

# **NORTHERN IRELAND LEGAL QUARTERLY**

**SPECIAL ISSUE:**

## **Essays on Legal History and the Common Law in Honour of Professor Desmond S. Greer**

**Guest Editors: Gordon Anthony and  
John Stannard**

**Articles by:**

Niall Osborough  
Alan Dowling  
Jack Anderson  
Eoin O'Dell  
Brice Dickson  
John Jackson  
John Stannard  
David Capper  
Gordon Anthony

Full table of contents inside

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**CONTENTS**

Bishop Dixon, The Irish Historian And Irish Law ( <i>Niall Osborough</i> ) .....	235
Early Reported Cases On Slander Of Title ( <i>Alan Dowling</i> ) .....	246
The Legal Response to Prize Fighting in Nineteenth Century England and America ( <i>Jack Anderson</i> ) .....	265
Liens, Necessity and Unjust Enrichment ( <i>Eoin O'Dell</i> ) .....	288
The Role Of Judges In The Development Of Constitutions ( <i>Brice Dickson</i> ) .....	332
Human Rights, Criminal Justice and the Future of the Common Law ( <i>John Jackson</i> ) .....	352
The Road To Shanklin Pier, Or The Leading Case That Never Was ( <i>John Stannard</i> ) .....	375
The Demise of the Advocate's Immunity ( <i>David Capper</i> ) .....	391
The Negligence Liability of Public Authorities: Was the Old Law the Right Law? ( <i>Gordon Anthony</i> ) .....	409

**BOOK REVIEWS**

<i>King's Inns Barristers 1868-2004</i> : edited by Kenneth Ferguson .....	426
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## BISHOP DIXON, THE IRISH HISTORIAN AND IRISH LAW

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The writing of history can be likened to the doing of a jigsaw puzzle. The more pieces are assembled the more coherent the shape of the final picture. And one would be ill-advised to imagine that the final picture can satisfactorily emerge without each and every one of the available pieces being properly slotted in. Finding the pieces when they do not tumble out freely and comprehensively from the box in which the jigsaw has been secreted serves naturally even so to distinguish the process of writing history from the doing of a jigsaw puzzle. Here the search for pieces to complete the historical puzzle risks at times to become a life-time burden.

To be sure, the more pieces of evidence one can turn up the more convincing and therefore the more instructive the interpretation of what has been the focus of the investigation. In the process, mysteries from time to time can quite confidently be laid to rest. Take, for instance, the case of Bishop Richard Dixon, appointed to the Church of Ireland see of Cork in 1570.

In the succession list of bishops in Cork furnished by Archdeacon Henry Cotton in the volume for Munster in his *Fasti Ecclesiae Hibernicae* published in 1847, there appears this entry against the year 1570:<sup>1</sup>

“Richard Dixon, Prebendary of Rathmichael in St. Patrick’s Cathedral, Dublin, was appointed bishop by patent dated June 6<sup>th</sup>.”<sup>2</sup>

The entry concludes with this further slightly sinister notice:

“He was deprived in the following year, for some cause now unknown.”

Thus is a conundrum presented: why was Bishop Dixon removed from his post in 1571?

In 1854, in the first volume of his three-volume history of Dublin, John Gilbert solved the conundrum.<sup>3</sup> Dixon had been deprived of his see ‘*propter adulterium manifestum per eum commissum et confessum*’. The evidence was furnished by an order made on 7 March 1570 by the then Commissioners for Ecclesiastical Causes which prescribed the penance Dixon was obliged to undergo. (The background to the deprivation, Gilbert

<sup>1</sup> Henry Cotton, *Fasti Ecclesiae Hibernicae: the succession of the prelates and members of the cathedral bodies in Ireland – vol. 1: the province of Munster* (Dublin, 1847), p.182.

<sup>2</sup> In a second edition of this volume of the *Fasti Ecclesiae Hibernicae* Cotton adds the detail that Dixon was consecrated before the end of the year 1570, but repeats the assertion that the cause of Dixon’s being deprived remained unknown: *Fasti Ecclesiae Hibernicae – vol. 1: the province of Munster*, 2<sup>nd</sup> ed. (Dublin, 1851), p.222.

<sup>3</sup> John T. Gilbert, *A history of the city of Dublin*, 3 vols. (Dublin, 1854 – 1859), i, 113 – 114.

noted, constituted `a fact unnoticed by our ecclesiastical historians'.) Since the source Gilbert quotes from is no longer extant, the punishment meted out to Dixon merits being rehearsed:<sup>4</sup>

“That upon Sondaie next immediatlie following into the cathedral church of the blessed Trynitie in Dublin the said Bishop shall come even at such tyme as the preacher shall goe up into the pulpitte to preache, with a white rodde in his hand and so bareheaded shall goe up into another lower pulpitte sett there for the same purpose and there stand during the whole time of the sermon and after that the preacher shall make an end the said Bishop shall there openlie confesse his faulte and desire forgevenes of God and the people to pray for him and immediatelie after that, in the same place he himself shall utter somewhat touching the grevousness of his owne faulte and showe his repentence therefor and desire forgevenes openlie of God and all ye people to pray for him and to forgyve him whom he hath by comitting of the same offended, and all the premisses in the most penitent maner he can doe.”

Seven years elapsed between Cotton's announcement of the puzzle and Gilbert's declaration of that puzzle's solution. Six years after volume 1 of Gilbert's history of Dublin had appeared, H.C. Hamilton's edition of the *Calendar of State Papers relating to Ireland, 1509 to 1573* was published. This confirmed Gilbert's discovery and went into rather more detail about Dixon. He had been, it would appear, chaplain to the lord deputy, Sir Henry Sydney.<sup>5</sup> In pressing for Dixon's appointment on 26 December 1569, Sydney was to point out that the value of the bishopric to which he trusted his protégé would be appointed – technically the bishopric of the combined sees of Cork and Cloyne – would not be likely to exceed £40 annually. By the spring of 1571, the trust in Dixon had been found to be misplaced. On 16 April, Robert Weston, the Irish chancellor, Adam Loftus, the archbishop of Dublin and Lord Justice Fitzwilliam joined in a report to Burghley in London that Dixon, despite being a married man, had `under colour of matrimony, retained a woman of suspected life as his wife.'<sup>6</sup> Dixon had been compelled to do penance in Christ Church cathedral – by the terms of the decree Gilbert reproduces – but `fearing to exceed their commission' the authors of the letter desire that Burghley would send them advice on how to proceed over depriving the bishop.

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<sup>4</sup> *ibid.*, 114. Gilbert quotes two other similar orders of the Commissioners for Ecclesiastical Causes: in the cases of Henry Hinchcliffe and Constance Kyng, an order of 29 March 1571 (*ibid.*, pp.213–215); and in the cases George Bateman and Benedicta his kept woman (meretrix), an order of 30 October 1572 (*ibid.*, p.215). Prior to the destruction of public records in 1922 the Irish Public Record Office held the Registrar's Book containing the acts of the Commissioners for Ecclesiastical Causes appointed in 1568. This book covered the years 1570 to 1573, and is almost certainly the source quoted from by Gilbert. See Herbert Wood, *A guide to the records deposited in the Public Record Office in Ireland* (Dublin 1919), p.267.

<sup>5</sup> *Cal. S. P. Ire., 1509 – 1573*, p.424.

<sup>6</sup> *Cal. S. P. Ire., 1509 – 1573*, p.444.

Certainly by 26 November 1571 Dixon had been deprived, for on that date the name of the proposed replacement as bishop of Cork was forwarded to Burghley in separate communications of that date from both the archbishop of Dublin and Lord Justice Fitzwilliam.<sup>7</sup>

The re-calendaring of the State Papers Ireland for the years 1571 – 1575, in the volume edited by Mary O’Dowd and published in 2000, yields a considerable amount of additional information. The full text of the letter to Burghley sent on 16 April 1571 reveals that Dixon’s conduct came to the attention of the authorities in Dublin ‘by public fame and crying out of his deed’.<sup>8</sup> His conduct constituted ‘no little glory of the adversaries and the grief of the godly’<sup>9</sup> which had determined the course of action pursued in Dublin. Of Dixon’s acknowledgment of his offence Burghley’s correspondents observed that it was ‘not in such penitent sort as we thought meet to put away the offence of so grievous and public a crime’.<sup>10</sup>

On the vexed question as to whether the Dublin triumvirate had the power to deprive Dixon – this might have encroached, they argued, on the queen’s authority – they went on to seek guidance from Burghley, just as the much shorter entry in the original Calendar for the years 1509 – 1573 had indicated. The full entry in the new Calendar deals with the point, and is of particular interest:<sup>11</sup>

“And having no great trust in the learning or in the sincerity of the consciences of the lawyers here nor any other, we thought we might resort to you for help. Our request is that you might upon conference had with learned and godly lawyers write to us what we may do therein. We enclose a copy of the relevant clauses in our warrant.<sup>12</sup> And if it shall be resolved clearly that by virtue of our commission we cannot deal therein, yet for that the public slander does remain still and in this slanderous and perverse people cannot but continue during such time as he shall remain in the bishopric, we would ask you to appoint a private commission to such as may please the queen that he may be removed from the bishopric.”

Burghley’s response does not appear to be extant, but it would seem he gave Weston, Loftus and Fitzwilliam the ‘green light’ to press ahead and deprive Dixon without further ado. Deprivation is dated to 8 November 1571.<sup>13</sup>

My business here is to draw attention to one species of evidence which, unlike the material unearthed by Gilbert and his successors in the case of Bishop Dixon, does not necessarily help solve a riddle, but which nevertheless fills out the context and thus advances the understanding. I allude to legal source-material and, in particular, material to be gleaned from

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<sup>7</sup> *Cal. S. P. Ire., 1509 – 1573*, p.460.

<sup>8</sup> *Calendar of State Papers, Ireland: Tudor Period, 1571 – 1575*, ed. Mary O’Dowd (London and Dublin, 2000), p.11.

<sup>9</sup> *ibid.*

<sup>10</sup> *ibid.*

<sup>11</sup> *ibid.*, p.12

<sup>12</sup> Printed, *ibid.*

<sup>13</sup> As per the index, *ibid.*, p.907.

the law reports – a source of enlightenment, I venture to suggest, not too frequently opened by the Irish historian.

Let me therefore produce a short inventory of opportunities let slip as a result of the reluctance of the Irish historian to engage with such legal material.

The most egregious omission of a pertinent legal source in recent Irish historiography will be found in L.P Curtis, Jr's outstanding text on the political governance of late nineteenth-century Ireland.<sup>14</sup> On 19 August 1886 a start was made with the planned evictions on the Woodford estate of the marquis of Clanricarde in east Co. Galway. The scene is described by Curtis. Two resident magistrates, 500 officers and men of the Royal Irish Constabulary and an assortment of bailiffs and emergency men were all in attendance. 'The resultant operation', Curtis writes:<sup>15</sup>

“which in design and execution resembled a medieval siege cost the authorities some £3000 and gave Dublin Castle formal notice of what difficulties lay ahead.”

And indeed they did.

At the time government policy was aimed at dissuading landlords like Clanricarde from exercising their right to evict. To this end, special orders had been issued for the morning of 19 August. Under these, the police had been instructed not to intervene once the evictions had commenced unless after one hour intervention was essential to preserve the peace.

It was these instructions which were assailed by Chief Baron Palles at the ensuing Connacht winter assizes where a number of individuals faced charges of riot and conspiracy – a sequel not alluded to by Curtis. Palles's observations on the entire sorry episode, including, in effect, criticism of Hicks-Beach, the Irish chief secretary, are preserved in a collection of judgments of the Irish courts during the period of the Land War and designated *Judgments of the superior courts*.<sup>16</sup>

In January 1887, at the assizes being held in Sligo, Palles first described the sequence of events at Woodford on the critical morning of the preceding August:<sup>17</sup>

“For one whole hour breaches of the peace, in gross and open violation of the law in contempt of the authority of the Queen, and of her mandate to the sheriff were persisted in, in the presence of that strong force of constabulary, and they did nothing. Upon, as I understand it, the conclusion of that period, orders were given to them by the resident magistrates, and the moment that these orders were given they performed their duty, not only with promptitude and courage which cannot be too highly commended, but with a remarkable amount of patience and forbearance, clearly evidenced by the fact that of

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<sup>14</sup> L.P. Curtis, Jr., *Coercion and conciliation in Ireland, 1880 – 1892: a study in conservative unionism* (Princeton, N.J., 1963).

<sup>15</sup> *ibid.*, p.139.

<sup>16</sup> ‘Observations of Palles CB at the Connacht winter assizes, 5 Jan. 1887’, in *Judgments of the superior courts in Ireland*, 2<sup>nd</sup> ed. (Dublin, 1890), p.23.

<sup>17</sup> *ibid.*, p.24.

the several thousands constituting the riotous mobs, upon the occasions in question there is no suggestion that injury was suffered by one.”

Palles then proceeded to excoriate the Dublin Castle authorities for illegally withholding support for the execution of judicially-sanctioned decrees.<sup>18</sup> ‘When judgment is once given’, the chief baron declaimed:

“– the judgement of a court of law, acting within the scope of its jurisdiction – it is not competent to any one in this Kingdom, I care not how high he may be, to say that a writ regularly issued on foot of that judgment shall not be executed, or prevent those who by law are bound to aid in its execution from giving that aid and assistance which the Constitution requires.”

Whilst Curtis does not allude to this unprecedented judicial rebuke, the volume of *A new history of Ireland* devoted to an Irish history chronology makes appropriate amends. In volume 8 of *A new history* we read under the date line of 5 January 1887:<sup>19</sup>

“Christopher Palles, lord chief baron of exchequer presiding at Sligo winter assizes, rebukes executive government for illegally withholding support from sheriffs executing writs.”<sup>20</sup>

Two episodes occurring over twenty years earlier – one a traffic accident, the other a fire at a third-level institution – also merit a place in this inventory.

The first was an accident involving a horse-drawn omnibus in which five, or according to another account, six people perished. It occurred in Dublin on 6 April 1861. The accident itself is well-known, being recalled, for example, in an article by Francis Murphy in the *Dublin Historical Record*.<sup>21</sup> I have also referred to it myself.<sup>22</sup> Neither Murphy nor myself mention the circumstance that the accident provoked a lawsuit which was to find its way into the law reports.<sup>23</sup> The circumstances were, to say the least, unusual: the victims all drowned. The omnibus served the route from Nelson’s Pillar to Rathgar on the south side of the city. For some reason not subsequently clarified, the horses at the front of the omnibus encountered particular difficulty in mounting the one major obstacle on the route – the steep slope on Portobello bridge over the Grand Canal. The driver’s strategy in resolving the problem was unwise. He set his horses at an angle but, still struggling, they went backwards and precipitated themselves together with the omnibus

<sup>18</sup> *ibid.*, p.30.

<sup>19</sup> *A new history of Ireland: vol. 8 – a chronology of Irish history to 1976*, ed. T.W. Moody, F.X. Martin and F.J. Byrne (Oxford, 1982), p.361.

<sup>20</sup> See further V.T.H. Delany, *Christopher Palles, lord chief baron of her majesty’s court of Exchequer in Ireland, 1874 – 1916* (Dublin, 1960), pp.100–104; W.N. Osborough, ‘Executive failure to enforce judicial decrees’, in J. F. McEldowney and Paul O’Higgins (ed.), *The common law tradition: essays in Irish legal history* (Dublin, 1990), p.85.

<sup>21</sup> ‘Dublin trams 1872 – 1959’, (1979) 33 *Dublin Historical Record* 2.

<sup>22</sup> Osborough ‘Recollection of things past: trams, their clientele and the law’ (1995) 46 *N.I.L.Q.* 443, at 449 – 50.

<sup>23</sup> *Byrne v. Wilson* (1865) 15 I.C.L.R. 332. The case was decided by the court of Queen’s Bench in Trinity term 1862.

and its passengers into the adjacent canal lock. Summoned, the lock-keeper in the emergency that had arisen, decided on a course of action, which, in the opinion of certain observers, only made matters a good deal worse. He let more water into the canal, as a result of which a number of passengers, including a Mrs. Mary Byrne, we are told, were 'suffocated and drowned'.

An action under Lord Campbell's Act<sup>24</sup> was commenced in the court of Queen's Bench by Mary's husband and administrator, William Byrne. He sued Wilson, the proprietor of the omnibus, for an act of negligence which had resulted in the death of his wife in the canal lock. From the account of *Byrne v Wilson* in the law reports, we can read that, perhaps predictably, Wilson had sought to shift the blame for what had happened on to the shoulders of the lock-keeper. He was not responsible, he argued, for the act of a third party not authorised by him, a third party who was neither employed by him nor under his control. After the bus had landed in the water it was this third party who had effectively occasioned the deaths by wilfully letting the excess water into the canal.

This defence was met by the plaintiff's replication that even if all this was so, the entering of the bus into the canal had materially contributed to the disaster. To this replication, Wilson entered his demurrer, and sought to support this by pressing the argument that no manslaughter charge could conceivably have been brought against him in the light of what had happened.

The Queen's Bench unanimously overruled the demurrer and thus paved the way for Byrne's eventual victory in the case, the details of which remain to be discovered. Chief Justice Lefroy cited *Scott v Shepherd*,<sup>25</sup> a leading authority on the responsibility of persons for the direct consequences of their acts. O'Brien J. and Hayes J. agreed, the latter holding that the party guilty of the first act of trespass or neglect had to be held responsible for all that act's natural consequences and results. That followed even though the lock-keeper had raised the sluices unlawfully and inundated everyone trapped in the canal lock.

The fire that broke out at dawn on Thursday 15 May 1862 gutted the west wing of the new Queen's College in Cork (today's University College, Cork). Lord Macaulay in his *History of England* praised the architectural merit of the building itself<sup>26</sup>: it was 'worthy', he said, 'to stand in the High Street of Oxford'. The destruction wrought was thus considered at the time a tragedy of no mean proportions. Aside from the physical damage done to the building, the College's herbarium was destroyed as was the Pathology museum. Professors Rushton and Vericour lost manuscripts and Professor Lewis his collection of antique medals, bronzes and shields as well as a valuable casket containing ancient gems.

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<sup>24</sup> 9 & 10 Vict., c. 93.

<sup>25</sup> (1773) 2 W. Bl. 892, 96 Eng. Rep. 525; 3 Wils. 403, 95 Eng. Rep. 1124.

<sup>26</sup> Lord Macaulay, *History of England from the accession of James II*, 5 vols. (London, 1858 – 61), iii, 171.

Professor Murphy is right to term the story of the fire and its aftermath ‘a dramatically lurid episode’ in the history of the College.<sup>27</sup> It was certainly an embarrassment to Sir Robert Kane, the president of the College – its first – a post he held until his retirement in 1873. As it happened, Kane had been one of the first on the scene, but helpless in face of the blaze that had already taken a very firm hold. It was generally agreed at the time that the fire had been started deliberately, but no one was ever charged with arson. As might have been anticipated, the incident inspired ‘a number of conspiracy theories, ranging’, Murphy would have us believe, ‘from the probable to the bizarre’.<sup>28</sup> Relationships within the young College were plainly not of the best when the Professor of Surgery, Denis Brenan Bullen, pointed the finger of suspicion at the President, Kane himself. (The charge was unsubstantiated and Bullen was to be removed from office in 1864.) Another theory was that the fire had been started so as to destroy forensic evidence linked to one or more murder cases being kept at the time in the west wing. A third explanation alluded to the earlier campaign of the priests against ‘the godless colleges’; under their influence, it was contended, ultramontane zealots had torched the college.

Within a few days of the fire a poster was circulated offering a reward of £150 from the College, as well as one of £100 from the government for information leading to the discovery of the culprit and his conviction. The fire itself was featured in the issue of the *Illustrated London News* for 24 May 1862.

A protracted struggle to secure compensation under the malicious injuries code forms part of the aftermath as well. Professor Murphy does not enter into the detail, being content to report that in the late summer of 1862 compensation had been refused on the technical grounds that both the College and the Board of Works had failed to post up notices of their claim, as required by law, in the usual places around Cork city.<sup>29</sup>

Very much more information bearing on the eventual loss of this significant malicious injuries compensation claim is to be gleaned from the law report of the proceedings in the court of Queen’s Bench generated by the first dismissal of the claim.<sup>30</sup> In these proceedings significant doctrinal matters were touched on when the court of Queen’s Bench took some pains to stress that the statutory requirements on serving notices of any claims were important and were not to be ignored. These requirements were set out in section 135 of the relevant legislation – the Grand Jury (Ireland) Act of 1836.<sup>31</sup>

This prescribed that the applicant-victim of any malicious injury was within 6 days of the occurrence of the injury to:

“serve notice in writing of such injury . . . upon the head-constable of the barony and the churchwardens of the parish, and at the nearest police station; or, if there be no

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<sup>27</sup> John A. Murphy, *The College: a history of Queen’s / University College Cork, 1845 – 1995* (Cork, 1995), pp.82–94.

<sup>28</sup> *ibid.*, p.83.

<sup>29</sup> *ibid.*, p.94.

<sup>30</sup> *The Queen v Recorder of Cork* (1866) 16 I.C.L.R.1.

<sup>31</sup> 6 & 7 Will. IV, c. 116.

churchwardens, upon two of the principal inhabitants of the parish wherein such offence shall have been committed.”

Relying on the failure of both the College and of the Board of Works to serve the prescribed notice, Cork town council refused on 9 September 1862 to admit the claim. The Commissioners of Public Works, for their part, argued that previously mandatory requirements on the serving of notices had been set aside with the adoption of the Cork Improvement Act in 1852.<sup>32</sup> But that contention was dismissed by the council. As the applicants were entitled to do, they then appealed this initial refusal to the recorder of Cork. On 2 October the recorder, however, decided to affirm the adjudication of the town council. Immediately, the government moved a writ of certiorari returnable in the Queen’s Bench to bring up the proceedings of the Cork town council to ensure that the joint application of the College and the Board to secure compensation was dealt with.

On 30 January 1863 the court of Queen’s Bench unanimously dismissed the motion of the solicitor-general to have the writ of certiorari made absolute.<sup>33</sup> No compensation was the outcome.

The judges of the Queen’s Bench<sup>34</sup> in their approach stressed the primacy of the statutory obligation to serve notice and explained the rationale behind it. There were three purposes that underlay the requirement:<sup>35</sup>

- “i. the desideratum of securing compensation for the party whose property had been injured;
- ii. the policy of enabling the offender to be discovered; and
- iii. the need to guard the public and ratepayers against the substitution of a feigned and pretended malicious injury under the cloak of which it might be attempted to get compensation from the county for the party whose property really had not been maliciously injured, but who himself might have been the injurer of it, with a view to get a compensation for it which he could not have got in any other way.”

This constituted important doctrinal clarification.

Two instances of opportunities missed by historians tackling the history of the early twentieth century can be added to this inventory.

A.T.Q. Stewart, in his seminal text *The Ulster Crisis*,<sup>36</sup> includes at the outset of his survey of the constitutional and military crisis immediately preceding the outbreak of World War I an apt quotation from Thomas Hobbes’s *Leviathan*:<sup>37</sup>

“For as the nature of Foule weather, lyeth not in a showre or two of rain; but in an inclination thereto of many dayes

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<sup>32</sup> 15 & 16 Vict., c. cxliii.

<sup>33</sup> *The Queen v Recorder of Cork* (1866) 16 I.C.L.R.1.

<sup>34</sup> Lefroy C.J., Fitzgerald, O’ Brien and Hayes JJ.

<sup>35</sup> 16 I.C.L.R. at 13.

<sup>36</sup> *The Ulster Crisis* (London, 1967).

<sup>37</sup> Hobbes, *Leviathan*, part I, chap.13.

together: So the nature of War, consisteth not in actual fighting; but in the known disposition thereto, during all the time there is no assurance to the contrary.”

In the ensuing volume, space, however, has not been found to consider the ramifications of a decision of the Irish King’s Bench Division handed down on 15 June 1914 and which was most certainly germane in the context of the Ulster ‘crisis’ (though it receives a brief mention in the appendix at page 247).

On 4 December 1913 King George V signed a royal proclamation prohibiting, under the terms of enabling customs legislation, the importation into Ireland of arms, ammunition, and the component parts of arms, empty cartridge-cases, explosives and combustibles for warlike purposes. Hunter & Co. were gunsmiths with an address at Royal Avenue, Belfast, and they had recently placed an order for guns from Hamburg. This consignment was on its way when the proclamation was issued on 4 December.

The consignment was seized by the collector of Customs and Excise at Belfast, a Mr. Coleman, when it arrived, and Hunters sued. A jury at Belfast assizes awarded them £92 damages but the judgment entered up by Boyd J. on the strength of that verdict was set aside by a majority of the King’s Bench Division (Cherry L.C.J. and Dodd J.) who held the proclamation to be constitutionally valid: *Hunter & Co. v. Coleman*.<sup>38</sup> There was a striking dissent from Kenny J. who commenced his judgment with a resounding declaration:<sup>39</sup>

“It is scarcely possible to conceive a case of greater constitutional importance than the present, involving as it does the question of the validity of a great act of State by the King in Council.”

Penny Bonsall, in her book on the Irish resident magistrates, includes in her four biographical studies, an account of the career of John Charles Milling, R. M. (1873 – 1919).<sup>40</sup> At a time when Dublin Castle was considering the transfer of Milling to do duty in Co. Antrim, he was shot and fatally wounded at his home in Co. Westport, Co. Mayo on 31 March 1919.<sup>41</sup> Missing from Bonsall’s account is any reference to one of the legal sequels to this murder: a civil bill for damages for trespass to the person and for false imprisonment brought on behalf of a boy called John McLaughlin, who had been taken into ‘protective custody’ as an eye-witness and kept in Castlebar for seven weeks before being finally transferred to Dublin and released. The more celebrated case of *Connors v Pearson*,<sup>42</sup> where a boy had been taken into protective custody following the murder of the two policemen at Soloheadbeg, Co. Tipperary in February 1919, was held in effect to govern

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<sup>38</sup> [1914] 2 I.R. 372.

<sup>39</sup> *ibid.*, at 384.

<sup>40</sup> Penny Bonsall, *The Irish RMs: the resident magistrates in the British administration in Ireland* (Dublin, n. d. [1997]), pp.134–53.

<sup>41</sup> *ibid.*, p.148.

<sup>42</sup> [1921] 2 I.R. 51.

the matter. An award in favour of Master McLaughlin for £25 was thus upheld: *McLaughlin v Scott*.<sup>43</sup>

Prior to the 1780s when the modern cycle of Irish law reports commences, recourse must perforce be had to English law reports for any detailed enlightenment regarding Irish affairs to be gleaned from such sources. The quest does not prove in vain. Let me furnish two discoveries.

In the summer of 1612 James I was contemplating the convening of his first Irish parliament. No Irish parliament had sat since the 1580s and James or, at least, his advisers were uncertain as to how to proceed under the constraints set down by Poynings's Act in the reign of Henry VII. On 30 June 1612, accordingly, the lords of the English Council thus wrote to the two English chief justices, the English chief baron and the English attorney and solicitor general announcing a legal conference that was to be held to consider the interpretation of Poynings's Act 'for avoidance of any question or inconvenience arising'. Those summoned attended a two-day conference that was soon thereafter held at Serjeants' Inn in London. Coke, the chief justice of King's Bench, includes, in his law reports, the conclusions of the conference on a range of questions prompted not only by the Irish statute 10 Henry VII, c. 4 (Poynings's Act itself) but also by the important amendment passed by the Irish parliament in the middle of the sixteenth century, 3 & 4 Philip & Mary, c. 4: see *The Case of the Parliament in Ireland*.<sup>44</sup>

The Act of Resumption passed by William III's English parliament of 1698 – 99<sup>45</sup> arranged for the vesting in trustees of estates forfeited from sundry Irish rebels. The legislation is complex as are several subsequent English statutes addressing the identical subject-matter. That the Forfeiture Trustees had overplayed their hand by seizing estates and interests that were not properly forfeited at all was confirmed in a key decision of the Irish court of King's Bench. Sadly, we know little about this decision itself, but the resultant writ of error that led to that decision being appealed to the English court of King's Bench has entailed, fortuitously, that we have the reasoning of the latter tribunal. This major case – probably something in the nature of a test case – was argued over three law terms in 1706 and 1707. Finally, early in 1707, the majority decision upholding the conclusions of the Irish King's Bench was announced: *Annesley v Dixon*.<sup>46</sup> That the affair was politically sensitive was grasped by Chief Justice Holt who was to observe early on in his judgment, with which, in effect, Powell and Gould JJ. were to agree, that any construction of the Act of Resumption other than the one he had embraced 'would be, instead of quieting Ireland, the ready way to have a new war there'.<sup>47</sup> The dissenter was Powys J. who in somewhat unguarded and highly political language appears to have warned against tinkering with what the Forfeiture Trustees had decided to do.

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<sup>43</sup> [1921] 2 I.R. 92n.

<sup>44</sup> (1612) 12 Co. Rep. 110, 77 Eng. Rep. 1386.

<sup>45</sup> An Act for granting an aid to his majesty by sale of the forfeited and other estates and interests in Ireland and by a land tax in England for the severall purposes therein mentioned: 11 Will. III, c. 2. For the background see J.G. Simms, *The Williamite confiscation in Ireland, 1690 – 1703* (London, 1956), especially chap.2.

<sup>46</sup> Holt K.B. 372, 90 Eng. Rep. 1106.

<sup>47</sup> Holt K.B. at 393, 90 Eng. Rep. at 1116.

The search programme recommended in these pages casts a significant burden on the historian and results, if and when the latter are obtained, may turn out to be disappointingly meagre. However, as I have attempted to show, that can by no means be taken for granted. Interesting discoveries are there to be made, fresh insights gained and new questions framed to be demanded of the conventional wisdom.

