’s behalf to the US Government.

In respect of the diplomatic protection point, the applicants, while conceding that customary international law at the time of the hearing did not provide Mr Abbasi with a definitive right to diplomatic protection, argued that there was nothing preventing the Court from developing such a right within domestic law. Citing a range of sources which suggested that international law is moving towards the recognition of such a right, the applicants submitted, boldly, that ‘our municipal law should lead so that international law may follow.’ The Court of Appeal, however, balked at this task, and declared that ‘[i]t is clear that international law has not yet recognised that a State is under a duty to intervene by diplomatic or other means to protect a citizen who is

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<sup>26</sup> [1938] AC 485.

<sup>27</sup> At 497.

<sup>28</sup> *R v Bow Street Metropolitan Stipendiary Magistrate, ex p. Pinochet Ugarte (No. 3)* [2000] 1 AC 147. That finding has been affirmed by the recent decision of the International Court of Justice in its *Arrest Warrant* decision (*Democratic Republic of Congo v Belgium* [2002] ICJ Rep 8. See especially para.58 where the ICJ found that it was unable to deduce under customary international law ‘any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent [senior Government officials like Ministers of Foreign Affairs and Heads of State], where they are suspected of having committed war crimes or crimes against humanity’.

suffering or threatened with injury in a foreign State.’ As such, said Lord Phillips MR, ‘it does not seem to us that [the applicant] can derive any assistance from established principles of international law’.<sup>29</sup>

### Justiciability

Discussion of *Abbasi* brings me to the second issue confronting a lawyer in the UK when attempting to advance international law arguments before a domestic court. As I said earlier, even if international law is correctly invoked in the case at hand, other considerations may preclude the court from ruling on questions of international law. Two recent decisions – one of which is *Abbasi*, the other the *CND* case – paint the picture vividly. They reveal that the sensitive nature of foreign relations and national security weigh heavily with domestic courts when confronted with international law arguments.

In *Abbasi* we have seen that the applicants sought an order for diplomatic protection from the UK Government. In pressing this claim, the applicants put arguments before the Court of Appeal to show that the United States was in the process of violating their human rights and that, in the circumstances, the Foreign Secretary was under a duty under domestic public law to take positive steps to redress the position, or at least give a reasoned response to the request for assistance. One of the arguments raised by the Government was that the Court was being improperly asked to make a ruling on the legality of US conduct at Guantanamo Bay – in effect, a ruling which would find the United States to be acting in violation of international law. According to the argument for the Foreign Secretary<sup>30</sup> this would run contrary to the classic statement of judicial restraint made by Lord Wilberforce in *Buttes Gas & Oil v Hammer*.<sup>31</sup> Lord Wilberforce there stated that there is ‘a general principle that the courts will not adjudicate upon the transactions of foreign sovereign states’, and deemed it ‘desirable to consider this principle . . . [as] one of judicial restraint or abstention’.<sup>32</sup>

The Court of Appeal in *Abbasi*, in a progressive jurisprudential move, rejected the Government’s broad contention. It did so by relying first on the House of Lords’ judgment in the *Kuwait Airways* case,<sup>33</sup> which we have already encountered, and which updates the law on judicial restraint. A passage in the judgment of Lord Nicholls in *Kuwait Airways* identified the modern limits to the principle of judicial restraint. One of those limits, said Lord Nicholls in reference to the Iraqi invasion, is that the judiciary need not

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<sup>29</sup> *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2003] UKHRR 76, para.69. See also, in the context of action which was said to be taken to prevent a crime against peace (namely the invasion of Iraq in March 2003), *R v Jones (Margaret)* [2005] QB 259, where the English Court of Appeal (Criminal Division) held that there was no sufficiently settled definition of a crime of aggression under international law so as to be a “crime” in domestic law within the meaning of section 3 of the Criminal Law Act 1967. The case is due to be heard by the House of Lords in February 2006.

<sup>30</sup> See para.32 of the judgment.

<sup>31</sup> [1982] AC 888.

<sup>32</sup> *ibid.*, at 931.

<sup>33</sup> (*nos. 4 and 5*) [2002] 2 AC 883, para.26.

‘shut their eyes to a breach of an established principle of international law committed by one state against another when the breach is plain’.<sup>34</sup>

The Court in *Abbasi* went further by drawing on immigration law. In asylum cases, where the issue is often whether the applicant for asylum has a well-founded fear of persecution if removed to a third country, the Court pointed out that ‘consideration of the claim for asylum frequently involves ruling on allegations that a foreign state is acting in breach of international law or human rights.’<sup>35</sup>

The Court of Appeal was openly concerned about ‘Mr Abbasi’s predicament’ – in particular, the undisputed fact that Mr Abbasi was (at that time)<sup>36</sup> being denied access to court to challenge the legality of his detention. And it allowed itself an opening to review steps taken by the UK Government to relieve this predicament on the basis that ‘[i]n apparent contravention of fundamental principles recognised by both [the US and the UK] and by international law, Mr Abbasi is at present arbitrarily detained in a “legal black hole”.’<sup>37</sup>

*Abbasi* thus provides a foothold for a lawyer in the UK facing the mountain of judicial restraint. One senses the height of this mountain, however, from the eventual decision given. The Court of Appeal was sufficiently concerned about ‘Mr Abbasi’s predicament’ to find that he had a legitimate expectation that the Government would consider making representations to the United States. But beyond this, it would not go. On the facts it found that Mr Abbasi’s case had indeed been considered by the Foreign and Commonwealth Office, and, finding refuge on the top of the mountain, concluded as follows:

“On no view would it be appropriate to order the Secretary of State to make any specific representations to the United States, even in the face of what appears to be a clear breach of a fundamental human right, as it is obvious that this would have an impact on the conduct of foreign policy, and an impact on such policy at a particularly delicate time.”<sup>38</sup>

If there were any doubts about the continuing potency of the doctrine of judicial restraint, then the *CND* case<sup>39</sup> ought to lay them to rest. The decision, given in December 2002, relates to the controversial invasion of Iraq by US-led forces in March 2003, which was already widely anticipated; and involved an investigation by the courts of the legality of the proposed use of force by the Crown. The Campaign for Nuclear Disarmament brought an application against the Prime Minister and others, seeking a declaration on whether UN Security Council Resolution 1441 authorised states to take military action in Iraq. In the words of Simon Brown LJ:

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<sup>34</sup> Para.26, *Kuwait Airways*.

<sup>35</sup> At para.53.

<sup>36</sup> Now *cf. Rasul v Bush* 542 US – (2004).

<sup>37</sup> Para.64.

<sup>38</sup> Para.107(ii).

<sup>39</sup> *R (Campaign for Nuclear Disarmament) v The Prime Minister of the United Kingdom and Others* [2002] EWHC 2777 (Admin) (17 December 2002).

“In short, the court is being invited to declare that the UK Government would be acting in breach of international law were it to take military action against Iraq without a further Resolution. It is, to say the least, a novel and ambitious claim.”<sup>40</sup>

The international law that the applicant invoked before the Court was limited to customary international law, more specifically, the breach of the *ius cogens* norm outlawing the use of force in international relations. The term *ius cogens* refers to peremptory norms of international law which are so fundamental that they permit of no derogation by any state. Following from our earlier discussion about the proper place of international law within UK domestic law, this is significant. *CND*, anticipating that the Government would maintain that any use of force was authorised on the Government’s understanding of existing unincorporated Security Council resolutions, placed its reliance on customary international law. In this way *CND* was able to argue that its claim was based on a breach of law over which the Court had jurisdiction, since, as we have seen, customary international law is part of domestic law.

The Divisional Court rejected the application, and did so on two principal bases which appear to be interrelated. The first problem, said the Court, is that the applicants’ reliance on customary international law did not avoid the real problem at hand, namely, the proper interpretation of Resolution 1441 – an unincorporated international instrument. The Court concluded that the applicants sought ‘a ruling on the interpretation of an [unincorporated] international instrument, no more and no less’, and could not therefore ‘escape the rule which *Lyons* exemplifies by seeking to invoke the principle of customary international law.’<sup>41</sup>

The second problem, in the Court’s eyes, was that the issues raised in the case were not justiciable. With the question: ‘[h]ow could our assumption of jurisdiction here [to interpret unincorporated Resolution 1441] be regarded around the world as anything other than an exorbitant arrogation of adjudicative power?’<sup>42</sup> Simon Brown LJ disclosed what the Court saw as the real obstacle confronting the applicants. That obstacle was the ‘general rule’ that, ‘in the interests of comity, domestic courts do not rule on questions of international law which affect foreign states’.<sup>43</sup> The rule of non-interpretation of unincorporated international legal standards appears to look like more than a principle of judicial restraint and to be a rule of jurisdiction – at least in the sense that the court regards itself as having none.<sup>44</sup> And certainly this appears to be the case in the *CND* decision. The Court found itself declining to embark upon the determination of the issue because to do so ‘would be damaging to the public interest in the field of international relations, national security or defence’.<sup>45</sup>

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<sup>40</sup> Para.2.

<sup>41</sup> Para.37.

<sup>42</sup> Para.37.

<sup>43</sup> Para.38.

<sup>44</sup> Colin Warbrick, ‘International Law in English Courts – Recent Cases’, (2003) 52 *ICLQ* 815, 823.

<sup>45</sup> Para.47(ii).

The applicants had submitted that ‘the only proper course for government to take is to conduct its international relations openly in accordance with whatever advice it has received’, a view that Simon Brown LJ took to ‘represent a singularly utopian view of international affairs’.<sup>46</sup> Perhaps, as the world order is in danger of rupture following the deeply controversial Iraqi conflict, one of the goals will be to ensure that international relations are conducted more openly, and the pressure on governments, including our own, is mounting. Sir Franklin Berman, a former chief legal adviser to the FCO, is reported to have said the following in the context of the government’s refusal to disclose its full reasons for going to war:

“For a decision to go to war, especially when the government claims to be acting on behalf of the international community, they ought to explain in the necessary detail the basis on which they were acting.”<sup>47</sup>

As is well-known, the debate about disclosure of the advice given by the Attorney General as to the legality of the attack on Iraq in 2003 continues unabated. Professor Philippe Sands has recently published a book, *Lawless World*, in which he discusses the question at length and concludes that: “I suspect that the cloud will continue to hang over those most closely associated with the advice until it is published in full.”<sup>48</sup>

The decisions in *Abbasi* and *CND* reveal that, where there is evident tension between reliance on international law and the policy considerations relied upon by the Executive, domestic courts will not allow the international law arguments to resonate too loudly.

What are we to make of this self-imposed judicial caution? If one thinks back to our discussion of *Kuwait Airways*, and Lord Steyn’s willingness to have recourse to the unincorporated UN Charter’s prohibition on the use of force and the relevant Security Council resolutions in that case, it might be questioned why, for example, the Court in *CND* was so reluctant to do the same. Certainly the UN Charter’s prohibition on the use of force relied on by Lord Steyn reflects the same principle of customary international law that the court was asked to have regard to in the *CND* case.

One difference, it would seem, is that the House of Lords had not been asked to interpret the real meaning of the unincorporated instruments, while the judges in *CND* felt that that is precisely what was required of them in relation to Resolution 1441. What appears to have been crucial is the fact that in *CND* the application of international law prohibiting the use of force did not dovetail with the Executive’s policy considerations. In this light the House of Lords’ judgment in *Kuwait Airways* can also be more readily understood. The House of Lords knew that its decision would accord with the policy considerations of the Executive. One of those considerations, as

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<sup>46</sup> Para.45, *CND case*.

<sup>47</sup> The Guardian, ‘War QC sticks to his guns’, Monday, March 1, 2004, available at <<http://www.guardian.co.uk/guardianpolitics/story/0,3605,1159222,00.html>>.

<sup>48</sup> Philippe Sands, *Lawless World: America and the Making and Breaking of Global Rules* (2005), p.201. After this lecture was delivered, the text of the Attorney General’s advice of 7 March 2003 was released by the Government after extracts from it had been leaked and were published in the media.

expressed by Sir Franklin Berman (then FCO Legal Adviser) in a letter before the Court, was that the UK considered itself bound by the Security Council resolutions which condemned the invasion of Kuwait as a breach of international peace and security<sup>49</sup> – the Executive’s policy considerations were a mirror of the international law arguments pleaded before the House.

What is not clear then is whether lawyers in cases to come will achieve success with facts any less “extraordinary” than those in *Kuwait Airways* and involving international law arguments which chime any less with the Executive’s policy considerations. The best that might be hoped for is an ability to scale the mountain of judicial restraint in the appropriate circumstances. *Abbasi* as we have seen provides something of a foothold. A domestic court is free to express a view in relation to what it conceives to be a clear breach of international law, particularly in the context of human rights.<sup>50</sup> But even in *Abbasi* the lawyers failed to scale the mountain face in respect of their request. More disconcertingly, the *CND* decision suggests that climbing might not even be worth the effort.

In the national context, courts readily accept that they are the guardians of the domestic law and the constraints it places on government action, even in the face of national security considerations the Executive might advance. As Colin Warbrick has recently pointed out: ‘however difficult an adverse judgment might be for the execution of the government’s chosen policy, the court will not decline to give its judgment and will expect it to be followed.’ Lord Steyn has had recent occasion to highlight this role for the courts in the context of the detention of prisoners at Guantanamo Bay.<sup>51</sup> Speaking extra-judicially about the terrible injustices in modern times that national governments have ‘perpetrated in the name of security on thousands who had no effective recourse to law’,<sup>52</sup> Lord Steyn stressed that ‘instinctive trust in public servants, executive or judicial, has been replaced by a culture requiring in principle openness and accountability from all entrusted with public power’.<sup>53</sup>

But in the realm of international law and foreign policy, things appear so far to be different. And where international law and government’s foreign policy do not openly mirror each other, the mountain of judicial restraint takes shape. The effect of this edifice, it appears to me, is that the constraints of international law stand the risk of being sacrificed on the altar of government’s chosen policy, no matter how bad, ill-conceived, or partisan that policy might be. In Professor Warbrick’s words:

“[I]t appears that the judges in *CND* took the position that international law is a part of the process of international relations, not a fetter upon it. While the judgment does not go quite so far as to say that the government needs the freedom to

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<sup>49</sup> See para.114, *Kuwait Airways*.

<sup>50</sup> Para.57, *Abbasi*.

<sup>51</sup> See Johan Steyn, “Guantanamo Bay: The Legal Black Hole” (2004) 53 *ICLQ* 1.

<sup>52</sup> At p.2.

<sup>53</sup> At p.5.

act contrary to international law, it does take a robust view of how international law works in the service of policy.”<sup>54</sup>

Professor Warbrick’s words allow me an opening to express some of my own opinions surrounding this question. I believe that we should be wary of allowing international law to be subservient to the demands of national security or the conduct of foreign affairs. The demands of international law should ordinarily come before the demands of comity, which may otherwise be a cloak for *realpolitik*; and international law should provide the framework of rules within which international relations are conducted. While other countries might allow or believe otherwise, international law ought to be a fetter on the way the UK conducts its foreign affairs. To believe otherwise is to place the type of ‘instinctive trust’ in public servants, executive or judicial, that Lord Steyn was talking about in the context of domestic policy. I think the time may have arrived for us to strive also for a culture of openness and accountability in the international context, and to use the courts to interrogate whatever instinctive trust may remain in those entrusted with public power in the field of foreign policy and international relations.

### The Future

Let me look towards the future. The Iraq war and the subsequent occupation of Iraq remain the most high profile sources of litigation that domestic courts have to confront. Two examples may suffice.

The first relates to the very issue that was at the core of the *CND* decision – the legality of the war. In cases involving protestors in Southampton Magistrates’ Court and Bristol Crown Court rulings have been made applying the *CND* decision even to criminal charges brought against individuals who wished to argue that they acted as they did to prevent an illegal war. In the judgment of Grigson J, given at Bristol Crown Court in the case of *R v Pritchard and others* (12 May 2004), it was held that the principle of non-justiciability in *CND* applies even where a domestic court has to decide whether or not a defendant has a defence available to a criminal charge. The Court of Appeal (Criminal Division) dismissed an appeal in July 2004.<sup>55</sup> However, it did say:

“There is, it seems to us, considerable force in the argument that the *CND* case does not, in itself, provide the answer to justiciability in the present case . . .”<sup>56</sup>

The second type of case to come before the courts has been brought by the families of Iraqi civilians killed by British soldiers.<sup>57</sup> The Divisional Court

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<sup>54</sup> Colin Warbrick, ‘International Law in English Courts – Recent Cases’, (2003) 52 *ICLQ* 815, 824.

<sup>55</sup> *R v Jones (Margaret)* [2005] QB 259. The case is due to be heard by the House of Lords in February 2006.

<sup>56</sup> Para.14 (Latham LJ, giving the judgment of the Court). Another case, decided by the Divisional Court after this lecture was delivered, also considered similar legal issues: *Ayliffe v DPP* [2005] EWHC 684 (Admin) (21 April 2005).

<sup>57</sup> See The Independent, ‘Britain on trial for Iraqis killed by its troops’, 1<sup>st</sup> March 2004, available at <[http://news.independent.co.uk/low\\_res/story.jsp?story=496536&host=3&dir=60](http://news.independent.co.uk/low_res/story.jsp?story=496536&host=3&dir=60)>.

heard six test cases last year in which three preliminary issues arose: (1) whether the ECHR applied to British forces in Iraq in the circumstances of those cases; (2), whether the HRA applied; and (3) if so, whether the procedural obligation under Articles 2 and 3 of the ECHR to conduct an investigation into deaths and alleged torture which may have been caused by state agents was breached in those cases. Judgment was given on 14 December 2004.<sup>58</sup>

The Divisional Court held, first, that only one of the cases before it fell within the jurisdiction of the UK, the case of Mr Mousa, on the ground that he was detained by British forces in a prison and so there was sufficient control over him to bring him within their jurisdiction. The Court held, secondly, that Mr Mousa's case also fell within the scope of the Human Rights Act, which to that extent does have some extra-territorial effect. Thirdly, the Court held that there had been a breach of the procedural obligation in Articles 2 and 3 in that there had not been an adequate and timely investigation of his alleged torture and killing by British soldiers. I hope I summarise the decision fairly if briefly but I will not comment on it in detail because the case is going to the Court of Appeal. For present purposes, what is of interest is that the Court was inevitably required to adjudicate on intricate questions of international law relating to the concept of a state's "jurisdiction" because that is the concept used in Article 1 of the ECHR.<sup>59</sup>

These examples illustrate the contemporary relevance of international law issues in UK courts. They also illustrate, as do the other cases I have spoken about, the importance of the issues at stake. Democracies face threats to national security, and controversial decisions about foreign policy are taken all the time. In the climate of our extraordinary times, however, it is not only our security and questions of foreign policy that are at issue. At issue also is the very nature of our democracy and its response to acts of war and international terrorism. Speaking of the outrage against international and human rights law that Guantanamo Bay represents, Lord Steyn asked whether our government ought to make plain publicly and unambiguously the utter lawlessness at Guantanamo Bay. To Lord Steyn the answer might be found in John Donne's famous vision of no man being an island unto itself – where 'any man's death diminishes me, because I am involved in Mankind'.<sup>60</sup>

Certainly, for effect to be given to this vision then comity and the precarious nature of international relations must in principle remain subservient to the demands of justice and the standards set by the world's law. And while Lord Steyn's challenge is limited to the UK government and its politicians, the difficulty remains for lawyers, once they have correctly invoked applicable international law in UK courts, to convince judges that the challenge is one that applies also to the judiciary.

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<sup>58</sup> *R (Al Skeini) v Secretary of State for Defence* [2005] HRLR 3.

<sup>59</sup> Note that, although Article 1 itself is not included in Sch.1 to the Human Rights Act 1998, the Divisional Court considered that it was relevant to the scope of the Act.

<sup>60</sup> Johan Steyn, "Guantanamo Bay: The Legal Black Hole", (2004) 53 *ICLQ* 1, 15.

As Lord Hoffmann said in *Rehman*, “it is important neither to blur nor to exaggerate the area of responsibility of the executive” and the courts may have to decide “issues which at no point lie within the exclusive province of the executive.”<sup>61</sup> I would suggest that questions of pure law, as opposed to the merits of a policy, are for the courts and certainly not within the exclusive province of the executive.

### **Why does international law matter in the present context?**

I would like to try to answer the question as follows:

- (a) It matters to governments, which say that they wish to comply with international law and that they are doing so – that has certainly been the position of the British Government in relation to the Iraq war of 2003. In a democracy they should be accountable for that view.
- (b) It matters to our armed forces – who are well-disciplined and trained to comply with the law, including international law. It has emerged that in the week leading up to the invasion of Iraq in March 2003 Lord Boyce (then Chief of the Defence Staff) required firm reassurance from the Attorney General that the invasion would be lawful. As Professor Sands puts it in his recent book, Lord Boyce “wanted to be sure that military chiefs and their soldiers would not be ‘put through the mill’ at the International Criminal Court.”<sup>62</sup>
- (c) It matters to the public – for example, opinion polls suggested that many people wished to see a UN resolution clearly authorizing the use of force on Iraq (the so-called “second resolution”) before the UK took part in any invasion. That may not be enough for some people, who would still have doubted the morality or political wisdom of attacking Iraq, but at least it would have been a good start.
- (d) It matters because we should live up to our own standards. If we do not, we simply give sustenance to those who believe that the rule of law is a sham which is used by Western powers to cloak the naked use of power. Defiance of the law encourages others around the world to use violence too. This is dangerous in an increasingly dangerous world.

I can do no better than to end with a quotation from an American judge, Justice Brennan, who was a judge for many years on the US Supreme Court and said:

“Mutuality . . . serves to inculcate the values of law and order. By respecting the rights of foreign nationals, we encourage other nations to respect the rights of our citizens. Moreover, as our Nation becomes increasingly concerned about the domestic effects of international crime, we cannot forget that the behavior of our law enforcement agents abroad sends a powerful message about the rule of law to individuals everywhere. As Justice Brandeis warned in *Olmstead v United States* 277 US 438 (1928):

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<sup>61</sup> *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153, para.54.

<sup>62</sup> Philippe Sands, *op. cit.*, p.197.

‘If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. . . .’ *Id.*, at 485 (dissenting opinion)

. . . If we seek respect for law and order, we must observe these principles ourselves. Lawlessness breeds lawlessness.”<sup>63</sup>

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<sup>63</sup> *Verdugo-Urquidez*, 494 US 259 (1990) at 285.

## **THE HOUSE OF LORDS AND THE SHAPING OF THE SUPREME COURT**

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### **ABSTRACT**

*The Labour Government, since assuming power in 1997, has undertaken a significant legislative programme of reform which has reshaped the United Kingdom's uncodified constitutional arrangements. These changes have embraced, inter alia, freedom of information, devolution, human rights and the partial reform of the House of Lords. In relation to the latter, although the Government's protracted attempt at fully reforming the second chamber has faltered in recent times, it has however, been singularly more successful in reforming the judicial aspect of the House with the recent passage of the Constitutional Reform Act 2005. This legislation represents a watershed in terms of the judicial arm of the constitution, with the most significant element of it undoubtedly being the structural reform of the final court of appeal. In essence, the Act makes provision for the establishment of a Supreme Court of the United Kingdom together with the removal of the Law Lords from the House of Lords. As the dual constitutional position of the Law Lords (forming part of both the judiciary and legislature) has been one of the enduring and historic hallmarks of the constitution, this reforming measure did not pass through Parliament without considerable controversy and highly contentious debate. The constitutional significance of the Constitutional Reform Act 2005 should not be underplayed, and it is arguable that in terms of the judiciary, this is the most important legislation since the Act of Settlement was passed three hundred years earlier.*

### **Introduction**

The Constitutional Reform Bill<sup>1</sup> was introduced in the House of Lords in February 2004 where it was comprehensively examined until December 2004. Thereafter, the Bill passed comparatively expeditiously through the House of Commons and secured the royal assent on the 24<sup>th</sup> March 2005. The rationale behind this measure was to continue the process of modernising the United Kingdom's uncodified constitution and to realign it so that it further accorded with the doctrine of the separation of powers. The original main elements of the Bill, as introduced in February 2004, comprised the following: Part 1 (now Part 2 of the Act) proposed to abolish the constitutional office of the Lord Chancellor, a position which historically has infringed the separation of powers with the Lord Chancellor

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<sup>1</sup> HL Bill 30, 2003-04.

simultaneously assuming legislative, executive and judicial<sup>2</sup> roles. Part 2 (now Part 3) proposed the creation of a Supreme Court to replace the Appellate Committee of the House of Lords (hereafter the Appellate Committee). Part 3 (now Part 4) provided for the establishment of a statutory Judicial Appointments Commission to be responsible for recruiting and selecting judges in England and Wales, and which subsequently would then be subject to ministerial approval. The provisions of the Bill, were therefore, of seminal constitutional importance as they proposed to reform fundamentally, key and historic hallmarks of the United Kingdom's constitution.<sup>3</sup> Although the measure as a whole has generated a vigorous and impassioned debate, the purpose of this article is to consider Part 3 of the Constitutional Reform Act 2005, which will establish a Supreme Court. In particular, in view of the scrutiny and amendment of the Bill's provisions in the second chamber, attention will focus largely on the passage of the legislation through the House of Lords.<sup>4</sup>

### The Chronology of Reform

The antecedents of Part 3 of the Constitutional Reform Act 2005 (hereafter the Act) can be traced to the Government's announcement in June 2003 of its intention to consult on the creation of a Supreme Court for the United Kingdom.<sup>5</sup> It has, however, been suggested that it is difficult not to perceive these proposed reforms as "the product of policy making on the hoof."<sup>6</sup> In fact, the policy behind the creation of a Supreme Court could hardly be characterised as a long term policy commitment given that, for example, on the 10<sup>th</sup> June 2002 the previous Lord Chancellor, Lord Irvine of Lairg, made it clear in a written reply to Lord Lester of Herne Hill that the Government was not persuaded that a sufficient case for the abolition of the Law Lords,

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<sup>2</sup> It should be remembered that Lord Falconer of Thoroton, on assuming the office of Lord Chancellor in June 2003, indicated that he would not sit in a judicial capacity.

<sup>3</sup> In fact, Andrew Le Sueur has stated that it "was difficult to overestimate the significance" of these changes: A. Le Sueur, "Judicial power in the changing constitution" in J. Jowell and D. Oliver (eds.), *The Changing Constitution* (5<sup>th</sup> ed., Oxford, 2004), p.344.

<sup>4</sup> This article draws upon a number of points made in my written submission in April 2004 to the House of Lords Select Committee on the Constitutional Reform Bill which was subsequently published in July 2004 as part of its volume of evidence: *Constitutional Reform Bill [HL] Volume 2: Evidence* HL Paper 125 – II (2004), pp.401-402.

<sup>5</sup> There is various literature on a Supreme Court and final courts of appeal which include the following: A. Le Sueur (ed), *Building the UK's New Supreme Court: National and Comparative Perspectives* (Oxford: 2004), A. Le Sueur and R. Cornes, *The future of the United Kingdom's highest courts* (London: The Constitution Unit, 2001), R. Cooke, "The Law Lords: An endangered heritage" (2003) 119 *L.Q.R.* 49, A. Le Sueur and R. Cornes, "What do the top courts do?" (2000) 53 *C.L.P.* 53, R. Cornes, *Reforming the Lords: the Role of the Law Lords* (London: The Constitution Unit, 1999) and a special issue of *Legal Studies* focusing on the creation of a Supreme Court: Constitutional innovation: the creation of a Supreme Court for the United Kingdom; domestic, comparative and international reflections (2004) 24 *L.S.*

<sup>6</sup> A. Le Sueur, "The conception of the UK's New Supreme Court" in A. Le Sueur (ed.), *Building the UK's New Supreme Court: National and Comparative Perspectives* (Oxford, 2004), p.5.

and their replacement with a Supreme Court, had been made out.<sup>7</sup> More importantly from a constitutional perspective, Andrew Le Sueur has argued that in the context of the rather haphazard fashion of the announcement of the Government's reforms "the *process* of constitutional change – especially where the independence of the judiciary is at stake – is as important as the end result. It was not an encouraging start."<sup>8</sup> Nevertheless, in July 2003 the Department for Constitutional Affairs issued a consultation paper on the Government's proposals to replace the Law Lords with a Supreme Court.<sup>9</sup> Although the paper invited responses to a series of questions concerning the Supreme Court (including an invitation for respondents to raise other points or make additional comments considered relevant), the consultation process itself was open to criticism on the basis that it was clearly premised on the assumption that the policy of a new Supreme Court had already been established and accepted. Consequently, the consultative process was somewhat circumscribed as it essentially focused on the mechanics of the responsibilities and form of the Supreme Court (for example, the number of judges and their appointment). Thereafter, on the 26<sup>th</sup> November 2003 it was announced in the Queen's Speech<sup>10</sup> that the Government intended to bring forward proposals to establish a Supreme Court together with provisions to abolish the office of the Lord Chancellor and to reform the system of judicial appointments (collectively, these elements were later to form the original draft of the Constitutional Reform Bill).

On the 26<sup>th</sup> January 2004 Lord Falconer of Thoroton – the Secretary of State for Constitutional Affairs and Lord Chancellor – announced in Parliament details of a *Concordat* that had been reached with the Lord Chief Justice, Lord Woolf (acting on behalf of the judiciary), in respect of the Lord Chancellor's judiciary-related functions (on the basis of the office of the latter being abolished under the Bill).<sup>11</sup> This *Concordat* is a constitutional watershed and has been described by Lord Woolf as "a remarkable document".<sup>12</sup> Its aim was to clarify and specify in writing the partnership and constitutional framework between the executive and the judiciary and, in particular, to safeguard the latter's independence.<sup>13</sup> The proposals contained within the *Concordat* included, *inter alia*, the handling of judicial complaints, discipline and training together with the clarification of the respective constitutional roles of the Secretary of State for Constitutional Affairs (the '*Minister*') and Lord Chief Justice (the latter to assume the role of the Head of the Judiciary in England and Wales). Shortly afterwards, on the 9<sup>th</sup> February 2004, Lord Falconer made a second Formal Statement to the House of Lords in which he set out a synopsis of the Government's proposals for the creation of a "new United Kingdom Supreme Court."<sup>14</sup> These

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<sup>7</sup> HL Official Report vol.636 WA 3 10 June 2002.

<sup>8</sup> *Supra*, n.6 at p.6.

<sup>9</sup> *Constitutional reform: a Supreme Court for the United Kingdom* CP11/03 (2003).

<sup>10</sup> *Her Majesty's Most Gracious Speech to both Houses of Parliament* (2003), p.2.

<sup>11</sup> HL Official Report vol.657 cols.12-17 26 January 2004.

<sup>12</sup> H. Woolf, 'Shaping the Future' at <<http://www.dca.gov.uk/judicial/speeches/Icj141004.htm>> (Last visited 3 January 2005).

<sup>13</sup> The details of the *Concordat* were set out in Appendix 6 of the House of Lords Select Committee on the Constitutional Reform Bill: *Constitutional Reform Bill [HL]: Volume 1: Report* HL Paper 125-I, (2004), pp.202-224.

<sup>14</sup> HL Official Report vol. 657 col. 926 9 February 2004.

provisions were subsequently to be published as Part 2 of the Constitutional Reform Bill (now Part 3 of the Act). The next day, the House of Commons Constitutional Affairs Committee (hereafter the Constitutional Affairs Committee) rather propitiously published the report<sup>15</sup> of its inquiry into the Government's proposed reforms. It is pertinent to note in its conclusion that in view of the complexity of the issues raised by these reforms it recommended "that the Government proceed with the Constitutional Reform Bill on the basis of its being draft legislation – in particular in respect of the proposals for a new court of final appeal."<sup>16</sup> (sic).

On the 24<sup>th</sup> February 2004, the Constitutional Reform Bill 2004<sup>17</sup> (hereafter the Bill) received its First Reading in the House of Lords. In fact, it is of interest to point out that the Bill, as originally drafted, comprised 104 clauses together with 15 schedules which were detailed in 212 pages, thereby indicating the extent, scale and complexity of these proposed constitutional changes. Shortly before the Second Reading of the Bill (which itself took place on the 8<sup>th</sup> March) Lord Woolf delivered the Squire Centenary Lecture at Cambridge University in which he expressed reservations about the proposal to create a Supreme Court. In particular, he drew attention to the question of how the new court would be resourced and to Scottish concerns in relation to the court handling devolution issues. In addition, he put forward the possibility that a new Supreme Court "could act as a catalyst causing the new court to be more proactive than its predecessor. This could lead to tensions."<sup>18</sup> Lord Woolf personally argued in favour of deferring a decision in respect of the Supreme Court until both of the following had been identified: *viz.*, the accommodation to be occupied by the new court and the method to be used in determining the remainder of the non-judicial members of the House of Lords in the context of a fully reformed second chamber. Finally, he concluded by positing that to proceed with these reforms in the face of the reservations about them would run counter to the desirability of achieving consensual constitutional reform.<sup>19</sup> Indeed, in view of the considerable reservations about the Bill as a whole, in the House of Lords on the 8<sup>th</sup> March, Lord Lloyd of Berwick tabled a somewhat controversial amendment which would have the effect of committing the Bill to a Select Committee for further consideration (rather than committing the Bill to a Committee of the Whole House which is the normal parliamentary procedure). The House voted on this amendment and agreed to it by the significant margin of 216 votes to 183.<sup>20</sup> As a result, on the 22<sup>nd</sup> March 2004 the 16 members of the House of Lords Select Committee on the

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<sup>15</sup> *Judicial appointments and a Supreme Court (court of final appeal)*, First Report of Session 2003-04 Volume I: Report HC 48-I (2004).

<sup>16</sup> *ibid.*, at para.193.

<sup>17</sup> HL Bill 30, 2003-04.

<sup>18</sup> H. Woolf, 'The Rule of Law and a Change in the Constitution' (Squire Centenary Lecture) at <<http://www.dca.gov.uk/judicial/speeches/lcj030304.htm>> (Last visited 3 January 2005).

<sup>19</sup> *ibid.* It should be noted that Lord Woolf indicated later his support for a Supreme Court in December 2004: HL Official Report vol.667 col.1556 20 Dec 2004.

<sup>20</sup> HL Official Report vol.658 cols 1108-1110 8 March 2004.

Constitutional Reform Bill (hereafter the Select Committee) were named, with Lord Richard as Chairman.<sup>21</sup>

The Select Committee was required to report to the House of Lords by the 24<sup>th</sup> June 2004, and in due course it received voluminous and wide-ranging written and oral evidence relating to various aspects of the Bill.<sup>22</sup> In fact, the Select Committee's second volume embodying this evidence has undoubtedly proved to be a valuable body of evidence on the issues raised by a Supreme Court and the abolition of the office of the Lord Chancellor. In April 2004, during the course of the Select Committee's deliberations, the Government published its response<sup>23</sup> to the Constitutional Affairs Committee's report issued two months earlier. Finally, on the 2<sup>nd</sup> July 2004 the report of the Select Committee was published,<sup>24</sup> which set out its recommendations and which detailed the considerable number of agreed amendments – over 400 – that it had made to the Bill. The report made it plain that these amendments had “been made by agreement and on the basis that they improve and clarify the bill while leaving the main structure of the bill in its present form”.<sup>25</sup> Accordingly, the Bill was reprinted on the 24<sup>th</sup> June *as amended by the Select Committee*.<sup>26</sup> Thereafter it was recommitted to a Committee of the Whole of the House of Lords, and on the 13<sup>th</sup> July 2004 the Bill commenced its Committee stage. Shortly afterwards the House of Lords Select Committee on the Constitution – whose remit is to examine the constitutional implications of all Public Bills – published a short report in respect of the Bill and noted that in the light of the comprehensive analysis of the issues already undertaken by the Select Committee, it would be otiose simply to replicate this work. However, it resolved to monitor the progress of the Bill – which after all, is a Public Bill of considerable constitutional import – and if necessary, would issue a further report at a later date.<sup>27</sup>

After the 2004 summer recess, the House of Lords continued the Committee stage of the Bill and in the Queen's Speech of 23<sup>rd</sup> November 2004<sup>28</sup> the Bill was carried over to the 2004-05 parliamentary session so that it did not run out of time. Without doubt, the most controversial aspect of the Committee stage was in respect of Part 1 of the Bill (now Part 2 of the Act) when the House of Lords voted by the significant margin of 240 votes to 208 to retain the office of the Lord Chancellor.<sup>29</sup> Nevertheless, Lord Falconer made it clear that this decision would not preclude the Government from seeking to reverse this and restore the position of the Secretary of State for Constitutional Affairs when the Bill subsequently proceeded to the House of

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<sup>21</sup> The composition sensibly included Lord Falconer under whose aegis the Bill was being piloted through the House of Lords.

<sup>22</sup> *Constitutional Reform Bill [HL] Volume 2: Evidence* HL Paper 125-II (2004).

<sup>23</sup> *Judicial Appointments and a Supreme Court (court of final appeal), The Government's response to the report of the Constitutional Affairs Committee* (Cm. 6150: April 2004).

<sup>24</sup> *Constitutional Reform Bill [HL]: Volume 1: Report* HL Paper 125-I (2004).

<sup>25</sup> *ibid.*, at para.7.

<sup>26</sup> HL Bill 91, 2003-04.

<sup>27</sup> *Constitutional Reform Bill* Report, 11<sup>th</sup> Report of Session 2003-04, HL Paper 142 (2004), paragraph 4.

<sup>28</sup> *Her Majesty's Most Gracious Speech to both Houses of Parliament* (2004), p.3.

<sup>29</sup> HL Official Report vol.663 cols.1191-1194 13 July 2004.

Commons.<sup>30</sup> At the end of November 2004, the Joint Committee on Human Rights (hereafter the Human Rights Committee) published its report on the human rights implications of the Bill in terms of whether its provisions were consistent with international human rights obligations.<sup>31</sup>

In December 2004, the House of Lords voted effectively to codify the constitutional conventions that the holder of the office of the (newly retained) Lord Chancellor should not only be a member of the upper house,<sup>32</sup> but also be a senior lawyer.<sup>33</sup> It is clearly questionable whether the holder of the office of Lord Chancellor should be restricted to being drawn from the second chamber and it is contended that, as a result of his not inconsiderable powers and functions under this legislation, he should be an MP and held directly accountable to both the elected chamber and the electorate. On the other hand, the decision of the House of Lords to stipulate that the Lord Chancellor should be legally qualified did appear eminently sensible. In short, his responsibilities would seem to presuppose the possession of legal qualifications and experience as his duties would embrace, *inter alia*, the following: ultimately selecting Justices of the Supreme Court, defending judicial independence (section 3 of the Act) and the rule of law (section 1), together with implementation of the *Concordat*. On the 20<sup>th</sup> December 2004, the Bill passed its Third Reading and was duly sent to the House of Commons for consideration.<sup>34</sup> During its tortuous passage through the House of Lords, the Bill as a whole, but particularly the proposed abolition of the office of the Lord Chancellor, had generated a vigorous and protracted debate. It is of interest to note that had the House rejected the Bill, one consequence of the Government introducing it in the second chamber would have been that the Parliament Acts of 1911 and 1949 would have been inapplicable. In these circumstances, one option open to the Government would have been to have commenced the process again by introducing a new Constitutional Reform Bill in the House of Commons.

On the 21<sup>st</sup> December 2004 the Bill was introduced in the House of Commons and its Second Reading followed a few weeks later on the 17<sup>th</sup> January 2005. At this point the Parliamentary Under-Secretary of State for Constitutional Affairs, Christopher Leslie MP, indicated that the Government had accepted the House of Lords' decision to retain the office and title of the Lord Chancellor as "many attach a symbolic value to the title."<sup>35</sup> The Bill, accordingly would seek to modify and reform the office of the Lord Chancellor, rather than simply abolish it. As a result, later in the House of

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<sup>30</sup> HL Official Report vol.665 col.13 11 October 2004. Lord Falconer also noted that the House would nevertheless proceed on the basis that the office of Lord Chancellor would still be reformed on the basis that the office holder would not sit as a judge or as the Head of the Judiciary and would be regulated by the terms of the *Concordat* together with the arrangements for the Judicial Appointments Commission (col.20).

<sup>31</sup> *Scrutiny of Bills: Final Progress Report, Twenty-third Report of Session 2003-04. Report, together with formal minutes and appendices* HL Paper 210 HC 1282 (2004), pp.5-24.

<sup>32</sup> HL Official Report vol.667 cols.776-779 7 December 2004.

<sup>33</sup> *ibid.*, at cols.785-788.

<sup>34</sup> HL Official Report vol.667 col.1625 20 December 2004.

<sup>35</sup> HC Official Report vol.429 col.558 17 January 2005.

Commons, the remaining references to the ‘*Minister*’ in Part 3 of the Bill were replaced with references to the newly retained Lord Chancellor. In contrast, Christopher Leslie made it clear that the Government would seek to reverse the House of Lords’ amendments to the Bill that had stipulated that the Lord Chancellor be both a member of the second chamber and be legally qualified.<sup>36</sup> It is also of interest to note that the Shadow Attorney General, Dominic Grieve MP, attempted (unsuccessfully) to move that the House of Commons should decline to give the Bill a Second Reading on the basis that, *inter alia*, the proposal to establish a Supreme Court was costly, unnecessary and based on the erroneous premise that the separation of powers required the removal of the Law Lords from the legislature. In essence, notwithstanding the benefits of a Judicial Appointments Commission, the Bill “offers no convincing justification for replacing a system that works well.”<sup>37</sup> Shortly after the Second Reading of the Bill, the Constitutional Affairs Committee published an update to its first report which had been issued in February 2004, which took into account the debate on, and amendments to the Bill that had occurred since the publication of its previous report almost a year earlier.<sup>38</sup>

As a result of comments made during the Second Reading that, by convention, a Bill of such constitutional importance should be debated on the Floor of the chamber, on the 31<sup>st</sup> January 2005 Christopher Leslie announced that the programme of the Bill had been changed to allow the entire Committee stage of the Bill (which began that day) to take place on the Floor of the House.<sup>39</sup> During the Committee stage the House of Commons voted to disagree with the House of Lords amendments that had insisted that the Lord Chancellor be a member of the House of Lords and be legally qualified.<sup>40</sup> On the 1<sup>st</sup> March 2005 the Bill successfully completed its Committee stage in the House of Commons and this was followed on the same day by it decisively securing its Third Reading by 280 votes to 118.<sup>41</sup> Thereafter on the 15<sup>th</sup> March 2005 the House of Lords considered the House of Commons amendments, and voted narrowly to disagree with the lower chamber’s amendments to leave out the statutory requirements that the Lord Chancellor be both a peer and a lawyer. The next day, in response to this ‘message’ brought from the House of Lords, and in an attempt to break this “impasse” Christopher Leslie successfully moved in the House of Commons an *amendment in lieu*, to the effect that the Lord Chancellor should be qualified by experience<sup>42</sup> (now section 2 of the Act). In short, ‘*A person may not be recommended for appointment as Lord Chancellor unless he appears to the Prime Minister to be qualified by experience*’ and that the latter may take

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<sup>36</sup> *ibid.*, at col.559.

<sup>37</sup> *ibid.*, at col.573.

<sup>38</sup> *Constitutional Reform Bill [Lords]: the Government’s proposals, Third Report of Session 2004-05 Volume I: Report, together with formal minutes* HC 275-I (2005). A second volume detailed its written and oral evidence: *Constitutional Reform Bill [Lords]: the Government’s proposals, Third Report of Session 2004-05 Volume II: Oral and written evidence* HC 275-II (2005).

<sup>39</sup> HC Official Report vol.430 col.589 31 January 2005.

<sup>40</sup> *ibid.*, at cols.663-666 (clause 2 – membership of the House of Lords) and 681-4 (clause 3 – be legally qualified).

<sup>41</sup> HC Official Report vol.431 cols.924-927 1 March 2005.

<sup>42</sup> HC Official Report vol.432 cols.371-374 16 March 2005.

into account experience, *inter alia*, as a Minister, as a member of either House of Parliament or as a qualifying practitioner. In short, although it would not be a statutory requirement for a future Lord Chancellor to sit in the second chamber, they would have to be qualified by appropriate experience. One week later the House of Lords voted to agree to these changes<sup>43</sup> and three days later on the 24<sup>th</sup> March 2005, the Bill obtained the royal assent. In essence, in many ways the debate on the Supreme Court in the House of Commons echoed the points which had earlier been made in the House of Lords, although the discussion in the lower chamber proved not to be as wide-ranging, detailed or as protracted. According to Martin Bowley QC, however, the passage of the Bill through the House of Commons had showed the chamber “at its worst” with a poor attendance in the chamber on the last day of the Committee stage. In addition, the day witnessed a significant number of clauses and amendments being approved which were not even debated. “It was a double disgrace.”<sup>44</sup>

### **The House of Lords Select Committee on the Constitutional Reform Bill**

The decision of the House of Lords in March 2004 to commit the Bill – a Government Public Bill – to a Select Committee was both politically controversial, and procedurally, a very unusual step to take. The consequence of this transfer meant that the Select Committee would be in a position to receive evidence relating to the Bill, determine if the Bill should proceed or not, and if it was decided that it should proceed, it could make amendments to it. During the debate in the House of Lords on this proposed committal a number of their Lordships spoke in favour of Lord Lloyd’s amendment. For example, Viscount Bledisloe made it plain that he regarded the Bill as “thoroughly ill thought out”,<sup>45</sup> which, therefore, necessitated further scrutiny by a Select Committee. Lord Phillips of Sudbury argued that the Government’s consultation in respect of the Bill had been very limited as they had simply “offered only two options; the status quo or what the Government had already decided”.<sup>46</sup> He added that committing the Bill to a Select Committee would be “in the best traditions of this House”<sup>47</sup> in the discharge of its parliamentary duty. Further, Lord McCluskey stated that although he welcomed Part 3 of the Bill (now Part 4 of the Act) which would establish a Judicial Appointments Commission, and in principle had no objection to the creation of a well thought out, established and resourced Supreme Court, he supported the amendment in the following terms: “I would hate to be accused of sinking a flagship, but I certainly would not mind if it were put into dry dock and had its bottom examined by a few experts – just to see whether it was seaworthy”.<sup>48</sup>

Clearly the political controversy in respect of the committal of the Bill would have been obviated had the Government arranged full pre-legislative scrutiny

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<sup>43</sup> HL Official Report vol.671 cols.39-46 21 March 2005.

<sup>44</sup> M. Bowley, “Playing truant?” (April 2005) *Counsel* p.14.

<sup>45</sup> HL Official Report vol.658 col.1035, 8 March 2004.

<sup>46</sup> *ibid.*, at col.1086.

<sup>47</sup> *ibid.*, at col.1088.

<sup>48</sup> *ibid.*, at col.1032.

of the Bill. It is argued that this should have been the appropriate course of action given the far-ranging constitutional changes envisaged by its provisions. This is particularly so in light of the somewhat inelegant manner in which these constitutional reforms had been announced in June 2003. As already noted, even before the First Reading of the Bill in the House of Lords, the Constitutional Affairs Committee had recommended that the measure was “a clear candidate for examination in draft”,<sup>49</sup> as it was concerned about the expeditious introduction of such fundamental reforms. Lord Crickhowell speaking in favour of the committal, conceded that even though a Select Committee would not “be as good as full pre-legislative scrutiny,”<sup>50</sup> it would nevertheless provide the opportunity for evidence to be received in relation to the main issues raised by the Bill. An alternative to parliamentary pre-legislative scrutiny could have been for the Government to establish a Royal Commission to investigate comprehensively, and report on its proposed reforms. Indeed, in April 2003 the Joint Committee on House of Lords Reform in the context of the general reform of the second chamber, re-affirmed that there was a need for a full and public debate as to whether there should be a Supreme Court separate from Parliament. It formed the view that this was an issue which required “an inquiry of its own.”<sup>51</sup> The Government’s response to this specific point was to state that its July 2003 consultation paper, together with the resultant consultation exercise, would enable this public discussion to take place.<sup>52</sup> As indicated earlier, it is a moot point as to whether this consultation process was satisfactory given its necessarily limited terms of reference. It is also of interest to remember that the Wakeham Royal Commission of 2000, although it considered the reform of the House of Lords in general, provisionally recommended that, subject to clarification of the constitutional conventions governing their role, the Law Lords “should continue to be *ex officio* members of the reformed second chamber and carry out its judicial functions.”<sup>53</sup>

Other Lordships strenuously opposed the transfer of the Bill to a Select Committee. Lord Carter, for example, stressed that the committal of a major Government Bill to a Select Committee was both unprecedented (the previous committal being in relation to the Hare Coursing Bill in the mid-1970’s, which in itself, had not been a major Government Bill) and inappropriate.<sup>54</sup> In particular, he questioned whether a Select Committee comprising only 12 or 16 members should have the power to either recommend that a prominent constitutional Bill should not progress to its next stage, or alternatively, significantly amend it.<sup>55</sup> Similarly, both Lord Falconer<sup>56</sup> and Lord Goodhart<sup>57</sup> argued that the House collectively, rather than a small committee, should examine the Bill. In addition, Lord Carter

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<sup>49</sup> *Supra*, n.15 at p.56.

<sup>50</sup> HL Official Report vol.658 col.1047, 8 March 2004.

<sup>51</sup> *House of Lords Reform: Second Report*, HL Paper 97, HC 668 (2003), p.9.

<sup>52</sup> *House of Lords Reform: Government Reply to the Committee’s Second Report*, HL Paper 155, HC 1027, (2003), para.9.

<sup>53</sup> *A House for the Future*, Cm. 4534 (2000), Recommendation 57.

<sup>54</sup> HL Official Report vol.658 col. 999, 8 March 2004.

<sup>55</sup> *ibid.*, at col.1001. In this context it is somewhat ironic that later, Lord Carter was to comprise one of the members of the Select Committee.

<sup>56</sup> *ibid.*, at col.1105.

<sup>57</sup> *ibid.*, at col.1100.

also asserted that the committal “would be setting a very dangerous precedent”<sup>58</sup> as it would be clear that the consequence would be that the Bill would not be completed during the 2003-04 parliamentary session. It would therefore flout the constitutional convention that the Government was “entitled to get their business through without unreasonable delay.”<sup>59</sup> On this basis, it would have been possible, therefore, to argue that the committal could have been construed as unconstitutional. It is, however, pertinent to remember that the proposals contained in the Bill were not foreshadowed in either of the Labour Party manifestos of 1997 or 2001. In addition, Lord Goodhart regarded the amendment to commit the Bill to a Select Committee “as political mischief-making”,<sup>60</sup> whilst Lord Marsh bluntly stated that it amounted to “a blatant wrecking amendment”.<sup>61</sup> In contradiction of this, Lord Alexander of Weedon strenuously refuted such an argument and made it clear that his support for the committal was not based on “any view to killing this Bill”,<sup>62</sup> for, as he pointed out, the Select Committee could be given specific instructions to report within a stringent time-frame of three months. In the event, the Select Committee conducted its inquiry expeditiously as its instructions had indeed required it to report within three months. Finally, Lord Brennan was concerned that committing the Bill to a Select Committee could raise questions as to whether the House would be viewed as unnecessarily obstructive and whether confidence would remain in its capacity to process prominent legislative proposals.<sup>63</sup>

In view of the seemingly controversial and divisive nature of the Government’s reforms, together with their fundamental constitutional ramifications, it does appear in hindsight to have been an appropriate decision – albeit a very unusual one – to commit the Bill to a Select Committee for further detailed investigation. This is particularly so in light of the absence of pre-legislative scrutiny of its provisions. In the event, in its report in January 2005, the Constitutional Affairs Committee commented that its first report together with the inquiry of the Select Committee and the Carry Over procedure, had in practical terms, given “the Bill the scrutiny that a draft Bill would expect to receive.”<sup>64</sup> Indeed, from a constitutional perspective, reforms as far-reaching as these necessitate as much consideration, and consensus, as possible. Moreover, the decision to commit the Bill to a Select Committee for further scrutiny could hardly be characterised as undemocratic given that it was the Constitutional Affairs Committee in its first report that had recommended that the Bill be examined in draft. In this context, it is perhaps worth pointing out that during the Second Reading in the House of Lords it had been argued that Part 3 of the Bill (now Part 4 of the Act) establishing a Judicial Appointments Commission, which is comparatively uncontroversial, could be severed and

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<sup>58</sup> *ibid.*, at col.1002.

<sup>59</sup> *ibid.*, at col.1002.

<sup>60</sup> *ibid.*, at col.1101.

<sup>61</sup> *ibid.*, at col.1044.

<sup>62</sup> *ibid.*, at col.1062.

<sup>63</sup> *ibid.*, at col.1027.

<sup>64</sup> *Constitutional Reform Bill [Lords]: the Government’s proposals, Third Report of Session 2004-05 Volume I: Report, together with formal minutes HC 275-I (2005) para.13.*

legislated on separately. For example, Lord Donaldson of Lynton suggested that it was surely not beyond the ingenuity of the second chamber for “a number two Bill” to be introduced which would effectively embody this part of the Constitutional Reform Bill.<sup>65</sup> It is, however, contended that the Bill comprised an intimately inter-connected and inter-dependent package of reforms that required enacting as a whole. In the event, during its passage through Parliament the Bill was considered as a composite measure.

It is interesting to note that during the Committee stage of the Bill in the House of Lords, Lord Falconer conceded that although he had initially opposed the committal of the Bill to a Select Committee, its deliberations had, however, proved to be beneficial. In particular, it had allowed proper consideration of the details and principles of the Bill and it had “made real progress in improving the Bill.”<sup>66</sup> Later, he stated that the Select Committee had been essential in enabling evidence to be taken from the Senior Law Lord, Lord Bingham of Cornhill who, owing to constitutional principle, was not prepared to contribute to debates in the House of Lords.<sup>67</sup> Any fears that the Select Committee would derail the Bill were dispelled at the outset of its report when it stated that the Committee had quickly taken the view that it would be inappropriate to prevent the Bill from continuing to its next stage.<sup>68</sup> Instead, it focused on those aspects of the Bill that had raised issues warranting further consideration – these were detailed in its report – and where appropriate, the Select Committee had amended these clauses. Unsurprisingly, the Select Committee was divided over the underlying policy of whether or not there should be a Supreme Court (a self-evidently divisive issue). It did, nonetheless, serve a valuable constitutional purpose as it succeeded in agreeing a considerable number of the details of a Supreme Court. It therefore provided a useful and consensual blueprint.

### **The Rationale Behind The Supreme Court**

Section 23 (Part 3) of the Act establishes a Supreme Court of the United Kingdom comprising 12 judges who, apart from the President and Deputy President, would be styled Justices of the Supreme Court. In tandem with this, section 137 (Part 6) of the Act effectively bars full time members of the Supreme Court from sitting and voting in the House of Lords while they hold that office. The constitutional arguments for a separate Supreme Court was set out by the Government in its July 2003 consultative paper and subsequently reaffirmed by Lord Falconer in Parliament and in his evidence to the Select Committee. In the consultation paper, the Government made it plain that the proposal to remove the Law Lords from the House of Lords, and reconstituting them elsewhere in a separate and free-standing Supreme Court, was part of its policy of modernising the United Kingdom constitution.<sup>69</sup> In essence, the creation of a new Supreme Court would realign the separation of powers in the United Kingdom by legally separating the highest court and its judges from the legislature. In his memorandum to the Select Committee, Lord Falconer asserted that “The Law Lords are

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<sup>65</sup> HL Official Report vol.658 col.1052 8 March 2004.