## EARLY REPORTED CASES ON SLANDER OF TITLE

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Actions in tort today arising as the result of something the defendant has written or spoken are commonplace. Newspapers, broadcasters and private individuals run the risk of actions being taken against them if they publish material defamatory of the plaintiff. Defamation aside, an action in negligence is possible as a result of a statement made by the defendant in circumstances where the various elements of that tort are present. Defamation and negligence are well-known. A less familiar cause of action, “curious in its origin, its history and its present features”,<sup>1</sup> likewise based on words spoken or written by the defendant, also exists, known as slander of title. According to Halsbury,<sup>2</sup> an action for slander of title lies against anyone who falsely and maliciously disparages the title of an owner of real or personal property, and by doing so causes him special damage. Gatley’s formulation of the cause of action does not differ in any material respect.<sup>3</sup> While the need to show special damage has been removed in cases to which the Defamation Act (NI) 1955 applies,<sup>4</sup> the essence of the action, as the texts make clear, is that the defendant has made a statement which puts the plaintiff’s title to land or personal property into question, in consequence of which the plaintiff has suffered damage. The statement of the cause of action by Clerk and Lindsell is fuller, and refers to a transaction relating to the plaintiff’s land which has been lost as a result of the defendant’s statement. According to Clerk and Lindsell, an action lies “if property of any kind is for sale, and anyone without lawful excuse comes forward and falsely alleges that any charges or liabilities exist with respect to it, or otherwise calls into question the right or capacity of the vendor to make a good conveyance and in consequence the bargain goes off”.<sup>5</sup>

Slander of title is nowadays treated as part of a wider generic tort of malicious falsehood, which encompasses also slander of goods.<sup>6</sup> Slander of title is undoubtedly however the origin of this wider tort. The term “slander” suggests a relationship with the tort of defamation, and so there is,

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<sup>1</sup> *British Railway Traffic and Electric Co Ltd v The CRC Co Ltd & LCC* [1922] 2 K.B. 260, *per* McCardie J.

<sup>2</sup> 28 *Halsbury’s Laws of England* (4<sup>th</sup> ed., 1979) para.262.

<sup>3</sup> *Gatley on Libel and Slander* (10<sup>th</sup> ed., 2004) para.20.14.

<sup>4</sup> S.3 provides that in an action for slander of title, slander of goods or other malicious falsehood, it is not necessary to allege or prove special damage where the words on which the action is founded are calculated to cause pecuniary damage and are published in writing or other permanent form; or are calculated to cause pecuniary damage to the plaintiff in respect of any office, profession, calling, trade or business carried on by the plaintiff at the time of publication.

<sup>5</sup> *Clerk and Lindsell on Torts* (18<sup>th</sup> ed., 2000) para.23.06.

<sup>6</sup> See *Gatley* para.20.2; Price & Duodu, *Defamation Law, Procedure & Practice* (3<sup>rd</sup> ed., 2004) para.6.01.

Holdsworth describing the two torts as springing from the same root.<sup>7</sup> It has been pointed out however that in cases of slander of title it matters not whether the words have been spoken or have been written, and to that extent the word “slander” in the context of actions based on statements regarding the plaintiff’s title is misleading.<sup>8</sup> Further, while actions for defamation and for slander of title may have sprung from a common root, they soon developed separate shoots. It was established at an early date that the limitation period applicable to actions for slander did not apply to actions for slander of title.<sup>9</sup> Equally, while an action for slander does not survive the death of the person defamed, an action for slander of title may be brought by the personal representatives after the death of the person whose title has been disparaged.<sup>10</sup> The statement of Tindal C.J. in *Malachy v Soper*<sup>11</sup> that “an action for slander of title is not properly an action for words spoken, or for libel written and published, but an action on the case for special damage sustained by reason of the speaking or publication of the slander of the Plaintiff’s title” does not mention the common root of the causes of action, but indicates clearly that the root had divided.

The tort of slander of title is of ancient origin. Modern instances concerning title to land are rare, but from late in the sixteenth century up until shortly after the Restoration the courts were kept busy with actions brought by landowners whose complaint was that their ownership of their land had been put in doubt as the result of something said by those against whom the actions were brought. The emergence of the tort coincided with development of the law of defamation, but by the early seventeenth century the differences between actions based on words spoken of the plaintiff’s person and actions based on words spoken of the plaintiff’s title to his land were emerging. After the Restoration the tort seems to have gone into hibernation for the best part of a century, before re-emerging to provide the courts with business once more. When it did however, the main aspect of the tort with which the courts were concerned, namely the need for the plaintiff to show the defendant had spoken the words complained of out of malice, was one which had featured very little in the early days. It was that feature which both made the burden on the plaintiff more onerous, and which led to the tort being nowadays being classified as an instance of the more general tort of malicious falsehood already mentioned. This article looks at the development of the law in the early reported cases, before this more general tort had been identified.<sup>12</sup>

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<sup>7</sup> Holdsworth, “Defamation in the sixteenth and seventeenth centuries” (1924) 40 L.Q.R. 302 & 397 at 402; (1925) 41 L.Q.R. 13; Holdsworth, 8 *History of English Law* (1925) p.351.

<sup>8</sup> *Gatley*, para.20.2.

<sup>9</sup> *Law v Harwood* (1628) Cro. Car. 140; *sub nom Harwood & Lowe* Palm. 529; *sub nom Lowe v Harewood* Jones W. 196; *Nurse v Pounford* (1629) Hetley 161. Below, p.257.

<sup>10</sup> *Hatchard v Mege* (1887) 18 Q.B.D. 771. For a comparison between actions for defamation and actions for malicious falsehood, see Price & Duodu, *op. cit.*, para.6.02.

<sup>11</sup> (1836) 3 Bing. (N.C.) 371.

<sup>12</sup> For earlier reviews see Kiralfy, *The Action on the Case* (1951) chap.9; Newark, “Malice in actions on the case for words” (1944) 60 L.Q.R. 366.

## Illustrations

While modern examples of actions for slander of title to real property are rare, they are not impossible to find. In *Lover v Pearce*,<sup>13</sup> an action for slander of title was successfully brought by a plaintiff who had entered into a contract to assign a lease. The defendants were the personal representatives of the lessor who had been asked to give consent to the assignment, as required under the terms of the lease. The lessor had granted consent, but the consent contained a statement to the effect that in agreeing to the assignment the lessor was not admitting that the lease had been validly granted or was binding on her. The purchaser rescinded the contract and the plaintiff resold at a loss which he sought to recover from the defendants. Buckley J. held that the lessor's statement carried the inference that the lease might be open to attack, and that as the lessor did not believe that she could impugn the lease, the statement was actionable. More recently, in *Arthur v Arthur*,<sup>14</sup> an action was brought against a defendant as a result of the defendant's denial that the plaintiff had a right of way, which led to a prospective purchaser breaking off negotiations with the plaintiff. The plaintiff was able to establish that the defendant was wrong in denying a right of way existed, and that he had suffered damage in the loss of the sale, but failed in his action for slander of title because the defendant had not acted with malice. *Cornwall Gardens PTE Ltd v RO Garrard & Co Ltd*<sup>15</sup> is the other side of the coin, where it was the assertion of a right of way which was the basis of an action for slander of title, though the action was found to be out of time. A modern Irish illustration is *Malone v McQuaid*,<sup>16</sup> in which the plaintiff brought an action as a result of the defendant's having registered a judgment mortgage against an equitable interest alleged by the defendant to be owned by the plaintiff's husband in property of which the plaintiff was the registered owner. The court held that no equitable interest existed in the husband, but went on to dismiss the plaintiff's claim for damages as the defendant had not acted out of malice.

Older cases illustrate the variety of statements, and circumstances in which statements are made, that can lead to an action for slander of title. A number of these involve auctions disrupted as a result of statements made at the auctions. A dramatic example is *Steward v Young*,<sup>17</sup> where the defendant announced at an auction of furniture, "I forbid the sale; for I hold a bill of sale of all the goods in the house in favour of Mr Alexander. I shall not allow a single lot to leave the house." Statements made in other cases have been equally effective in disrupting sales. In *Pater v Baker*,<sup>18</sup> a highways surveyor announced at an auction that he would prevent any purchaser occupying the property in sale until certain roads had been made up. In both *Hargreave v Le Breton*,<sup>19</sup> and *Watson v Reynolds*<sup>20</sup> auctions were disrupted as the result of interventions by attorneys acting on behalf of their clients: in

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<sup>13</sup> (1961) 178 E.G. 333.

<sup>14</sup> 19<sup>th</sup> February 1986, unrep. C.A..

<sup>15</sup> [2001] E.W.C.A. Civ. 699.

<sup>16</sup> 28<sup>th</sup> May 1998, unrep. High Court, RoI.

<sup>17</sup> (1870) L.R. 5 C.P. 122.

<sup>18</sup> (1847) 3 C.B. 831.

<sup>19</sup> (1769) 4 Burr. 2422.

<sup>20</sup> (1826) Moo. & M. 1.

the former, the attorney announced that a previous owner of the land in sale who had mortgaged it to the vendor had been made bankrupt before the mortgage was made; in the latter, that proceedings in Chancery were taking place relating to the property in sale, that there had been a breach of covenant in the lease under which the land in sale was held, and that proceedings would be taken against the purchaser of the property. Announcements at auctions of breaches of covenant affecting the land in sale led also to actions for slander of title in *Smith v Spooner*<sup>21</sup> and *Brook v Rawl*.<sup>22</sup>

Auctions are by no means a pre-requisite however to actions for slander of title. In *Pitt v Donovan*,<sup>23</sup> an action was brought as the result of a letter by the defendant to a purchaser of the plaintiff's lands, asserting that the plaintiff's predecessor in title was not of sound mind when he sold the land, and that the plaintiff's title would sooner or later be contested; in *Millman v Pratt*,<sup>24</sup> the defendant had published a notice that the vendor was not entitled to sell the land; and in *Atkins v Perrin*,<sup>25</sup> an action was brought by the widow of an intestate as a result of publication by the defendant of handbills offering a reward to anyone who could produce a will made by the deceased after the date of his marriage to the plaintiff, and the defendant's announcement at the sale of land that the title to the property was disputed. Perhaps more interesting to conveyancers is *Ravenhill v Upcott*,<sup>26</sup> where the defendant, the proprietor of a newspaper, published an advertisement asking the public not to buy the land offered for sale by the plaintiff "without ascertaining that the title deeds of the same are correct, as the heirs of [a named person] are not dead, or abroad, but are still alive", the implication being that the plaintiff's title was in doubt. In fact the title to the land had already been registered in the name of the plaintiff and was therefore indefeasible.

The plaintiffs' success or failure in these instances need not concern us for the present. One point may however be made at this stage. In many of the instances in which actions were brought for slander of title, the statement upon which the action was based was an assertion by the defendant, or his solicitor, in defence of rights in the land claimed by the defendant. One such instance is *Smith v Spooner*, where the action was based on the defendant's statement to the auctioneer of a house offered for sale by the plaintiff that it was no use to put the house up for sale, as the house was the defendant's. The statement was based on breaches of covenant in the lease under which the house was held having taken place, and the defendant's right, as lessor, to recover possession in consequence. The complexity of land ownership and the difficulties of proving title to land are well known. If assertions by the defendant of a claim to the land were to be actionable as slander of title, the implications for anyone believing he had a right in or claim to the land were clearly going to be serious. The same would be true for solicitors employed to advise on a claim. *Hargrave v Le Breton* and *Watson v Reynolds* are both instances where attorneys were the defendants in actions for slander of title.

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<sup>21</sup> (1810) 3 Taunt. 246.

<sup>22</sup> (1849) 4 Ex. 521.

<sup>23</sup> (1813) 1 M. & S. 639.

<sup>24</sup> (1824) 2 B. & C. 486.

<sup>25</sup> (1862) 3 F. & F. 179.

<sup>26</sup> (1869) 20 L.T. 233.

The need to strike a balance between allowing a plaintiff to bring an action where he suffered damage as a result of a statement disparaging the plaintiff's title, and allowing other parties to assert claims to the land themselves or through their advisers, was something the courts would have to address in developing the tort of slander of title.

### Origins of the Tort

In the early development of the law the King's courts afforded little relief to plaintiffs as a result of words spoken.<sup>27</sup> Local courts entertained actions for defamation, and so did the Ecclesiastical courts, but while a successful action in the local courts could lead to an award of damages,<sup>28</sup> no such relief was possible in the Ecclesiastical courts.<sup>29</sup> Nor was any relief at all possible in the King's courts for words spoken of the plaintiff, apart from cases of *scandalum magnatum* which were limited to the "great men of the realm".<sup>30</sup> At the beginning of the sixteenth century however both the King's Bench and the Common Pleas began to entertain actions in which the plaintiff's complaint was that the defendant had accused him of theft. This led in turn to cases involving statements alleging the commission of other offences, as to the plaintiff's conduct or competence in his profession, and what have been termed "accusations of socially unfortunate conditions"<sup>31</sup> such as having a venereal disease or being illegitimate.

### Bastardy cases

The early reports contain many examples of cases of plaintiffs bringing action as a result of being called a bastard. Such an accusation alone would afford no relief in the common law courts. What brought the complaint within the jurisdiction of those tribunals was damage sustained by the plaintiff as a result of words spoken of the plaintiff. In *Nelson v Staff*,<sup>32</sup> the damage relied on was the loss of the plaintiff's intended marriage. *Matthew v Crass*,<sup>33</sup> *Sell v Facy*,<sup>34</sup> *Harwood v Hopkins*<sup>35</sup> and *Bridge v Langton*<sup>36</sup> are

<sup>27</sup> Holdsworth, 3 *History of English Law* (1908) p.408 ff; Plunknett, *A Concise History of the Common Law* (5<sup>th</sup> ed., 1956) p.484 ff; Potter, *Historical Introduction to English Law and its Institutions* (4<sup>th</sup> ed., 1958) p.430 ff; Milsom, *Historical Foundations of the Common Law* (2<sup>nd</sup> ed., 1981) p.379 ff; Baker, *An Introduction to English Legal History* (4<sup>th</sup> ed., 2002) p.436 ff; Fifoot, *History and Sources of the Common Law* (1949) p.126 ff. For a more detailed treatment see Baker, 6 *Oxford History of the Laws of England* (2003) ch.44; Baker, 2 *The Reports of Sir John Spelman* (1978) 94 *Selden Society* p.236 ff; Helmholz, *Select Cases on Defamation to 1600* (1985) 101 *Selden Society* p.lxvi ff; Holdsworth, "Defamation in the sixteenth and seventeenth centuries" (1924) 40 *L.Q.R.* 302 & 397; (1925) 41 *L.Q.R.* 13; Holdsworth, 5 *History of English Law* (1924) p.205 ff; Holdsworth, 8 *ibid.*, p.333 ff.

<sup>28</sup> Plunknett, *A Concise History of the Common Law* (5<sup>th</sup> ed., 1956) p.484. For actions in local courts see also Holdsworth, 2 *History of English Law* (1903) p. 83.

<sup>29</sup> For defamation in the Ecclesiastical courts see Carr, "The English Law of Defamation" (1902) 18 *L.Q.R.* 270.

<sup>30</sup> For *scandalum magnatum* see Baker, 2 *The Reports of Sir John Spelman* (1978) 94 *Selden Society* p.244; Lassiter, "Defamation of Peers: The Rise and Decline of the Action for *Scandalum Magnatum*, 1497-1773" (1978) 22 *A.J.L.H.* 216.

<sup>31</sup> Baker, 6 *Oxford History of English Law* (2003) p.788.

<sup>32</sup> (1617) *Cro. Jac.* 422.

<sup>33</sup> (1613) *Cro. Jac.* 323.

other early examples (albeit not bastardy cases) of actions based on such loss. Of more relevance so far as the development of the action for slander of title is concerned however is a line of reported<sup>37</sup> cases where the damage suffered by the plaintiff as a result of the defendant's statement was loss of a transaction relating to the plaintiff's land. The line begins in 1583 with *Banister v Banister*,<sup>38</sup> in which the plaintiff, the heir of land from his father, was successful in an action on the case brought as a result of the defendant's calling the plaintiff a bastard, on the basis that the accusation tended to his disherison of the land. Although there is no mention of the loss of a sale of the land in Coke's note of the case, it appears that this was shown by the plaintiff.<sup>39</sup> The line continues with *Vaughan v Ellis*,<sup>40</sup> in which the land in question was held under an entail. The plaintiff was the youngest of a number of sons, and had been offered a sum for his title to the land. As a result of being called a bastard by the defendant the sale fell through. In an action by the plaintiff the defendant relied on the fact that the plaintiff had no present title to the land. The court gave judgment for the plaintiff, on the basis that although he had no present title, there was the possibility that he might inherit the land.

In *Vaughan v Ellis* the plaintiff would inherit, if at all, by reason of the entail under which the land was held. *Humphreys and Studfield's Case*<sup>41</sup> was one where the plaintiff's inheriting the land or not depended not on operation of law but on the decision of the plaintiff's father and brother. The plaintiff's complaint was that by reason of the accusation of bastardy the father and the brother intended to, and did in fact, give the land to someone other than the plaintiff. The action was successful, *Banister v Banister* and *Vaughan v Ellis* being relied on as precedents. The report of the case by Croke is of interest in that it records that the plaintiff would have been successful even if he had not been disinherited by the father and brother. Were that to have been the case, it is hard to see how the plaintiff could have succeeded unless an accusation of bastardy itself implied damage, or an action lay for the possibility of damage. Authority did exist that calling someone a bastard was itself sufficient to ground an action: in *Elborow v Allen*<sup>42</sup> the court by a majority held that the words complained of ("Shall Elborow's wife sit above my wife? He is but a bastard.") were "in themselves scandalous and dangerous to cause his inheritance to be questioned", but the point was

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<sup>34</sup> (1614) 2 Bulst. 276; *sub nom Sell v Fairee* 1 Rolle 79.

<sup>35</sup> (1599) Cro. Eliz. 787.

<sup>36</sup> (1628) Litt. 193.

<sup>37</sup> An earlier unreported case, *Pulham v Pulham* (1523), on the same issue is mentioned by Professors Baker and Helmholz: see Baker, 2 *The Reports of Sir John Spelman* (1978) 94 *Selden Society* p.241 n.2; Helmholz, *op. cit.*, p.lxxi n.7; Baker, *An Introduction to English Legal History* (4<sup>th</sup> ed., 2002) p.440 n.2; Baker, 6 *Oxford History of the Laws of England* (2003) p.788.

<sup>38</sup> (1583) noted in 4 Co. Rep. 17a.

<sup>39</sup> See *Elborow v Allen* (1622) Palm. 299. The other reports of the case do not mention the point.

<sup>40</sup> (1608) Cro. Jac. 213.

<sup>41</sup> (1637) Godb. 451; *sub nom Humfreys v Stotville Jones W.* 388; *sub nom Humfreys v Stanfeild* Cro. Car. 469.

<sup>42</sup> (1622) Cro. Jac. 642; *sub nom Elborough v Allen* 2 Rolle 249; *sub nom Elborow v Allen* Palm. 299.

clearly a questionable one, the court a few years later in *Law v Harwood*<sup>43</sup> distinguishing words such as “thief” and “bankrupt” which implied loss, from words such as “whore” and “bastard” where the court considered damage had to be shown. The alternative argument, that an action lay for the possibility of damage, divided the court some years later in *Turner v Sterling*.<sup>44</sup> According to Ventriss’ report of the case, Wylde J. held the plaintiff entitled to succeed because the law gave an action “for but a possibility of damage, as an action for calling an heir apparent, bastard”. It appears however from Freeman’s report that that proposition was not accepted by Vaughan C.J..

The cases in which the plaintiff obtained redress in the common law courts for having been called a bastard are of interest not only in showing the importance attached at the time to a term which today is probably little more than a term of abuse. Fornication and adultery were spiritual offences punishable in the Ecclesiastical courts, rather than in the King’s courts.<sup>45</sup> In *Davis v Gardiner*<sup>46</sup> it was argued that if an offence was punishable in the Ecclesiastical courts, the remedy for defamation consisting in the accusation of the offence was there also. That accusations of fornication or adultery were actionable in the Ecclesiastical courts is clear from a text published some years earlier.<sup>47</sup> Whether or not cases in which the plaintiff brought an action in the King’s courts as a result of being called a bastard involved a jurisdictional conflict between the Ecclesiastical courts and the King’s courts,<sup>48</sup> the more important point for present purposes is that the cases show the King’s courts granting relief where statements made by the defendant caused damage to the plaintiff in the form of the loss of a transaction relating to the plaintiff’s land, or the loss of an inheritance of land. If the plaintiff’s ownership of land depended on his being the legitimate heir of his predecessor in title, an accusation of bastardy would clearly put the plaintiff’s title in doubt. The action for slander of title bears a marked resemblance to such cases.

### ***Action for forgery of deeds***

Various possible origins for actions in the King’s courts for words have been identified.<sup>49</sup> One in particular is of interest so far as actions for slander of title are concerned. By the Forgery Act 1413 it was provided that landowners whose titles had been put in question by defendants who had forged deeds could bring actions for damages. The mischief recited in the

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<sup>43</sup> (1628) Cro. Car. 141; *sub nom Harwood & Lowe* Palm. 529; *sub nom Lowe v Harewood* Jones W. 196.

<sup>44</sup> (1671) 1 Freem. 15; 2 Ventr. 25. For proceedings in error against the decision see *Sterling v Turner* (1672) 1 Ventr. 206; *sub nom Sterling & Turnor* 3 Keble 26; *sub nom Starling v Turnor* 3 Keble 32; *sub nom Starling v Turner* 2 Lev. 49.

<sup>45</sup> Holdsworth, 1 *History of English Law* (1903) p.619; *Davis v Gardiner* (1593) 4 Co. Rep. 16b.

<sup>46</sup> (1593) 4 Co. Rep. 16b.

<sup>47</sup> *Natura Brevium* (1528 ed.) f.155, quoted in Baker & Milsom, *Sources of English Legal History* (1986) p.625.

<sup>48</sup> See Baker, 2 *The Reports of Sir John Spelman* (1978) 94 *Selden Society* p.241, n.2. For temporal and spiritual defamation see Baker, 6 *Oxford History of the Laws of England* (2003) p.788.

<sup>49</sup> Helmholz, *op. cit.*, p.lxviii.

statute was the forgery and publication of such deeds causing the King's liege people "to be troubled and vexed and at all times abiding in doubt of their possessions and estate". Litigation between Lord Beauchamp and Sir Richard Croft at the end of the fifteenth century provides an interesting illustration of an action under the statute and an example of the *scandalum magnatum* action in the common law courts mentioned earlier. The litigation began with Sir Richard bringing an action against Lord Beauchamp pursuant to the statute, alleging that Lord Beauchamp had forged deeds. Lord Beauchamp's response was to issue a writ against Sir Richard on the ground that the allegation of forgery was actionable as a slander.<sup>50</sup> The outcome of the litigation is not of importance to the present discussion. What is of relevance is that it appears that as time went by references to the Forgery Act came to be omitted from declarations in actions brought under it, plaintiffs merely asserting their good title to their land.<sup>51</sup> The development of an action for slander of title against such a background is understandable. The Forgery Act had established an action for damage caused to the plaintiff by the defendant's forging deeds and thereby putting the plaintiff's title in doubt: the action for slander of title extended the circumstances in which an owner of land would be granted relief beyond cases of forgery into cases where the defendant's words had similar consequences.

### Emergence of the Tort

Instances in the Plea Rolls involving actions for slander of title from early in the sixteenth century have been identified by Professor Baker.<sup>52</sup> The first reported cases are decisions of the courts from later in the century. Some are cases where the words spoken can only relate to the plaintiff's title to land, but in some cases the words complained of can be seen either as relating to the plaintiff's title, or to the plaintiff himself.<sup>53</sup> The bastardy cases are the clearest example, but not the only one. The words in *Williams and Linford's Case*<sup>54</sup> that "Williams is worth nothing, and do you think the manor of D. is his? It is but a compact between his brother Thomas and him" can be seen either as defaming the plaintiff by impugning his solvency, or as a slander of his title to the manor referred to. The case appears to be dealt with as one of slander of title, Wray J. saying that it mattered not whether the words spoken were to a potential purchaser of the land or to a third party, "for in both cases the title of the plaintiff is slandered, so as he cannot make sale of his lands". The same possibility that the words spoken would be actionable because they relate to the plaintiff's person, or alternatively because they slander the plaintiff's title can be seen in the later case of *Bois v Bois*,<sup>55</sup> where the words complained of were that the plaintiff was a whore. An allegation of immorality against a woman had led to a successful action in *Davis v*

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<sup>50</sup> *Lord Beauchamp v Croft* (1497) Keilway 26; Dyer 285a; also reported in Baker, 1 *The Reports of John Caryll* (1999) 115 *Selden Society* p.349.

<sup>51</sup> Helmholz, *op. cit.*, p.lxxi.

<sup>52</sup> Baker, 6 *Oxford History of English Law* (2003) p.788.

<sup>53</sup> The possibility that words spoken may give a cause of action in defamation or alternatively for slander of title exists today: see *Gatley*, para.20.3. For possible advantages in framing the complaint as one of slander of title, see Price & Duodu, *op. cit.*, para.6.02.

<sup>54</sup> (1588) 2 Leon. 111; 3 Leon. 177.

<sup>55</sup> (1664) 1 Lev. 134; 1 Keble 731 & 758; *sub nom Bois v Boys* 1 Sid. 214.

*Gardiner*<sup>56</sup> in 1593, but the interest for present purposes is that in *Bois v Bois* the plaintiff held land while she was sole and chaste. An allegation of immorality therefore not only defamed the plaintiff, it put her at risk of losing her land.<sup>57</sup>

The reported cases on slander of title begin with an anonymous case in 1564 reported by Dalison.<sup>58</sup> This again was an allegation of bastardy, but this time not against the plaintiff. The action was brought following the defendant's statement that the plaintiff's father was a bastard. The report of the case, in which the plaintiff was successful, is interesting for a number of reasons. The court was split over the question whether the plaintiff could succeed if the words had related to the plaintiff rather than his father. As we have seen, later cases dealt with that issue. Secondly however, the court clearly thought that an action would lie in a case where the plaintiff suffered loss of his land because the defendant said the plaintiff's elder brother, being a bastard, was legitimate. An action in such circumstances can only be one of slander of title. Such an action took place a few years later, and is also reported by Dalison. In *Booth v Trafford*<sup>59</sup> the plaintiff was the daughter of a settlor and had inherited land in default of any son of the settlor who would take a prior estate under the settlement. The plaintiff brought an action on the basis of a statement by the defendant that the settlor's wife had a son following her marriage with the settlor. The action failed however on the pleadings. *Bliss v Stafford*,<sup>60</sup> reported by Owen, appears to be the same case.

*Johnson v Smith*<sup>61</sup> is another early case in which an action for slander of the plaintiff's title failed. The action was brought against an attorney on the basis of advice (that the land was burdened by a rentcharge) given by the latter to a prospective purchaser of the land, and as a result of which the sale had fallen through. Why the action was unsuccessful is not made clear in the report of the case,<sup>62</sup> but the case shows that the action had been clearly established by 1584. The same can be seen from *Mildmay's Case*,<sup>63</sup> which was widely reported, though not principally on the issue of slander of title.

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<sup>56</sup> (1593) 4 Co. Rep. 18a.

<sup>57</sup> Such a situation had been envisaged in *Davis v Gardiner* and in *Sell v Facy* (1614) 2 Bulst. 76 (*sub nom Sell v Fairee* 1 Rolle 79) and was considered there to be a case in which an action would lie in the common law courts. It seems that in *Bois v Bois* the main concern of the court was the need for the plaintiff to prove special damage, and that the court distinguished the defendant's statement that the plaintiff was a whore from an earlier statement to like effect, but with the addition of a comment that the defendant intended to put the plaintiff out of her living. The case is complicated also because there was a single award of damages. The was adjourned and the outcome is not clear.

<sup>58</sup> *Anon* (1564) Dal. 63.

<sup>59</sup> (1573) Dal. 102.

<sup>60</sup> (1573) Owen 37.

<sup>61</sup> (1584) Moore 187.

<sup>62</sup> It seems the plaintiff was relying on what the defendant said as being hearsay. The only indication of the basis for rejecting the claim is a reference by Coke C.J. to an unreported case establishing that no action would lie for a statement amounting to a claim of title by the defendant. The decision is explicable on the ground that the defendant should have been free to give advice to his client.

<sup>63</sup> (1584-5) 1 Co. Rep. 175a; Jenk. 247; *sub nom Mildmay v Standish* Cro. Eliz. 34; Moore 144.

The most extensive of the reports of the case is by Coke, but it is primarily concerned with issues of land law arising in the case. A process of piecing together information from the various reports enables us however to understand the matters involved. The case appears to be the first reported instance of a successful claim based on slander of the plaintiff's title.

The action was brought by Anthony Mildmay and his wife Grace against Roger Standish for slander of title. The plaintiffs' declaration alleged that they were owners of land and had been in discussion with a third party for the grant of a lease of the land for 21 years. The defendant, knowing of such discussion, told the third party that one John Talbot and his wife Oliffe had an existing lease of the land for 1,000 years. In consequence of the statement, the third party declined to take a lease from the plaintiffs, who then brought the present action. The defendant's answer was essentially that his statement was true, a lease to Talbot and his wife having been made by the plaintiffs' predecessor in title. The problem was that the lease turned out to be invalid, for reasons which may be found in Coke's report, with the result that the defendant's statement was a slander of the plaintiff's title for which they were entitled to recover against the defendant. Sympathy for the defendant was clearly limited, Coke's report concluding "forasmuch as he hath taken upon him the knowledge of the law, and meddling with a matter which did not concern him, had published and declared, that Oliffe had a good estate for 1000 years, in slander of the title of Mildmay, and thereby prejudiced the plaintiff,<sup>64</sup> . . . the judgment given for the plaintiff was affirmed in the writ of error; *et ignorantia juris non excusat*."