<sup>66</sup> HL Official Report vol.663 col.1183 13 July 2004.

<sup>67</sup> HL Official Report vol.665 col.71 11 October 2004.

<sup>68</sup> *Supra*, n.24 at para.7.

<sup>69</sup> *Supra*, n.9 at para.1.

judges and not legislators: the separation between those two roles should be made explicit. That principle of separation is already established in many other democracies.<sup>70</sup> In fact, it has been suggested that it is unusual for constitutional reform in the United Kingdom to be predicated on the basis of principle, as opposed to mere pragmatism.<sup>71</sup> It is self-evident, therefore, that, at least in abstract and theoretical terms, a final court of appeal which forms part of the legislature clearly fails to adhere to the basic principles underpinning the doctrine of the separation of powers.

The Government in its consultation paper also argued that a new Supreme Court would redefine the constitutional relationship between the three arms of the constitution and place it “on a modern footing, which takes account of people’s expectations about the independence and transparency of the judicial system.”<sup>72</sup> Lord Falconer specifically commented that the present position of the Law Lords sitting in the legislature causes confusion.<sup>73</sup> In addition, Lord Brennan questioned whether the public could possibly comprehend the subtle constitutional position of these judges forming part of Parliament as a distinct judicial committee,<sup>74</sup> and Lord Goodhart described the combination of judicial and legislative functions as “a constitutional nonsense.”<sup>75</sup> According to Christopher Leslie speaking in the House of Commons, the current status quo was problematic as “To anyone except a seasoned observer, it can appear that a legislative body is interpreting legislation.”<sup>76</sup> Furthermore, Lord Plant of Highfield asserted that if the Law Lords were to remain in the legislature they would continue to occupy a constitutionally privileged position, which amounted to “a form of double counting” which was in effect “procedurally unfair”.<sup>77</sup> In other words, their judgment would be counted twice, *viz.*, once in the legislature (during the passage of legislation) and secondly in the courtroom (in the context of reviewing executive action). In light of the gradual constitutional expansion of the role of the judges via judicialisation,<sup>78</sup> (through the process of judicial review and latterly under the aegis of the Human Rights Act 1998) it is contended that a more discernible constitutional division should be made between the three arms of government by way of the creation of a legally separate Supreme Court and, in the absence of its abolition, at the very least the reform of the office of the Lord Chancellor. According to Lord Steyn a new Supreme Court would serve as a public constitutional badge of judicial neutrality and independence.<sup>79</sup> During the Committee Stage of the Bill in the House of Commons, Ross Cranston MP added that a separate Supreme Court

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<sup>70</sup> *Supra*, n.22 at p.9.

<sup>71</sup> K. Maleson, “Modernising the constitution: completing the unfinished business” (2004) 24 *L.S.* 119.

<sup>72</sup> *Supra*, n.9 at para.1.

<sup>73</sup> HL Official Report vol.657 col.1217 12 February 2004.

<sup>74</sup> *ibid.*, at col.1303.

<sup>75</sup> HL Official Report vol.665 col.66 11 October 2004.

<sup>76</sup> HC Official Report vol.430 cols 735-736 1 February 2005.

<sup>77</sup> HL Official Report vol.658 col.1076 8 March 2004.

<sup>78</sup> On the process of judicialisation see n.71, p.127.

<sup>79</sup> J. Steyn, “The Case for a Supreme Court” (2002) 118 *L.Q.R.* 384.

would illustrate “the fact that judges are functionally separate and that judges do judging.”<sup>80</sup>(sic).

In practice, the dual constitutional role of the Law Lords has already resulted in the issuing (in June 2000) of a self-denying ordinance delivered by Lord Bingham as to the circumstances when it would be constitutionally inappropriate for them to participate in the proceedings of the second chamber. These would embrace matters which involve “a strong element of party political controversy” and where “they might render themselves ineligible to sit judicially if they were to express an opinion on a matter which might later be relevant to an appeal”.<sup>81</sup> Lord Falconer has made it clear that it was no longer desirable or sustainable to rely on this self-denying ordinance<sup>82</sup> and in this context it is interesting to note that attention has been drawn to the fact that the dividing line demarcating controversial issues under the ordinance is difficult to draw.<sup>83</sup> Even the statement itself issued by Lord Bingham recognised that it was dealing with broad principles and that it was “impossible to frame rules which cover every eventuality”.<sup>84</sup> It is clearly the case that the notion of *party political controversy* is a necessarily nebulous and subjective term, which is incapable of precise definition. For example, is Part 4 of the Act relating to a Judicial Appointments Commission a matter of party political controversy? Although during its passage through the House of Lords it appeared to be a comparatively uncontested aspect of the Bill, it is nevertheless suggested that it is inextricably linked to the other main elements of the measure *viz.*, reforming the office of Lord Chancellor and the creation of a Supreme Court, which are self-evidently highly politically controversial. For its part, the Human Rights Committee noted that notwithstanding the self-denying ordinance, “it is clear that there is still no sufficiently established constitutional convention separating the judicial branch from the legislative in politically controversial matters.”<sup>85</sup> In this context it is of interest to remember that two serving Law Lords – Lord Hoffmann and Lord Scott of Foscote – recently voted in 2004 during the passage of the highly contentious Hunting Bill.<sup>86</sup> Although this clearly disqualifies them from sitting in a subsequent case involving this legislation, nevertheless it is suggested that it does serve to make further the case that an institutional separation should take place.

At the Second Reading of the Bill in the House of Lords, Lord MacLennan of Rogart commented that the removal of the Law Lords appeared sensible in practical terms “in that it avoids the embarrassment of judges having to rule themselves out of consideration of cases on matters that come up with which they may have had a legislative connection”.<sup>87</sup> In his oral evidence to the Constitutional Affairs Committee, Lord Bingham, an advocate of a Supreme

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<sup>80</sup> HC Official Report vol.430 col.727 1 February 2005.

<sup>81</sup> HL Official Report vol.614 col.419 22 June 2000.

<sup>82</sup> HL Official Report vol.665 col.73 11 October 2004.

<sup>83</sup> *Supra*, n.71 at p.128.

<sup>84</sup> HL Official Report vol.614 col.419 22 June 2000.

<sup>85</sup> *Supra*, n.31 at p.21.

<sup>86</sup> HL Official Report vol.665 cols 1214-1215 26 October 2004.

<sup>87</sup> HL Official Report vol.658 col.1057 8 March 2004.

Court,<sup>88</sup> noted that the reason that there had been little difficulty with the Law Lords being part of the legislature was precisely because in recent years they had largely abstained from the business of the House.<sup>89</sup> Furthermore, two years earlier in a lecture to the Constitution Unit he had asserted that as judges, the Law Lords “do not belong in a House to whose business they can make no more than a slight contribution.”<sup>90</sup> At this point it is instructive to point out that the Select Committee in the appendix of its report usefully supplied a table<sup>91</sup> which revealed that, up to the time of this report, of the twelve serving Law Lords, eight had made no interventions in debates in the second chamber. This is clearly a significant figure notwithstanding the fact that a number of these Law Lords are relatively recent appointments. Paradoxically, in the table the only interventions of Lord Nicholls of Birkenhead and Lord Hoffmann were in a debate on the Government’s proposals for a Supreme Court (as already noted, Lord Hoffmann also voted on the Hunting Bill later in the year). It is clear that these statistics further support the case for a separate Supreme Court on the basis that the Law Lords, through constitutional self-restraint, already have a necessarily limited impact on the second chamber as evidenced by their infrequent interventions. Consequently, their departure would cause minimum disruption to the business of the House. In any event, in the House of Commons Simon Hughes MP usefully made the point that the Law Lords only become part of the legislature (and therefore become involved in its business) incidentally, as they are specifically and primarily appointed to the House to act as senior judges.<sup>92</sup>

Lord Falconer, in his memorandum to the Select Committee further supported the case for a separately constituted Supreme Court in terms of international law by reference to Article 6(1) of the European Convention on Human Rights. This Article is central to the independence of the judiciary and the rule of law. It requires that everyone is entitled to a fair and public hearing administered by an independent and impartial court/tribunal in terms of both perception and reality. To comply with the requirements of independence, the court must be independent of the parties, the executive and the legislature,<sup>93</sup> and to comply with the principle of impartiality there should be “protection against actual and presumed bias”.<sup>94</sup> As in relation to domestic law, under the European Convention, appearances and perceptions are significant (*viz.*, involving an objective test of impartiality).<sup>95</sup> In his memorandum, Lord Falconer argued that the principle of judicial independence embodied within Article 6 needed “to be buttressed by appropriate and effective constitutional guarantees” and that these guarantees would be provided by the creation of a free-standing Supreme Court.<sup>96</sup>

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<sup>88</sup> T. Bingham, *A New Supreme Court for the United Kingdom* (London: The Constitution Unit, 2002).

<sup>89</sup> *Judicial appointments and a Supreme Court (court of final appeal)*, *First Report of Session 2003-04 Volume II: Oral and written evidence* HC 48-II (2004), Q446.

<sup>90</sup> *Supra*, n.88 at p.6.

<sup>91</sup> *Supra*, n.24 at pp.234-235.

<sup>92</sup> HC Official Report vol.430 col.729 1 February 2005.

<sup>93</sup> J. Simor (ed), *Human Rights Practice* (Sweet and Maxwell: 2002), 6.119.

<sup>94</sup> *ibid.*, at 6.123.

<sup>95</sup> *Piersack v Belgium* (1982) 5 E.H.R.R. 169, para.30.

<sup>96</sup> *Supra*, n.22 at p.10.

Further, Andrew Le Sueur has suggested that part of the pressure exerted on the Government to establish a new Supreme Court may have been driven by a critical report concerning the dual constitutional position of the Law Lords by the Legal Affairs and Human Rights Committee of the Parliamentary Assembly of the Council of Europe.<sup>97</sup>

Moreover, it is without doubt that in the era of the Human Rights Act – which gives further effect in domestic law to the Convention Articles – our existing constitutional arrangements will inevitably have to be viewed afresh in the light these principles which now have an immediacy about them. The question, however, as to whether in practice the Law Lords, by virtue of sitting within the legislature, contravenes Article 6 is arguably a moot point (notwithstanding the *Pabla Ky* case to be considered later). Andrew Le Sueur and Richard Cornes writing in May 2001, commented that although there had not as yet at that point been a legal challenge to the Law Lords under the European Convention, nevertheless “the footsteps of Article 6(1) are getting ever closer”<sup>98</sup> as evidenced by *Procola v Luxembourg*<sup>99</sup> and *McGonnell v UK*.<sup>100</sup> In this context it is pertinent to note that in November 2004, although the Human Rights Committee concluded that Article 6 did not *per se* require the removal of the Law Lords, it nevertheless argued that a free-standing Supreme Court “would make it much less likely that violations of Article 6(1) will occur in practice”.<sup>101</sup> It is clear that it would undoubtedly be the case that a final court of appeal, which is constitutionally, physically and visibly separate from Parliament, would inject a greater degree of clarity (and constitutional transparency) into the institutional structure of the United Kingdom’s constitution. In short, the creation of a separate Supreme Court would, in both domestic and international terms, demonstrate a public commitment to the basic precepts of constitutionalism, *viz.*, the rule of law, separation of powers and judicial independence. Accordingly, it is contended that Lord Falconer was right to assert in his Formal Statement to Parliament on the Supreme Court that “The time has come for the United Kingdom’s highest court to move out from under the shadow of the legislature.”<sup>102</sup>

At a more practical and basic level, the case for a new Supreme Court has also been advanced on the basis that the present arrangements in terms of supporting, resourcing and accommodating the Appellate Committee of the House of Lords are inadequate. For example, in his memorandum to the Select Committee, Lord Falconer has made it plain that the present offices of the Law Lords were “cramped and inconveniently located.”<sup>103</sup> Richard Gordon QC who has appeared before the Law Lords has also urged the use

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<sup>97</sup> *Supra*, n.3 at p.335.

<sup>98</sup> A. Le Sueur and R. Cornes, *The future of the United Kingdom’s highest courts* (London: The Constitution Unit, 2001), p.53.

<sup>99</sup> (1995) 22 E.H.R.R. 193

<sup>100</sup> (2000) 30 E.H.R.R. 289

<sup>101</sup> *Supra*, n.31 at p.21.

<sup>102</sup> HL Official Report vol.657 col.926 9 February 2004.

<sup>103</sup> *Supra*, n.22 at p.10.

of larger accommodation.<sup>104</sup> A separately housed and appropriately resourced Supreme Court would help to resolve these difficulties. Indeed, it is important that in the pursuit of the legal maxim that justice should manifestly be seen to be done, the public have appropriate physical access to the final court of appeal. Accordingly, with the establishment of a new Supreme Court, the public would symbolically be directed to a detached and visibly separate court (thereby reaffirming the independence of the final court in physical terms) as opposed to the present position whereby the public locate the Law Lords in a committee room of Parliament. Finally, it is also perhaps worth pointing out that the case for reform has significant and widespread support and currently includes the Bar Council, JUSTICE, the Law Society, five serving Law Lords<sup>105</sup> (including the Senior Law Lord), together with a number of academics. Furthermore, on the 19<sup>th</sup> of January 2005 a Sewel motion was passed by the Scottish Parliament (albeit narrowly by 63 votes to 56) that endorsed “the principle of having a clear and transparent separation between the judiciary and the legislature” and therefore agreed that the United Kingdom Parliament should consider the provisions of the Bill establishing a Supreme Court.<sup>106</sup> It is also not without significance that towards the end of the passage of the Bill through the House of Lords, Lord Woolf, as Chairman of the Judges’ Council indicated that this body was in favour of a Supreme Court (subject to an appropriate sunrise clause).<sup>107</sup> Further, he had personally changed his view from initially being “weakly against the idea of a Supreme Court”,<sup>108</sup> to being in support of it.

### **The Criticism of The Supreme Court**

Those opposing reform have argued, *inter alia*, that the case for reform has simply not been made out. In particular, Lord Norton of Louth has claimed that there was “a persuasive case”<sup>109</sup> for retaining our current constitutional arrangements in respect of the Appellate Committee and asserted that the onus was on those advocating reform to demonstrate its necessity. In particular, he questioned how a separately constituted Supreme Court could enhance the independence of the judges as “no one is arguing that the highest court of appeal is not a body of integrity and independence, what is there that needs enhancing? Physical separation will not enhance the independence of the Law Lords in their judicial deliberations.”<sup>110</sup> Lord Lloyd of Berwick has added that everybody accepted that the Law Lords are already “completely independent.”<sup>111</sup> In fact, Lord Falconer has repeatedly and consistently made it plain that the Government’s proposals for reform should in no way be seen to represent criticism of how the current Law Lords have performed their

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<sup>104</sup> R. Gordon, “The Relationship between the Bar and the House of Lords” in A. Le Sueur (ed), *Building the UK’s New Supreme Court: National and Comparative Perspectives* (Oxford: 2004), p.326.

<sup>105</sup> These are Lord Bingham of Cornhill, Lord Steyn, Lord Saville of Newdigate, Lord Walker of Gestingthorpe and Baroness Hale of Richmond.

<sup>106</sup> Scottish Parliament, Official Report Session 2 col.13661 19 January 2005.

<sup>107</sup> HL Official Report vol.667 col.759 7 December 2004.

<sup>108</sup> HL Official Report vol.667 col.1556 20 December 2004.

<sup>109</sup> *Supra*, n.89 at Ev 115.

<sup>110</sup> HL Official Report vol.657 col.1269 12 February 2004.

<sup>111</sup> HL Official Report vol.665 col.56 11 October 2004.

constitutional functions,<sup>112</sup> and the Select Committee indicated in its report that one area of broad agreement was the high reputation and probity of the Law Lords.<sup>113</sup> Moreover, it has been commented that the debate in respect of the independence of the judiciary in this context “has been conducted, overwhelmingly, in the abstract. The problem is posed as one of potential conflict.”<sup>114</sup>(sic).

Furthermore, Lord Norton strenuously argued that although part of the Government’s justification for change was driven by public confusion in respect of the role of the Law Lords, no empirical data had actually been presented to support this assumed misconception. Instead, “we are offered the Government’s perception of perception.”<sup>115</sup> Consequently, the case for reform was not proven as it was based on unsubstantiated presumptions. For its part, the Select Committee came to the conclusion that to the extent that it could gauge the perception of the public on this matter, and in respect of the proposed reforms, “the most we can say is that opinion does not run high”<sup>116</sup> and fittingly, it added that few members of the general public had actually responded to the online e-consultation exercise that it had commissioned. Similarly, the Constitutional Affairs Committee stated in its first report that there was common agreement that the current system for appeals works, and therefore the case for change concerned “principle and perception.”<sup>117</sup> In its written reply to this specific point, the Government reaffirmed that its proposals were indeed firmly founded on principle, *viz.*, the constitutional principle that the judicial and the legislative arms of the constitution should not be blurred. Accordingly, in the 21<sup>st</sup> century, as a matter of constitutional principle and propriety, the highest court of appeal should be separate from the legislature.<sup>118</sup> This is after all, a principle that is a basic precept of other modern democracies and fundamental to constitutionalism.

One obvious criticism of the creation of a new Supreme Court being based on an adherence to the separation of powers is, of course, that the United Kingdom constitution does not strictly follow the doctrine in a pure sense in any case. In fact, Lord Lloyd of Berwick has bluntly asserted “that the separation of powers is not part of our constitution.”<sup>119</sup> In any event, it must be remembered that the establishment of a separate Supreme Court would still leave in place a parliamentary executive whereby the executive is drawn from – and invariably dominates – the legislature. It is arguable that a case could be put forward that the constitutional and political implications of this breach of the separation of powers, and specifically the problem associated with the ‘elective dictatorship’<sup>120</sup> of recent decades, is more significant than that of the Law Lords. Yet there is no party political proposal (either in the

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<sup>112</sup> HL Official Report vol.657 col.926 9 February 2004.

<sup>113</sup> *Supra*, n.24 at para.130.

<sup>114</sup> J. Webber, “Supreme Courts, independence and democratic agency” (2004) 24 *L.S.* 59.

<sup>115</sup> HL Official Report vol.657 col.1269 12 February 2004.

<sup>116</sup> *Supra*, n.24 at para.117.

<sup>117</sup> *Supra*, n.15 at para.23.

<sup>118</sup> *Supra*, n.23 at p.7.

<sup>119</sup> HL Official Report vol.665 col.57 11 October 2004.

<sup>120</sup> On the concept of the elective dictatorship see: Lord Hailsham, “Elective dictatorship”, *Listener*, 21 October (1976) pp.496-500.

short or long term) for the executive to be separated from, and be independent of, Parliament. In contrast, however, the point has to be made that the executive does not always control the legislature. More importantly, from a constitutional perspective it is imperative in terms of the separation of powers and the rule of law that the judicial arm of the constitution is independent of both the legislature and executive.

In terms of the separation of powers it is instructive to draw attention to the fact that although the Government in its written reply to the Constitutional Affairs Committee's first report reaffirmed that the case for reform was founded on the need for the final court of appeal to be separate from the legislature, it also agreed with the Committee's recommendation that upon retirement, all judges of the Supreme Court should, subsequently, be appointed to the second chamber.<sup>121</sup> In this context, Diana Woodhouse wisely has identified the pressure that could be exerted on those judges nearing retirement in the event of only specific judges being selected for appointment.<sup>122</sup> In any event, it is contended that in the interests of constitutional clarity, and in view of the underlying *raison d'être* of the reforms, no retired Supreme Court Justices should be appointed to sit in Parliament. In fact, the appointment of Justices would become impossible in the (albeit unlikely) event that a future fully reformed second chamber would be wholly elected. It is also significant to point out that, during the Third Reading in the House of Lords, Lord Falconer urged their Lordships to support the proposal for a Supreme Court on the basis that a final court of appeal separate from the legislature would be consistent with other modern democracies and "not because of any slavish adherence to the doctrine of the separation of powers".<sup>123</sup>

In respect of the European Convention of Human Rights, the Select Committee noted in its report that a number of witnesses refuted the case that a separate Supreme Court was necessary in order to comply with Article 6. In particular, Sir Robert Carnwath stated that the European Court of Human Rights in Strasbourg "does not insist on a rigid division of functions between the judges and the legislature. It is concerned with specific connections in individual cases. The Law Lords have responded by a self-imposed restriction on participation in parliamentary debates."<sup>124</sup> According to Jeremy Webber in a recent article, the Law Lords have already taken the necessary steps to reduce the possibility of the appearance of bias and that therefore (for the most part) their participation in the legislative process which is "not charged with partisan significance", created no more appearance of bias than, for example, a Law Lord's comments in a lecture.<sup>125</sup> This in turn, however, raises the question of whether judges, in any event, should deliver such lectures. In addition, the Constitutional Affairs Committee indicated in its first report that it had received evidence from judges suggesting that a legal challenge to a ruling of the existing Appellate

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<sup>121</sup> *Supra*, n.23 at p.10.

<sup>122</sup> D. Woodhouse, "The constitutional and political implications of a United Kingdom Supreme Court" (2004) 24 *L.S.* 137.

<sup>123</sup> HL Official Report vol.667 col.1566 20 December 2004.

<sup>124</sup> *Supra*, n.22 at p.331.

<sup>125</sup> *Supra*, n.114 at p.63.

Committee based upon Article 6 would be very unlikely to succeed.<sup>126</sup> Moreover, it has been asserted that such a challenge could “hardly be advanced after any serious thought.”<sup>127</sup> For its part, the Human Rights Committee has suggested that there was scope for misunderstanding as to the requirements of Article 6 in terms of the separation between the legislature and the judiciary and concluded that there was no *per se* requirement that the Law Lords should be removed from Parliament.<sup>128</sup> Further, Dominic Grieve, speaking in the House of Commons, asserted that if a challenge to the Law Lords were to be made in the European Court of Human Rights, “the margin of appreciation allowed for a country’s individual judicial system would enable our arrangements to stand the test without difficulty.”<sup>129</sup> Similarly, in the House of Lords, Lord Lloyd of Berwick stressed that the proposition that the constitutional dual position of the Law Lords violates Article 6 “is just plain wrong”<sup>130</sup> and made reference to the 2004 Strasbourg decision of *Pabla Ky v Finland*.<sup>131</sup>

This case concerned an MP of the Finnish Parliament, who in 1997 acted as an expert member of a panel of five members of the Court of Appeal that rejected the applicant’s appeal. The applicant contended a violation of Article 6 on the basis that, as one of its expert members was also an MP, the court could not therefore be considered independent and impartial. A Chamber of the European Court of Human Rights reaffirmed that in order to satisfy the requirements of independence, regard had to be had to, *inter alia*, the presence of safeguards against external pressures and whether an appearance of independence was presented. In relation to impartiality, it was made clear that the court must subjectively be free of personal bias or prejudice. It should also be objectively impartial and “must offer sufficient guarantees to exclude any legitimate doubt in this respect.”<sup>132</sup> The court indicated that although the principle of the separation of powers had assumed increasing importance in the European Court’s jurisprudence, nevertheless, Article 6 did not require:

“States to comply with any theoretical constitutional concepts regarding the permissible limits of the powers’ interaction. The question is always whether, in a given case, the requirements of the Convention are met.”<sup>133</sup>

The European Court added that there was no objection *per se* to expert lay members being involved in the decision making in a court, and in relation to the specific facts of the case before it, noted that the MP – as part of the legislature – had not previously participated in the legislation which was in issue before the court. The nature of this case, therefore, was in contrast to the earlier decisions of *Procola* and *McGonnell*. In short,

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<sup>126</sup> *Supra*, n.15 at para.21.

<sup>127</sup> R. Cooke, “The Law Lords: An endangered heritage” (2003) 119 *L.Q.R.* 64.

<sup>128</sup> *Supra*, n.31 at pp.20-22.

<sup>129</sup> HC Official Report vol.429 col.575 17 January 2005.

<sup>130</sup> HL Official Report vol.665 col.57 11 October 2004.

<sup>131</sup> <<http://cmiskp.echr.coe.int/tkp197/viewhbk.asp?sessionId=1506887&skin=HUDOC-EN>>. (Last visited on 6 December 2004).

<sup>132</sup> *ibid.*, at para.27.

<sup>133</sup> *ibid.*, at para.29.

“The Court is not persuaded that the mere fact that M.P. was a member of the legislature at the time when he sat on the applicant’s appeal is sufficient to raise doubts as to the independence and impartiality of the Court of Appeal. While the applicant relies on the theory of separation of powers, this principle is not decisive in the abstract.”<sup>134</sup>(sic).

This would, accordingly, suggest that the current self-denying ordinance appears to satisfy the requirements of Article 6. One judge, Judge Borrego Borrego, however, dissented from the judgment,<sup>135</sup> and it is of interest to remember that in the case, the MP was in a minority on the court as three professional judges outnumbered the two expert witnesses. In contrast, the position in the United Kingdom is that the entire panel of Law Lords determining an appeal forms part of the legislature. It is also perhaps significant that according to the European Court’s judgment, from January 2003 the domestic law of Finland had been changed and that expert members no longer participate in proceedings before the Court of Appeal. The fact remains that a legal challenge to the constitutional duality of the Law Lords under Article 6 has not yet been realised in either the domestic courts under the Human Rights Act or in the European Court of Human Rights. Perversely, the former situation would raise the legal spectre of the Law Lords themselves ruling on this matter as it would no doubt be the case that – in exhausting the *domestic remedy* – the issue would have to be litigated up to the final court of appeal. In any event, for a definitive determination, the issue would ultimately have to be tested in Strasbourg. Nevertheless, even if the current position of the Appellate Committee appears to be consistent with the requirements of the Convention, as noted above, the Human Rights Committee clearly have a case that, in practice, a separately constituted Supreme Court would in any event make it much less likely that a breach of Article 6 would occur.<sup>136</sup>

Opponents of a Supreme Court such as Lord Jauncey of Tullichettle have also argued that such a reform would provide no real practical benefit and was unnecessary.<sup>137</sup> In addition, the Shadow Minister for Home Affairs, Jonathan Djanogly MP speaking in the House of Commons stated that this reform was modernisation of the constitution for the sake of it and asserted that the Bill (notwithstanding the creation of a Judicial Appointments Commission which was generally supported) represented “constitutional vandalism”.<sup>138</sup> In fact, it has been proposed that a Supreme Court could actually be harmful in two ways: Firstly to Parliament and secondly to the Law Lords themselves. With regard to the former, it has been suggested that the expulsion of the judges would mean that the second chamber (as part of the legislature) would lose the benefit of the Law Lords’ judicial wisdom,<sup>139</sup> together with their valued participation in the committee system. The removal of the Law Lords, however, would clearly not leave the House of Lords lacking in legal knowledge as other members of the chamber have

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<sup>134</sup> *ibid.*, at para.34.

<sup>135</sup> *ibid.*, at pp.7-8.

<sup>136</sup> *Supra*, n.31 at p.21.

<sup>137</sup> *Supra*, n.22 at p.364.

<sup>138</sup> HC Official Report vol.431 cols 917-918 1 March 2005.

<sup>139</sup> As noted by Lord Borrie: HL Official Report vol.657 col.936 9 February 2004.

valuable expertise in the law. Moreover, as already noted, the appendix supplied by the Select Committee listing the interventions of the serving Law Lords, illustrates the somewhat limited value they have currently in respect of the business of the House in any case. Indeed, in this context Lord Hope of Craighead commented in his oral evidence to the Constitutional Affairs Committee that, in practice, there was already almost a complete separation of the judiciary from the legislature (“if that is important”) owing to the self-imposed absence of most of the Law Lords from the second chamber.<sup>140</sup> It is plain, however, that these absences merely serve to indicate the necessarily limited role the Law Lords play in the non-judicial business of the House. Further, Lord Richard has pointed out that the contribution made by the Law Lords in the House was in essence made by those Law Lords who had retired.<sup>141</sup>

Secondly, it has been argued that a new Supreme Court could prove detrimental to the Law Lords themselves. Lord Craig of Radley has suggested that the level of constitutional protection that the Law Lords currently receive under the aegis of Parliament would be greater than that which might be enjoyed by judges in a constitutionally separate Supreme Court.<sup>142</sup> Lord Norton has added that he feared that the establishment of a free-standing court could merely serve to constitutionally isolate the judiciary and leave them liable to criticism when they made controversial or unpopular decisions.<sup>143</sup> It is clearly the case that in the contentious jurisdiction of judicial review the tension between the judicial and executive arms of the constitution has become more marked in the past two decades.<sup>144</sup> This has undoubtedly been exacerbated with the enactment of the Human Rights Act 1998 and Kate Maleson has rightly commented that as a consequence of this Act, together with the advent of devolution, “politically and morally sensitive questions are more frequently coming before the courts.”<sup>145</sup> The recent highly contentious case involving the indefinite detention without charge or trial of non-nationals suspected of international terrorist activity<sup>146</sup> serves to underscore this point. In light of the above, it is contended that this further makes the case for a constitutionally separate Supreme Court which is visibly independent from the other arms of the constitution. Moreover, it is highly pertinent at this point to draw attention to the fact that the Act imposes a statutory requirement on the Lord Chancellor together with other Ministers, specifically to uphold the continued independence of the judiciary (section 3). The Human Rights Committee broadly welcomed this express statutory recognition of the principle of judicial independence which is typically enshrined in international

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<sup>140</sup> *Supra*, n.89 at Q281.

<sup>141</sup> HL Official Report vol.667 col.1562 20 December 2004.

<sup>142</sup> HL Official Report vol.657 col.1254 12 February 2004.

<sup>143</sup> *ibid.*, at col.1268.

<sup>144</sup> On the constitutional tension between the judiciary and the executive in the context of judicial review, see H. Woolf, “Judicial review – The tensions between the executive and the judiciary” (1998) 114 *L.Q.R.* 579.

<sup>145</sup> K. Maleson, “Selecting Judges in the Era of Devolution and Human Rights” in A. Le Sueur (ed), *Building the UK’s New Supreme Court: National and Comparative Perspectives* (Oxford, 2004), p.295.

<sup>146</sup> *A and Others v Secretary of State for the Home Department*, *The Times* 17 December 2004, p.78.

instruments.<sup>147</sup> Andrew Le Sueur, however, in commenting on the original draft of the Bill, pointed out the inherent difficulties with this attempt at codifying such complex conventions.<sup>148</sup> In addition, he observed that the Bill failed “to locate, delimit, and entrench judicial power”,<sup>149</sup> which is part of the ideal of the “institutional autonomy” of a final court of appeal.<sup>150</sup>

Lord Nicholls of Birkenhead made a further argument against reform by suggesting that the separation of the final court of appeal from Parliament would result in the Law Lords losing out on the wider perspective provided by the second chamber of Parliament which, of course, “is not judge centred”.<sup>151</sup> In fact, Jeremy Webber has noted that there is a respectable argument that involvement in, and appreciation of, the law making process, enhances the judicial function “helping judges to avoid the simplistic caricatures of the legislative process”.<sup>152</sup> This implies, however, that those lower ranked judges not in Parliament are necessarily at a constitutional disadvantage, together with those judges in other Supreme Courts that are separated from their respective legislature. In any case, the mechanics, flavour and process of legislative debates are readily available through Hansard. Lord Nicholls also contended that as a new court, the Supreme Court would not enjoy the international reputation currently enjoyed by the Appellate Committee.<sup>153</sup> Instead, the newly constituted court would be required to establish its reputation over time rather than inheriting that of its predecessor. It is suggested, however, that as section 24 of the Act would ensure that the first members of the newly created Supreme Court would be those judges acting as Law Lords immediately prior to the commencement of section 23 of the Act (the creation of the Supreme Court), it is equally arguable that the status and kudos associated with these Law Lords would be transferred to the nascent court.

Lord Hope of Craighead has drawn particular attention to the possible cost of a Supreme Court. He stressed that, in terms of efficiency and value for money, the present arrangements “cannot be bettered”<sup>154</sup> and Dominic Grieve speaking in the House of Commons added that in fact they are “astonishingly cheap”.<sup>155</sup> Indeed, one theme which ran throughout the debates as the Bill proceeded through the House of Lords, was the issue of cost (another being the question of accommodation). It is, of course, imperative that the proposals for the creation of a Supreme Court are “fully and accurately costed”<sup>156</sup> and the Government’s case for reform was hardly assisted by the initial absence of specific and detailed figures as to all of the costs involved. In the event, in December 2004 Lord Falconer issued a written statement to Parliament specifying the running and capital costs of the new court. In short, the reforms would be approximately £30 million in capital terms

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<sup>147</sup> *Supra*, n.31 at pp.13-15.

<sup>148</sup> *Supra*, n.3 at p.337.

<sup>149</sup> *Supra*, n.3 at p.342.

<sup>150</sup> *Supra*, n.98 at p.30.

<sup>151</sup> HL Official Report vol.657 col.1228 12 February 2004.

<sup>152</sup> *Supra*, n.114 at p.67.

<sup>153</sup> HL Official Report vol.657 col.1228 12 February 2004.

<sup>154</sup> *ibid.*, at col.1301.

<sup>155</sup> HC Official Report vol.429 col.584 17 January 2005.

<sup>156</sup> *Supra*, n.4 at p.402.

(renovating Middlesex Guildhall) together with £15 million for the relocation of other existing courts.<sup>157</sup> The envisaged annual running costs for the new Supreme Court would be approximately £8.4 million (the current running costs of the Law Lords are approximately £3.2 million). As this represents an approximate annual increase of £5.2 million, this will necessarily ensure that, notwithstanding the passing of the Act, the cost/benefit analysis of the reform will continue to be keenly debated.

In view of the above range of arguments deployed in support of, and ranged against the policy of the establishment of a Supreme Court, it is not altogether surprising that the Select Committee was itself divided over the desirability of this reform proposal.<sup>158</sup> Furthermore, it is also of interest to note that the persons who would be directly and intimately affected by the implementation of this measure, *viz.*, the serving Law Lords, are themselves divided on the issue. For example, whereas the Senior Law Lord, Lord Bingham is in favour of a Supreme Court,<sup>159</sup> the Second Senior Law Lord, Lord Nicholls of Birkenhead, is not.<sup>160</sup> Notwithstanding the arguments levelled against the creation of a Supreme Court, it is strongly contended to be “a desirable and long overdue constitutional reform”,<sup>161</sup> as it will modernise the judicial arm of the constitution by finally, and visibly, severing the final court of appeal from Parliament. From a constitutional perspective a free-standing Supreme Court would necessarily realign our constitutional arrangements so that they would accord further with the principles underpinning the separation of powers. In international terms, it would represent a public declaration of constitutionalism and bring our constitution into line with other democracies where the judicial power is more clearly separated.

### **The Nomenclature and Composition of The Supreme Court**

As part of its deliberations the Select Committee examined whether the terms Supreme Court and Justices of the Supreme Court were appropriate nomenclature. One difficulty is that the term Supreme Court, of course, already exists in England and Wales as an umbrella term for the courts of the High Court, Court of Appeal and the Crown Court. Similarly, the term is also in use in both Northern Ireland and Scotland.<sup>162</sup> Accordingly, it is conceivable that the term Supreme Court could mislead. In this context the Select Committee also noted that “the bill does not create a new level of “United Kingdom” law separate from the laws of the three jurisdictions”<sup>163</sup> (a point which Lord Falconer made clear earlier in Parliament as part of his Formal Statement to the House of Lords on the Supreme Court).<sup>164</sup> Consequently, the new Supreme Court would not be a United Kingdom court processing United Kingdom appeals *per se*. Instead, it would operate as a

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<sup>157</sup> HL Official Report vol.667 WS 72-73 14 December 2004.

<sup>158</sup> *Supra*, n.24 at para.132.

<sup>159</sup> *Supra*, n.88.

<sup>160</sup> HL Official Report vol.657 cols 1227-1229 12 February 2004.

<sup>161</sup> *Supra*, n.4 at p.401.

<sup>162</sup> For example, in Scotland it collectively refers to the Court of Session and the High Court of Justiciary.

<sup>163</sup> *Supra*, n.24 at para.147.

<sup>164</sup> HL Official Report vol.657 col.927 9 February 2004.

separate final court of appeal for each of the three distinct jurisdictions of England and Wales, Northern Ireland and Scotland (except in Scottish criminal appeals).<sup>165</sup> In fact, apart from in relation to devolution matters, judicial decisions of the new Supreme Court in respect of an appeal from one jurisdiction would not be a binding judicial precedent in the others. This principle was given recognition in an amendment to the Bill (now section 41(2) of the Act). This section also usefully safeguards the different national identities of the jurisdictions of the United Kingdom by expressly protecting the distinction between them (section 41(1)). The Select Committee had earlier recommended that such an amendment to the Bill was desirable in order to safeguard these separate and distinct jurisdictions.<sup>166</sup> Accordingly, section 41 should help prevent the new Supreme Court ‘Anglicising’ the other two legal systems in the United Kingdom.

A further reservation with the title of a Supreme Court was expressed by the Constitutional Affairs Committee which asserted that it “is not a happy choice”<sup>167</sup> as the term could mislead by intimating, erroneously, that the new Supreme Court would assume the constitutional power of the United States Supreme Court or any Supreme or Constitutional Court with the authority to invalidate primary legislation. Indeed, Lord Woolf initially cautioned in his Squire Centenary Lecture in March 2004 that although the new court would be called a Supreme Court, “Among the Supreme Courts of the world, our Supreme Court will, because of its more limited role, be a poor relation.”<sup>168</sup> In short, although the new court would process devolution issues, in essence it will simply assume the same constitutional position of that of the existing Appellate Committee. Notwithstanding the overriding constitutional force of European Community Law,<sup>169</sup> the new Supreme Court would not threaten the fundamental precept of the United Kingdom constitution, *viz.*, the legislative supremacy of Parliament. Nevertheless, it is contended that the nomenclature of the Supreme Court of the United Kingdom is appropriate. In fact, the current title of Appellate Committee of the House of Lords is apt to mislead the non-lawyer in any event. In support of the term Supreme Court, Lord Bingham in his oral evidence to the Select Committee was insistent that “it is the nearest we have got to the apex of the jurisdictional, curial pyramid in the jurisdictions of England, Wales, Scotland and Northern Ireland, and that is the proper name for it in my opinion.”<sup>170</sup>(sic). The Select Committee – with self-confessed different degrees of enthusiasm – agreed that both the titles of the Supreme Court and Justice of the Supreme Court were apposite, but that as a consequence of adopting them, the existing use of the term Supreme Court in other contexts should be altered.<sup>171</sup> This appeared an eminently sensible conclusion and in the House of Commons the Bill was amended to the effect that the Supreme Court of England and Wales

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<sup>165</sup> In Scotland, under the new arrangements Scottish criminal appeals will continue to proceed to the High Court of Justiciary.

<sup>166</sup> *Supra*, n.24 at para.283.

<sup>167</sup> *Supra*, n.15 at para.101.

<sup>168</sup> *Supra*, n.18.

<sup>169</sup> *R v Secretary of State for Transport, ex parte Factortame Ltd (No. 2)* [1991] 1 A.C. 603.

<sup>170</sup> *Supra*, n.22 at Q434.

<sup>171</sup> *Supra*, n.24 at para.153.

was renamed the Senior Courts of England and Wales (section 59(1) of the Act). Similarly, the Supreme Court of Judicature of Northern Ireland was renamed the Court of Judicature of Northern Ireland (section 59(2)). It is further contended that the term Justice of the Supreme Court is appropriate and it is certainly preferable to the current term of Lord of Appeal in Ordinary, which no doubt confuses the non-lawyer.

As noted above, under the Act the Court would comprise 12 permanent judges, although section 38 makes provision enabling the court to have access, where necessary, to additional judges ('*acting judges*'), which would supplement the permanent membership of the court. As the newly constituted Supreme Court would process appeals from the three different jurisdictions of the United Kingdom, this will necessarily require that Justices, as is currently the case with the Law Lords, be recruited from each jurisdiction. The Act does not specify the number of judges to be recruited from each jurisdiction, which would appear to be a sensible approach as otherwise this would amount to a rigid quota system which plainly could cut across the requirement of merit. For its part, the Select Committee specifically recommended the continuation of the constitutional convention that at least two judges in the final court of appeal should be Scottish<sup>172</sup> (the Constitutional Affairs Committee concurred with this in its report in January 2005).<sup>173</sup> The Select Committee made no similar recommendation, however, in respect of Northern Ireland, although it is clearly the case that the practice of appointing one Law Lord from Northern Ireland is a less well established and settled constitutional convention. In any event, Brice Dickson has drawn attention to the constitutional anomaly of the Appellate Committee whereby the court had recently heard a number of appeals from Northern Ireland in which none of the presiding Law Lords had had personal experience of the Northern Irish legal system.<sup>174</sup> In particular he made reference to Lord Hutton (who retired in 2004) who sat in only 6 out of 13 appeals from Northern Ireland since 1997. Furthermore, the position of Wales appears to have been completely overlooked. It has been highlighted that in view of the fact that Welsh devolved matters will be resolved by the Supreme Court as part of its jurisdiction, this raises the issue as to whether consideration should be given to one of the Justices being Welsh (or at least a judge with judicial experience in Wales).<sup>175</sup>

In terms of how the Supreme Court would sit, the Bill as originally drafted, required that in order to be duly constituted, the court must consist of an uneven number of judges, (with a minimum of three, to include at least one of whom would be a permanent judge). During the progress of the Bill in the House of Lords, concern was expressed that, as a consequence, the Supreme Court could, for example, theoretically consist of a panel of five judges, only one of whom, would be a permanent judge.<sup>176</sup> In due course the Bill was later amended in the House of Lords to ensure that for a panel to be properly

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<sup>172</sup> *Supra*, n.24 at para.171.

<sup>173</sup> *Supra*, n.64 at para.45.

<sup>174</sup> B. Dickson, "A Constitutional Court for Northern Ireland?" in A. Le Sueur (ed.), *Building the UK's New Supreme Court: National and Comparative Perspectives* (Oxford, 2004), p.60.

<sup>175</sup> *Supra*, n.122 at p.147.

<sup>176</sup> Lord Goodhart, HL Official Report vol.665 col.105 11 October 2004.

constituted, more than half of the judges have to be permanent (now section 42(1) of the Act). Following the practice of the Appellate Committee, the new Supreme Court would sit in uneven panels which would give it flexibility and allow the court to hear more cases than if it sat *en banc*, viz., with all Justices present. Although the Select Committee received evidence as to whether the new Supreme Court should sit *en banc*, as in the United States Supreme Court, it nevertheless agreed “that the Supreme Court should sit in panels, the size of which may be varied at the Court’s discretion according to the importance of the case.”<sup>177</sup> In fact, Lord Bingham had earlier cautioned that if the final court of appeal were to sit *en banc* it would have the effect of resulting in “a savage reduction in the number of cases heard”.<sup>178</sup>

In any event, it is plain that it would be impossible for the final court to sit *en banc* if final court judges continued periodically, to be called upon to oversee inquiries. For example, Lord Saville of Newdigate has been involved in the Bloody Sunday inquiry since 1998. It is contended that in view of the importance of safeguarding judicial independence, the practice of using final court judges to chair inquiries – some of which are necessarily politically charged and controversial – should be discontinued. In addition, Diana Woodhouse has argued that in the interests of constitutional transparency, the way in which the final court undertakes its business in relation to the determination and selection of its panels, required reconsideration.<sup>179</sup> Furthermore, Richard Gordon QC has rather interestingly suggested that, specifically in terms of important constitutional cases, the Law Lords should sit in a specialist panel.<sup>180</sup> In terms of the delivery of its judgments, one innovation which could usefully be adopted by the new court, as noted by Diana Woodhouse above, would be for each judgment to be accompanied by a summary in plain English. This would undoubtedly make the final court more accessible to the public at large.

In respect of the qualifications required for appointments, in essence section 25 of the Act stipulates that these are the same as currently required for appointment to the existing Appellate Committee.<sup>181</sup> On this point the Select Committee received written evidence from The Odysseus Trust which hoped that the criteria would be “sufficiently flexible” so as to embrace, for example, legal scholars.<sup>182</sup> This would appear to be an interesting proposition given the nature of the role of the final court of appeal at the apex of the legal system, which is, in essence, to resolve very refined, sometimes esoteric, points of law. Indeed, other Supreme/Constitutional Courts include academics within their membership, as do the European Courts of Justice and of Human Rights. Moreover, the suggestion that the legal academic community should be included within the Supreme Court would undoubtedly widen its social diversity. In a recent article in 2003,

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<sup>177</sup> *Supra*, n.24 at para.171.

<sup>178</sup> *Supra*, n.88 at p.10.

<sup>179</sup> *Supra*, n.122 at pp.148-149.

<sup>180</sup> *Supra*, n.104 at p.324.

<sup>181</sup> Section 25 requires that a putative Justice should have either have held high judicial office for at least 2 years or have been a qualifying practitioner for at least 15 years.

<sup>182</sup> *Supra*, n.22 at p.382.

however, Sir Sydney Kentridge cautioned that a Law Lord who lacked judicial experience or years in practice as a lawyer “would be at a considerable and possibly incurable disadvantage.”<sup>183</sup> Nevertheless, recently, Baroness Hale of Richmond has been appointed to the Appellate Committee and she has both a judicial and academic background. It is also perhaps of interest to remember that the value of an academic perspective is expressly recognised in the Act. As already noted, the Prime Minister, in recommending a putative Lord Chancellor for appointment, may take into account, *inter alia*, ‘*experience as a teacher of law in a university*’ (section 2(2)(d) of the Act).

In terms of social composition, the lack of diversity in the judiciary generally is clearly a live issue as evidenced by the June 2003 Bar Council Working Party Report which made clear the desirability of greater diversity in the judiciary.<sup>184</sup> In addition, in October 2004 the Department for Constitutional Affairs published a consultation paper into the lack of diversity in the judiciary as a whole.<sup>185</sup> In relation to the final court of appeal, it is self-evident that this court is not fully representative of society (Baroness Hale, for example, is currently the only female member of the Appellate Committee). In fact, the lack of diversity in the court is thrown into sharp relief by cases such as *R v A*<sup>186</sup> where an all male panel of Law Lords determined the issue of the admission of evidence in a rape trial in the context of section 3 of the Human Rights Act. Notwithstanding this, it is contended that the introduction of a fixed quota system (for example, in terms of gender and ethnicity), to address this imbalance, would plainly cut across the principle of appointing Justices on the basis of merit, particularly as the pool of such applicants would necessarily be very restricted. Indeed, Sir Thomas Legg QC has sensibly advised that there was no room “for political correctness for its own sake” in the appointment of judges in general.<sup>187</sup> It is pertinent to note that during its passage through the House of Commons, Part 4 of the Bill – concerning the Judicial Appointments Commission – was specifically amended to encourage diversity in the judiciary. As a result, section 64 of the Act requires the Commission, in exercising its functions under this Part of the Act, to ‘*have regard to the need to encourage diversity in the range of persons available for selection for appointments.*’ Significantly, this provision is made expressly subject to section 63 which, *inter alia*, stipulates that ‘*Selection must be solely on merit.*’

### The Process of Appointment

The process of appointing Justices to the Supreme Court is of considerable constitutional significance as it is paramount that this process, and consequently the Justices themselves, are perceived to be constitutionally

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<sup>183</sup> S. Kentridge, “The Highest Court: Selecting the Judges” (2003) 62 *C.L.J.* 62.

<sup>184</sup> *Bar Council Working Party on Judicial Appointments and Silk*, The Bar Council (2003), pp.12-15.

<sup>185</sup> *Increasing Diversity in the Judiciary* CP 25/04 (2004). In this context see A. Jack, “Number-crunching for diversity” (2004) vol.154 *N.L.J.* 1664.

<sup>186</sup> [2001] 3 ALL ER 1.

<sup>187</sup> T. Legg, “Brave New World – The new Supreme Court and judicial appointments” (2004) 24 *L.S.* 49.

legitimate and acceptable. It is important to remember that, as noted above, although the original purpose of the Bill was to abolish the Lord Chancellor, as it was subsequently amended to retain this office, references to the ‘*Minister*’ in the earlier drafts of the Bill – and hence below – should now be treated as a reference to the Lord Chancellor. In essence, the original draft of the Bill envisaged that in the event of a vacancy among the judges in the court, the Minister would have convened an *ad hoc* Supreme Court Selection Commission (hereafter the Selection Commission) which would have prepared for the Minister a list of two to five possible candidates. In preparing this list, the Selection Commission would have been required to consider the proscribed criteria laid down by the Minister and consult with senior judges. On receipt of this list, the Minister would also have been required to consult with the senior judges, which seemingly represented needless repetition of the consultation previously undertaken by the Selection Commission. In addition, the Minister would also have been required to consult with the First Minister in Scotland, the First and deputy First Ministers in Northern Ireland together with the National Assembly for Wales. It is arguable that this in itself is constitutionally inappropriate given that this consultation would take place between party politicians. In any case, the value of such comments proffered, certainly is open to question. Further, in relation to Wales, consultation would have been with a corporate body, as opposed to a specified individual office, and as such, as subsequently noted by the Select Committee, this necessarily raised issues of the maintenance of confidentiality in the consultation process.<sup>188</sup> Finally, after deciding which candidate was most suitable for appointment, the Minister would then have notified the Prime Minister of the candidate, who in turn, would then have recommended that candidate to the Queen for appointment.

The process of appointing Justices to the Supreme Court, as originally proposed by the Bill, raised a number of issues: firstly, in relation to the role of the executive in the process and secondly, in respect of the discretion conferred. As far as the former is concerned, it is arguable from a constitutional perspective that the executive – in the form of the Minister – should not be involved in the appointment of Justices of the Supreme Court given that, for example, these judges will inevitably be called upon to review the lawfulness of government action in judicial review proceedings (particularly under the aegis of the Human Rights Act 1998). It is suggested that a member of the cabinet vested with a wide and considerable discretion in the appointment of top level judges is inconsistent with the separation of powers. Nevertheless, there is widespread support for the principle that the executive be involved in the appointment of the judiciary. For example, Sir Thomas Legg QC in his oral evidence to the Constitutional Affairs Committee commented in relation to judicial appointments that “in my own view, the appointment of judges, and particularly of senior judges, is a political act in the broadest sense of the term” and therefore this power to appoint “should be primarily located in an accountable minister.”<sup>189</sup> The role of the Minister, therefore, would represent accountability to Parliament for the appointments made. Similarly, Andrew Le Sueur and Richard Cornes

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<sup>188</sup> *Supra*, n.24 at p.52.

<sup>189</sup> *Supra*, n.89 at Q251.

have contended that it is clear that elected politicians should play some part in senior judicial appointments in view of “the political importance of the senior judges’ roles”.<sup>190</sup> After all, the exercise of judicial power should not be excluded from the requirements of constitutional accountability.<sup>191</sup> In addition, the Constitutional Affairs Committee in its first report argued that the appointments process to the Supreme Court must have “some level of democratic accountability”.<sup>192</sup>

In essence, the argument in favour of directly involving the executive in the appointment process is to ensure that both the executive and Parliament (and indeed, the wider public) have confidence in the senior judiciary. Secondly, it would also avoid the constitutional spectre of a self-appointing judicial oligarchy. The question has to be asked, however, as to how accountable, in political reality, would the Minister actually be to Parliament for the appointments sanctioned. For example, Baroness Hale has already questioned the existing parliamentary arrangements in terms of securing accountability for appointments currently made. She has pointed out that, to her knowledge, neither the Lord Chancellor nor the Prime Minister is ever actually questioned in Parliament about individual judicial appointments that they had approved.<sup>193</sup> It is plain, therefore, that if the executive is entrusted with the constitutional responsibility for ultimately making these senior appointments, there must be improved parliamentary scrutiny and examination of these highly significant decisions.

Although the Bill was premised on the basis of direct executive involvement in the appointment of Justices of the Supreme Court, there was nevertheless criticism of the breadth of the discretion conferred on the Minister under the Bill as originally drafted, namely, the selection of a candidate from a list of between two and five names submitted to him. Notwithstanding that the Minister, in theory, would be accountable to Parliament for the exercise of this power, it is plain that such a list of candidates would have conferred an “unacceptably wide”<sup>194</sup> measure of discretion on him. Arguably, it could leave room for political manipulation in the appointments to the highest court. In fact, it is pertinent to remember that the Government’s consultation paper of July 2003 favoured, (in the context of the different possible models of a selection commission) in the light of “the likely limited field of candidates”,<sup>195</sup> a Selection Commission putting forward the names of one or two candidates only. Moreover, these names in any case would go to the Prime Minister. Further, even before the Bill was published, Lord Goodhart, though an advocate of a Supreme Court, described a list of five candidates as absurd. For example, he argued that even in the context of two names being submitted it would provide the executive with the opportunity to ignore the clearly outstanding candidate – but who happened to be unpopular with the Government at the time – and instead choose the less outstanding

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<sup>190</sup> *Supra*, n.98 at p.122.

<sup>191</sup> A. Le Sueur, “Developing mechanisms for judicial accountability in the UK” (2004) 24 *L.S.* 74.

<sup>192</sup> *Supra*, n.15 at para.57.

<sup>193</sup> B. Hale, “A Supreme Court for the United Kingdom?” (2004) 24 *L.S.* 42.

<sup>194</sup> *Supra*, n.4 at p.401.

<sup>195</sup> *Supra*, n.9 at para.41.

candidate.<sup>196</sup> For its part, the Select Committee stated that one name only should be submitted to the Minister and amended the Bill on this basis.<sup>197</sup>

In any event, it is debatable if (as the Act stipulates) a member of the executive is to be directly involved in the appointment process for putative Justices of the Supreme Court – a role, which is of paramount constitutional importance – it should be a figure with the constitutional gravitas of the Prime Minister. This is notwithstanding the fact that the office of the Lord Chancellor has now been retained under the Act and replaced references to the ‘*Minister*’. Conversely, the role of the Prime Minister in the appointment process is essentially formalistic and mechanical as he simply recommends to the Queen the candidate that has been notified to him.<sup>198</sup> Nonetheless, the Select Committee concluded (in relation to the original draft of the Bill) that within the context of appointing Justices to the Supreme Court, the respective roles of the Minister and Prime Minister were appropriate, with the latter simply acting as a conduit between the Queen and the Minister. It therefore recommended no change to the Bill.<sup>199</sup> As indicated above, as the Bill progressed through the House of Lords, the Supreme Court appointment process originally detailed in its provisions was subject to a number of amendments. Thereafter, this amended appointment procedure was subsequently endorsed by the House of Commons (although references to the ‘*Minister*’ in the Bill were replaced with those of the newly retained office of the Lord Chancellor). A summary of the revised procedure (now sections 25 to 31 of the Act) is detailed below.