The statements which led to early actions for slander of title are as diverse as the more recent examples already noted. A statement that a third party had a lease of the plaintiff's land was the basis not only of the action in *Mildmay's Case*, but also in *Pennyman v Rabanks*<sup>65</sup> and *Earl of Northumberland v Byrt*,<sup>66</sup> though in the last of these the defendant sought to argue that the lease had been assigned to him, in order to defend the action by asserting a claim to the land himself.<sup>67</sup> Statements in which the defendant was asserting a claim to the plaintiff's land were behind the actions in a number of cases.<sup>68</sup> In other instances actions were brought for statements impugning the validity of a marriage of the plaintiff's wife, through whom the plaintiff derived title;<sup>69</sup> for saying that the land should have devolved to someone other than the plaintiff;<sup>70</sup> or that the defendant would rather buy the title of a named

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<sup>64</sup> According to the reports by Croke and Moore, the action was brought by Mildmay and his wife. Coke's report proceeds on the footing that the action was brought by Mildmay alone. His *Book of Entries* suggests that the action was by Mildmay and Grace: Coke, *Book of Entries* (1614) f.30.

<sup>65</sup> (1595) Cro. Eliz. 427; *sub nom Penniman v Rawbanks* Moore 410.

<sup>66</sup> (1607) Cro. Jac. 163.

<sup>67</sup> Below, p.261.

<sup>68</sup> *Gerrard v Dickenson* (1590) Cro. Eliz. 196; *sub nom Gerard v Dickenson* 4 Co. Rep. 18a ("I have a lease of the manor of Hely for ninety-nine years"); *Lovett v Weller* (1616) 1 Rolle 409 ("take heed how you buy it for it is mine") and *Cane v Golding* (1649) Style 169 & 176 ("His right and title is naught, and I have a better title than he."); *Cock v Heathcock* (1677) 3 Keble 744 ("I have a surrender of the lands of B and intend to sue for the same, and that the plaintiff hath not title").

<sup>69</sup> *Bold v Bacon* (1594) Cro. Eliz. 346.

<sup>70</sup> *Gresham v Grinley* (1607) Yelv. 88.

third party than the plaintiff's title;<sup>71</sup> or more bluntly, that the plaintiff had no more right to the land than a mere stranger;<sup>72</sup> that the plaintiff had no title to the land;<sup>73</sup> or had no power to sell it.<sup>74</sup>

### *A separate cause of action*

That slander of the plaintiff's title to land had emerged as a separate cause of action from an action of defamation of the plaintiff is clear from two cases arising shortly after the Statute of Limitations 1623. The distinction is however apparent from cases before the Statute was enacted. *Bold v Bacon*<sup>75</sup> is an early instance, Gawdy and Clench J.J. saying that the action there was "brought for slandering the plaintiff's title, and not his person". A later example is *Sneade v Badley*<sup>76</sup> in which an action was brought as a result of the defendant's statement that the plaintiff had no more title to a named farm than a stranger. The case was determined on the sufficiency of the plaintiff's declaration in showing that the plaintiff has suffered damage. By a majority the court held that the declaration was insufficient for not stating that the plaintiff had been in negotiations for the sale of his land.<sup>77</sup> The present relevance of the case is the distinction drawn by Croke J. and Coke C.J. between actions of slander of the plaintiff's title and actions of slander of the plaintiff himself.<sup>78</sup> In the former but not the latter, Coke C.J. explained, it was necessary to aver that there had been negotiations for a sale which had fallen through.<sup>79</sup>

That a distinction had emerged between cases involving words which related to the plaintiff's person, and words which related to his title, is apparent also from *Nelson v Staff*.<sup>80</sup> Here again the words complained of were that the plaintiff was a bastard. The action was brought on the ground that the

<sup>71</sup> *Crush v Crush* (1605) Yelv. 80.

<sup>72</sup> *Sneade v Badley* (1616) 3 Bulst. 75; *sub nom Smead v Badley* Cro. Jac. 397; *sub nom Swead v Badley* 1 Rolle 409.

<sup>73</sup> *Marvin v Maynard* (1595) Cro. Eliz. 419; *Law v Harwood* (1628) Cro. Car. 140; *sub nom Harwood & Lowe* Palm. 529; *sub nom Lowe v Harewood* Jones W. 196.

<sup>74</sup> *Manning v Avery* (1673) 1 Freem. 274; 3 Keble 153.

<sup>75</sup> (1594) Cro. Eliz. 346.

<sup>76</sup> (1616) 3 Bulst. 75; *sub nom Smead v Badley* Cro. Jac. 397; *sub nom Swead v Badley* 1 Rolle 409.

<sup>77</sup> Below, p.258.

<sup>78</sup> Bulstrode's report of the case records Croke J. saying that "[t]here will be a difference, where one doth slander and disable the person of another, as where one being an heir, the other saith, that he is not an heir, but a bastard, an action upon the case well lieth for this; . . . here in this case the slander is to the title of the land; and this is no slander without damage; . . ." Rolle's report is to similar effect: "Crooke action gist si home dit que auter que est un heire est un bastard quod fuit concessum per Dod[deridge J] pur ceo que vae al person, mais auterment est en nostre case . . ."

<sup>79</sup> "For to call one a thief, or a villein regardant, &c. This is good cause of an action upon the case; without any averment here in this case, the plaintiff being seised of a manor: another saith unto him, you have no right unto this. I do somewhat doubt of these words, whether actionable. . . . This difference is to be observed, that an action upon the case for words, which do tend to the slandering of the person of one, may be without any averment; but not so where the words are for slandering of the title . . ."

<sup>80</sup> (1617) Cro. Jac. 422.

defendant's statement had led to the plaintiff losing a marriage for which he was in negotiations prior to the statement being made. After judgment for the plaintiff the defendant brought a writ of error. The errors alleged included the omission of the plaintiff to show he was heir to the owner of the land. The judgment was affirmed however on the ground that the action was not one for slander of title, in which the court considered such an averment might be needed, but was for the loss of the marriage, and was based on defamation of the plaintiff.

The Statute of Limitations 1623 made the distinction between actions for slander of title and actions for slander of the plaintiff personally important for two reasons. By the Statute it was provided that an action on the case for words was subject to a limitation period of two years,<sup>81</sup> and that in cases where an award was made in such actions which was less than 40 shillings, the costs recoverable by the plaintiff would be limited to amount of damages.<sup>82</sup> In *Law v Harwood*<sup>83</sup> the court by a majority held that the provisions of the Statute both as to limitation and as to costs did not apply to an action for slander of title.<sup>84</sup>

### Elements of the Tort

Two aspects of the action for slander of title in particular concerned the courts in the early days. One concerned the proof of damage which the plaintiff needed to establish in order to succeed; the other concerned the defendant's ability to assert a claim of his own to the land in question without running the risk of an action against him on account of such assertion. In addition to these matters however, it appears from the early cases that it was not a requirement that the plaintiff should show in his declaration what estate he held in the land,<sup>85</sup> and that the defendant would not escape liability by showing he made the statement to someone other than a would-be purchaser or lessee.<sup>86</sup>

### *The need to show a colloquium*

The basis on which the common law courts took cognisance of complaints based on statements made concerning the plaintiff was, as we have seen, that the plaintiff had suffered damage as a consequence of the statement. In actions for slander of title, the early reported cases invariably show such damage being established in the form of the loss of a transaction relating to the plaintiff's land, for which he had been in negotiation, and which had fallen through as a result of the slander of the plaintiff's title by the defendant. In *Johnson v Smith*,<sup>87</sup> the plaintiff's declaration stated that the plaintiff was seised of certain land from his father and was in communication with B to sell it to him, but that as a result of advice given by the defendant (an attorney) B refused to buy the land, as did all others, in consequence of

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<sup>81</sup> S.3.

<sup>82</sup> S.6.

<sup>83</sup> (1628) Cro. Car. 140; *sub nom Harwood & Lowe* Palm. 529; *sub nom Lowe v Harewood* Jones W. 196.

<sup>84</sup> See also *Nurse v Pounford* (1629) Hetley 161.

<sup>85</sup> *Marvin v Maynard* (1595) Cro. Eliz. 419.

<sup>86</sup> *Williams and Linford's Case* (1588) 2 Leon. 111; 3 Leon. 177; above, p.253.

<sup>87</sup> (1584) Moore 187.

which the plaintiff suffered damage in the loss of the price and the value of the land. Similarly, in *Lovett v Weller*,<sup>88</sup> the declaration stated that the plaintiff was seised of land and in discussion for the sale of it to a third party, when the defendant spoke the words complained of, by which the plaintiff lost his bargain. Negotiations for a sale which fell through were likewise the background to the complaint in *Pennyman v Rabanks*.<sup>89</sup> In *Mildmay's Case*,<sup>90</sup> *Gerard v Dickenson*<sup>91</sup> and *Earl of Northumberland v Byrt*,<sup>92</sup> the declarations complained that the slander had resulted in the loss of a lease by the plaintiff for which he had been in discussion prior to the defendant's statement. In *Williams and Linford's Case*,<sup>93</sup> the complaint was that the slander had resulted in the loss of an exchange of land. The requirement for the plaintiff to show loss of a transaction for which he had been in discussion was made plain in *Bold v Bacon*.<sup>94</sup> Fenner J. saying "[t]his action [slander of title] lieth not but by reason of the prejudice in the sale; and this appeareth not . . ."

The requirement to show discussions which had fallen through as a result of the defendant's statement was strictly adhered to. A declaration which stated merely that the plaintiff *intended* to sell the land or to make a lease would result in the action failing,<sup>95</sup> the reason being that such a declaration did not show that the plaintiff had suffered damage.<sup>96</sup> In *Sneade v Badley*,<sup>97</sup> the court was divided on the point. The plaintiff's declaration stated that the plaintiff had a purpose and intent to convey part of his land to his son for his advancement and to lease another part of the land, and that as a result of the defendant's slander of the plaintiff's title, the plaintiff was unable to make any lease or other assurance for his son. Houghton J. thought that the declaration was sufficient to allow the plaintiff to succeed, on the basis that the slander would dissuade others from buying the land from the plaintiff. Dodderidge and Croke J.J. held it was not, as the declaration did not show damage had been suffered by the plaintiff. The basis of Dodderidge J.'s decision was that notwithstanding the defendant's statement the plaintiff was

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<sup>88</sup> (1616) 1 Rolle 244.

<sup>89</sup> (1595) Cro. Eliz. 427; *sub nom Pennyman v Rawbanks* Moore 410.

<sup>90</sup> (1584-5) 1 Co. Rep. 175a; Jenk. 247; *sub nom Mildmay v Standish* Cro. Eliz. 34; Moore 144.

<sup>91</sup> (1590) 4 Co. Rep. 18a; *sub nom Gerrard v Dickenson* Cro. Eliz. 196.

<sup>92</sup> (1607) Cro. Jac. 163.

<sup>93</sup> (1588) 2 Leon. 111; 3 Leon. 177.

<sup>94</sup> (1594) Cro. Eliz. 346.

<sup>95</sup> See *Sell v Facy* (1614) 2 Bulst. 276; *sub nom Sell v Fairee* 1 Rolle 79, where the principle was applied in a case where the complaint was that the plaintiff had lost a marriage, Coke C.J. saying that in an action for slander of title a declaration that "quod intendebat, & conatus fuit, for to sell [the plaintiff's land], this is not good, but he ought to lay precisely, that he was in speech and communication for the sale of this . . ."

<sup>96</sup> See *Gresham v Grinley* (1607) Yelv. 88 where the declaration showed that the plaintiff had an intention to make a jointure to his wife and to transfer parts of his land to his children. The action failed, one reason being "[b]ecause it does not appear by any thing in the declaration that the plaintiff is damnified, viz, that he was *about to sell it*, or had enter'd into a bond to make a jointure to his wife, which by reason of such words would not be accepted".

<sup>97</sup> (1616) 3 Bulst. 75; *sub nom Smead v Badley* Cro. Jac. 213; *sub nom Swead v Badley* 1 Rolle 244.

still able to settle the lands on the son. Croke J.'s decision was based on the proposition that damage could not be shown unless the plaintiff's declaration stated the plaintiff had been in negotiations for the sale or the land, and that these had fallen through as a result of the defendant's statement. The case was adjourned, and when it came before the court again, judgment was given for the defendant, Coke C.J. saying that it was necessary that the defendant's words should have hindered the plaintiff in the sale or leasing of the land, and that this had both to be expressed in the declaration and proved on the evidence.<sup>98</sup>

*Elborow v Allen*<sup>99</sup> also resulted the court being divided on the question whether the plaintiff needed to state in his declaration he had been in discussion for a sale or lease of his land. The basis of the case was that the plaintiff had been called a bastard by the defendant. By a majority (Ley C.J., Chamberlaine and Houghton J.J.; Dodderidge J. dissenting) the court held that the plaintiff could succeed notwithstanding the absence of any averment that there had been discussions for a sale or lease and that these had fallen through as a result of the defendant's statement. If the case is one where it was the person of the plaintiff which is slandered, then there was authority in *Sneade v Badley* for the proposition that no such averment was necessary. It seems however from the reports by Palmer and Rolle that the court proceeded on the basis that it was protecting the plaintiff's title.<sup>100</sup> If that is the case, it is hard, on the basis of the earlier authorities, to disagree with the view of Dodderidge J. that the plaintiff needed to show discussions for a transaction, which had fallen through as a result of the statement made by the defendant.<sup>101</sup>

Later cases confirm the requirement that in cases of slander of title the plaintiff had to show discussions for a sale or lease which had fallen through as a result of the slander. *Law v Harwood*<sup>102</sup> has already been noted. In *Tasburgh v Day*,<sup>103</sup> the assertion that the plaintiff intended to sell an advowson in order to pay his debts, and that by reason of the defendant's

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<sup>98</sup> Speaking of the plaintiff's declaration, Coke C.J. explained: "here it is said, habens propositum & intentionem, this is not good; but if he had said, habens colloquium & propositum, this had been good cause of action".

<sup>99</sup> (1622) Cro. Jac. 642; *sub nom Elborow v Allen* Palm. 299; *sub nom Elborough v Allen* 2 Rolle 248.

<sup>100</sup> In Palmer's report the basis of the decision of the majority is that "quia ceux parols come sont layd en le declaration, sont actionable; quia le parties est scandal en son title, & inheritance, p cest note & imputation de bastardy; car cest Court doet pteect son title". Rolle reports Chamberlaine J. as saying that "si home que avoit terre per discent soit called bastard ceo est tout come si fuit dit il avoit null title a ses terres, though there be no communication de son title, & vous naves null case in le ley que dit, que pur calling un bastard generalment, que action ne voilt giser jeo die, que si home que ad terres per purchase soit call un bastard, que el poet aver action, pur ceo que sil nad heire de son corps son terre escheater".

<sup>101</sup> The judgment of Dodderidge J. proceeds from the starting point that an allegation of bastardy was a matter for the Ecclesiastical courts, and that to ground an action in the common law courts it was necessary to show damage for which an award could be made, neither element of which had been established by the plaintiff.

<sup>102</sup> (1628) Cro. Car. 140; *sub nom Harwood & Lowe* Palm. 529; *sub nom Lowe v Harewood* Jones W 196.

<sup>103</sup> (1618) Cro. Jac. 484.

statement the plaintiff was hindered in the sale, was held to be insufficient, the court giving judgment for the defendant whose argument that the declaration did not show any communication to sell it which had been hindered by the defendant's statement appears to have been accepted. *Cane v Golding*<sup>104</sup> and *Manning v Avery*<sup>105</sup> are to like effect.

### *Claim of title by defendant*

Just as it became established from an early date that the plaintiff needed to show that he had been in discussions for the sale or a lease of his land, so it is also clear from the earliest reported cases that the defendant would not be liable in an action for slander of title if the defendant claimed title in himself to the land, even though such claim were untrue. In *Banister v Banister*,<sup>106</sup> the report records the court having resolved that if the defendant pretended the plaintiff were a bastard, and that he (*i.e.* the defendant) was the next heir, no action would lie. In *Johnson v Smith*,<sup>107</sup> Coke C.J. refers to an earlier case, apparently unreported, for the proposition that no action would lie where the defendant claimed title to the land. The proposition is applied in a number of cases. In *Lovett v Weller*,<sup>108</sup> the plaintiff failed in an action brought as a result of the defendant's statement to a third party negotiating to buy the plaintiff's land "take heed how you buy it for it is mine". Likewise in *Cock v Heathcock*,<sup>109</sup> the plaintiff failed in an action founded on the words "I have a surrender of the lands of B. and intend to sue for the same, and that the plaintiff hath no title".<sup>110</sup> The reason for the proposition is that were the position otherwise, no claim could be put forward without the risk of an action against the claimant.<sup>111</sup>

The rule that an action for slander of title would not succeed where a claim of title was the basis of the action did not assist a defendant unless the claim were that the defendant himself had title. If the defendant's statement was that a third party had title to the land, then the defendant would be liable in an action for slander of title, assuming the defendant's statement were untrue. That had been the reason why the defendant in *Mildmay's Case* was liable, the defendant's statement being that a lease of the land had been made to a third party.<sup>112</sup> This distinction between immunity from action where the defendant claimed title himself, and liability where the assertion was that title existed in a third party, led to cases where the statement was apparently an assertion that a third party had title (in which case the defendant was going to be liable) but where the defendant sought to show that the title claimed was in fact his own (so defeating the plaintiff's action). In *Pennyman v Rabanks*,<sup>113</sup> an action was brought for the words "I know one

<sup>104</sup> (1649) Style 169 & 176.

<sup>105</sup> (1673) 1 Freem. 274; 3 Keble 153.

<sup>106</sup> (1583) noted 4 Co. Rep. 17a.

<sup>107</sup> (1584) Moore 187.

<sup>108</sup> (1616) 1 Rolle 409.

<sup>109</sup> (1677) 3 Keble 744.

<sup>110</sup> See also *Anon* (1654) Style 414.

<sup>111</sup> *Lovett v Weller* (1616) 1 Rolle 409; *Gerard v Dickenson* (1590) 4 Co. Rep. 18a; *sub nom Gerrard v Dickenson* Cro. Eliz. 346.

<sup>112</sup> For a later example of the rule being applied, see *Rowe v Roach* (1813) 1 M. & S. 304.

<sup>113</sup> (1595) Cro. Eliz. 427; *sub nom Penniman v Rawbanks* Moore 410.

that hath two leases of [the plaintiff's] land, who will not part with them at any reasonable rate". In a motion to arrest judgment obtained by the plaintiff, the defendant argued that the statements referred to leases made to himself. The court was unanimously of opinion that no action lay against a defendant who claimed title himself, even though such claim were false. Moore's report of the case states however the court divided on the point whether the defendant could succeed on the basis that the words referred to leases to himself, Popham J. taking the view that the defendant could not succeed on this point, but Gawdy and Fenner J.J. of opinion that he could. Croke's report shows that the judgment obtained by the plaintiff was affirmed, but the point under discussion is left unclear. A similar point arose in *Earl of Northumberland v Byrt*,<sup>114</sup> where the defendant had said that the plaintiff's predecessor had made a lease to a third party. The defendant sought to argue that the third party had later assigned the lease to the defendant, so that the defendant had spoken in maintenance of his own title. The court rejected the argument, as the words imported that the defendant had spoken them "to countenance the title and interest of a stranger, which is not lawful" and that the defendant could not subsequently rely on the assignment to him to avoid liability.

A claim of title based on a lease to someone other than the defendant was the basis of the action in the more difficult case of *Gerard v Dickenson*.<sup>115</sup> There is a statement by Richardson J. in *Nurse v Pounford*<sup>116</sup> that "they had alwaies conceived *Sir Gilbert Gerrards case* not to be law", but the criticism can only refer to the construction put by Wray C.J. on the words spoken by the defendant in the case, or to the decision being based on the ground of the defendant's knowledge, for the case does not depart from the general principle that a defendant asserting a claim to title in himself is not liable in an action for slander of title. The action was brought as a result of the defendant's statement that she had a lease of the plaintiff's land. The lease was one which had been made to her husband, but which appears to have been forged. The court held that the defendant was liable to the plaintiff in an action for slander of the plaintiff's title. In resolving that no action would lie if the defendant had affirmed and published that the plaintiff had no title, but that the defendant had title herself, even though such claim were false, the court was reasserting the principle already established; and accordingly in holding, on this ground, that the defendant was not liable as a result of her statement, the court's decision is unobjectionable. The court went on however to hold the defendant liable on grounds based on the defendant's knowledge that the lease was a forgery.<sup>117</sup> For present purposes interest lies in Croke's report of the case, from which it appears that Wray C.J. considered the words "I have a lease" were not to be construed as meaning that the defendant claimed to be entitled to the term created by the lease, but meant merely that she had a deed (in favour of her husband) in her possession. The Chief Justice went on to say that had the defendant said that she had an interest or term for ninety-nine years, and entitled herself to it, she

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<sup>114</sup> (1608) Cro. Jac. 165.

<sup>115</sup> (1590) 4 Co. Rep. 18a; *sub nom Gerrard v Dickenson* Cro. Eliz. 196.

<sup>116</sup> (1629) Hetley 161.

<sup>117</sup> On this point the decision was considered "a particularly hard one" in *Wren v Weild* (1869) L.R. 4 Q.B. 730.

would not have been liable. There is nothing objectionable in that statement, but the initial construction of the defendant's words seems questionable, and was not shared by Gawdy J., who took the view that they amounted to a claim to the leasehold term.

Finally, one of the last of the cases from the seventeenth century raises a matter which would come to be of more concern later. The report of *Goulding v Herring*<sup>118</sup> records that it was agreed that though the defendant claimed the title, "yet being malitiose found by verdict the action lieth, but if upon the evidence any probable cause appeared of claim, it ought not to be found malitiose". The question of malice had featured very little in the early cases, but would become the main concern for the courts in the nineteenth century.

### Slander of Title Revived

The early reported cases on slander of title span the period 1564 to 1677. Thereafter the tort disappears from the reports, before resurfacing in *Hargrave v Le Breton* almost another century later. When it does, the main concern of the courts appears to be the need for the defendant's statement to have been made maliciously.<sup>119</sup> Although there are references in some of the cases from the earlier period to malice,<sup>120</sup> none of those cases appear to have turned on the issue, and it may be that the assertion that the defendant's statement was *falso et malitiose* was simply the standard form for pleading.<sup>121</sup> Holdsworth<sup>122</sup> explains that originally all that was meant by such allegation in actions on the case for words was that the words were spoken without just cause or excuse, but that use of the formula led to the belief that malice was an essential element. That belief was later laid to rest so far as actions for defamation were concerned, but that did not take place with actions for slander of title. Indeed quite the reverse occurred, the courts emphasising the need for the plaintiff in such actions to prove the words were spoken maliciously.<sup>123</sup> This need for the plaintiff to prove malice is one

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<sup>118</sup> (1673) 3 Keble 141.

<sup>119</sup> For the history of malice in defamation actions see Holdsworth, "Defamation in the sixteenth and seventeenth centuries" (1924) 40 L.Q.R. 302 & 397; (1925) 41 L.Q.R. 13, p.24; Holdsworth, 8 *History of English Law* (1925) p.371. For the history of malice in actions for slander of title see Newark, "Malice in actions on the case for words" (1944) 60 L.Q.R. 366.

<sup>120</sup> See *Mildmay v Standish* (1584) Moore 145 ("le def. ad malicousmt publish . . ."); *Elborow v Allen* (1622) Cro. Jac. 642 ("although the plaintiff saith he was scandalized in his estate, and that [the words] were spoken maliciously, . . ."); *Cane v Golding* (1649) Style 169 & 176 ("the saying that the words were spoken falso & malitiose"); *Goulding v Herring* (1673) 2 Keble 141.

<sup>121</sup> See Newark, *op. cit.*, p.370, referring to *Elborow v Allen* (1622) Cro. Jac. 642 where the allegation in the declaration of malice was said to be "but the clerk's drawing and inserting". *Cp Shepherd v Wakeman* (1662) 1 Sid. 79 (action for defamation: "le incerting de falso & malitiose in le declaration nest que formall . . .").

<sup>122</sup> Holdsworth, "Defamation in the sixteenth and seventeenth centuries" (1924) 40 L.Q.R. 302 & 397; (1925) 41 L.Q.R. 13, p.24; Holdsworth, 8 *History of English Law* (1925) p.371.

<sup>123</sup> See *Hargrave v Le Breton* (1769) 4 Burr. 2422; *Smith v Spooner* (1810) 3 Taunt. 246; *Pitt v Donovan* (1813) 1 M. & S. 638; *Pater v Baker* (1847) 3 C.B. 831.

of the features which distinguishes actions for slander of title from actions for defamation. In the latter, malice is relevant in certain instances, notably in defeating a defence based on qualified privilege, but otherwise the onus on the plaintiff does not require him to state that the defendant has spoken maliciously.<sup>124</sup> Whether the courts were right in taking the view that a plaintiff in an action for slander of title must prove malice has been disputed, Professor Newark arguing that the true position ought to be that a plaintiff should be required to prove only that the words were spoken with intent to disparage, but that if the defendant raises a claim of title in himself, then the plaintiff must show the defendant spoke maliciously.<sup>125</sup> The situation is, in other words, no different from an action for defamation in which the defendant raises a defence of qualified privilege. It seems from the authorities up until the late eighteenth century that such argument is compelling. Despite that however, it is likely the requirement that the plaintiff must discharge the onus of showing malice in cases of slander of title is now too long established to be overturned.

If the revival of the action led to an inflexible rule that the plaintiff prove malice, it led also to a less rigid view of the damage the plaintiff needed to establish. Early cases had proceeded on the basis that the plaintiff needed to show discussions for the sale or lease of the plaintiff's land, which discussions had fallen through as a result of the defendant's statement. In *Malachy v Soper*,<sup>126</sup> Tindal C.J. was prepared to admit that these might be instances only, and that there might be other cases in which damage might be equally apparent without such allegation. The only support from the early authorities for the view that the need to show loss of a transaction is only an example of the damage which the plaintiff needs to establish is *Law v Harwood*,<sup>127</sup> in which one error assigned by the defendant to the judgment obtained by the plaintiff was that the plaintiff's declaration was bad for not showing damage "as that he was bargaining for the inheritance with any or for a lease or any other special prejudice" (emphasis supplied). Apart from *Law v Harwood*, all the other cases proceed on the allegation of loss of a transaction.

The need for the plaintiff to show special damage has, as we have seen, been abolished in cases to which section 3 of the Defamation Act (NI) 1955 applies. In cases not provided for under the statute, *e.g.* where the defendant's statement has been spoken rather than written, the plaintiff will have to show that by reason of the defendant's statement the plaintiff has suffered damage. Whether the old cases in which the tort of slander of title evolved, almost all of which proceed on the basis that the plaintiff must show

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<sup>124</sup> *Bromage v Prosser* (1825) 4 B. & C. 247, following *Mercer v Sparks* (1587) Noy 35; Owen 51; *sub nom Mercer's Case* Jenk. 268, and *Anon* (1652) Style 392. In the last mentioned, Rolle C.J. explains that "in an indictment, a thing must be expressed to be done falso et malitiose, because that is the usual form, but in a declaration those words are not necessary." See further Holdsworth, "Defamation in the sixteenth and seventeenth centuries" (1924) 40 L.Q.R. 302 & 397; (1925) 41 L.Q.R. 13, p.26.

<sup>125</sup> Newark, *op. cit.*, p.376.

<sup>126</sup> (1836) 3 Bing. (N.C.) 371.

<sup>127</sup> (1628) Cro. Car. 140; *sub nom Harwood & Lowe* Palm. 529; *sub nom Lowe v Harewood* Jones W. 196.

negotiations for a sale or lease of his land which have fallen through as a result of the defendant's statement, will be followed, or whether the courts will prefer the more liberal approach to damage voiced in *Malachy v Soper*, is a moot point. It is thought unlikely that the more restrictive view of the old cases would appeal to the courts today.

### Conclusion

In treating slander of title nowadays as an instance of a wider generic tort of malicious falsehood, attention has become focussed on the requirement that the plaintiff show that the defendant's statement was made maliciously.<sup>128</sup> The early reported cases show this was not the concern of the judges who were called on to determine actions in which the plaintiff's complaint was that his title had been put in question by words spoken by the defendant. The action on the case for words had come into existence before the first reported cases were determined, and had separated into two forms, actions for defamation and actions for slander of title. In both forms, the principal concern of the courts was that damage had been caused as a result of the defendant's statement. In denying relief to plaintiffs where the defendant had claimed a title himself, the courts were seeking to ensure that those believing they had a right in or claim to the plaintiff's land could assert such right or claim without the risk of an action against them. The allegation that the defendant had acted *falso et malitiose* seems to have been no more than the standard form in which actions on the case for words, whether for defamation of the plaintiff or for slander of his title, were pleaded. Not long before it was established in *Bromage v Prosser*<sup>129</sup> that the plaintiff need not allege malice in actions for defamation, Lawrence J. had said of actions for slander of title that malice was the gist of the action.<sup>130</sup> The same statement had however been made in connection with actions for defamation,<sup>131</sup> and it might have been expected that the view in *Bromage v Prosser* could have been applied to cases on slander of title. That it was not may be attributable to the view, already noted, expressed not many years later in *Malachy v Soper*, that such an action is "not properly an action for words spoken, or libel written and published". Whether that be so or not, the need for the plaintiff to prove malice on the part of the defendant in actions for slander of title resulted in the development of the action in a direction of which the early reported cases give little indication.

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<sup>128</sup> For modern authorities on the meaning of "malice" see *Clerk and Lindsell*, para.23.11 ff; *Gatley*, para.20.7 ff.

<sup>129</sup> (1825) 4 B. & C. 247.

<sup>130</sup> *Smith v Spooner* (1810) 3 Taunt. 246.

<sup>131</sup> *Smith v Richardson* (1737) Willes 24.

## THE LEGAL RESPONSE TO PRIZE FIGHTING IN NINETEENTH CENTURY ENGLAND AND AMERICA

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### Introduction

In the spring of 1888, champion-pugilist, John L. Sullivan, was nearing the end of a year-long promotional tour of Britain and Ireland. Sullivan had been bare fisted prize fighting's undisputed champion for six years. As was the practice, he had rarely defended his title in a competitive setting, content to fight gloved exhibitions under the Queensberry Rules. However, in January 1888, Sullivan agreed to fight a leading English fighter, Charlie Mitchell. This article will highlight that by the 1880s the English legal authorities had, as a result of half a century of dedicated legal intervention, almost eradicated prize fighting from the jurisdiction and, unsurprisingly, on March 2, 1888, Mitchell found himself peremptorily bound to the peace for over two hundred pounds. The fight, which ended in a draw, had to take place eight days later on the estate grounds of Baron Alphonse Rothschild near Chantilly, just north of Paris.

As the pugilists and their immediate entourage left the Rothschild estate, French police arrested them. Sullivan spent a night in jail but subsequently skipped bail and fled to America. He was later sentenced *in absentia* to three days in prison and a fine of one thousand francs. As Sullivan returned home, it was surely evident to him that the days of the bare knuckle fight were drawing to a close. The risk of injury, the considerable obstacles in arranging and holding prizefights as well as increased legal surveillance were threatening the very existence of the sport. In addition, it was increasingly clear that whatever "stake" fighters such as Sullivan won in a bare knuckle bout, they would end up spending most of it in an attempt to stay out of prison.

Queensberry-regulated bouts now became an attractive proposition for Sullivan. Gloved bouts attracted lower levels of physical risk, they decreased a fighter's legal exposure and they increased his commercial capacity by permitting him to fight more often and more openly. Consequently, it is the contention of this article that Sullivan, whose reign is generally held to mark the beginning of the modern heavyweight championship and whose influence on the sport goes beyond that, bridged the (legal) gap between the bare fisted prizefight and the gloved bout. More fundamentally, it is also suggested that, in a pattern first established in England, the criminal law of the United States forced fighters to forego bare fisted fights under the London Prize Ring Rules and manipulated them into adopting the Queensberry Rules. It is further submitted that, in a typical example of nineteenth-century social engineering, once the English and American authorities became satisfied that the activity in question was adequately regulated and codified, the criminal law was seen to retreat.

In strictly legal terms, the legitimising equation that emerged can be understood as follows: boxing, as regulated by the Queensberry Rules or

some statutory derivation thereof, was not prize fighting; it did not incite social disturbance nor act as a threat to general public morality; it no longer required participants to fight to a standstill nor could it be considered unacceptably dangerous. The historical context of that “equation” is now examined to the point where it is argued that the induced evolution of prize fighting into modern boxing provides a provocative insight into some of the hitherto undervalued socio-legal forces at play in England and America during the nineteenth century.

### Regency Boxiana

In his treatise *Pleas of the Crown (1803)*, Sir Edward East viewed the legal repercussions of fatal accidents in sport as follows:

“If death ensues from such as are innocent and allowable, the case will fall within the rule of excusable homicide: but if the sport be unlawful in itself, or productive of danger, riot or disorder from the occasion, so as to endanger peace, and death ensues; the party killing is guilty of manslaughter.”<sup>1</sup>

Activities that East deemed “innocent and allowable” and not unlawful included the “manly sports and exercises that tend to give strength and activity in the use of arms” such as “playing at cudgels, or foils or wrestling”. These activities, according to East, were entered into merely as private recreations among friends “though doubtless it cannot be said that such exercises are altogether free of danger yet they are very rarely attended with fatal consequences; and each party has friendly warning to be on his guard.”<sup>2</sup>

East continued:

“. . . [b]ut the latitude given to manly exercises of the nature above described, when conducted merely as diversions among friends, must not be extended to legalise prize fightings, public boxing matches, and the like, which are exhibited for the sake of lucre and are calculated to draw together a number of idle and disorderly people.”<sup>3</sup>

East must have been aware of the popularity of the sport of prize fighting among his contemporaries and he would have been in his early twenties when Daniel Mendoza fought Richard Humphries in a series of celebrated bouts attended by thousands of commoners, members of the “Fancy” and the Prince of Wales.<sup>4</sup> The sport clearly appealed to all elements of society. In July 1821, when the Regency reached its zenith with the coronation of George IV, prize fighting was prominently represented with a number of fighters acting as pageboys during the ceremony. They were charged with keeping order during proceedings at Westminster Abbey and, by all

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<sup>1</sup> 1 East P.C. 268.

<sup>2</sup> *ibid.*

<sup>3</sup> *ibid.*, at 270.

<sup>4</sup> Contemporary reports of these and other fights can be found in J. Ford’s reproduction of *Boxiana, or, Sketches of Ancient and Modern Pugilism by Pierce Egan* (1976). See also J. Ford, *Prizefighting: The Age of Regency Boxiana, 1787-1824* (1971).

accounts, they fulfilled their role admirably even when Caroline, the King's estranged wife, reacted melodramatically to His Majesty's strict orders to refuse her entry.

Gorn attempts to explain this social phenomenon by suggesting:

"Perhaps the aggressive masculinity of the ring was a defensive reaction for men of an old upper class whose relative power and wealth – the very basis of their patriarchal prerogatives – were declining. Prizefights and other popular recreations momentarily re-established elite authority among the masses. They allowed gentlemen at once to mingle with the multitudes, cementing the loyalty of their social inferiors, but simultaneously to distance themselves through displays of wealth and largesse."<sup>5</sup>

The patronage of the "Fancy" ensured that the sport had a sound financial footing. More importantly, their attendance also discouraged the authorities from intervening in any meaningful way with the holding of prizefights. Popular enthusiasm for prize fighting notwithstanding, the law's institutional writers remained unconvinced. According to East, the nature of a professional prizefight was such that it must be seen to corrupt the sporting intention of the fighters: "For in such cases, the intention of the parties is not innocent in itself each being careless of what hurt may be given, provided that the promised award or applause be obtained."<sup>6</sup>

In East's opinion, the consent of the participants had to be considered vitiated by their overwhelming resolve to obtain monetary reward. There is an element of paternalism in the belief that fighters, weak in the sight of money and applause, had to be prevented from recklessly exposing themselves to harm. Nevertheless, that stance was analogous to the English courts' well-established view that consent was no defence to killing in a duel: so as the consent of duellists was seen as false and coerced upon "the punctilio of what swordsmen falsely call honour"; prizefighters were seen to recklessly compromise their bodily integrity, and that of their opponent, for monetary reward.<sup>7</sup>

However, it would not be until the mid-nineteenth century, when increased policing and a shift in public attitudes – from the dilettante roughness of the Regency period to the disciplined utilitarianism of the early Victorian period – that there would be a marked increase in the rates of conviction against duellists.<sup>8</sup> Kernan's summary of the abandonment of the "unhappy custom" of duelling also reflects the Fancy's parallel abandonment of prize fighting in the 1830s:

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<sup>5</sup> E. Gorn, *The Manly Art: Bare Knuckle Prize Fighting in America* (1989), p.27.

<sup>6</sup> 1 East P.C. 270.

<sup>7</sup> Fost. 296. See also *R v Mawgridge* (1706) 17 St. Tr. 57, *R v Oneby* (1726) 17 St. Tr. 29, *R v Rice* (1803) 3 East 581, 102 E.R. 719 and J. Horder, "The Duel and the English Law of Homicide" (1992) 12 O.J.L.S. 12.

<sup>8</sup> *R v Young and Webber* (1838) 8 Car & P 644, 173 ER 655, *R v Cuddy* (1843) 1 Car & K 210, 174 ER 779 and D. Andrew, "The Code of Honour and its Critics: The Opposition to Duelling in England, 1700-1850" (1980) 5 *Social History* 409.

“For a long time a rooted instinct made Toryism feel that to abandon the time-honoured right to private combat would be perilous surrender...But the Reform Act of 1832 meant defeat by the better-off middle classes, and it was soon followed by the rampant Chartism of the workers. It might well seem that an outpost of aristocracy like duelling was no longer a bulwark, but a source of weakness, a hindrance to the closing ranks among all the propertied which the times so loudly called for.”<sup>9</sup>

In short, prize fighting became exposed, in a legal sense, as the support of its former patrons ebbed away. Prize fighting’s vulnerability was aggravated by the fact that, in an organisational sense, the sport imploded in the 1830s. Safety standards slipped dramatically. The historical authority of the Broughton Rules, then almost a century old, was fading. The Broughton Rules were named after the leading English prizefighter of the eighteenth century. In 1741, John Broughton fought the inexperienced George Stevenson of Hull. Over the course of the forty-minute fight, Stevenson received a severe hammering with a blow to the heart forcing his final collapse. Stevenson died a number of weeks later. Apparently, Broughton was so affected by the fatality that he used his status to promote the sport’s first set of uniform rules, published in 1743.<sup>10</sup>

Boxing at that time was only vaguely related to the sport we know today. Wrestling and grappling were acceptable tactics as was eye-gouging and “purring”, which was the raking of a spiked boot across a fallen man. There was no such thing as a formal roped-off ring and often the only preparation was a chalk mark scratched on the ground. If a competitor could not bring themselves up to that scratch (as assisted by his seconds), he would then be deemed defeated. The Broughton Rules introduced three major innovations. Firstly, there was a requirement that a “square of a yard” be chalked in the centre of the ring. When a fighter was knocked, his seconds had thirty seconds to get him into position on one side of the square, facing his opponent. In effect, this was the first time that bouts were divided into rounds since each knockdown ended the fighting for at least thirty seconds. The Broughton Rules also introduced the concept of independent umpiring. Finally, though wrestling holds were permitted, a number of safety initiatives were introduced with Rule VII stating: “That no person is to hit his Adversary when he is down...a man on his knees is to be reckoned down.”

The Broughton Rules did little to rid the sport of its occasional and sickening excesses. For example, while fighters could avail of a thirty-second “break” on knockdown, there was still no limit on the duration of the fight as a whole. Neither was there any weight classification, and fighters with significantly different physiques could be pitted against each other. By the 1830s, the sport was losing further credibility: “much was allowed pass that it earlier days would have meant disqualification – head butting, hitting a man who was down on one knee, falling with knees in his throat or groin and even the equivalent of rugby tackles.”<sup>11</sup> In addition, and as driven by betting

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<sup>9</sup> V.G. Kiernan, *The Duel in European History* (1989), p.125.

<sup>10</sup> B. Mee, *Bare Fists: The History of Bare-Knuckle Fighting* (2001), p.13.

<sup>11</sup> D. Brailsford, *Bareknuckles: A Social History of Prizefighting* (1988), p.89.

patterns, fighters' seconds would often continue to drag clearly exhausted fighters up to scratch in the hope that their charge might make an "active recovery". In 1829, this practice had seen one group of seconds sentenced to transportation for life, there being, according to the trial judge, "no excuse whatsoever" for permitting the deceased to continue after he was gravely injured.<sup>12</sup> Furthermore, the death of Simon Byrne in similar circumstances, during a championship fight against James Burke in London on May 30, 1833, had a hugely detrimental impact on the sport, attracting enhanced police concern.<sup>13</sup>

*The Annual Register of 1838* notes that four men, while acting as seconds, were convicted of manslaughter having failed to prevent their clearly injured fighter from continuing.<sup>14</sup> The trial overshadowed the introduction of the London Prize Ring Rules, which set out to update the Broughton Rules. The most notable safety rule was that a knockdown would mark the end of a round and on receiving a thirty-second break a fighter would then be given eight seconds to come up to scratch unaided. In retrospect, 1838 was a pivotal year for the sport of prize fighting in England. Although the London Prize Ring Rules gave the sport a sheen of progressiveness, all previous attempts to administer the sport had failed. Despite being founded by leading ex-pugilists, self-regulating agencies such as the Pugilistic Club established in 1814 and the Fair Play Club in 1825, had quickly lost control of and credibility within the sport.

Moreover, emboldened by the exoneration of the Metropolitan Police in the inquiry into the Coldbath fields disturbances of 1833, the nascent police forces began to target prize fighting events. Reformers such as Patrick Colquhoun urged the police to broaden their remit from crimes against the person and property to the investigation of moral and social evils. The existing laws on drunkenness, prostitution, vagrancy, Sabbath breaking, gambling and cruel sports, according to social reformers, needed to be enforced with greater rigour.<sup>15</sup> A prizefight incorporated many of these social evils and were known as events hosted and sponsored by publicans.<sup>16</sup> Prize fighting was also seen to brutalise the masses with its easy acceptance of violence on display. It is further suggested that prize fighting was a reminder of the embarrassing inadequacies of England's previous system of policing. At best, local magistrates under the traditional authority had ignored prize fighting events, intimidated by the attending "Fancy". At worst, magistrates had themselves attended and even officiated at boxing matches.

It seemed that no amount of tampering with the rules would bring the sport within the range of what Victorian society perceived as "rational recreations"

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<sup>12</sup> *R v Davis*, *The Times*, September 11, 1829.

<sup>13</sup> See *R v Wilkinson*, *The Times*, April 3, 1834.

<sup>14</sup> M. Wiener, *Men of Blood: Violence, Manliness and Criminal Justice in Victorian England* (2004), p.49.

<sup>15</sup> Colquhoun outlined his views to the Select Committee of the House of Commons on Policing in 1834, see *IUP Series on British Parliamentary Papers, Crime and Punishment: Police* (1968-1971), Vol.6, App.4, pp. 404-433.

<sup>16</sup> J. Carter Wood, *Violence and Crime in Nineteenth Century England: The Shadow of our Refinement* (2004), p.75.

in tune with the disciplined and regulated norms of that society.<sup>17</sup> Boxing, as with many other folk-based sports, would have to subject itself to the “civilising process” in order to survive.<sup>18</sup> Incrementally, and taking its lead from the institutional writers, the criminal law reflected these societal concerns.

### **The Riot and Tumult of The Ring**

In *Crown Cases (1762)*, Sir Michael Foster appeared well disposed to friendly exertions of cudgelling, fencing and trials of strength involving wrestling and sparring. These “manly diversions” were not unlawful because, according to Foster, “they intend to give, strength, skill and activity and may fit people for defence, public as well as personal in time of need.”<sup>19</sup> Equally, Foster was resolute in his view that “prize fighting and public boxing matches...can serve no valuable purpose but on the contrary encourage a sport of idleness and debauchery.”<sup>20</sup> Prize fighting was taken to be associated with all manner of vice. It promoted gambling and was viewed as a social nuisance.

In 1822, for example, the owner of the “Tennis Court”, a well-known boxing academy in London’s Haymarket, took an action for libel “in his vocation as an exhibitor of sparring matches”.<sup>21</sup> The case centred on whether the plaintiff’s exhibitions were illegal. Burrough J was of the opinion that they were:

“The chief object for which persons attend these exhibitions is to see and judge the comparative strength and skill of the parties, who may be afterwards matched as prize fighters...there can be no doubt that the skill acquired in these schools enables the combatants to destroy life...and it is notorious that persons assembled at these exhibitions engage in illegal bets on the issues of such encounters.”<sup>22</sup>

Three years later, in *R v Billingham, Savage and Skinner*, Burrough J was arguing that prize fighting should be banned primarily on the ground that it promoted breaches of the peace:

“By law whatever is done in such an assembly by one, all present are equally liable for; which ought to make persons very careful. It cannot be disputed that all these fights are illegal, and no consent can make them legal, and all the country being present would not make them any less an offence. They are unlawful assemblies, and every one going to them is guilty of an offence.”<sup>23</sup>

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<sup>17</sup> Compare with the development of sports such as football, cricket and greyhound racing in R. Vorspan, “Rational Recreations and the Law: The Transformation of Popular Urban Leisure in Victorian England” (2000) 45 *McGill L.J.* 891.

<sup>18</sup> N. Elias, *The Civilizing Process* (1994), at p.166.

<sup>19</sup> Fost. 260.

<sup>20</sup> *ibid.*

<sup>21</sup> *Hunt v Bell* (1822) 1 Bing. 1, 130 E.R. 1.

<sup>22</sup> *ibid.*, at 5.

<sup>23</sup> (1825) 2 Car. & P. 234, 172 E.R. 106.

In the case at hand, the defendants were indicted for a riot and an assault of a magistrate. The first and second-named defendants were the combatants. Skinner had been assisting in the organisation of the fight. He had objected to the magistrate's attempts to stop the fight and arrest the participants. The magistrate had then attempted to arrest Skinner, instigating a "general tumult" among the thousand-strong crowd, which had ended only with the "rescue" of Skinner and the magistrate's retreat.

A guilty verdict followed as it would in *R v Perkins*.<sup>24</sup> In *Perkins*, the combatants and their seconds were indicted on various charges of riot. Evidence emerged that Perkins had struck the first blow. Patteson J directed the jury to the effect that prize fighting was illegal because it was clearly a breach of the peace, thus, it was irrelevant as to who struck the first blow. All who were present, and again the estimate was that the crowd numbered over a thousand, were, according to the court, as guilty of riot as the principals. The jury passed a guilty verdict.

Similarly, in *R v Hargrave*,<sup>25</sup> the defendant, who had assisted in the promotion of a prizefight during which a fighter had died, was convicted of manslaughter and sentenced to fourteen years' transportation. *R v Edward Murphy*<sup>26</sup> also concerned a charge of manslaughter directed upon a fighter's second. In that case, Murphy had attended a prizefight in support of his brother, who during the course of the bout had killed his opponent, Edward Thompson. A number of witnesses attested to the fact that Murphy had indeed attended the fight but that he had not assisted with the running or management of the fight. Accordingly, Murphy's defence was that he could in no way be considered to have actively aided and abetted in the death of Thompson. Nevertheless, Littledale J's direction to the jury was clear: "If the prisoner was at this fight, encouraging it by his presence, he is guilty of manslaughter, although he took no active part in it."

Littledale J also reminded the jury that if the death had occurred from violence unconnected with the fight itself, then the defendant could not be found guilty. The background to that direction is that the prizefights of the era were often interrupted by the surrounding mob. These invasions were usually of a tactical nature, instigated by supporters of the fighter who appeared to be struggling. The idea was that as attempts were made to clear the ring and push these supporters behind the roped-off area, the boxer in question would effectively be given an extended period in which to recover. There was evidence in this case that the defendant had been an integral part of an assembled "Irish mob" that had intervened in such a manner in order to protect "their man" from the advances of Thompson, who had clearly been the superior fighter. A verdict of guilty of manslaughter was returned and Murphy was sentenced to two months' hard labour.

Finally, on February 9, 1841, Daniel Herbert, a constable in the Bedfordshire rural police, attempted to put a halt to a prizefight at which there were over four hundred spectators. Herbert admitted that he had received a tip-off as to the fight's venue. On entering the roped-off area, Herbert stated that he had

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<sup>24</sup> (1831) 4 Car. & P. 537, 172 E.R. 814.

<sup>25</sup> (1831) 5 Car. & P. 170, 172 E.R. 925.

<sup>26</sup> (1833) 6 Car. & P. 103, 172 E.R. 1164.

observed two men “in fighting attitudes” both of whom he had attempted to arrest. The crowd prevented him from doing so, upon which the constable charged the defendant “in the Queen’s name to aid and assist in the quelling of this riot.” The defendant, Brown, had refused claiming that he had been charged with the care of the spectators’ horses and carriages. In *R v Brown*,<sup>27</sup> the Crown successfully prosecuted the defendant for refusing to assist a constable in the execution of his duty with Alderson B reminding the court that all prizefights were illegal as breaches of the peace, thus all persons engaging in them were punishable by law.

Overall, it is suggested that by 1838 the law on prize fighting was as unambiguous as Alderson B suggested: prize fights in their unacceptably riotous and unruly assembly equated to breaches of the peace. The determination with which the English courts sought to eliminate prize fighting was further evidenced in the manner in which they gradually extended liability beyond the combatants to include, as aides and abettors, the fight’s organisers and spectators. In this, the courts took their lead, and were consistent with, the views expressed by the institutional writers.<sup>28</sup> By the second half of the nineteenth century, enhanced police resources (individual constables would rarely be as isolated as Herbert was in *Brown*) not only increased the rate of prosecutions but also contributed to the emphasis in such actions switching from the indirect – unlawful assemblies and riot; towards the direct – assault. Baron Alderson had alluded to this approach in *R v Hunt*,<sup>29</sup> where the defendants had been indicted on one count of riot and in another for affray as a result of a prize fight held in front of a large crowd off an isolated country lane. Alderson B, who four years earlier in *Brown* had been satisfied *simpliciter* to declare prizefights illegal as breaches of the peace now argued:

“It seems to me that there is no case against these men. As to the affray, it must occur in some public place, and this is to all intents and purposes a private one. As to riot, there must be some sort of resistance made to lawful authority to constitute it, some attempt to oppose the constables who are there to preserve peace. The case is nothing more than this: – Two persons choose to fight, and others look on, and the moment the officers present themselves, all parties quietly depart. The defendants may be indicted for an assault but nothing more.”

In sum, by the latter half of the nineteenth century, it had become clear that the legality of the very nature of prize fighting, as opposed to its incidentals, was now being examined in the English courts. Notwithstanding that on conviction prize fighters often received little more than a token fine or short custodial sentence, the cumulative effect of increased police and judicial activity against the sport was beginning to take its toll.<sup>30</sup> In addition, the situation in England was aggravated by the sport’s increasingly corrupt

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<sup>27</sup> (1841) 1 Car. & M. 314, 174 E.R. 522.

<sup>28</sup> 1 Hale P.C. 443-5, Fost. 260 and 1 East P.C. 270.

<sup>29</sup> (1845) 1 C.C.C. 177.

<sup>30</sup> *R v Case*, *The Times*, March 15, 1830 and *R v Dawson*, *The Times*, March 17, 1841; on conviction for manslaughter each defendant was fined one shilling.

organisation. Prize fighting's commercial heart was about to be transplanted elsewhere.

### Boxing's New World

The nature of the American sport is encapsulated in a bout between Ned Hammond and George Kensett held in New York on 14 October 1824. The sport was dominated by Irish (Hammond was a Dubliner) and English (Kensett was a Liverpudlian) fighters. The fight's original location, Coney Island, was typical in that it was, in relative and contemporary terms, a secluded yet accessible venue, in the same way as racecourses such as Ascot and Epsom proved popular with the London prize fighting fraternity. The bout eventually took place in Queens, once the party – combatants, seconds and spectators – had evaded a bayonet charge by infantry under the sheriff of Kings County.<sup>31</sup>

For the next decade or so, the American sporting press downplayed prize fighting's popularity.<sup>32</sup> It was dismissed as a minority sport with a small ethnic base, which was held as nothing more than an excuse for working class, Anglo-Irish mobs to provoke each other or city authorities.<sup>33</sup> Admittedly, American prize fighting remained a highly unregulated affair, though by the 1850s, a combination of the post-Famine Irish masses (a sympathetic and eager audience) and elite fighters from England (driven by the legal campaign against the sport) meant that it could no longer be ignored. The irregular but robust nature of American pugilism was epitomised in fighters such as John Ambrose "Yankee" Sullivan. Sullivan, who was born in Cork in 1813, established quite a reputation as a prizefighter, notably defeating the highly-rated William Bell on Hart's Island, NY for a stake of three hundred dollars in the summer of 1842.<sup>34</sup>

Shortly after the Bell fight, Sullivan assisted Christopher Lilly in a fight against Thomas McCoy, held near Hastings in the Hudson Valley, New York. McCoy received a terrible beating and died of his injuries. Subsequently, a grand jury indicted the promoters and the ring keepers, including Sullivan, on charges ranging from riot to manslaughter.<sup>35</sup> The local authorities in Westchester County, clearly under pressure from their nearby city counterparts, set out to make an example of Sullivan. While most of the accused were fined, Sullivan was convicted of manslaughter and sentenced to two years' imprisonment. Ruggles J, in a judgment that is clearly identifiable with the then English perspective on the sport, reiterated the institutional writers' view that prize fighting was a reprehensible activity because:

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<sup>31</sup> Reports of early prizefights can be found in *The American Fistiana*, which claimed to be the definitive history of the American ring. It was first published in 1849, enlarged in 1860 and again in 1873 by Robert DeWitt.

<sup>32</sup> See the examples cited in J. Betts, "Sporting Journalism in Nineteenth Century America" (1953) *5 American Quarterly* 39 at 44.

<sup>33</sup> See *The American Fistiana* (1860), n.31, pp.7-8, for an account of a fight between Jem Reed and Tom Burrett that degenerated into a full-scale riot on Hart's Island in 1835.

<sup>34</sup> *The American Fistiana* (1860), n.31, pp.10-13.

<sup>35</sup> T. McDade, "Death in the Afternoon" (1970) *46 Westchester Historian* 1.

“A prizefight . . . brings together a large assemblage of the idle, disorderly, vicious, dissolute people . . . you can readily perceive the influence which such assemblages are likely to exercise on the public peace, and morals, and taste . . . The assemblage was in itself indictable as an unlawful one.”<sup>36</sup>

Despite receiving a gubernatorial pardon within six months, Sullivan was careful never to fight again in the state of New York. During the period 1838 to 1860, a key distinction in the legal response to prize fighting in England and America, emerges. Prize fighting events while not *eo nomine* an offence at common law in England and the United States, were nevertheless punishable as a breach of the peace, assault and battery, riot or affray. However, the American prize fighting fraternity took advantage of the fact that not all states within the Union were consistently of that view. While English prize fighting title bouts could, at a push, be held in France or Ireland; in the United States, and particularly on the eastern coast, fighters could easily cross a nearby state line in order to fight. In short, during the period in question, American prizefighters evaded the law’s grasp for longer simply because, in comparison to their English colleagues, there was more geographical and jurisdictional confusion in which to do so. For example, when Sullivan eventually lost his title to Tom Hyer in February 1849, the fight was fixed for Poole’s Island in Chesapeake Bay mainly on the grounds that the island’s jurisdictional status was a matter of dispute between the federal government and the Maryland authorities.

In 1860, prize fighting, in its bareknuckle tradition, had its last great event. The so-called “Championship of the World” between the English champion, Tom Sayers, and John C. Heenan held at Farnborough in Hampshire attracted an enormous crowd.<sup>37</sup> The internationalism and success of the fight could not disguise the sport’s decline. In the United States, the sport suffered badly in the 1860s, partly due to the Civil War draft though mainly as a consequence of the sport’s insidious corruption.<sup>38</sup> In England, the legal campaign against the sport had now extended to prohibiting railway companies from hiring out trains to facilitate “prize fighting” excursions.<sup>39</sup>

Moreover, proponents of the sport in England knew that influential elements in society had begun to tire of the prize fighting spectacle and its associated tumults. As the foundation of the Football Association (1863) and the Rugby Football Union (1871) demonstrated, the Victorian policy on sport demanded institutional administration and codification. Similarly, Gorn notes that unlike other “shifty” sports of the Gilded Age, such as baseball and horse racing, prize fighting in the United States suffered because it failed to sanitise itself in the form of effective rules, regulations and sanctions.<sup>40</sup> The drafting of the Queensberry Rules by John Graham Chambers in 1865 must

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<sup>36</sup> Reported in *The New York Herald*, November 28, 1842.

<sup>37</sup> A. Lloyd, *The Great Prize Fight* (1977).

<sup>38</sup> Gorn, n.5 at pp.172-178.

<sup>39</sup> Regulation of Railways Act 1868 (31 & 32 Vic., c.119). Specially chartered trains were an integral part of major prize fighting events; they facilitated much pre-fight gambling and, with the cooperation of private railway operators, permitted all to escape quickly once the event had taken place.

<sup>40</sup> Gorn, n.5 at p.172.

be seen in this context. The rules were a clear attempt to bring the sport within the contemporary definition of a respectable and legitimate leisure pursuit. In this, the rules not only promoted tightly regulated gloved bouts of fixed duration, they were also designed to appeal expressly to both the “gentleman” amateur and the law.<sup>41</sup> The acceptance of the Queensberry Rules and a concomitant decline in bare fisted fighting did not take place immediately, or at least not as quickly as the authorities in England and the United States would have liked. In order to persuade the prize fighting fraternity that their future lay within the Queensberry code, the authorities once again resorted to an application of the criminal law.

### **Criminal Activity or Sporting Pursuit?**

In England, the initial legal attack on prize fighting had focussed on the sport’s associated evils of gambling, riot and tumult. By 1838, there was a change in emphasis. Prosecutions now included charges of mutual assault (or in the case of fatalities, manslaughter charges), while convictions for associated prize fighting activities also began to attract stiffer sentences.<sup>42</sup> This was in line with the general policy to promote socially acceptable “manly diversions” to the detriment of more traditional and unruly fist fighting activities. However, as an 1860 article in the *Law Times* chided:

“ . . . [w]here is the written or unwritten code which permits boxing with gloves, and prohibits boxing without gloves; which allows of fencing and the single-stick, but not of a permitted blow with the bare knuckles?...If prize fighting be illegal, let it be declared to be so by the Legislature. Otherwise let us fear the judge-made law, which seeks, perhaps to substitute only the dainty squeamishness of the present age for the coarse but masculine brutality of former times.”<sup>43</sup>

The courts addressed the charge of “dainty squeamishness” by directing juries that a bout was lawful if it were an amicable contest or mere exhibition of skill in sparring but if the combatants intended to struggle in anger and fight until one was exhausted it was a criminal offence. Accordingly, it was for the jury to decide, on the basis of the presented evidence, whether the stated encounter was a sparring match (a legal and acceptable fighting contest) or a prizefight (viewed as an illegal and intolerable struggle). As the essentials of both versions of the sport remained very similar, this was an extremely difficult distinction to make.<sup>44</sup> The introduction of the Queensberry Rules in 1865 would have helped, although it must be remembered that in contrast to the other major sports of the period, a credible governing authority did not exist in boxing to ensure that the code was

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<sup>41</sup> S. Shipley, “Boxing”, in *Sport in Britain: A Social History* (A. Mason ed., 1989), pp.78-115.

<sup>42</sup> Wiener, n.14 at p.49. See *R v Lidstone*, *The Times*, December 11, 1858, where on a manslaughter conviction, the surviving fighter was sentenced to six months’ hard labour.