In the event of a vacancy, the Lord Chancellor would convene a Supreme Court Selection Commission<sup>200</sup> which would select one candidate for recommendation. During the selection process, section 27 specifies that the Selection Commission would be required to consult with the senior judges, the Lord Chancellor, the First Minister in Scotland, the Secretary of State for Northern Ireland (pending the resumption of devolution) together with the Assembly First Secretary in Wales. Under section 27, in making a selection, the Selection Commission would be specifically required to ensure that selection was on merit and that, collectively, the Justices would ‘*have knowledge of, and experience of practice in, the law of each part of the United Kingdom*’ (section 27(8)). This latter provision thereby obviates the need for a statutory quota of a specified number of judges for each jurisdiction to be set out in the Act. In addition, regard would also have to be had to any guidance issued by the Lord Chancellor as to relevant matters to take into account in making a selection (section 27(9)). Thereafter, under

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<sup>196</sup> HL Official Report vol.657 cols 932-933 9 February 2004.

<sup>197</sup> *Supra*, n.24 at para.189.

<sup>198</sup> Section 26(3)(b) of the Act expressly states that the Prime Minister may not recommend any other person other than the person that has been notified to him under section 29.

<sup>199</sup> *Supra*, n.24 at para.200.

<sup>200</sup> Under Schedule 8, Part 1, para.1 to the Act, the composition of the Selection Commission would comprise the President and Deputy President of the Supreme Court together with one member of each of the following: the Judicial Appointments Commission, the Judicial Appointments Board for Scotland and the Northern Ireland Judicial Appointments Commission (at least one of these members must not be non-legally qualified).

section 28 the Selection Commission would submit a report to the Lord Chancellor in which it would state the candidate selected.

It is noteworthy to point out that although the Bill had been amended so that the Selection Commission would put forward one candidate only, nevertheless, the Constitutional Affairs Committee in its report in January 2005 recommended that an amendment be made so as to allow the Selection Commission the opportunity, when appropriate to do so, of the choice of supplying more than one name in the event of there being two or more equally appointable candidates.<sup>201</sup> Notwithstanding this, under the revised procedure agreed under the Act, on receiving the report from the Selection Commission, the Lord Chancellor in turn would then consult the judges aforementioned, the First Minister in Scotland, the Secretary of State for Northern Ireland together with the Assembly First Secretary in Wales, thereby needlessly replicating the consultation already undertaken by the Selection Commission. In respect of Wales, the Bill as originally drafted, stipulated ministerial consultation with the National Assembly. As noted above, during the passage of the Bill concerns were expressed in relation to the issue of confidentiality in consulting with a corporate body. As a result, in the House of Lords an amendment was successfully moved which had the effect of substituting the National Assembly with the Assembly First Secretary instead. Following this consultation, under section 29, the Lord Chancellor had in effect three options as detailed below.

Firstly, the Lord Chancellor could accept the selection and notify the name to the Prime Minister who in turn would then recommend that person to the Queen for appointment. Secondly, the Lord Chancellor could reject the selection (in writing and with reasons section 30(3)), although the power to reject was only exercisable under section 30(1) on the basis that in the Lord Chancellor's opinion the proposed candidate was not suitable for office. Thirdly, the Lord Chancellor could require the Selection Commission to reconsider<sup>202</sup> its selected candidate (in writing and with reasons section 30(3)). If at Stage 1 the Lord Chancellor decided to reject the selection of the Selection Commission, at Stage 2 of the process, the Lord Chancellor must either accept and notify the Prime Minister of the selected candidate put forward at this stage or require the Selection Commission to reconsider its selection (for the latter, the conditions set out in section 30(2) and (3) would still apply). If the latter option is taken, at Stage 3 of the process, the Lord Chancellor, with one exception,<sup>203</sup> would have to accept the Selection Commission's selection made at this stage and notify the Prime Minister of it. Alternatively, if at Stage 1 the Lord Chancellor required the Selection Commission to reconsider its selection, at Stage 2 of the process, the Lord

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<sup>201</sup> *Supra*, n.64 at pp.17-18.

<sup>202</sup> This power is only exercisable under section 30(2) on the grounds that in the Lord Chancellor's opinion there was insufficient evidence that the person was suitable for office, there was evidence that in terms of merit the person was not the best candidate, or that there was insufficient evidence that this appointment would ensure that, collectively, the judges of the court would 'have *knowledge of, and experience of practice in, the law of each part of the United Kingdom.*'

<sup>203</sup> Section 29(5). In essence, if a name which 'the Lord Chancellor required to be reconsidered at stage 1 or 2 was not selected again at the next stage, the Lord Chancellor' at stage 3 could then notify that name to the Prime Minister.

Chancellor must either accept and notify the Prime Minister of the selected candidate made at this stage or reject the selection (for the latter, the conditions set out in section 30(1) and (3) would still apply). If the latter option is taken, at Stage 3 of the process, the Lord Chancellor, with one exception (as above in section 29(5)), would have to accept the Selection Commission's selection made at this stage and notify the Prime Minister of it. Although this revised appointments process clearly fetters the discretion of the Lord Chancellor, the unnecessarily convoluted nature of it will, however, do little to either aid public understanding of the process or to enhance the transparency of the appointments procedure.

### **Jurisdiction**

In terms of its jurisdiction, section 40 of the Act – rather conservatively – simply transfers the current legal jurisdiction of the Appellate Committee of the House of Lords in appellate matters to the newly created Supreme Court. In other words, the Supreme Court would function as the final court of appeal for each of the separate jurisdictions of England and Wales, Northern Ireland and Scotland (except for Scottish criminal appeals, which would continue to proceed to the High Court of Justiciary). In relation to Scotland, the Select Committee examined whether Scottish criminal appeals should proceed to the new Supreme Court, but saw no need to alter the Bill to allow the Supreme Court to have jurisdiction over these matters.<sup>204</sup> On this issue, Andrew Le Sueur and Richard Cornes have observed that one consequence of Scottish criminal appeals being resolved within Scotland is that it necessarily denies Scottish criminal defendants access to the highest United Kingdom court of appeal.<sup>205</sup> In fact, it is of course arguable that this current jurisdictional anomaly could, in effect, be characterised as a legal variant of the West Lothian question which has been transposed into the Act. In other words, in the new Supreme Court, whereas the Scottish Justices would be able to determine English and Welsh criminal appeals, the reverse would not apply. Consequently, the continuation of this anomaly requires clear and cogent justification. In any event, the case for a new Supreme Court assuming responsibility for Scottish criminal appeals is plainly strengthened by the fact that the new court will process Scottish devolution matters (as detailed below) which could themselves involve Scottish criminal law or procedure.

In relation to Scottish civil appeals, the Act adopts a continuation of the current practice whereby appellants in Scottish civil appeals – unlike appellants in the rest of the United Kingdom – would not be required to seek leave/permission in order to access the final court of appeal. The Select Committee declined to recommend a change in this respect.<sup>206</sup> Accordingly, leave to appeal to the new Supreme Court will not be a universal requirement. This does appear to be a striking constitutional inconsistency and requires more justification than simply being an historic anomaly. It is pertinent to note that in the House of Commons Annabelle Ewing MP unsuccessfully moved an amendment which would have had the effect of

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<sup>204</sup> *Supra*, n.24 at para.226.

<sup>205</sup> *Supra*, n.98 at p.69.

<sup>206</sup> *Supra*, n.24 at para.244.

repatriating Scottish civil appeals by preventing final appeals in civil cases proceeding to the new Supreme Court. It was defeated overwhelmingly by 411 votes to 4.<sup>207</sup>

In one respect the new Supreme Court would enjoy additional constitutional responsibility as section 40(4) Schedule 9(b) of the Act transfers devolution jurisdiction (for example, whether the Scottish Parliament had exceeded its legal powers) from the Judicial Committee of the Privy Council to the newly constituted Supreme Court. Under section 41(3)(b) decisions of the Supreme Court made in respect of a devolution matter will be '*binding in all legal proceedings*' (in other words, in all three jurisdictions) and in this sense, therefore, the new court would represent a Supreme Court of the United Kingdom with a United Kingdom-wide jurisdiction. As Andrew Le Sueur has observed, the devolution legislation, together with the Human Rights Act, are already areas of law that could "meaningfully" be called UK Law.<sup>208</sup> He also indicated that one expectation concerning the status of the top-level court of the United Kingdom is for it to operate as "*a national institution of and for the whole UK*" with unifying functions.<sup>209</sup> Further, the Government argued in its consultation paper that a Supreme Court resolving devolution matters would avoid the current possibility of jurisprudential inconsistency in the Human Rights Act 1998 case law between the Judicial Committee of the Privy Council and the Appellate Committee. In other words, it would avoid a conflict in human rights jurisprudence, between on the one hand, the Appellate Committee processing ordinary appeal cases involving the Human Rights Act 1998 and, on the other, the Privy Council determining devolution issues with a human rights dimension. In short, a new Supreme Court would "restore a single apex to the UK's judicial system where all the constitutional issues can be considered."<sup>210</sup>(sic). In fact, Aidan O'Neill QC in his memorandum to the Select Committee indicated that the current arrangements had already pointed "to certain tensions in the manner in which these two courts have been operating to date as courts for the whole of the United Kingdom."<sup>211</sup> It seems clear, therefore, that a Supreme Court assuming a devolution jurisdiction would help ensure that a consistent approach is taken in respect of the ever increasing and important jurisprudence generated by the Human Rights Act.

### Final Issues

One matter on which the Act is silent is the issue of the establishment of a parliamentary committee (joint or otherwise) to act as a link between the judiciary and Parliament. Although under the Act the judges in the final court of appeal would be separated from the legislature, it is important that these Justices do not become isolated and operate in a constitutional vacuum. A parliamentary committee could be convened to facilitate communication and manage the constitutional relationship between these two arms of the constitution. It is also possible that the newly created ad hoc Supreme Court Selection Commission could report to this committee in respect of the

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<sup>207</sup> HC Official Report vol.430 cols 755-758 1 February 2005.

<sup>208</sup> *Supra*, n.6 at p.10.

<sup>209</sup> *Supra*, n.6 at p.9.

<sup>210</sup> *Supra*, n.9 at para.20.

<sup>211</sup> *Supra*, n.22 at p.384.

performance of its functions. In fact, it has been pointedly argued that although the Government issued its consultation paper on its proposals, the issue of the relationship between Parliament and the newly constituted court had been neglected in the context of the overall general debate on a Supreme Court. Yet this is a matter which should have necessarily formed part of any package of reform.<sup>212</sup> In addition, it is arguable that in order to strengthen further this communication, putative Justices of the Supreme Court, immediately after the appointment process had been completed, could be introduced to Parliament. This could, for example, be usefully performed by a joint committee of both Houses of Parliament.

In respect of parliamentary confirmation hearings in general, Kate Malleson has commented that such examinations would provide some information on the ideological beliefs of final court judges, as it is arguable that such scrutiny “is precisely what is lacking in the present system.”<sup>213</sup> It is clear that this process would inevitably increase public awareness of, and no doubt interest in, putative Justices of the Supreme Court. For its part, although the Select Committee concluded in principle, that although it would be desirable for a parliamentary committee to act as a bridge between the two arms of the constitution, nevertheless, it made it plain that “Such a committee should not seek to hold individual judges to account.”<sup>214</sup> This view was subsequently endorsed by the Human Rights Committee.<sup>215</sup> Although the issue of a parliamentary committee is now one for Parliament itself to decide in due course, in this context it is perhaps pertinent to draw attention to an amendment to the Bill (now section 5 of the Act) which was moved by Lord Woolf.<sup>216</sup> This section sensibly facilitates dialogue between, on the one hand, Parliament and the other, the ‘*chief justice of any part of the United Kingdom*’ (section 5(1)). In essence, it enables these judges to lay written representations before Parliament in respect of important issues relating to the judiciary, or the administration of justice, in that part of the United Kingdom.

One final issue that was not addressed by the original draft of the Bill was the question of accommodation. At the time of the introduction of the Bill in February 2004, permanent premises (quite understandably) had not been acquired to house the proposed new Supreme Court. Consequently, during the passage of the Bill in the House of Lords, the issue was raised as to whether the operation of the part of the Bill relating to the Supreme Court, should be suspended pending appropriate accommodation being secured. The Select Committee was divided over the issue of whether this part of the measure should be delayed in these circumstances and therefore made no recommendation on this issue.<sup>217</sup> Notwithstanding this, the insertion of a sunrise clause into the Bill appeared an eminently sensible option to take.<sup>218</sup> Indeed, it would be self-evidently incongruous for the Supreme Court to come into operation with the newly created Justices sitting in Parliament

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<sup>212</sup> *Supra*, n.191 at p.88.

<sup>213</sup> *Supra*, n.145 at p.309.

<sup>214</sup> *Supra*, n.24 at para.420.

<sup>215</sup> *Supra*, n.31 at p.23.

<sup>216</sup> HL Official Report vol.667 col.1540 20 December 2004.

<sup>217</sup> *Supra*, n.24 at para.144.

<sup>218</sup> *Supra*, n.4 at p.402.

waiting for appropriate accommodation to be arranged. In April 2004 the Government stated that it was inevitable that it would take time to identify the best location for the new Supreme Court, but insisted that it was “for the Government to decide how best to manage any transitional period and it would be inappropriate for the legislation to impose limitations or restriction in this respect.”<sup>219</sup> Eight months later, however, Lord Falconer successfully moved an amendment to the Bill with the effect that the Supreme Court would not come into force unless the Lord Chancellor was satisfied that the court would ‘*be provided with accommodation in accordance with written plans that he has approved*’ (now section 148(4) of the Act). The Lord Chancellor will only be able to approve such plans if, having consulted the existing Law Lords at the time of the approval, he was ‘*satisfied that accommodation in accordance with the plans will be appropriate for the purposes of the Court.*’ (Section 148(5)).

Lastly, it is suggested that the architecture of the building in which the Supreme Court is to be housed must be appropriate to the constitutional standing of the court as the final court of appeal, *viz.*, The Supreme Court of the United Kingdom. In this context, Sir Sydney Kentridge indicated that a new Supreme Court would merit the architecture of a building comparable with the Supreme Courts in Ottawa, Canberra and Washington.<sup>220</sup> This would undoubtedly serve to act as a clear public demonstration of the constitutional significance and importance attached to a newly constituted Supreme Court. In a written statement in December 2004, Lord Falconer expressed the hope that the Supreme Court’s first sitting in its accommodation in Middlesex Guildhall (his preferred option) would be in 2008,<sup>221</sup> and later, in the House of Commons, Christopher Leslie reaffirmed that the Government’s preferred option was for Middlesex Guildhall to be the location of the new Supreme Court.<sup>222</sup> For its part, the Constitutional Affairs Committee in its report in January 2005 noted that this particular building would have the potential to be the seat of the Supreme Court provided that it was suitably adapted to enable “the new court to function as a modern appellate court.”<sup>223</sup>

### Conclusion

In conclusion, the establishment of a Supreme Court is to be welcomed as it will place the United Kingdom’s uncodified constitutional arrangements on a modern footing by finally severing the highest court of appeal from Parliament. It would provide much needed clarity and transparency into the institutional structure of the constitution and would specifically integrate with two other recent constitutional reforms *viz.*, the devolution settlement and the Human Rights Act. Accordingly, Part 3 of the Constitutional Reform Act 2005 will represent a watershed for the judicial arm of the constitution and will result in the United Kingdom, like New Zealand, who themselves have recently established a Supreme Court in Wellington, beginning the 21<sup>st</sup> century armed with new arrangements in respect of the

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<sup>219</sup> *Supra*, n.23 at para.30.

<sup>220</sup> *Supra*, n.183 at p.57.

<sup>221</sup> HL Official Report vol.667 WS 71-73 14 December 2004.

<sup>222</sup> HC Official Report vol.429 col.565 17 January 2005.

<sup>223</sup> *Supra*, n.64 at p.19.

final court of appeal.<sup>224</sup> Notwithstanding this, although the new Supreme Court would be physically, legally and visibly separate from Parliament and represent a significant shift in our constitutional arrangements, Andrew Le Sueur has stressed that in terms of the court's composition, powers and jurisdiction, the Government, in drafting Part 2 of the Bill (now Part 3 of the Act) "rejected almost every innovation that could have been introduced".<sup>225</sup> In other words, the new Supreme Court, apart from the new jurisdiction to process devolution issues, would simply be a transplantation of the current Appellate Committee. Indeed, Baroness Hale opined that, in view of the upheaval that would necessarily result from the establishment of a new Supreme Court, whether in these circumstances it was perhaps worth undertaking something more radical with the court?<sup>226</sup> Finally, if the new Supreme Court is to be housed in Middlesex Guildhall, Christopher Leslie has rather poignantly commented that this would result in Parliament Square in London being flanked by all three arms of the constitution, *viz.*, the legislature in the Palace of Westminster, the executive in Whitehall and the judiciary in the form of the Supreme Court in the Middlesex Guildhall.<sup>227</sup>

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<sup>224</sup> The Supreme Court Act 2003 (NZ). On the New Zealand Supreme Court see: R. Cornes, "Appealing to history: the New Zealand Supreme Court debate" (2004) 24 *L.S.* 210.

<sup>225</sup> *Supra*, n.3 at p.331.

<sup>226</sup> *Supra*, n.193 at p.42.

<sup>227</sup> HC Official Report vol.430 col.737 1 February 2005.

## COMMORIENTES, JOINT TENANCIES AND THE LAW OF SUCCESSION

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### Introduction

The Latin term *commorientes* refers to two or more people who die, often in a common disaster, in circumstances where there is uncertainty as to the order of their deaths. By extension, the term is also used to refer to the phenomenon of people dying in the relevant circumstances.<sup>1</sup> The cases are a catalogue of shared tragedy, with unfortunate victims succumbing to car accidents,<sup>2</sup> fire,<sup>3</sup> murder,<sup>4</sup> massacre,<sup>5</sup> shipwreck,<sup>6</sup> exploding bombs,<sup>7</sup> gas poisoning<sup>8</sup> and, in one case, strawberries and cream laced with arsenic.<sup>9</sup> The difficulty in determining the order of death in such cases causes legal problems of various sorts. Issues arise in relation to the interpretation of dispositions in the wills of the *commorientes* or concerning the operation of the rules of intestacy. For example, if X has left property to Y, it is crucial to know which of the two survived the longer because the gift to Y would lapse if Y died first. Similarly, X may have left her property to Y, with a proviso that the property should pass to Z if Y dies during X's lifetime. Furthermore, where the parties hold property under a joint tenancy, the right of survivorship applies and the property should pass to the estate of the last

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<sup>1</sup> The legal issues discussed in this article can arise even where there has been no common calamity. In *Wing v Angrave* (1860) 8 H.L.C. 183 at 208-209, Lord Campbell L.C. referred to the hypothetical case where a husband's ship was lost at an unknown point in its voyage and his wife died at home at around the same time. Note the similar remarks of Lord Wensleydale *ibid.*, at 218 and see also *Hickman v Peacey* [1945] A.C. 304 at 314-315 *per* Viscount Simon L.C. *Cf. Re Albert* [1967] V.R. 875; *Re Lay Estates* (1961) 32 D.L.R. (2d) 156.

<sup>2</sup> *E.g. Re Kennedy* [2000] 2 I.R. 571.

<sup>3</sup> *E.g. In Re Smith* [1955] N.Z.L.R. 1122; [1956] N.Z.L.R. 992; *Lamb v Lord Advocate* 1976 S.C. 110.

<sup>4</sup> *E.g. Re Pechar* [1969] N.Z.L.R. 574.

<sup>5</sup> *E.g. Re Benyon* [1901] P. 141.

<sup>6</sup> *E.g. Elliot v Smith* (1882) 22 Ch. D. 236; *Re Alston* [1892] P. 142; *Re Rowland* [1963] Ch. 1. As an example of the heart-breaking nature of the facts underlying many *commorientes* cases, see *Underwood v Wing* (1855) 4 De G.M. & G. 633 at 654, where Wightman J. (giving the joint opinion of himself and Martin B.) summarised the evidence of a sailor named Joseph Reed, the only survivor of the shipwreck in question, in relation to the death of a family: "they were all standing together on the side of the ship, the husband with his wife in his arms, and the two boys clinging to their mother, all clasped together; . . . whilst in this position a sea swept them right off, and he saw them no more, and his belief was that they all four went down together, instantly, in a whirlpool or eddy caused by the beating of the sea against the ship, and never rose again."

<sup>7</sup> *E.g. Hickman v Peacey* [1945] A.C. 304. See also the cases listed in n.71 below.

<sup>8</sup> *E.g. Re Bate* [1947] 2 All E.R. 418; *Re Trenaman* [1962] S.A.S.R. 95.

<sup>9</sup> *Re Comfort* [1947] V.L.R. 237.

surviving joint tenant. In cases of *commorientes* the problem is, of course, that one cannot determine which joint tenant was the last survivor.

The issues surrounding *commorientes* were addressed in detail by the Northern Ireland Land Law Working Group.<sup>10</sup> However, its recommendations for reform have not yet been implemented.<sup>11</sup> In the Republic of Ireland, there has already been some legislative intervention.<sup>12</sup> However, the relevant provision is limited in its scope and clearly does not solve all the problems. In 2003, the Republic of Ireland's Law Reform Commission (the "L.R.C.") made a new proposal in respect of "Commoventes and Joint Tenancies" in a report entitled *Land Law and Conveyancing Law (7): Positive Covenants Over Freehold Land and Other Proposals*.<sup>13</sup> In a more recent Consultation Paper on the *Reform and Modernisation of Land Law and Conveyancing Law* (October 2004),<sup>14</sup> the L.R.C. has provisionally recommended the enactment of the proposals in its series of earlier reports on land law<sup>15</sup> including its recommendation in respect of *commorientes* and joint tenancies.<sup>16</sup> This article discusses the law on *commorientes* and attempts to clarify the existing legal position in Northern Ireland and in the Republic of Ireland. This will involve *inter alia* offering a critique of *Re Kennedy*,<sup>17</sup> an important recent decision of the Republic of Ireland's High Court, and a reassessment of the old case of *Bradshaw v Toulmin*,<sup>18</sup> the leading case in both jurisdictions in relation to *commorientes* and joint tenancies. The article will then move on to examine the law reform options for both jurisdictions.

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<sup>10</sup> Land Law Working Group, *Discussion Document No.4 (Conveyancing and Miscellaneous Matters)* (1983) Ch. 7; *Final Report* (1990), Vol.1, paras.2.14.3-2.14.6. See also Land Law Working Party, *Survey of the Land Law of Northern Ireland* (1971), paras.406-407.

<sup>11</sup> With the exception of one comparatively minor recommendation enacted in the Wills and Administration Proceedings (NI) Order 1994, Art.30 (see text following n.149 below).

<sup>12</sup> See Succession Act 1965, s.5 (discussed in more detail in the text following n.34 below).

<sup>13</sup> LRC 70-2003 (March 2003), Ch.3.

<sup>14</sup> LRC 34-2004. This Consultation Paper follows the inception in late 2003 of a joint project, between the Department of Justice, Equality and Law Reform and the L.R.C., for the major reform and modernisation of land law and conveyancing law. The "ultimate goal . . . is the introduction of an e-conveyancing system similar to those being developed in other jurisdictions." See p.vii of the Consultation Paper. There is therefore considerable momentum behind the law reform process relating to land law and a real prospect of the prompt enactment of legislation to implement extensive reform.

<sup>15</sup> See *Report on the Rule against Perpetuities and Cognate Rules* (LRC 62-2000) (December 2000); *Report on the Acquisition of Easements and Profits à Prendre by Prescription* (LRC 66-2002) (December 2002); *Report on Title by Adverse Possession of Land* (LRC 67-2002) (December 2002). See also *Consultation Paper on General Law of Landlord and Tenant* (LRC CP 28-2003) (December 2003); *Consultation Paper on Judgment Mortgages* (LRC CP 30-2004) (March 2004).

<sup>16</sup> n.14 above, p.84.

<sup>17</sup> [2000] 2 I.R. 571.

<sup>18</sup> (1784) Dick. 633.

### The Current Law on Commorientes in Northern Ireland

In the absence of legislative intervention, the common law position (established in the English case law) still applies in Northern Ireland.<sup>19</sup> The current Northern Irish position has been summed up as follows: “when the order in which two persons died cannot be satisfactorily determined, neither is deemed to have survived the other, with the result that their estates cannot benefit from each other.”<sup>20</sup> In the early cases, the courts rejected the approach of the Napoleonic Code in France<sup>21</sup> which, in the absence of any guidance from the facts themselves, relied on a series of presumptions based on considerations such as the age or sex of the parties<sup>22</sup> to try to reach the most probable result in terms of the order of death.<sup>23</sup> As was explained in *Re Phené’s Trusts*,<sup>24</sup> the rule which became established in English law was that “those who found a right upon a person having survived a particular period must establish that fact affirmatively by evidence”. It appears that the burden of proof which must be discharged is the normal civil standard of proof on the balance of probabilities.<sup>25</sup>

<sup>19</sup> Note, however, two relevant legislative provisions: Wills and Administration Proceedings (NI) Order 1994, Art.30 (see text following n.149 below) and Succession (NI) Order 1996, Art.3 (see text to and following n.170 below).

<sup>20</sup> Grattan, *Succession Law in Northern Ireland* (SLS Legal Publications, Belfast, 1996), p.157. Cf. the discussion in Maxwell (ed.) *Miller’s Irish Probate Practice 1900* (Professional Books, Oxford, 1984), pp.391-393.

<sup>21</sup> As well as finding favour in European civil law systems, presumptions based on the Napoleonic Code were also adopted, for example, in Louisiana (for full text, see Law Reform Commission of British Columbia *Report on Presumptions of Survivorship* LRC-56 (October 1982) pp.23-24), California, Puerto Rico and the Philippines. See Wigmore *Evidence in Trials at Common Law (Chadbourn Revision)* (Little, Brown & Co, Boston, 1981), Vol.9, p.620.

<sup>22</sup> The relevant presumptions are elaborate. For example, they regard the youngest person as surviving where all the deceased were over 60 years of age but the eldest when all were under 15 years of age. Where the deceased were all aged between 15 and 59, the male is presumed to survive the female (although in Louisiana the age of the parties was determinative unless there was less than one year of difference in the ages). Wigmore (n.21 above, p.621) dismissed a “rule of the continental sort” as “grotesquely false to human nature as we observe it” suggesting that “[s]ome monkish jurist of the Middle Ages must have been its composer”. See also n.64 below. The tendency in modern times has been to discard the presumptions. This occurred in Louisiana as late as 1997 (see Samuel, “The 1997 Successions and Donations Revision – A Critique in Honor of AN Yiannopoulos” (1999) 71 *Tulane Law Review* 1041 at p.1043).

<sup>23</sup> See *Wright v Netherwood* (1793) 2 Salk. 593 at 593 *per* Sir William Wynne, rejecting the idea of having “resort to any fanciful supposition of survivorship on account of the degrees of robustness”. Some earlier cases had shown more sympathy with the civil law approach. See, e.g. *Sillick v Booth* (1841) 1 Y. & C.C.C. 117, cited in Land Law Working Group, *Discussion Document No.4: Conveyancing and Miscellaneous Matters* (1983), p.125.

<sup>24</sup> (1870) 5 Ch. App. 139 at 152 *per* Sir GM Giffard L.J.

<sup>25</sup> The reference in *Re Phené’s Trusts* to establishing the proposition “affirmatively by evidence” was intended to emphasise, in the context of the dispute in that case, that there is no presumption that a person who has disappeared less than seven years ago is still alive. See also *Wing v Angrave* (1860) 8 H.L.C. 183 at 221, where Lord Chelmsford noted that the uncertainty surrounding the parties’ deaths “leaves no greater weight on one side or another to incline the balance of evidence

The relevant rule is illustrated clearly by the leading authorities of *Underwood v Wing*<sup>26</sup> and *Wing v Angrave*.<sup>27</sup> These cases were concerned with a husband and wife who had been swept off a sinking ship by the same wave and never seen again.<sup>28</sup> The husband had left his property to his wife and, in the event that his wife died in his lifetime, the property was to pass (given the deaths of other potential beneficiaries) to one Wing. Similarly, Wing was to benefit under the wife's will if the husband were to die in her lifetime. However, because of the circumstances in which the spouses had died, it was impossible for Wing to prove affirmatively either that the wife had died during the husband's lifetime or that the husband had died during the wife's lifetime. Therefore, he was unable to benefit under either spouse's will.

It was emphasised in *Underwood v Wing*<sup>29</sup> that (notwithstanding the fact that, in the absence of proof, the law will not accept that either party survived the other) the law does not assume that the parties have died at the same time.<sup>30</sup> This was confirmed in the unusual case of *Re Rowland*,<sup>31</sup> where a husband and wife had made similar wills leaving all their property to each other but providing for gifts over in the event of the other spouse's death "preceding or coinciding with" his or her own. The spouses subsequently perished in a shipping accident in the South Pacific. There was no evidence as to the precise time and circumstances of the loss of the ship in question. As Lord Denning M.R. cheerfully observed, "[d]eath in these waters does not normally occur from cold or exposure but from being eaten by fish."<sup>32</sup> In the circumstances, it could not be determined whether the husband had survived the wife or vice versa. The Court of Appeal held<sup>33</sup> that, furthermore, it could not be proven that the spouses' deaths had "coincided" within the terms of their wills, since it was quite possible that one had survived the other by some period of time. Therefore, the bequests in the wills were of no effect.<sup>34</sup>

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either way". At one point in his dissenting judgment in *Wing* (*ibid.*, at 199), Lord Campbell L.C. referred to "a clear preponderance of evidence", the use of the word "clear" appearing at first sight to indicate some augmented version of the normal civil standard of proof. However, Lord Campbell L.C. was speaking about whether he would "take upon myself to say, that Master of the Rolls and the [former] Lord Chancellor were wrong" in their decision on the facts at earlier stages of the litigation. He felt (*ibid.*) that "by no means" could he do so since "I myself should probably have come to the same conclusion". He had previously stated that it "was an issue of fact for their determination" (*ibid.*, at 197).

<sup>26</sup> (1855) 4 De G.M. & G. 633.

<sup>27</sup> (1860) 8 H.L.C. 183.

<sup>28</sup> See n.6 above.

<sup>29</sup> (1855) 4 De G.M. & G. 633.

<sup>30</sup> *ibid.*, at 660-661 per Lord Cranworth L.C. In the later case of *Wing v Angrave* (1860) 8 H.L.C. 183 at 213, Lord Wensleydale commented that the evidence left it "in total uncertainty whether the husband died before or after the wife, or whether they both died at the same instant. Whoever has to maintain any one of these propositions, must certainly fail."

<sup>31</sup> [1963] Ch.1.

<sup>32</sup> *ibid.*, at 4 (in the recital of facts, taken from the judgment of Lord Denning M.R.).

<sup>33</sup> Lord Denning M.R. dissenting.

<sup>34</sup> As a result, the case had to be resolved by the application of the Law of Property Act 1925, s.184 (see the discussion of this provision in the text to and following

## The Current Law in the Republic of Ireland

### *Section 5 of the Succession Act 1965*

Unlike in Northern Ireland, there has been (limited) legislative reform in the Republic of Ireland. Section 5 of the Succession Act 1965 provides that where “two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, then, for the purposes of the distribution of the estate of any of them, they shall all be deemed to have died simultaneously.”<sup>35</sup> The Northern Ireland Land Law Working Group has commented in respect of this provision that:

“A statutory presumption along these lines is a distinct advance on the common law position, because the common law, by leaving the possible sequence of deaths open to argument, practically invites litigation. A presumption gives a firm starting point and can be displaced only by positive evidence.”<sup>36</sup>

Notwithstanding this comment, it seems that section 5 makes a relatively modest alteration to the common law. For example, the provision would lead to the same result on the facts of *Underwood v Wing*<sup>37</sup> and *Wing v Angrave*.<sup>38</sup> The parties would be deemed to have died simultaneously and therefore, as under the common law, neither party could be said to have survived the other. There is, however, one clear advantage of section 5 as compared with the common law. This lies in dealing with facts similar to those in *Re Rowland*.<sup>39</sup> As has already been seen, this case involved a gift over which would be triggered in the event of a beneficiary’s death “preceding or coinciding with” that of the testator. If section 5 were to have applied in *Re Rowland*, the gifts in question would not have failed, since the parties would be deemed to have died simultaneously. It may be that cases such as *Re Rowland* will arise relatively infrequently. However, presumably the case (reported in 1963) would have been fresh in the legislators’ minds in 1965 when enacting the Succession Act.<sup>40</sup> This supports the hypothesis that the enactment of section 5 was partly motivated by a desire to avoid the unsatisfactory result which had arisen in *Re Rowland*.

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n.60 below). Contrast *Re Pringle* [1946] Ch. 124 where the testatrix had used the phrase “simultaneous death” and Cohen J. held that the circumstances of the deaths (in an air raid) were such that an ordinary person would infer that the deaths were simultaneous.

<sup>35</sup> This provision was derived from the Art.20 of the German Civil Code as amended in 1951. See Brady, *Succession Law* (2nd ed., Butterworths, Dublin, 1995), p.183 (citing p.2 of the Explanatory Memorandum to the Succession Act). Cf. *Re Cohn* [1945] Ch.5, applying German law in a *commorientes* context in respect of the movable property of a German national killed in an air-raid in London.

<sup>36</sup> *Discussion Document No.4 (Conveyancing and Miscellaneous Matters)* (1983), p.130.

<sup>37</sup> (1855) 4 De G.M. & G. 633.

<sup>38</sup> (1860) 8 H.L.C. 183.

<sup>39</sup> [1963] Ch. 1.

<sup>40</sup> The case attracted some attention at the time. See Stone, (1963) 26 *M.L.R.* 87; Albery, (1963) 26 *M.L.R.* 353.

Section 5 applies only “for the purposes of the distribution of the estate of any of [the *commorientes*]”. By contrast, the relevant English legislation<sup>41</sup> “applies for all purposes affecting the title to property”. Presumably, the fact that the Irish provision is included in an Act codifying the law on succession explains why its application is limited to the succession context. Thus, for example, it would appear that the Irish provision would not apply in the case of a transfer “to A and B for their joint lives, remainder to the survivor in fee simple” (assuming the death of A and B in a *commorientes* situation) because the joint tenancy given to them was limited to determine on the death of either.<sup>42</sup> While this is true, it is also the case that the application of the section would make no difference in the scenario under discussion. At common law, the property would be dealt with on the basis that neither person survived the other, giving the same result as if the statutory presumption had applied. It would only be in very limited circumstances that the limitation on the scope of section 5 could have practical significance. At a stretch one can imagine a relevant example: a gift “to A and B for their joint lives, remainder to the survivor in fee simple but if A and B should die simultaneously then to C in fee simple”. Given that section 5 would not apply to this gift, the gift over to C would be liable to fail on the basis of the logic applied in *Re Rowland*.<sup>43</sup> However, the gift to C would be triggered if section 5 applied, since the parties would be deemed to have died simultaneously. Thus, it would be desirable for section 5 to be extended to apply “for all purposes affecting the title to property”. However, since the practical impact of this change would be minimal, it would only be worth the effort in the context of the implementation of more radical legislative reform.

### ***Re Kennedy and the Burden of Proof***

Until recently, there was no reported case on the interpretation of section 5.<sup>44</sup> However, in 2000 the section was applied in the High Court in *Re Kennedy*.<sup>45</sup> The case involved a married couple who had been killed when, in bad driving conditions, they had driven off a pier into Lough Derg. The

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<sup>41</sup> Law of Property Act 1925, s.184 (discussed in the text to and following n.60 below).

<sup>42</sup> See Spierin, *The Succession Act 1965 and Related Legislation: A Commentary* (3rd ed., Butterworths, Dublin, 2003), p.27 (“only by a very bold construction” could the provision be applied in this situation). See further text following n.158 below, discussing possible law reform to deal with this type of conveyance. Another circumstance in which s.5 would have no application is in relation to insurance issues (*e.g.* if a husband and wife died together and had insurance policies in each other’s favour).

<sup>43</sup> [1963] Ch.1. See the discussion in the previous paragraph of text.

<sup>44</sup> *cf. In the Goods of Murphy* (1973) 107 I.L.T. & S.J. 267 (cited by Spierin n.42 above, p.25). In this case, reported very briefly, a husband and wife had been killed in a collision between a car and a train. There was “evidence that both had died contemporaneously”. Two of the next of kin were applying for a grant of administration to the estate of the husband and sought a declaration that they be entitled to state that the parties had died simultaneously. Finlay J. held that, rather than grounding the grant of administration on s.5 of the Succession Act 1965, it would be more expedient to base the grant on s.27(4) of the Act (which empowers the court to grant administration to such person as it thinks fit where “special circumstances” exist).

<sup>45</sup> [2000] 2 I.R. 571.

consultant pathologist who had performed an autopsy on the bodies was unable to state for certain which of the parties had died first. On the facts, Kearns J. concluded that the statutory rule applied and that the parties had to be deemed to have died simultaneously. The main interest of the case lies in Kearns J's discussion of the burden of proof under section 5. The learned judge took the view that under the section "the onus of establishing that one deceased survived another remains on the party so asserting."<sup>46</sup> He went on to explain that "where clear and cogent evidence can be produced to establish and prove positively the order of death then, even if the time interval between deaths is a matter of only seconds, there is no scope for the section to apply."<sup>47</sup> Interestingly, he continued as follows:

"However, where the evidence adduced falls short of eliminating an element of uncertainty, then the presumption in the section must apply. This may seem equivalent to or stricter than the 'proof beyond reasonable doubt' test appropriate to criminal standards of proof, but in reality it is nothing more than the onus of proof necessarily to be derived from the wording of the section. 'Uncertainty', it seems to me can only be displaced by 'certainty'."<sup>48</sup>

Kearns J's strict view on the burden of proof was strictly speaking *obiter*. According to the judge, the evidence in the case established "more than an element of uncertainty".<sup>49</sup> On the facts, it was "quite impossible to state, even on the balance of probabilities, which spouse survived the other."<sup>50</sup>

There are obvious difficulties with Kearns J's opinion that "uncertainty can only be displaced by certainty". If the matter is regarded strictly, one can never really have complete certainty about any fact, given that facts must be established on the basis of evidence gathered and interpreted by fallible humans. For the practical purposes of the law, the opposite of "uncertainty" is not absolute certainty but rather the absence of uncertainty. In the Scottish case of *Lamb v Advocate General*,<sup>51</sup> Lord Leechman explained (in respect of a comparable statutory provision)<sup>52</sup> that the use of the word "uncertainty" was "adequately explained by its aptness to describe the factual situation arrived at where, assuming a judicial process, and assuming that the normal standard of proof has been applied thereto, the evidence is yet evenly balanced upon which, if either, of two persons has survived the other."<sup>53</sup> Similarly, in the Canadian case of *Adare v Fairplay*,<sup>54</sup> Roach JA explained that "there is uncertainty only when the Court is unable to say that one [of the *commorientes*] survived the other."<sup>55</sup> Even in criminal cases, where in the past a conviction might have cost a defendant his or her life, absolute

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<sup>46</sup> *ibid.*, at 575.

<sup>47</sup> *ibid.*

<sup>48</sup> *ibid.*

<sup>49</sup> *ibid.*, at 576.

<sup>50</sup> *ibid.*

<sup>51</sup> 1976 S.C. 110.

<sup>52</sup> Succession (Scotland) Act 1964, s.31.

<sup>53</sup> 1976 SC 110 at 120.

<sup>54</sup> (1956) 2 D.L.R. (2d) 67.

<sup>55</sup> *ibid.*, at 68.

certainty has never been required.<sup>56</sup> The suggestion by Kearns J. that the standard of proof could be “stricter than” the criminal standard must be dismissed as lacking precedent in the legal system. Furthermore, it would amount to an invitation to the parties to litigate in the hope of establishing a fanciful doubt which would eliminate absolute certainty and bring the section into play in their favour. This is ironic given Kearns J.’s view that his interpretation of the section was “harmonious and not socially divisive”<sup>57</sup> and his comment that “[a]n interpretation of the section which produces an outcome where a husband’s family are at loggerheads with the family of his wife in circumstances where both perished in the same tragedy, would be highly undesirable.”<sup>58</sup>

Although, as has just been concluded, there is no merit in the suggestion that section 5 will apply unless there is absolute certainty as to the order of death, it is somewhat more plausible to suggest a requirement of proof beyond a reasonable doubt. There is limited support for this view in the one authority relied upon by Kearns J. to justify his position. This was the decision of the House of Lords in *Hickman v Peacey*,<sup>59</sup> the leading case on the legislation applicable to *commorientes* cases in England. In order to assess the value of *Hickman* as an aid to interpreting section 5 of the Succession Act, it will be necessary to consider the case in some detail (taking the opportunity in the process to give an account of the current English legal position). It will also be useful to consider the approach which has been taken in other Commonwealth jurisdictions. It will be seen that the weight of opinion in other jurisdictions is in favour of the normal civil standard of proof on the balance of probabilities.

### ***The Burden of Proof under English and Commonwealth Commorientes Provisions***

The legislative provision considered in *Hickman v Peacey* was section 184 of the English Law of Property Act 1925,<sup>60</sup> which provides that:

“[Where] two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, such deaths shall (subject to any order of the court),<sup>61</sup> for all purposes affecting the title to property, be presumed to have occurred in order of seniority, and accordingly the younger shall be deemed to have survived the elder.”

This provision makes a far more dramatic change to the common law than does section 5 of the Succession Act. Section 184 provides a clean (albeit arbitrary) solution to the problem of determining the order of death of

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<sup>56</sup> See, e.g. *Miller v Minister of Pensions* [1947] 2 All E.R. 372 at 373 *per* Denning J.

<sup>57</sup> [2000] 2 I.R. 571 at 576.

<sup>58</sup> *ibid.*

<sup>59</sup> [1945] A.C. 304.

<sup>60</sup> This provision first appeared in the Law of Property Act 1922, s.107(3) and was re-enacted in identical terms in the Law of Property Act 1925, s.184.

<sup>61</sup> For discussion of the words in parenthesis, see n.66 below.

*commorientes*, allowing one to presume that the younger survived the elder.<sup>62</sup> It was because of the arbitrary nature of this rule that, notwithstanding the “certainty and clarity” it offers, the Law Reform Commission recently rejected it as a basis for law reform in the Republic of Ireland.<sup>63</sup> One might try to argue that the English presumption has an objective basis in that the young tend to be more robust than the old and, in a situation of disaster, the younger person would on average survive longer. However, this statistical generalisation does not apply if, for example, the younger person was a vulnerable infant and the elder was a healthy adult. Furthermore, if one were genuinely concerned with statistical probabilities, one would be willing to entertain evidence of the general health and physical conditions of the parties and this is not considered relevant under the English regime.<sup>64</sup> On the whole, one must conclude that the presumption in section 184 is essentially one of convenience, with no firm basis in probability.

Whatever about the basis for the English statutory rule, the significant point for present purposes is that it applies in exactly the same circumstances as its Irish counterpart (arising in cases where “two or more persons have died in circumstances rendering it uncertain which of them survived the other or others”). Following this identical beginning, a slight difference may be detected in the phrasing of the two provisions. Under the English section, the parties are “presumed” to die in a certain order while the Irish section makes no reference to a presumption. However, this difference appears to be without significance. In the English provision, the reference to a presumption is qualified by the subsequent statement that “accordingly, the younger is deemed to survive the elder”. Thus, the parties are “deemed” to die in a certain order, just as they are “deemed” to die simultaneously under the Irish provision. While it might loosely be said that the English presumption can be “rebutted”,<sup>65</sup> this can only be accomplished by evidence showing that it was not applicable in the first place.<sup>66</sup> Given, then, that the

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<sup>62</sup> Note also the effect of the Law Reform (Succession) Act 1995, s.1 (spouse not entitled to take on intestacy unless he or she survives the other spouse by 28 days). See further text to and following n.170 below. *Cf.* an older provision, Administration of Estates Act 1925, s.46(3).

<sup>63</sup> See n.13 above, p.35, where the L.R.C. argued that the English rule has the potential to operate unfairly in that, “without any evidential basis for doing so”, it prefers certain beneficiaries above others (for example, if the *commorientes* held property as joint tenants, all the relevant property would go to the successors of the youngest of the joint tenants at the expense of the successors of the other joint tenants). Note also Kearns J.’s apparent lack of enthusiasm in *Re Kennedy* [2000] 2 I.R. 571 at 575 for the English approach (“approaching the problem in such an artificial way”).

<sup>64</sup> *cf.* n.22 above, discussing the presumptions based on the age and sex of the parties originating in the Napoleonic Code. A difficulty with even the complex presumptions traditionally favoured by the civil law is that the relative robustness of the parties would be of more significance in a more “old-fashioned” tragedy such as a shipwreck than in a case where the parties were killed, say, when a plane crashes into a mountain-side. *Cf.* Wigmore n.21 above, p.621.

<sup>65</sup> *Re Lindop* [1942] Ch.377 at 382 *per* Bennett J.

<sup>66</sup> See on this point, *Stewart v Police* [1970] N.Z.L.R. 560 at 576 *per* Turner J: “it is more correct to say that this presumption never arises at all except upon the condition created by the statute; and that, once it arises, it is irrebuttable.” Note that the words “subject to any order of the court” which appear in parenthesis in

two sections are set up in essentially the same way, one would expect the burden of proof to be the same in each case.

The issue which arose in *Hickman*, and which led to consideration *inter alia* of the burden of proof applicable under section 184, was a fascinating one. In 1940, a high-explosive bomb had landed on a small house in Chelsea, reducing it to “a heap of ruins” and killing all five people in a shelter in the basement. A number of the deceased had made bequests in their wills which would take effect only if the beneficiaries, also amongst the deceased, were to survive them. On the face of it, this was a prime case for the application of section 184, leading to a presumption that the parties had died in order of seniority. However, it was argued in *Hickman* that there was no uncertainty within the terms of the statute, since it was clear that the parties had died simultaneously, and therefore the statutory presumption could have no application. This argument exposed a weakness in the drafting of section 184. It seems that the drafters rashly assumed on the basis of certain *dicta* in the nineteenth century cases that, given that “time . . . is said to be infinitely divisible”,<sup>67</sup> it “cannot be assumed to be proved, or probable, or possible that two human beings should cease to breathe at the same moment of time, for that is hardly within the range of imagination”.<sup>68</sup> However, the assumption that two people can never die at exactly the same time strays dangerously into metaphysics.<sup>69</sup> Furthermore, it seemed more open to question by 1945, given that “the march of civilisation”<sup>70</sup> had led to new “methods of wholesale instantaneous destruction”.<sup>71</sup> Notwithstanding the flawed drafting of the section, it would have been an unexpected result if the House of Lords had found section 184 inapplicable on the facts of *Hickman*. Lord Simonds argued persuasively that it could not “have been deliberately intended [by the legislature] to supply a remedy by way of presumption where the estates of A and B had to be administered as if they had died at the same time because the

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s.184 “appear to be meaningless” and “certainly give the court no discretion to disregard the statutory presumption on the ground that it would be unfair or unjust to act upon it” (Kerridge, *Parry & Clark: The Law of Succession* (11th ed., Sweet and Maxwell, London, 2002), p.305; see also *Re Brush* [1962] V.R. 596). For a compilation of unconvincing judicial attempts to find some explanation for the relevant words, see Kerridge above, p.305 n.51.

<sup>67</sup> *Wing v Angrave* (1860) 8 H.L.C. 183 at 199 *per* Lord Campbell L.C.

<sup>68</sup> *Underwood v Wing* (1855) 4 De G.M. & G. 633 at 660 *per* Lord Cranworth L.C.

<sup>69</sup> In the Court of Appeal in *Hickman v Peacey* (sub nom. *Re Grosvenor* [1944] Ch. 138 at 144) Lord Greene M.R. described the proposition that time is infinitely divisible as “a metaphysical conception”. He went on to comment that “[n]o doubt, when a bevy of angels is performing saltatory exercises on the point of a needle it is always possible to find room for one more, but propositions of this character appear to me to be ill suited for adoption by the law of this country which proceeds on principles of practical common sense.”

<sup>70</sup> *Re Grosvenor* [1944] Ch. 138 at 145 *per* Lord Greene M.R. (presumably intending this ironically).

<sup>71</sup> *Hickman v Peacey* [1945] A.C. 304 at 318 *per* Viscount Simon L.C. Other *commorientes* cases involving “wholesale instantaneous destruction” caused by bombing include *Re Lindop* [1942] Ch. 377; *Re Howard* [1944] P. 44; *Re Cohn* [1945] Ch. 5; *Re Pringle* [1946] Ch. 124. A curious aspect of another of the cases in this series, *Re Mercer* (1944) 60 T.L.R. 487 at 488, was the court’s consideration, for the purposes of compensation under the War Damage Act 1943, of whether one of the deceased had survived his furniture.

order of death was uncertain, but to supply no remedy where the same estates had to be administered upon that footing because they, in fact, died at the same time.”<sup>72</sup> By a three to two majority, the House of Lords found that section 184 was applicable.

It is not an easy task to summarise “the differing, varying, qualified and non-committal views”<sup>73</sup> expressed by the Law Lords in *Hickman* in relation to the burden of proof under section 184. One of the judges in the majority, Lord Macmillan, took the view that the statutory presumption would apply unless there was certainty, beyond a reasonable element of doubt, as to the order of death.<sup>74</sup> On this view, the standard of proof would be equivalent to the criminal standard of proof. When one refers back to the mischief which the section was designed to address, Lord Macmillan’s view is difficult to defend. The common law position, prior to the enactment of the section, had allowed affirmative proof that one person had survived another. The deficiency in the law which section 184 sought to remedy was that, where affirmative proof was not available, the common law threw up its hands and proceeded as if neither party had survived the other (while not assuming either that the parties had died simultaneously). Lord Macmillan’s view on the burden of proof would require section 184 to impact on cases which had been free of doubt before the statute. Where it could be proven, but not beyond all reasonable doubt, that an older person had survived a younger person, the arbitrary presumption of the section would displace the proven fact and the property would be distributed as if the younger had survived. In trying to understand why Lord Macmillan would have contemplated this counter-intuitive result, it should also be remembered that the facts of *Hickman* involved an ingenious attempt to find a loophole in section 184. It may be that, in his attempts to seal the loophole, Lord Macmillan advocated a higher standard of proof than he would have in a standard case (such as *Re Kennedy*) where what was at issue was simply whether or not one party had survived the other.

In *Re Kennedy*,<sup>75</sup> Kearns J. quoted briefly from Lord Macmillan’s speech and clearly regarded it as representing the position of the House of Lords. However, on a fair reading of the case, it is doubtful whether any of the other Law Lords shared Lord Macmillan’s opinion on the matter in question. Lord Porter, also in the majority, noted that some of the other Law Lords took the view that proof on the balance of probabilities was sufficient. He, however, was “not sure whether it is or not, and would leave the point open”.<sup>76</sup> Lord Simonds, the last of the judges in the majority, regarded it as impossible for two persons to die simultaneously.<sup>77</sup> However, he stated that it would be necessary to examine the facts more closely “if the alternative view prevails and the operation of the section is excluded where upon a preponderance of probability the proper inference is that the deaths in question are simultaneous”.<sup>78</sup> His view was that, “according to the ordinary standards of

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<sup>72</sup> [1945] A.C. 304 at 343.

<sup>73</sup> *Lamb v Lord Advocate* 1976 S.C. 110 at 115 *per* Lord Justice-Clerk Wheatley.

<sup>74</sup> [1945] A.C. 304 at 324-325.

<sup>75</sup> [2000] 2 I.R. 571 at 575.

<sup>76</sup> [1945] A.C. 304 at 340.

<sup>77</sup> *ibid.*, at 345.

<sup>78</sup> *ibid.*, at 346.

proof”,<sup>79</sup> it could not be inferred that the parties had died at the same time. It seems from his language that Lord Simonds regarded the ordinary civil standard as applicable to section 184, *i.e.* proof “upon a balance or preponderance of probability”.<sup>80</sup> Lord Wright, one of the judges dissenting from the result reached by the majority, felt that the question of whether the parties had died at the same time was “a fact . . . to be ascertained by the verdict of a jury or the decision of a judge of fact in the same way and by the same rules as to proof as any other disputed issue of fact.”<sup>81</sup> He could not “see why any special and peculiar rule of evidence should be demanded in these cases or why the ordinary requirement of evidence reasonably sufficient to satisfy a jury should not be applicable.”<sup>82</sup> Finally, Viscount Simon L.C. (again dissenting in the result) felt that the uncertainty referred to in the section was “uncertainty which is not removed by evidence leading to a defined and warranted conclusion”.<sup>83</sup> In one subsequent lower court case, *Re Bate*,<sup>84</sup> it appears to have been felt that his reference to “a defined and warranted conclusion” indicated a stricter requirement than proof on a simple balance of probabilities.<sup>85</sup> It would not be unknown for a standard of proof to apply in a civil case which is stricter than the normal “balance of probabilities” test but which falls short of the criminal standard of proof.<sup>86</sup> However, the phrase used by Viscount Simon L.C. is rather opaque<sup>87</sup> and

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<sup>79</sup> *ibid.*

<sup>80</sup> *ibid.*, at 345.

<sup>81</sup> *ibid.*, at 326.

<sup>82</sup> *ibid.*, at 327.

<sup>83</sup> *ibid.*, at 318.

<sup>84</sup> [1947] 2 All E.R. 418. In this case, Jenkins J. reviewed the differing views of the Law Lords in *Hickman* and opined that “all would have agreed that Lord Simon did not put it too high when he spoke of ‘evidence leading to a defined and warranted conclusion’” (*ibid.*, at 421). The judgment of Jenkins J. is somewhat confusing because, notwithstanding his adoption of Viscount Simon’s formulation, at a later point he appeared to state the burden of proof as effectively requiring proof beyond a reasonable doubt (*ibid.*, at 421B-C). Moreover, in one report of his judgment ([1947] L.J.R. 1409 at 1411), he referred in his conclusion to not being satisfied on “the balance of probabilities”. See the discussion of the difference between the two reports in *Lamb v Lord Advocate* 1976 S.C. 110 at 113-114, 118-119.

<sup>85</sup> Note also Lord Wright’s invocation at one point in his speech of the standard of proof at common law as laid down by Lord Campbell L.C. in *Wing v Angrave* (1860) 8 H.L.C. 183 at 199 (“a clear preponderance of evidence”). See, however, n.25 above, for an explanation of the context of Lord Campbell’s remarks.

<sup>86</sup> See generally Dennis, *The Law of Evidence* (2nd ed., Sweet and Maxwell, London, 2002), pp.394-399, noting that while some courts have recognised the possibility of “more or less infinite degrees of proof between a bare preponderance of probabilities and beyond reasonable doubt” (p.396), others have argued that the normal balance of probabilities is generally applicable but that in some circumstances greater evidence is required to tip the balance. See also Fennell, *The Law of Evidence in Ireland* (2nd ed., LexisNexis Butterworths, Dublin, 2003), pp 96-103.