<sup>43</sup> ‘Is Prize Fighting Legal?’, *The Law Times*, April 28, 1860, p.75.

<sup>44</sup> See N. Parpworth, “Boxing and Prize Fighting: The Indistinguishable Distinguished” (1994) 2 *Sport and the Law Journal* 5.

uniformly applied. It would take almost a quarter of century before the Queensberry Rules could be said to have been truly accepted.

In the meantime, juries took a sympathetic view of any activity that could ostensibly be deemed a “fair fight”. Consequently, acquittals in prizefight deaths remained more likely than in manslaughter charges taken as a whole.<sup>45</sup> Wiener observes that of the thirty men charged with manslaughter resulting from a prizefight at the Old Bailey in the period 1856-1875, thirteen were acquitted, and sentences for the convicted never exceeded six months.<sup>46</sup> However, by the end of the 1870s the authority of the Queensberry rules was beginning to settle and the distinction between that which was legitimate with the fist and that which was unacceptable, had become more readily identifiable. For example, in *R v Orton*<sup>47</sup> the defendants had been convicted at trial for unlawfully assembling for the purpose of a prizefight. The Court of Criminal Appeal dismissed the appeal, affirming the trial judge’s direction to the jury:

“If it were a mere exhibition of skill in sparring [it was not unlawful]; but that if the parties met intending to fight till one gave in from exhaustion or injury received, it was a breach of the law and a prizefight, whether the combatants fought with gloves or not.”<sup>48</sup>

After an exhaustive review of the facts, including an examination of the bloodied gloves used by the combatants, the *Orton* jury had held that, although the appearance was of an organised boxing match, such was the severity and intensity of the blows that the nature of the fight clearly went beyond that which would normally be expected of a gloved sparring exhibition of fixed duration. In legal argument, reference was made to *R v Young*.<sup>49</sup> In that case, a boxer had been charged with manslaughter as a result of a sparring exhibition held in an indoor arena. During the course of the bout, Young’s opponent had fallen against a ring post and died. Bramwell B, in directions that ultimately led to a verdict of not guilty, had difficulty in seeing what was unlawful with the matter at hand primarily on the ground that the fight had taken place in private rooms, there being no breach of the peace:

“No doubt if death ensued from a fight, independent of its taking place for money, it would be manslaughter, because a fight was a dangerous thing and likely to kill; but the medical witness here had stated that this sparring with gloves was not dangerous, and not a thing likely to kill . . . however . . . supposing there was no danger in the original encounter, and the men fought on until they were in such a state of exhaustion

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<sup>45</sup> A broader criminological perspective on the concept of a “fair fight” and the rituals associated with prize fighting can be found in C. Conley, *The Unwritten Law: Criminal Justice in Victorian Kent* (1991), ch.2.

<sup>46</sup> Wiener, n.18 at p.50. Note also the remarkable acquittal in *R v Walker*, *The Times*, March 7, 1876 when the jury disregarded the defence counsel’s purported admission of his client’s guilt.

<sup>47</sup> (1878) 14 C.C.C. 226.

<sup>48</sup> *ibid.*, 227.

<sup>49</sup> (1866) 10 C.C.C. 371.

that it was probable they would fall, and fall dangerously, and if death ensued from that, it might amount to manslaughter.”<sup>50</sup>

Two years earlier, the Supreme Court of Massachusetts had taken a similar approach. In *Commonwealth v Collberg*,<sup>51</sup> the defendants were charged with assault and battery. At trial, the defendants rejected the charges on the ground that they had mutually consented to the bout in question. Furthermore, they claimed that the contest, which had taken place in a secluded spot in front of a small and peaceful crowd, was nothing more than an amicable and athletic test of strength and agility. In contrast, the prosecution noted that the bout had been instigated as a result of a prior and hostile verbal altercation between the parties, that the parties intended to do each other bodily harm and had fought until one of the parties (Collberg) was at a “standstill” and a “good deal bruised”. The trial judge, Lord J, instructed the jury:

“If the defendants were simply engaged in a wrestling match, that being a lawful sport, they could not be convicted of an assault and battery; but if by mutual agreement between themselves . . . [they] . . . went to a retired sport for the purpose of fighting with each other . . . with a view to ascertain by a trial of their skill in fighting which was the best man, and there engaged in a fight, each endeavouring to and actually doing all the physical injury in his power to the other . . . each may properly be convicted of assault and battery upon the other, although the whole was done by mutual arrangement . . . and without anger on the part of either against the other.”<sup>52</sup>

On appeal, the Supreme Court of Massachusetts, then one of the most influential courts in the United States, was of the opinion that the instructions were an accurate representation of the law. The implicit agreement between the American and English courts at this point is reflected in the fact that Lord J’s instructions were entirely similar to those given in the English case of *R v Ward*.<sup>53</sup> In that case, the prisoner had been tried and convicted for the manslaughter of a man whom he had killed during a fight, notwithstanding the largely uncontested evidence that the fight had been conducted fairly and was little more than a public trial of skill in boxing. A subsequent appeal was rejected with the court affirming the trial judge’s view that the premeditated and hostile nature of such encounters should be discouraged.

This focus on *both* the nature and operation of a prizefight is fundamental to the understanding of the Court of Crown Cases Reserved’s celebrated decision in *R v Coney*.<sup>54</sup> In that case, an eight-three majority rejected the “easy and summary” mode of suppressing prize fighting by targeting those who supported it.<sup>55</sup> The majority held that mere voluntary presence at a prizefight should not be translated into a charge of aiding and abetting a

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<sup>50</sup> *ibid.*, 373.

<sup>51</sup> (1876) 119 Mass. 350; 20 Am Rep 328.

<sup>52</sup> *ibid.*, 119 Mass. 350 at 353-54.

<sup>53</sup> (1872) 12 C.C.C. 123.

<sup>54</sup> (1882) 8 Q.B.D. 534.

<sup>55</sup> *ibid.*, 550 *per* Stephen J.

criminal activity.<sup>56</sup> As a preliminary issue, the court had been unanimous in holding that prize fighting was a criminal activity. Mathew J was succinct: “no consent can render that innocent which is in fact dangerous . . . The fists of a trained pugilist are dangerous weapons which they are not at liberty to use against each other.”<sup>57</sup> Stephen J took the traditional view that “prizefights are injurious to the public both because it is against the public interest that the lives and health of the combatants should be endangered by blows, and because prizefights are disorderly exhibitions, mischievous on many grounds.”<sup>58</sup> Cave J was more expansive:

“. . . [a] blow struck in anger, or which is likely or intended to do corporal harm, is an assault, but that a blow struck in sport, and not likely, nor intended to cause bodily harm, is not an assault, and that, an assault being a breach of the peace and unlawful, the consent of the person struck is immaterial. If this view is correct a blow struck in a prizefight is clearly an assault; but playing with single sticks or wrestling do not involve an assault; nor does boxing in the ordinary way, and not with the ferocity and severe punishment to the boxers deposed to in *Reg v Orton*.”<sup>59</sup>

Hawkins J concurred, warning the boxing fraternity that even under what he termed “the colour of a friendly encounter”, if the parties had as their object the intent to beat each other until one of them was exhausted or subjugated by that force, and so engage in conflict likely to end in a breach of the peace, the parties remained exposed to a prosecution in assault.<sup>60</sup>

With the *Coney* judgment interpreting legitimate fighting contests in such a restrictive manner, it is difficult to see how, in its wake, any competitive, antagonistic and professional boxing contest could have been justified at law.<sup>61</sup> The Court of Crown Cases Reserved appeared, impliedly at least, to be promoting amateur exhibitions or sparring contests of an athletic purpose only and it is noteworthy that at this time amateur boxing was flourishing in Britain.<sup>62</sup> In 1880, the Amateur Boxing Association had been founded and in the following year, it was sufficiently established to be in a position to hold the first official national amateur championships from a feeder of local competitions.

Similarly, in the United States, various state jurisdictions were taking the position that only “manly diversions” of a very limited fighting scope would

<sup>56</sup> Littledale J’s direction to the jury in *R v Murphy* (1833) 6 Car. & P. 103, 172 E.R. 1164 rejected. See *Coney*, at 543 *per* Cave J; at 550 *per* Stephen J; at 552 *per* Lopes J; at 557 *per* Hawkins J; at 561 *per* Huddleston B; at 562 *per* Mainstay J. In contrast, see *Coney* at 548 *per* Mathew J; at 563-566 *per* Pollock B and Lord Coleridge who remarked at 569: “The brutalising effect of prizefights are chiefly due to the crowd who resort to them.”

<sup>57</sup> *ibid.*, *Coney*, 547.

<sup>58</sup> *ibid.*, 549.

<sup>59</sup> *Coney*, 539.

<sup>60</sup> *ibid.*, 554.

<sup>61</sup> Note Lord Mustill’s comments in *R v Brown* [1993] 2 WLR 556, 590-592.

<sup>62</sup> N. Tranter, *Sport, Economy and Society in Britain, 1750-1914* (1998), at p.19.

be permitted. In *State v Burnham* (1884),<sup>63</sup> the Supreme Court of Vermont, in affirming the conviction of two prizefighters charged with breaching the peace, held:

“It is true . . . that sparring or boxing with gloves manufactured for that purpose, as conducted and engaged in ordinary athletic sports, is not unlawful, nor in breach of the peace . . . But such pugilistic exercise may be abused and carried beyond the limits of healthful and lawful exercise and sport. It may be conducted as to create a breach of the peace. It may even degenerate into a prizefight.”<sup>64</sup>

Moreover, at this time a number of anti-prize fighting statutes emerged, crystallising the distinction between “boxing in the ordinary way” and illegitimate fighting contests.<sup>65</sup> As early as 1849, the Commonwealth of Massachusetts had enacted a statute dedicated to the proscription of the sport.<sup>66</sup> Section one of the Act declared that every person who “by previous appointment” met another person to engage in a fight would be punished. Section two took care to provide that those present at such a fight – “as an aid, second or surgeon or promoter” – would also be punished. The provision was interpreted liberally in that it was not necessary, in order to maintain an indictment under the provision, to prove that the fight was for a prize or reward.<sup>67</sup> Neither did it have to be proven that the agreement to fight took place in the jurisdiction nor at a distinct time and place from the actual bout.<sup>68</sup>

Prize fighting first received the dedicated attention of the legislature in the state of New York by the enactment in 1858 of a statute entitled: “An Act to prevent prizefights and fights among game animals.”<sup>69</sup> The following year saw the enactment of dedicated legislation in the form of, “An Act to prevent and punish prizefights.”<sup>70</sup> Subsequently, section 458 of the Penal Code of the State of New York, which on conviction carried a maximum punishment of one year in jail and/or a fine of \$250, would read:

“A person who, within this State, engages in, instigates, aids, encourages, or does any act to further a contention or fight without weapons between two or more persons, or a fight commonly called a ring or prizefight, either within or without this State, or who sends or publishes a challenge or acceptance of the challenge for such a contention or fight, or carries or delivers such a challenge or acceptance, or trains or assists any person in training or preparing for such a contest or fight, is guilty of a misdemeanour.”

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<sup>63</sup> (1884) 56 Vt. 445, 48 Am. Rep. 801.

<sup>64</sup> *ibid.*, 56 Vt. 445, 448.

<sup>65</sup> E. Million, “The Enforceability of Prize Fight Statutes” (1937) 27 *Ky.L.J.* 152.

<sup>66</sup> Mass. Laws 1849, c.49.

<sup>67</sup> *Commonwealth v Welsh and Mitchell* (1856) 73 Mass. 324.

<sup>68</sup> *Commonwealth v O’Baldwin* (1869) 103 Mass. 210 and *Commonwealth v Barrett*. (1871) 108 Mass. 302.

<sup>69</sup> N.Y. Laws 1858, c.98.

<sup>70</sup> N.Y. Laws 1859, c.37.

Further west, section 6888 of the Revised Statutes of the State of Ohio provided, “whoever engages as principal in any prizefight shall be imprisoned in the penitentiary for not more than ten years nor less than one year.” On 25 February 1891, David Seville fought Arthur Majesty at the Nelsonville Athletic Club, Ohio. Majesty died of his injuries. Seville was indicted and convicted of a violation of section 6888. *In Seville v State*,<sup>71</sup> the defendant appealed to the Supreme Court of Ohio, principally on the ground that the trial judge had erred in sustaining the prosecution’s objection to the testimony offered by an expert witness on the fundamental differences between prize fighting and boxing, the latter, it was claimed, having taken place on this occasion.

Williams J, in dismissing the appeal, reminded the court that the purpose of the statute was clear: “to suppress all prize fighting, because of its brutality, and consequent danger to human life, as well as the demoralising and pernicious effects it has on the good order and well being of society.”<sup>72</sup> Williams J agreed with the trial judge that the term “prizefight” should be given its ordinary meaning under the statute, accordingly: “The question for the jury to decide was, whether this combat was a prizefight; not what the Queensberry Rules, or any other rules called it, nor what name those accustomed to such combats, have given it. What was it in plain English?”<sup>73</sup>

Subsequently, the Supreme Courts of Arkansas,<sup>74</sup> Colorado,<sup>75</sup> Delaware,<sup>76</sup> Indiana,<sup>77</sup> Kansas,<sup>78</sup> Kentucky,<sup>79</sup> Michigan,<sup>80</sup> Oklahoma<sup>81</sup> and Wisconsin<sup>82</sup> would also interpret the term prize fighting in a strict manner, equating it to any pugilistic encounter or boxing match for a stake or reward. Some commentators suggest that the stated legal developments “devastated” the commercial viability of the bare fisted sport in America.<sup>83</sup> Yet, in the same year that the Supreme Court of Vermont was tending toward a more restrictive definition of prize fighting, the most important fight in the history of modern boxing was about to occur. On September 7, 1892, at the New Orleans Olympic Club, John L. Sullivan, prize fighting’s undisputed champion, fought James J. Corbett. That Sullivan lost is of minor interest because the symbolism of fight – its history, its organisation and its aftermath – are of fundamental significance to the law’s evolving attitude towards the sport.

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<sup>71</sup> (1892) 49 Ohio St. 117, 30 N.E. 621.

<sup>72</sup> *ibid.*, 49 Ohio St. 131.

<sup>73</sup> *ibid.*, 136-137.

<sup>74</sup> *Magness v Isgrig* (1920) 145 Ark. 232, 225 S.W. 332.

<sup>75</sup> *People v Corbett* (1922) 72 Colo. 117, 209 P. 808.

<sup>76</sup> *State v Gregory* (1928) 34 Del. 115, 143 A. 458.

<sup>77</sup> *State v Patton* (1902) 59 Ind. 248, 64 N.E. 850.

<sup>78</sup> *State v Purtell* (1896) 56 Kan. 479, 43 P. 782.

<sup>79</sup> *Commonwealth of Kentucky v McGovern* (1903) 116 Ky. 212, 75 S.W. 261.

<sup>80</sup> *People v Taylor* (1893) 96 Mich. 576, 56 N.W. 27.

<sup>81</sup> *Teeters v Frost et ux.* (1930) 145 Okla. 273, 292 P. 356, 71 A.L.R. 179.

<sup>82</sup> *Parmentier v McGinnis* (1914) 157 Wis. 596, 147 N.W. 1007.

<sup>83</sup> M. Isenberg, *John L. Sullivan and His America* (1994), at p.81 and J. Sammons, *Beyond the Ring: The Role of Boxing in American Society* (1990), at p.6.

**Sullivan vs. Corbett**

Much of John L. Sullivan's career was spent ducking, weaving and evading the law's grasp. The law never landed a knockout punch, though cumulatively it did enough to make Sullivan change tactics and with that the bare knuckle prizefight was abandoned and the sport of boxing emerged. The law was the primary reason for Sullivan's inability to pursue his profession in the state of his birth. Not only were the authorities in Massachusetts reasonably proficient in implementing the state's anti-prize fighting provisions, they also, through decisions such as *Collberg*, demonstrated a willingness to indict prizefighters for assault and battery.

Sullivan sought respite in the commercial heart of American prize fighting – New York; but the law followed. Section 458 of the Penal Code of the State of New York ensured that prizefighters had to undertake some subterfuge in order to partake in bouts. In 1883, the then Mayor of New York, Franklin Edson, launched a campaign of “moral” reform, part of which was a drive to eradicate prize fighting. Central to that operation was the much-publicised stoppage by the police of the Sullivan vs. Charlie Mitchell bout at Madison Square Garden on May 14, 1883. Similarly, on November 18, 1884, the police brought a bout between Sullivan and Alf Greenfield to a premature halt on the grounds that the participants were clearly breaching the terms of a State Supreme Court order that had permitted an exhibition of sparring only in circumstances where “the blows were to have no relation to the injury or exhaustion of either party.”<sup>84</sup>

In the immediate aftermath of that fight, the combatants were arrested and charged under section 458. The subsequent trial, held on December 17, 1884, was simply a piece of theatre. The jury, awestruck by Sullivan's presence (and most likely bribed), returned a unanimous verdict of not guilty. The jury took less than eight minutes to hold that what had taken place was a mere exhibition and not a contest for physical supremacy. Sullivan now knew that if he couched his bouts in the language, circumstance and rules of gloved boxing or sparring exhibitions, the law as then stated in New York (and most states in the Union) would have little practical impact on the sport. From then on, only the most extreme cases of primitive, bare fisted prize fighting would fall foul of the New York statute.<sup>85</sup>

Accordingly, Sullivan, and all the leading American prizefighters, became increasingly attracted to Queensberry-regulated bouts. The advantages were manifold: they resulted in an air of legitimacy gathering round the sport; they attracted lower levels of physical risk; they increasing a boxer's commercial capacity by permitting him to fight more often. The new regulations also facilitated indoor, purpose-built stages or plinths, superseding the established tradition that a prize fighting ring should only be staked in turf. That particular initiative advanced the sport's progress in a number of ways. For

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<sup>84</sup> Sullivan's plea in front of Barrett J at State Supreme Court received significant coverage in *The New York Times*, November 16-18, 1884.

<sup>85</sup> Contrast *People v Floss* (1889) 7 N.Y.S. 504, where the event was held to be a mere exhibition between two women fighters and *People v Finucan* (1903) 80 N.Y.S. 929, where the promoter of a bare fisted prizefight fought under the London Prize Ring Rules was convicted.

the emerging middle classes, it meant that boxing events could now be held in exclusive gentlemen's clubs. Equally, the working class could enjoy regular bouts at the local hall. Although indoor arenas made it easier for the local police to patrol events, promoters could now exercise stricter control over the collection of the admission price.

The benefits of adopting a sanitised version of the sport were clearly demonstrated to John L. Sullivan in the embarrassing aftermath of his bare fisted fight against Charlie Mitchell in France in March 1888. On July 8, 1889, Sullivan would be goaded into his final bare fisted fight, when he defended his title against Jake Kilrain near Richburg, Mississippi.<sup>86</sup> Sullivan emerged triumphant but it was a pyrrhic victory. Although, much to the embarrassment of the state authorities, the fight had managed to take place, the crowd was relatively small, numbering no more than three thousand.<sup>87</sup> Furthermore, the state of Mississippi was sufficiently moved to indict both fighters.

In *Sullivan v The State of Mississippi*,<sup>88</sup> Sullivan was convicted on a violation state's anti-prize fighting statute. Although an appeal was upheld on the grounds that the indictment in question was fatally defective, Sullivan could not sustain the expenses associated with such litigation, and his stake for defeating Kilrain was lost in costs. Sullivan vowed never again to fight under the old bare knuckle rules and it is within that context that the historic 1892 fight against Corbett in New Orleans must be seen.

Even though Sullivan vs. Corbett was a sporting and commercial success for the sport of prize fighting, the law quickly reasserted its authority.<sup>89</sup> In *State v Olympic Club*,<sup>90</sup> a review of the activities being promoted by the New Orleans Olympic Club, then the centre of boxing promotions in the United States, held that what was occurring were not simply licensed gloved contests predicated on skill and athleticism but bouts fought to a bloody finish underwritten by significant gambling wagers.<sup>91</sup> Similar decisions, clamping down on the scope of exhibitions that could be held by athletic clubs, followed in several hitherto benign jurisdictions.<sup>92</sup> American prize fighting did then what it always had done and searched for jurisdictions that were more sympathetic. For a while, it found refuge in the relaxed legal climate of the West. Carson City in Nevada, for example, was the host for the Bob Fitzsimmons vs. James J. Corbett heavyweight title fight on March

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<sup>86</sup> See J. Cox, "The Great Fight: Mr. Jake vs. John L. Sullivan" (1984) 15 *The Smithsonian* 153.

<sup>87</sup> See W. Adams, "New Orleans as the National Centre of Boxing" (1956) 39 *Louisiana Historical Quarterly* 92 and D. Somers, *The Rise of Sports in New Orleans, 1850-1900* (1972), p.170.

<sup>88</sup> (1890) 67 Miss. 346, 7 So. 275.

<sup>89</sup> See *State v Olympic Club* (1894) 46 La. Ann. 935, 15 So. 190 where an unsuccessful attempt to shut down the New Orleans Olympic Club revealed that the Club had recorded a profit of more than \$50,000 from the proceeds of the Sullivan vs. Corbett fight.

<sup>90</sup> (1895) 47 La. Ann 1095, 17 So. 599.

<sup>91</sup> Contrary to the anti-prize fighting statute passed by the General Assembly of the State of Louisiana on June 25, 1890, (La. Laws 1890, c.25).

<sup>92</sup> See, for example, Ohio: *In re Athletic Clubs* (1896) 5 Ohio S. & C.P. Dec. 696 and *State ex rel. Attorney General v Hobart* (1901) 11 Ohio. Dec. 166.

17, 1897, while the California Athletic Club established a solid reputation for prize fighting in San Francisco in the 1880s and 1890s. However, this “cat and mouse” between the authorities and the prize fighting fraternity would soon exhaust both parties.

It must be remembered that participation in or the aiding and abetting of a prize fighting was rarely more than a misdemeanour in the various anti-prize fighting statutes of the era.<sup>93</sup> Moreover, it is arguable that prize fighting had, through the adoption of the Queensberry Rules, sanitised itself to such an extent that those very provisions effectively proscribed a sport that no longer existed. Implementing the proscription of a popular and now seemingly safe sport was seen as a waste of policing resources and of limited moral or political expediency. Equally, the prize fighting fraternity knew that the move West was not sustainable. They were clearly willing to submit to further regulation if that was what was required to survive. All these factors would crystallise in New York City.

### **The New York Model**

More so than rival cities such as New Orleans and San Francisco, New York had a concentrated and interested sporting population. It was home to the national sporting press. It had venues as diverse as Coney Island and Madison Square Garden and its location best facilitated the promotion of international bouts. In 1896, the Horton Laws amended section 458 of the Penal Code by exempting from its operation sparring exhibitions with gloves held in buildings owned or leased by a domestic incorporated athletic association.<sup>94</sup> The intention was that professional pugilism would be legalised so long as such gloved bouts would take place for the pleasure of members only in clubs incorporated under the Membership Corporations Law of the State of New York.<sup>95</sup>

This legislative initiative was broadly in line with the shift in public opinion towards a sport that was seen to have evolved hugely in light of its eventual acceptance of the Queensberry Rules.<sup>96</sup> The trend in favour of the sport had been identifiable in a jury’s acquittal of Bob Fitzsimmons in a manslaughter trial resulting from the death of his opponent in a public sparring exhibition held in Syracuse on November 16, 1894. Fitzsimmons was one of the stars of the emerging sport. World middleweight champion from 1891 to 1894, he ultimately became the world heavyweight champion on defeating James J. Corbett in 1897. As with all professional prizefighters of the era, Fitzsimmons’s main income came from exhibitions of which the Syracuse event was typical. Shortly into that contest, Fitzsimmons struck his sparring partner a single, concussive blow to the side of the face. The opponent died five hours later without regaining consciousness.

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<sup>93</sup> See, for example, La. Laws 1890, c.25, s.1; Miss. Acts 1882, p 142; N.Y. Laws 1859, c.37, s.1.

<sup>94</sup> N.Y. Laws 1896, c.37.

<sup>95</sup> N.Y. Laws 1895, c.559.

<sup>96</sup> S. Reiss, “In the Ring and Out: Professional Boxing in New York, 1896-1920” in *Sport in America: New Historical Perspectives* (D. Spivey, ed., 1985), pp.95-128.

In *People v Fitzsimmons*,<sup>97</sup> the presiding judge's instructions to the jury specifically acknowledged Fitzsimmons's defence – that he had been engaged in a lawful contest the exclusive nature of which was an exhibition of the skills of sparring, and not in the misdemeanour prohibited by section 458 – by reminding the jury that “in any athletic contest, exhibiting powers of skill, there is necessarily involved an element of danger.”<sup>98</sup> The jury found the defendant not guilty and the acquittal seems to suggest that by the mid-1890s the New York public viewed the practices of the Queensberry code as a reasonable restriction on the sport's previous inherent excesses. In fact, the Horton Laws, introduced shortly afterwards, should probably be seen as a legislative recognition of that perspective on pugilism.

The provision was effectively a statutory recognition of the Queensberry Rules and to the extent that it monitored the participants' conduct and safety within the ring, the scheme was quite successful. In recognition, championship boxing returned to New York where, on 9 June 1899, James J. Jeffries defeated Fitzsimmons in a world heavyweight title fight. However, the Horton Laws' administration of that which occurred “outside” the ring was less successful and the prize fighting fraternity, in particular its gambling element, could not resist the exploitation of a loophole within the provision. Under the scheme, private member clubs were not permitted to grant public access nor were they allowed to levy an admission fee to the general public, however, this was circumvented by the practice that membership of a club would be granted to anyone purchasing a ticket for the upcoming fight.<sup>99</sup>

In 1900, an outrageous gambling scam would lead to the repeal of the Horton Laws.<sup>100</sup> On 30 August 1900, Charles “The Real” McCoy fought the ex-heavyweight champion, James J. Corbett. McCoy, who won more than half of his 107 fights by knockout, was expected to win easily but he threw the fight, as ordered to by a gambling syndicate of which he was an associate member. By 1901, New York had again lost much of its attraction for the fight game particularly at the higher end of the scale, and few championship fights occurred in the state during the first decade of the new century.

The popularity of the sport in New York City, and the futility of attempting to maintain a total proscription on all forms of organised fist fighting, meant that a compromise was inevitable. That compromise manifested itself in the enactment of the Frawley Laws in 1911.<sup>101</sup> That scheme established a New York State Athletic Commission (“NYSAC”) and gave all contests licensed by that commission an express exemption from the applicable provisions of the New York Penal Code. In addition, the Frawley Laws mandated certain minimum medical safeguards and authorised the NYSAC to regulate the general health and safety concerns of the profession.<sup>102</sup> The authority of the

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<sup>97</sup> (1895) 34 N.Y.S. 1102. See W. Hechter, “The Criminal Law and Violence in Sport” (1976-7) 19 *Crim. L.Q.* 425 at 442.

<sup>98</sup> *ibid.*, 34 N.Y.S. 1107.

<sup>99</sup> See *People v Johnson* (1903) 49 N.Y.S. 382.

<sup>100</sup> N.Y. Laws 1900, c.270.

<sup>101</sup> N.Y. Laws 1911, c.779.

<sup>102</sup> L. Laufer, “Uniform Health and Safety Standards for Professional Boxing” (1984) 15 *Columbia Human Rights Law Review* 259 at 270.

NYASC was enhanced when in 1914 the State Supreme Court upheld its decision to refuse to grant a license to Bob Fitzsimmons on the grounds of age (he was over fifty years old) and physical condition (he had by then fought over three hundred competitive bouts).<sup>103</sup> By 1917, the Frawley Laws had been repealed as Governor Whitman reacted in disgust to the death of a fighter in an event held in the state capital, Albany.

Three years later, professional boxing in its modern form was finally and fully legalised in the state of New York by the Walker Laws of 1920.<sup>104</sup> The Walker Laws reconstituted the NYSAC with the power to implement a rigorous licensing code regulating all aspects of the sport. In this, the Walker Laws made no distinction between prize fighting and professional boxing. The legality of an event was determined not by the nature of the fight but whether it had taken place under the regulatory control of the NYASC.<sup>105</sup> It is probably an exaggeration to attribute the remarkable advancement of professional boxing in the 1920s solely to the introduction of the Walker Laws, nevertheless, they did have a profound impact. The scheme was soon followed throughout the United States. In 1923, for example, Pennsylvania created an Athletics Commission modelled on the Walker Laws. Two years later, California legalised professional boxing under a similar scheme, after a statewide referendum. In 1926 it was Illinois's turn, while in April 1927, Colorado formed a boxing commission. By 1933, states as diverse as Washington and Texas had adopted statutory schemes similar to that of New York.<sup>106</sup> In England, the predominance of the NYSAC was acknowledged by the fact that when the British Boxing Board of Control ("BBBC") – the sport's private regulatory agency in the UK – was set up in 1929, it largely accepted the New York classification of the different weight categories for fighters.

### **Late Victorian *Boxiana***

As various jurisdictions within the US moved towards a statute-based compromise, English prize fighting was also being treated more sympathetically in the post-*Coney* era of the 1880s. Codification and enhanced administrative control of the sport throughout that decade was rewarded with decreasing police and judicial interest in the sport. The criminal law reflected that retreat in the sense that any death or injury consequent to ordinary or incidental participation in boxing was seen as excusable so long as the authorities were satisfied that the sport did not tend towards a breach of the peace, that its rules and practices remained reasonable, were consented to by all engaged and were not likely to induce serious injury or to end life.<sup>107</sup> In short, once prize fighting was seen to have undertaken a process of rational regularisation, in line with many other traditional sports of the Victorian era, its legal future was seen as secure.

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<sup>103</sup> *Fitzsimmons v The NYSAC* (1914) 146 N.Y.S. 117, affirmed 147 N.Y.S. 1111.

<sup>104</sup> N.Y. Laws 1920, c.912.

<sup>105</sup> See the discussion in *People ex rel. Weiner v Barr* (1928) 228 N.Y.S. 192.

<sup>106</sup> P. Millsbaugh, "The Federal Regulation of Professional Boxing" (1994) 19 *Seton Hall Legislative Journal* 33 at 40-42.

<sup>107</sup> See also *R v Bradshaw* (1878) 14 C.C.C. 83 and *R v Moore* [1898] 14 T.L.R. 229, cases concerning injuries and deaths in football.

The impact of this implicit compromise quickly became evident. In the 1890s and early 1900s the National Sporting Club (“NSC”) governed the professional code in Britain. A number of fatalities occurred in NSC-sponsored boxing events, most notably in December 1897 when the Chicago-born Jimmy Barry killed Walter Croot in a world bantamweight championship bout. In the aftermath of the fight, five men, including prominent members of the NSC, were charged with manslaughter. In a decision that resonates with the acquittal of Bob Fitzsimmons in New York two years previously, the authorities subsequently dropped all charges in recognition of the proper administration of the sport by the NSC.<sup>108</sup>

It is worth reiterating that the self-regulatory freedom granted to boxing in England must be seen in light of the pervading view that the sport’s associated risks had now been minimised to acceptable levels. Pointedly, an article in *The Lancet* dismissed a number of deaths in NSC-administered fights, attributing them to apoplexy and nervous tension.<sup>109</sup> In fact, the compromise that emerged in the 1880s – based on the careful self-regulation of a risky but on balance safe sport – is encapsulated in the contributor’s view that the events at the NSC were generally “of such a high class nature that no really violent blow was received on either side.” In sum, by the beginning of the twentieth century the settled view in Britain was that the law would have little need to further investigate that affairs and conduct of boxing, and for a large part, the sport has since avoided the law’s critical gaze.

## Conclusion

The policy on sport, such as it existed in nineteenth century England, was preoccupied with the metamorphosis of traditional sports into events as regulated and controlled as the factory whistle. It was felt that these rational recreations would help divert the working class during their increased leisure periods and, ideally, transform them into efficient, disciplined and “muscular” Christians. In that context, the concerted effort to rationalise, legitimise and distinguish boxing from its prize fighting roots must be seen as an outstanding example of the social and sporting engineering policies of the era. A similar pattern is identifiable in America’s Gilded Age. This article has suggested that in both countries the criminal law was the principal tool used in that task.

By the 1920s, professional boxing was the most commercialised and truly global of sports with the heavyweight bout between America’s Jack Dempsey and the French war hero George Carpentier on July 2, 1921 becoming the first sporting event to gross one million dollars in gate receipts alone. In the United States, boxing was by then regulated on strict statutory basis – state schemes that had their origins in the anti-prize fighting statutes of the mid-nineteenth century. That process of legislative intervention continues to this day with the US Congress currently considering a bill to

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<sup>108</sup> G. Deghy, *Noble and Manly: The History of the National Sporting Club* (1956) at p.147 and K. Sheard, ““Brutal and Degrading”: The Medical Profession and Boxing, 1838-1984” (1998) 15 *International Journal of the History of Sport* 74 at 78.

<sup>109</sup> *The Lancet*, May 11, 1901, p.1366.

create a Federal Boxing Commission. In the UK, boxing continues to self-regulate under the auspices of the British Boxing Board of Control, an organisation that traces its origins to the Pelican Club established in the 1880s. It is also within that decade that the legality of the sport in English law can be found. In what this article has termed the “post-*Coney*” compromise, the legality of a BBBC-licensed boxing match is based on the presumption that it is not a prizefight tending towards a breach of the peace, it is adequately regulated, it is relatively safe with its social utility as a competitive aspect of a recognised sport justifying (if not entirely explaining) its exemption from the ordinary threshold of consent in criminal law.

## LIENS, NECESSITY AND UNJUST ENRICHMENT

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### I. Introduction: The Lost Prince

A person with an interest in property, who – for reasons of necessity or compulsion or the like – saves a superior interest in the property or the property itself, is often entitled to an equitable lien over the interest or property thereby saved. This lien thrived in chancery in both England and Ireland until the late nineteenth century; thereafter, it continued to find favour in Irish courts, but hostile *dicta* largely saw it fall first into disfavour and then into obscurity in England. In many ways, therefore, this equitable lien for compulsion or necessitous intervention might well be regarded as equity's lost prince.

Nevertheless, the House of Lords has subsequently approved not only the lien itself but also an analogous extension; and – in the context of the recent discernible general trend towards the re-utilisation of the lien as an equitable remedy – the time may now therefore be ripe for a re-examination, and perhaps even a re-adoption, of this once-venerable species of equitable lien.

This article is intended as just such a re-examination. It has two themes. The first, considered in part II of the article, is the nature of the equitable lien for compulsion or necessitous intervention itself and on its own terms. The analysis strikes out from a fact-pattern common in the cases, first to locate essence of this lien as responsive to compulsion, necessity or the like, and then to distil its further elements. From this, there emerges a relatively precise set of conditions necessary to establish this species of lien, against which the hostile late nineteenth century English *dicta* (though all of a piece with contemporary attitudes to liens generally) will be measured and found wanting.

The second theme of this article is a consideration of the place of this lien in the modern law. Moving from the particular to the more general, this part of the article considers its possible and potential relationships with other doctrines which resemble it, the better to understand the nature of the lien already described. Early in part II, an analogous extension will already have been discussed; but the main location for this theme is part III of this article, where the lien's connections with other similar doctrines and principles will be examined. As well as a consideration of its maritime echoes, the lien's elements will be tested against the principle against unjust enrichment, concluding that the aim of the lien may very well be the reversal of unjust enrichment. If so, then elements of the lien may have much to contribute to the development of the modern law of unjust enrichment, and *vice versa*. In particular, the understanding of necessity emerging from this lien could go a

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long way towards securing necessity as a factor rendering an enrichment unjust, and explaining otherwise problematic cases. Furthermore, some of the early authorities draw analogies between the lien and subrogation, and this in turn raises the issue of the proprietary nature of the lien; part III therefore concludes by rejecting the analogies with subrogation but defending the lien's proprietary nature.

In the event, therefore, what emerges is a lien which, if and when re-adopted, may very well provide the modern law with an example of an equitable proprietary response to unjust enrichment, especially in the context of the unjust factors of compulsion and necessity. A prince, once lost, might yet be found again.

## II. The Equitable Lien for Compulsion or Necessitous Intervention

### The Essence of the Lien

Consider the common chain of head-landlord, tenant, and sub-tenant. At common law, if the head-landlord were to terminate the head-lease – on the grounds, for example, of non-payment of rent by the tenant – then the sub-lease carved out of it would fall with it.<sup>1</sup> To avoid this, such a sub-tenant might pay the head-landlord the arrears of rent to keep the head-lease and thus the sub-lease on foot. It came to be established at common law,<sup>2</sup> and statute subsequently confirmed,<sup>3</sup> that the sub-tenant could deduct such payments over time from the rent payable to the tenant.

Furthermore, a claimant compelled by operation of law to pay a debt primarily owed by the defendant can have restitution from the defendant in the amount so paid. Hence, a sub-tenant who has been compelled<sup>4</sup> to pay the

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<sup>1</sup> On the effects of such a hostile termination by the head-landlord (as opposed to a surrender by the tenant), see, e.g. *Baron Sherwood v Moody* [1952] 1 All E.R. 389 (Ormerod J.); *Viscount Chelsea v Hutchinson* [1994] 2 E.G.L.R. 61 (CA); *Pennell v Payne* [1995] Q.B. 192 (CA); *Barrett v Morgan* [2000] 2 A.C. 264 (HL); *Kay v London Borough of Lambeth* [2006] UKHL 10 (8 March 2006) [142], [147] *per* Lord Scott; *Consultation Paper on the General Law of Landlord and Tenant* (LRC CP 28-2003) (Law Reform Commission, Dublin, 2003), 68-69 [3.22]-[3.23], 176-177 [14.24]-[14.25]. Statutes have ameliorated this in various ways: e.g. s.146(4) of the Law of Property Act 1925 (England and Wales) (*Bland v Ingrams Estates* [2001] Ch. 767 (CA)); s.137(2) of the Rent Act 1977 (*John Lyon School (Keepers) v James* [1996] Q.B. 163 (CA)); see also s.4 of the Conveyancing Act, 1892; ss.13 and 78 of the Landlord and Tenant (Amendment) Act, 1980 (Ireland); ss.15, 32(1) and 116 of the Residential Tenancies Act, 2004 (Ireland).

<sup>2</sup> *Sapsford v Fletcher* (1792) 4 T.R. 511; 100 E.R. 1147; *Waters v Weigall* (1795) 2 Anst 575; 145 E.R. 971; *Taylor v Zamira* (1816) 6 Taunt 524; 128 E.R. 1138; *Carter v Carter* (1829) 5 Bing 406; 130 E.R. 1118; *Jones v Morris* (1849) 3 Ex 742 at 746-747; 154 E.R. 1044 at 1046-1047 *per* Pollock C.B.; *Graham v Alsopp* (1848) 3 Ex 185 at 198; 154 E.R. 809 at 814 *per* Rolfe B.; *Ahearne v McSwiney* (1874) I.R. 8 C.L. 568 at 574 *per* O'Brien J.

<sup>3</sup> See ss.20 and 21 of the Landlord and Tenant Law (Amendment) (Ireland) Act, 1860 (Deasy's Act). In Ireland, the Law Reform Commission has recommended the repeal of these sections (see LRC CP 29-2003, n.1 above, 67-71 [3.24]).

<sup>4</sup> As where the head-landlord demands payment, or distrains, or threatens or takes proceedings to recover it: *Graham v Alsopp* (1848) 3 Ex 185 at 199; 154 E.R. 809

tenant's arrears to the head-landlord would also have an action for money had and received against the tenant. In *Ryan v Byrne*,<sup>5</sup> the sub-tenant had paid the head-landlord after ejectment orders had been obtained by the head-landlord against both the claimant sub-tenant and the defendant tenant. Palles C.B. held that the claimant sub-tenant, having paid the head-landlord under compulsion of law, was entitled to recover the amount so paid from the defendant tenant.<sup>6</sup> Indeed, even where the sub-tenant has not been compelled, if the tenant subsequently adopts the benefit of the sub-tenant's payment, then the sub-tenant has an action for money had and received against the tenant.<sup>7</sup> Moreover, if there is a number of sub-tenants, and one pays off arrears of head-rent in order to save the estate from eviction, the payer is entitled to contribution from the other sub-tenants.<sup>8</sup>

This is a claim at law, but equity too plays a role here,<sup>9</sup> granting the sub-tenant a lien in the property or estate thereby preserved; this will often be attractive to sub-tenants: a tenant who did not have the money to pay the head-landlord is unlikely to be a satisfactory mark for a personal obligation to the sub-tenant.<sup>10</sup> In *Locke v Evans*,<sup>11</sup> the claimant made various payments to the head-landlord to prevent the defendant tenant's ejectment, and was entitled to a lien in that amount over the tenant's interest in priority to all other charges upon it. In *O'Geran v McSwiney*,<sup>12</sup> O'Sullivan M.R. described this outcome as:

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at 814-815 *per Rolfe B.*; *Ahearne v McSwiney* (1874) I.R. 8 C.L. 568 at 574 *per O'Brien J.*; *Grogan v Regan* [1902] 1 I.R. 196 at 198 *per Madden J.*

<sup>5</sup> (1894) 17 I.L.T.R. 102.

<sup>6</sup> *ibid.*, 103 *per Dowse B.*, Andrews J., concurring; followed in *Murphy v Davey* (1884) 14 L.R. Ir 28 at 30 *per Murphy J.*: claimant "did not make a voluntary payment, all, but acted under the strongest compulsion, namely to save himself from being turned out of possession of a house which he had built on the lands".

<sup>7</sup> *Ahearne v McSwiney* (1874) I.R. 8 C.L. 568. This is a clear case of free acceptance. Although the claimant had not been compelled to make the payment, the defendant adopted it two years later by claiming credit for it when the head-landlord sought the head-rent, and the claimant's claim for money had and received succeeded on the ground that the defendant had adopted and enjoyed the benefit of the claimant's payment ((1874) I.R. 8 C.L. 568 at 571, 572 *per Whiteside L.C.J.*, 575 *per O'Brien J.*, 577 *per Fitzgerald J.*; following *Osborne v Rogers* (1681) 1 Wms Saund 264; 85 E.R. 318 n.1 (money laid out, the defendant's request recoverable; subsequent conduct evidence of that request)). Furthermore, the action was commenced more than six years after the payment but less than six years after it was adopted by the defendant, but it was not time barred, as time did not begin until the payment had been adopted.

<sup>8</sup> *Allison v Jenkins* [1904] 1 I.R. 341 at 346 *per Porter M.R.*, drawing an analogy with general average (below n.205); *Craig v A.G.* [1926] N.I. 218 (CA NI), 220-221, 230 *per Moore C.J.* (though not established on the facts).

<sup>9</sup> R. Sutton "Payment of Debts charged Upon Property" in A. Burrows (ed.) *Essays on the Law of Restitution* p.71.

<sup>10</sup> *O'Geran v McSwiney* (1874-1875) 8 Ir. Rep. Eq. 501 at 503 *per O'Sullivan M.R.*

<sup>11</sup> (1848) 11 Ir. Eq. Rep. 52n (decided 1823) (Court of Exchequer in Equity); see also *Warnock v Leslie* (1882-1883) 10 L.R. Ir 68.

<sup>12</sup> *O'Geran v McSwiney* (1874-1875) 8 Ir. Rep. Eq. 501 (following *Locke v Evans*); *aff'd* (1874-1875) 8 Ir. Rep. Eq. 624. The claim was not affected by the claimant's statutory remedy in Deasy's Act (n. 3 above) against the defendant ((1874-1875) 8 Ir. Rep. Eq. 501, 503 *per O'Sullivan M.R.*).

“a most reasonable one; if the sub-tenant, in a case like the present, does not make the advance, his own interest and that of his landlord will be lost for ever. To save his own interest from the gross default or misconduct of his landlord, who will neither discharge his duty to his tenant or to the person from whom he holds, the sub-tenant has to pay down his money to the landlord, the effect of this payment is, of course, to set up not merely his own interest but the actual interest of the defaulting mesne landlord himself. What is more reasonable than that this interest, so set up by the payment of the sub-tenant’s money, should be made to answer for the money which has saved it? It appears to me that there are many heads of equity which do not rest on grounds so high.”<sup>13</sup>

Hence, a party with an interest in property making payments for the preservation of superior interest in the property which would otherwise have been lost or destroyed can have a lien over the interest so preserved.<sup>14</sup> The traditional justification for such a claim is said to be the element of compulsion under which the payer acted, and the benefit which accrued to all concerned. In *Fetherstone v Mitchell*,<sup>15</sup> Brooke M.C. said that he had:

“always understood the priority which Courts of Equity give to the . . . [claimant] is this, that *the payment is in a manner compulsory* and that, in the common danger, *it is for the benefit of all* to encourage the advance of money, with which the mortgagor himself and every one of his creditors must suffer a serious loss. It is considered beneficial for all parties to give the most ample remedies to him who has saved the common security, provided that they are confined to that property which, but for his advance, would have been lost to every one concerned.”<sup>16</sup>

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<sup>13</sup> (1874-1875) 8 Ir. Rep. Eq. 501 at 504. His smugness was replicated, less ungrammatically, by Barry L.J. in the later *Ferguson v Ferguson* (1886-1887) 17 L.R. Ir. 552 at 579: “it seems to me consonant to natural justice to hold that there is a lien on this property for the expenditure, and I am fond of believing, that if you arrive, the natural justice between the parties, you arrive, what is the law or equity of the case” (*cp ibid.*, 571 *per* Naish L.C.). Similar sentiments have been expressed in respect of equitable liens more generally, see, *e.g.* *Todd v Moorhouse* (1874) L.R. 19 Eq. 69, 71 *per* Jessel M.R.; *In re Johnson* (1880) 15 Ch.D. 548 at 555-556 *per* Jessel M.R.; *Whitebread v Watt* [1902] 1 Ch. 835 at 838-840 *per* Stirling L.J.; *Davies v Littlejohn* (1923) 34 C.L.R. 175 (HCA) 185 *per* Isaacs J.; *Hewett v Court* (1983) 149 C.L.R. 639 (HCA) 667 *per* Deane J.

<sup>14</sup> *E.g.* A. Lyall *Land Law in Ireland* (2<sup>nd</sup> ed., 2000) pp.408-409, 826; J. Wylie *Irish Landlord and Tenant Law* (Butterworths, Dublin, looseleaf, 1990-present) [10.36]; J. Wylie *Irish Land Law* (3<sup>rd</sup> ed., 1997) p.798 [13.158]. See also Anon “The Doctrine of Salvage Payments” (1913) 47 I.L.T.S.J. 119 (Part I), 125 (Part II); Anon “Salvage Payments in Equity” (1953) 87 I.L.T.S.J. 145 (Part I), 151 (Part II).

<sup>15</sup> (1848) 11 Ir. Eq. Rep. 35. Followed: *O’Geran v McSwiney* (1874-1875) 8 Ir. Rep. Eq. 501 at 505 *per* O’Sullivan M.R.; *O’Loughlin v Dwyer* (1884) 13 L.R. Ir. 75 at 81 *per* Chatterton V.C.

<sup>16</sup> (1848) 11 Ir. Eq. Rep. 35 at 42 (emphasis added).

The claimant was the assignee of a judgment creditor whose judgment attached to the defendant's lease for lives renewable forever, and Brooke M.C. and Jackson J. awarded him a lien on the defendant's leasehold interest in respect of payments of the defendant's arrears of rent to redeem the lands from eviction. Moore J, who agreed as to the principle, dissented on the grounds that the claimant had not been compelled but rather had made the "the advance solely with a view to his own interest . . . [hoping that] when the value of the estate is realised the fund will reach his demand. . .".<sup>17</sup> Similarly, if the risk of eviction is brought about not by the defendant tenant but by the claimant sub-tenant himself or herself, then the claim for such a lien will fail.<sup>18</sup> The sub-tenant payment cases provide an excellent example of Brooke M.C.'s principle, as all of the successful claimants had acted under the compulsion of a demand made or distress levied or the threat of legal action or the enforcement of a judgment by the head-landlord.

Furthermore, the underlying personal claim extends from compulsion of law<sup>19</sup> at least to cases of a kind of compulsion variously described as circumstantial compulsion, compulsion in fact, practical compulsion, moral compulsion, or necessity.<sup>20</sup> Similarly, the lien extends from cases of compulsion of law (such as the sub-tenants cases<sup>21</sup>) to cases of necessity,<sup>22</sup> such as that arising from the need to preserve the income-producing capacity of the property,<sup>23</sup> or to carry out necessary repairs or reconstruction on the property.<sup>24</sup> For example, in *In re Lisnavagh Estate*,<sup>25</sup> on the application of the tenant for life of settled land, Dixon J. held that the such a lien would be available as a remedy for the prevention of an imminent loss to a sufficient

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<sup>17</sup> *ibid.*, 46.

<sup>18</sup> *Craig v A.G.* [1926] N.I. 218 (CA NI).

<sup>19</sup> *Moule v Garrett* (1872) L.R. 7 Exch 101; *East Cork Foods v O'Dwyer Steel* [1978] I.R. 103 (Ir SC).

<sup>20</sup> The word "necessity" is used generically in this article to encompass the various descriptions of this extension. On it, see *Exall v Partridge* (1799) 8 T.R. 308; 101 E.R. 1405; *England v Marsden* (1866) L.R. 1 C.P. 529 (CA); *Peel v Canada* (1993) 98 D.L.R. (4<sup>th</sup>) 140 (SCC); and below, text with and in nn.157-185; *cp* R. Sutton, n.9 above, 99-103.

<sup>21</sup> See also *In re Smith's Settled Estates* [1901] 1 Ch. 689 at 691 *per* Buckley J. (tenant for life compelled to pay expenses incurred by the local authority "entitled to be recouped and to keep the charge alive in his own favour").

<sup>22</sup> Indeed, the sub-tenants could also be described as having paid pursuant to the necessity to save their interests from "absolute destruction" (*O'Geran v McSwiney* (1874-1875) 8 Ir. Rep. Eq. 501 at 503 *per* O'Sullivan M.R.).

<sup>23</sup> *In re McDonnell's Estate* [1900] 1 I.R. 295 (Ross J.); *Neill v Neill* [1904] 1 I.R. 513 (Kenny J.).

<sup>24</sup> *In re Johnson's Settlement* [1944] I.R. 529 (Gavan Duffy J.). *Ferguson v Ferguson* (1886-1887) 17 L.R. Ir. 552 at 577 *per* Palles C.B., 578 *per* FitzGibbon J.

<sup>25</sup> *In re Lisnavagh Estate; Lord Rathdonnell v Colvin* [1952] I.R. 296 (Dixon J.); *cp Bank of Ireland v Geoghegan* (1955-1956) Ir. Jur. Rep. 7 (Budd J.). See also *Frith v Cameron* (1871) L.R. 12 Eq. 169 (Mallins V.C.); *In re Jackson* (1882) 21 Ch.D. 786 (Kay J.) applying *Glover v Barlow* (1831) (1882) 21 Ch.D. 788n; *In re Household* (1884) 27 Ch.D. 553 (Bacon V.C.); *In re Hotchkys* (1886) 32 Ch.D. 408 (CA); *Conway v Fenton* (1888) 40 Ch.D. 512 (Kekewich J.); *In re Freman* [1898] 1 Ch. 28 (North J.).

part of the estate,<sup>26</sup> and authorised the expenditure by the trustees of capital monies in respect of substantial necessary works on the mansion house on the estate. In such cases, the lien is again justified on the grounds of compulsion – not compulsion of law, however, but rather a practical compulsion or necessity arising from the circumstances of the estate itself.

The cases also illustrate another extension of the lien, from the protection of interests in property to the preservation of the property itself. Of course, a “man spends money in improving another man’s property at his peril”<sup>27</sup> unless there is compulsion or something akin to it, and such compulsion was made out in *Dent v Dent*.<sup>28</sup> The claimant, tenant for life, worked a mine sufficiently to prevent the Columbian government taking it over, in the process converting it from loss-making to profit-making; and Romilly M.R. held that he was entitled to a lien against the interest of the defendant remainderman in the amount of his expenditure.<sup>29</sup> The work preserved both the interest (it prevented forfeiture to the government) and the property itself (it prevented desuetude and produced an incoming-producing asset). But there are also many cases in which the work merely preserved the property and not the interest. In *Dent* itself, the claimant’s lien covered not only the saved mine but also the completion of a mansion house begun by the testator; and in *Hibbert v Cooke*,<sup>30</sup> a testator commenced the construction of a mansion house upon the estate, and the tenant for life was entitled to a lien over it for its completion.

In *Ferguson v Ferguson*,<sup>31</sup> the executors of an estate, at the request of the tenants for life, completed the construction of 13 houses on the testator’s property, preventing them from falling into disrepair and allowing them to be rented out for the benefit of the estate. The tenants for life were held liable to the executors, and the Court of Appeal held that the tenants for life in turn had a lien against the remaindermen over the property preserved. Palles C.B. went so far as to say that “the authorities not only authorize, but coerce us to hold that the appellants are entitled to this lien”.<sup>32</sup>

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<sup>26</sup> [1952] I.R. 296 at 302.

<sup>27</sup> *Ferguson v Ferguson* (1886-1887) 17 L.R. Ir. 552 at 565 *per* Porter M.R.; *cp Taylor v Laird* (1856) 25 L.J. Ex. 329 at 332 *per* Pollock B.: “One cleans another’s shoes, what can the other do but put them on?” See also nn.69-76, 110, 189-200 below.

<sup>28</sup> (1862) 30 Beav. 363; 54 E.R. 929.

<sup>29</sup> *ibid.*, 370, 932.

<sup>30</sup> (1824) 1 Sim. & St. 552; 57 E.R. 218; *cf Gilliland v Crawford* (1868-1870) Ir. Rep. 4 Eq. 35 at 41 (Chatterton V.C.) (testator commenced construction of houses for letting; but tenant for life who completed construction not entitled to a lien; *Dent* and *Hibbert* distinguished; see below n.32).

<sup>31</sup> (1886-1887) 17 L.R. Ir. 552.

<sup>32</sup> *ibid.*, 573; *cp* 571 *per* Naish L.C. 577-578 *per* FitzGibbon J. 579 *per* Barry J. Palles C.B. described *Dent v Dent* as doing no more than to “apply a well-settled principle to a striking example” (*ibid.*, 574) and distinguished *Gilliland v Crawford* on the ground that there was no evidence there that the property had been “saved from total loss” (*ibid.*, 575). There is an element of practical compulsion about the completion of a mansion house on an estate (as in *Hibbert*) or the working of a mine to prevent it being lost to the government (as in *Dent*) which is absent in the completion of the construction of the houses (as in *Gilliland*) unless the completion prevents the total loss of the property, as to which

On the other hand, it seems that, to justify the lien, the cases take the view that the tenant for life of settled land will have been sufficiently compelled only where the property is preserved from destruction, and not where it merely needs improvement or current maintenance. In *In re Hurst*,<sup>33</sup> Porter M.R. considered that only repairs absolutely necessary to preserve the property and make it modestly habitable would attract a lien. Again, in *In re De Teissier's Settled Estate*,<sup>34</sup> Chitty J. held that a lien would arise where the work was done because property had been condemned by the sanitary authority as a dangerous structure,<sup>35</sup> but would not arise where the tenant for life merely sought to make some improvements to the settled estate. In *In re Legh's Settled Estate*,<sup>36</sup> a tenant for life had incurred significant expenditure working on the mansion house of a settled estate. Kekewich J. held that he was entitled to claim some of the expenditure under statute,<sup>37</sup> but that no lien arose in respect of the remainder, since it was impossible to say that that it had been spent on preserving the property from destruction rather than on mere improvements.<sup>38</sup> In allowing the lien in cases of preservation or repairs on the one hand, but in denying it in cases of maintenance or improvements on the other, the courts have taken the relatively strict view that claimants will properly have been acting out of necessity only in the former cases.

The settled land cases demonstrate not only the application of the lien itself, but also an important analogical extension of that application. Where the emergency work has been done, the cases award the tenant for life a lien over the estate; but some tenants for life, rather than doing the work and seeking a remedy afterwards, instead sought judicial *laissez passer* in advance. Unsurprisingly, courts applied the same principles, holding that the necessity which would subsequently justify a lien would also justify an order in

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there was no evidence in *Gilliland*, but which was the case in *Ferguson* (*ibid.*, 573, 577 *per* Palles C.B.), where non-completion would have had a serious and negative impact upon the remainder of the testator's property (*ibid.*, 578 *per* FitzGibbon L.J.).

<sup>33</sup> (1892-1893) 29 L.R. Ir. 219; *Caldecott v Brown* (1842) 2 Hare 144; 67 E.R. 60 (Wigram V.C.); *Dunne v Dunne* (1855) 3 Sm. & Giff. 22 at 28-29; 105 E.R. 546 at 549 *per* Stuart V.C.; *Floyer v Bankes* (1869) L.R. 8 Eq.115 (Lord Romilly M.R.); *Landowners West of England and South Wales Drainage and Inclosure Co v Ashford* (1880-1881) 16 Ch.D. 411 at 433 *per* Fry J.; *In re Montagu* [1897] 2 Ch. 8 (CA) 11 *per* Lopes L.J.; *In re Cobden's Estate* [1923] 1 I.R. 1 at 3 *per* Wylie J.

<sup>34</sup> [1893] 1 Ch. 153.

<sup>35</sup> *ibid.*, 161-162, discussing *In re Hurst*.

<sup>36</sup> [1902] 2 Ch.274.

<sup>37</sup> Settled Land Act, 1890, s.13; *cp In re Dunham Massey Settled Estates* (1906) 22 T.L.R. 595 (Kekewich J.); see also *De Vere v Perceval and Cole* [1945] Ir. Jur. Rep. 9 (Gavan Duffy J.) (giving s.13 an expansive interpretation); *In re O'Farrell; O'Farrell v Stapleton* [1959] I.R. 387 (Dixon J.) (discussing various sections of the Settled Land Act, 1882); *cf In re De Teissier's Settled Estate* [1893] 1 Ch. 153 at 161 *per* Chitty J.

<sup>38</sup> [1902] 2 Ch. 274 at 281; claims in respect of improvements (*Dent*) or the repair of dry rot (*Hibbert*) were not included in the liens; *In re Cobden's Estate* [1923] 1 I.R. 1 at 4 *per* Wylie J. (repairs to an embankment to prevent an immediate breach were compelled, the improvement of the draining system did not). Indeed, the underlying personal claim in respect of the preservation of property likewise does not extend to the improvement of property: S. Stoljar *The Law of Quasi-Contract* (2nd ed., 1989) p.208; G. Virgo *Principles of the Law of Restitution*, p.315.

advance allowing such work. Often, this would be accomplished by the court's amending the terms of the settlement, and not just settlements but of trusts generally. This therefore came to be established as a judicial power to vary trusts generally for reasons of necessity, in the exercise of the inherent jurisdiction of the court of chancery to administer trusts.<sup>39</sup> Hence, in *In re New*, Romer L.J. held that, although it is a jurisdiction to be exercised with caution, if there are peculiar circumstances of emergency, the court can sanction actions by the trustees not otherwise authorised by the trust deed.<sup>40</sup> This was approved by the House of Lords in *Chapman v Chapman*,<sup>41</sup> declining an invitation to expand this into a general power to alter trusts as an aspect of the inherent jurisdiction, and holding that, since there was no emergency, there was no basis to sanction a variation of the trust. Of course, the doctrine at issue in *Chapman* is not an equitable lien for compulsion or necessitous intervention but rather an analogous extension, where the analogy is built upon the common element of necessity which is the basis both of the lien and of this aspect of the inherent jurisdiction.<sup>42</sup>

*Chapman* was one of three cases which came before the Court of Appeal in *In re Downshire Settled Estates*<sup>43</sup> seeking the court's sanction, in the exercise of its inherent jurisdiction, to amend various settlement trusts, for tax reasons. In the Court of Appeal, Denning L.J., dissenting in part, saw this aspect of the inherent jurisdiction as an example of a more general inherent jurisdiction to amend trusts, and would have sanctioned all three amendments.<sup>44</sup> However, the majority, Evershed M.R. and Romer L.J., held that this aspect of the inherent jurisdiction was of a limited character:

“It is a power or jurisdiction to confer upon trustees, *quoad* items of trust property vested in them, administrative powers to be exercised by them as the persons in whom the property is vested (notwithstanding that such powers were not conferred

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<sup>39</sup> On this jurisdiction, see D. Hayton *Underhill and Hayton on the Law Relating to Trusts and Trustees* (16th ed., 2003) pp.493-529, Article 47. On this aspect of the jurisdiction, see O. Marshall “Deviations from the Terms of a Trust” (1954) 17 *M.L.R.* 420; J. Harris *Variation of Trusts*, chap.2. Of course, the court's inherent jurisdiction to supervise trusts covers a large range of matters which have their roots in various places; this particular aspect of the jurisdiction arises by analogy with the liens which have been discussed so far in this article.