<sup>87</sup> Viscount Simon L.C.’s reference to a “warranted” conclusion may echo a remark in the seminal case of *Wing v Angrave* (1860) 8 H.L.C. 183 at 206 where, with no indication that he was not applying the normal civil standard of proof, Lord Cranworth stated that “there is no evidence warranting any conclusion” as to which of the parties had survived. The reference to a “defined” conclusion

appears to have been clarified by his subsequent quotation, with approval, of the view of Goddard LJ at the Court of Appeal stage of the litigation<sup>88</sup> that “it is undoubted law that in civil proceedings a finding can, and may be, rested on the probabilities of the case”.<sup>89</sup>

Reviewing the various speeches of the Lords in *Hickman*, it appears that the standard of proof which was most heavily supported was the civil standard of proof on the balance of probabilities. Only Lord Macmillan favoured applying the criminal standard of proof beyond a reasonable doubt, Lord Porter expressly reserved his position, and the remaining three Law Lords seemed to favour the civil standard of proof on the balance of probabilities. The argument that the applicable standard is simply proof on the balance of probabilities receives unequivocal support from the Australian case law (notably *Re Plaister*<sup>90</sup> and *Re Comfort*)<sup>91</sup> dealing with provisions based on section 184.<sup>92</sup> Similarly, it has been concluded in the Canadian context that “the accepted view is that uncertainty need only be rebutted on the usual civil standard, the balance of probabilities.”<sup>93</sup> In *Adare v Fairplay*,<sup>94</sup> Roach JA concluded after a detailed consideration of the *dicta* in *Hickman v Peacey*, “that the totality of judicial opinion expressed by their Lordships supports the view that the instant case being a civil case, the standard of proof in civil cases and not that in criminal cases applies.”<sup>95</sup> Similarly, in the Scottish case of *Lamb v Advocate General*<sup>96</sup> it was unanimously held by the three judges of the Inner House of the Court of Session, after consideration of the English and Commonwealth authorities, that the normal civil standard of proof applies. It is only in New Zealand that a different conclusion has been reached and this is explicable on the basis of the different wording of the applicable legislation. The relevant New Zealand provision applies where the parties “have died at the same time or in circumstances which give rise to reasonable doubt as to which of them survived”.<sup>97</sup> Logically, under this provision, the presumption can only be overridden if there is no “reasonable

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appears close to meaningless when considered on its own. It may simply mean that one must be able to reach a specific conclusion on the evidence.

<sup>88</sup> Sub nom. *Re Grosvenor* [1944] Ch. 138 at 153.

<sup>89</sup> [1945] A.C. 304 at 319.

<sup>90</sup> (1934) 34 S.R. (N.S.W.) 547.

<sup>91</sup> [1947] V.L.R. 237.

<sup>92</sup> See also *Re Zapullo* [1966] V.R. 390; *Re Brush* [1962] V.R. 596; *Re Albert* [1967] V.R. 875; MacCallum and Moore, *Australian Real Property Law* (2nd ed., L.B.C. Information Services, Sydney, 1997), p.10-4; Atherton and Vines, *Australian Succession Law Commentary and Materials: Families, Property and Death* (Butterworths, Sydney, 1996), pp.189-198.

<sup>93</sup> Law Reform Commission of British Columbia *Report on Presumptions of Survivorship* LRC-56 (October 1982), p.23. See also Institute of Law Research and Reform, Alberta *Survivorship* Report No.47 (1986), p.9 (taking the same view).

<sup>94</sup> (1956) 2 D.L.R. (2d) 67 (Ontario Court of Appeal). See also *Re MacLauchlan and MacLauchlan* (1968) 68 D.L.R. (2d) 556 (British Columbia Supreme Court).

<sup>95</sup> (1956) 2 D.L.R. (2d) 67 at 73.

<sup>96</sup> 1976 S.C. 110.

<sup>97</sup> Simultaneous Deaths Act 1958, s.3(1).

doubt” as to the order of death, thus leading to a requirement of proof beyond reasonable doubt.<sup>98</sup>

### ***Conclusion on the Burden of Proof***

It has emerged from the preceding discussion that the English and Commonwealth authorities do not support the idea of applying the criminal standard of proof beyond a reasonable doubt (and *a fortiori* do not support a requirement of absolute certainty). Having assessed these authorities, as well as the arguments put forward by the learned judge in *Re Kennedy*,<sup>99</sup> it may be concluded Kearns J. did not take the appropriate approach in *Re Kennedy* to the question of the burden of proof applicable under section 5. The proper test, it has been argued, is the civil balance of probabilities test. This allocates section 5 a logical place in the law, giving it application in cases where the common law was unable to reach a conclusion as to the order of death. The significance of Kearns J.’s approach to section 5 is that it increases the number of cases in which parties will be deemed to die simultaneously, thus increasing the problems which can arise in the *commorientes* context.<sup>100</sup> In the context of possible reform of the law on *commorientes*, it would be advisable to clarify the position in relation to the burden of proof (especially given the suggestion by Kearns J. that the test could be stricter than the criminal standard, requiring absolute certainty). It would be necessary to make clear that the statutory presumption will apply

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<sup>98</sup> *Re Pechar* [1969] N.Z.L.R. 574. In this case, Hardie Boys J. expressed the *obiter* view that the same test would have applied under the older version of the New Zealand legislation, s.27 of the Property Law Act 1952, which had copied the English wording. In *In re Smith (deceased), Huzziff v Public Trustee* [1956] N.Z.L.R. 992 at 995 *per* Shortland J, New Zealand’s Court of Appeal had expressly declined to express a view on the burden of proof under the older provision. See also the judgment of Barraclough CJ at first instance, [1955] N.Z.L.R. 1122 at 1123, finding it “unnecessary to resolve this double dubeity – this uncertainty as to what is meant by uncertainty”.

<sup>99</sup> It will be recalled that Kearns J. stressed the importance of an interpretation “which is harmonious and not socially divisive”. It has already been pointed out that this objective would by no means be promoted by a requirement of absolute certainty. Even in relation to a modified version of Kearns J.’s position, where only proof beyond a reasonable doubt is required, it is not entirely clear that this would be more effective in discouraging litigation than a standard of proof on the balance of probabilities. On both tests, the parties would be tempted to litigate if it was questionable whether the relevant test (whatever it was) was satisfied. Also, it could be argued that additional bitterness would be felt by parties who lost their claim to property because they could prove their case only on the balance of probabilities but not beyond a reasonable doubt. See further n.100 below.

<sup>100</sup> The approach of requiring proof beyond a reasonable doubt would, in fact, be less objectionable (or, possibly, unobjectionable) in the context of comprehensive legislative reform which would *inter alia* clarify the position in relation to joint tenancies and address the problem exemplified by *Wing v Angrave* (1860) 8 H.L.C. 183. See text following n.141 below for discussion of the question of reform. *Cf.* text to and following n.164 below, discussing a possible rule that the parties would be deemed to die simultaneously unless one survived the other by a specified number of days (probably a more efficient method of taking account of Kearns J.’s understandable desire to avoid divisive litigation than the imposition of a requirement of proof beyond a reasonable doubt).

only where it is not possible to prove, on the applicable standard of proof, that one person has survived the other.<sup>101</sup>

### Commorientes and Joint Tenancies

As has been discussed, in cases of *commorientes*, the approach of the common law was that neither of the *commorientes* could be deemed to have survived the other. Section 5 of the Succession Act, however it is interpreted, does nothing to clarify matters in relation to the joint tenancy problem. If all the parties are deemed to have died simultaneously,<sup>102</sup> then which joint tenant is deemed to be the last survivor? The only guidance in the case law comes from *Bradshaw v Toulmin* (1784),<sup>103</sup> where Lord Thurlow stated that “if two persons, being joint tenants, perish by one blow, the estate will remain in joint tenancy in their respective heirs”.<sup>104</sup> This memorable formulation is invariably cited in the Irish textbooks<sup>105</sup> yet its import is by no means clear. Wylie stays close to Lord Thurlow’s words in stating that the common law position is “that there could be no survivorship and so the heirs of the deceased joint tenant succeeded to the property as joint tenants.”<sup>106</sup> Expanding slightly on this, in its recent discussion of the issue, the Irish Law Reform Commission explained that there will be “a joint tenancy between the (possibly numerous) respective successors of the deceased persons”.<sup>107</sup> Similarly, the Northern Ireland Land Law Working Group has stated that there will be “a new joint tenancy between the residuary legatees or next-of-kin of the deceased joint tenants”.<sup>108</sup> This, then, is the conventional understanding of the position established by *Bradshaw* as

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<sup>101</sup> See n.144 below.

<sup>102</sup> The Land Law Working Group took the view that s.5 would not apply “as between joint owners”. (*Final Report* (1990), p.186). However, this does not appear to be the case. Unless one assumes that the interests of both joint tenants are extinguished by the *commorientes* event, in which case there would be nothing to pass under the will or intestacy of either party, it appears that s.5 must apply. See n.112 below. In defence of the view of the Land Law Working Group, it might be argued that the effect of *Bradshaw v Toulmin* (1784) Dick. 633 (discussed in detail in the text following this footnote) is that the old joint tenancy comes to an end and is (by some unexplained process) replaced by a completely new co-ownership arrangement involving the successors of the respective parties. However, the very fact that the new co-owners are the parties’ successors (as determined by the operation of the rules of succession) suggests that the transmission of the property to them has been an aspect of “the distribution of the estate of any of [the *commorientes*]” for the purposes of s.5.

<sup>103</sup> (1784) Dick. 633.

<sup>104</sup> *ibid.*, at 633.

<sup>105</sup> See Wylie, *Irish Land Law* (3rd ed., Butterworths, Dublin, 1997), p.429; Coughlan, *Property Law* (2nd ed., Gill & McMillan, Dublin, 1998), p.135; Brady n.35 above, p.183; Keating, *Keating on Probate* (Round Hall Sweet and Maxwell, Dublin, 2002), p.237.

<sup>106</sup> Wylie n.105 above, p.429.

<sup>107</sup> n.13 above, p.33. See also Coughlan n.105 above, p.135 (“the persons entitled to the estates of the respective deceased joint tenants take their places as joint tenants in respect of the property which was so held.”)

<sup>108</sup> See *Discussion Document No.4 (Conveyancing and Miscellaneous Matters)* (1983), p.130.

it applies both in Northern Ireland and in the Republic of Ireland.<sup>109</sup> In this Part of the article, it will be argued that this conventional understanding is incorrect and that certain basic points have been overlooked. In fact, it will be suggested, the law on the relevant point is more sensible than is generally realised.

### *An Alternative Reading of Bradshaw v Toulmin*

To begin the argument, one may point out that rather curious results follow from the conventional understanding of the law. Imagine if one joint tenant had left all of his property to his four children and the other had left all of his property to his spouse. On the conventional view, in the event of uncertainty as to the order of death of the joint tenants, there would be a joint tenancy between these five successors. This would be a strange result, which would randomly confer a decisive benefit on the successors of one joint tenant at the expense of the successors of the other. The four children could sever the joint tenancy, securing for themselves eighty per cent of the ownership in the property.<sup>110</sup> And what if, as will frequently happen, the successors of one joint tenant are to take in different proportions? Imagine that one of the joint tenants has died intestate, being survived by one child and by the four children of a second deceased child (with no surviving spouse). Under the applicable legislation in both Northern Ireland and the Republic of Ireland, the surviving issue will take *per stirpes*. This means that the surviving child will be entitled to one-half of the deceased's estate, while the four grandchildren will be able to represent their deceased parent, and will be entitled to a one-eighth share each.<sup>111</sup> In either jurisdiction, it would be entirely inconsistent with the applicable legislation to regard the husband and the children as joint tenants along with the successors of the other deceased joint tenant.<sup>112</sup> It is in the nature of a joint tenancy that all joint tenants are

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<sup>109</sup> The case ceased to have relevance in England and Wales with the advent of legislative reform in 1922, re-enacted as Law of Property Act 1925, s.184. See text to and following n.60 above. The author has been unable to find analysis of *Bradshaw* in either pre-1925 or modern English texts.

<sup>110</sup> Note also that, in *Re Kennedy* [2000] 2 I.R. 571, the deceased husband and wife had held all of their property as joint tenants. This property fell to be distributed under the rules of intestacy. It appears from the report that the deceased husband was survived by a sister and the deceased wife by seven siblings and by the ten children of a deceased sibling. The judgment of Kearns J. was concerned solely with the applicability of the Succession Act, s.5 and the report does not reveal how the property was ultimately distributed. The conventional view would suggest that there would be a joint tenancy, with the husband's sister left as only one of eighteen joint tenants!

<sup>111</sup> See Administration of Estates (Northern Ireland) Act 1955, s.8; Succession Act 1965, s.67(4).

<sup>112</sup> It seems clear that the legislation must apply in the situation under discussion. See Administration of Estates (Northern Ireland) Act 1955, s.6 ("All estate to which a deceased person was entitled for an estate or interest not ceasing on his death and as to which he dies intestate . . . shall . . . be distributed in accordance with this Part") and s.44(d) (which provides that "the estate or interest of a deceased person under a joint tenancy where any tenant survives the deceased person shall be deemed to be an estate or interest ceasing on his death", thus making clear that where no joint tenant survives the deceased person, as in a *commorientes* situation, the interest of the deceased joint tenant is one "not ceasing on his

equal in all respects; one joint tenant cannot be entitled to a greater share than the others. Thus, one must conclude that some form of severance of the joint tenancy would have to occur in cases where one joint tenant's estate was to be split up in unequal proportions (whether because of the application of the rules of intestacy or simply because one or more of the joint tenants provided for an unequal division by will). However, consistent with the logic of the conventional view it is not easy to suggest what form the severance would take.<sup>113</sup>

One is left with a feeling that all this is rather peculiar. Why would the judge in *Bradshaw v Toulmin* have created such a perverse solution to the problem which faced him? One should resist the temptation to assume that the lawyers of the past were somehow more foolish than us. Although not without his flaws as a lawyer and a politician, Lord Thurlow L.C. (nicknamed "the Tiger")<sup>114</sup> was regarded with awe by his contemporaries.<sup>115</sup> It is difficult to see why he would have been tempted to set up a rule which required a division on the basis of the number of successors of the deceased joint tenants, leading to obviously arbitrary results. If one wishes to reassess *Bradshaw v Toulmin*, the obvious starting point is a consideration of the report of the decision. Significantly, the report<sup>116</sup> is only one sentence long: "Lord Thurlow, C, said, if two persons being joint tenants, perish by one blow, the estate will remain in joint tenancy (*sic*) in their respective heirs."<sup>117</sup> Thus, we learn nothing directly about the precise circumstances of

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death" and therefore, under s.6, is to be distributed according to the rules on intestacy set out in the Act). The legislative provisions are similar in the Republic of Ireland. See Succession Act 1965, s.66 and s.4(c).

<sup>113</sup> In Northern Ireland, particular problems are created by the complex rules applicable where an intestate person is survived by a spouse along with issue or parents or siblings or issue of deceased siblings. In such cases, the spouse will not be entitled to the entire estate but will take the personal chattels as well as a statutory legacy of a specified sum and a fraction of the remainder, if any, of the estate (with the details varying according to which relatives have survived along with the spouse). See generally Wylie n.105 above, p.858; Grattan n.20 above, pp.129 *et seq.* If the estate of one of the *commorientes* is to be distributed according to these rules, how is one to apply the conventional view of *Bradshaw v Toulmin*?

<sup>114</sup> See Holdsworth, *A History of English Law* (Methuen, London, 1938), Vol.12, p.321.

<sup>115</sup> "His commanding appearance, his air of infinite wisdom, his powers of invective and sarcasm, and his very considerable legal and political ability, hypnotised his contemporaries – 'he impressed his audience with awe before he opened his lips'; for, as Fox said, he looked wiser than any man ever was": *ibid.* at p.318. Posterity has, however, been relatively harsh in its judgment of Lord Thurlow. Holdsworth concludes on him (*ibid.*, at p.327) that "though his intellectual and physical qualities gave him the opportunity of becoming the very great man that many of his contemporaries imagined him to be, his moral shortcomings prevented him from taking that opportunity."

<sup>116</sup> (1784) Dick. 633.

<sup>117</sup> *ibid.* at 633. The only other information in the report is a heading, presumably in the words of the reporter, which states that "If two persons perish by one blow, the estate will remain as it was." Interestingly, in his discussion of the career of Lord Thurlow, Holdsworth remarks (n.114 above, p.327) that, while "his strong sense and his legal abilities generally led him to the right conclusion, . . . often he did not trouble to discuss at length the legal problems which had been argued by

the case and the nature of the judge's reasoning from the single sentence which has come down to us. However, some insight can be gained if one reflects on the brief report of the case.

Lord Thurlow was said to have required that "the estate will remain in joint tenancy in the respective heirs", referring to "*heirs*" not "legatees" or "devisees" (or some similar term). It must be remembered that "heir" is a technical term, referring to the person who, under the law prevailing at the time of the decision, would have been entitled to inherit a deceased person's real property on intestacy. Normally the heir would have been the eldest son and, significantly, there would normally be only one person who would qualify as a person's "heir".<sup>118</sup> The modern significance of the old rules of heirship is minimal, with their application being restricted to fee tails, and there is a tendency nowadays to refer loosely to a person's "heirs" when one means those who are entitled under that person's will or intestacy. However, when Lord Thurlow gave judgment in 1784, the rules of heirship were central to a legal system which gave heavy emphasis to the law of real property. It seems unlikely that he would have used the word "heirs" other than with its proper connotation in mind. Thus, it is submitted that the facts of *Bradshaw* (not stated in the report) happened to involve joint tenants who had died intestate.<sup>119</sup>

Considered on the basis that Lord Thurlow was dealing with two (or more) joint tenants who had died intestate, his approach makes a fair degree of sense. The estate of each deceased joint tenant would have passed automatically at the instant of death to his heir<sup>120</sup> (normally the eldest son) and it would have been plausible to regard the surviving eldest sons as joint tenants. On one view, there would be no disruption of the four unities which would require a severance. Each of the new co-owners could be said to owe his title to the same event as the others (*i.e.* the simultaneous death of the parties), so that arguably there would be no disruption to the unity of title.<sup>121</sup> Given that the other unities would undoubtedly remain intact, Lord Thurlow L.C. might have seen no reason to conclude that a tenancy in common should

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the opposing counsel. Lengthy and elaborate arguments are followed by very short judgments." It is impossible to tell, more than two hundred years after the case was decided, whether the very brief report of *Bradshaw v Toulmin* is a reflection of a brief judgment given by Lord Thurlow.

<sup>118</sup> There would, however, be an exception where a person had no male heir and was survived by more than one female descendant. In that instance all the eligible females would collectively constitute the heir and would take under a special form of co-ownership called coparcenary. On coparcenary, see Wylie n.105 above, pp.446-448.

<sup>119</sup> This argument is supported by the fact that it had been possible since the Statute of Wills 1540 to devise real property by will. If one of the deceased joint tenants in *Bradshaw* had exercised his power to leave his property by will to someone other than his heir, there would have been no justification for setting up a joint tenancy giving an interest to the heir (to whom the law would have given no claim except upon intestacy).

<sup>120</sup> See paragraph of text accompanying n.122 below.

<sup>121</sup> According to Wylie n.105 above, p.431 unity of title requires that "all the joint tenants should have acquired their interests in the land by the same title, whether that source of title lay in a particular document of title or the act of another party or, indeed, the joint tenants' own act of adverse possession" (footnotes omitted).

result from the simultaneous deaths of the parties. Thus, assuming the parties to have died intestate with their eldest sons as heirs, Lord Thurlow's approach makes sense in terms of the standard principles of co-ownership (with the only tricky step in the argument being the conclusion that unity of title is not shattered when the parties have gained their titles by intestate inheritance following a *commorientes* event).

### ***The Significance of Devolution to Personal Representatives***

The above interpretation of *Bradshaw v Toulmin* does not necessarily require that Lord Thurlow's solution be restricted to (what have been inferred to have been) the facts of that case. It might be thought that his solution could also be applied in cases where the deceased joint tenants had left their property to the same number of successors. If each had left all his property to his or her spouse or if each had left it to (say) two children, there would be no imbalance as between the different sets of successors in making them all joint tenants over the property. Furthermore, if one were willing to accept a degree of imbalance, one could extend it to all cases besides the troublesome ones involving an unequal division amongst the successors of one of the joint tenants.

At this point, one must introduce the final link in the argument against the conventional understanding of the law on *commorientes* and joint tenancies. This is the fact, central to the modern law of succession, that one's property does not pass directly to one's successors. Instead, it first devolves on one's personal representatives, who must administer the estate and ultimately pass on the property to those properly entitled to it. This process would not have occurred in the case of intestate succession back in 1784. At that time, the land of a deceased intestate would have vested automatically in his heir, with no intermediate devolution to personal representatives. Under English law, prior to the Land Transfer Act 1897, the deceased's realty did not vest in his personal representatives (so-called because they were responsible for *personal* property) but instead passed directly to his heir on intestacy or to a devisee under his will. Under the modern law, represented in Northern Ireland by section 1 of the Administration of Estates (Northern Ireland) and in the Republic of Ireland by section 10 of the Succession Act 1965, all property of a deceased person to which he was "entitled for an estate or interest not ceasing on his death" devolves on his personal representatives.<sup>122</sup>

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<sup>122</sup> In the *commorientes* situation, the interest of each deceased joint tenant is clearly one to which he was "entitled for an estate or interest not ceasing on his death". If it was not, there would be nothing to pass to any of the successors of the deceased joint tenants. This is confirmed by s.44(d) of the Administration of Estates (Northern Ireland) Act and s.4(3) of the Republic's Succession Act 1965, both of which state that "the estate or interest of a deceased person under a joint tenancy where any tenant survives the deceased person shall be deemed to be an estate or interest ceasing on his death". Since in a *commorientes* situation no joint tenant survives the deceased person, the interest of each deceased joint tenant falls outside s.44(d) and s.4(3) and, by clear implication, constitutes an estate or interest which *does* survive each of the deceased joint tenants.

When one considers the matter, it becomes clear that the process of devolution must inevitably sever a joint tenancy in a case of *commorientes*.<sup>123</sup> Consider the permutations, for simplicity focusing on a case where there were originally only two joint tenants. Where both joint tenants die testate, each set of executors will owe their title to the will which appointed them. This will shatter unity of title, severing the joint tenancy. This is fortunate, since it would be unworkable for the different sets of executors to be joint tenants. The death of a sole executor in the course of the administration would lead to the termination of the claims of the successors of the deceased person who had appointed the sole executor. Similarly, there could not be a joint tenancy involving the personal representatives if one of the joint tenants died testate and the other died intestate (or died testate but without appointing executor/s who survived him). There would again be a shattering of the unity of title. The respective titles would depend on different documents, in one instance the relevant will and in the other a grant of administration. In fact, in this instance, there would also be a shattering of unity of time,<sup>124</sup> since one share in the former joint tenancy property would vest in the executors upon the death of the testator in question, whereas the other share in the joint tenancy would vest initially in the Probate Judge (under Northern Irish law)<sup>125</sup> or in the President of the High Court (under the law of the Republic of Ireland)<sup>126</sup> and subsequently in the administrators upon the subsequent grant of administration.<sup>127</sup> Where both joint tenants died intestate, the shares of each would vest initially in the Probate Judge or the President of the High Court, thus temporarily putting an end to the co-ownership over the property. Even if, contrary to what has been argued thus far, the joint tenancy could somehow survive the vesting of the shares in the former joint tenancy in the various personal representatives, there is no way that it could survive the subsequent transfer of the shares to the successors of the deceased joint tenants. Some of the successors will owe their title to an assent from the personal representative/s of one of the deceased joint tenants and others will owe their title to an assent from the personal representative/s of the other deceased joint tenant. Thus, there can be no unity of title between the ultimate co-owners and therefore no joint tenancy between all of them.

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<sup>123</sup> *Contra* Lyall, *Land Law in Ireland* (2nd ed., Round Hall Sweet and Maxwell, Dublin, 2000), p.425, commenting, without further discussion, that “It may be the case that while the personal representatives hold the legal estate as joint tenants, the equitable interest is held by those entitled to it as tenants in common, so that simultaneous death causes a severance in equity”.

<sup>124</sup> It is well established that unity of time is not applicable to dispositions by will. See Wylie n.105 above, p.431. However, it does not seem that the case under discussion falls within this exception, since one is dealing with the devolution of property to different sets of personal representatives under one party’s will and the other party’s intestacy.

<sup>125</sup> See Administration of Estates (Northern Ireland) Act 1955, s.3 (and see also Interpretation Act 1954 s.42(3), defining “probate judge”).

<sup>126</sup> Succession Act 1965, s.13.

<sup>127</sup> See Wylie n.105, pp.875-876. It does not appear that the conclusion just reached would be affected by the limited doctrine of “relation back” in respect of a grant of administration. See Wylie *ibid.* at p.876.

The effect of the foregoing argument is clear. The devolution of the property to the respective personal representatives of the deceased creates a severance of the joint tenancy which had existed during the lifetimes of the joint tenants. If there had been two joint tenants, then an undivided one-half share under a tenancy in common will pass to each set of personal representatives.<sup>128</sup> When the relevant estate has been administered, the personal representatives will be in a position to pass on the one-half share which they have held (or what remains of it after the payment of the deceased's debts etc) to the successors of the relevant deceased joint tenant. The manner in which these successors will, as between themselves, take their share will depend on the terms of the deceased person's will or upon the rules of intestacy.

It is submitted, then, that the position which has just been outlined represents the current legal position in Northern Ireland and the Republic of Ireland. The discussion turns now to the different question of what law reform might be desirable in this area. This will first involve a consideration of the Law Reform Commission's proposal in respect of joint tenancies and *commorientes*. Once this has been accomplished, the author will outline a set of proposals covering this and other aspects of the *commorientes* problem.

### **The Law Reform Commission's Recommendation on Commorientes and Joint Tenancies**

#### ***The L.R.C.'s Approach***

In its treatment of the problem of *commorientes* and joint tenancies, the Irish Law Reform Commission explained the response of the courts by reference to *Bradshaw v Toulmin*<sup>129</sup> where, as has already been discussed in detail, Lord Thurlow L.C. stated that "if two persons, being joint tenants, perish by one blow, the estate will remain in joint tenancy in their respective heirs".<sup>130</sup> The L.R.C. went on to argue as follows:

"This response of implying a joint tenancy between the (possibly numerous) respective successors of the deceased persons is not without its difficulties. The normal right of survivorship will operate as between these successors, even though they may have little or nothing to do with each other, and despite the fact that the testator may have intended them to take an absolute interest. It is this burdensome persistence of a joint tenancy after *commorientes* which forms the subject matter of our current proposal."<sup>131</sup>

This is a somewhat unexpected way of characterising the problem. The L.R.C. did not mention the difficulties discussed in the previous part of this article, namely, the unbalanced nature of the *Bradshaw v Toulmin* solution (as the L.R.C. understood it) as well as the difficulties in implementing it in

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<sup>128</sup> Each set of personal representatives will hold the undivided one-half share as joint tenants *inter se*.

<sup>129</sup> (1784) Dick. 633.

<sup>130</sup> *ibid.*, at 633, quoted in the L.R.C. Report n.13 above, p.34.

<sup>131</sup> L.R.C. Report n.13 above, p.34.

cases where the successors are entitled in different proportions. Instead, the L.R.C. drew attention to apparently more minor issues such as the fact that the parties under the new joint tenancy “may have little or nothing to do with each other”. In any event, having identified the problem in the manner just discussed, the L.R.C. proceeded to consider a possible solution along the lines of section 184 of the English Law of Property Act 1925. However, as has been mentioned, the L.R.C. rejected this option on the basis of the arbitrary nature of the English provision.<sup>132</sup> Instead, the L.R.C. proposed to “to treat commorientes as an event that severs a joint tenancy, creating instead a tenancy in common”, with the result that “the respective successors will inherit the estate – either on intestacy or under the terms of the will – as if it had been held under a tenancy in common.”<sup>133</sup> Thus, one would avoid “the inconvenience of a joint tenancy” and also ensure that “the respective successors will continue to take equal shares in the estate, thereby avoiding the imbalance inherent in the English approach”.<sup>134</sup> The L.R.C. proposed to phrase the relevant legislation as follows: “any property held by [the *commorientes*] in a joint tenancy shall be deemed to have been so held under a tenancy in common and shall pass to their respective heirs under a tenancy in common.”<sup>135</sup> Thus, the L.R.C.’s recommendation would reach the same result which, it has been argued in the previous part of this article, already applies in Irish law. However, even if one accepts that the L.R.C.’s proposal would make no difference to the legal position, it could obviously have value in terms of clarifying the law.<sup>136</sup>

### ***Problems of Drafting in the L.R.C.’s Proposal***

If the value of legislative intervention is to clarify the law, it is essential that the relevant provision be accurately drafted. However, an examination of the L.R.C.’s draft suggests that it would create unnecessary problems. On the positive side, however, once the problems have been highlighted it seems there are no real obstacles to drafting a satisfactory provision. The L.R.C.’s draft provision, section 7(b) of the Draft Bill,<sup>137</sup> requires section 5 of the Succession Act 1965 to be amended by the insertion of additional words. If the L.R.C.’s proposal were implemented, the amended section 5 would read as follows (with the amending words being indicated in italics):

“Where, after the commencement of this Act, two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, then, for the

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<sup>132</sup> See n.63 above and accompanying text.

<sup>133</sup> L.R.C. Report n.13 above, p.35.

<sup>134</sup> *ibid.*

<sup>135</sup> *ibid.*, at p.36.

<sup>136</sup> It is noteworthy that s.13 of the L.R.C.’s Draft Bill (L.R.C. Report n.13 above, p.98) states that the L.R.C. Report “may be considered by any court when interpreting any provision of this Act and shall be given such weight as the court considers appropriate in the circumstances.” Such a provision would give some degree of legislative weight to the L.R.C.’s discussion of the law. However, if one accepts the arguments advanced earlier in this article, the L.R.C.’s discussion omits to consider many of the important issues which arise. Therefore, the desirability of the draft s.13, insofar as it applies to the *commorientes* issue, is questionable.

<sup>137</sup> L.R.C. Report n.13 above, p.95.

purposes of the distribution of the estate of any of them, they shall all be deemed to have died simultaneously *and any property held by any or all of them in a joint tenancy shall be deemed to have been so held under a tenancy in common and shall pass to their respective heirs under a tenancy in common.*"

One minor problem may be noted immediately, in respect of the reference to the property passing to "their respective heirs" towards the end of this amended section. As has been mentioned already, "heir" is a technical term, applicable in rare cases when one is applying the old rules of heirship. The appropriate word in this context, which is in fact used in the relevant discussion in the Report, is "successors". This is apt to cover those entitled under a will or intestacy.

There are, however, more major difficulties with the L.R.C. wording. These arise from the approach taken by the L.R.C. of appending the reforming provision to the existing section 5 of the Succession Act rather than creating a new subsection in which to state the new rule. The beginning of section 5 states that it applies where "two or more persons have died in circumstances rendering it uncertain which of them survived the other or others". This leads first of all to the difficulty that the severance rule being added by the L.R.C. will only apply in such circumstances of uncertainty. As it is drafted, it could not apply to a situation where there was no uncertainty and the evidence clearly established that the parties *had* died simultaneously. This is the problem which led to the litigation in *Hickman v Peacey*.<sup>138</sup> While the argument based on simultaneous death was unsuccessful in *Hickman*, a majority of the House of Lords appeared to regard simultaneous death as a possibility.<sup>139</sup> It would clearly be best to follow the example of legislatures in a number of jurisdictions and rephrase the provision in relation to joint tenancies so that it applies to cases of simultaneous death as well as to cases where there is uncertainty as to the order of death.<sup>140</sup>

Other difficulties flow from the decision to link the new provision with the existing part of section 5. The proposed new section 5 begins by referring to a case where "two or more persons have died in circumstances rendering it uncertain which of them survived the other or others" and then goes on to state that a severance will be deemed to have occurred in relation to "any property held by *any or all of them* in a joint tenancy" (emphasis supplied). The problems arise from the use of the words "any or all of them". These words are presumably designed to cover a case where, *e.g.* H, W and X have

<sup>138</sup> [1945] A.C. 304. Any argument that simultaneous death is impossible is somewhat undercut by the fact that the existing part of s.5 operates by deeming people to have died simultaneously.

<sup>139</sup> Viscount Simon L.C. and Lord Wright felt simultaneous death was possible. Lord Macmillan agreed that it was possible but felt it was covered by the wording of the Law of Property Act, s.184. Lord Porter was unsure if it was possible and even less inclined to believe that it could be proven in practice. Only Lord Simonds was convinced that simultaneous death was impossible in principle.

<sup>140</sup> See, for example, Survivorship and Presumption of Death Act (Revised Statutes of British Columbia 1996, c.444), s.2(1); Succession Law Reform Act (Revised Statutes of Ontario 1990, c.S-26), s.55(1); Simultaneous Deaths Act 1958 (New Zealand), s.3(1).

been killed in a plane crash and property had been held by H and W as joint tenants. The relevant property would not be held by “all” of those who died but would have been held by “any” of them and so a severance would occur, although even here the case might more comfortably have been covered by the phrase “some or all” rather than “any or all”. Consider however two further examples, which might be caught by the L.R.C. wording but where as a matter of principle it is obvious that no severance should occur. The first example involves the death of H and W in a plane crash, where property had been held on a joint tenancy by H, W and X. Since X (who was not on the plane) has survived, he clearly should become the sole owner of the property in question and there should be no question of a severance. Yet, it could be argued that the property in question had been held “by . . . all of [the *commorientes*] in a joint tenancy”, so that the draft provision would require a severance. The second example involves a case where H and W are killed in a plane crash and where H had held property on a joint tenancy with X. Again there should be no severance of this joint tenancy since X is clearly the surviving joint tenant. Unfortunately, this scenario could be caught by the L.R.C. wording on the basis that this is a case where “any” of the *commorientes* held the property on a joint tenancy.

The way around these potential difficulties appears to be simply to avoid linking the new provision to the existing sentence in section 5. One should instead state expressly the key circumstance which triggers the severance, *i.e.* the simultaneous death of *all* of a number of joint tenants. Along these lines, the following draft may be advanced for consideration (without the pretence that the author is a draftsman) which builds upon the existing L.R.C. formulation insofar as this is possible:

“For the avoidance of doubt it is hereby provided that, where property is held in a joint tenancy and all of the joint tenants die simultaneously or in circumstances rendering it uncertain which of them survived the other or others, the property held in the joint tenancy shall be deemed to have been held by the parties under a tenancy in common and shall pass to their successors under a tenancy in common.”<sup>141</sup>

### What Form Should Law Reform Take?

In this Part, an attempt is made to sketch out a possible way forward in terms of law reform in Northern Ireland and in the Republic of Ireland. It will be seen that the scheme which is put forward draws on the proposals made by both the Northern Ireland Land Law Working Group and the Republic of Ireland’s Law Reform Commission (as well as those made by the Law Reform Commission of British Columbia in 1982,<sup>142</sup> which in turn drew on the US Uniform Simultaneous Death Act).<sup>143</sup>

<sup>141</sup> For one example of a provision along these lines, see Succession Law Reform Act (Revised Statutes of Ontario 1990, c.S-26), s.55(2).

<sup>142</sup> *Report on Presumptions of Survivorship* LRC-56 (October 1982).

<sup>143</sup> This was first promulgated in 1940 (and amended in 1953) and adopted in virtually all the states of the USA. A revised version was promulgated in 1991 (with minor technical amendments in 1993). For the 1991 version, see <[www.law.upenn.edu/blw/ulc/usda/1991FinalAct.htm](http://www.law.upenn.edu/blw/ulc/usda/1991FinalAct.htm)>.

The author recommends the adoption of the Land Law Working Group's proposal of a general rule that "where two or more persons die in circumstances rendering it uncertain<sup>144</sup> which of them survived the other or others, for all purposes affecting the title to property they are deemed to have died simultaneously".<sup>145</sup> This provision is more or less identical to section 5 of the Republic of Ireland's Succession Act 1965, with the difference that it applies "for all purposes affecting the title to property" rather than merely "for the purposes of the distribution of the estate of any of them". The author also favours the adoption of the Land Law Working Group's proposal that an exception should apply in relation to "dispositions expressed to take effect in the event of one person dying before, or simultaneously with, another". Where the parties subsequently die simultaneously<sup>146</sup> or in circumstances rendering the order of death uncertain, "the event contemplated by the disposition should be deemed to have occurred."<sup>147</sup> A provision of this nature would deal satisfactorily with the type of problem that arose in *Underwood v Wing*<sup>148</sup> and *Wing v Angrave*.<sup>149</sup> The Land Law Working Group also recommended the enactment of a similar provision in relation to cases where the testator has provided for an alternative executor in the event that the first choice has died before or simultaneously with the testator.<sup>150</sup> This has already been enacted in Northern Ireland<sup>151</sup> and, in the author's view, should also be adopted in the Republic of Ireland.

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<sup>144</sup> It was concluded earlier in this article (see text to n.101 above) that it would be desirable for reforming legislation to clarify the position in relation to the burden of proof. This could be done by inserting an additional sub-section stating that the civil standard of proof on the balance of probabilities would apply in respect of a finding of uncertainty. Cf. n.100 above.

<sup>145</sup> *Final Report* (1990), Vol.2, p.960 (Art.239 of the draft Property Order). This proposal differs from the approach of the Land Law Working Party, *Survey of the Land Law of Northern Ireland* (1971) which had envisaged the adoption of a version of s.184 of the Law of Property Act 1925 (with a presumption that the younger had survived the elder). See the *ibid.* at p.163 and cl.267 of the draft Property Bill (*ibid.* at pp.358-359).

<sup>146</sup> The Land Law Working Group's wording (*Final Report*, Vol.2, p.960) fails to mention this possibility, referring only to the parties dying "in circumstances rendering it uncertain which of them survived the other or others". This is unfortunate since it ignores the lessons of *Hickman v Peacey* (see text to and following n.138 above). The *Survey of the Land Law of Northern Ireland* (1971), p.163 had sensibly included a reference to simultaneous death "to settle a doubt". See also Land Law Working Group, *Discussion Document No.4 (Conveyancing and Miscellaneous Matters)* (1983), p.127. The omission of a reference to "simultaneous death" also weakens Art.239(3) of the Land Law Working Group's proposals *Final Report* (1990), p.960 (in relation to joint tenancies and gifts limited to the survivor of two or more persons).

<sup>147</sup> *Final Report*, p.187. The wording of the proposed provision is contained in Art.239(2) of the draft Property Order, p.960. For completeness, it might be advisable to phrase the provision so that it would also apply where the disposition is expressed to take effect in the event of uncertainty as to which person died first. See the wording of the Survivorship and Presumption of Death Act (Revised Statutes of British Columbia 1996, c.444), s.2(3).

<sup>148</sup> (1855) 4 De G.M. & G. 633.

<sup>149</sup> (1860) 8 H.L.C. 183.

<sup>150</sup> *Final Report*, Vol.1, p.187; Art.30 of the draft Succession Order, Vol.3, p.1595.

<sup>151</sup> See Wills and Administration Proceedings (NI) Order 1994, Art.30.

In relation to cases where the parties hold the property on joint tenancy, it is the author's recommendation that one should follow the approach suggested by the Law Reform Commission (already discussed in detail in this article).<sup>152</sup> This would mean providing for a severance of the joint tenancy and a distribution of an equal share in the ownership of the property to the estates of each of the deceased joint tenants. This is also the approach advocated by the American Uniform Simultaneous Deaths Act.<sup>153</sup> In its Final Report, the Land Law Working Group preferred an English-style presumption that the younger person survived the elder. It is submitted that the reasons advanced by the Land Law Working Group are not sufficiently convincing to justify this further exception to its proposed general rule that the parties are deemed to have died simultaneously. The Land Law Working Group argued that "[i]n the case of joint interests of this kind, we think the parties can reasonably be taken to have anticipated that the elder will predecease the younger".<sup>154</sup> However, this is not persuasive. The most one can assume is that a person who has set up a joint tenancy expects that the right of survivorship will operate (unless the parties have severed the joint tenancy in the meantime). If the parties are close in age, it is unlikely that the settlor will have assumed that the slightly younger person will necessarily survive the elder.<sup>155</sup> It is also possible that the settlor will have been aware that the younger person was in poor health and was unlikely to survive the older but healthier joint tenant. Speculation as to the likely intentions of the settlor, based crudely on age alone, carries little more weight than the general argument in favour of the English-style presumption that "in the course of nature" the younger will survive the elder. In its 1983 Discussion Document,<sup>156</sup> the Land Law Working Group mentioned a second justification for the recommendation ultimately contained in its Final Report. This was that in relation to land a presumption of simultaneous death could have the effect of increasing the number of co-owners and "[t]his is undesirable because it would serve to complicate titles".<sup>157</sup> Given the comparative rarity of *commorientes* cases, this consideration is of little significance. Overall, it is preferable to avoid the arbitrariness involved in a rule favouring the younger over the elder. A rule of sharing the property between the successors of the deceased joint tenants on the basis that a severance took place at the time of death reflects the reality that no joint tenant can be proven to have survived and provides a solution which can be defended in principle. It is also arguable that it is calculated to minimise the possibility of rancour and dispute between the respective successors of the parties (thus addressing a concern expressed by Kearns J. in *Re Kennedy*).<sup>158</sup>

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<sup>152</sup> See text following n.132 above.

<sup>153</sup> s.4. See n.143 above.

<sup>154</sup> *Final Report* (1990), Vol.1, p.187.

<sup>155</sup> *cf.* Institute of Law Research and Reform, Alberta *Survivorship* Report No.47 (1986), p.20 (pointing out that, even where a woman is older than a man, the actuarial probabilities may be that she will be the survivor).

<sup>156</sup> *Discussion Document No.4 (Conveyancing and Miscellaneous Matters)*.

<sup>157</sup> *ibid.*, at p.131.

<sup>158</sup> [2000] 2 I.R. 571 at 576. See text to and following n.57 above and also n.99 above.

The Land Law Working Group also recommended<sup>159</sup> applying the English-style presumption in relation to cases where “property has been disposed of in such a way that a person would be entitled to it if he survived another or others”.<sup>160</sup> An example would be a conveyance to “X and Y for their joint lives, remainder to the survivor in fee simple”. In this instance, a presumption of simultaneous death would mean that neither X nor Y could claim to be the survivor and the remainder interest would revert to the original grantor or fall back into the estate of that person. It has already been argued that the arbitrary English-style presumption should not be applied to any other aspect of the law of *commorientes* and it would be curious to apply it only to deal with this minor problem. A better solution to the problem would be to divide the relevant property equally between the estates of the deceased persons.<sup>161</sup> In the example given above, the estates of X and Y would share the remainder interest equally (resulting in a tenancy in common over the property).

A final point of importance relates to the question of deaths which occur within a short period of time. In such cases, the parties are not really *commorientes* since it is possible to prove the order of death. However, legislation in some jurisdictions provides that, where the parties have died within a short period of time, neither is to be regarded as having survived the other.<sup>162</sup> This approach has been said to represent a ‘third generation’ of legislative reform.<sup>163</sup> The influential US Uniform Simultaneous Death Act<sup>164</sup> sets the relevant period at 120 hours but somewhat longer periods have been favoured elsewhere, e.g. 30 days in Queensland.<sup>165</sup> One argument in favour of extending the notion of simultaneous death in this manner is that the deceased would have preferred to benefit his own successors rather than those of the beneficiary if the beneficiary were to die shortly after the

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<sup>159</sup> *Final Report* (1990), Vol.1, p.187; Vol.2, p.960.

<sup>160</sup> This is the wording used in Art.239(3)(b) of the draft Property Order, *Final Report*, Vol.2, p.960.

<sup>161</sup> The Land Law Working Group originally appeared to be leaning towards this conclusion: see *Discussion Document No.4 (Conveyancing and Miscellaneous Matters)* (1983), p.130 where it was suggested that it would probably accord with the settlor’s intentions. This solution was favoured in the original version of the US Uniform Simultaneous Death Act, s.2 and carried forward to the 1991 version in the differently worded s.4 (see <[www.law.upenn.edu/bll/ulc/usda/1991/FinalAct.htm](http://www.law.upenn.edu/bll/ulc/usda/1991/FinalAct.htm)>). See also Law Reform Commission of British Columbia, *Report on Presumptions of Survivorship* LRC-56 (October 1982), p.33, recommending the approach in question.

<sup>162</sup> See the discussion in Land Law Working Group, *Discussion Document No.4 (Conveyancing and Miscellaneous Matters)* (1983), pp.127-128.

<sup>163</sup> Institute of Law Research and Reform, Alberta n.155 above, p.7 *et seq.* ‘First generation’ reforms, typified by the English Law of Property Act 1925, s.184 create a statutory presumption that, in cases of uncertainty, the younger survived the elder. ‘Second generation’ reforms, such as the Republic of Ireland’s Succession Act 1965, s.5, deal with uncertainty by means of a presumption of simultaneous death (or take the equivalent approach of regarding none of the *commorientes* as having survived the others).

<sup>164</sup> See n.143 above.

<sup>165</sup> Succession Act 1981, s.32(1) (wills) and s.35(2) (intestate succession).

testator.<sup>166</sup> There would also be the advantage of “reducing transactional costs associated with succession of property because the decedent’s property is probated once rather than two or three times.”<sup>167</sup> A final advantage, as pointed out by the drafters of the US Uniform Simultaneous Death Act 1991, is the avoidance of “unfortunate litigation in which the representative of one of the individuals attempts, through the use of gruesome medical evidence, to prove that the one he or she represents survived the other by an instant or two”.<sup>168</sup> This chimes generally with the concern of Kearns J. in *Re Kennedy*<sup>169</sup> to reduce the likelihood of divisive litigation in the wake of a family tragedy. In the intestacy context, Northern Ireland already has legislation giving limited effect to the approach under discussion. Under Article 3 of the Succession (NI) Order 1996,<sup>170</sup> for the purposes of intestate distribution, one spouse is deemed not to have survived the other if he or she dies within 28 days of the first spouse.<sup>171</sup> Consideration should be given in the Republic of Ireland to adopting this kind of provision and, in both Irish jurisdictions, to the possibility of adopting a general rule which would regard those dying within a defined period of each other as having died simultaneously. No definitive view is offered here on the reform option considered in this paragraph, which does not strictly speaking involve *commorientes*, but it has clear attractions.

### Conclusion

This article has examined a number of issues relating to the law governing the property of *commorientes*. An attempt has been made to clarify the existing law in both Northern Ireland and the Republic of Ireland, in particular by a close examination of two cases, *Bradshaw v Toulmin*<sup>172</sup> and *Re Kennedy*,<sup>173</sup> and by a consideration of the impact of modern rules on devolution to personal representatives. In Northern Ireland, the position is essentially the same as it was in the mid-nineteenth century when the classic cases of *Underwood v Wing*<sup>174</sup> and *Wing v Angrave*<sup>175</sup> were decided. In the Republic of Ireland, there has been limited reform in the shape of section 5 of the Succession Act 1964. However, this provision does little more than codify the common law position, although it is of some value in a limited set

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<sup>166</sup> Gifts in professionally drafted wills, particularly gifts between husband and wife, are commonly subject to a clause stipulating that the gift will not take effect unless the beneficiary survives the testator by more than 28 days (or some similar period).

<sup>167</sup> Institute of Law Research and Reform, Alberta n.155 above, p.22.

<sup>168</sup> See Prefatory Note to the US Uniform Simultaneous Death Act 1991 (available at <[www.law.upenn.edu/bll/ulc/usda/1991FinalAct.htm](http://www.law.upenn.edu/bll/ulc/usda/1991FinalAct.htm)>).

<sup>169</sup> [2000] 2 I.R. 571 at 576. See text to and following n.57 above and also n.99 above.

<sup>170</sup> Which inserted a new s.6A into the Administration of Estates (Northern Ireland) Act 1955.

<sup>171</sup> See the similar provision in the English Law Reform (Succession) Act 1995, s.1(1). Cf. Law Commission *Family Law: Distribution on Intestacy* Law Com No.187 (1989) p.14.

<sup>172</sup> (1784) Dick. 633.

<sup>173</sup> [2000] 2 I.R. 571.

<sup>174</sup> (1855) 4 De G.M. & G. 633.

<sup>175</sup> (1860) 8 H.L.C. 183.

of situations. There is clearly a need for reform in both jurisdictions. Useful proposals have been made by the Northern Ireland Land Law Working Group in 1990 and by the Law Reform Commission in 2003. Drawing on these proposals and other sources, this article has set out another possible reform scheme. It remains to be seen whether, in either jurisdiction, a legislative solution will be forthcoming to the intriguing legal problems which arise in *commorientes* situations.

## THE DISTANCE SELLING DIRECTIVES – A TIME FOR REVIEW

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### Introduction

European consumer law is characterised by its fragmented nature.<sup>1</sup> In recent years, it has developed different rules for different types of “product or service” (such as consumer credit<sup>2</sup> and consumer goods<sup>3</sup>) and different methods of “distribution” (such as doorstep selling<sup>4</sup> and electronic commerce<sup>5</sup>). Directive 2002/65 concerning the distance marketing of consumer financial services and its sister Directive, Directive 97/7 on the protection of consumers in respect of distance contracts both follow this pattern. Both Directives (hereinafter, the Directives) deal with the method of distribution known as “distance selling” and hence share many common features. Most notably, both Directives seek to protect consumers using the same four mechanisms: through the provision of information to consumers; by giving consumers a right of withdrawal; by offering protection against the fraudulent use of payment cards; and by prohibiting certain activities by suppliers, namely, inertia selling and cold-calling. At the same time, the Directives address different products or services – Directive 2002/65 covers financial services, whereas Directive 97/7 covers the supply of goods and services, other than financial services. In this regard there are significant differences between the two Directives, in particular in relation to the provision of information and the right of withdrawal.

Both Directives were adopted in the context of the aims of the single market and the attainment of a high level of consumer protection. Directive 97/7 was implemented in the UK and Ireland in 2000 and 2001, respectively.<sup>6</sup> Directive 2002/65 was implemented in the UK in 2004<sup>7</sup> and in Ireland in

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<sup>1</sup> The more recent use of “maximum harmonization” clauses and “framework directives” can be seen as a move away from this pattern as a means of producing a more coherent legislative framework: see, *e.g.* proposed Directive on unfair business-to-consumer commercial practices: COM (2003) 356 final.

<sup>2</sup> Directives 87/102 and 90/88 concerning consumer credit, [1987] OJ L42/48 and [1990] OJ L61/14.

<sup>3</sup> Directive 99/44 on consumer sales and associated guarantees, [1999] OJ L171/12.

<sup>4</sup> Directive 85/577 to protect the consumer in respect of contracts negotiated away from business premises, [1985] OJ L372/31.

<sup>5</sup> Directive 2000/31 on certain legal aspects of information society services, in particular electronic commerce in the Internal Market, [2000] OJ L178/1.

<sup>6</sup> See the UK Consumer Protection (Distance Selling) Regulations 2000, S.I. 2000 No 2334; and the Irish EC (Protection of Consumer in Respect of Contracts made by means of Distance Communication) Regulations 2001, S.I. 2001 No 207, as amended by S.I. 2005 No 71.

<sup>7</sup> The Financial Services (Distance Marketing) Regulations 2004, S.I. 2004 No. 2095. See further text to n.42.

early 2005.<sup>8</sup> In this article we examine the key protections afforded to consumers by the Directives and, where relevant, the national implementing measures in the United Kingdom and Ireland and we question the extent to which these Directives are successful in achieving a high level of consumer protection. As well as suggesting that the Directives need to be reviewed in the context of greater harmonization *inter se*,<sup>9</sup> we also query the basic philosophy which underlies the Directives: that well-informed consumers can protect themselves.

The article is divided into four main parts. In the first part we consider the application of the Directives. In the second part of this article we analyse the information obligations placed on suppliers. In the third part we examine how the Directives go beyond the standard contractual framework to protect consumers by placing default performance obligations on certain suppliers and by providing consumers with a right of withdrawal from the contract. In the fourth part we consider the issue of security of payment and how the Directives and the national implementing measures have responded to this issue.<sup>10</sup> As a preliminary to this analysis, the Directives are set in their commercial and legal context.

### ***The Commercial and Legal Context***

Distance selling differs from more traditional face-to-face selling that takes place in a shop or other commercial premises. With distance selling the supplier and purchaser are “at a distance” from each other and communication between the parties is via the post, the telephone or increasingly, the Internet. Distance selling has many advantages when compared to face-to-face selling. From the supplier’s perspective, the marketplace is greatly expanded beyond the local market. In addition, the supplier has reduced costs associated with establishing and maintaining a business.<sup>11</sup> Equally, from the buyer’s perspective, distance selling offers a number of advantages including the convenience of being able to “shop from home” for a wide range of goods and services.<sup>12</sup> Moreover, there is evidence that prices are more competitive.<sup>13</sup> There are however inherent risks in

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<sup>8</sup> The European Communities (Distance Marketing of Consumer Financial Services) Regulations 2004, S.I. 2004 No. 853.

<sup>9</sup> At the time of writing, the Commission was in the process of reviewing eight consumer directives, including Directive 97/7 but not Directive 2002/65, as part of the wider project in European Contract Law.

<sup>10</sup> Other aspects of the Directives prohibiting inertia selling and cold-calling are not considered in this article.

<sup>11</sup> Some well known businesses operate exclusively at a distance, *e.g.* <www.amazon.com>, while others operate both at a distance and in the traditional face-to-face environment.

<sup>12</sup> In a Eurobarometer survey published in 2004, 48% of those surveyed who bought something over the Internet indicated that convenience was the main reason: European Commission, *European Union Public Opinion on issues relating to business to consumer e-commerce* (2004) at <www.europa.eu.int/comm/consumers/topics/facts\_en.htm>.

<sup>13</sup> The 2004 Eurobarometer survey found that 47% of those who purchased something over the Internet indicated that cost was the main reason: *ibid.* See further details of European Consumer Centre online price comparison survey

distance selling. For the supplier, the main risk is non-payment or fraud. Hence, the supplier usually requires the buyer to pay in advance. For the buyer, the risks are numerous. First, a buyer of goods at a distance has no opportunity to examine the goods before deciding to buy or not.<sup>14</sup> Secondly, the buyer is usually required to pay in advance and thereby runs the risk of non-performance due to supplier fraud or insolvency. While this risk is not unique to distance selling, it may be increased because of the physical distance between supplier and buyer. Thirdly, where problems arise, the supplier may be located out of jurisdiction and therefore the enforcement of any buyers' rights may be impractical.<sup>15</sup> Finally, and more generally, where contracts are concluded at a distance, payment is usually also at a distance, thus the potential for fraud is increased.

Despite these inherent risks, developments in ICT (information and communications technology), especially the increased usage of the Internet by consumers<sup>16</sup> and the easy availability of payment mechanisms such as credit and debit cards, has led to the popularisation of distance selling.<sup>17</sup> Indeed, such was the initial popularity of the Internet that it was predicted that it would cause a dramatic change to the retail process. However, as noted in the Foreword to the European Consumer Centre's study on *Realities of the European Online Marketplace*,<sup>18</sup> "many of the initial e-business projects failed, as they did not manage to attract sufficient consumer interest".<sup>19</sup> Consumers were more sceptical than expected about buying online and, without consumer trust, the market could not expand at the rate predicted. More recently, however, there appears to be a renewed interest in e-commerce.<sup>20</sup> To enable twenty first century e-commerce to realise early market predictions, consumer trust in the process is essential.<sup>21</sup> This in turn

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reported in their Newsletter 'Consumer Watch', Winter 2003 at <[www.eccdublin.ie/resources/publications/heading2](http://www.eccdublin.ie/resources/publications/heading2)>.