<sup>40</sup> *In re New* [1901] 2 Ch. 534 (CA) 544-545; Underhill & Hayton, *ibid.*, 523-524; see also n.25 above; *In re Tollemache* [1903] 1 Ch. 457 at 463-464 *per* Kekewich J.; *aff'd.* [1903] 1 Ch. 955 (CA) (no emergency) (*New* the “high-water mark” of the jurisdiction: *ibid.*, 956 *per* Cozens-Hardy M.R.; *cp Rafidain Bank v Saipem* (Court of Appeal, unreported, 2 March 1994) *per* Stuart Smith L.J.); *In re Foster's Settlements* [1954] 3 All E.R. 714 (Harman J.) (no emergency). *In re de Malahide* (1952) 86 I.L.T.R. 191 (Gavan Duffy J.) is probably a case of this type.

<sup>41</sup> [1954] A.C. 429 (HL).

<sup>42</sup> Hence, the variation of trust cases are discussed here for what they say about *necessity*, and not for what they might or might not say about liens which trustees acting properly will have over the trust for their expenses (see, *e.g.* Underhill & Hayton, n.39 above, p.810 at pp.818-821, Article 83 para. 2; *Re Spurling* [1966] 1 W.L.R. 920; *Armitage v Nurse* [1998] Ch. 241; *X v A, B and C* [2000] 1 All E.R. 49 (Arden J.); see also n.67 below).

<sup>43</sup> [1953] 1 Ch. 218 (CA); The three cases were *In re Downshire Settled Estates*, *In re Chapman's Settlement Trusts*, and *In re Blackwell's Settlement Trusts*.

<sup>44</sup> [1953] 1 Ch. 218 at 269, 275.

by the trust instrument) where a situation has arisen in regard to the property (particularly a situation not originally foreseen) *creating what may be fairly called an emergency* – that is a state of affairs which has to be presently dealt with, by which we do not imply that immediate action then and there is necessarily required – and such that *it is for the benefit of everyone interested under the trusts* that the situation should be dealt with by the exercise of the administrative powers proposed to be conferred for the purpose.”<sup>45</sup>

Hence, this did not amount or extend to a general power to modify settlement trusts,<sup>46</sup> and Evershed M.R. and Romer L.J. held that the limited aspect of the inherent jurisdiction did not apply in any of the three cases. However, on the basis of a wide interpretation of an exception in respect of compromises to benefit infants,<sup>47</sup> they sanctioned the amendments in two of the cases, though not in *Chapman*.<sup>48</sup>

The claimants in *Chapman* appealed. The House of Lords<sup>49</sup> rejected the claimants’ assertion of a broad power to amend trusts<sup>50</sup> and approved the approach of the Court of Appeal on this issue.<sup>51</sup> However, their Lordships significantly reined in the infants’ compromise jurisdiction,<sup>52</sup> confining it to

<sup>45</sup> *ibid.*, 235 (emphasis added).

<sup>46</sup> *ibid.*, 233, 265.

<sup>47</sup> *ibid.*, 239-240; on this exception, see *Brooke v Lord Mostyn* (1864) 2 DeG.J.&S. 373; 46 E.R. 419; *In re Trenchard* [1902] 1 Ch. 378 (Buckley J.); *In re Wells* [1903] 1 Ch. 848 (Farwell J.); *cp In re Duke of Leeds* [1947] Ch. 525 (Jenkins J.); *In re Lucas* [1947] Ch. 558 (Jenkins J.); see also s.42 of the Conveyancing Act, 1881. See further, n.52 below.

<sup>48</sup> *Downshire* was not within the limited inherent jurisdiction ([1953] 1 Ch. 218 at 258, discussing *New*), but was within the infants’ compromise exception (*ibid.*, 258-260, discussing *Trenchard*). *Blackwell* was not within the inherent jurisdiction, but was within the compromise exception (*ibid.*, 268-269). *Chapman* was within neither the inherent jurisdiction nor the exception (*ibid.*, 264-266).

<sup>49</sup> [1954] A.C. 429 (HL); see O. Marshall, n.39 above; R. Megarry “The Remoulding of Trusts” (1954) 70 *L.Q.R.* 473; J. Mitchell “The Finality of Settlements” (1954) 17 *M.L.R.* 473.

<sup>50</sup> *ibid.*, 443 at 446 *per* Lord Simonds L.C., 466 *per* Lord Morton (Lords Oaksey and Cohen concurring on this point), 470 *per* Lord Asquith.

<sup>51</sup> *ibid.*, 444-445 *per* Lord Simonds L.C., 455 *per* Lord Morton (Lords Oaksey and Cohen concurring on this point), 469 *per* Lord Asquith.

<sup>52</sup> *ibid.*, 446-447 *per* Lord Simonds L.C., 462-464 *per* Lord Morton (Lord Oaksey concurring), 470-471 *per* Lord Asquith; *cf.* 472-474 *per* Lord Cohen, dissenting on this point. See *Re Lord Hylton’s Settlement* [1954] 2 All E.R. 647 (CA) (variation approved); *Re Powell-Cotton’s Re-Settlement* [1956] 1 All E.R. 60 (CA) (variation not approved); *Re Heyworth’s Contingent Reversionary Interest* [1956] Ch. 364 (Upjohn J.) (same); *Re Barbour’s Settlement* [1974] 1 All ER 1188 (Megarry J.) (variation approved); *Allen v Distillers* [1974] Q.B. 384 (Eveleigh J.) (variation approved, but not for *Chapman* reasons); *Mason v Farbrother* [1983] 2 All E.R. 1078 (Blackett-Ord V.C.) (variation approved). See also the power to vary maintenance: s.43 of the Conveyancing Act, 1881; *Revel v Watkinson* (1748) 1 Ves. Sen. 93; 27 E.R. 912 (Lord Hardwicke L.C.); *Greenwell v Greenwell* (1800) 5 Ves. Jun. 194; 31 E.R. 541 (Lord Loughborough L.C.); *Errat v Barlow* (1807) 14 Ves. Jun. 202; 33 E.R. 498 (Lord Eldon L.C.); *Havelock v Havelock* (1800) 17

cases where the beneficial interests under the terms of a trust are genuinely in dispute, and dismissed the appeal. The outcome demonstrated the need for a broader judicial power to vary trusts<sup>53</sup> which was soon supplied by the legislature;<sup>54</sup> but this aspect of the inherent jurisdiction still remains alongside the statutory powers,<sup>55</sup> and arises where “some event or development unforeseen, perhaps unforeseeable, and anyhow unprovided against by the settlor or testator, threatened to make a shipwreck of his

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Ch. D. 807 (Malins V.C.); *In re Collins* (1886) 32 Ch.D. 229 (Pearson J.); *In re Walker* [1901] 1 Ch. 879 (Farwell J.).

<sup>53</sup> It had been argued in *Chapman* that many such orders had in fact been made ([1954] A.C. 429 at 434-435 *arguendo*, 447 *per* Lord Simonds L.C. (recording that counsel had submitted that he had made such orders whilst a judge of the High Court, though he failed to recollect it), 464, 466 *per* Lord Morton; see *In re Brook's Settlement* [1968] 3 All E.R. 416, 424 *per* Stamp J. (it “had often been done”); *cp In re St John's Chelsea* [1962] 2 All E.R. 850 (London Consistory Court) 857 *per* Deputy Chancellor, G.H. Newsom Q.C.; in the immediate aftermath of the decision of the House, Roxburgh J. (who had been the first instance judge in *Downshire* and *Blackwell*, the companion cases to *Chapman* in the Court of Appeal) recalled various orders made before that decision but not perfected, and the Court of Appeal approved this action: see in *In re Harrison's Share under a Settlement* [1955] Ch. 260 (Roxburgh J., and CA); followed: *Charlesworth v Relay Roads Ltd.* [1999] 4 All E.R. 397 (Neuberger J.). However, the decision of the House did not affect orders made but not appealed: see [1954] A.C. 429 at 474 *per* Lord Cohen; *In re Gale* [1966] Ch. 236 (CA) 247 *per* Russell L.J.; *Warr v Warr* [1975] 1 All E.R. 85, 94 *per* Bagnall J.

<sup>54</sup> After *Chapman*, implementing the Law Reform Committee Sixth Report (*Court's Power to Sanction Variation of Trusts*) (Cmnd 310, 1957), the then-existing partial statutory powers of trust amendment (ss.53 and 57 of the Trustee Act, 1925 (see O. Marshall “The Scope of Section 53 of the Trustee Act 1925” (1957 *Conv. (ns)* 448) and s.64 of the Settled Land Act, 1925 (which was held to be satisfied by the Court of Appeal in *Downshire* [1953] 1 Ch. 218, 258-260) as extended by the Settled Land and Trustee Acts (Courts' General Powers) Act 1943 as amended by s.9 of the Emergency Laws (Miscellaneous Provisions) Act 1953) were supplemented by the comprehensive Variation of Trusts Act 1958 (see J. Harris, n 39 above; D. Evans “The Variation of Trusts Act in Practice” (1963) 27 *Conv (ns)* 6; *Goulding v James* [1997] 2 All E.R. 239 (CA)). The 1958 Act was almost immediately pressed into service to sanction a scheme very similar to that which had been before the House in *Chapman* (see *In re Chapman's Settlement Trusts (No 2)* [1959] 1 W.L.R. 372 (Vaisey J.)). It was extended to Northern Ireland (The Trustee (Northern Ireland) Act 1958) and Scotland (The Trusts (Scotland) Act 1961) and replicated in many other common law jurisdictions, such as New Zealand (s. 64A of the Trustee Act 1956 (NZ)), some Australian territories (s. 63A of the Trustee Act 1958 (Vic); s.90 of the Trustees Act 1962 (WA); s.95 of the Trusts Act 1973 (Qld)) and Canadian Provinces (s. 29A of the Trustee Act 1952 (New Brunswick); s.63 of the Trustee Act 1954 (Manitoba); s.31A of The Trustee Act 1955 (Alberta); The Variation of Trusts Act 1959 (Ontario); The Variation of Trusts Ordinance 1963 (Northwest Territories); The Variation of Trusts Act 1963 (Prince Edward Island); The Variation of Trusts Act 1967 (Nova Scotia); The Variation of Trusts Act 1968 (BC); The Variation of Trusts Act 1969 (Saskatchewan); The Variation of Trusts Ordinance 1971 (Yukon Territory)). See, generally, A. McClean, “Variation of Trusts in England and Canada” (1965) 43 *Can. Bar Rev.* 181.

<sup>55</sup> *Rafidain Bank v Saipem* (Court of Appeal, unreported, 2 March 1994) (*New and Chapman* applied and followed).

intentions; and it was imperative that something should be saved from the impending wreck”.<sup>56</sup> It requires that level of compulsion or necessity, “mere expediency [i]s not enough to found the jurisdiction”.<sup>57</sup>

In sum, then, a party with an interest in property who, for reasons of compulsion or necessity, preserves a superior interest in the property or the property itself, can have a lien over the interest or property so preserved. Some tenants for life of settled lands who made necessary repairs to settlement property successfully claimed such liens, though others sought judicial approval before acting out of such necessity; this often required the variation of the settlement itself, and – as exemplified in *Chapman* – this came to be understood as an aspect of the inherent jurisdiction of the court to supervise trusts. However, both the equitable lien and the analogical *Chapman* extension turn on compulsion, necessity or the like; and whilst the *Chapman* jurisdiction is about the extent of the court’s powers to supervise trusts, it arose by analogy with this species of equitable lien, and is constructed upon the same view of necessity that is of the essence of the lien.

### The Further Elements of the Claim Giving Rise to the Lien

Although something akin to compulsion or necessity would seem to be essential to the lien, it is not sufficient. There are further elements which also need to be established. In *In re Power’s Policies*,<sup>58</sup> Holmes L.J. set out three further conditions for a payment to generate a lien:

1. It [the payment] must have had the effect of saving for the benefit of everyone interested property which would otherwise have been lost.
2. It must be made by a person having a charge on or an interest carved out of the estate of the ultimate owner of such property.
3. The [payer] must make it voluntarily for his own advantage, and not in pursuance of an obligation or in the performance of a duty, or as the agent of another.<sup>59</sup>

This passage is neither comprehensive nor entirely accurate. It is not comprehensive for four reasons: it does not refer to the requirement that the claimant have been compelled or have acted out of necessity; it does not contemplate the application of the lien to property rather than to interests in property; it does not contemplate actions other than payments; and it does not encompass the analogous extension into the inherent jurisdiction. And it

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<sup>56</sup> [1954] A.C. 429 at 469 *per* Lord Asquith; followed by Hobhouse L.J. in *Rafidain (ibid)*.

<sup>57</sup> [1954] A.C. 429 at 445 *per* Lord Simonds L.C. There is no authority directly applying *Chapman* in Ireland; see R. Keane *Equity and the Law of Trusts in the Republic of Ireland*, pp.129-130, [10.31]-[10.32]; H. Delany *Equity and the Law of Trusts in Ireland* (3<sup>rd</sup> ed., 2003) pp.439-443; though, of course, its application should be unproblematic given the solid Irish basis of the underlying doctrine. Neither is there variation of trusts legislation, although the Law Reform Commission has recommended its introduction: *Report on the Variation of Trusts* (LRC 63-2000) (Law Reform Commission, Dublin, 2000).

<sup>58</sup> [1899] 1 I.R. 6.

<sup>59</sup> [1899] 1 I.R. 6 at 27; followed: *In re McDonnell’s Estate* [1900] 1 I.R. 295 at 297 *per* Ross J.; *Munster and Leinster Bank v McCann* [1936] I.R. Jur. Rep. 40 at 41 *per* Kennedy C.J., 42 *per* FitzGibbon J.

is not entirely accurate in that in the analysis below, some of the wording – particularly of the third condition – will be found wanting. Nevertheless, Holmes L.J.’s three conditions provide helpful structure for this part of the analysis.

(i) *The payment must have had the effect of saving, for the benefit of everyone interested, property which would otherwise have been lost.*

The sub-tenant cases are excellent examples of the fulfilment of this first condition: the payment by the sub-tenant protects his own interest, that of the tenant, and those of the owners of any other interests subsidiary to the tenant’s. Similarly, where renewal fines or the like are paid to preserve the property to the benefit of all concerned, the payer will be allowed a lien on the property.<sup>60</sup> In *Hamilton v Denny*,<sup>61</sup> the parties were joint-lessees, the claimant had twice paid the renewal fine to renew the lease, and Lord Manners L.C. held that the payments made by the claimant for the benefit of the estate should be recovered out of it.

(ii) *The payment must be made by a person having a charge on, or an interest carved out of, the estate of the ultimate owner of such property.*

This second condition makes eminent sense; and, again, the sub-tenant cases are excellent examples of its fulfilment: sub-tenants plainly have a sufficient interest carved out of the estate of the ultimate owner of the property. Similarly, tenants for life and trustees of settlements,<sup>62</sup> mortgagees of property,<sup>63</sup> and judgment creditors,<sup>64</sup> have all been held to have such an interest.<sup>65</sup> As Brooke M.C. put it in *Fetherstone v Mitchell*,<sup>66</sup> the “remedies and privileges yielded to the creditor who saves the estate are founded on the principle that every just encouragement should be given to any interested party who, in the common emergency, will advance money for the good of all”.<sup>67</sup> As FitzGibbon L.J. put it in *Power’s*, Equity does not give a lien for

<sup>60</sup> *Manlove v Bale* (1688) 2 Vern. 84; 23 E.R. 664; *Lacon v Mertins* (1743) Atk 1; 26 E.R. 803; *Brice v Williams* (1781) Wall L. 325 (Lord Lifford L.C.).

<sup>61</sup> (1809) 1 Ball. & B. 199 (see also n.153 below); see also *Jones v Jones* (1846) 5 Hare 440; 67 E.R. 984 (Wigram V.C.).

<sup>62</sup> See above, text with and in nn.23-57. However, the settlement cases are of less direct relevance in the United Kingdom after the Trusts of Land and Appointment of Trustees Act 1996, of which there is as yet no Irish equivalent.

<sup>63</sup> *Kelly v Staunton* (1826) 1 Hogan 393 (McMahon M.R.); *Hill v Browne* (1844) 6 Ir. Eq. Rep. 403 (Sugden L.C.); *In re McDonnell’s Estate* [1900] 1 I.R. 295 (Ross J.); *Munster and Leinster Bank v McGlashan* [1937] I.R. 525 (Meredith J.; and Ir SC) (*semble*); *Hibernian Bank v WJ Yourrell* [1918] A.C. 372 (HL (Ir)).

<sup>64</sup> *Kehoe v Hales* (1843) 5 Ir. Eq. Rep. 597; *Fetherstone v Mitchell* (1848) 11 Ir. Eq. Rep. 35.

<sup>65</sup> See also R. Sutton, n.9 above, pp.73-75.

<sup>66</sup> (1848) 11 Ir. Eq. Rep. 35.

<sup>67</sup> *ibid.*, 43. For similar reasons, where litigation by one party benefits others connected with funds, trusts, companies, pension funds, and the like, that party is often entitled to have the costs of that litigation taxed and proportionately met by the others who also received the benefit; see *Re McRea* (1883) 32 Ch.D. 613 (Kay J.) (funds); *In re Beddoe*; *Downes v Cottam* [1893] 1 Ch. 547 (CA) (trust); *In re Bayly* (1906) 40 I.L.T.R. 81 (CA) (same); Underhill & Hayton, n.39 above, pp.810-818 Article 83 para.1 (same); *Wallersteiner v Moir (No 2)* [1975] Q.B. 373 (CA) (derivative action); *Smith v Croft* [1986] 1 W.L.R. 580 (Walton J.) (same);

money paid for, or with the effect of, preserving property “unless there is some recognised privity or relation between the parties or between the preserver and the property”.<sup>68</sup>

Furthermore,<sup>69</sup> since the payment must be made by a person having a charge on, or an interest carved out of, the estate of the ultimate owner of such property, it follows that neither the ultimate owner<sup>70</sup> nor a claimant with no interest at all carved out of the ultimate estate will get benefit of the lien. Hence, in *O’Loughlin v Dwyer*,<sup>71</sup> Chatterton V.C. said that it is “a fundamental rule” in claims for such liens “that a mere third person who voluntarily makes a payment by which an estate or interest is preserved for the benefit of the persons interested therein cannot claim a lien for money so paid”.<sup>72</sup> O’Loughlin assigned his tenancy to Dwyer, who got into arrears, which the landlord compelled O’Loughlin to pay. However, since he had retained no interest in the property after assignment to Dwyer, he had “no interest authorising him”<sup>73</sup> to make a payment which would give rise to the lien. Again, in *Munster and Leinster Bank v McCann*,<sup>74</sup> the deceased owed a debt to the Land Commission in respect of certain property; and, at his request, his brother paid that amount; but the latter’s claim to a lien failed

*McDonald v Horn* [1995] I.C.R. 685 (CA) (pension fund). In principle, it would seem to follow that such claimants would be entitled to liens over the relevant funds if the other elements of the lien at issue in this article are also fulfilled. Since such claimants will usually apply to the court in advance for a costs order (*cp* the *Chapman* jurisdiction, nn.39-57 above), and trustees acting properly are always entitled to a lien for their expenses, emergency or not (*cp* n.42 above), such a lien is unlikely to arise in the ordinary course of events, though it ought to be available in respect of extra work necessarily undertaken (*cp* Sheehan, n.108 below, 277).

<sup>68</sup> [1899] 1 I.R. 6 at 25; which is an entirely accurate statement of this condition, provided that “privity” is understood as a synonym for “relation” in that passage. For another example of the rather unfortunate usage of the word “privity” to express the link between the claimant and the property, see *Ferguson v Ferguson* (1886-1887) 17 L.R. Ir. 552, 565 *per* Porter M.R.

<sup>69</sup> And reflecting a distinction between primary and secondary liability which also holds in respect of the underlying personal claim; see, *e.g.* A. Burrows *The Law of Restitution* (2<sup>nd</sup> ed., 2002) pp.273-276.

<sup>70</sup> *Angell v Bryan* (1845) 2 J. & Lat. 763 (Sir Edward Sugden L.C.) (no lien where the first mortgagee pays); *In re Regent’s Canal Ironworks Co* (1876) 3 Ch.D. 411 (CA) 422-423 *per* Mellish L.J., 425 *per* Brett J. (vendor in possession not a subsidiary party and thus not entitled to the lien); *cp. Clack v Holland* (1854) 19 Beav. 262, 276-277; 52 E.R. 350, 355-356 *per* Lord Romilly M.R. See also A. Underhill and A. Cole *Fisher* (6th ed, below n.95) p.282, [526] (no lien in favour of the owner of an incumbered estate), and text with and in nn.82, 108-109 below.

<sup>71</sup> (1884) 13 L.R. Ir. 75.

<sup>72</sup> *ibid.*, 80. *Kavanagh v Waldron* (1846) 9 Ir. Eq. Rep. 279 at 283 *per* Sugden L.C. (voluntary payment); *Fetherstone v Mitchell* (1848) 11 Ir. Eq. Rep. 35 at 46 *per* Moore J. (third party, not having any interest to preserve); *Clack v Holland* (1854) 19 Beav 262 at 276-277; 52 E.R. 350 at 355-356 *per* Lord Romilly M.R. (stranger gets no such lien); *Munster and Leinster Bank v McCann* [1937] Ir. Jur. Rep 40 at 42 *per* Kennedy C.J. (voluntary payment).

<sup>73</sup> (1884) 13 L.R. Ir. 75 at 84, though of course he would still have had his personal action for money had and received: *ibid.*; see *Moule v Garrett* (1872) L.R. 7 Exch. 101; *In re Healing Research Trustee Ltd* [1992] 2 All E.R. 481 at 484-485 *per* Harman J.

<sup>74</sup> [1937] Ir. Jur. Rep. 40 (Ir SC).

because he was “not a claimant against, nor a person having an interest in or a charge on, the estate”.<sup>75</sup> Similarly, in *In re Kavanagh Ltd*,<sup>76</sup> the claimant was a shareholder in, director of, and solicitor to, a company, for which he paid rent and rates to prevent forfeiture. Nevertheless, as he had no interest in the property, his claim failed.

(iii) *The payer must make it voluntarily for his own advantage, and not in pursuance of an obligation or in the performance of a duty, or as the agent of another.*

The pith of this condition is plain enough: the claimant must have acted in effect for himself, rather than in the performance of some other duty; but Holmes L.J.’s language is more than a little awkward, if not unwelcome, for at least three reasons.

First, it is unfortunate that that he should have described such a claimant as having acted voluntarily, not least because in many of the cases relating to Holmes L.J.’s second condition that the payment must be made by a person having a sufficient interest in the property, persons without such an interest are often described as having paid voluntarily. Plainly, he cannot have meant to require by the second condition that claimants not have acted voluntarily and by the third that they have done so.

Second, if it were strictly the case that claimants must not have acted in the performance of an obligation or duty, then those sub-tenants compelled by operation of law to pay the head-rent would fail to fulfil this condition. Rather, it seems that what Holmes L.J. had in mind was that not only must the claimant be a party interested in the property (the second condition) but also that the payment must be made *in that capacity* and thus not on foot of another *primary* obligation (which seems to be the essence of the third condition).

Third, not only do Holmes L.J.’s three conditions not take any account of *Fetherstone v Mitchell*, but if it were strictly the case that the claimant must have made the payment voluntarily (albeit “voluntarily for his own advantage”), then the third condition would contradict the *Fetherstone v Mitchell* requirement that in such cases “the payment is in a manner compulsory” – if it is compelled, it can hardly be voluntary. On the other hand, if all that is meant by Holmes L.J.’s third condition is a requirement that the payment be made in the claimant’s capacity as a party interested in the property and not on foot of a primary obligation, then there is no conflict with *Fetherstone v Mitchell*, where the claimant claimed in his capacity as judgment creditor.

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<sup>75</sup> *ibid.*, 42 *per* Kennedy C.J., 42 *per* FitzGibbon J. (stranger in interest), 43 *per* Murnaghan J. (payment “must be made by a person having an interest in the property saved by the payment”; nevertheless, he would – dissenting – have held for claimant for other (vague) equitable reasons); *cp Hooper v Eyles* (1704) 2 Vern. 480; 23 E.R. 908 (guardian borrowed to pay off an incumbrance on the infant’s estate; lender to the guardian failed in a claim to have the loan repaid out of the estate).

<sup>76</sup> [1952] Ir. Jur. Rep. 38 (Dixon J.).

All of this confusion would be avoided if the word “voluntary” were eschewed in the context of this third condition, the essence of which is that not only must the claimant be a party interested in the property but the payment must also be made in that capacity, and not on the basis of some other capacity or in the performance of another duty or obligation – the claimant must have acted in effect out of the compulsion or necessity to protect his or her interest, rather than in the performance of some other duty or obligation on which he or she is primarily liable.

The sub-tenant cases once again provide an excellent example of the fulfilment of this third condition: a sub-tenant compelled to pay arrears of the head-rent has a sufficient interest in the property and pays in that capacity and not on the basis of some other capacity or in the performance of another duty.<sup>77</sup> On the other hand, in *Power’s* the claim failed in part; and, where it failed, it did so because the payment was made by the claimant not in his capacity as a *puisne* mortgagee but in the performance of a primary obligation which he already owed in another capacity, as solicitor or agent for the mortgagor.

A loan to Mrs Power was secured by a mortgage in favour of Mrs Hearne on two policies of assurance upon Mrs Power’s life. When Mrs Power died, Mrs Hearne claimed the proceeds; and she was met by a claim by representatives of Pierce Kelly, who had paid *premia* to preserve the policies. When he made the payments, Kelly was solicitor for both Mrs Hearne and Mrs Power, himself a *puisne* mortgagee on the policies, and land agent both for Mrs Power and – for a time at least – also for one of her sons. Mrs Hearne initially knew only of Kelly’s capacity as her solicitor, though in subsequent correspondence he informed her that he had paid the *premia* for the previous six years to keep the policy alive “for her benefit” and that he would continue to do so; she sent a studiously ambiguous reply, on foot of which he continued to pay.

At first instance, Chatterton V.C. held in Kelly’s favour in respect of all of his payments, and awarded a lien with a priority over all other incumbrancers (especially Mrs Hearne) for the amount of all of the payments plus interest;<sup>78</sup> but the Court of Appeal reversed in part and upheld in part.

As to that part of Chatterton V.C.’s judgment which was reversed, Fitzgibbon L.J. held that Kelly’s payments for the six years prior to his letter could be recovered neither at law<sup>79</sup> nor in equity on the basis of a lien, because he had made the payments on behalf of and as agent and solicitor for Mrs Power and not in his capacity as *puisne* mortgagee.<sup>80</sup> Likewise, Holmes L.J. held that it “would have been part of the business of the land agent . . . to pay the premiums on those policies out of the rents received” and that the correspondence showed that “up to that time Kelly had been paying the

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<sup>77</sup> *Cp In re McDonnell’s Estate* [1900] 1 I.R. 295 (Ross J.); *Hamilton v Tighe* [1898] 1 I.R. 123 (Porter M.R.).

<sup>78</sup> [1899] 1 I.R. 6 at 11.

<sup>79</sup> *ibid.*, 20.

<sup>80</sup> *ibid.*, 21-22.

premiums on behalf of Mrs Power, the mortgagor”.<sup>81</sup> Thus, these payments did not give rise to a lien.<sup>82</sup>

As to that part of Chatterton V.C.’s judgment which was upheld, the Court of Appeal held that because Mrs Hearne’s reply knowingly allowed Kelly to keep the policies up at his own expense for the protection of his own interest as *puisne* mortgagee, he would be entitled to a lien in respect of the payments after the date of his letter to Mrs Hearne.<sup>83</sup>

Hence, for the Court of Appeal, in respect of the first six years’ worth of payments, Kelly, though as a *puisne* mortgage he had an interest in the property, nevertheless made those payments not in that capacity but rather in the performance of another duty or obligation arising in his capacities as land agent and solicitor for the mortgagor; whilst in respect of his payments after his letter to Mrs Hearne, he made those payments in his capacity as a *puisne* mortgage and not in the performance of another duty arising in his other capacities. On this view of the facts,<sup>84</sup> the decision is an excellent illustration of this understanding of Holmes L.J.’s third condition in *Power’s* itself.