<sup>14</sup> The 2004 Eurobarometer survey found that about two-thirds (68%) of people who do not use the Internet for shopping gave as their reason that they needed to see and touch the products: *ibid.* In practice, many sellers of goods operate a 'free refund policy' to counter this problem.

<sup>15</sup> See Caplin, "Resolving consumer disputes online: a review of consumer ODR" [2003] *Commercial Law Practitioner* 207; Hornle, "Online Dispute Resolution in Business to Consumer E-commerce Transactions", (2002) 2 *JILT* at <<http://elj.warwick.ac.uk/jilt/02-2/hornle.html>>.

<sup>16</sup> By the end of 1999, 34% of inhabitants in the EU owned a Personal Computer (PC). This had increased to 47.4% by the end of 2000. By the end of 1999, the total number of Internet users in the EU was estimated at 72.2 million (of approximately 19% of inhabitants). This figure represented an increase of 51% since the previous year. See further Hobbey, *Just Numbers: Numbers on Internet Use, Electronic Commerce, IT and Related Figures for the European Community* (European Commission's Electronic Commerce Team, 2001).

<sup>17</sup> According to Hobbey, the European e-commerce market was estimated to be valued at more than €14 billion in 1999. On-line purchases were estimated to reach a total value of US\$1.5 trillion by 2004: *ibid.*, p.9.

<sup>18</sup> (ECC, 2003) at <[www.ecic.ie/resources/publications/](http://www.ecic.ie/resources/publications/)>.

<sup>19</sup> *ibid.*, p.4.

<sup>20</sup> *ibid.*, p.4.

<sup>21</sup> There is clearly some way to go. In January 2002, Consumer Webwatch reported that only three out of 10 consumers trusted websites that sold goods or services:

lends an urgency to the question of regulation of the e-commerce environment as the means whereby consumer trust in the process can be regained.

A feature of distance selling of all kinds, and especially of Internet selling, is the extent to which national boundaries become irrelevant.<sup>22</sup> A purchaser sitting at a PC in Dublin or Belfast can order goods or services from anywhere in the world. From a legal perspective, this created the impetus for the development of a harmonised approach guaranteeing global as well as local protection for consumers. In 1996, UNCITRAL adopted a *Model Law on Electronic Commerce*<sup>23</sup> and in 1999, the OECD agreed *Guidelines for Consumer Protection in the Context of Electronic Commerce*.<sup>24</sup> While the UNCITRAL Model Law is concerned solely with e-commerce in a commercial rather than consumer context,<sup>25</sup> the OECD Guidelines set out in general terms the protections that should arise in the business-to-consumer context. The Guidelines specify basic information that should be provided to consumers, require the provision of “easy-to-use, secure payment mechanisms” and require the adoption of adequate dispute resolution mechanisms. While indicative of policy goals in this area, neither of these global harmonising attempts is legally binding.<sup>26</sup> Instead, the first move in this direction came at EU level with the introduction of Directives 97/7 and 2002/65. These Directives constitute an important first attempt to introduce legally enforceable cross-border protections for consumers with regard to distance selling.

### ***Introducing the Directives***

Five years after it was originally proposed<sup>27</sup>, Directive 97/7/EC on the protection of consumers in respect of distance contracts (hereinafter, the

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see Princeton Survey Research Associates, *A Matter of Trust: What Users Want from Websites* (2002) at <www.consumerwebwatch.org>.

<sup>22</sup> According to an OECD Report, in 2003, consumer mistrust of Internet retail is exacerbated in a cross-border context. The Report noted a recent Eurobarometer study which indicated that only 32% of European consumers felt well-protected in a cross-border dispute as opposed to 56% where the dispute was domestic: Committee on Consumer Policy *Consumers in the Online Marketplace: The OECD Guidelines Three Years Later* (DSTI/CP (2002)/4/Final) p.4 at <www.oecd.org>.

<sup>23</sup> At <www.uncitral.org>.

<sup>24</sup> At <www.oecd.org>.

<sup>25</sup> Article 1 of the Model Law provides that the law applies to “any kind of information in the form of a data message used in the context of commercial activities” (although the Model Law does provide that it does not override any rule of law intended for the protection of consumers).

<sup>26</sup> This does not mean that they are without practical effect. In their report, *Consumers in the Online Marketplace: The OECD Guidelines Three Years Later*, the Committee on Consumer Policy sets out the attempts made to extend the application of the OECD Guidelines. These included public education and information initiatives and the facilitation of bilateral and multilateral co-operation agreements among jurisdictions: n.22 above pp.15-21.

<sup>27</sup> See original proposal at [1992] OJ C156/14. The original proposal was accompanied by Recommendation 92/295 on codes of practice for the protection of consumers in respect of contracts negotiated at a distance: [1992] OJ L156/21.

Distance Selling Directive) was adopted in May 1997.<sup>28</sup> The policy goals of the Directive are evident in the Preamble, which presents the Directive as part of the “attainment of the aims of the internal market”.<sup>29</sup> Noting that the possibility of cross-border commerce is one of the most tangible results for consumers of the completion of the internal market, the Directive sets out to introduce a minimum set of common rules to apply across the member states. As such, the Directive constitutes a minimum harmonisation measure and permits member states to introduce or maintain more stringent protective measures for consumers in this regard.<sup>30</sup> Member states were given three years to implement the Directive,<sup>31</sup> which was implemented in the United Kingdom by the Consumer Protection (Distance Selling) Regulations 2000<sup>32</sup> and in Ireland by the EC (Protection of Consumer in Respect of Contracts made by means of Distance Communication) Regulations 2001.<sup>33</sup> In the UK, the Directive is enforced through the Office of Fair Trading and the Northern Ireland Department of Enterprise, Trade and Investment. In Ireland, enforcement is achieved primarily through the Office of the Director of Consumer Affairs.

Although the intangible and high-value nature of services such as insurance, banking and credit provision makes these services extremely suitable for distance selling, contracts relating to financial services were excluded from the application of the Distance Selling Directive.<sup>34</sup> This omission was justified by the Council because of the “specific nature” of financial services and because financial services were already covered by Community legislation “in many respects”.<sup>35</sup> However, the exemption was the subject of considerable criticism at European Parliament level and the Commission took the relatively unusual step of appending a Statement to the Directive to the effect that it would “examine ways of incorporating consumer protection into the policy on financial services” and “if need be” submit legislative proposals.<sup>36</sup> In 1998, the Commission brought forward proposals for a

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<sup>28</sup> [1997] OJ L144/19; see further Bradgate, “The EU Directive on Distance Selling”, (1997) 4 Web JCLI <[http://www.webjcli.ac.uk/1997/issue4/bradgate\\_4.html](http://www.webjcli.ac.uk/1997/issue4/bradgate_4.html)>; Cremona, “The Distance Selling Directive”, [1998] JBL 613; Brownsword & Howells, “When surfers start to shop: Internet commerce and contract law”, [1999] LS 287; Hornle, Sutter & Walden, “Directive 97/7/EC on the protection of consumers in respect of distance contracts” Ch.2 in Lodder & Kaspersen ed., *eDirective: Guide to the European Union Law on e-Commerce* (The Hague: Kluwer Law International, 2002).

<sup>29</sup> Recital 4.

<sup>30</sup> Art.14. Note also that art.12 provides that a consumer cannot waive the rights conferred on him by the national transposition of the Directive.

<sup>31</sup> Art.15.

<sup>32</sup> S.I. 2000 No. 2334. These Regulations extend to Northern Ireland: Reg 1(2).

<sup>33</sup> S.I. 2001 No. 207. This was subject to minor amendment by the EC (Protection of Consumers in Respect of Contracts made by means of Distance Communication) (Amendment) Regulations 2005, S.I. 2005 No. 71 (the 2005 Regulations).

<sup>34</sup> Art.3. A non-exhaustive list of financial services is contained in Annex II to Directive 97/7 and includes investment services, insurance and reinsurance operations, banking services and operations relating to dealings in futures and options.

<sup>35</sup> Common Position adopted by the Council, June 28, 1995: [1995] OJ C288/1.

<sup>36</sup> [1997] OJ L144/19.

Financial Services Directive.<sup>37</sup> Following an extensive debate and a significant number of amendments, Directive 2002/65 concerning the distance marketing of consumer financial services (hereinafter the Financial Services Directive) was adopted in September 2002.<sup>38</sup> Reflecting the Commission's shift to a more hands-on approach to consumer protection,<sup>39</sup> this Directive sets out, in absolute terms,<sup>40</sup> the standards that must be met by all member states in relation to the distance marketing of "financial services" to consumers. "Financial services" are broadly defined to include "any service of a banking, credit, insurance, personal pension, investment or payment nature".<sup>41</sup>

Member states were given until 9 October, 2004 to implement the Directive.<sup>42</sup> The process of implementation was complicated by the nature of the services regulated. Financial services are already subject to extensive European and domestic regulation and member states had to decide how the Financial Services Directive should interact with existing regulatory frameworks. In the UK, HM Treasury chose to incorporate the provisions of the Directive into the existing regulatory framework where possible.<sup>43</sup> Accordingly, the Financial Services Authority (FSA) integrated the provisions of the Directive directly into its rules (for services already regulated by the FSA).<sup>44</sup> In order to cover those financial services which are not regulated by the FSA ("gap services"), the Financial Services (Distance Marketing) Regulations 2004<sup>45</sup> came into force on October 31, 2004. These Regulations also cover distance contracts for consumer credit (although this aspect of the Regulations becomes effective from May 31, 2005). The UK approach minimizes the amount of new legislation with which suppliers must comply. This is intended to reduce the likelihood of ambiguity and ensure a measured enforcement by the most appropriate and familiar regulator.

In Ireland, the Department of Finance preferred to adopt a single overarching implementing measure that would apply to all financial services. The measure in question, the European Communities (Distance Marketing of

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<sup>37</sup> See Commission Green Paper, *Financial Services: Meeting Consumers' Expectations*, COM(96) 209, which led to the proposal for a Financial Services Directive in October 1998, COM(98) 468 final.

<sup>38</sup> [2002] OJ L271/16.

<sup>39</sup> See the Consumer Policy Strategy 2002-2006, COM(2002) 208.

<sup>40</sup> See justifications for the adoption of this approach in Recital 13.

<sup>41</sup> Art.2(b).

<sup>42</sup> Art.21.

<sup>43</sup> For the policy considerations leading to this decision, see HM Treasury Summary of Consultation Feedback and Government Response, *Implementation of the Distance Marketing of Consumer Financial Services Directive* (August 2004) at <[www.hm-treasury.gov.uk/media/43283/Implementation\\_dmd.pdf](http://www.hm-treasury.gov.uk/media/43283/Implementation_dmd.pdf)>; and HM Treasury Consultation Document *Implementation of the Distance Marketing of Consumer Financial Services Directive* (July 2003) at <[www.hm-treasury.gov.uk/consultations\\_and\\_legislation/consult\\_fullindex.cfm#live](http://www.hm-treasury.gov.uk/consultations_and_legislation/consult_fullindex.cfm#live)>.

<sup>44</sup> Implementation was by means of the Distance Marketing Directive Instrument 2004 and the Distance Marketing Directive (Amendment) Instrument 2004 (together the DMDI) which amended a number of modules dealing with Conduct of Business in the FSA Handbook (available at <<http://fsahandbook.info/FSA/>>).

<sup>45</sup> S.I. 2004 No. 2095.

Consumer Financial Services) Regulations 2004,<sup>46</sup> became effective on February 15, 2005.<sup>47</sup> The main “competent authority” for the purposes of enforcement is the Central Bank and Financial Services Regulatory Authority of Ireland (IFSRA) although the Director of Consumer Affairs also has a limited role.<sup>48</sup>

### The Application of the Directives

Once it is decided that consumers who purchase goods or services under distance contracts need protection, over and above that already afforded to consumers of goods and services, the issue becomes one of application. In addressing this preliminary issue a number of factors should be considered and balanced. There is, of course, the obvious tension between the need to protect vulnerable consumers and the cost of compliance that any protectionist legislation places on businesses. In this context suppliers and consumers are seen as operating on opposing sides. At the same time, the participation of consumers in e-commerce is seen as a major driver in the development of the e-commerce market and the wider information society agenda.<sup>49</sup> Therefore legislation that has the effect of enhancing consumer confidence in the market is seen as an important component in the development of the market. Less contentious factors relate to the nature of the distance contract and the practicalities of applying and enforcing such legislation in particular circumstances.

There are four pre-conditions to the application of the Directives.<sup>50</sup> First, the contract must be between a supplier and a consumer, as defined.<sup>51</sup> Secondly, the contract must concern the sale of goods or the supply of services, including financial services. Thirdly, the goods or services must be supplied under an “organised distance sales or service provision scheme run by the supplier”.<sup>52</sup> And fourthly, the supplier must make exclusive use of one or

<sup>46</sup> S.I. 2004 No. 853. For a detailed analysis of these Regulations, see Donnelly and White, “The European Communities (Distance Marketing of Consumer Financial Services) Regulations 2004: Business Compliance and Consumer Rights” (2005) 12 *Commercial Law Practitioner* 41.

<sup>47</sup> The Department of Finance introduced amending Regulations shortly before the 2004 Regulations came into force. The EC (Distance Marketing of Consumer Financial Services) (Amendment) Regulations 2005, S.I. 2005 No. 63 make a number of minor amendments to the 2004 Regulations and came into operation at the same time as the 2004 Regulations. See further Donnelly and White, “An Update on the Distance Marketing of Consumer Financial Services: The EC (Distance Marketing of Consumer Financial Services) (Amendment) Regulations 2005” (2005) 12 *Commercial Law Practitioner* 83.

<sup>48</sup> The Director’s role is only in relation to suppliers to whom Part XI of the Consumer Credit Act 1995 applies (*i.e.* credit intermediaries).

<sup>49</sup> See European Commission, *eEurope 2005: An Information Society for all* COM(2002) 263 final.

<sup>50</sup> Directive 97/7, Art.2; Directive 65/2002, Art.2.

<sup>51</sup> “Consumer” means any natural person who is acting for purposes which are outside his trade, business or profession; “supplier” means any natural or legal person acting in his commercial or professional capacity: see Directive 97/7, art.2(2) & (3); Directive 65/2002, art.2(c) & (d).

<sup>52</sup> This pre-condition ensures that once-off transactions are not caught by the legislation.

more means of distance communication up to and including the moment of contract conclusion. “Means of distance communication” is further defined as any means which, without the simultaneous physical presence of the supplier and the consumer, may be used for conclusion of the contract or the marketing of a financial service between those parties, such as the telephone or the Internet.<sup>53</sup>

These pre-conditions are largely straightforward. However, in one respect, there is uncertainty as to the application of the legislation. As noted above, Directive 97/7 applies to two classes of distance contract: *sale of goods contracts* and *supply of services contracts*. These terms are not defined in the Directive, or the implementing Regulations, though the term “consumer goods” has been defined in a more recent European consumer protection Directive as “any tangible moveable item ...”.<sup>54</sup> This lack of definition may raise difficulties where “digital content”, such as computer software, music or games, is supplied on-line.<sup>55</sup> The classification of contracts for the supply of computer software has been addressed in a number of common law jurisdictions but the decisions would seem to raise more questions than answers.<sup>56</sup> It is clear that software may be supplied pursuant to a contract for the supply of services, as where there is a contract to write a new programme for a customer.<sup>57</sup> Moreover, where software is supplied on a disk or CD, or

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<sup>53</sup> Directive 97/7, art. 2(4); Directive 65/2002, art.2(e). Annex 1 of Directive 97/7 contains an indicative list of means of distance communications which comprises: addressed and unaddressed printed matter; standard letter; press advertising with order form; catalogue; telephone with and without human intervention; radio; videophone; videotex with keyboard or touch screen; electronic mail; fax; and television. Recital 9 of Directive 97/7 rightly notes that the constant development of means of communication does not allow an exhaustive list to be compiled. In fact, this list is unchanged from the Commission’s list originally proposed in 1992 and is notable for its omission of the Internet, which in 1992 was not widely recognised as the new shopping environment.

<sup>54</sup> Art.1(2) of Council Directive 1999/44 on certain aspects of the sale of consumer goods and associated guarantees, [1999] OJ L171/12.

<sup>55</sup> This is an area where huge growth is predicted. For example, In-stat/MDR predicts that the total on-line gaming (OLG) market will grow from just over a billion in 2003 to nearly \$4 billion by the end of 2008: at <www.instat.com>. Forrester states that online music business is expected to grow from a projected \$308 million in 2004 to \$4.4 billion in 2008: at <www.itfacts.biz/index.php?id=C0\_10\_1>.

<sup>56</sup> In the US, because of uncertainty about the application of Art.2 (on sale of goods) of the Uniform Commercial Code (UCC) to computer software the Uniform Computer Information Transaction Act (UCITA, at <www.law.uh.edu/ucc2b/>) was enacted in 1999. UCITA provides substantive contract law rules for computer information transactions similar to UCC art.2. This issue has also arisen in relation to the UN Convention for the International Sale of Goods (the Vienna Convention) 1980. Two decisions from the German courts support the view that ‘goods’ under the Vienna Convention includes computer software. See Appellate Court Koblenz (Oberlandesgericht Koblenz, Case 2U 1230/91, September 17, 1993), case abstract at <www.cisg.law.pace.edu/cisg/wais/db/cases2/930917g1.html>. See also District Court of Munich (LG München, Case 8 HKO 24667/93, February 8, 1995, summary at <http://cisgw3.law.pace.edu/cases/950208g4.html>.

<sup>57</sup> *Salvage Association v CAP Financial Services Ltd* [1995] FSR 654. In *Saphena Computing Ltd v Allied Collection Agencies Ltd* [1995] FSR 616 the Court of

where hardware and software are supplied together, as where a PC is bought with pre-installed software, it has been held that if the software is defective, the supplier may be in breach of the statutory implied terms as to quality, under sale of goods legislation.<sup>58</sup> The difficulty, as noted by Sir Ian Gildewell in the Court of Appeal in *St Albans City and District Council v International Computers Ltd*<sup>59</sup> is that while a disk, CD or PC is clearly goods, software “being instructions or commands telling the computer hardware what to do”, of itself is not. In the *St. Albans* case, the defective software was not sold or hired, it was simply copied from a disk onto the plaintiff’s computer without delivery of the disk. The property in the disk remained with the supplier, while the plaintiff was licensed to use the software. In these circumstances, it was held that the software was not “goods” so there were no statutory implied terms as to quality under the UK Sale of Goods Act 1979.<sup>60</sup> Similar difficulties exist where software is purchased and then downloaded under a licence agreement. In these circumstances, there is no disk or CD to point to to identify the transaction as a sale of goods, and where the software purchased is “off-the peg” and not custom-made it would be difficult to argue that its supply constitutes a supply of services. The issue is whether the supply of software under a licence agreement alone comes within the protection of Directive 97/7.<sup>61</sup> As has been noted elsewhere<sup>62</sup>, it makes no sense to have the buyer’s rights dependent on the relatively insignificant manner of delivery, that is, on whether the software is delivered on a disk or via the Internet. Should this issue come before the European Court of Justice<sup>63</sup>, a choice will have to be made between the application of strict legal definitions and the protection of consumers.<sup>64</sup> As already noted, these terms are not defined in the Directive and hence the policy of enhancing consumer protection in the EU could be pursued without such restrictions. Moreover, the potential exclusion of contracts for the supply of digital content would appear to be more an accident of timing (in 1992 when the Directive was proposed, and in 1997

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Appeal avoided classifying a supply of software which was adapted to the customer’s needs because it was common ground that the law was the same whether it was a supply of services or a sale of goods.

<sup>58</sup> In a New South Wales case *Toby Construction Products Pty Ltd v Computa Bar (Sales) Pty Ltd* [1983] 2 NSWLR 48, the Supreme Court held that the transfer of property in hardware and software together was a sale of goods. But this case failed to address the issue of the supply of software alone.

<sup>59</sup> [1996] 4 All ER 481.

<sup>60</sup> In the absence of any express terms, his Lordship held that there would be a term implied at common law that the program should be reasonably fit for its intended purpose.

<sup>61</sup> Note, *e.g.* under the VAT on E-Commerce Directive (2002/38/EC) downloaded digital content (such as software, music and games) supplied by non-EU suppliers to consumers in the EU is treated as a supply of services.

<sup>62</sup> Hedley, “Quality of Goods, Information, and the Death of Contract”, [2001] JBL 114 at 119-120.

<sup>63</sup> See art.234 of the EC Treaty on the preliminary reference procedure.

<sup>64</sup> In *The London Borough of Newham v Khatun, Zeb and Iqbal* [2004] EWCA Civ 55 a purposive approach, rather than a literal approach, was taken with regard to the application of the unfair contract terms legislation, thereby broadly protecting consumer interests.

when it was adopted, no one foresaw the potential of ICT) than based on some policy imperative, further strengthening the case for their inclusion.

Further to the four pre-conditions identified above, the Directives specify a number of exemptions from their application. Under Directive 97/7 there are three classes of exemption: complete exemptions from the whole Directive; partial exemptions from the core provisions of the Directive (*i.e.* those relating to rights to information, to withdraw and to supplier's performance)<sup>65</sup> and further partial exemptions from the consumer's right to withdraw only.<sup>66</sup> Directive 2002/65 is less complicated in this regard with only one class of exemption relating to the right of withdrawal.<sup>67</sup> These exemptions reflect the basic tension between the need to protect vulnerable consumers and the cost of compliance that any protectionist legislation places on business. While many of these exemptions are reasonable, others are problematic either because their stated rationale is not convincing or because of uncertainty about their operation in practice. Again, it should be recognized that some of this uncertainty has been caused by the rapid developments in ICT that were not foreseeable in the 1990s when Directive 97/7 was being formulated.

Some contracts, because of their immediate nature, do not give rise to the standard problems of distance contracts and hence are exempted. Examples of completely exempted contracts under Directive 97/7 include contracts concluded by means of automated vending machines or automated commercial premises; and contracts concluded with telecommunications operators through the use of public payphones (*i.e.* a telephone call). These exemptions appear reasonable though the term "automated commercial premises" is not defined in the Directive. It would seem to include automated car parks and automated photo booths, for instance, but when applied to the Internet environment, this lack of definition may give rise to problems. As noted elsewhere<sup>68</sup>, it is arguable that an automated website would fall within the definition of automated commercial premises.<sup>69</sup> Another rationale for the exemptions is that the provisions of the Directive would be unworkable. For example, contracts for the construction and sale of immovable property or relating to other immovable property are completely exempted from Directive 97/7 because the availability of a right to withdraw from such contracts would give rise to problems.<sup>70</sup> However, rental agreements of such property are covered by the Directive.

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<sup>65</sup> Art.3.

<sup>66</sup> Art.6(3); see further below.

<sup>67</sup> Art.6(2) & (3); see further below.

<sup>68</sup> Hornle, Sutter & Walden, n.28 above p.13.

<sup>69</sup> The Irish Regulations would appear to take a narrow view of this point by defining "premises" in concrete terms as "*including* any building, dwelling, temporary construction, vehicle, ship or aircraft" and thus excluding a virtual premises, such as a web-site: Reg 2. However, the Irish definition is not exhaustive and it is unclear whether a narrow definition if adopted would be in compliance with the Directive.

<sup>70</sup> This category may also be exempted by member states as regards the validity of electronic contracts under art.9(2) of Directive 2000/31/EC on electronic commerce: see above n.5.

Interestingly, auctions are also completely exempted from Directive 97/7 because, it would seem, of their special nature. Given the huge growth in on-line auctions<sup>71</sup>, it might be thought that this exemption is another example of Directive 97/7 showing its age.<sup>72</sup> However, the term “auction” is not defined in the Directive and it is unclear whether what are widely known as “on-line auctions” would in fact come within the definition of auction under the Directive.<sup>73</sup> Rather than a seller or buyer engaging the services of an auctioneer to act as an intermediary on their behalf, most on-line auction sites operate not as an “auctioneer” in the traditional sense but as a facility whereby buyers and sellers can meet and ultimately transact directly. Indeed, some of the most popular on-line auction sites emphasise this point in their express terms and conditions of trade.<sup>74</sup> But, where the transaction between the seller and the buyer is once-off or where it is between two consumers, it would fall outside the application of the Directive in any case. However, where a business regularly uses an on-line auction web site to supply goods to consumers it is arguable that such a transaction would come within the scope of the Directive. This appears to be the finding of a recent decision from the German Federal Supreme Court concerning the sale of a diamond bracelet sold by a jeweller on eBay, the popular auction web site.<sup>75</sup>

Two classes of contract are partially exempt from Directive 97/7, in that the core provisions of the Directive relating to rights to information, to withdraw and to supplier’s performance do not apply to contracts:

- for the supply of foodstuffs, beverages or other goods intended for everyday consumption supplied to the home, residence or workplace of the consumer by regular roundsmen; and
- for the provision of accommodation, transport, catering or leisure services where the supplier undertakes, when the contract is made, to provide those services on a specific date or within a specific period.<sup>76</sup>

The exemptions in the first bullet-point were designed to cover the traditional milk, and related, deliveries to home. However the advent of supermarket shopping on-line leads to questions as to whether the Directive applies in this

<sup>71</sup> eBay was the first online auction site for the sale of goods and services, and is currently the most widely known and used. It was started in 1995, to provide a central location to buy and sell unique items and to meet other people with similar interests. Currently, there are over 1,000 retail auction sites in operation, with eBay dominating the market with 42.4 million registered users. eMarketer, a leading provider of Internet statistics, predicts that revenue from online auctions will reach \$16.3 billion dollars by 2004.

<sup>72</sup> See above regarding supply of ‘digital content’.

<sup>73</sup> See further Ramberg, *Internet Marketplace: the law of auctions and exchanges on-line* (Oxford: Oxford University Press, 2002).

<sup>74</sup> See, e.g. Clause 3 of eBay’s User Agreement at <www.ebay.com>; and Clause 3 of uBid’s User Agreement at <www.uBid.com>.

<sup>75</sup> Reported at <http://www.heise.de/english/newsticker/news/52867>.

<sup>76</sup> The remaining substantive provisions of Directive 97/7 as regards fraudulent use of payments cards; inertia selling; and cold-calling continue to apply to these contracts. These contracts were completely exempted in the original draft of Directive 97/7.

new context.<sup>77</sup> It could be argued that the reference to “regular roundsmen” would exclude home deliveries by supermarkets which usually are made following a specific order placed on-line each time and hence are not delivered on a “regular” or routine basis. Moreover, the application of the Directive to supermarket shopping on-line would be limited, in that, there is a specific exception to the right to withdraw in relation to contracts for the supply of perishable goods, thereby protecting the supplier’s interest.<sup>78</sup>

The thinking behind the exemptions in the second bullet-point, which would include hotel and airplane bookings, is that the consumer decision to contract generally “represents a considered decision by the consumer” and therefore further protection, in the form of the main provisions of the Directive, is not required.<sup>79</sup> This reason is not particularly convincing and it is more likely that these exemptions are an example of suppliers’ interests taking precedence over consumer protection interests. In particular, to perform such contracts the supplier may have to make advance arrangements, or, having committed to provide the service to a customer, the supplier may have to refuse the service to other prospective customers given the limited availability of the service at a specific date or within a specific period. The underlying assumption is that it would be unfair on the supplier to allow the first consumer to withdraw from the contract in these circumstances because to do so would involve imposing the financial cost of the cancellation on the supplier who because of the time restrictions has no realistic way of recouping that financial cost. While this may justify the exclusion of this class of contracts from the right of withdrawal, it does not explain why such contracts are excluded from the other main protections of the Directives, and in particular, the right to information.

With regard to both exemptions uncertainty about their exact meaning, and hence application, exists. To date, this uncertainty has given rise to one preliminary reference ruling from the ECJ regarding the meaning of the term “transport services” in the second bullet-point above.<sup>80</sup> The case involved easyCar, a car-hire business established by Stelios Haji-Ioannou, the founder of easyJet. The Office of Fair Trading (OFT) in the UK had complained of easyCar’s refusal to allow customers to cancel car-hire contracts and obtain a refund, under the relevant Distance Selling Regulations. In their defence, easyCar claimed that the Regulations did not apply to it because its car hire business is a “transport service”, which is exempt from the cancellation provisions of the Regulations. The commercial reality that underlay this case was that easyCar is a low cost supplier of car hire facilities and the application of Directive 97/7 to this type of activity would clearly have an impact on its competitiveness. The OFT disputed this interpretation. The OFT accepted that the exemption for transport services covered services provided by train operators, bus companies and airlines, for example. But the OFT view was that self-drive car hire was not in law a “transport

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<sup>77</sup> Tesco Direct claims to be the largest on-line grocery retailer in the world with annual on-line sales in 2003 of £500 million: <[www.tesco.com/corporateinfo/](http://www.tesco.com/corporateinfo/)>.

<sup>78</sup> Directive 97/7, Art.6(3). See further below.

<sup>79</sup> See Explanatory Memorandum to draft Directive.

<sup>80</sup> Following a joint application to the High Court, the matter was referred to the ECJ on 21 July 2003. The ECJ gave its ruling on 10 March 2005: see Case 336/03 at <<http://curia.eu.int/en/content/juris/index.htm>>.

service”. Again, the uncertainty arose because “transport service” is not defined in the Directive. The ECJ first noted that it is settled case law that the meaning and scope of an undefined term must be determined by considering its usual meaning in everyday language, while also taking into account the context in which it occurs and the purpose of the rules of which it is a part.<sup>81</sup> Moreover, where a term appears in a provision that derogates from the rules for the protection of consumers, it must be interpreted strictly.<sup>82</sup> However, the ECJ then proceeded to interpret “transport services” broadly. It noted that the Directive, rather than use the more common term “contracts of carriage” which relates to the carriage of passengers and goods performed by a carrier, used the term contracts for the provision of ... transport . . . services. The latter phrase was held to cover all contracts governing services in the transport field, including those contracts that enabled the consumer to perform the carriage. Therefore, easyCar’s car hire business is a “transport service”, which is exempt from the cancellation provisions of the relevant Regulations. Interestingly, in support of this interpretation, and with reference to the context of the legislation, the ECJ made reference to the Advocate General’s opinion that the intention of the legislature was to institute protection for consumers and also protection for the interests of suppliers of certain services, in order that the latter should not suffer the disproportionate consequences arising from cancellations at no expense. The case clearly illustrates the tension, which underlies this Directive, between the need to protect vulnerable consumers and the cost of compliance that any protectionist legislation places on businesses.

One final issue concerns the Directives’ application to severable or successive contracts. Recital 10 of Directive 97/7 addresses the situation where the same transaction comprises successive operations or a series of separate operations over a period of time. It recognises that this type of arrangement may give rise to different legal consequences depending on the law of the member state. For example, it could be interpreted as one severable contract or several separate contracts. To ensure uniform application in this regard Recital 10 provides that there must at least be compliance with the Directive at the time of the first of a series of successive operations or the first of a series of successive operations over a period of time which may be considered as forming a whole, whether that operation or series of operations are the subject of a single contract or successive, separate contracts. Recital 10 is problematic for two reasons. First, and as noted elsewhere, Recital 10 causes particular problems if applied to book and music clubs or other similar arrangements.<sup>83</sup> Usually, when a person joins such a club they agree that, in return for being allowed to purchase a number of items (such as books) at a reduced price, they will purchase a minimum number of other items at full price over a period of time. In legal terms, when a person “joins” the club he probably enters into an initial contract which includes the club’s rules of membership and thereafter each time a member buys a book a separate contract for the sale of goods is concluded.

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<sup>81</sup> Case C-128/94 *Hönig* [1995] ECR I-3389, para.9.

<sup>82</sup> Case C83/99 *Commission v Spain* [2001] ECR I-445, para.19.

<sup>83</sup> See further Bradgate, “Distance Selling in the UK and the proposed EC Directive”, [1993] CLJ 19; Bradgate, “The EU Directive on Distance Selling”, [1997] 4 *Web JCLI* <[www.webjcli.ac.uk/1997/issue4/bradgate4.html](http://www.webjcli.ac.uk/1997/issue4/bradgate4.html)>.

If applied to the book club scenario Directive 97/7 would only apply to the initial contract when the member joins the club and not to successive contracts under which the consumer purchases goods. This approach is misguided. It seems to be designed to alleviate the repeated burden that would be placed on suppliers if the Directive were to apply to all transactions but in doing so it ignores the position of consumers. While notification of the terms of the contract may be sufficient when the member “joins” the club, other aspects of the Directive’s protection, such as the right to withdraw, cancellation of disputed card payments and prohibitions on inertia selling only make sense when applied to individual sales transactions. The second problem with Recital 12 is that Directive 97/7 itself is silent on this issue thereby raising questions as to the legal effect of this provision. Article 253 EC requires that directives must state the reasons on which they are based and must refer to any proposals or opinions that were required by the Treaty. This requirement is satisfied in the recitals of the preamble of a directive. These obligatory recitals in the preamble to legislation are commonly used as aids to interpretation of the legislation but they are not legally binding in themselves. Thus, because this provision is not repeated in the text of Directive 97/7, it is arguable that suppliers must comply with Directive 97/7 in relation to all successive operation and not just the first of a series. Such an interpretation would clearly favour the position of consumers and thereby be in keeping with a teleological interpretation of the Directive. However, it would be in direct conflict with Recital 12.

Moreover, developments in relation to this issue in Directive 2002/65 may undermine such an argument. In addressing this issue Directive 2002/65 makes two important changes. First, the issue is dealt with in Article 1(2) of the Directive removing any doubts as to its legal effect in Directive 2002/65. While questions about the legal effect of Recital 12 in Directive 97/7 remain, the inclusion of the provision in the text of Directive 2002/65 may indicate an intention that this provision, which is essentially the same in both Directives, was intended to have legal consequences in both Directives.<sup>84</sup> Secondly, although following a similar approach by requiring that the Directive apply only to the initial agreement or operation, Directive 2002/65 provides that where there is no operation for more than one year, the next operation is deemed to be the first operation and the information requirements (only) of the Directive apply again. While Directive 2002/65 can be viewed as an improvement on Directive 97/7 in that it offers legal certainty as to legal effect of the provision, it is in substance another example of suppliers’ interests taking precedence over consumers’ interests. Furthermore, the fundamental objection to the operation of this type of provision, as highlighted above in relation to book clubs, remains.

### **Information Deficit or Information Overload?**

Once a distance contract fits within the Directives’ application, the first of the protections afforded to consumers involves the placing of a number of

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<sup>84</sup> The contrary argument can also be made that because the provision is expressly included in the text of Directive 2002/65 and expressly excluded in the text of Directive 97/7 the provision in Recital 10 of Directive 97/7 is not legally binding.

information obligations on suppliers.<sup>85</sup> Close analysis of these information obligations placed on suppliers show that they are voluminous and complicated. They can be divided into two categories. First, both Directives require that the consumer be provided with specified information, in advance of contract formation, in a clear manner (“the prior information”).<sup>86</sup> In effect, this seeks to ensure that the consumer is notified in advance of the main terms of the contract and hence is in a position to make a well informed choice to enter the contract or not. Secondly, both Directives require that some further confirmation or communication of the prior information (plus some additional information) be made available to the consumer in written/paper form or in another durable medium. Directive 97/7 requires that the confirmation be provided during the performance of the contract and at the latest at the time of delivery of goods (“post-contractual confirmation”).<sup>87</sup> In contrast, Directive 2002/65 provides that the supplier communicate the relevant information before the consumer is bound by any distance contract or offer (“pre-contractual communication”).<sup>88</sup>

Essentially, these obligations are intended to be confidence-building measures in the distance sales market designed to ensure that the consumer’s informed consent to the distance contract is obtained.<sup>89</sup> They address the different environment that surrounds distance sales when compared with face-to-face transactions. Where goods or services are sold face-to-face, the buyer through his physical presence alone has a certain knowledge of the supplier. In the distance sales environment this information may not be as readily available. For example, where goods or services are bought at a distance, the identity and location of the supplier may be unclear. Goods, rather than being physically examined, must be described by the supplier: orally where the telephone is used; or in writing and visually where print media and the Internet is used. To meet this information deficit the Directives require that *specific information* be provided *at particular times* and *in a particular manner*.

### ***Specific information***

Both Directives identify the specific information to be provided.<sup>90</sup> But Directive 2002/65 sets out a much longer and more detailed list of

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<sup>85</sup> Directive 97/78 arts 4 & 5; Directive 2002/65, arts.3–5.

<sup>86</sup> Directive 97/78 art.4; Directive 2002/65, arts.3 & 4.

<sup>87</sup> Art.5.

<sup>88</sup> Art.5.

<sup>89</sup> See further Directive 97/7, Recital 11; and Directive 2002/65, Recitals 5, 21–23.

<sup>90</sup> For example, Directive 97/7 identifies the follow prior information in art.4(1): (a) the identity of the supplier and, in the case of a contract requiring payment in advance, his address; (b) the main characteristics of the goods or services; (c) the price, including all taxes; (d) any delivery costs; (e) arrangement for payment, delivery or performance; (f) the existence of a right of withdrawal; (g) the cost of communication, where other than at a basic rate; (h) the period for which the offer or the price remains valid; (i) the minimum duration of the contract where the contract is to be performed permanently or recurrently. Additional post-contractual information is identified in art.5(1): written information on the conditions and procedures for exercising the right of withdrawal; the geographical address of the supplier; any information on after-sales services and guarantees; the

information that must be provided when compared with Directive 97/7.<sup>91</sup> This difference is not surprising given that financial services products are generally recognized as more complicated than the average goods or services. However, some differences cannot be explained for this reason. For example, as part of the prior information, Directive 2002/65 requires that the consumer be informed of the supplier's "geographical address", while Directive 97/7 only requires disclosure of the supplier's "address" and then only where the contract requires payment in advance.<sup>92</sup> Similarly, Directive 2002/65 states that the consumer shall be provided with details of the total price to be paid by the consumer for the service via the supplier and otherwise, including all related fees, charges and expenses as well as taxes. Again, this is an improvement on Directive 97/7, which specifies only the inclusion of taxes in addition to the price of the goods.<sup>93</sup> Arguably, this leaves the consumer of goods and services (other than financial services) less well informed than the consumer of financial services and for no good reason.

It is also important to note that the information requirements of the Directives are in addition to any other information requirements found in existing legislation whether it is general in nature (such as the information requirements for contracts concluded by electronic means found in Articles 5, 10 and 11 of the E-Commerce Directive<sup>94</sup>) or specific to the type of contract (e.g. contracts for the supply of credit).<sup>95</sup> While there is some overlap between these various information requirements<sup>96</sup>, there are also

conditions for cancelling the contract where it is of unspecified duration or duration exceeding one year.

<sup>91</sup> Art.3 of Directive 2002/65 provides that the consumer must be provided with information relating to the supplier, the financial service, the distance contract and his rights of redress. In particular, regarding the supplier, the consumer must be informed of the identity and main business of the supplier, as well as the supplier's geographical address; the identity of the supplier's representative in the state where the consumer resides; the identity and details of any professional with whom the consumer may interact; the supplier's business registration details, if any; details of any relevant supervisory authority to which the supplier is subject. Secondly, in relation to the financial service the consumer must receive information describing the financial service; the total price to be paid by the consumer for the service, including all related fees, charges and expenses as well as taxes; where relevant, whether the financial service is linked to an instrument involving special risks or if the price of the service depends on fluctuations in the financial markets; other taxes or costs that are not paid via the supplier; any limitation period for which the information is valid; the arrangements for payment and performance; and any additional cost for using a means of distance communication. Lastly, the consumer must be informed of details relating to the contract itself including his right of withdrawal or its absence and practical details involving its exercise, the right of termination, minimum duration of the contract; and whether out-of-court redress mechanisms exist.

<sup>92</sup> Directive 97/7 does require details of the supplier's geographical address as part of the post-contractual confirmation.

<sup>93</sup> While simple sales of goods may not incur fees and charges to the same extent as the sale of financial services, these can be an issue in more complex sales.

<sup>94</sup> Directive 2000/31/EC, [2000] OJ L178/1.

<sup>95</sup> See, e.g. Recital 14 & art.4 of Directive 2002/65.

<sup>96</sup> The information requirements of Directive 2002/65 mirror in large part the provisions of the consumer credit Directives: see Directives 87/102 and 90/88.

important differences.<sup>97</sup> The result is that suppliers are obliged to provide significance amounts of information which consumers are expected to digest.

### ***At Particular Times***

As noted above, Directive 2002/65 provides that all the specified information<sup>98</sup> must be provided “in good time”<sup>99</sup> before the consumer is bound by the contract.<sup>100</sup> In contrast, Directive 97/7 requires that the prior information be provided in good time before the conclusion of any contract but the confirmation of the relevant information<sup>101</sup> need not be provided until during the performance of the contract and at the latest at the time of delivery of goods and hence after the contract is concluded.<sup>102</sup> Interestingly, this information, which is required to be provided at the latest during performance or at the time of delivery of goods, is not of a different nature to the specific information under Directive 2002/65. Thus, it would appear again that the consumer of goods and services (other than financial services) is less well informed in advance of entering a contract than the consumer of financial services and for no good reason.

### ***In a Particular Manner***

The Directives state that the “commercial purpose” of the prior information must be “made clear”. Moreover, the prior information must be

provided in a clear and comprehensible manner in any way appropriate to the means of distance communication used, with due regard, in particular, to the principles of good faith in commercial transactions and the principles governing the protection of those who are unable ... to give their consent, such as minors.<sup>103</sup>

The guiding principle here is transparency however a number of questions about the operation of this provision remain to be addressed. The

<sup>97</sup> While Directive 97/7 merely requires information about “the identity of the supplier”, the E-Commerce Directive requires the name of information service provider (ISP); the ISP’s VAT number; details of any regulated body to which the ISP belongs and applicable rules/code; any trade/public registration details; and any authorization scheme details.

<sup>98</sup> *i.e.* all the terms and conditions and the information specified in art.3(1) and art.4.

<sup>99</sup> This phrase is not defined in the Directives. A court might interpret it with reference to a “reasonable period of time” in advance of contract conclusion that would enable the consumer to be fully informed of the nature of the transaction. Clearly, this period of time would vary depending on the circumstances of the case.

<sup>100</sup> Exceptionally, this obligation may be fulfilled after the contract is concluded if the contract has been concluded at the consumer’s request using a means of distance communication which does not enable providing the relevant information: art.5(2).

<sup>101</sup> *i.e.* the prior information plus some additional information: see Art.5 of Directive 97/7.

<sup>102</sup> This requirement of post-contractual confirmation does not apply in two circumstances: (i) where the information has already been provided; and (ii) where goods are delivered to third parties: art.6(1).

<sup>103</sup> Directive 97/7, art.4(2) and Directive 2002/65, art.3(2). Art.4(3) of Directive 97/7 and art.3(4) of Directive 2002/65 contain further requirements in the case of telephone communications.

requirement of a “clear and comprehensible manner” is reminiscent of the “plain, intelligible language” requirement in the Unfair Terms in Consumer Contracts Directive.<sup>104</sup> However, as with the unfair terms legislation, it is not clear whether the requirement is subjective or objective. Secondly, the information must be provided in a way appropriate to the means of distance communication used. While this requirement is not defined further, it would seem to mean that where communication is via the Internet, the information should be provided via the Internet, for instance. Thirdly, the information must be provided with due regard to the principles of good faith in commercial transactions and the principles governing the protection of those who are unable to consent. This reference to principles, in particular, good faith in commercial transactions, causes problems for common law systems where such principles are not generally recognised.<sup>105</sup> Principles of good faith have been adopted into our domestic legal systems following the transposition of the Directive on unfair terms in consumers contracts<sup>106</sup> and the Directive on commercial agents<sup>107</sup> but the exact meaning and scope of these principles remain unexplored in a common law context. It could be argued that the principles of good faith would be breached, for instance, where a supplier provides information in a language that he knows the consumer does not understand. Whether as a result the supplier is obliged to translate the information into the language of an order remains to be seen.<sup>108</sup> And, whether there is a difference between principles of good faith in *commercial* transactions, as opposed to *consumer* transactions, remains to be seen.

### **Written Confirmation**

One area of uncertainty in relation to Directive 97/7 concerns the requirement that the post-contractual information must be confirmed in written form or in other durable medium available and accessible to the consumer. The term “durable medium” is not defined in Directive 97/7 and accordingly this requirement has been criticised for being unclear.<sup>109</sup> Recital 13 states that “information disseminated by certain electronic technologies is

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<sup>104</sup> Art.5 of the EC Directive on Unfair Terms in Consumer Contracts, 93/13/EEC, [1993] OJ L95/29.

<sup>105</sup> See further Beatson & Friedmann ed., *Good Faith and Fault in Contract Law* (1997); Harrison, *Good Faith in Sales*, (1997); and Brownsword, Hird and Howells ed., *Good Faith in Contract: Concept and Context*, (1999).

<sup>106</sup> See art.3 of the EC Directive on Unfair Terms in Consumer Contracts, 93/13/EEC, [1993] OJ L95/29.

<sup>107</sup> See arts.3 & 4 of the EC Directive on self-employed commercial agents, 86/653/EEC, [1986] OJ L382/17.

<sup>108</sup> Directive 97/7 avoided the political/national issue of language by stating in Recital 8 that the languages used for distance contracts are a matter for the member states. This represented a step back from the position proposed in the draft Directive, which required that the contract information be provided in the same language as the contract solicitation. Arguably, this change undermines the usefulness of the information requirements. Interestingly, under Directive 2002/65 the supplier must provide information concerning the language(s) in which the prior information is supplied and, with the agreement of the consumer, the languages in which the supplier undertakes to communicate during the duration of the contract: art.3(1)(3)(g).

<sup>109</sup> See, e.g. Hornle, Sutter & Walden, n.26 above, pp.15-16.

often ephemeral in nature insofar as it is not received on a permanent medium; whereas the consumer must therefore receive written notice ...” Some have argued that this requirement means that paper and other physical media are required even where contracts were made via the telephone or Internet.<sup>110</sup> Others have argued that “durable medium” means any permanent medium, which would include any medium that can be stored or printed out. Hence, confirmation by fax or e-mail would suffice.<sup>111</sup> Clearly, the latter view is preferable in terms of promoting electronic communications and commerce generally but the lack of definition in the Directive left the matter unclear. The implementing Regulations are also silent on the meaning of “durable medium”. But even accepting this broader view, questions remain. For example, is a supplier required to send an e-mail containing the relevant information to the consumer or would providing the relevant information on a website, which would require the consumer to actively seek and download/save the information, suffice? Fortunately this lack of definition has been addressed in Directive 2002/65 where “durable medium” has been defined as meaning

Any instrument which enables the consumer to store information addressed personally to him in a way accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored.<sup>112</sup>

Moreover, Recital 20 provides that durable mediums include in particular floppy discs, CD-ROMs, DVDs, and the hard drive of a consumer’s computer on which electronic mail is stored, but they do not include Internet websites unless they fulfill the criteria contained in the definition of a durable medium. This definition, which can be applied by analogy to Directive 97/7, clearly includes the use of e-mail for confirmation purposes but excludes websites unless they comply with the definition. To satisfy this definition the website would need to address the specific information to the consumer and maintain the information, unchanged, for a sufficient period of time. Given the possibility of changing the contents of a website without reference to its users, it is difficult to see how Internet websites could conform to this definition.

Two points arise following the above analysis. First, the analysis illustrates a number of circumstances where there are irrational inconsistencies between the two Directives which result in the consumer of goods and services (other than financial services) being less well informed than the consumer of financial services. We believe that Directive 97/7 should be reviewed in

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<sup>110</sup> See, e.g. Madden, “A Safe Distance?” [2002] LSG 14; Bradgate, “The EU Directive on Distance Selling”, [1997] 4 Web JCLI <<http://www.webjcli.ac.uk/1997/issue4/bradgate4.html>>. However, it was noted that in most cases this would cause few problems because the requirement could be satisfied by including the information on a delivery note with the goods. Interestingly, Directive 2002/65 contains a provision which states that at any time during the contractual relationship the consumer is entitled, at his request, to receive the contractual terms and condition on paper: art.5(3).

<sup>111</sup> See, e.g. the UK’s DTI, *New Regulations for Business to Consumer Distance Selling - A Guide for Business*, (2000) p.17: <[www.dti.gov.uk/ccp/topics1/pdf1/bus\\_guide.pdf](http://www.dti.gov.uk/ccp/topics1/pdf1/bus_guide.pdf)>; see also Hornle, Sutter & Walden, n.26 above, pp.15-16.

<sup>112</sup> Art.2(f).

light of these differences with a view to harmonizing the provisions where appropriate.

Secondly, information provision is a cornerstone of the Directives. In this respect, the Directives adopt a “light-handed” approach, based on the concept of the consumer as an autonomous actor in a free market.<sup>113</sup> Rather than blacklisting terms, for example, consumers are provided with information and allowed to make their own decisions. This approach characterises the United States response to consumer protection where self-protection (i.e. well-informed consumers who can protect themselves) and self-regulation (i.e. business regulating itself) go hand-in-hand.<sup>114</sup> This approach is increasingly representative of EU consumer protection policy.<sup>115</sup> However, a question arises regarding whether in fact the best way to protect consumers is to provide them with large amounts of information and expect them to then protect themselves. Ironically, while designed to meet the “information deficit” associated with distance contracts when compared with face-to-face transactions, the operation of these information provisions means that consumers who buy at distance are frequently provided with more information than their face-to-face counterparts. We would suggest that the problem may be one of “information over-load” rather than “information deficit”. Moreover, the impact of a potential information over-load needs to be considered, both from a supplier’s perspective and a consumer’s perspective. Clearly, as more and more information requirements are placed on suppliers the cost of compliance increases and this may, in turn, have a negative impact on compliance levels. At the same time, it is questionable whether the provision of information leads to better-informed customers. In simple terms, how many consumers go to the trouble of seeking out this information in order to read it before making a decision to purchase? On many websites this information is not easy to access because it is not located in any single place but in a variety of places including in any standard terms of sale, any statements about delivery and returns, and, as part of the ordering process. And, if in fact consumers do not go to such trouble, can the imposition of extensive informational obligations on suppliers be said to constitute an effective consumer protection measure? Even where a consumer goes to the trouble of accessing the information it does not follow that the information is fully understood. Research from the USA shows that this type of information based consumer protection tends to operate more to the advantage of those in high-income groups, and those from lower income-groups in society benefit less.<sup>116</sup> In our view, further research on the effect of this type of information based consumer protection, on suppliers and consumers, is needed.

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<sup>113</sup> Stuyck, “European consumer law after the Treaty of Amsterdam: consumer policy in or beyond the internal market?” (2000) 37 *CMLRev* 367.

<sup>114</sup> Howells & Wilhelmsson, “EC and US approaches to consumer protection: should the gap be bridged?” (1997) 17 *YEL* 207.

<sup>115</sup> Howells & Wilhelmsson, “EC consumer law: has it come of age?” (2003) 28 *EL Rev* 370.

<sup>116</sup> Whitford, “The Functions of Disclosure Regulation in consumer transactions”, (1973) 2 *Wisconsin Law Review* 400 at 414.

### **Extra-Contractual Obligations and Rights – The Supplier’s Duty to Perform and The Consumer’s Right of Withdrawal**

The second of the protections afforded to consumers by the Directives involves placing extra-contractual obligations on suppliers and giving consumers extra-contractual rights. Generally, parties’ obligations are defined by the terms of the contract of supply and once the contract is properly formed parties are obliged to perform their obligations in accordance with those terms.<sup>117</sup> The Directives alter this general position in two ways. First, as regards the supply of goods and services (other than financial services) Directive 97/7 places default performance obligations on suppliers. Secondly, both Directives allow consumers to withdraw from an otherwise legally binding contract.

#### ***Performance obligations***

Under any contract each party is obliged to perform his side of the bargain. The time for such performance varies. For example, under general sale of goods legislation where the parties have agreed a time for delivery of the goods, the seller is contractually obliged to deliver at that time. Where no time has been agreed, the seller is required to deliver the goods within a reasonable time of the conclusion of the contract.<sup>118</sup> Moreover, generally, stipulations as to time are regarded as conditions of the contract (it is said that time is *of the essence*) such that where a seller fails to deliver at the specified time, the buyer can terminate the contract and sue for damages.<sup>119</sup>

Article 7 of the Directive 97/7 contains specific provisions on the supplier’s duty to perform the contract within a specified time.<sup>120</sup> These provisions are particularly important where the consumer pays in advance, as is frequently the case with distance sales. Accordingly, unless agreed otherwise<sup>121</sup>, a supplier must execute a consumer’s order within 30 days from the date following that on which the consumer *forwarded his order* to the supplier.<sup>122</sup> This requirement may cause problems from a common law perspective

<sup>117</sup> Performance may of course be excused under the doctrine of frustration.

<sup>118</sup> See Irish Sale of Goods Act 1893, s.29(2), and UK Sale of Goods Act 1979, s.29(3).

<sup>119</sup> *Hartley v Hymans* [1920] KB 475; *Charles Rickards v Oppenheim* [1950] 1 KB 616. In contrast, sale of goods legislation states that the time for payment of the price is generally not of the essence: see Irish Sale of Goods Act 1893, s. 10(1); and UK Sale of Goods Act 1979, s.10(1).

<sup>120</sup> See also Recital 15. As a counter balance, art.7(3) permits member states to allow suppliers to provide substitute goods and services in certain circumstances. There is no equivalent to art.7 in Directive 2002/65.

<sup>121</sup> Suppliers often forecast or promise shorter performance periods. An extended performance period would probably be subject to the test of fairness under the unfair terms legislation. Excessively long delivery periods or a provision that would leave the time for performance completely at the supplier’s discretion may be unfair and therefore unenforceable.

<sup>122</sup> Similar requirements can be found in various codes of practice in this area: see e.g. Art.16 of the International Chamber of Commerce’s International Code of Direct Marketing, 2001 at <[www.iccwbo.org/home/statements\\_rules/rules/2001/code\\_of\\_direct\\_marketing.asp](http://www.iccwbo.org/home/statements_rules/rules/2001/code_of_direct_marketing.asp)>; and art.2.3.2 of the Federation of European Direct Marketing (FEDMA) Code on e-Commerce and Interactive Marketing (2000) at <[www.fedma.org](http://www.fedma.org)>.

however. In Irish and English law, an order from a consumer may be classified as an offer to buy<sup>123</sup> (the advertisement in a supplier's catalogue or on a website being classified as an invitation to treat<sup>124</sup>). When an offer to buy is received by the supplier he is under no legal obligation to accept that offer. An acknowledgement of the offer may constitute acceptance<sup>125</sup>, or at the latest, the dispatch of the goods would probably constitute acceptance. But, importantly, only at the point of acceptance is the supplier legally obliged to deliver. Therefore the Article 7 requirement to execute the order is out of line with our common law approach to contract formation where the order is merely an offer to buy. Unfortunately, the relevant implementing measures do not resolve this issue because they follow closely the wording of Article 7 in this regard.<sup>126</sup> Does the requirement to "execute the order" or perform the contract mean that a supplier must accept all orders? Or, does the Article 7 requirement only apply where the consumer's order constitutes an acceptance? The position remains unclear.

Moreover, Article 7(2) provides that where a supplier fails to perform his side of the contract because the goods or services ordered are unavailable<sup>127</sup>, the consumer must be informed of this situation and must be able to obtain a refund of any sums paid as soon as possible and within 30 days, at the latest.<sup>128</sup> This provision, like Article 7(1), is based on an understanding (that once an order is placed the supplier is obliged to deliver) which does not always fit with our rules on contract formation. Again, the implementing regulations follow the approach of the Directive and so this mis-fit remains unaddressed.

### ***A Right of Withdrawal***

As noted above, once a contract is concluded the parties are bound by its terms. There are however a number of ways to escape contractual obligations. Clearly before any contract is concluded a buyer can withdraw from the negotiations. Where a supplier advertises goods or services in a catalogue or on a website, such advertisements are usually classified as invitations to treat. The buyer's order is therefore an offer to buy that can be

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<sup>123</sup> *PSGB v Boots Cash Chemists* [1953] 1 All ER 482; *Minister for Industry & Commerce v Pim* [1966] IR 154.

<sup>124</sup> *Partridge v Crittenden* [1968] 2 All ER 421. Where the advertisement is considered an offer (*e.g. Carlill v Carbolic Smoke Ball Co.*, [1893] 1 QB 256; *Kennedy v London Express Newspapers* [1931] IR 532) and the consumer's order an acceptance, the same problem does not arise.

<sup>125</sup> Under Directive 2000/31/EC (the E-Commerce Directive) where an order is placed by electronic means the service provider must acknowledge receipt of the order without undue delay and by electronic means: art.11.

<sup>126</sup> Re Ireland see Reg 9 of the EC (Protection of Consumers in Respect of Distance Contracts) Regulations 2001, S.I. 27/2001; re the UK see Reg. 19 of the Consumer Protection (Distance Selling) Regulations 2000, S.I. 2334/2000.

<sup>127</sup> This provision does not apply where failure to supply is for any reason other than non-availability.

<sup>128</sup> Earlier drafts of Directive 2002/65 included similar provisions on the unavailability of the services but these were deleted from the final version of the Directive.

accepted or rejected by the supplier.<sup>129</sup> A standard term in suppliers' terms of trade may provide that no contract is concluded until the goods are dispatched to the buyer.<sup>130</sup> Therefore, in such circumstances, up to the time of dispatch the buyer can withdraw by communicating to the supplier his intention to revoke his offer.<sup>131</sup> Moreover, where a buyer is induced to enter a contract following a misrepresentation by the seller the buyer may have a right to rescind the contract. Further, where an important term of the contract is breached the buyer may have a right to terminate the contract. Over and above these opportunities for a buyer to escape the contract the Directives give consumers a right to withdraw from an otherwise legally binding contract, without penalty and without giving any reason.<sup>132</sup>

The withdrawal period differs under the two Directives. Under Directive 97/7 the right of withdrawal is exercisable for seven working days though this period may be extended up to three months where the supplier has failed to comply with the post-contractual information requirements.<sup>133</sup> Under Directive 2002/65 the consumer is given more time to withdraw - 14 days, and 30 days for contracts for life insurance and personal pensions operations.<sup>134</sup> Moreover, the three-month withdrawal limit that operates in relation to other services does not apply to financial services. If the supplier of financial services does not comply with the informational requirements, the right of withdrawal continues to exist indefinitely.

When looking at the application of the Directives we noted that there are exemptions from the right of withdrawal. Accordingly, the right to withdraw is not available in certain circumstances, such as where the price fluctuates beyond the control of the supplier and where goods are made to the consumer's specification or clearly personalised. These and other similar exemptions<sup>135</sup> are designed to represent a balance between the interests of suppliers and consumers. One exemption under Directive 97/7 that is worthy of further mention covers the provision of services where performance has begun with the consumer's consent before the end of the 7 days withdrawal period. It is argued that, unlike goods, which can be identified and returned easily, services cannot be returned and hence the right of withdrawal is not appropriate in these circumstances. But this argument is flawed. In contrast, under the Directive 2002/65 a consumer has a right to withdraw from financial service contracts but is required to pay for any benefit received.<sup>136</sup> This appears a more balanced approach, particularly as regards contracts for

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<sup>129</sup> *PSGB v Boots Cash Chemists* [1953] 1 All ER 482; *Minister for Industry & Commerce v Pim* [1966] IR 154.

<sup>130</sup> See, e.g. Clause 13 of Amazon's Conditions of Use and Sale at <[www.amazon.co.uk](http://www.amazon.co.uk)>.

<sup>131</sup> *Byrne & Co v Leon Van Tienhoven* (1880) 5 CPD 344.

<sup>132</sup> Directive 97/7, art.6; Directive 2002/65, arts 6 & 7.

<sup>133</sup> Art.6(1). In general, the seven-day period start to run: (i) in relation to goods, from the day of receipt of the goods; and (ii) in relation to services, from the day of conclusion of the contract.

<sup>134</sup> Art.6(1). In general, the period for withdrawal begins from the date of conclusion of the contract, or for life insurance, the date the consumer is informed that the contract has been concluded.

<sup>135</sup> See Directive 97/7 art.6(3) and Directive 2002/65 art.6(2) & (3).

<sup>136</sup> Art.7.

the provision of a continuing service, such as Internet access or mobile phone services, where a consumer can only assess the quality of the service once performance has commenced. As with suppliers' information obligations, there are irrational differences between the two Directives, and again we would argue that the Directives should be reviewed in light of these differences with a view to harmonizing the treatment of all distance contracts, where appropriate.

### **Security of Payment**

The last of the main protections contained in the Directives relates to security of payment. Consumer concern in this regard has been shown to be significant.<sup>137</sup> Addressing this mistrust is therefore one of the most important ways of guaranteeing the smooth expansion of the market in business to consumer e-commerce.

Ensuring security of payment is, in fact, a two-fold problem. One problem relates to third party fraud, as for example, where a third party gains access to a consumer's payment card details and uses those details to purchase goods or services at a distance. A second problem arises where a consumer is required to pay for goods or services in advance. In these circumstances the buyer is at risk of the supplier failing to perform the contract, either as a result of the supplier's fraud (as where a rogue supplier establishes a fictitious website to sell goods or services) or insolvency. While the risk of supplier fraud or insolvency is inherent in every transaction involving advance payment, it is augmented in distance sales where the consumer may know little of the nature and creditworthiness of the supplier. The legislative response to these two problems is found in Article 8 of each Directive. The approach in each Directive is identical and, unfortunately, it is also completely inadequate. The Directives address the problem of protection from third party fraud in a perfunctory way and do not address in any way the problem of supplier fraud or insolvency. As will be seen below, in some situations, this deficiency is addressed in part either by member states at implementation level or through protections afforded to specific payment mechanisms. However, these steps (insofar as they exist) do not fully address the limitations in the Directives, which ultimately can only be addressed by a substantial increase in the protections afforded to consumers in this area.

Before examining security of payment problems in detail, it is useful to note that, in the modern e-commerce environment, the most commonly used payment method is payment by card, with credit card payments being the

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<sup>137</sup> A Eurobarometer survey published in 2004 indicated that 48% of those surveyed has concerns about security of payment when buying on the Internet: European Commission, *European Union Public Opinion on issues relating to business to consumer e-commerce* (2004) at <[www.europa.eu.int/comm/consumers/topics/facts\\_en.htm](http://www.europa.eu.int/comm/consumers/topics/facts_en.htm)>. In an earlier survey in 1999, 57% of the EU population surveyed indicated that they would not transmit their credit cards details to make an internet purchase; 41% said that they would not use internet currency: Hobley, n.16 above p.10.

most popular form in this regard.<sup>138</sup> Indeed, card based payments have been described as “virtually monopolis[ing] Internet payments”.<sup>139</sup> Although efforts are being made to increase the availability of Internet-specific payment methods, these developments appear to have had a fairly limited take-up in practice, not least because they all involve prepayment on the part of the payor.<sup>140</sup> Credit card payments also dominate in the telesales environment with consumers giving credit card details over the phone without ever physically presenting the payment card or providing any form of electronic identification. Even if other methods of payment gain more widespread acceptance, they are unlikely to present a significant challenge to the popularity of credit cards not least because credit cards are the only payment method to combine a convenient method of payment with a period of credit.<sup>141</sup>

### ***Protecting Against Fraud***

Although almost any means of distance payment raises the potential for fraud<sup>142</sup>, the risks are especially acute in card-not-present transactions, such as telesales and sales over the Internet, where it is not possible to get the traditional signature-based authentication from the card-holder. Clearly, the first imperative in building consumer confidence is to increase the security of websites to ensure safer transmission and storage of customers’ payment details. Technological advances have made this increasingly possible<sup>143</sup> and

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<sup>138</sup> The *Realities of the European Online Marketplace* survey found that 24% of the websites surveyed offered only one method of payment and, of these websites, 47% offered only the option of payment by credit card: n.18 above pp.21-22.

<sup>139</sup> Hornle, Sutter & Walden, n.28 above p.26.

<sup>140</sup> In *E-Payments in Europe – the Eurosystem’s perspective*, Issues Paper of the European Central Bank (ECB, 2002) at <www.ecb.int> pp.12-16, the ECB set out the range of “innovative” e-payments. These include e-money schemes which can be card-based or software-based (both involve loading monetary value onto the payor’s card or digital wallet); personal online payment services (the customer opens an account with the service provider and instructs it to make payments typically communicating with the provider via email); and prepaid cards (monies are paid into the payor’s account through the purchase of cards which can then be used to make payments).

<sup>141</sup> As noted above, new forms of e-payments require pre-payment. EFTPOS or debit cards involve payment at the time the card is presented, while charge cards (such as American Express) require payment immediately when the bill is received. Although there is in effect a form of “credit” for the time between card usage and forwarding of the bill, charge cards do not offer credit in a real sense and do not come within the ambit of consumer credit legislation: see further text to n.164.

<sup>142</sup> The opportunities for fraud with the most traditional means of distance payment, the cheque, are well known: see Donnelly, “Cheque Fraud: Modern Treatment and Future Trends” (1997) 4 *Commercial Law Practitioner* 216.

<sup>143</sup> Commonly used methods of securing websites involves the utilisation of a Secure Sockets Layer (SSL) which establishes a secure connection between the client and the server which only lasts for the length of the session and the utilisation of a Secure Electronic Transaction (SET) which provides a means of encrypting numbers as they cross the Internet and hides certain card details from merchants. Secure websites are usually marked by a locked padlock symbol. Some credit card providers also provide protection for their customers: see Visa 3-D Secure

a significant number of websites now offer secure online payment guarantees.<sup>144</sup> However, a recent study found that 39% of websites surveyed did not convince the researchers that they were secure for online payment.<sup>145</sup> In these circumstances, the sources of legal redress for consumers become important both in a practical sense and in terms of developing consumer confidence in this area.

Article 8 of both Directives requires member states to ensure that appropriate means exist to allow the consumer to request cancellation of a payment where fraudulent use has been made of his payment card and in the event of fraudulent use to be re-credited with the sum paid. In all respects, the Directives are very short on detail in this provision. First, there is no stipulation regarding when and how the request for cancellation should be granted. Secondly, while the consumer is entitled to a return of any sums paid as a result of fraudulent use, the Directives are silent regarding standards of proof in relation to the establishment of fraud.<sup>146</sup> As is revealed by the extensive debate in relation to the allocation of the burden of proof of fraud in relation to payment methods in general<sup>147</sup>, the meaningfulness of consumer protection in this regard will depend upon who is required to establish fraudulent use of the payment card. If the burden is placed on the consumer to establish that the card was used fraudulently, this can constitute an almost impossible hurdle. Thirdly, the Directives do not indicate who should bear the cost of re-crediting the consumer. This is especially important in the event of supplier insolvency or dishonesty. If it is the responsibility of an insolvent supplier to re-credit the consumer, the right to re-credit will have little meaning. Finally, both Directives refer to “payment card” payments only<sup>148</sup> and do not take account of newer payment

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and MasterCard Secure Payment Application. See further *E-Payments in Europe* n.139 above pp.29-30.

<sup>144</sup> See for example <www.amazon.com> which offers a “safe shopping guarantee” where the retailer guarantees not to charge for any unauthorised charges made while shopping at its website. See also art.4 of the Federation of European Direct Marketing (FEDMA) Code on e-Commerce and Interactive Marketing (2000) which provides that marketers should ensure that appropriate and trustworthy security systems are established to safeguard the security, integrity and confidentiality of financial transactions and payments made by consumers: at <http://www.fedma.org>.

<sup>145</sup> European Consumer Centre’s study on *Realities of the European Online Marketplace*, n.16 above.

<sup>146</sup> Art.15 of both Directives states that that any contractual term that places the burden of proof on the consumer in relation to the supplier’s compliance with his or her obligations pursuant to the Directive shall be an unfair term within the meaning of Council Directive 93/13/EEC. However, this has no application in relation to the question of payment cards where the contract in question is not between the supplier and the consumer but between the consumer and the card issuer.

<sup>147</sup> See the *Banking Services: Law and Practice Report 1989* (The Jack Report) Cm 622 (London: HMSO, 1989) pp.91-92. See further Donnelly, *The Law of Banks and Credit Institutions* (2000) pp.335-337.

<sup>148</sup> The term payment card is undefined in the Directives – presumably it extends to credit and debit cards and to other forms of prepaid cards.

methods.<sup>149</sup> While card based payments are still predominant, this limit is completely arbitrary and could lead to unfair distinctions when and if newer payment methods become more widely used.

As noted above, the lack of detail in the Directives may be addressed by the methods of implementation chosen at member state level. In the UK, the Consumer Protection (Distance Selling) Regulations 2000<sup>150</sup> and the Financial Services (Distance Marketing) Regulations 2004<sup>151</sup> expand considerably upon the limited protections offered by the Directive, although, like the Directive, the Regulations are limited to payment cards only.<sup>152</sup> The Regulations place the responsibility for re-crediting on the card issuer.<sup>153</sup> However, there is nothing in the Regulations to stop the card issuer from ultimately placing liability back on the supplier through the use of a charge-back provision in its contract with the supplier.<sup>154</sup> A typical contractual provision to this effect will state that, if a cardholder disputes a payment on the basis of fraud or error, the supplier will reimburse the card issuer for any monies paid together with a processing fee.<sup>155</sup> This agreement is secured by means of a charge over the supplier's property (the charge-back) upon which the card issuer can rely in the event of supplier insolvency.<sup>156</sup> The use of charge-backs therefore effectively shifts the burden of bearing the cost of fraud away from the card issuer and onto the supplier and, if necessary, his estate in bankruptcy. While the reality of charge-backs means that the ultimate liability will rarely lie with the issuer in practice, the importance of the UK Regulations is that they provide a clear guarantee of protection for

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<sup>149</sup> This is especially odd in light of the substitution of the term "electronic payment instrument" (EPI) for the term payment card in the *EC Recommendation Concerning Transactions by Electronic Payment Instruments and in particular the Relationship between Issuer and Holder* 97/489/EC. An EPI is defined in the Recommendation as an instrument which enables its holder to transfer monies, make cash withdrawals or load and unload monies onto the instrument at cash dispensing machines, automated teller machines or at the premises of an EPI issuer or an institution which is under contract to accept the payment instrument. See further Donnelly and McDonagh, "Maintaining Standards in Electronic Banking: How Does Ireland Measure Up?" (2000) 7 *Commercial Law Practitioner* 211.

<sup>150</sup> S.I. 2000 No. 2334.

<sup>151</sup> S.I. 2004 No. 2095.

<sup>152</sup> Reg. 21(6) states that payment card "includes credit cards, charge cards, debit cards and store cards".

<sup>153</sup> Reg. 21(2) of the 2000 Regulations and Reg. 14(1) of the 2004 Regulations.

<sup>154</sup> It has been accepted since the decision of Millett J in *Re Charge Card Services* [1987] Ch 150 that payment by card gives rise to three separate contracts (between provider and consumer; between consumer and supplier; and between provider and supplier) which operate bilaterally.

<sup>155</sup> Provided of course that the relevant terms in the contract are enforceable and do not come within the terms of the UK Unfair Contract Terms Act 1977. See Brownsword & Howells, "When surfers start to shop: Internet commerce and contract law", [1999] *LS* 287 at 308-312 for a consideration of circumstances in which charge-backs might be held not to be enforceable. There is no possibility of a similar challenge in Ireland, which has no equivalent to the UK Act.

<sup>156</sup> For discussion of the legal nature of a charge-back, see *In re Bank of Credit and Commerce International SA (No 8)* [1997] 3 WLR 909.

consumers, leaving only the finer details of who pays for this protection to be determined elsewhere.

In relation to the establishment of fraud, the UK Regulations place the burden of proof on the card issuer, providing that “if the consumer alleges that any use made of the payment card was not authorised by him it is for the card issuer to prove that the use was so authorised.”<sup>157</sup> The Regulations do not set out how a card issuer is to perform the rather difficult task of proving the existence of authorisation and some further clarification in this regard would be useful, from a card issuer’s perspective at least. This clear allocation of the burden of proof is in line with the EC Recommendation Concerning Transactions by Electronic Payment Instruments and in particular the Relationship between Issuer and Holder<sup>158</sup> which places the burden of proof on issuers in the event of a dispute<sup>159</sup> and which requires that the holder be exempted from liability if payment is made without physical presentation or electronic identification.<sup>160</sup>

In Ireland, the EC (Protection of Consumers in Respect of Contracts made by means of Distance Communication) Regulations 2001<sup>161</sup> did little to remedy the deficiencies in the Directive. Regulation 10 provides that a consumer may request cancellation of any payment made under a distance contract, or as appropriate, the recredit or return of such a payment, where fraudulent use has been made of his “payment card”.<sup>162</sup> Such a request must be complied with immediately<sup>163</sup>, and a person who fails to comply with this request is guilty of an offence.<sup>164</sup> The Irish Regulations make no provision for the allocation of the burden of proving fraudulent use nor do they specify who should bear the cost of recrediting. While it might be argued that EU policy, as indicated by the EPI Recommendation,<sup>165</sup> suggests that the burdens and costs should fall on the card issuer, the absence of a clear legislative statement to this effect is unfortunate.

In contrast to the minimalist approach taken in the 2001 Regulations, the European Communities (Distance Marketing of Consumer Financial Services) Regulations 2004<sup>166</sup> provide extensive payment protection to buyers of financial services who use payment cards.<sup>167</sup> Regulation 29(1)

<sup>157</sup> Reg. 21(3) of the 2000 Regulations and Reg. 14(2) of the 2004 Regulations.

<sup>158</sup> 97/489/EC: n.148 above.

<sup>159</sup> Art.7(2)(e). However, the Recommendation is more specific than the Regulations in setting out how this burden may be met: it provides (art.7(2)(e)) that the issuer must show that the transaction was accurately recorded and entered into accounts and that it was not affected by technical breakdown or other deficiency.

<sup>160</sup> Art.6(3).

<sup>161</sup> S.I. 2001 No. 207.

<sup>162</sup> Reg. 19(1). “Payment card” is defined as including credit cards, charge cards, debit cards and store cards.

<sup>163</sup> Reg. 10(2).

<sup>164</sup> Reg. 10(3) and Reg. 17.

<sup>165</sup> n.148 above.

<sup>166</sup> SI 2004 No. 853, as amended by S.I. 2005 No. 63.

<sup>167</sup> Reg. 29(6) defines a payment card as “a card issued to a consumer by means of which the consumer . . . can obtain goods, services or cash that, either as the time of the transaction or subsequently, are charged to an account kept in the name of the customer”.

states that the contract between card provider and consumer is “deemed to provide” that the relevant payments are to be recredited or returned to the consumer whenever the card is used fraudulently. Further, Regulation 29(2) provides the consumer is not to be liable for payments made without the consumer’s authorisation after the consumer has informed the card provider of the loss, theft or misappropriation of the card.<sup>168</sup> Regulation 29 contains the most protective measures thus far adopted by any Irish legislation in relation payment card usage<sup>169</sup> and contrasts clearly with the vague provisions found in the 2001 Regulations.

### ***Alleviating the Risks for Pre-paying Buyers***

Many supply contracts, including distance contracts with consumers, require the buyer of goods or the recipient of services to pay in advance.<sup>170</sup> The risk for a consumer who pays in advance is that the supplier will not, or cannot, perform his side of the bargain due to fraud or insolvency, respectively. In such a situation, the Directives offer absolutely no protection to the consumer who must resort to the protections afforded by the common law or under legislation.

The protections offered to consumers against supplier fraud or insolvency at common law are very limited in scope. While a consumer has a contractual right of action against the supplier for non-performance<sup>171</sup>, in the case of fraud, the supplier will most likely be untraceable and, in the case of insolvency, the consumer will have difficulties enforcing the debt unless he can establish some kind of proprietary interest in the insolvent supplier’s estate in bankruptcy. In most distance sales situations, the possibility of achieving this is remote. First, the pre-paying buyer will rarely have proprietary rights over the goods.<sup>172</sup> This is because the passing of property in goods is not generally linked to the payment of the price.<sup>173</sup> Where goods are advertised in a catalogue or on a website and are bought based on this description, property in the goods would normally not pass to the buyer unless and until the goods are dispatched or at the latest delivered to the buyer, and not at the time of payment. Thus, it is highly unlikely that the payment will be secured in this way. Secondly, while in some limited

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<sup>168</sup> Reg. 29, as substituted by Reg, 2 of the 2005 Regulations.

<sup>169</sup> In addition to Reg, 29(1), Reg, 29(4) provides that, if a consumer alleges that the card has been used without the consumer’s authorisation, the onus of establishing that the consumer did in fact authorise the use is placed on the card provider.

<sup>170</sup> While the basic rule in sale of goods legislation provides for “cash on delivery”, in reality, the time of payment can be deferred (*i.e.* credit sales) or brought forward (*i.e.* advance payment).

<sup>171</sup> See, *e.g.* Irish Sale of Goods Act 1893, s.51 and UK Sale of Goods Act 1979, s.51.

<sup>172</sup> Goode, “Ownership and Obligations in Commercial Transactions”, (1987) 103 *LQR* 433 at 447-451. In the UK, the rules on the passing of property to pre-paying buyers of goods have been altered to give buyers proprietary rights in certain defined circumstances: see the UK Sale of Goods (Amendment) Act 1995. However, this has limited application to consumers. See further Bradgate and White, “Sale Of Goods Forming Part of a Bulk: Proposals for Reform”, [1994] *LMCLQ* 315.

<sup>173</sup> See Irish Sale of Goods Act 1893, ss.16-19; and UK Sale of Goods Act 1979, ss.16-20; see further White, *Commercial Law* (2002) Ch.17.

circumstances, buyers may seek to establish the existence of a quistclose trust over monies paid, this is rarely likely to occur in practice.<sup>174</sup> The decision in *Re Kayford Ltd*<sup>175</sup> provides the precedent for claims in this regard. Here, payments to a mail-order company were placed in a separate account headed “Customers’ Trust Deposit Account” with the intention of benefiting customers if the company, which was in financial difficulties, became insolvent. Notwithstanding the fact that the customers had not intended the monies to be held on trust on their behalf, the company’s action was held to be sufficient to establish the existence of a quistclose trust. The monies in the account did not pass to the liquidator upon insolvency but were held on trust for the customers. It is unlikely that a *Re Kayford* situation would arise in most pre-paid distance contracts as this would require a clear intention on the part of the supplier to protect monies received and the supplier would have to put this intention into effect. In the absence of any proprietary rights over the goods or the monies paid, the consumer will have the status of unsecured creditor and will be dependent for repayment on the extent to which assets remain once all secured and preferential debts have been met.

Although the Directives do not provide protection of pre-paying consumers, there is a protective regime in place where the consumer has used a credit card to make the distance purchase. The extent of this protection varies considerably between the UK and Ireland. In the UK, section 75 of the Consumer Credit Act 1974 (CCA 1974) provides that a creditor (in this case, the card issuer under a credit agreement) in a tri-partite debtor-creditor-supplier arrangement is jointly and severally liable together with the supplier for any misrepresentation or breach of contract by the supplier.<sup>176</sup> Further, the consumer has a choice regarding whether to pursue the creditor, the supplier, or both.<sup>177</sup> The Irish legislation provides a much more limited

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<sup>174</sup> This form of resulting trust (see *Twinsectra v Yardley* [2002] 2 AC 164) takes its name from the decision in *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567 where a trust was held to exist where monies have been designated for a specific purpose and have been kept in a separate and specifically identified fund. For an overview of the operation and nature of the quistclose trust, see generally Oakley Parker and Mellows, *The Modern Law of Trusts* (8<sup>th</sup> ed., 2003) pp.292-300.

<sup>175</sup> [1974] 1 WLR 279. See also *Re Chelsea Cloisters* (1981) 41 P & CR 98 (deposits paid by tenants and lodged in a separate account with the intention that they be repaid at the end of the lease were held to be subject to a trust in favour of the tenants).

<sup>176</sup> See further Bradgate, *Commercial Law* (3<sup>rd</sup> ed., 2000) pp.588-591 and pp.593-595.

<sup>177</sup> In *Office of Fair Trading v Lloyds TSB Bank plc and Others* [2004] EWHC 2600 (Comm) Gloster J rather controversially held that s.75 does not apply to cover purchases of goods or services where (i) the contract was made wholly outside of the United Kingdom; and (ii) the contract was governed by a foreign law and (iii) the goods were delivered or the services were supplied outside of the United Kingdom (*ibid.*, para.59). Gloster J chose not to rule on the question of whether s.75 would apply where all three of these requirements were not met. While this decision clearly removes face-to-face overseas purchases from the ambit of s.75, it has less impact on on-line purchases where, typically, the goods or services will be delivered within the United Kingdom. On December 21, 2004, the OFT announced its intention to appeal the ruling. At the time of writing, the matter had not been determined by the Court of Appeal. Bradgate explores two other

protection.<sup>178</sup> Section 42(2) of the Consumer Credit Act 1995 permits a right of action against a card issuer/creditor for a default on the part of the supplier only where the credit has been provided exclusively by the specific creditor to customers of the specific supplier.<sup>179</sup> This protection is therefore highly unlikely to be relevant to most consumers in a distance sales context.

In addition to the legislative schemes outlined above, in practice, credit card issuers offer some protection for pre-payments. As noted above<sup>180</sup>, the contract between the card issuer and the supplier will typically include a charge-back provision that will come into effect if the card holder disputes a payment (as for example where a card holder has pre-paid for goods or services that cannot be supplied because of insolvency). The operation of this provision gives the card issuer a secured interest in the supplier's estate and a much greater likelihood of recovery in the event of insolvency. It is the practice of card issuers to pass on this benefit to their card holders. While credit card pre-payments may be protected in this way, consumers who pay with debit or EFTPOS cards or who utilise the developing forms of e-payment are left without the same levels of protection. This is a fact of which many customers will be unaware when they choose their method of payment. There is no logical basis for differential treatment regarding the protections offered depending on the form of payment utilised yet this illogical distinction will remain unless an umbrella provision relating to pre-payment in all forms of distance selling is established. One potential solution would require suppliers to establish a pre-payment protection fund, or to participate in a protection scheme operated by a third party.<sup>181</sup> A legal requirement of this kind would impact on national property laws and in particular on the law of distribution on insolvency and hence it is a sensitive topic not addressed by the Directives.<sup>182</sup> However, without some form of broader protection, the Directives cannot be said to have made any meaningful contribution to this important aspect of consumer protection.

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relevant possible limits on the application of s.75. These are the suggestion that the section does not apply (i) where the credit card finances only part of the transaction (for example, to pay a deposit) and (ii) where the card is used by someone other than the debtor (with the debtor's permission). Bradgate rejects both of these arguments. In relation to the first argument, there is nothing in the wording of the section to require that the entire purchase be funded by the credit. In relation to the second argument, a third party using the card may be acting as agent for the debtor and therefore the section would apply: *ibid.*, p.594.

<sup>178</sup> See generally Bird, *Consumer Credit Law* (1998) pp.294-300.

<sup>179</sup> Further, the right of action only accrues after the consumer has pursued all other remedies against the supplier and has failed to obtain satisfaction.

<sup>180</sup> See further discussion in text to n.153 above.

<sup>181</sup> The 1992 Commission Recommendation which supplements Directive 97/7 promotes the use of codes of practice for the protection of consumers regarding distance contracts and recommends that such codes include arrangements to ensure the reimbursement of payments made by consumers at the time of placing the order. Neither the ICC International Code on Direct Marketing (2001) at <[www.iccwbo.org/home/statements\\_rules/rules/2001/code\\_of\\_direct\\_marketing.asp](http://www.iccwbo.org/home/statements_rules/rules/2001/code_of_direct_marketing.asp)> nor the Federation of European Direct Marketing (FEDMA) Code on e-Commerce and Interactive Marketing (2000) at <[www.fedma.org](http://www.fedma.org)> prohibit "forward trading", *i.e.* where pre-payments are used to purchase goods to satisfy the order, or require the establishment of a pre-payment protection fund.

<sup>182</sup> See further Cremona, n.28 above at 619.

### Concluding Remarks

The introduction of the Distance Selling Directive in 1997 was an important first step in providing consumers with legally binding protections. In the five or so years between the introduction of the Distance Selling Directive and that of the Financial Services Directive, the increased usage of ICT has led to a significant shift in the whole nature of distance selling.<sup>183</sup> The market addressed by the Financial Services Directive differs from that of the Distance Selling Directive therefore not just in terms of the products covered but also in terms of the environment.

The Financial Services Directive constitutes a step forward for a number of reasons. First, it is undoubtedly a positive development to see the protective framework extended to consumers of financial services. Secondly, the Directive seeks to provide more legal certainty by improving on the drafting of the Distance Selling Directive.<sup>184</sup> Lastly, the Financial Services Directive adopts a more balanced approach to withdrawal rights, permitting a consumer to withdraw from a contract for the provision of services after performance of the service has begun but requiring that the consumer pay for the benefit of any services received. In some respects, these improved aspects of the Financial Services Directive draw attention to some of the inadequacies in the Distance Selling Directive. In the main, the improved aspects of the Financial Services Directive arise from the inevitable bedding-down of the Distance Selling Directive rather than because of any inherent characteristics of the product covered. Insofar as this is the case, the argument in favour of greater harmonisation of the two Directives is difficult to refute. We would suggest that, except where provisions relate to the specific nature of the product<sup>185</sup>, the protections afforded and the clarity of the protective framework should be the same.

Further, the extension of the protective framework to financial services contracts makes the ongoing exclusion of certain other contracts appear even less justifiable. Most notable is the partial exemption of contracts for the supply of accommodation, transport, catering or leisure services. This is the very market that has most benefitted from the expansion in ICT-based distance selling. Even accepting the legitimacy of compromise between competing supplier and consumer interests in these areas, there is no logical justification for the exclusion of these services from *all* the major protections afforded by the Directives.<sup>186</sup> Why should the purchaser of a plane ticket not be entitled to basic information before committing to the contract? Or, why should a member of a fitness club not be able to withdraw from a contract? The original financial services exemption and the ongoing partial exemption

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<sup>183</sup> For instance, it is now difficult to imagine that the indicative list of distance communications contained in the Distance Selling Directive did not include the Internet: see n.53 above.

<sup>184</sup> Examples include the inclusion in the text of the Financial Services Directive of the provision dealing with several or successive contracts, and the inclusion of a definition of “durable medium”.

<sup>185</sup> For example, the longer list of information requirements under the Financial Services Directive may be justified on the basis that the product sold is inherently more complex and consumers need more information.

<sup>186</sup> See discussion in text to n.78 above.

for accommodation, transport, catering or leisure services evidence a political rather than a legal rationale. It would seem that some supplier lobby groups were more effective than others in persuading the European legislators of their economic needs. We believe that it is time to reassess all the categories of excluded contracts. This is not to say that there is no room for compromise, however, both the legal and the economic rationale for consumer protection/supplier regulation need to be considered before such compromises are made.

While a harmonised and updated version of the Directives would provide a better basis for consumer protection for distance selling of all products, it would not solve all of the difficulties identified in this article. It is inevitable that some definitional uncertainty will remain. Further, the essential compromise required for a Europe-wide measure means that a dissonance between a directive and the common law position is unfortunately to be expected. Nonetheless, significant advances could be made from a revision of the text of the Distance Selling Directive in light of the Financial Services Directive and the new ICT environment.

The limitations of the Directives' protective framework is perhaps most apparent in regard to security of payment. The minimal Article 8 of the Distance Selling Directive is reproduced without amendment in the Financial Services Directive. Although domestic implementing measures have provided some measure of protection in the event of fraudulent use of payment cards, the absence of any statutory protection for consumers of goods and services under the Irish Regulations 2001 is regrettable. In the context of supplier insolvency, although there are protections available to consumers who use credit cards, there is not a consistent level of protection across all payment mechanisms. Yet, for many consumers, it is a matter of chance whether they use their credit card or another payment method. At a very minimum, it should be required that the discrepancy in protection be expressly brought to consumers' attention so that the decision to choose one method of payment over another is at least an informed one. Ultimately, however, some attempt to integrate payment protection into the Directives is necessary if meaningful consumer protection is to be achieved in this field.

This article has argued that there is room for substantive improvements to be made with regard to the legal framework governing distance sales. To conclude, however, it is necessary to broaden the question beyond the text of the Directives, and their implementing measures, and to ask whether the Directives are actually effective in delivering consumer protection, in practice.

Assessing levels of compliance requires basic empirical data. To date, such data is available only in relation to the Distance Selling Directive. A major study carried out by the European Consumer Centre (ECC) on the operation of cross-border Internet shopping indicated that there were significant levels of non-compliance with the provisions of the Directive.<sup>187</sup> Arising from an "information quality examination" of 262 websites, it was found that in 32% of cases the website gave no information about the right to cancel<sup>188</sup>, and

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<sup>187</sup> See n.18 above.

<sup>188</sup> *ibid.*, p.23.

13% of websites contained no information whatsoever about the terms and conditions of the contract.<sup>189</sup> Further, as part of a “shopping exercise” whereby a total of 114 cross-border EU orders were made, 34% of the orders were not delivered.<sup>190</sup> Of these, 8% had been paid for in advance.<sup>191</sup> Information contained with deliveries was also limited. Only 31% of webtraders included written information regarding after-sales service, warranty, and guarantee conditions and only 36% included information regarding the consumer’s right to return the goods.<sup>192</sup> The survey also indicated that there were significant levels of difficulty in obtaining refunds on goods purchased following the exercise of the statutory right of withdrawal: 31.5% of goods returned where not refunded.<sup>193</sup> Summarising their findings, the ECC concluded that “[c]ross-border e-commerce in the EU is a good shopping alternative unless something goes wrong, which it frequently does.”<sup>194</sup>

These difficulties are reflected in a further ECC study regarding the nature and range of complaints received by consumer centres.<sup>195</sup> This study found that 41% of complaints related to non-delivery of ordered goods.<sup>196</sup> The ECC surveys are limited in coverage: the first survey addressed cross-border internet shopping only while the second survey is inevitably skewed by the fact that it is based on complaints received. Nonetheless, the implications of these studies are clear. Many suppliers are either unaware of the Distance Selling Directive or are ignoring its provisions. It is too soon to assess compliance with the Financial Services Directive. However, compliance levels might be expected to be higher given that financial service providers are more used to outside regulation and that high profile financial institutions will be a relatively easy target for investigation.

The fact that relatively significant numbers of suppliers either do not know or do not appear to care about their obligations in regard to distance selling raises the issue of enforcement under the Directives. Both Directives leave the matter of enforcement to the member states. Complaints relating to the Distance Selling Directive may be dealt with at agency level and enforcement to date has generally been achieved through an agreement on the part of the supplier to correct any deficiencies. It is only if this agreement is not forthcoming that the consumer protection agencies apply to

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<sup>189</sup> *ibid.*, p.23.

<sup>190</sup> *ibid.*, p.11.

<sup>191</sup> *ibid.*, p.10.

<sup>192</sup> *ibid.*, p.13.

<sup>193</sup> *ibid.*, p.13.

<sup>194</sup> *ibid.*, p.16.

<sup>195</sup> *The European Online Marketplace: Consumer Complaints* (ECC, 2004) at <[www.eccdublin.ieresources/publications/index.htm](http://www.eccdublin.ieresources/publications/index.htm)>. The analysis related to complaints received during the first ten months of 2003. A total of 590 complaints were received during this time and most of these complaints related to webtraders located within the EU (82% EU; 6 % non-EU and the remaining 12% were not possible to locate).

<sup>196</sup> Of the remaining complaints 23% related to the quality of the goods received; 11% of complaints related to price with the most common difficulty being that the price ultimately paid (usually by deduction from the customer’s credit card) was higher than the one agreed; 10% related to the contract terms with most difficulties here relating to the exercise of the right to withdraw: *ibid.*, pp.16-17.

the courts<sup>197</sup> for an order for compliance.<sup>198</sup> This approach to enforcement makes it difficult to assess the effectiveness of the enforcement agency. Is it the case that agencies are receiving complete co-operation from suppliers and therefore do not need to utilise more heavy-handed enforcement methods or is it the case that distance selling is not at the top of the consumer protection agenda?

Dealing with complaints is of course only one part of achieving compliance. Making sure that suppliers know the law plays as important a role. In the UK, the Department of Trade and Industry and the Office of Fair Trading provide extensive information both for consumers and suppliers regarding, respectively, their rights and duties under the Distance Selling Directive.<sup>199</sup> However, recent research from the UK suggests that non-compliance results, in part, from the fact that many businesses are unaware of the law.<sup>200</sup> In Ireland, the basic information available on the Office of the Director of Consumer Affairs website is much less extensive. This would suggest that an Irish survey might find even greater levels of ignorance of the legal provisions among suppliers.

In the meantime, a recent Eurobarometer poll found that only 16% of EU15 citizens had ever bought anything on the Internet.<sup>201</sup> Of these, the major concerns about buying on-line related to: security of payment (48%); ability to get a refund (38%); delivery (including delay and non-delivery) (36%); credibility of the information on the Internet (27%) and respect for consumer rights (23%).<sup>202</sup> Of the 83% of citizens who had not used the Internet to make a purchase the main reason given related to access – e-commerce was not available to 57% of this group.<sup>203</sup> A further 28% said that they were not interested, while 25% said that they did not trust the medium.<sup>204</sup> Those consumers who had not purchased on the Internet and who did not trust the medium gave as their prime reason security of payment (73%). Other significant reasons included credibility of the information (44%); delivery issues (goods being damaged, delayed etc) (37%); ability to get a refund (36%).<sup>205</sup> Clearly, the legislative structures currently in place need ongoing

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<sup>197</sup> Agency powers in this regard are set out in Reg. 27 of the UK Consumer Protection (Distance Selling) Regulations 2000 and Reg. 13 of the Irish EC (Protection of Consumer in Respect of Contracts made by means of Distance Communication) Regulations 2001.

<sup>198</sup> To the authors' knowledge, the only legal action taken by an enforcement agency to date, in Ireland or the UK, in relation to the Distance Selling Directive concerns the reference from the English High Court to the ECJ under art.234 concerning the meaning of "transport service": see discussion in text to n.79 above.

<sup>199</sup> See <[www.dti.gov.uk/](http://www.dti.gov.uk/)> and <[www.offt.gov.uk/default.htm](http://www.offt.gov.uk/default.htm)>.

<sup>200</sup> See <[www.offt.gov.uk/News/Press+releases/2004/40-04.htm](http://www.offt.gov.uk/News/Press+releases/2004/40-04.htm)>.

<sup>201</sup> European Commission, *European Union Public Opinion on issues relating to business to consumer e-commerce* (2004) p.3 at <[www.europa.eu.int/comm/consumers/topics/facts\\_en.htm](http://www.europa.eu.int/comm/consumers/topics/facts_en.htm)>.

<sup>202</sup> *ibid.*, pp.5-6.

<sup>203</sup> *ibid.*, pp.9-11.

<sup>204</sup> *ibid.*

<sup>205</sup> *ibid.*, pp.14-16.

monitoring and revision if they are to contribute to building consumer “e-confidence”.

## MAKING SENSE OF NUISANCE IN SCOTS LAW

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### Introduction

Professor T.B. Smith wrote:<sup>2</sup> “If it were recognised that reparation for harm caused by the use of property was based upon the principle of culpa, then “nuisance” could appropriately be eliminated from the law of obligations (because the category would be unnecessary).”

The concern underlying Smith’s statement relates not only to the duplication of doctrines, but also by implication, to coherence.

This article draws on T.B. Smith’s observations. Initially it deals briefly with the duplication of doctrines. Then, the majority of the paper is devoted to the issue of coherence. In relation to coherence it may be said that the boundaries between circumstances amenable to resolution in nuisance and those subject to the law of negligence have not always been clearly drawn.

Until the relationship between nuisance and other aspects of the law of neighbourhood, principally negligence, are understood it will remain difficult to provide a prognosis for nuisance as a coherent doctrine of Scots law in the twenty first century. This paper proceeds on the premise that any such prognosis should be informed by an understanding of the processes that have brought nuisance to its current state.

### Is Nuisance Necessary In Delict?

When T.B. Smith wrote nuisance was thought not to be a doctrine based on culpa.<sup>3</sup> In 1985 the House of Lords ruled that liability in reparation for harm amounting to nuisance did indeed depend upon culpa.<sup>4</sup> Should nuisance now be eliminated from the law of obligations, since harm caused by the use of property is surely remediable under other fault based doctrines?

The simple answer is “no”. Nuisance has a specialised role in protecting occupiers of property from serious disturbance and substantial

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<sup>2</sup> *A Short Commentary on the Law of Scotland* (1962), p.642.

<sup>3</sup> See, e.g. DM Walker, *Delict* 2<sup>nd</sup> ed., (1981), p.643: “It is unnecessary to prove either intention to harm, or fault or lack of reasonable care.” In *Watt v Jamieson* 1954 SC 56, at 57 Lord President Cooper criticised the defender’s plea for its tendency to “confuse nuisance as a cause of action with culpa and the special aspect of culpa which is generally described as the rule in *Rylands v Fletcher*.” On nuisance presented in terms of strict liability see e.g. DM Walker, “Strict Liability in Scotland” 1954 *JR* 231; KWB Middleton, “Liability Without Fault” 1960 *JR* 72.

<sup>4</sup> *RHM Bakeries (Scotland) Ltd v Strathclyde Regional Council* 1985 SC (HL) 17, 1985 SLT 214.

inconvenience.<sup>5</sup> This is a peculiar form of harm that is not protected by other regimes such as the law of negligence.<sup>6</sup> Of course the common law is not the only relevant means of regulation, but it can be seen as providing a residual level of protection when statutory regimes fail, for one reason or other.<sup>7</sup> Furthermore, the availability of interdict in nuisance fulfils a specialised role in providing a remedy against anticipated events or ending those that are continuing whereas reparation can only follow after the event.

While it is possible to provide a quick answer to the issue raised by TB Smith there remains scope for further discussion. Smith confessed that he found nuisance mystifying and considered that an element of property law had become confused with a claim in delict.<sup>8</sup> Of course, the elimination of nuisance from the law of obligations does not entail the elimination of nuisance from the common law altogether. Interdict in respect of disturbing or inconvenient uses of land could equally well be available as an operation of property law.<sup>9</sup> The earlier treatments of nuisance in Scots law do indeed place it in property rather than delict<sup>10</sup> and it has been argued that its location in the law remains a matter of difficulty.<sup>11</sup>

Following Smith's view, nuisance could be retained as an element of property law in which declarator and interdict are available in respect of activities carried out on land that cause serious disturbance or substantial inconvenience to the occupiers of neighbouring property. Culpa need not be proved for an award of interdict, but nuisance, that is a degree of disturbance or inconvenience that is more than the victim ought reasonably to tolerate,<sup>12</sup> must be established. What obstacles would then remain to the elimination of nuisance from the law of obligations?

First, how is the law to deal with the situation where quantifiable loss has arisen as a consequence of nuisance? A polluting activity may cause physical damage to property and persistent noise disturbance may have a detrimental effect on the health of the victim. Reparation has been awarded in such circumstances since a relatively early stage in the development of the

<sup>5</sup> *Watt v Jamieson* 1954 SC 56, at 58.

<sup>6</sup> Nowhere is this point better made than in D.B. Dobbs *The Law of Torts* vol.II (2001), at 1324: "[T]o find a nuisance is to say that the plaintiff can recover for loss of enjoyment, a kind of chronic emotional harm that might be viewed more cautiously without a finding of nuisance." In Scotland "harm" of this nature is also protected by the doctrine of *aemulationem vicini*, however the requirement to prove malice restricts the applicability of this doctrine.

<sup>7</sup> See C. Gearty, "The Place of Private Nuisance in a Modern Law of Torts" (1989) 48 *CLJ* 214 at 217.

<sup>8</sup> "Short Commentary" 531.

<sup>9</sup> N.R. Whitty, "Nuisance" in *The Laws of Scotland: Stair Memorial Encyclopaedia*, Reissue (2001), para.17 identifies three possible roles for nuisance in modern Scots law: "Primo, the main role is as a doctrine of property law or neighbourhood protecting interests in the use and enjoyment of land or public places from present and future interference, the main remedies being interdict, declarator and (at least historically) decree *ad factum praestandum* for abatement."

<sup>10</sup> Hume, *Lectures* vol. III pp.214 – 216; Bell, *Principles* paras. 973 - 978.

<sup>11</sup> D. Visser & N. Whitty, *The Structure of the Law of Delict* in K Reid and R Zimmermann (eds.) *A History of Private Law in Scotland* (2000), vol.II 422 p.466.

<sup>12</sup> *Watt v Jamieson*, n.5 above.

doctrine.<sup>13</sup> Since *Watt v Jamieson* nuisance in Scots law has been defined so as to include material harm along with serious disturbance and substantial inconvenience.<sup>14</sup> While interdict is the appropriate device to prevent the continuation of a harmful activity it is a fundamental principle of the law that loss caused wrongfully should be repaired.

If reparation in nuisance was not available in respect of material harm consequent upon nuisance are there alternative doctrines that would allow this function to be performed? The alternative in some cases would be to litigate according to the law of negligence. However, the law of negligence cannot serve generally to provide reparation where merited in all cases where material harm to property is caused by the use of property.

To employ a tautology, the law of negligence concerns negligence. Unless the position sometimes contended for by English lawyers is adopted, that intention is a form of negligence,<sup>15</sup> then the law of negligence must be regarded as inapplicable in cases of intentional conduct. The classic nuisance action does not result from a failure to take care in circumstances where care is required, but from an activity deliberately conducted either in the belief that the consequences to neighbours would not amount to a legal wrong or in disregard of those consequences. Traditionally, delictual conduct has been presented as either intentional or negligent.<sup>16</sup> Scots law does not contemplate intention as a form of negligence. Accordingly, in Scotland, the law of negligence cannot serve generally to provide reparation in cases of material harm to property caused by the use of property.

Thus, a continuing role exists for the doctrine of nuisance in providing reparation in cases of material harm caused intentionally.<sup>17</sup> However, material harm caused negligently should perhaps, be recoverable only according to the law of negligence.<sup>18</sup>

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<sup>13</sup> The first action in which reparation was sought in respect of property harm arising from nuisance was *Skene v Maberleys* (1820) 2 Murr 352. Cases in which injury to health has formed an element of reparation in nuisance include *Chalmers v Dixon* (1876) 3 R 461 and *Shanlin v Collins* 1973 SLT (Sh Ct) 21.

<sup>14</sup> Discussed below, p.257.

<sup>15</sup> E.g. Gearty, n.7 above at 223: "The tort of negligence embraces, as logically it must, a tort of intention" and at 229: "We know that the tort of negligence includes intention".

<sup>16</sup> See Visser and Whitty, n.11 above.

<sup>17</sup> Whitty, n.9 above para.17: "*Secundo*, nuisance has also a role as a doctrine in the law of delict or reparation, applicable to situations where (as in the case of interdict) the defender's conduct is intentional in the sense that he knows that the harm is certain, or substantially certain, to result from his conduct."

<sup>18</sup> Whitty, n.9 above para.17: "*Tertio*, the third role is as a doctrine of the law of reparation applicable where the defender's conduct is unintentional or negligent. It is submitted that whereas the first two roles [nn.9 & 17 above] are consistent with principle, the third role is inconsistent with the fundamental general principle that there is no liability in delict without culpa. Here, nuisance usurps the role of the delict of negligence which is properly applicable to such cases to the exclusion of the test of reasonable tolerability (*plus quam tolerabile*) normally applied in nuisance cases." See further refs at n.102 below.

### Finding Coherence In Nuisance

This leads on to the concern implicit in TB Smith's statement, that nuisance and negligence have to some extent become confused. Modern evidence of this can be seen in the case law that follows *RHM Bakeries v Strathclyde Regional Council*.<sup>19</sup> Confusion between the two doctrines presents in acute form in the case of *The Globe v North of Scotland Water Authority*.<sup>20</sup>

The next aim of this paper is to explore the processes by which confusion has arisen. Such an examination has to be conducted in the Scottish context.<sup>21</sup> The relationship between private nuisance and negligence in the English law of torts is and historically has been, quite different.<sup>22</sup>

It has been argued elsewhere that nuisance in Scots law is best seen as an indigenous development albeit one that drew upon English as well as civilian influences.<sup>23</sup> Nuisance developed as a doctrine of Scots law over the latter half of the eighteenth century. It emerged into the nineteenth as a relatively limited aspect of a broader, developing, law of neighbourhood. By the end of that century nuisance retained its limited nature although the seeds of future confusion had by this time been sown.<sup>24</sup> Nuisance retained neither its limited nature nor relative coherence far into the twentieth century. It became confused with other doctrines and while criteria existed for some time to differentiate nuisance from negligence, by mid century such a distinction could no longer be drawn clearly. Nuisance broadened in scope, encroaching into territory previously held by other aspects of the law of neighbourhood. Cases that would once have been determined in negligence or indeed according to property law rules on support, came to be raised in nuisance.

### Scots Nuisance In The Nineteenth Century

During the nineteenth century reparation for property harm caused by the use of property was indeed based upon culpa.<sup>25</sup> Equally, reparation for personal

<sup>19</sup> See, e.g. *Argyll & Clyde Health Board v Strathclyde Regional Council* 1988 SCLR 120, 1988 SLT 381.

<sup>20</sup> 2000 SC 392; 2000 SLT 674; Sheriff Court proceedings reported *sub nom Cansco International plc v North of Scotland Water Authority* 1999 SCLR 494. For analysis see E. Reid, "Financial Loss and Negligent Nuisance" 2000 *SLT (News)* 151; GDL Cameron, "Muddy Pavements and Murky Law: Intentional and Unintentional Nuisance and the Recovery of Pure Economic Loss" 2001 *JR* 223.

<sup>21</sup> See GDL Cameron, "Scots and English Nuisance . . . Much the Same Thing?" (2005) 9 *Edin LR* 98 which concludes: "One point should be clear. When there are problems to be addressed in Scots nuisance they need to be considered in the Scottish context. The law of torts may prove of very limited assistance."

<sup>22</sup> On nuisance and negligence in the English jurisdiction see e.g. C. Gearty, n.7 above; M. Lee, "What is Private Nuisance" (2003) 119 *LQR* 298; JPS McLaren, "Revolution – Some Lessons from Social History" (1983) *OJLS* 155; JF Brenner, "Nuisance Law and the Industrial Revolution" 1973 *JLS* 403. RA Buckley, *The Law of Nuisance* 2<sup>nd</sup> ed. (1996), pp.18–22.

<sup>23</sup> GDL Cameron, n.21 above.

<sup>24</sup> Particularly in *Chalmers v William Dixon Ltd* (1876) 3 R 461 discussed below, pp.250-252.

<sup>25</sup> *Callendar v Eddington* (1826) 4 Murr 108; *Douglas v Monteith* (1826) 4 Murr 130 explained in *McIntosh v Scott* (1859) 21 D 363 *per* Lord President McNeill at 368

injury caused by the use of property or dangerous states of property was also based upon culpa.<sup>26</sup> In such cases, culpa had to be averred and proved, but nuisance was not normally involved. Most nineteenth century reparation cases arising from the use of property are more accurately viewed in terms of negligence. Property harm in general was not considered in terms of nuisance.

It is contended that nuisance was a doctrine of relatively narrow application. It was invoked, classically, in the process of seeking interdict in respect of noxious trades. During the century there was a very small number of cases raised in which reparation was sought in respect of nuisance. In all of these cases physical harm to property was alleged as a consequence of either air or water pollution.<sup>27</sup>

In presenting this narrow view of the scope of nuisance during the nineteenth century it is necessary to take account of cases that have presented some difficulty in classification. *Cleghorn v Taylor*,<sup>28</sup> *Kerr v The Earl of Orkney*,<sup>29</sup> *Laurent v Lord Advocate*<sup>30</sup> and *Campbell v Kennedy*<sup>31</sup> have all been discussed at one time or another in the context of nuisance.<sup>32</sup> All these cases involved property damage to some extent albeit in *Kerr* the property harm

and in *Laurent v Lord Advocate* (1869) 7 M 607 per Lord President Inglis at 611; *Weston v Incorporation of Tailors of Potterrow* (1839) 1 D 218; *Thomson v Gray* (1842) 5 D 377; *Campbell v Kennedy* (1864) 3 M 121; *Lindsay v Thomson* (1866) 5 M 29; *Murdoch v Glasgow & South Western Railway Co* (1870) 8 M 768; *Pirie v Aberdeen Magistrates* (1871) 9 M 412; *Wilson v Waddell* (1876) 3 R 288; *Moffat v Park* (1877) 5 R 13; *Cameron v Fraser* (1881) 9 R 26; *Scott's Trustees v Moss* (1889) 17 R 32.

<sup>26</sup> *Gardner v Ferguson* 1795 (unreported) see discussion in H. MacQueen and W.D.H. Sellar, *Negligence* in K Reid & R Zimmermann, n.11 above vol.II, p.526 ff; *Innes v Edinburgh Magistrates* (1798) Mor 13189, 13967; *Black v Cadell* 9 Feb 1804 FC, (1804) Mor 13905, (1812) 5 Pat App 567; *Chapman v Parlane* (1825) 3 S 401; *Prentice v The Assets Co Ltd* (1889) 17 R 484; *Cormack v Wick & Pulneytown School Board* (1889) 16 R 812.

<sup>27</sup> The water pollution cases are: *Skene v Maberleys*; *Collins v Hamilton* (1837) 15 S 895; *Hamilton v Charles Tennant & Co* (1839) 1 D 502; *Ewen v Turnbull's Trustees* (1857) 19 D 513; *Armistead v Bowerman* (1888) 15 R 814. The air pollution cases are: *Arrott v Whyte* (1826) 4 Murr 149; *McCallum v Forth Iron Co* (1861) 23 D 729; *Cooper & Wood v North British Railway Co* (1863) 2 M 116; *Chalmers v William Dixon Ltd*. Damages were also sought in respect of a nuisance in *Blantyre (Lord) v Clyde Navigation Trustees* (1867) 5 M 508, (1871) 9 M (HL) 6. The defenders' operations had caused the accumulation of filth and sewage on the foreshore. The perceived harm to the pursuer was in terms of loss of access to the river channel rather than pollution. *Blantyre* is more instructive on statutory liability and interpretation than on the law of nuisance.

<sup>28</sup> (1856) 18 D 664.

<sup>29</sup> (1857) 20 D 298.

<sup>30</sup> (1869) 7 M 607.

<sup>31</sup> (1864) 3 M 121.

<sup>32</sup> See, e.g. K.W.B. Middleton, n.3 above. For a recent example See R. Zimmermann and P. Simpson, *Liability among neighbours* in K. Reid & R. Zimmermann, n.11 above vol.II, p.619. *Cleghorn*, which the authors interpret in terms of strict liability is seen in terms of nuisance on the strength of the following passage in Lord Cowan's opinion at 671: "They must use their property so as not to injure that of their neighbour, by any nuisance, or by what is tantamount to it, being within their premises."

had been made good by the defender and the pursuer sought reparation in respect of derivative financial losses which he could not prove.

In *Laurent* the pursuer argued that customers declined to patronise his restaurant because of the dust and dirt occasioned by the defender's activities. However, neither the report nor the discussion on the significance of *Laurent* in *Huber v Ross*<sup>33</sup> indicate that this action was pled or determined in nuisance. *Kerr* involved property harm through flooding consequent upon the collapse of a *novum opus*, a dam constructed by the defender. There is nothing in the report to suggest that the litigants or the bench considered this a case of nuisance. The invocation of nuisance in connection with flooding is a relatively recent development.<sup>34</sup> *Kerr* has caused difficulties because certain *obiter dicta* of Lord Justice Clerk Hope have been interpreted to support strict liability. This may have led some writers in the era when nuisance was associated with strict liability to conclude that *Kerr* as litigated, involved nuisance. It did not.<sup>35</sup>

The circumstances in *Cleghorn v Taylor* were quite unlike any action raised in nuisance during the nineteenth century. The defender was found liable in damages, apparently without proof of culpa, when a chimney, built for him

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<sup>33</sup> 1912 SC 898. See Lord Johnston at 916 and Lord President Dunedin at 907–909. See also discussion on *Laurent* in J.J. Gow “Is Culpa Amoral?” 1953 *JR* 17, pp.24–25.

<sup>34</sup> Flooding cases were pursued in nuisance, in some cases in addition to other grounds, in: *Gourock Rope Works v Greenock Corporation* 1966 SLT 125; *RHM Bakeries (Scotland) Ltd v Strathclyde Regional Council*; *Plean Precast v NCB* 1986 SLT 78; *Argyll & Clyde Health Board v Strathclyde Regional Council* 1988 SCLR 120, 1988 SLT 381; *Logan v Wang (UK) Ltd* 1991 SLT 580; *GA Estates Ltd v Caviapen Trustees Ltd No 1* 1993 SLT 1037; *Dewar v Lothian* 1996 GWD 26-1538 OH; *Anderson v White* 2000 SLT 78; *Hand v North of Scotland Water Authority* 2002 SLT 798. Earlier cases were not pursued in nuisance. See *Fairly v Earl of Eglinton* (1744) Mor 12780; *Burgess v Brown* (1790) Hume 504; *Henderson & Thomson v Stewart* (1818) 5 S 868; *Graham v Loch* (1829) 5 Murr 74; *Samuel v Edinburgh & Glasgow Railway Co* (1849) 11 D 968, (1850) 13 D 312; *Macfarlane v Lowis* (1857) 19 D 1038; *Kerr v Earl of Orkney* (1857) 20 D 298; *Tennent v Earl of Glasgow* (1862) 1 M 133, (864) 2 M (HL) 22; *Potter v Hamilton & Strathaven Railway Co* (1864) 3 M 83; *Campbell v Bryson* (1864) 3 M 254; *Pirie & Sons v Aberdeen Magistrates* (1871) 9 M 412; *Moffat v Park* (1877) 5 R 13; *Roths (Countess of) v Kirkcaldy & Dysart Waterwork Commissioners* 1882 7 App Cas 694; *Filshill v Campbell* (1887) 14 R 592; *Kidston v Caledonian Railway Co* (1894) 31 SLR 564; 1894 1 SLT 576; *Clark v Glasgow Water Commissioners* (1896) 12 Sh Ct Rep 13; *Hanley v Edinburgh Magistrates* 1913 SC (HL) 27, 1913 1 SLT 420; *Caledonian Railway Co v Greenock Corporation* 1917 SC (HL) 56, [1917] AC 556; *St George's Cooperative Society v Glasgow Corporation* 1921 SC 872, 1921 SLT 178; *Brownlie & Son v Barrhead Magistrates* 1925 SC (HL) 41, 1925 SLT 373; *R Wylie Hill & Co Ltd v Glasgow Corporation* 1951 SLT (Notes) 3; *Greyhound Racing Trust Ltd v Edinburgh Corporation* 1952 SLT 35; *Tontine Hotel (Greenock) Ltd v Greenock Corporation* 1967 SLT 180. *Stirling v North of Scotland Hydro Electric Board* 1965 SLT 229, 1975 SLT 26 was raised *inter alia* on grounds of *opus manufactum*.

<sup>35</sup> *Kerr* has been much discussed. The present author's treatment is in “Strict Liability and the Rule in *Caledonian Railway Co v Greenock Corporation*” (2000) 5 *SLPQ* 356. Lord Hope's dictum is reproduced at 360.

by a contractor collapsed shortly after its erection destroying crockery in the pursuer's shop below.

Nowhere in the report is it suggested that *Cleghorn* was pled or determined in nuisance except that in Lord Cowan's opinion the maxim *sic utere tuo ut alienum non laedas* is quoted.<sup>36</sup> It is submitted that this single citation of a maxim normally associated with nuisance is not a sufficient reason to label *Cleghorn* as nuisance. No reference, either to this maxim or to the law of nuisance in general is made in any of the other opinions or in the pleadings as reported. Perhaps Lord Cowan viewed the maxim as being of general application in the law of neighbourhood. We might compare it with Guthrie-Smith's observation on negligence or culpa that: "every one must so govern his affairs and regulate his conduct, as not to be productive of injury to his neighbour".<sup>37</sup> The idea that one should not harm one's neighbour can be said to underpin the whole of delict. The *sic utere tuo* maxim may have occurred to Lord Cowan as a means of articulating this general idea and while it is normally associated with nuisance it is unusual, but not necessarily significant, to see it articulated in other types of property harm case.

*Cleghorn* could equally well be understood in terms of vicarious liability for the act of an independent contractor without the requirement to establish fault, perhaps inferring fault on the part of the contractor and calling upon the principal to answer for it.<sup>38</sup> In this analysis *Cleghorn* concerns vicarious liability and this seems a more plausible view than holding it as any sort of law, good or bad, in nuisance. Commenting on *Cleghorn* Lord Inglis regarded it as a case of implied negligence.<sup>39</sup>

A similarly weak foundation underlies any description of *Campbell v Kennedy* in terms of nuisance. On this occasion Lord Inglis, alone of the judges who delivered opinions, cited the maxim *sic utere tuo ut alienum non laedas*,<sup>40</sup> although his comments on the pursuer's case make it abundantly clear that the case was one of negligence: "[The pursuer's] summons is based on an averment of negligence, and, in so far as it was intended to embrace

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<sup>36</sup> At 671. The maxim may be translated: use your (property) so as not to harm (the property) of another.

<sup>37</sup> J. Guthrie Smith, *A Treatise on the Law of Reparation* (1864) quoted in H. MacQueen & W.D.H. Sellar, n.26 above p.534. See also the Lord Ordinary (McLaren) in *Armistead v Bowerman* (1888) 15 R 814 at 817: "The obligation of neighbourhood is expressed in the maxim *sic utere tuo* etc. I conceive that the obligation of neighbourhood required the defender to use a reasonable degree of care and trouble to avoid injurious pollution."

<sup>38</sup> *Per* Lord Neaves in *Campbell v Kennedy* (1864) 3 M 121 at 125: "The case of *Cleghorn* only settled this principle, that when a proprietor employs a tradesman to do something to his property, he is responsible to his neighbours for injury caused by the insufficiency of the work."

<sup>39</sup> *ibid*, at 126: "With regard to that case (*Cleghorn*) I would observe, in the first place, that no such doctrine as that contended for by the pursuer (in *Campbell*) was required for its decision. The verdict found culpa proved, and any observations of the judges in regard to the liability of a proprietor when there was no culpa, were not necessary for the decision of the cause, and must be regarded as obiter." See also *McCull v Hoo* 1983 SLT (Sh Ct) 23 and W.M. Gordon, "Householders' Liabilities" (1982) 27 *JLSS* 253.

<sup>40</sup> At 126.

any other ground of action, it is plainly irrelevant.”<sup>41</sup> The source of complaint was a leaking water closet and the harm was flooding in a lower property. It was held that no liability could flow *ex dominio solo*. Again, flooding at the time was not regarded in terms of nuisance. The operative principle in such circumstances was fault or negligence. The circumstances and decision in *Campbell* do not differ in any significant way from the earlier case of *Weston v Tailors of Potterrow*<sup>42</sup> which was clearly a negligence case.

If we take the view that the scope of nuisance was more or less restricted to pollution, whether of air or water or in the forms of unusual noise, unnatural heat or vibration, reparation cases in nuisance would then only arise in respect of physical harm to person or property arising from such pollution.<sup>43</sup> The classification of any reparation case arising from different circumstances should not be designated as nuisance without some convincing argument being advanced. General understanding of nuisance has not been assisted by failure to appreciate the narrowness of its bounds during the nineteenth century.

### *Contemporary Texts*

It is true that nineteenth century texts on nuisance did not state the doctrine in the narrow terms contended for here. Both Bell, in “Principles” (first edition 1829) and Broun, writing in 1891,<sup>44</sup> presented nuisance in terms that arguably, were broader than merited by the operation of the doctrine in the courts.

Bell presented nuisance thus:

“The description of nuisance in Scotland is the same whether the public or individual be regarded. Whatever obstructs the public means of commerce and intercourse, whether in highways or navigable rivers; whatever is noxious or unsafe, or renders life intolerable to the public generally, or to the neighbourhood; whatever is intolerably offensive to individuals in their dwelling houses, or inconsistent with the comfort of life, whether by stench (as the boiling of whale blubber), by noise (as a smithy in an upper floor), or by indecency (as a brothel next door), is a nuisance”.<sup>45</sup>

In practice, nuisance in nineteenth century Scottish courts typically involved intolerably offensive operations detracting substantially from the comfortable enjoyment of property.<sup>46</sup> Potential or present dangers (especially in the form

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<sup>41</sup> *ibid.*, Rankine too viewed *Campbell* in terms of negligence. See J. Rankine, *The Law of Land Ownership in Scotland* 4<sup>th</sup> ed., (1909), p.372.

<sup>42</sup> (1839) 1 D 1218.

<sup>43</sup> This is borne out by the 19<sup>th</sup> century reparation cases explicitly pled and determined in nuisance. n.27 above.

<sup>44</sup> J.C.C. Broun, *The Law of Nuisance in Scotland*.

<sup>45</sup> “Principles” (1829), para.241; 10<sup>th</sup> (Guthrie) ed. (1899), para.974.

<sup>46</sup> “Thus narrowed in its application, the word nuisance, in the law of Scotland, corresponds rather with its popular than its technical signification in England, and is seldom applied to any other cases but those in which one party, by his direct operations or by his negligence, [in the sense of neglecting to abate a nuisance] occasions something offensive to the sight, smell or hearing of another.” *Per J*

of fire hazards) could also be interdicted as nuisances,<sup>47</sup> but as will be explained, the description without further qualification of dangers, or things unsafe, as nuisance is potentially misleading. Nuisance *contra bonos mores* or indecency also requires further discussion.

First, let us deal briefly with Bell's opening comments. The observation on the lack of distinction drawn between what in England at the time would have been termed private, common and public nuisance reflects accurately eighteenth century Scots case law and in particular those cases in which successful pleas for interdict were founded upon nuisance to the wider neighbourhood in combination with alleged invasions of the pursuer's enjoyment of his own property.<sup>48</sup>

The idea that obstructions to public means of commerce and intercourse should be characterised as nuisance seems never fully to have caught on.<sup>49</sup> It is true that this aspect of nuisance is preserved in Whitty's treatment,<sup>50</sup> but there are reasons for scepticism. For one thing, such obstructions could be dealt with in Scots law by invoking rules on encroachment on public right or *purpresture*.<sup>51</sup> There seems no need for Bell to have applied the label "nuisance" and relatively little justification from the case law. There have been very few obstruction cases brought in Scots law in nuisance.<sup>52</sup> Lord President Clyde in *Slater v McLennan* clearly regarded "public nuisance" as English terminology and seems almost to suggest what is probably true, that what had once gone by the name of *purpresture* might now be termed "nuisance" with no change in the law and no particularly good reason for the

Hill-Burton, *On the State of the Law as Regards the Abatement of Nuisances and the Protection of the Public Health, in Scotland, with Suggestions for Amendment*, (1840), p.1. Examples include: *Dowie v Oliphant* 11 Dec 1813 FC; *Trotter v Fairnie* (1830) 9 S 144, (1831) 5 W&S 649 (boiling of whale blubber); *Palmer v Macmillan* (1794) Mor 13188; *Kelt v Lindsay* 8 July 1814 FC; *Lauder v McLagan* 16 June 1815 FC; *Swinton v Peddie* (1837) 15 S 775, (1839) Macl & R 1018 (HL) (slaughtering of cattle in immediate vicinity of houses); *Raeburn v Kedslie* (1816) 1 Murr 1; *Johnston v Constable* (1841) 3 D 1263 (stream engines in tenements).

<sup>47</sup> E.g. *Carrubers Close Proprietors v Reoch* (1762) Mor 13175; *Wood v Sandeman* (1762) Mor 13175; *Lauder v Donaldson* 1788 (unreported) see Hume "Lectures" vol.III 215; *Vary v Thomson* 2 July 1805 FC, Mor "Public Police" App. No.4.

<sup>48</sup> See discussion in Cameron, n.21 above pp 101-102 on *Kinloch v Robertson* (1756) Mor 13163; *Carruber's Close Proprietors v Reoch*; *Wood v Sandeman*; and *Vary v Thomson*.

<sup>49</sup> Whitty, n.9 above para.163: "The basic principles of this branch of Scots law are not well developed."

<sup>50</sup> *Ibid.*, see paras.159 – 168.

<sup>51</sup> E.g. *Cockburn v Ramsay* (1497) Mor 13157; *Forbes v Ronaldson* (1783) Mor 13185; *Montrose Magistrates v Scott* (1761) Mor 13175; *Trotter v Hume* (1757) Mor 12798.

<sup>52</sup> *Donaldson v Pattison* (1834) 13 S 27 involved a dangerous obstruction on a pavement. *Adam v Moir* (1874) 2 R 143 involved an element of anticipated obstruction by a public urinal. There was an element of inconvenient overcrowding of the road by cattle in *Anderson v Aberdeen Agricultural Hall Co* (1879) 6 R 901. In Scotland collisions involving parked vehicles are resolved in negligence with no reference to nuisance. See e.g., *Scott v McIntosh* 1935 SC 199, 1935 SLT 171; *Isbister v J&T Smith* 1948 SLT (Notes) 8; *Campbell v Gillespie* 1996 SLT 503.

change in terminology.<sup>53</sup> Bell's inclusion of obstructions may have been prompted by statute rather than the common law.<sup>54</sup>

Broun's treatment of nuisance classifies it according to specific forms: pollution of air and water; unusual noise; unnatural heat or vibration. To these "typical" forms of nuisance he added a further two categories, nuisance *contra bonos mores* and dangerous nuisances.<sup>55</sup> Turning to nuisance *contra bonos mores* or indecency, to the extent that this was ever a form of nuisance in Scotland it was marginal. While it is true that in one relatively early case, *Scott v Cox*,<sup>56</sup> the drying of cow hides within sight of a public road was interdicted in nuisance as offensive to sight, the only other nuisance case that appears relevant is *Adam v Moir*<sup>57</sup> in which the pursuers objected to the erection outside their shop of a public urinal. The grounds of objection were that this would: interfere with public traffic; darken the pursuers' premises; prevent carts and carriages from drawing up to the doors of the shops; and would be "otherwise offensive to them and their customers." Apart from *Scott* there was only one further Scottish case upon which Bell and Broun founded. In footnote e) to paragraph 974 in Bell it is stated: "In *Paterson v Beattie*<sup>58</sup> it was held that a monument erected in a churchyard to the memory of persons convicted of sedition was not a nuisance." This is a misleading account of the case in which interdict was refused by the majority on the grounds that the proposed erection would not violate such property rights as the pursuers had. Lord Jeffrey listed four potential grounds upon which the pursuers could have advanced their arguments<sup>59</sup> and nuisance was among these, but it was perfectly clear that the arguments were founded upon other bases. The Court was not called upon to determine whether the monument would be a nuisance or not and did not do so.

Dangers also require careful consideration. Broun claimed:

"A person also occasions a dangerous nuisance where the condition of *opera manufacta* on his lands causes danger to the person or property of others; for example, a person occasions a dangerous nuisance if he builds a house close to his neighbour's march fence or to a public road and allows the

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<sup>53</sup> 1924 SC 854 at 858: "If any road user uses the road in such a way. . . as to interfere with other people's use of the road, he commits what in Scotland we recognise as an encroachment on public right (we used to call it *purpresture*) remediable by interdict, or by way of damages, at the instance of the road authority, or of any individual member of the public whose exercise of the public road has been interfered with. In England such interference is recognised as 'public nuisance' and the remedy is by indictment. The differences between our own law and that of England in this matter are differences of remedy, not of principle."

<sup>54</sup> The Turnpike Road Act 1831 1&2 Wm IV c43 s.96 provided for penalties for persons committing nuisances. Although the Act applied only to Scotland the wide ranging concept of nuisance employed belongs firmly to the law of England.

<sup>55</sup> Broun, n.44 above p.1.

<sup>56</sup> 5 July 1810 FC.

<sup>57</sup> (1874) 2 R 143.

<sup>58</sup> (1845) 7 D 561.

<sup>59</sup> *ibid.*, at 578. Readers who appreciate a little humour are directed to the opinion of Lord Mackenzie, at 568-571.

house to get into an unsafe condition, or if he makes a quarry in a similar position and neglects to fence it, or if he excavates his lands so close to the boundary line as to remove the natural support of his neighbour's land."<sup>60</sup>

This passage is an eccentric representation of Scots law as it stood at the time. The authorities cited in support of Broun's view were almost entirely English (criminal) public nuisance cases.<sup>61</sup> It may be noted that he founded neither upon *Cleghorn* nor *Kerr*. While the instances Broun gave would, in England, have attracted the label "nuisance," in Scotland all of these examples called for the invocation of other doctrines.

For example, while interdict against operations posing a fire risk gave rise to some relatively early nuisance cases in Scots law,<sup>62</sup> the extent to which dangerous states of property in general fell to be regarded as nuisances was strictly limited. There were a few interdict cases in which dangers were referred to as nuisances<sup>63</sup> and none in which reparation was sought. Reparation actions arising from dangerous buildings that fell down were litigated without reference to nuisance.<sup>64</sup> In general, dangers that materialised and caused harm were determined in negligence, not nuisance.<sup>65</sup> When injury was occasioned to persons falling into unfenced quarries or holes in general, again, no recourse was made to the doctrine of nuisance.<sup>66</sup> Broun's final example, deprivation of lateral support, confuses nuisance with property law rules. At the time Broun wrote, nuisance played no role in support cases.<sup>67</sup>

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<sup>60</sup> Broun, n.44 above p.75.

<sup>61</sup> *R v Lister* 1875 26 LJ, MC 196; *Hepburn v Lordan* 1865 2 H&M 345, 34 LJ, Ch 293; *R v Muters* 1864 34 LJ, MC 22; *Arnold v Furness Railway Co* 1874 22 WR 613; The Scottish cases were *Vary v Thomson* 2 July 1805 FC, Mor "Public Police" App No 4; The other Scottish case founded upon is *Elgin Road Trustees v Innes* (1888) 14 R 48 and in this case any mention of the word "nuisance" is conspicuous by its absence!

<sup>62</sup> n.47 above.

<sup>63</sup> *Stevenson v Hawick Magistrates* (1871) 9 M 753; *Fleming v Hislop* (1882) 10 R 426, (1886) 13 R (HL) 43; *Ireland v Smith* (1895) 33 SLR 156, 3 SLT 180 (danger to health from dust from chickens); *Fergusson v Ferguson* (1900) 38 SLR 100; *Fergusson v Pollock* (1901) 3 F 1140.

<sup>64</sup> *Hay v Littlejohn* (1666) Mor 13974; *Caledonian Railway Co v Greenock Sacking Co* (1875) 2 R 671. Dangerous buildings in burghs fell under a statutory regime. An Act of Charles II anent Ruinous Houses in Royal Burghs APS 1663 c 12 empowered the Provost and Baillies to enforce repairs or to demolish dangerous buildings. Hill-Burton, n.46 above p.10 notes that this power was exercised during the nineteenth century by the Dean of Guild.

<sup>65</sup> *Sibbald v Lady Rosyth* (1685) Mor 13976; *Farquharson v Gillanders* (1698) 4 Brown's Supp 400; *Gordon v Grant* (1765) Mor 7356; *Mackintosh v Mackintosh* (1864) 2 M 1357; *Caledonian Railway Co v Greenock Sacking Co* (1875) 2 R 671; *Howie v Ailsa Shipbuilding Co Ltd* 1921 SC 1225; *Brierly v Midlothian CC* 1920 2 SLT 80, (1921) 1 SLT 192.

<sup>66</sup> See cases listed at n.26 above.

<sup>67</sup> See *Dunlop v Corbet & Macnair* 20 June 1809 FC; *Robertson v Hamilton's Trustees* (1825) 4 S 456; *Callendar v Eddington* (1826) 4 Murr 108; *Balds v Alloa Colliery Co* (1854) 16 D 870; *McIntosh v Scott* (1859) 21 D 363; *Bargeddie Coal Co v Wark* (1859) 3 Macq 467 (HL); *Taylor v Dunlop* (1872) 11 M 25; *Buchanan*

In short, a state of affairs that threatened a neighbour's property could be interdicted in nuisance. There are also cases in which states of affairs that threatened injury to persons could be interdicted in nuisance.<sup>68</sup> However, where the risk materialised and reparation was sought culpa had to be shown, no reference to nuisance was made, and the operative area of delict was negligence. Bell did not develop his point that what was unsafe was a nuisance and Broun's treatment of dangers simply did not represent the law of Scotland.

### *Nuisance and Culpa*

The need to classify nineteenth century cases as nuisance or negligence really only arises for the purposes of analysis, in the course of trying to make sense of what is generally acknowledged to be a difficult area of the law. Retrospective classification of reparation cases presents problems not least because actions are, of course, neither nuisance nor negligence actions, but actions for damages.

It is important to avoid classification of nuisance according to the different conceptions of a later period. As discussed above, there are difficulties in determining the exact scope of nuisance in the nineteenth century from the literature. Nevertheless there are indicators. First, the status as nuisance of cases brought in respect of anything other than pollution must be questionable bearing in mind that nuisance in the form of encroachment on public right is at best marginal and in the form of indecency is more or less non-existent. Second, the extent to which a case was pled or determined in nuisance will usually be clear from the report although there are cases that present particular difficulties. *Fleming v Gemmill*<sup>69</sup> is a good example of a case in which elements of nuisance and negligence cannot truly be separated.<sup>70</sup>

Third and critically, is the requirement of culpa. Nineteenth century nuisance cases did not require proof of culpa, any case in which such proof was required for liability was therefore not a case of nuisance. The converse is not true. It does not follow that where liability was established, apparently without culpa, that the case was one of nuisance.

Nuisance cases did not require proof of culpa, but this does not support the view sometimes proposed that liability in nuisance was strict. While it is true that liability in nuisance came to be seen as strict in time, this followed

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v *Andrew* (1873) 11 M (HL) 13; *Campbell's Trustees v Henderson* (1884) 11 R 520.

<sup>68</sup> n.63 above.

<sup>69</sup> 1908 SC 340, 15 SLT 691.

<sup>70</sup> This case involved water pollution, but there is no mention of nuisance in the pursuers' pleadings. The circumstances were remarkably similar to *Caledonian Railway Co v Baird & Co* (1876) 3 R 839 in which pollution had arisen from the misuse by tenants of the effluent system installed by the landlords. *Caledonian* was clearly raised and determined in nuisance and was founded upon in *Fleming*. In *Fleming* the ruling in damages against two of the defenders appears to have proceeded on the basis of nuisance, but the award of damages against the remaining defenders was made on grounds that, retrospectively at least, appear more like negligence.

as a result of later developments and did not really come to fruition until into the twentieth century.

Nuisance had its own special accommodation within delictual principles. It was determined in *Duke of Buccleuch v Cowan*<sup>71</sup> that specific proof of culpa was not required in an action based on nuisance. It must be noted that the remedy sought in *Duke of Buccleuch* was interdict, however it appears that the same view came to be taken in reparation cases.<sup>72</sup> No offence was given against the principle, *damnum injuria datum* since nuisance was viewed as a wrong in itself. As Lord Gillies put it directing the jury in *Arrott v Whyte*: “There is no doubt that a man can use his property in the way he thinks best; but it is equally true that he is not entitled to put a nuisance upon it.”<sup>73</sup> According to this analysis, where nuisance was established, an *ex lege* obligation had been breached, a delict had been committed, an unlawful act had taken place. The existence of a nuisance evidenced *injuria*. To require further proof of culpa would have been tautologous.<sup>74</sup>

A nuisance, after all, was more or less bound to cause discomfort or some other form of harm, otherwise it would not have been held as a nuisance. The view advanced here is supported by the test for nuisance as stated by Lord Chief Commissioner Adam in *Hart v Taylor*:

“In a question of nuisance, the first point is, whether the product of the work is noxious or unwholesome; but though it

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<sup>71</sup> (1866) 4 M 475. It was held that the pursuers did not have to put the word “wrongfully” in issue since the commission of a nuisance was itself a wrong.

<sup>72</sup> In *Skene v Maberlys* (1820) 2 Murr 352 there was no plea of culpa or wrongfulness, the action was defended on the argument that there was no nuisance. A jury verdict for the defenders was set aside and a new trial was allowed. In *Collins v Hamilton* (1837) 15 S 895 the pursuers did put wrongfulness in the issues. Lord Cockburn, directing the jury said at 902: The pursuer undertakes to prove loss by nuisance, and that it is wrongfully done. He must establish the three qualities of nuisance, damage and wrong.” The jury returned verdicts for the defenders on both issues. The pursuer had established neither nuisance nor loss. In *Hamilton v Charles Tennant & Co* (1839) 1 D 502 the report is concerned with a bill of exceptions and the competence of a question asked in cross examination. Neither culpa nor wrongfulness were in the issue. In *Ewen v Turnbull’s Trustees* (1857) 19 D 513 the issue proposed by the pursuer included the word wrongfully. The defenders were allowed to prove acquiescence in answer. In *Blantyre v Clyde Navigation Trustees* (1867) 5 M 508, (1871) 9 M (HL) 6 there is no concern with culpa or wrongfulness. The case turned on the interpretation of the Clyde Navigation Acts of 1758, 1840 & 1858. In *Cooper & Wood v North British Railway Co* (1863) 1 M 499, (1863) 2 M 116 the defenders’ plea, that wrongfully (meaning in this context . . . in excess of the powers in the Railways Clauses Consolidation (Scotland) Act 1845 s.16) should be put in issue was repelled. In *Armistead v Bowerman* (1888) 15 R 814 which involved water pollution the case was resolved for the pursuer at first instance on grounds of negligence. This was overturned on reclaiming in a bizarre judgment in which their lordships proceeded as if the laws of nuisance and negligence did not exist.

<sup>73</sup> (1826) 4 Murr 149, 158. Damages and interdict were awarded in this case. The action had been defended on grounds of acquiescence.

<sup>74</sup> *Duke of Buccleugh v Cowan* at 481: “The pursuers having withdrawn the additional issues, the Court approved of the other issues proposed by them, holding that “nuisance” being a species of legal wrong, it would be tautological to insert “wrongfully” in the issues.”

may not be absolutely noxious, still if it renders the enjoyment of life substantially uncomfortable, either in the pursuer's house or grounds, it is a nuisance."<sup>75</sup>

Lord Adam's test corroborates the view that nuisance was primarily concerned with pollution and must cast a shadow of dubiety over the marginal categories, obstruction or immorality, to which it can scarcely have applied.

This analysis of the relationship between nuisance and culpa was made possible by the narrowness of the scope of Scots nuisance and by what may be described as the objectified approach to nuisance that was taken at the time. The focus of inquiry was often upon whether a given activity or state of affairs was or was not a nuisance.<sup>76</sup> Notwithstanding the reservations stated above on his treatment of dangers, nuisances fell within a reasonably well defined taxonomy of recognisable types of invasion as noted by Broun. Accordingly, because courts could identify a nuisance, and because the commission of a nuisance was unlawful in the sense of being a wrong, nuisance was remediable without further proof of culpa. Property harm that did not arise from nuisance did, in the general case, require proof of culpa before liability in reparation could be established.

### Summary

Although there are some cases that present difficulty, it is generally possible to provide a broad classification of nineteenth century case law as falling under either nuisance or negligence. The important point is that care needs to be exercised in the process and there are cases whose classification as nuisance requires supporting arguments that are not always advanced. Retrospective labelling as nuisance of cases that were not, at the time they were determined, considered to be nuisance cases at all has not helped understanding of this doctrine.

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<sup>75</sup> (1827) 4 Murr. 307, at 313-314.

<sup>76</sup> E.g. "Buildings for the boiling of whale blubber are a nuisance" *Dowie v Olphant* 11 Dec 1813 FC; An outside toilet (euphemistically termed "house of office" in the report) is not a nuisance *Clark v Gordon* (1760) Mor 13172; An establishment on the ground floor of a tenement for boiling tripe was a nuisance *Farquhar v Watson* 19 Jan 1813 FC; A chimney that issued smoke seven feet from the pursuer's window was a nuisance *Laing v Muirhead* (1822) 2 S 73; "I know of no case where a hospital has been found to be a nuisance." *per* Lord President Boyle in *Mutter v Fife* (1849) 11 D 303; Bathwater used to irrigate fields was not a nuisance *Lady Willoughby d'Eresby's Trustees v Strathearn Hydropathic Establishment Co* (1873) 1 R 35; An elephant on the public highway was not *per se* a nuisance *Bennet v Bostock* (1897) 13 Sh Ct Rep 50. It is not that certain events or activities were necessarily nuisances as *Frame v Cameron* (1864) 3 M 290 demonstrates. In that case a steam engine in a residential setting was not proved to be injurious or disturbing. "[W]hether an elephant, or a traction engine, or anything else upon the highway is a nuisance is a question of fact, the answer to which must depend on the circumstances of each particular case." *Per* Sheriff Rutherford in *Bennet v Bostock* at 53. "[E]very case depends upon its own circumstances; and that is a nuisance which a jury of intelligent gentlemen think so in the circumstances of each case." *Per* Lord Gillies in *Arrott v Whyte* (1826) 4 Murr 149 at 158.

At the same time, contemporary accounts of the scope of nuisance need some care in their treatment. Broun's first four categories of pollution of air and water, unusual noise and unnatural heat appear to encapsulate the core of nuisance as it operated at the time. Obstructions in public highways and nuisance *contra bonos mores* can be regarded at best as marginal. It is very important to recognise that while dangers could be interdicted in nuisance, property harm or personal injury resultant upon the realisation of a danger required proof of culpa and thus belonged in the law of negligence rather than nuisance.

Liability in nuisance was not strict. The absence of any requirement to show culpa is explained by the status of nuisance as a wrong. So long as the objectified view of nuisance was taken, that a nuisance was something that courts could identify, this rationalisation of nuisance was perfectly coherent and did not offend against the general principle of no liability without fault.

### **The Early To Mid Twentieth Century: Nuisance and Non-Natural User**

A number of factors, taken together, played a role in changing nuisance from the relatively coherent doctrine of the nineteenth century to the comparatively difficult one of the twentieth.

First, conceptions of nuisance changed over the period at the end of the nineteenth and beginning of the twentieth centuries. The objectified view, in which nuisance was seen as a "thing" came to be replaced, gradually, with descriptions of nuisance in terms of the interest invaded. This change can be witnessed when the treatments of nuisance in the 1912 and 1930 editions of Green's Encyclopaedia are compared.<sup>77</sup> The point is of some significance, because while "a nuisance" was something that fell within certain recognised categories of event, an interference with rights incidental to land ownership was a potentially broader conception. It might include interferences that did not possess the characteristics of "a nuisance" in the old sense. Without generally accepted rules to define which interferences were actionable in nuisance and which were not, it is not difficult to see that this conceptual change could facilitate the erosion of what boundaries nuisance possessed and in turn the capture by nuisance of circumstances that belonged properly to other doctrines.

Moreover, nuisance came to be associated with the doctrine of non-natural user through a process that also brought within the potential ambit of nuisance liability for *opera manufacta* and created dangers. The case of *Chalmers v Dixon*<sup>78</sup> is at the root of this development and represents a true confusion of doctrines.

In *Chalmers* damages were sought in respect of harm to crops and the health of the inhabitants of a farm. The source of harm was a smouldering bin on neighbouring land for which the defenders were responsible. The defenders were held liable without proof of specific culpa.

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<sup>77</sup> *Green's Encyclopaedia of the Law of Scotland* (1912) Vol.viii, pp.563-593; (1930) Vol.x, pp.340-387.

<sup>78</sup> (1876) 3 R 461.

Now, a smoking pit bing that polluted the air of neighbouring property to the extent that health was affected and crops were destroyed was a nuisance by any reckoning. Since nuisance was a wrong it would have been tautologous to require further proof of culpa.

However, the circumstances did not allow for disposal in this fashion. This was unlike other nuisance cases. This was not a case in which a factory chimney belched forth smoke. The pit waste was not smoking when the bing was constructed. Inevitably the defenders sought to focus attention on the issue of how combustion had occurred. They had not deliberately created a nuisance. The issue then ought to be whether they had exercised sufficient care to prevent combustion from occurring. In other words were the defenders culpable? In *Chalmers* nuisance and negligence came together.

It can be seen how it would have benefited the defenders to have had the case treated as one of negligence. This would have required the pursuers to aver and prove specific culpa. On the other hand since smoke pollution was the source of harm, the action was raised in nuisance and in nuisance courts would not require pursuers to prove culpa. Had this case involved anticipated harm that had not materialised then, as an easily combustible and presently dangerous *opus manufactum*, the bing could have been interdicted in nuisance in exactly the way that occurred in the later case of *Fleming v Hislop*.<sup>79</sup> Since the danger had materialised and the harm had been done the Court found itself considering the case along negligence lines and resolved the issue in a way that must have seemed ingenious at the time.

The requirement to prove culpa was circumvented by distinguishing *Mackintosh v Mackintosh*<sup>80</sup> in which property harm was caused by fire spreading from neighbouring land on the basis that the source of the fire in *Mackintosh*, muirburn, was a natural operation on land whereas the construction of the bing amounted to a non-natural use of land. This concept was taken explicitly from the English case of *Rylands v Fletcher*.<sup>81</sup> The view that specific culpa need not be proved in respect of a dangerous *opus manufactum* came from *Kerr v The Earl of Orkney*.<sup>82</sup> Through the application of *Kerr* and *Rylands* it was held that the pursuer was entitled to recover damages, without specific proof of culpa, in respect of a dangerous *opus* that represented a non-natural use of land.<sup>83</sup>

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<sup>79</sup> (1882) 10 R 426, (1886) 13 R (HL) 43. See also *Inglis v Shotts Iron Co* (1881) 8 R 1006, (1882) 9 R (HL) 78.

<sup>80</sup> (1864) 2 M 1357.

<sup>81</sup> (1868) LR 3 HL 330.

<sup>82</sup> (1857) 20 D 298.

<sup>83</sup> See Lord Justice Clerk Moncreiff at 464. The rule in *Rylands v Fletcher* has not, in Scotland, invariably been understood to signify liability without culpa. Bell, *Principles*, para.970: "In the class of cases which falls under what English lawyers call the principle of *Fletcher v Rylands*, negligence is still the ground of liability. The only difference is that in such cases the proprietor is doing something upon his property which is in its nature dangerous and not necessary (or usual?) in the ordinary management of the particular kind of property, and he is therefore bound to observe a higher degree of diligence to prevent injury to his neighbour." In *Watt v Jamieson* 1954 SC 56, 57 Lord President Cooper referred to *Rylands* as involving a "special aspect of culpa". Of course, there are other cases in which

Although *Chalmers* was determined in 1876 the consequences of the reasoning employed did not materialise until much later. As a consequence of *Chalmers* and *Rylands* nuisance, bereft of the limited taxonomy associated with the objectified view, came in time to be associated with non-natural use of land, with *opera manufacta* and with created dangers.

There appears to have been some ambivalence about the relationship between nuisance and non-natural user. It was not always clear whether they were different aspects of the same doctrine or entirely separable. Thus, in 1930, what had been the “Nuisance” chapter in earlier editions of Green’s Encyclopaedia became “Nuisance and Non-Natural use of Property”.

The author of the 1930 entry, Mitchell, attempted to rationalise liability for the infringement of natural rights incidental to land ownership in general. He was careful to differentiate damage resulting from the illegal use of property, which he designated “nuisance proper” from damage resulting from extraordinary and non-natural use of property. By illegal Mitchell did not of course mean criminal, but unlawful in the sense established in *Duke of Buccleuch v Cowan*. According to Mitchell’s analysis, in “nuisance proper” the concern of courts should have been with the illegality of the conduct and the issue of negligence need not have been raised. The relevant question was whether the defender had done something which he or she ought not, rather than whether they had exhibited less care than they ought. Mitchell took the view that where damages were sought in respect of extraordinary and non-natural uses of property, negligence could be imputed, much as it was in *Chalmers*. This meant that for physical harm arising from non-natural use of property, liability was strict in the limited sense that there was no requirement to prove specific culpa. Liability in nuisance “proper” was not strict, but arose from the unlawful nature of the defender’s conduct. Liability for acts that were neither wrongful in themselves, *i.e.* not “nuisance proper”, nor extraordinary or non-natural could only be found upon proof of culpa.<sup>84</sup>

This, it is submitted, is a sound analysis given: the currency of authority in which liability for non-natural user was “strict”; the *Duke of Buccleuch v Cowan* accommodation of nuisance within delictual principle; and clear authority that liability in reparation for ordinary uses of land that did not amount to nuisance depended upon the establishment of culpa. Mitchell sought to preserve the integrity of nuisance as it had operated during the previous century. That he was not successful in so doing may be attributed a number of inter-related factors: weaknesses in the distinction between natural and non-natural user;<sup>85</sup> the fact that the key authority on non-natural user in

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*Rylands* liability is regarded as absolute. See, *e.g.* *Giblin v Lanarkshire CC* 1927 SLT 563.

<sup>84</sup> Mitchell, “*Nuisance and Non-Natural Use of Property*” n.77 above, para.692.

<sup>85</sup> The point is well explained by W Stallybrass, (1928) *Torts* 7th ed. quoted in F. McManus, “Liability for *Opera Manufacta* in Scots Law”, 1998 *JR* 282 at 287: “Such a distinction has little in principle to recommend it. What is the natural use of land? Is it natural to build a house on it, or to light a fire? Almost all use of land involves some alteration of its natural condition, and it seems impossible to say how far this alienation may go before the use of the land becomes non-natural or extraordinary, so as to bring the rule in *Rylands v Fletcher* into operation. Moreover, if there is one kind of use more natural than another it is the keeping of

Scots law, *Chalmers v Dixon*, appeared as an authority on nuisance; and the demise of the idea of “nuisance” falling within the limitations of an accepted taxonomy.

By the time Mitchell wrote a tendency had already been demonstrated in the courts to equate nuisance with non-natural user. In *Blair v Springfield Stores*<sup>86</sup> damages were awarded in an action raised in nuisance by a shopkeeper in respect of loss of stock and discomfort and annoyance. The harm was caused by the escape of weevils from the defender’s grain store. Sheriff Welsh held that the knowing storage of grain infested by weevils was an exceptional and unusual act and founding upon *Kerr v Earl of Orkney*, *Chalmers v Dixon* and *Rylands v Fletcher* described the law in the following terms:

“[T]he storage thereof, though quite a lawful act in itself, becomes an exceptional and unusual act, and is such an act as the owners of the store must know, or ought to know, may cause injury to neighbouring proprietors. The storage of such a consignment creates a hazard which did not exist before, and, if damage is done by the escape of weevils from the consignment, then in my view, the persons under whose administration the consignment is stored are responsible, however careful they may have been, to neighbouring proprietors who may have suffered damage.”<sup>87</sup>

Non-natural user cases had the potential to bring within the ambit of nuisance property harm actions that were not restricted according to the nature of the source of harm. Thus, any harmful use of property designated “non-natural” could now be viewed as nuisance, and not just those involving pollution.

It is worth reiterating the point that it is perfectly clear that, notwithstanding Broun and Bell’s inclusion of dangers or things unsafe within their treatments of nuisance, and the fact that dangers could be interdicted in nuisance, during the nineteenth century reparation for dangers that materialised did not proceed in nuisance. This changed in the early twentieth century.

In 1896 alternative issues of fault and nuisance were allowed in *Hay v Waldegrave Leslie*<sup>88</sup> in which the pursuer claimed his horse had bolted in fright at the sight of a traction engine blowing off steam on the road. He sought reparation in respect of injury to himself, his dogcart and the horse. The locomotive was alleged to be a nuisance in terms of the Locomotives Act 1861 s. 13. This statutory provision featured once again in 1924 in *Slater v A & J McLellan*.<sup>89</sup> A householder, whose home and garden had been damaged by burning embers from a cargo of cork that had ignited while being towed by a steam lorry, sought damages. The pursuer had attempted to

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cattle; yet cattle-trespass is a typical instance of the application of this rule of strict responsibility, and it is indeed the historical source of the general principle.”

<sup>86</sup> (1911) 27 Sh Ct Rep 178.

<sup>87</sup> *ibid.*, at 181.

<sup>88</sup> (1896) 4 SLT 124.

<sup>89</sup> 1924 SC 854.

establish fault although there was some difficulty in proving the source of the fire. Lord President Clyde stated:

“[T]his motor and its load of cork dust constituted, as they went along the public road, a manifest source of danger. One of the categories of nuisance is that which is known as a dangerous nuisance...There is, I think, no doubt in these circumstances that the damage of which the pursuer complains was the result of a nuisance – a dangerous nuisance – which was created by the defenders on the public road opposite his house. It is not necessary for him in order to establish his right to damages to appeal to the doctrine of *Rylands v Fletcher*, nor indeed to the law of negligence. His remedy is under the law of nuisance.”<sup>90</sup>

In *Slater* damages were awarded in respect of a dangerous nuisance irrespective of negligence. While there is some authority during this period to show the award of damages on the sole basis of *Rylands*,<sup>91</sup> the concepts of the dangerous nuisance and non-natural user were brought together in *Giblin v Lanarkshire County Council*.<sup>92</sup> The pursuer sought reparation in respect of his mother who had died following a gas leak. Alternative issues of fault and nuisance were allowed. Lord Moncrieff expressed the law in the following terms:

“One who brings a dangerous agent on his land or keeps there anything likely to do damage if it escapes, must keep it at his peril. If there be escape of the dangerous agent and damage ensues, the defenders...are liable as for a legal wrong irrespective of negligence. Under the issue of fault the Court has regard only to the origin of the event; under an issue of nuisance the Court has regard only to the fact of the event as having interfered with a natural right of property irrespective of the origin of any such interference. In supporting a claim founded on nuisance it is accordingly not necessary to put negligence in issue.”<sup>93</sup>

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<sup>90</sup> *ibid.*, at 859. Earlier cases involving sparks from locomotives had been resolved in negligence rather than nuisance. See *Murdoch v Glasgow & South Western Railway Co* 1870 8 M 768; *Port Glasgow & Newark Sailcloth Co v Caledonian Railway Co* (1892) 19 R 608, (1893) 20 R (HL) 35. In 1950 liability in such circumstances was once more resolved in negligence. *Balfour v The Railway Executive* 1950 SLT (Notes) 43.

<sup>91</sup> *Gemmell's Trustees v Alexander Cross & Sons Ltd* (1906) 14 SLT 576. *Rylands* was distinguished in *Marshall v Moncrieffe* 1912 2 SLT 306 and discussed in *Reynolds v Lanarkshire Tramways Co* (1908) 16 SLT 230. In *Durham v Hood* (1871) 9 M 474 *Rylands* had been founded upon by the complainer seeking to interdict blasting operations in a mine. The relevance of *Rylands* to the judgment is not clear, but the extraordinary nature of the charge used did weigh with the Court. In *Clark v Glasgow Water Commissioners* (1896) 12 Sh Ct Rep 13 the pursuers founded upon *Rylands, Kerr & Chalmers* in an unsuccessful argument that they need not prove fault.

<sup>92</sup> 1927 SLT 563.

<sup>93</sup> *ibid.*

The practical effect of this view does not differ from the *Duke of Buccleuch* position in which nuisance is a wrong. The difference is that the view in *Giblin* is founded squarely on *Rylands* and not only that, but on an interpretation of *Rylands* in terms of absolute liability whereas in Scotland the tendency had been to see *Rylands* as a case of inferred negligence.<sup>94</sup>

Rather than the threefold classification favoured by Mitchell, a two fold classification appears to have been in development whereby non-natural use of land and nuisance were placed together. Where land use was not extraordinary or non-natural of course, culpa still required to be proved, so a great deal turned on whether courts viewed a given activity as natural or not. This is seen in cases involving escapes of gas subsequent to *Giblin*. In 1934 in *Miller v Robert Addie & Son* it was determined that:

“the laying of gas pipes by a landlord for the supply of gas to dwelling houses owned by him was a natural and not a non-natural use of his property, and, accordingly, that ownership of an ordinary service pipe for the conveyance of gas to a tenant’s house was insufficient, *per se*, and without proof of negligence, to render the landlord liable for injury resulting to the occupants of the house through an escape of gas from the pipe.”<sup>95</sup>

A further unsuccessful attempt to argue that a gas supply was a non-natural use of land falling within the principle of *Rylands* was made in 1948 in *McLauchlan v Craig*.<sup>96</sup>

The emergent two fold classification between nuisance and non-natural user on one hand and negligence on the other could not prove satisfactory in the long run, because the distinction between natural and non-natural user was not easily drawn. So long as the belief that it could be drawn persisted,

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<sup>94</sup> See n.83 above. The view of *Rylands* taken in *Giblin* followed *Midwood & Co Ltd v Manchester Corporation* [1905] 2 KB 597; and *Charing Cross Electricity Supply Co Ltd v Hydraulic Power Co* [1914] 3 KB 772. Lord Moncreiff at 564 quoted Collins MR in the latter case as follows: “It is not having water in the pipes which is the legal wrong, it is not even subjecting water in pipes to the very high pressure necessary for the defendant’s undertaking that is the legal wrong, it is letting the water escape.” This view of allowing the escape as a wrong *per se* may be contrasted with the interpretation of *Rylands* found in Bell, *Principles* para.970 and may be compared with the Scottish view of nuisance as something in itself wrongful. Per Sheriff Donald in *Spiers v Newton-on-Ayr Gas Co Ltd* (1940) 56 Sh Ct Rep 226, 234: “The doctrine of things dangerous in themselves finds its chief expression in the celebrated English case of *Rylands v Fletcher* and there is a noticeable tendency in distinguished writers, not only south of the Border, to overlook Lord Justice-Clerk Moncreiff’s opinion. . . in *Chalmers v Dixon* that negligence is still the fundamental ground of liability, although it may be inferred from various circumstances.” See also W.A. Elliott, “What is Culpa?” 1954 *JR* 6 pp 22-26.

<sup>95</sup> 1934 SC 150, 1934 SLT 160. The quote is taken from the rubric. This rubric was cited with approval by Lord Russell in *McLauchlan v Craig* 1948 SC 599, 1948 SLT 483 at 489.

<sup>96</sup> *ibid.* In *McLauchlan* Lord President Cooper launched a scathing attack on *Rylands* at 490-491. See also *Spiers v Newton-on-Ayr Gas Co Ltd* n.94 above. The natural/ non-natural user distinction was also considered in *Gordon v Huntly Lodge Estates Co Ltd* (1946) 56 Sh Ct Rep 112.

criteria existed to differentiate nuisance from negligence. Ordinary uses of land gave rise to liability in negligence, extraordinary or non-natural uses of land gave rise to liability in nuisance. When non-natural user fell out of favour it took with it the basis for the distinction, and after this occurs we see further expansion in the scope of nuisance into circumstances once litigated in negligence.<sup>97</sup>

As a final point it may be added that non-natural user and reparation for dangerous nuisances served to distort perceptions of Scots nuisance. In the interests of coherent development it is perhaps unfortunate that during the early to mid twentieth century there was not one single reported case in which reparation was sought in nuisance in respect of pollution after *Fleming v Gemmill* in 1908.<sup>98</sup> The rationalisation effected between nuisance and delictual principle in *Duke of Buccleuch v Cowan* was given little or no opportunity to develop and become generally accepted. Instead, focus shifted from pollution to dangerous land uses. The idea of nuisance as a wrong *per se* appears more or less forgotten, and the notion of liability irrespective of fault gained ground.

### **Watt v Jamieson**

In the 1950's what may be thought of as a conscious attempt to clarify Scots nuisance was taken by Lord President Cooper sitting in *Watt v Jamieson*,<sup>99</sup> in the Outer House.

*Watt* was a reparation action for an intentionally conducted activity. Damages were sought in respect of physical harm to the upper floors in a tenement, namely: damp in interior walls; discolouration and disintegration of stonework; crumbling of brickwork and plaster; and dry rot caused by the fact that the defender had installed a gas water heater in the lower flat connecting it to the flue in the gable. The emissions contained water vapour impregnated with sulphuric acid. The installation of the heater was a deliberate act done apparently with no regard to the consequences.

Lord Cooper ended the association between nuisance and non-natural user by the fashion in which he disposed of the defender's proposition that: "an action for nuisance will not lie in Scotland where the type of user complained of involves only a normal, natural and familiar use of the property." This argument brought the issue to a critical point, had it found favour with the

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<sup>97</sup> See p.258 below.

<sup>98</sup> Indeed, in comparison with the nineteenth century there were relatively few interdict actions raised in nuisance during the same period. Research has revealed only 12 such reported cases during the period 1900 to 1950: *Wilson v Gibb* (1902) 10 SLT 293; *Harvie v Robertson* (1903) 5F 338, 10 SLT 581; *Midlothian v Pumpherson Oil Co Ltd* (1903) 6 F 387, 11 SLT 557; *Richmond (Duke of) v Lossiemouth Burgh* (1904) 12 SLT 116; *Allison v Stevenson* (1908) 24 Sh Ct Rep 214; *Rennie v North British Railway Co* (1910) 26 Sh Ct Rep 100; *McEwen v Steedman & McAlister* 1912 SC 156, 1913 SC 761, 1913 1 SLT 298; *Maguire v Charles McNeil Ltd* 1922 SC 174, 1922 SLT 193; *Simpson v Millar* (1923) 39 Sh Ct Rep 182; *Buchan v Stephen's Representatives* 1946 SC 39, 1946 SLT 82; *Ben Nevis Distillery (Fort William) Ltd v North British Aluminium Co Ltd* 1948 SC 592, 1948 SLT 450; *Gavin v Ayrshire CC* 1950 SC 197, 1950 SLT 146.

<sup>99</sup> 1954 SC 56.

Court, the doctrine of non-natural user could have occluded nuisance altogether. Lord Cooper rejected the defender's contention. The focus of concern in nuisance was to be not on the nature or reasonableness of the defender's use of land, but on the tolerability of the defender's conduct as seen from the victim's point of view.

Thus, Lord Cooper imposed upon the law of nuisance the *plus quam tolerabile* requirement. This measures the gravity of the harm and taking all the facts and circumstances into account may be used to determine whether or not nuisance is established. Is the disturbance to which the pursuer is subjected more than he or she ought reasonably to tolerate?

Lord Cooper defined nuisance in the following terms:

“[I]f any person so uses his property as to occasion serious disturbance or substantial inconvenience to his neighbour or material damage to his neighbour's property, it is in the general case irrelevant to plead merely that he was making a normal and familiar use of his own property. The balance in all such cases has to be held between the freedom of a proprietor to use his property as he pleases and the duty on a proprietor not to inflict material loss or inconvenience on adjoining proprietors or adjoining property.”<sup>100</sup>

The express inclusion of material damage along with serious disturbance and substantial inconvenience as forms of harm actionable in nuisance follows from the harm alleged in *Watt* and indicates that physical harm could be an incidental effect of nuisance, as indeed it was in the nineteenth century nuisance cases in which damages were sought. To this extent, Cooper's definition may be seen as a timely update to that provided one hundred and twenty seven years earlier by Lord Chief Commissioner Adam.<sup>101</sup>

Unfortunately there was an unforeseen effect. Although there was now criteria to establish the existence of nuisance in the form of the *plus quam tolerabile* test, there was nothing really to differentiate circumstances amenable to resolution in nuisance and negligence respectively. The argument has been put that the *plus quam tolerabile* test is inapplicable in cases of unintentional harm, but this argument was not advanced until long after *Watt*.<sup>102</sup> *Watt* was a case of intentional harm, but Lord Cooper said nothing to suggest that nuisance should be restricted to such cases. Neither did he re-establish explicitly the idea of nuisance as a wrong in itself.

Nuisance cases were not culpa cases, and the idea that had originated with non-natural user cases, that liability in nuisance was strict persisted. While there had been some broadening in scope in the period before *Watt* so that reparation for dangerous operations could competently be sought in nuisance, the period following *Watt* saw further expansion. Since material harm to property now fell within the definition of nuisance, since material harm would more or less always be *plus quam tolerabile*, since culpa,

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<sup>100</sup> *ibid.*, 58.

<sup>101</sup> Above, pp.248-249.

<sup>102</sup> Not until Whitty's treatment of nuisance in the *Stair Memorial Encyclopaedia* in 1998. See Whitty, n.9 above paras.17, 77, 89, 104, 105, 106 in (2001) Reissue.

apparently, did not have to be proved and moreover since nuisance was now unencumbered by any perception that it necessarily involved extraordinary or non-natural land uses, it is perhaps unsurprising that actions that would once have been raised in negligence came to be founded upon nuisance.

### Modern Developments

Following *Watt* the next major judicial development of Scots nuisance came in 1985 in *RHM Bakeries v Strathclyde Regional Council*. In the intervening years between these two cases there was no effective check on the scope of nuisance and by the time of *RHM* nuisance had become more broadly associated with property harm arising from the use of property. Not only were reparation claims brought in nuisance in circumstances that would once have given rise to actions founded in negligence, particularly flooding from burst pipes or other operations on water not involving pollution,<sup>103</sup> but nuisance had also been invoked in cases arising from deprivation of support.<sup>104</sup> This represents a significant increase in the scope of nuisance and an encroachment upon territory previously held by other doctrines.

Scots nuisance in the modern context is by no means limited to pollution, in fact the majority of reported reparation cases since 1951 concern property damage through flooding. In this period there is only one reported reparation case involving noise,<sup>105</sup> two involving property harm caused by vibration<sup>106</sup> and three where the nature of harm was water pollution.<sup>107</sup> One further reparation case raised, *inter alia* in nuisance involved a rather personal form of pollution.<sup>108</sup> A further change in the operation of the nuisance doctrine is the increase in reparation cases relative to interdict actions. In the period 1976 to 2000 reparation cases outnumbered interdict cases fourteen to seven.

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<sup>103</sup> See n.34 above.

<sup>104</sup> n.67 above cites nineteenth century support cases. Twentieth century support cases raised in negligence were: *Hill's Trustees v Edinburgh Magistrates* 1912 1 SLT 448; *McCormick v Fife Coal Co Ltd* 1931 SC 9, 1930 SLT 747; *Angus v NCB* 1955 SC 175, 1955 SLT 245; *Thomson v St Cuthbert's Cooperative Association Ltd* 1958 SC 380, 1959 SLT 54; *Kerr v McGreavy* 1970 SLT (Sh Ct) 7; *Doran v Smith* 1971 SLT (Sh Ct) 46; *G.U.S. Property Management Ltd v Littlewoods Mail Order Stores Ltd* 1982 SC (HL) 157, 1982 SLT 533. Support cases raised in nuisance, in some cases with alternative pleadings in negligence were: *Duncan's Hotel (Glasgow) Ltd v J&A Ferguson Ltd* 1974 SC 191; *McNab v McDevitt* 1971 SLT (Notes) 41 (in this case there were elements of noise, vibration and dust from machinery); *Lord Advocate v Reo Stakis Organisation Ltd* 1980 SC 203, 1981 SC 104, 1984 SLT 140 (structural damage caused by vibrations from defenders' piling operations); *Borders RC v Roxburgh DC* 1989 SLT 837; *Kennedy v Glenbelle* 1996 SC 95, 1996 SLT 1186, 1996 SCLR 411.

<sup>105</sup> *Shanlin v Collins* 1973 SLT (Sh Ct) 21.

<sup>106</sup> *Lord Advocate v Reo Stakis Organisation Ltd* 1980 SC 203, 1981 SC 104, 1984 SLT 140; *Steel-Maitland v British Airways Board* 1981 SLT 110. This case involved an additional allegation of air pollution in the form of droplets of aviation fuel from airliners.

<sup>107</sup> *Noble's Trustees v Economic Forestry (Scotland) Ltd* 1988 SLT 662; *Mull Shellfish Ltd v Golden Sea Produce Ltd* 1992 SLT 703; *British Waterways Board v Moore & Mulheron* 1998 GWD 11-569 (Sh Ct).

<sup>108</sup> The averments in *Gray v Dunlop* 1954 SLT (Sh Ct) 75 involved the pouring from a window of a pot of urine over an eleven year old boy.

The interdict cases reported since 1951 show little or no change in the operation of nuisance since the nineteenth century. Interdict was sought in respect of: noise or anticipated noise in six cases<sup>109</sup>; water pollution in three cases;<sup>110</sup> air pollution or smells in four cases;<sup>111</sup> and against blasting operations causing property harm in one case.<sup>112</sup> In *Rae v Musselburgh Town Council*<sup>113</sup> declarator and specific implement were sought to abate flooding containing sewage.

The diminution in the numbers of traditional interdict actions can probably be accounted for by the existence of statutory regimes. Historically, the introduction of Public Health legislation in the mid nineteenth century and the development of planning regimes have reduced the importance of the common law remedy. The abatement of nuisance under current statutory regimes<sup>114</sup> may be effected by local authorities or the Scottish Environmental Protection Agency. Accordingly the need for common law actions is not what it once was.

Regarding reparation actions, while the scope of nuisance has broadened to include harm caused by dangerous operations, by flooding and by deprivation of support, it is notable that it has not broadened further. Scots law has never reached the position where property harm in general caused by operations on property is regarded as nuisance.

### **Culpa**

In *RHM Bakeries* it was determined that liability for reparation in nuisance under the common law was not strict, but depended upon culpa. However, as Lord President Hope said of *RHM* in the 1996 case of *Kennedy v Glenbelle*:

“But the analysis of the authorities in that case did not go into the difficult question as to what types of delictual conduct on the part of the defender, amounting to culpa or fault on his part, are actionable on the ground of nuisance and what types are actionable by reference to the ordinary principles of negligence.”<sup>115</sup>

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<sup>109</sup> *Fergusson v McCulloch* 1953 SLT (Sh Ct) 113 (noise and vibration from sawmill); *Skilbeck v Beveridge* 959 SC 313, 1959 SLT 342; *Central Motors (St Andrews) Ltd v St Andrews Magistrates* 1961 SLT 290 (noise and obstruction); *Murdoch v Airdrie Dean of Guild Court* 1967 SLT (Sh Ct) 4; *Webster v Lord Advocate* 1984 SLT 13, 1985 SLT 361; *Cumnock & Doon Valley DC v Dance Energy Associates Ltd* 1992 GWD 25-1441 (Sh Ct).

<sup>110</sup> *Elderslie Estates v Gryfe Tannery Ltd* 1959 SLT (Notes) 71; *McColl v Strathclyde Regional Council* 1983 SC 225, 1983 SLT 616 (in this case interdict was sought, unsuccessfully, in respect of fluoridation of the domestic water supply); *Hugh Blackwood (Farms) Ltd v Motherwell DC* 1988 GWD 30-1290.

<sup>111</sup> *Hands v Perthshire CC* (1959) 75 Sh Ct Rep 173; *Forth Yacht Marina Ltd v Forth Road Bridge Joint Board* 1984 SLT 177 (the petitioners complained of property damage to boats and marina caused by abrasive materials falling from the bridge above during maintenance work); *Barr & Stroud Ltd v West of Scotland Water Authority* 1996 GWD 36-21236 (OH).

<sup>112</sup> *Banks v Fife Redstone Quarry Co Ltd* 1954 SLT (Notes) 77.

<sup>113</sup> 1973 SC 291, 1974 SLT 29.

<sup>114</sup> E.g. under the Environmental Protection Act 1990.

<sup>115</sup> 1996 SCLR 414D.

The defenders' plea in *Kennedy*, that an action for damages in nuisance could not succeed without proof of negligence, provided the Court with the opportunity to deal with this unfinished business. Lord Hope proceeded by differentiating between nuisance and negligence as follows:

“A claim for damages for nuisance is a delictual claim, as it does not depend for its existence on any contract. It arises where there is an invasion of the pursuer's interest in land to an extent which exceeds what is reasonably tolerable. The *plus quam tolerabile* test is peculiar to the liability in damages for nuisance. Where that test is satisfied and culpa is established, the requirements for the delictual liability are fulfilled. Liability in damages for negligence, on the other hand, depends on a failure to take reasonable care where there is a foreseeable risk of injury. That is another species of delictual liability, the basis for which also depends upon culpa.”<sup>116</sup>

So nuisance is established by measuring the gravity of the harm through the *plus quam toilerabile* requirement introduced in *Watt* and affirmed in *Kennedy*. No liability in damages arises unless culpa also can be shown, but culpa is not synonymous with negligence, negligence is a species of culpa separate from nuisance. Lord Hope continued by discussing delictual liability in general:

“The essential requirement is that fault or culpa must be established. *That may be done by demonstrating negligence, in which case the ordinary principles of the law of negligence will provide an equivalent remedy.* Or it may be done by demonstrating that the defender was at fault in some other respect. This may be because his action was malicious, or because it was deliberate in the knowledge that his action would result in harm to the other party, or because it was reckless as he had no regard to the question whether his action, if it was of a kind likely to cause harm to the other party, would have that result. Or it may be – and this is perhaps just another example of recklessness – because the defender has indulged in conduct which gives rise to a special risk of abnormal damage, from which fault is implied if damage results from that conduct . . . in each case personal responsibility rests upon the defender because he has conducted himself in a respect which is recognised as inferring culpa by our law. So what is required is a deliberate act or negligence or some other conduct from which culpa or fault may be inferred.”<sup>117</sup>

In averring “a deliberate act, done in the knowledge that harm would be the likely result” the pursuer's case in nuisance was held relevant. This formula has been followed successfully in subsequent cases.<sup>118</sup> It appears from

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<sup>116</sup> *ibid.*, 414F-G.

<sup>117</sup> *ibid.*, 416D, italics added.

<sup>118</sup> *Anderson v White* 2000 SLT 37; *Powrie Castle Properties v Dundee CC* 2001 SCLR (Sh Ct) (Notes) 146. There are also subsequent nuisance cases in which pleadings were directed at an alleged failure to take care. See *The Globe*

*Kennedy* that harm arising from intentional conduct in the sense of a deliberate act is actionable in nuisance whereas unintentionally caused harm is actionable in negligence. The issue raised by Whitty, concerning the applicability of the *plus quam tolerabile* test in cases of unintentional harm<sup>119</sup> is resolved. The *plus quam tolerabile* requirement applies in every case of nuisance as Lord Cooper surely intended it to, because, following *Kennedy*, nuisance is not a relevant head of claim for negligently caused harm.

The sense in which liability in nuisance is described as *intentional* requires further comment. It appears clear that it is not meant that the act complained of was intended to harm the victim. In the model of culpa applied in *Kennedy* any such action would more accurately be described as malicious. According to this model an act is intentional in the sense that it is deliberately conducted in the knowledge that harm to the pursuer will be the consequence. It is necessary to explain the model of culpa applied by the Court.

Lord Hope founded upon the treatment of culpa presented in Whitty.<sup>120</sup> Whitty had derived this model from the American Second Restatement of the Law of Torts.<sup>121</sup> In order to understand this model it is necessary to see culpa in terms of a continuum.<sup>122</sup> At one end of the continuum is malice where the delinquent sets out to harm the victim. Moving down the continuum intentional conduct is a deliberately conducted activity where harm to the victim is a virtual certainty. As the likelihood of harm lessens to highly probable, but less than substantially certain, conduct is described as reckless. Where an activity gives rise to a mere risk of harm then conduct is negligent where the risk materialises as a consequence of failure to exercise the requisite degree of care.

Because culpa is seen as operating on a continuum it can be seen that there is no clear demarcation between liability for intentional and unintentional harm. These two forms meet somewhere under the cloak of recklessness. The difference may be explained by the distinction between an act that bears a foreseeable risk of harm if conducted without sufficient care and one that will most likely cause harm irrespective of care taken.

Lord Hope found support for this view of fault in Scots authority. The following dicta are quoted in his opinion in *Kennedy*.

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*(Aberdeen) Ltd v North of Scotland Water Authority* 2000 SC 392, 2000 SLT 392, 2000 SLT 674, sheriff court proceedings reported *sub nom Cansco International plc v North of Scotland Water Authority* 1999 SCLR 494. For analysis of this case see n.20 above.

<sup>119</sup> See n.102 above.

<sup>120</sup> Whitty, n.9 above (1988) paras.2087, 2089. See paras.87, 89 in (2001) Reissue.

<sup>121</sup> American Law Institute 1979.

<sup>122</sup> Whitty "Nuisance" 2001 para.89. cf J.J. Gow, n.33 above p.20: "[C]ulpa is much more comprehensive [than legal negligence], capable of containing at one end legal negligence of the most technical nature and at the other end, what, to the uninformed, appears to be strict or absolute liability. In brief *damnum plus culpa* does not mean that in Scots law of reparation there is no liability without legal negligence, or there is no liability without fault; it does mean that there is no liability without legal fault and legal fault there may be even where the most censorious could find not even carelessness."

“If a man puts upon his land a new combination of materials, which he knows, or ought to know, are of a dangerous nature, then either due care will prevent injury, in which case he is liable if injury occurs for not taking that due care, or else no precautions will prevent injury, in which case he is liable for his original act in placing the materials upon the ground.”<sup>123</sup>

“If the necessary or natural result of the blasting was to cause structural damage to the pursuers’ property, although there was no want of care or skill in the conduct of the operations, then the defenders were not, in my judgment, entitled to carry on the operations at all, because no man is entitled to cause an explosion in his property, the necessary or natural result of which is to blow down or injure his neighbour’s house. On the other hand, if injury to the pursuers’ buildings was not a necessary or natural result of the blasting, but injury in fact resulted, the inference is that the operation was negligently or unskillfully conducted.”<sup>124</sup>

“A landowner will be liable to his neighbour if he carries out operations on his land which will or are likely to cause damage to his neighbour’s land however much care is exercised. Similarly will a landowner be liable in respect of carrying out operations, either at his own hand or at the hand of the contractor, if it is necessary to take steps in the carrying out of those operations to prevent damage to a neighbour, and he, the landlord, does not take or instruct those steps. In the former case the landowner’s culpa lies in the actual carrying out of his operations in the knowledge, actual or implied of their likely consequences. In the latter case culpa lies in not taking steps to avoid consequences which he should have foreseen would be likely to flow from one method of carrying out the operation.”<sup>125</sup>

It is submitted that it was Lord Hope’s intention to designate nuisance as the appropriate doctrine where property harm results from deliberate acts which will or are likely to cause harm irrespective of care exercised and to allocate to the law of negligence harm attributable to a failure to exercise care where such care would have prevented that harm.<sup>126</sup> Regarding the form of culpa relevant to nuisance, Lord Hope appears to have located this towards the

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<sup>123</sup> Per Lord Justice-Clerk Moncreiff in *Chalmers v Dixon*, n.78 above at 464 quoted in *Kennedy* at 415C.

<sup>124</sup> Per the Lord Ordinary (Low) in *Edinburgh Railway Access & Property Co v John Ritchie & Co*, (1903) 5 F 299 at 302 quoted in *Kennedy* 415D.

<sup>125</sup> Per Lord Jauncey in *Nobles Trustees v Economic Forestry (Scotland) Ltd* 1988 SLT 662 at 664A-B quoted in *Kennedy* 415 F-G.

<sup>126</sup> The decision in *British Waterways Board v Moore & Mulheron Contracts Ltd* 1998 GWD 11-569 (Sh Ct) is contrary to the argument pursued in this paper. Reparation was awarded in respect of a dangerous nuisance, diesel oil stored in tanks near a canal which, having been tampered with, leaked into the water. Culpa consisted in the situation of the tank, insufficient protection and the defenders’ awareness of the risk of tampering. Sheriff Morrison considered that the pursuers could have succeeded in negligence as well.

reckless rather than the malicious end of the intentional part of the continuum. It also appears from the dicta cited above that there is no need to inquire into the state of mind of the defender to determine his or her knowledge. Just as negligence is concerned with what the reasonable person in the defender's position ought to have foreseen when directing his mind to the likely consequences of his conduct, so too in this form of intentional liability, courts will impute constructive knowledge.

There is of course scope to argue that a defender did not and could not have known that a particular consequence would transpire. We do not yet have case law on this point. When the issue does emerge, as doubtless it will given time, Scots courts should avoid the English solution of imposing a requirement of *reasonable foreseeability* as happened in *Cambridge Water Co v Eastern Counties Leather*,<sup>127</sup> simply because this terminology belongs properly to negligence and its use in the context of Scots nuisance will serve only to confuse the doctrines once more.

In the context of damages claims at least, nuisance can now be seen as a nominate delict of intention. Otherwise, if negligence is a relevant form of culpa, there is no effective check on the scope of nuisance. While it is arguable that the ramifications of the view of culpa taken in *Kennedy* extend beyond nuisance and inform delictual theory in a more general sense there is no need to pursue this point here. For present purposes it can be said that nuisance, like other intentional delicts, has its own peculiar rules for liability in damages. While the view taken of intention here may not meet with universal approval it is surely less controversial than the presumption of malice found in defamation in which malice is inferred from the defamatory nature of the offending statement.<sup>128</sup> Similarly we know, from *Reid v Mitchell*<sup>129</sup> that a directed intention to cause harm is not required to found liability in damages for assault.

It may be that intention as described here would not appeal to lawyers in the English jurisdiction.<sup>130</sup> It may, however find parallels in other jurisdictions. For example in their text on the (South African) Law of Delict, Neethling, Potgieter and Visser describe three forms of intention, two of which appear relevant in the present analysis.

“Indirect intent . . . is present where a wrongdoer directly intends one consequence of his conduct but at the same time has knowledge that another consequence will unavoidably or inevitably occur. The causing of the second consequence is accompanied by direct intent.”<sup>131</sup>

This is similar to *Kennedy* style intention inasmuch as the defender is liable in delict for the second undesired consequence as well as for the first, desired consequence. However, in the example given in the text, the direct intent of the actor is to shoot a man and the indirect consequence is the damage to the

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<sup>127</sup> [1994] 2 AC 264, [1994] 1 All ER 53.

<sup>128</sup> See K.McK. Norrie, *Defamation and Related Actions in Scots Law* (1995), discussion p.7.

<sup>129</sup> (1885) 12 R 1129.

<sup>130</sup> See e.g. P. Cane, “Mens Rea in Tort Law” (2000) 20 *OJLS* 533.

<sup>131</sup> J. Neethling, J.M. Potgieter, P.J. Visser, *Law of Delict* (2001), p.123.

window through which he shoots. The direct intent in nuisance, to carry out some operation on property for one's own benefit is not *per se* wrongful, but only becomes so because of the invasion of a neighbour's rights.

The next form of intention in South Africa, *dolus eventualis*, appears closer to the *Kennedy* formulation.

“*Dolus eventualis* . . . is present where the wrongdoer, while not desiring a particular result, foresees the possibility that he may cause the result and reconciles himself to this fact; that is, he nevertheless performs the act which brings about the consequence in question.”<sup>132</sup>

It is submitted that classically, nuisance actions are of this type. The defender carries out an activity, either regardless of neighbours' interests or in the belief that the degree of interference will not amount to a wrong. The difference between intention in *Kennedy* and *dolus eventualis* is that in the latter, knowledge of the harmful consequence must be subjective and actual. In Scotland it appears that knowledge can be treated objectively. The South African authors consider that objective knowledge belongs properly to recklessness which they equate with gross negligence.

Of course in *Kennedy*, the Court applied an American and not a South African model. The present point in considering South African law is to demonstrate that the concept of intention need not necessarily be restricted to desired results. A further parallel may be drawn with the German law concept *Rechtswidrigkeit*, meaning unlawfulness in the sense of a violation of a person's legal interests without lawful excuse. Of this concept Markensius writes:

“The traditional school of thought on the matter, which still enjoys much support with the courts, takes the view that the element of unlawfulness is automatically satisfied whenever one of the interests or rights enumerated in paragraph 823 BGB<sup>133</sup> has been violated . . . Unlawfulness, in other words, depends on the harmful result.”<sup>134</sup>

While *Rechtswidrigkeit* is a concept of broader application, it can be seen that liability in nuisance is precisely of this order. The law of nuisance stipulates comfortable enjoyment of property, free from serious disturbance and substantial inconvenience as a legally protected interest. The invasion of this interest through deliberate conduct was described by Mitchell as “illegal,” equally we might describe it as unlawful. The concept of *rechtswidrigkeit* accords harmoniously with the *Duke of Buccleuch v Cowan* view in which nuisance is seen as a wrong *per se*.

*Rechtswidrigkeit* accords equally well with the modern position. Nuisance normally consists of acts that would be perfectly lawful were it not for the

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<sup>132</sup> *ibid.* 124.

<sup>133</sup> 823 BGB states: “A person who wilfully or negligently injures the life, body, health, freedom, property, or other right of another contrary to law is bound to compensate him for any damage arising therefrom.”

<sup>134</sup> B.S. Markensinis, *The German law of Obligations*, 3<sup>rd</sup> ed., (1997) vol.II, p.68.

fact that a neighbour has suffered an infringement of his or her right. Unlawfulness is judged by results, given the circumstances is the harm more than reasonably tolerable? If so, nuisance is established and the requirements of culpa necessary for liability in reparation can be satisfied providing it can be established that the harm arose from a deliberate act or course of conduct undertaken in circumstances where the defender ought to have known that the harm would occur.

### **Conclusion**

*Kennedy* does much to restore nuisance not only to general coherence, but also preserves to a large extent the theoretical integrity of the doctrine as it operated prior to the confusions that arose during the early 20<sup>th</sup> century. Given the developments in the scope of nuisance and the fact that damages actions appear to have become the norm rather than the exception, the attainment of coherence must be regarded as a considerable achievement.

The nature of the achievement is in the limitation of nuisance. At one time nuisance was limited by the idea that courts could determine what was and what was not, a nuisance. Later, limitation appeared in the form of the distinction between ordinary and extraordinary or non-natural land uses. Now the limitation is to be found in the difference between intentional and unintentionally caused harm albeit intention is to be understood in a specific form which may or may not be peculiar in Scots law to liability in nuisance.

The practical implications in court are that pleadings must be directed, not at any failure to take care, but at the objectionable act itself. There will be cases in which the knowledge of the defender may be easily presumed and one day no doubt, there will be a case in which the defender's knowledge presents much difficulty. Where the culpability of the defender is alleged in terms of a failure to take care the action should be raised not in nuisance, but in negligence.

## INFORMED CONSENT THROUGH THE BACK DOOR?

(CASE NOTE: *Chester v Afshar* [2004] 4 All ER 587)

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### Introduction

*Chester v Afshar*<sup>1</sup> represents the most recent House of Lord's case on the issue of negligent liability for failure to disclose information, and has arguably provided the most significant development in this field since 1985.<sup>2</sup> Historically, the majority of legal debate has surrounded the standard of care in medical disclosure cases and the amount of information patients are entitled to in order that they can make an informed decision. However, the issue here was one of causation and how, if indeed at all, legal rules can be manipulated as a means of vindicating patient autonomy.

### The Facts

Miss Chester suffered from significant motor and sensory disturbance in her lower body and limbs after a spinal operation carried out by the defendant surgeon, Mr. Afshar. She had been suffering from intolerable back pain for a number of years which had previously been controlled by conservative non-invasive treatment. As a result of serious deterioration of her spinal disks, she agreed to a consultation with Mr. Afshar with a view to the discussion of surgery. It was maintained by the claimant that this appointment was only ever agreed to on the basis that it would be a mere exploratory conversation about the desirability of surgery or otherwise. During the consultation, upon receipt of an MRI scan, Mr. Afshar was of the opinion that continuation of conservative treatment was no longer viable and that surgery was mandatory due to the potential for increasing and severe dilapidation should the condition be left untreated. Accordingly the claimant reluctantly agreed to undergo the recommended procedure at the next available opportunity. The operation was carried out without any negligence on the part of the defendant. However, sadly for Ms. Chester the small risk of *cauda equina* damage subsequently eventuated leaving the claimant severely disabled. The basis for the claim in negligence centred on Mr. Afshar's failure to disclose this risk and whether it could be proved that this omission had caused Ms. Chester's injury.

At trial the issue of breach of duty was dealt with in a straightforward manner. There was conflicting evidence from both claimant and defendant

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<sup>1</sup> [2004] 4 All ER 587.

<sup>2</sup> 1985 was when the first medical disclosure case was heard before the House of Lords and the majority defined the standard of care within the scope of the *Bolam* test. *Sidaway v Bethlem Royal Hospital Governors* [1985] 1 All ER 643.

about the true dynamics of the consultation. The defendant claimed he had discussed all the risks with the patient in accordance with the accepted practice of the profession at the time. This included the risk of *cauda equina*, haemorrhage and infection. Nevertheless, the patient asserted that she was not given any substantial information about the risks upon which to make an informed choice about whether or not to proceed. She claimed the consultant dismissed her queries about risks in a flippant and off-the-cuff manner in joking 'I haven't crippled anybody yet.'<sup>3</sup> In situations like this there are often three sides to every story, the claimant's side, the defendant's side, and the truth. This makes it very difficult for the courts to establish what has actually passed between doctor and patient in terms of dialogue and thus it has to be resolved largely on evidential issues. In this case the trial judge clearly felt compelled to believe Ms. Chester. Thus, as the risk stood at roughly one to two per cent, there was no difficulty in concluding that the defendant had breached his duty of care by falling below the reasonable standard of disclosure associated with the profession at the time.

The remaining issue for the court was whether the consultant's omission provided a sufficient basis for establishing a causal link between the breach and the resultant harm. Fundamental legal principle dictates that in order to establish causation it is for the patient to demonstrate, on the balance of probabilities, that had they been given the relevant information about the risks they would have declined the operation. Ordinarily this would not prove too much of a problem where there is sufficient information to reach a conclusion on this issue. That is, where there is enough evidence for the judge to form an opinion as to what the patient would have done.<sup>4</sup> Yet, in *Chester* the court was faced with a relatively new set of facts in that they were unable to form a view on the claimant's future conduct.

The trial judge, Taylor J. found in favour of the defendant on the issue of causation stressing that all the patient had to prove was that she would not have undergone the operation on that particular occasion.<sup>5</sup> The Court of Appeal agreed with this reasoning. The case was subsequently appealed before the House of Lords.

### **The Dissenting Judgments: Causation and Strict Legal Principles**

The decision from the House of Lords was not unanimous. However, by a majority of three to two the Lords found in favour of the claimant on the issue of causation. The dichotomy of judicial opinion was seemingly based on the distinction between strict legal principles and the underlying policy considerations with which the law is concerned pertaining to justice and fairness.

Based on the facts of *Chester*, and in applying conventional 'but-for' principles of negligence, legally speaking the claimant should have lost her case. The rationale behind the need to establish causation in order to recover in negligence is relatively straightforward. Damage is the gist of any

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<sup>3</sup> *Ibid.*, p.600. The facts of the case are set out in the judgment of Lord Hope.

<sup>4</sup> See for example the earlier case of *McAllister v Lewisham and North Southwark Health Authority* [1994] 5 Med LR 343.

<sup>5</sup> [2000] WL 33201379.

negligence action. A claimant is rightly allowed to claim compensation for any harm that is caused as a result of the defendant's negligence. Still, as Lord Bingham suggested: '... the corollaries are also true: a claimant is not entitled to be compensated, and a defendant is not bound to compensate the claimant, for damage not caused by the negligence complained of.'<sup>6</sup> This unearths a number of difficulties in regard to causation in negligent disclosure cases. In comparison to the majority of the Lords who found in favour of the claimant, Lord Hoffmann, in attempting to justify a strict legal approach, provided a somewhat narrow analysis of the foundation on which the doctor's duty of disclosure is based. He stated:

"The purpose of a duty to warn someone against the risk involved in what he presupposes to do, or allow to be done to him, is to give him the opportunity to avoid or reduce the risk. If he would have been unable or unwilling to take that opportunity and the risk eventuates, the failure to warn has not caused the damage. It would have happened anyway."<sup>7</sup>

Accordingly, the problem for the claimant in *Chester* was that she had to establish, on the balance of probabilities, that had the surgeon adequately warned her, she would have taken the opportunity to avoid or reduce the risk, effectively leaving her to prove she would not have had the operation. This she could not do, and actually made no attempt to do, instead preferring honestly to suggest she may well have had the procedure at some time in the future after a second or even third opinion.<sup>8</sup> Medical evidence suggested the risk of *cauda equina* developing would have stood at exactly the same even if performed at a later date and by a different surgeon. Thus, as the claimant failed to prove the defendant's breach actually caused her loss or worsened her physical condition, arguably on conventional causation principles the defendant should not have been liable. However, based on a successful Australian case, the claimant's argument was grounded in the fact that all she had to prove was that she would not have had the operation at that particular time and by that particular surgeon.<sup>9</sup>

In a measured rejection of this Lord Hoffmann used the analogy of a casino to illustrate how the law operates. He provided the following analysis:

"In my opinion this argument is about as logical as saying that if one had been told, on entering a casino, that the odds on No. 7 coming up at roulette were only 1 in 37, one would have gone away and come back next week or gone to a different casino. The question is whether one would have taken the opportunity to avoid or reduce the risk, not whether one would have changed the scenario in some irrelevant detail."<sup>10</sup>

Prima facie one can see the logic in this argument. The odds of the risk eventuating would not have altered and, in undergoing the operation at a later date, the patient would not have been able to avoid or reduce the risk. Thus

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<sup>6</sup> *Op cit.* n.1, p.592.

<sup>7</sup> *Ibid.*, p 597.

<sup>8</sup> *Ibid.*, p.591.

<sup>9</sup> *Chappel v Hart* [1999] 2 LRC 341.

<sup>10</sup> *Op cit.* n 1, p 597.

it is possible to conclude that the claimant failed to satisfy the requirements of 'but-for' causation. With respect, this may not be strictly accurate. On reflection it is the issue of the *likelihood of the risk occurring at a later date* which is in need of further consideration. When analysed through the exact prism of medical disclosure it is possible to view the casino analogy in a different light. Professor Jones illustrates this neatly by turning Lord Hoffmann's argument on its head. He suggests:

. . . the materialisation of a small random risk. . . is the result of the particular time and circumstances in which the treatment was given (assuming that there is nothing which predisposes the particular patient to this risk), and therefore if treatment had been delayed to another occasion the probability is that the small inherent risk would not have materialised on that occasion, and thus the materialisation of the risk is causally linked to the negligent non-disclosure of risk.<sup>11</sup>

Lord Hoffmann may have fallen into the trap of becoming submerged in an argument based purely on the theoretical ideal of how the law *should* operate whilst overlooking the actual context and surrounding environment concerning the exact circumstances of the case. It is by virtue of the very fact that the outcome hinges on the uncertainty and imprecise nature of medicine which renders Lord Hoffmann's argument unsustainable. Medical risk disclosure is not a precise science and therefore within this particular context, altering the scenario in some way *does* actually have a marked effect on the chances of a risk eventuating. As Jones points out, changing the scenario in contemporary medicine has the effect of reducing the chances of a risk materialising. This is because the chances of a small risk eventuating are very much connected to the timing and circumstances of that *particular* operation. As a result, in delaying the treatment, changing the clinical setting where the procedure takes place or by appointing a different consultant to perform surgery at a later date, the probability of that small risk materialising on that later occasion is reduced.

Therefore whilst it is possible to suggest the judgment in *Chester* represents a departure from the strict legal principles governing factual causation, if one adopts a pragmatic approach it is still possible to suggest the breach is causally connected to the harm in a broader sense. However, it seems Lord Walker was the only judge who identified the real dangers in Lord Hoffmann's casino analogy<sup>12</sup> and as such it is apparent the real explanation as to why the majority of the Lords found in favour of the claimant was not based on the above proposition that a causal link actually exists, but rather on a number of wider policy considerations.

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<sup>11</sup> Jones, M.A. "But-for causation in actions for non-disclosure of risks" (2002) 18 *PN* 192, p.200.

<sup>12</sup> *Op cit.* n.1, p.615.

### **Manipulating the Law: The Duty of Disclosure and The Bigger Picture**

In order that the claimant succeeded, it is evident that the remainder of the judges based their arguments on what they perceived to be a deviation from a straightjacket application of ‘but-for’ principles of causation.

Effectively what the majority of the Lords did was look beyond the immediate concern of establishing a causal connection to address the actual purpose and rationale behind the doctor’s duty of disclosure. As we have seen earlier, Lord Hoffmann interpreted this in a restrictive manner and within the confines of strict legal principles. In contrast Lord Hope took a much broader view and suggested:

“The function of the law is to protect the patient’s right to choose. If it is to fulfil that function it must ensure that the duty to inform is respected by the doctor. It will fail to do this if an appropriate remedy cannot be given if the duty is breached.”<sup>13</sup>

The recommendation here is that for the law to achieve its purpose, and insofar as the duty of disclosure must have some meaningful content, it is desirable that if breached a remedy must be available to the patient by virtue of this very fact. Lord Hope further stated that: ‘The scope of this duty...is unaffected by the response which the patient may give on being told of these risks.’<sup>14</sup> In acknowledging this and effectively condoning a versatile approach, Lord Hope confirmed causation is very much an ancillary consideration when placed in the wider setting of patient autonomy and the underlying purpose behind enforcing the duty of disclosure. However, a certain degree of perceived manipulation was needed in order to carry this to its conclusion. Some other justification was needed which was more persuasive than the tenuous argument that a causal link actually existed. Lord Steyn, a rather forward thinking judge who has a fondness for academic opinion, found this in Professor Honoré’s discussion pertaining to the Australian case of *Chappel v Hart*.<sup>15</sup> This was a case with more or less the same facts as *Chester* where the Australian High Court saw fit to find in favour of the claimant. Whilst conceding on the facts the doctor’s failure to warn was not the cause of the injury in the sense that he had not exposed the patient to a risk she need never run nor increased the risk she was bound to run in any event, he suggested:

“Dr Chappel violated Mrs Hart’s right to chose for herself, even if he did not increase the risk to her. Judges should vindicate rights that have been violated if they can do so consistently. . . Dr Chappel did cause the harm that Mrs Hart suffered, though not by the advice he failed to giver her. . . Morally he was responsible for the outcome of what he did. . . Do the courts have power in certain cases to override causal considerations in order to vindicate a plaintiff’s rights? I

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<sup>13</sup> *Ibid.*, p.603.

<sup>14</sup> *Ibid.*, p.604.

<sup>15</sup> *Op cit.* n.9.

believe they do though the right must be exercised with great caution.”<sup>16</sup>

Thus, in *Chester* Lord Steyn concluded that as a result of the doctor’s failure to warn the patient, she had not given a true informed consent in a legal sense. Accordingly ‘her right of autonomy and dignity can and ought to be vindicated by a narrow and modest departure from traditional causation principles.’<sup>17</sup> This is where it becomes evident that the crux of the decision was based on policy considerations regarding justice and fairness taking precedent over traditional negligence principles so that the courts could reach a fair outcome for the patient. This is reinforced by Lord Steyn’s further comments where he said:

“ . . . I am glad to have arrived at the conclusion that the patient is entitled in law to succeed. This result is in accord with one of the most basic aspirations of the law, namely to right wrongs. Moreover, the decision announced by the House today reflects the reasonable expectations of the public in contemporary society.”<sup>18</sup>

Within the precise nature of the complaint in *Chester*, it is this final reference to the ‘reasonable expectations of society’ which may carry most significance in the medico-legal environment. Therefore it is necessary to analyse this statement through the prism of the potential effect of the case on the domain of patient rights.

### **Patient Rights and Informed Consent Through The Back-Door?**

*Chester* represents a continuing trend of cases where policy arguments have prevailed over and above fundamental legal principle. Nevertheless, it is the first time we have seen this in a medical case.<sup>19</sup> It is a trite observation by Jones that in the six previous medical negligence actions to come before the House of Lords the scores stood at Claimants 0; Defendants 6.<sup>20</sup> Historically the law has taken the view that the doctor knows-best, more or less allowing the medical profession themselves to dictate the standard of care in negligence.<sup>21</sup> Thus, in respect of risk disclosure, the courts have subconsciously become embroiled in an almost unquestioning acceptance of medical decision making, thereby creating a paternalistic environment within law. This has now changed somewhat as a result of *Chester* which represents the first decision by the House of Lords in which the patient has been successful. Indeed it is possible to view the judgment as evidence of a

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<sup>16</sup> *Op cit.* n.1, pp.595, 596 quoting from Honoré, T. “Medical non-disclosure, causation and risk: *Chappel v Hart*” (1999) 7 *Torts Law Journal* 1, p.8.

<sup>17</sup> *Ibid.*, p.596.

<sup>18</sup> *Ibid.*, p.597.

<sup>19</sup> See *Fairchild v Glenhaven Funeral Services Ltd, Fox v Spousal (Midlands) Ltd, Mathews v Associated Portland Cement Manufacturers (1978) Ltd* [2002] 3 All ER 305.

<sup>20</sup> Jones, M.A. “The Bolam test and the reasonable expert” (1999) *Tort Law Review* 226, p.236.

<sup>21</sup> This is due to the paternalistic nature of the *Bolam* test. For discussion see Brazier, M. & Miola, J. “Bye-bye *Bolam*: A medical litigation revolution” (2000) 8 *Med L Rev* 85.

paradigm shift re-enforcing the notion that we are on the precipice of a new dawn for patient rights.<sup>22</sup>

That being said, would it be acceptable to suggest the case has introduced informed consent by the back-door? Probably not. Effectively what the courts have done is endorse a strict liability approach to negligent disclosure cases rendering medical practitioners liable by virtue of the very fact they have breached their duty of disclosure.<sup>23</sup> This is not a justifiable argument for suggesting informed consent has been introduced in England. Whilst there have been subtle moves towards a prudent patient standard of care, this has not been accepted unequivocally by the courts at the highest level and the types of risks that ought to be disclosed will still inevitably be judged in reference to the accepted practice of the medical profession.<sup>24</sup> *Chester* did not specifically consider or alter the standard of care and the English courts have not yet sanctioned the approach endorsed by some North American and Commonwealth jurisdictions.<sup>25</sup> Notwithstanding this, its real impact may well lie in the fact that the standard of care itself was omitted to be considered in any detail. The risk stood at 1-2 per cent and, in accordance with the accepted standards of the profession, it was made quite clear the consultant had been negligent in failing to disclose this.<sup>26</sup> This demonstrates a commitment from within the profession towards an enhanced standard of openness and disclosure within the consent process and it is apparent there is a renewed appetite for respecting individual patients when considering what risks to discuss with them.<sup>27</sup>

As Devaney suggests ‘in practice the responsibilities of the courts and doctors remain the same as they ever were. The simple function of the law,

<sup>22</sup> However, after the recent House of Lord’s decision in *Gregg v Scott* [2005] 2 WLR 268 this assertion may no longer carry the same weight. Here, by a majority of three to two, the House of Lords declined to continue the expansive approach to causation in refusing to recognise liability for the loss of a chance of a more favourable outcome in clinical negligence actions. Nevertheless, this case was not related to information disclosure *per se* and was more concerned with negligent diagnosis.

<sup>23</sup> Indeed Professor Honoré suggests this in his article, *Op cit.* n.16. However, with respect this may not be totally accurate. Devaney suggests the claimant still has to prove that if provided with the information about risks they would have acted differently and that “the one piece of information which was withheld was that which would have changed their mind”. Devaney, S. “Autonomy rules OK” (2005) 13 *Med L Rev* 102, p.105.

<sup>24</sup> The case of *Pearce v United Bristol Healthcare NHS Trust* (1998) 48 BMLR 118 synthesised the various decisions preceding it and defined the standard of care as an obligation to disclose all ‘significant risks’. Whilst the terminology of the reasonable patient was used in this case it is not authority for suggesting the prudent patient standard of care exists in England *per se*. See Maclean, A. “The doctrine of informed consent: does it exist and has it crossed the atlantic” (2004) LS 386, p.407-410.

<sup>25</sup> *Canterbury v Spence* (1972) 464 F 2d 772 (US); *Rogers v Whitaker* [1992] 175 CLR 479 (Australia).

<sup>26</sup> See Lord Steyn’s comments. *Op cit.* n.1, p.592.

<sup>27</sup> Indeed Jones has suggested that ‘as professional attitudes to the question of information disclosure change patients will become “entitled” to more information under the *Bolam* standard. See Jones, M. “Informed consent and other fairly stories” (1999) 7 *Med L Rev* 103, p.125.

to right wrongs, has been upheld. All that is new is that patient autonomy really rules.<sup>28</sup> Whilst this assertion may ring true, it can only be assessed over a matter of time and only when considered in relation to the potential effect *Chester* may have on both medical practice and litigation levels on the whole.

### **The Potential Effect of *Chester* on Litigation and Medical Practice**

The actual effect *Chester* may have on negligent disclosure cases is somewhat uncertain. Previous situations where the courts have been prepared to deviate from established legal principles, often concerning general negligence cases, have been described as stand-alone judgments confined very much to the specific facts of a case.<sup>29</sup> Thus, it is very difficult to visualise these cases as having any profound effect on the law of negligence generally. Whilst it is plausible that the liberal approach to causation is limited to information disclosure type cases<sup>30</sup>, can one really say it is a case confined to its own facts? It is submitted not to the same extent. When faced with the same scenario the temptation for patients, when questioned about their hypothetical conduct, will undoubtedly be to claim they would always have delayed the treatment in order to obtain a second opinion. After this, if all that remains for them to do in order to establish a causal link is to decline to speculate about what course of action they would adopt in the future, it does make it easier for patients and increases their chances of success. Therefore, it is with interest one should view the policy considerations falling at the opposite end of the spectrum. Indeed both Lord Bingham and Lord Hoffmann commented on the undesirability of opening the floodgates and allowing the payment of potentially huge sums of damages where the defendant's action has not actually worsened the condition of the claimant.<sup>31</sup> Lord Hoffmann suggested an expansive approach would increase the costs of litigation to an extent where the law of tort would be an 'unsustainable vehicle' for cases of this kind.<sup>32</sup> Whilst he also warned of the potential dangers of making the doctor the insurer of any damage he causes regardless of whether the patient knew of the risk, respectfully it is submitted that this approach is too restrictive.<sup>33</sup> It fails to take into account the accurate comments made by Devaney that claimants still have to prove that had they been warned they would have acted differently.<sup>34</sup> Thus, *Chester* is not the green-light for prospective litigants that many may perceive it to be. Irrespective of this, in situations where policy considerations fall on both sides of the argument, it is contended the greater good must prevail, and in the current climate it is evident considerations pertaining to patient's rights

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<sup>28</sup> *Op cit.* n.23, p.107.

<sup>29</sup> See comments by Lord Steyn. *Op cit.* n.1, p.596.

<sup>30</sup> In the recent case of *Beary v Pall Mall Investments* [2005] EWCA Civ 415 the Court of Appeal rejected the attempt to extend the policy considerations in *Chester* from medical to financial advice. Dyson L.J. (para. 38) stated the extension would be "breathtakingly ambitious, contrary to authority and . . . wrong."

<sup>31</sup> *Ibid.*, p.592 per Lord Bingham, p.597 per Lord Hoffmann.

<sup>32</sup> *Ibid.*, p.597.

<sup>33</sup> *Ibid.*, p.598.

<sup>34</sup> *Op cit.* n.23, p.105.

take precedent over and above policy considerations concerning economic and flood-gate factors.<sup>35</sup>

The judgment has been greeted with warmth by a number of academic writers and its significance cannot be underestimated.<sup>36</sup> However, for various reasons as suggested above it still remains very difficult for patients to actually be successful in medical disclosure cases and many of them will inevitably be settled before ever reaching court. As a result the actual effect on litigation levels *per se* remains to be seen.

The true significance of the decision is bound up in its symbolic nature. The law is supposed to be prescriptive in nature; laying down guidelines for future conduct. Thus, its real power is to be found in the indirect effect that it may have on the medical profession in years to come, where consent may be taken more seriously as a result of the new found judicial recognition of respect for patient's rights. The outcome is likely to be met with distaste from doctors and there is already evidence of growing concern from within the profession.<sup>37</sup> In all probability it will have the effect of playing up the importance of consent procedures within hospitals by enhancing the recognition that ought to be afforded to the patient's right to be informed. Yet, this is not without its dangers. It is only with a speculative and optimistic eye that one can hope the reasoning of the House of Lords does not encourage defensive medical practice via the medium of excessive risk disclosure. Moreover, that it does not increase the amount of red-tape within modern medicine, and finally, that it does not introduce unnecessarily bureaucratic informed consent procedures which exhaust the therapeutic benefits of the doctrine itself by taking something away from both the patient and consent as a continuing and reciprocal process.

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<sup>35</sup> For discussion on the changing nature of the law and its attitude towards patient's rights see Lord Irvine "The patient, the doctor, their lawyers and the judge" (1999) 7 *Med L Rev* 255.

<sup>36</sup> See for example Stapleton, J. "Cause-in-fact and the scope of liability for consequences" (2003) 119 *LQR* 388; Stauch, M. "Taking the consequences for failure to warn of medical risks" (2000) 63 *MLR* 261; Grubb, A. "Clinical negligence: informed consent and causation" (2002) 10 *Med L Rev* 322.

<sup>37</sup> See NHSLA Risk Alert "Informed Consent" (2004) 4 *NHS Litigation Authority*; Mathews, J., "*Chester v Afshar*: does it raise more questions than it answers?" (2005) 11 *The AvMA Medical & Legal Journal* 78.

## THE MENTAL CAPACITY ACT 2005 (ENGLAND AND WALES) - A NEW LEGAL FRAMEWORK FOR DECISION-MAKING

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### Introduction

A major reform of the law on decision-making for people who lack mental capacity to make decisions for themselves has taken place recently in England and Wales with the passage of the Mental Capacity Act 2005<sup>1</sup> (“the Act”). This reform is the product of over 15 years’ research, analysis, consultation and scrutiny, beginning with a detailed Report by the Law Commission, undertaken between 1989 and 1995<sup>2</sup> and including evidence-based scrutiny by a Parliamentary Joint Committee.<sup>3</sup> Although some aspects attracted detailed debate, the Act enjoyed broad public and parliamentary support as a new legal framework on decision-making for people who lack capacity to make decisions for themselves.

Against a backdrop of complex and challenging socio-economic, demographic<sup>4</sup> and legal issues, the Act provides guidance for decision-making in relation to decisions involving property and affairs, medical treatment and welfare. It seeks to balance individual rights and autonomy with individual needs and protection. It is an amalgam of new provisions, revised provisions such as those previously found in the Enduring Powers of Attorney Act 1985 which dealt only with property and affairs, and a range of matters formerly found in the common law, most of which deal with medical treatment decisions. Many of the main elements of the Act will, therefore, resonate across other common law jurisdictions, including Northern Ireland.

The Act opens with a clear statement of principles, defines what it is to be incapable of making decisions, places the common law *best interests* doctrine on a statutory basis and creates five mechanisms for substitute or alternative decision-making:

- Acts in connection with care and treatment;
- Advance refusal of treatment which the person who has become incapable has decided previously;

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<sup>1</sup> The Mental Capacity Act 2005, together with Explanatory Notes can be found at: <<http://www.dca.gov.uk/menincap/legis.htm>>. The Act is not yet in force and will be supplemented by a detailed Code of Practice.

<sup>2</sup> Report of the Law Commission for England and Wales, *Mental Incapacity*, Law Com 231 (March 1995): <<http://www.lawcom.gov.uk>>.

<sup>3</sup> Report of the Joint Committee on the Draft Mental Incapacity Bill (as it was then titled) (Nov 2003): <<http://www.publications.parliament.uk/pa/jt/jtdmi.htm>>.

<sup>4</sup> It is estimated that more than 2 million adults in England and Wales have limited capacity due to mental illness, brain injury or illnesses such as dementia. Significantly, given the ageing population, the prevalence of dementia increases with old age.

- Power of attorney under which the person has delegated decision-making authority to another;
- Decisions by the new Court of Protection;
- Decisions made by a court-appointed deputy.

The Act brings clarity to the role of carers and professionals and introduces new legal, procedural and structural safeguards as well as a new criminal offence to ill-treat or neglect a person who lacks capacity. The following offers an overview of this important new legislation.

### **Principles**

The Act opens with a statement of fundamental principles which must guide all substitute decisions made under the Act. The first principle of the Act is the presumption that a person has decision-making capacity unless it is proved otherwise. This reflects the importance of not ‘labelling’ people as necessarily incapable because they have a particular diagnosis. The second and fifth principles constitute a move towards an emphasis on maximising autonomy by providing that all practical steps must be taken to assist people to participate as fully as possible in decision-making and where intervention is required, this should be one that is the least restrictive of the person’s rights and freedoms. The third principle requires that a person must not be treated as incapable merely because he or she makes an unwise decision. The fourth principle places the individuality of the person at the centre of the decision-making process and requires that any act done, or decision made, under the Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.

### **People Who Lack Capacity – ‘The Functional Approach’**

A person lacks capacity in relation to a matter if at the material time he or she is unable to make a decision in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain. Assessment of capacity is, therefore, not a general assessment but is functional to the particular decision and the cognitive and other ability of a particular person, at a particular time. This part of the Act also includes a ‘non-discrimination clause’ which echoes the first principle, stating that lack of capacity cannot be established merely by reference to a person’s age, appearance, condition, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity. Ultimately, if the issue of a person’s capacity is disputed, the issue will be referred to the Court of Protection for a decision.

### **Best Interests**

If a person lacks capacity, substitute decisions must be made in his or her *best interests*. This requirement reflects the common law position established in medical treatment cases such as *Re F* [1990] 2 AC 1 (HL) and *Re MB* [1997] 2 FLR 426, and applies to all of the various substitute decision-making mechanisms in the Act. The Act sets out a checklist of relevant factors which must be considered in deciding the person’s best interests, including a duty to ascertain the person’s past and present wishes, feelings, values and beliefs. There is also a duty, if it is practicable and appropriate, to

consult anyone named by the person, the person's carers, any attorney appointed by the person, or any deputy appointed by the court. The test remains, however, an objective test of what would be in the person's best interests. It is not a substitution of what others think is right for the person. In relation to a decision that results in the refusal or withdrawal of life-sustaining treatment, the Act stipulates that the decision-maker must be not motivated by a desire to bring about death.

### **Acts in Connection with Care and Treatment**

This part of the Act provides a statutory defence for people who make non-consensual interventions in the form of giving everyday treatment, care and informal assistance to a person with incapacity. Without this statutory provision, such caring interventions as dressing a person, entering her home to clean it or driving her car to take her to a hospital appointment, might otherwise be potentially unlawful. This provision replaces the unclear and poorly understood common law doctrine of necessity and it is likely to be widely used and very important. The extent of intervention permissible includes restraint, provided that it *necessary* to prevent harm to the person with incapacity and *proportionate* to the likelihood of harm. It does not, however, permit restraint to such an extent as would constitute a deprivation of liberty contrary to article 5 on the European Convention on Human Rights.

### **Lasting Power of Attorney**

A power of attorney enables a person ('donor'), when capable, to plan for future incapacity by making a provision for the delegation of decision-making authority to another person ('donee'). The Act replaces the system of *enduring* power of attorney, which permitted the delegation of decision-making authority in relation to his or her property and affairs only, with a new *lasting* power of attorney. One of the most significant features of the Act is the development of the role of the donee of a lasting power of attorney to include decisions relating to health and personal welfare, as well as property and affairs. This includes decisions to refuse consent to life-sustaining treatment, if this power has been expressly delegated to the donee by the donor. The new system has additional checks and balances. The donor can appoint different donees to make decisions in relation to different matters. Unlike the former system, there must be a certification of the donee's capacity to make a power of attorney and the power of attorney will only take effect after it has been registered with the new Office of the Public Guardian, which will investigate concerns about abuse.

### **New System of Court Appointed Deputies**

A further mechanism for substitute decision-making is the power of the new Court of Protection to appoint a deputy or deputies to make decisions for the person with incapacity. The Court might appoint a person such as a social worker, a solicitor or a relative. As with the power of attorney, the scope of this decision-making authority can extend to health, personal welfare or property and affairs. After extensive debate in Parliament, however, it was decided that, unlike a donee of a lasting power of attorney, a deputy is not empowered to make decisions relating to the refusal or withdrawal of life-sustaining treatment. The Act also states that, in line with the principle of

least intervention, a decision of the Court is to be preferred to the appointment of a deputy. If, however, an appointment of a deputy is made, it should be as limited as possible in scope and duration. The new Office of the Public Guardian will supervise the appointment and conduct of deputies and the new Court of Protection will have the power to require deputies to give security and to submit reports to the Public Guardian.

### **Advance Refusal of Treatment**

The provisions relating to advance refusal of treatment represent the most contentious part of the statute. They attracted detailed debate in Parliament and in public, even though such refusals are, under the common law, legally binding (*HE v A Hospital NHS Trust* [2003] EWHC 1017). It is often overlooked that such refusals apply not only to life-sustaining treatment but to all sorts of treatment. The Act brings improved clarity to this area of decision-making. In order to take effect, an advance refusal must be valid and applicable to the circumstances and the proposed treatment. Additional safeguards apply to the advance refusal of life-sustaining treatment. These advance refusals must state specifically that they apply to the treatment even if life is at risk and they must be written, witnessed and signed by the maker and the witness. Furthermore, in order to alleviate concerns about euthanasia, there is an express declaration that nothing in the Act is to be taken to affect the law relating to murder or manslaughter or assisting suicide.

### **Independent Mental Capacity Advocate**

The Act provides that, where the national health service or the local authority is proposing serious medical treatment, or a move to hospital, care home or residential accommodation, for a person who lacks capacity and there is no-one, other than a paid or professional carer, whom it would be appropriate to consult in determining the person's best interests, an independent mental capacity advocate must be instructed to represent the person. The advocate is a significant new safeguard and should help in determining and communicating what might be in the best interests of people with incapacity who are without friends or family and so are particularly vulnerable. Recourse to this provision will not be necessary where the person has nominated a person to be consulted in matters affecting his or her interests, or where a donee or a deputy has been appointed. The Act provides for Regulations to be made to extend the functions of the independent mental incapacity advocate to other circumstances.

### **New Court of Protection**

The Act creates a new superior Court of record, the *Court of Protection*. The new Court replaces the previous Court of Protection, which was an office of the Supreme Court. The Court will have the same powers and privileges as the High Court. It will have powers to make declarations regarding capacity, to decide where a person with incapacity should live or with whom he or she should be in contact and to give or refuse consent to medical treatment. It will also have powers in relation to the control and management of a person's property and in relation to the performance of deputies and donees. The Court is an important new structure but, given the other informal and formal decision-making mechanisms, it is intended to be the forum of last resort, for the resolution of complex or sensitive cases.

### **Office of the Public Guardian**

The Public Guardian will be a new statutory official, appointed by the Lord Chancellor and with a duty to report to the Court, if so required. The Public Guardian will have an important supervisory role in relation to donees and deputies, for example, by maintaining a register of powers of attorney and deputies and investigating complaints. He or she will also work with other authorities and agencies when concerns are raised or there are allegations of abuse and will have power to access health and social security records.

### **Northern Ireland**

The Mental Capacity Act 2005 does not extend to Northern Ireland. There is, however, some current statutory provision under the Enduring Powers of Attorney (Northern Ireland) Order 1987, which regulates the continuing action of donees in the event of the donor's incapacity and also under part 8 of the Mental Health (Northern Ireland) Order 1986, under which the High Court has jurisdiction over the management of the property and affairs of persons who are incapable by reason of mental disorder. In practice this jurisdiction is exercised primarily by the Office of Care and Protection. Much of the law on general decision-making capacity, however, is to be found in the common law. In order to begin to consider proposals which might be suitable for this jurisdiction, the Office of Law Reform<sup>5</sup> is reviewing the framework provisions of the Mental Capacity Act 2005 and is engaging with a recently-established reference group of people with expertise in this area and with relevant sections of the Bamford Review<sup>6</sup>.

### **Conclusion**

The Mental Capacity Act 2005 represents a significant legislative reform. It is the product of substantial research and consultation with stakeholder groups, such as people with incapacity, their carers and relatives and members of the caring, medical and legal professions. It is a sound framework for balancing autonomy and empowerment with safeguards and care. As it would be impossible for a statute to legislate for the many different circumstances that might arise, the Act is a framework statute, which will be heavily informed by a Code of Practice. As the statute progresses to implementation stage, it is planned to conduct a wide-ranging information and education programme, again working closely with stakeholders.

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<sup>5</sup> <<http://www.olrni.gov.uk/>>.

<sup>6</sup> In October 2002 DHSSPS initiated a major, wide-ranging and independent review of the law, policy and provision affecting people with mental health needs or a learning disability in Northern Ireland. The Review Chair is Professor David Bamford and follows similar exercises in England and Scotland.