The cases seem therefore to establish four conditions necessary to generate the lien. (i) The claimant must have been acting under compulsion or necessity or something akin to it. (ii) The claimant’s actions must have had the effect of saving, for the benefit of everyone interested, property, or an interest or estate in property, which would otherwise have been lost. (iii) The claimant must have had a subsidiary rather than the main interest in the property or estate or interest thereby saved, or something akin to such an interest, such as a sufficient relationship with the owner of the main interest in the property or with the property itself. (iv) The claimant must have made the payment in that capacity, and not on the basis of some other capacity or in the performance of another duty or obligation on which he or she is primarily liable.<sup>85</sup>

Finally, here, something must be said about the label which the cases ascribe to this species of lien. In *Power’s*, Holmes L.J. said that the conditions are necessary “to constitute a good *salvage* payment”.<sup>86</sup> In *Hill v Browne*,<sup>87</sup> a tenant for life had allowed arrears to build up which were about to be fatal to his estate and to all others with an interest in it (such as a mortgagee), and Sugden L.C. posed the question: “If the estate is about to be lost, what is the mortgagee to do? I apprehend he is entitled to *salvage*. If he does not, the

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<sup>81</sup> *ibid.*, 28.

<sup>82</sup> *Cp In re Kavanagh Ltd* (n.76 above). Similarly, therefore, payments made in the ordinary course of business do not trigger the lien: *In re Regent’s Canal Ironworks Co* (1876) 3 Ch.D. 411 (CA) 421-422 *per* James L.J.; *Hibernian Bank v WJ Yourrell* [1918] A.C. 372 (HL (Ir)).

<sup>83</sup> [1899] 1 I.R. 6 at 24-25 *per* FitzGibbon L.J., 29 *per* Holmes L.J.

<sup>84</sup> It might be thought that this view of the facts is a little odd: why does Mrs Hearn’s knowledge change the capacity in which Mrs Kelly made the payments? For a better view of the importance of Mrs Hearne’s knowledge, see below n.154.

<sup>85</sup> Depending on how, if at all, the lien comes to be accommodated in the modern law, there may need to be some modification of these conditions; see, for example, the paragraph with nn.152-154 below.

<sup>86</sup> [1899] 1 I.R. 6 at 27 (emphasis added).

<sup>87</sup> (1844) 6 Ir. Eq. Rep. 403.

estate is lost to all parties . . .”<sup>88</sup> And in *Fetherstone v Mitchell*,<sup>89</sup> Brooke M.C. referred to “the priority which Courts of Equity give to the *salvage creditor*” in such cases. Indeed, the *Chapman* jurisdiction to vary trusts in circumstances of necessity or emergency is also described as a salvage jurisdiction.<sup>90</sup> These passages demonstrate that, in all of the relevant cases, the lien has been described as a salvage lien, the payments described as salvage payments, the jurisdiction described as the salvage jurisdiction, and the doctrine described as the doctrine of equitable salvage.<sup>91</sup> Salvage is an evocative label, picturesque, vivid, even apt. Nevertheless, it adds nothing to the substance of the analysis; it has maritime echoes; and it has in part been responsible for some of the opprobrium visited upon the lien. For these reasons, the label has been avoided in the analysis thus far. At this point, however, with the elements of the lien secure, and with the label’s echoes postponed until part III, the analysis turns in the next section to the objections to the lien, especially those associated with its label.

### Objections to the Lien

The equitable salvage lien for compulsion or necessitous intervention was relatively common in England and Ireland until the last third of the nineteenth century; thereafter, the histories divide: the lien survived and prospered in Ireland but, although the salvage aspect of the inherent jurisdiction has still found a home in English chancery courts, the salvage lien itself by and large has not. The tide may have been turning as early as the 1850s. When Sir Edward Sugden was Lord Chancellor of Ireland, he decided *Hill v Browne* in 1844;<sup>92</sup> subsequently, as Lord St. Leonards, Lord Chancellor of England, he decided *In re Tharp* in 1852,<sup>93</sup> commenting:

“*In Ireland, it is a very common equity to have as a prior charge to all other incumbrances, what is called salvage money. Where a lease-hold estate, or an estate held for lives to which half a dozen people are entitled in succession, many of them being mortgagees, according to certain priorities, the last man of all who is entitled after everybody, being in possession, redeems, I may say, the estate by paying the landlord, who otherwise would have recovered the estate and taken it from everybody: this payment is what is called salvage money. That is an established equity and a very proper equity. He that pays the salvage has a prior incumbrance to every other charge and interest, because, so far as any interest is left to anyone beyond*

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<sup>88</sup> *ibid.*, 406 (emphasis added).

<sup>89</sup> (1848) 11 Ir. Eq. Rep. 35 at 42 (emphasis added).

<sup>90</sup> *E.g. Chapman v Chapman* [1954] A.C. 429 (HL) 445 (Lord Simonds LC), 454-455 (Lord Morton (Lord Oaksey concurring)), 469-470 (Lord Asquith).

<sup>91</sup> See, *e.g.* n.14 above.

<sup>92</sup> (1844) 6 Ir. Eq. Rep. 403; he also decided the later salvage cases of *Angell v Bryan* (1845) 2 J. & Lat. 763 and *Kavanagh v Waldron* (1846) 9 Ir. Eq. Rep. 279; see above nn.63, 70, 72, 87-88, and below nn.240, 247-249.

<sup>93</sup> (1852) 2 Sm. & G. 578; 65 ER 533; followed: *Morrison v Morrison* (1855) 2 Sm. & G. 564, 575; 64 E.R. 527 at 532 *per* Stuart V.C.

the charge, it is acquired by that payment in the shape of redemption money.”<sup>94</sup>

But there was something of King Canute about this; not only did it not turn back, but the incoming tide swept away many of the traces of equitable salvage on English shores.<sup>95</sup> In *In re Leslie, Leslie v French*,<sup>96</sup> Fry L.J. held the Lord Chancellor “was referring to a practice in the Irish law of conveyancing, which probably had its basis in agreement; and . . . the proposition would seem to be inconsistent with the general law of the land”.<sup>97</sup> The deceased had effected an insurance policy on her own life; when she married, her husband took over the payments, and when he died, they were paid out of his estate. Upon her death, his estate claimed a lien on the proceeds in respect of the *premia* so paid. Plainly, no salvage lien could have arisen here; the first of the four conditions distilled above – that the claimant must have been acting under compulsion or something akin to it – is plainly not fulfilled.<sup>98</sup> Nevertheless, counsel for the husband’s estate sought

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<sup>94</sup> (1852) 2 Sm. & G. 578 at 578-579; 65 E.R. 533 at 533 (emphasis added); approved: *In re Power’s Policies* [1899] 1 I.R. 6 at 26 *per* Holmes L.J. Sugden was Lord Chancellor of Ireland in 1834, and again from 1841 until 1846, and kept the Great Seal in Lord Derby’s first, short-lived, government in 1852. See J. Getzler “Sugden, Edward Burtenshaw, Baron St Leonards (1781-1875)” *Oxford Dictionary of National Biography*.

<sup>95</sup> There are many English cases in the footnotes thus far, but, apart from the *Chapman* variation of trusts context, both salvage in general and the salvage lien in particular seem almost to have disappeared without a trace. For example, in one leading textbook, the doctrine appeared in every edition from the first (W. Fisher *The Law of Mortgage* (1<sup>st</sup> ed., 1856) p.152 [230], p.278 [493], p.408 [726]) to the sixth (A. Underhill and A. Cole *Fisher on The Law of Mortgage and Other Securities Upon Property* (6<sup>th</sup> ed., 1910) pp.278-284 [520]-[530], p.596-599 [1169]-[1176]) where there is a detailed treatment of the salvage lien. However, other contemporary texts so disparaged it (see n.115 below) that when the seventh edition was substantially revised and rewritten (J. Lightwood *Fisher and Lightwood’s Law of Mortgage* (7<sup>th</sup> ed., 1931) pp.253-256) the treatment became far more circumspect; the lien chapter was removed from the eighth edition (E. Tyler (ed.) *Fisher and Lightwood’s Law of Mortgage* (8<sup>th</sup> ed., 1969) p.vii) and does not appear in the most recent (W. Clark *et al* (eds.) *Fisher and Lightwood’s Law of Mortgage* (11<sup>th</sup> ed., 2002)). Hence, as R. Sutton (n. 9 above, p.71) puts it, such principles “appear to have atrophied through lack of use” (*cp ibid*, p.79), and do not appear in modern texts such as A. Silverton *The Law of Lien*.

<sup>96</sup> (1883) 23 Ch.D. 552; followed: *In re Earl of Winchilsea’s Policy Trusts* (1888) 39 Ch.D. 168 (North J.); *Strutt v Tippett* (1889) 61 L.T. 460 (Chitty J.); *aff’d* (1890) 62 L.T. 475 (CA).

<sup>97</sup> (1883) 23 Ch.D. 552 at 562 *per* Fry L.J. (in a judgment delivered by Pearson J.); *cf* R. Sutton, n.9 above, p.90.

<sup>98</sup> Though it had been in the earlier *Sherman v British Empire Assurance Co* (1872) L.R. 14 Eq. 4 (Lord Romilly M.R.) (payments of *premia* on a policy on his life by a bankrupt after bankruptcy held to constitute salvage payments; widow of the deceased bankrupt held entitled to recover them in the proceeds of the policy). See also *Burridge v Row* (1842) 1 Y. & C.C.C. 185 at 191-192; 62 E.R. 846 at 850 *per* Knight-Bruce V.C. (necessary payments of insurance policy do not give ownership of the policy but do give rise to a lien in the amount of the payments); *West v Reid* (1843) 2 Hare 249; 67 E.R. 104 (Wigram V.C.); *Norris v Caledonian Insurance Co* (1869) L.R. 8 Eq. 127 (Lord Romilly M.R.); *Gill v Downing* (1873-1874) L.R. 17 Eq. 316 (Hall V.C.). See, generally, R. Sutton, n.9 above, pp.86-96.

to rely upon *Hamilton v Denny* and *In re Tharp*.<sup>99</sup> Fry L.J. held that a lien could arise<sup>100</sup> by contract, by subrogation,<sup>101</sup> and by “reason of the right vested in mortgagees, or other persons having a charge upon the policy, to add to their charge any moneys which have been paid by them to preserve the property”.<sup>102</sup> This formulation, far from rejecting the equitable salvage lien, is, rather, a classical statement thereof.<sup>103</sup> It emphasises the compulsion or necessity under which the claimant as the owner of a subsidiary interest must operate; indeed, Fry L.J. held that voluntary payments and payments by the full owner do not qualify.<sup>104</sup> Consequently, he could have decided the case as he did, against the claim of salvage on the facts, without disparaging the salvage lien, which he described accurately in his fourth ground for lien, but which he fundamentally misrepresented in his comments on *Tharp*: salvage rarely arises in conveyancing cases and has nothing to do with agreement; and beyond mere assertion, he gave no reason why the Irish doctrine was inconsistent with the general English law.<sup>105</sup> Nevertheless, in the later *Falcke v Scottish Imperial Insurance Company*,<sup>106</sup> he expressed the wish that the expression “salvage” had “remained on the other side of the

<sup>99</sup> (1883) 23 Ch.D. 552, 555-556; counsel opposing the application had sought to dismiss *Hamilton v Denny* as “an Irish case” (*ibid.*, 557) and said of *Tharp* that it “depended on the right of a consignee of West Indian estates and on Irish law, both of which are peculiar” (*ibid.*, 558)! *Cp Cadogan Estates Ltd v McMahon* [2001] 1 A.C. 378 at 394 *per* Lord Millett (not following an *obiter* in the Irish case of *In re Drew* [1929] I.R. 504 (Johnston J.) which had been “referred to without adverse comment in successive editions of Megarry on the Rent Acts, though the latest edition adds the words ‘in Ireland’, which may be the author’s equivalent of ‘*sed quaere*’!”). Indeed.

<sup>100</sup> As to whether this list was exhaustive, see R. Sutton, n.9 above, p.92 at pp.94-96; and *Hewett v Court* (1983) 149 C.L.R. 639 (HCA), text below, with and in nn.127-128, 144-145.

<sup>101</sup> (1883) 23 Ch.D. 552, 560: he held that a lien would arise either by reason of the right of trustees to an indemnity out of the trust property for money expended by them in its preservation, or by subrogation to this right of trustees of some person who may, their request have advanced money for the preservation of the property. On the limits of such subrogation, see *Foskett v McKeown* [2001] 1 A.C. 102 (HL) 118-119 *per* Lord Hope, 140 *per* Lord Millett (payor not compelled, no subrogation).

<sup>102</sup> (1883) 23 Ch.D. 552 at 560. C. Rotherham *Proprietary Remedies in Context*, p.325 comments that this categorisation of lien “amounts simply to an enumeration of different cases in which a lien arises rather than an effort to explain why the right should be available in these cases and why it should be denied in others”.

<sup>103</sup> It was so treated in *Moore v Ulster Bank* (1909) 43 I.L.T.R. 136 at 138 *per* Meredith M.R. Indeed, in *Landowners West of England and South Wales Drainage and Inclosure Co v Ashford* (1880-1881) 16 Ch.D. 411, Fry J. expressed no objections to the doctrine, holding only that mere improvements by second mortgagee did not give rise to the lien.

<sup>104</sup> (1883) 23 Ch.D. 552 at 561 (‘payments by a mere stranger ... are a mere impertinence’), 563.

<sup>105</sup> In *In re Power’s Policies* [1899] 1 I.R. 6 at 23-24, FitzGibbon J. made this point a little more stridently, and he took care to demonstrate that the outcome in that case was entirely consistent with *Leslie* and *Falcke*.

<sup>106</sup> (1886) 34 Ch.D. 234; see R. Sutton, n.9 above; N. Allen “Necessity, Incapability and Emergency” in S. Hedley and M. Halliwell (eds.) *The Law of Restitution*, pp.353-359 [16.9]-[16.30].

channel where it seems to have arisen. I doubt whether any doctrine which is expressed by the word ‘salvage’ applies to cases of this description”.<sup>107</sup>

In *Falcke*, Emanuel, the owner of the equity of redemption of a life assurance policy, paid a year’s premium; the policy was later sold at the application of the widow of the holder of a charge over it; but it was held that Emanuel had no lien over the proceeds. As with *Leslie*, plainly no salvage lien could have arisen here; the second of the four conditions distilled above – that the claimant must have had a subsidiary rather than the main interest in the property or estate or interest thereby saved – is plainly not fulfilled: as the owner of the equity of redemption, Emanuel was the owner of the main interest in the policy.<sup>108</sup> Indeed, this is the basis upon which Bowen L.J. rejected his claim.<sup>109</sup> All three members of the Court of Appeal also held that a stranger paying a premium acquires no lien on the policy or its proceeds,<sup>110</sup> and though an action might be founded upon a request by the owner to the stranger,<sup>111</sup> there was no such request here. This is a famous holding, but it should not be pushed further than it actually goes: it excludes a *stranger* from the lien; but it does not preclude the equitable salvage lien, which is confined to part-owners and is also not available to strangers.<sup>112</sup> Nevertheless, Bowen and Fry L.J.J. went further, in effect rejecting the equitable salvage lien altogether. Bowen L.J. held that no doctrine similar to maritime salvage “applies to things lost upon land, nor to anything except ships or goods in peril at sea”,<sup>113</sup> and Fry L.J. “exceedingly doubt[ed] whether that word [“salvage”] can with any propriety be applied to cases of this description”.<sup>114</sup> However, as the elements of the lien were not established in this case, Bowen and Fry L.J.J. could have decided the case as they did, against the claim for an equitable salvage lien, without disparaging the lien itself.

<sup>107</sup> (1886) 34 Ch.D. 234 at 254.

<sup>108</sup> J Kortmann *Altruism in Private Law. Liability for Nonfeasance and Negotiorum Gestio* p.113 (Emanuel “acted ‘out of a self-oriented desire to preserve the value of his own interest’”); Virgo, n.38 above, p.314 (claimant “was acting to protect his own interest in the property rather than that of the defendant”); P. Birks “*Negotiorum Gestio* and the Common Law” (1971) *C.L.P.* 110 at 112; P. Birks *Introduction to the Law of Restitution* (rev. ed., 1987) p.195; R. Sutton, n.9 above, pp.93-94; D. Sheehan “*Negotiorum Gestio: A Civilian Concept in the Common Law?*” (2005) 55 *I.C.L.Q.* 253 at 261.

<sup>109</sup> (1886) 34 Ch.D. 234 at 250-251, *cp* 253 *per* Fry L.J.

<sup>110</sup> *ibid.*, 241 *per* Cotton L.J.; 248 *per* Bowen L.J. (“Liabilities are not to be forced upon people behind their backs any more than you can confer a benefit upon a man against his will”); 253 *per* Fry L.J.; *In re Cleadon Trust* [1939] Ch. 286 (CA); see also nn.27, 69-76, above and nn.189-200 below.

<sup>111</sup> *ibid.*, 241 *per* Cotton L.J.; 249 *per* Bowen L.J.

<sup>112</sup> *Cp* R. Sutton, n.9 above, p.76. Recall the second of Holmes L.J.’s conditions in *In re Power’s Policies* that the payment giving rise to the lien “must be made by a person having a charge on or an interest carved out of the estate of the ultimate owner of such property” ([1899] 1 I.R. 6 at 27; above, text with and in nn.62-77).

<sup>113</sup> (1886) 34 Ch.D. 234 at 249; *cp* 239 *per* Bowen L.J. responding to counsel: “If that were the law salvage would prevail, common law as well as in maritime law, which it certainly does not”; see below, text with and in nn.129, 202-212.

<sup>114</sup> (1886) 34 Ch.D. 234 at 254. On the basis of such *dicta*, Sheehan (n.108 above, 261) identifies *Falcke* as “the case where the tide turned decisively against such [salvage] liens in England”.

Nevertheless, that attitude took hold.<sup>115</sup> In *In re De Teissier's Settled Estate*,<sup>116</sup> Chitty J. described many salvage claims as “very often of a very loose character indeed, and the Court has to examine with care to see whether the case is one of salvage or not”.<sup>117</sup> In *De Teissier*, properly treating the salvage claim with care, Chitty J. held that work, compelled by a local authority and necessary to protect the property of a settled estate, could amount to salvage, but that mere repairs would not.<sup>118</sup> Again, the result, denying the salvage claim for mere repairs, is entirely consistent with the elements of the equitable salvage lien, as the repairs were neither compelled nor necessary.

Furthermore, this retrenchment is consistent with the contemporary English approach to liens more generally. In *Nicholson v Chapman*,<sup>119</sup> Lord Eyre C.J. suggested that the claimant might have had a personal claim for “some reasonable recompense”<sup>120</sup> for saving timber from floating downstream, but not a lien over the timber.<sup>121</sup> Similarly, in *British Empire Shipping Co v Somes*,<sup>122</sup> it was held that, whilst shipwrights, who had repaired a ship which had remained in dock during a dispute over payment for the repairs, might have a claim for “a reasonable sum for the use of the dock”<sup>123</sup> from the owners of the ship, nevertheless they would have no lien over the ship for

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<sup>115</sup> Hence, the salvage lien is disparaged in W. Ashburner *A Concise Treatise on Mortgages, Pledges and Liens*, pp.99-102; W. Webster (ed.) (2<sup>nd</sup> ed., 1911) pp.121-125.

<sup>116</sup> [1893] 1 Ch. 153 (Chitty J.); see also *In re Willis* [1902] 1 Ch. 15 (CA).

<sup>117</sup> [1893] 1 Ch. 153 at 161; *cp In re Staffordshire Gas and Coke Co* [1893] 3 Ch. 523 at 538 *per* Kekewich J. (though salvage claims often prove “troublesome” matters, the lien was established on the facts). Indeed, care is also properly counselled in the parallel variation of trusts context: in *Chapman v Chapman* [1954] A.C. 429 (HL) 452-455 *per* Lord Morton (Lords Oaksey and Cohen concurring on this point) characterised it as an “exceptional” jurisdiction, to be exercised with “great caution”.

<sup>118</sup> [1893] 1 Ch. 153 at 161-162.

<sup>119</sup> (1793) 2 H. Bl. 254; 126 E.R. 536; *cf Raft of Timber* (1844) 2 W. Rob. 251 (Dr. Lushington) (a raft of timber, flotsam, not a proper subject of maritime salvage); there is an excellent discussion of *Nicholson v Chapman* in Kortmann, n.108 above, pp.111-112, 115-117.

<sup>120</sup> (1793) 2 H. Bl. 254 at 258; 126 E.R. 536, 539; Birks, n.108 above, pp.111-112; J. McCamus “Necessitous Intervention: The Altruistic Intermeddler and the Law of Restitution” (1979) 11 *Ottawa L.R.* 297 at 316; *cf Glenn v Savage* 13 p.442 (Or, 1887); Kortmann, n.108 above, p.112.

<sup>121</sup> As there was no right to retain the timber, doing so rendered the defendant liable in trover. For the view that *Nicholson* stands with *Falcke* in resisting a general salvor’s lien, English law, see C. Rotherham, n.102 above, p.315; P. Birks and C. Mitchell “Unjust Enrichment” in P. Birks (ed.) *English Private Law*, vol. 2, p.580 [15.157].

<sup>122</sup> (1858) 2 El. Bl. & El. 353; 120 E.R. 540 (QB); *aff’d* (1858) 2 El. Bl. & El. 367; 120 E.R. 545 (Exch Ch); *aff’d* (1860) 8 H.L.C. 338; 11 E.R. 459 (HL).

<sup>123</sup> (1860) 8 H.L.C. 338 at 344; 11 E.R. 459 at 462 *per* Lord Cranworth. See also *Peruvian Guano v Dreyfus Bros & Co* (1887) [1892] A.C. 166 (HL) 174-177 *per* Lord Macnaghten (the absence of a lien did not preclude a personal claim for recompense); *China Pacific v Food Corpn of India (The Winson)* [1982] A.C. 939 (HL) 962-963 *per* Lord Diplock (see n.163 below).

that amount.<sup>124</sup> Again, in *Great Northern Railway v Swaffield*,<sup>125</sup> a stable which took in a horse unclaimed at a railway station had a personal claim against the owner for the livery charges, but not a lien<sup>126</sup> over the horse. Indeed, in none of these cases could an equitable salvage lien have arisen, as in none had the salvors the necessary interest in the property to begin with. Nevertheless, the rejection of the liens proceeded on rather more general grounds, reflecting the attitude of Fry L.J. in *Leslie*, that liens arose only in limited categories of case;<sup>127</sup> an attitude which resulted in unnecessary narrowness even in the existing categories.<sup>128</sup>

The law could have taken another turn; despite the modern position, there is old authority in which finders of animals have had liens over them for their

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<sup>124</sup> The shipwrights had refused to return the ship until the full amount of the cost of the repairs and their charge for the use of the dock had been discharged; the owners paid the full amount, and sued for the return of the dock charges. It was held, every level that no lien for the charges arose either by contract or by operation of law, and that the charges were therefore recoverable by the owners. The shipwrights do not seem to have pursued the claim (suggested only by Lord Carnwarth, *obiter*) that they might have had a (personal) claim for a reasonable sum to justify retention of the dock charges.

<sup>125</sup> (1874) L.R. 9 Ex. 132; *cp China Pacific v Food Corpn of India (The Winson)* [1982] A.C. 939 (HL) (see n.163 below).

<sup>126</sup> (1874) L.R. 9 Ex. 132 at 137 *per* Pollock B.; *cp* 139 *per* Amphlett B. (*dubitante*); *cf* 136 *per* Piggot B. (leaving the question aside). As to the personal claim, in *Guildford Borough Council v Hein* [2005] EWCA Civ. 979 (27 July 2005) Clarke L.J. likewise accepted as a matter of principle that where a local council retained possession of rescued dogs as a matter of necessity, they would have a correlative right to be paid reasonable expenses ([25]; *cp ibid.*, [80] *per* Waller L.J.) (though necessity was excluded on the facts because the council were in fact obliged to return the dogs to the owner who had been seeking them (*ibid.*, [24] *per* Sir Martin Nourse, [50] *per* Clarke L.J., [80] *per* Waller L.J.)). However, there is no right, common law to *retain* a rescued animal pending payment of such expenses (*ibid.*; see also *Binstead v Buck* (1777) 2 Wm.B. 1117; 96 E.R. 660 (pointer-dog); *Flannery v Dean* [1995] 2 I.L.R.M. 393 (Costello J.) (horse)); hence, although the owner must tender for any damage caused by the animal, there is no obligation to tender for keep (*Sorrell v Paget* [1950] 1 K.B. 252 (CA) (horse)). Similarly, in the U.S., a personal claim will lie but a lien will not arise (*Meekins v Simpson* 176 N.C. 130; 96 S.E. 894 (1918) (dog); *Bailey v West* 105 R.I. 61; 249 A. 2d. 414 (1969) (horse)). However, in respect of the expenses of public authorities (such as the police), the position has been amended by statute both in the U.K. (*e.g.* s.3(1) of the Dogs Act 1906; s.7(3) of the Protection of Animals Act 1911; ss.4(1)(b) and 7(2) of the Animals Act 1971; s.149(5) of the Environmental Protection Act 1990) and in Ireland (*e.g.* s.4 of the Animals Act, 1985; s.11(5)(c) of the Control of Dogs Act, 1986; s.39(2)(b) of the Control of Horses Act, 1996).

<sup>127</sup> See, *e.g.* D. Waters "Where is Equity Going? Remedying Unconscionable Conduct" (1988) 18 *U.W.A.L.R.* 3 at 24 ('list of equitable liens . . . something of a themeless rag-bag'); J. Phillips "Equitable Liens – A Search for a Unifying Principle" in N. Palmer and E. McKendrick (eds) *Interests in Goods* (2nd ed., 1998) p.975 at 975; D. Wright "The Place of the Equitable Lien as a Remedy" in E. Cooke (ed) *Modern Studies in Property Law. Volume I: Property 2000*, p.41 at 42; F. Burns "The Equitable Lien Rediscovered: A Remedy For the 21st Century" (2002) 25 *U.N.S.W.L.J.* 1 at 7. D. Wright *The Remedial Constructive Trust*, pp.109-111, [3.59] provides a full list of such categories.

<sup>128</sup> S. Worthington "Equitable Liens in Commercial Transactions" [1994] *C.L.J.* 263.

keep;<sup>129</sup> and despite the generality of the *dicta* in *Falcke*, the salvage lien continued to prosper at Irish law. Of course, the Irish courts were well aware of these English developments; some judges simply chose not to follow them,<sup>130</sup> while others expressed bafflement at them: in *Power's*, FitzGibbon L.J. did not believe:

“that there is any difference in principle between the equities which are recognised in England as ‘incidental or accessorial’ and those which we metaphorically describe in Ireland as ‘salvage’ and ‘graft’. It is remarkable that these terms, so long and familiarly known here, like some other Irish products, do not seem to find favour in England. Our English brethren have objected to the introduction into equitable terminology of a word borrowed from Admiralty law, . . . Our calling such payments ‘salvage payments’ where they confer a lien, or give rise to an equity, is merely a matter of nomenclature, and describing a ‘salvage claim’ as ‘incidental or accessorial’ is merely translating a good metaphor into prose.

I do not know, or admit, that ‘salvage’ or ‘graft’ has ever been rightly established in Ireland upon any ground which would not have supported the same claim in England, though, . . . the instances in which ‘salvage claims’ have been discussed and recognised by our Courts of Equity have been much more numerous in this country.”<sup>131</sup>

There were many salvage lien cases in Ireland in the century after the English retrenchment;<sup>132</sup> so that, whatever about its status in England, the salvage lien is well established as a matter of Irish law. Furthermore,

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<sup>129</sup> With the cases in n.126 above, contrast *Robinson v Walter* (1617) 3 Bulst. 269; 81 E.R. 227 (horse); and, with the cases in n.211 below, contrast *Hartford v Jones* (1698) 1 Ld. Raym. 383, 91 E.R. 1161; (1689) 2 Salk 654, 91 E.R. 556 (Holt C.J. KB) (recognising a right at common law to retain salvaged goods until paid for), but this was not followed in *Nicholson v Chapman* (1793) 2 H. Bl. 254 at 257; 126 E.R. 536 at 538 (Lord Eyre C.J. referring to “the case which has been cited from Raymond and Salkirk” the two reporters of *Hartford*); W. Kennedy and F. Rose *The Law of Salvage* (6<sup>th</sup> ed., 2002) pp.68-77, [129]-[149].

<sup>130</sup> *In re Power's Policies* [1899] 1 I.R. 6 at 18 *per* Ashbourne L.C.; *In re McDonnell's Estate* [1900] 1 I.R. 295 at 297 *per* Ross J.; *Munster and Leinster Bank Ltd v McCann* [1937] Ir. Jur. Rep. 40 at 41 *per* Kennedy C.J.; *Neill v Neill* [1904] 1 I.R. 513 (Kenny J); *In re Lisnavagh Estate*; *Lord Rathdonnell v Colvin* [1952] I.R. 296 at 302-303 *per* Dixon J.; *De Vere v Perceval and Cole* [1945] Ir. Jur. Rep. 9 (Gavan Duffy J.).

<sup>131</sup> [1899] 1 I.R. 6 at 23-24 *per* FitzGibbon L.J.; on “graft”, a species of constructive trust liability for breach of fiduciary duty associated with the taking up of leases which ought to have been renewed for the benefit of another, see A. Power “The Eighteenth Century Origins of the Irish Doctrine of Graft” in O. Breen, J. Casey and A. Kerr (eds.) *Liber Memorialis Professor James C. Brady*, p.326, discussing *inter alia* eighteenth century English cases which form the basis for the Irish development.

<sup>132</sup> The most recent cases seem to have been in the 1950s: *In re Lisnavagh Estate*; *Lord Rathdonnell v Colvin* [1952] I.R. 297; *In re Kavanagh Ltd* [1952] Ir. Jur. Rep. 38; *Bank of Ireland v Geoghegan* (1955-1956) Ir. Jur. Rep. 7. But then, so is *Chapman v Chapman* [1954] A.C. 429!

notwithstanding *Leslie*, *Falcke* and *De Teissier*, there are still authoritative traces of the equitable salvage lien in English law. It has been relied upon in settled land cases;<sup>133</sup> and it has subsequently been approved by the House of Lords. In *Hibernian Bank v W.J. Yourell*,<sup>134</sup> the claimant bank sought salvage liens for payments in respect of mortgages securing loans owed by the defendant customer. In the Irish courts, O'Connor M.R. at first instance held that the payments were not salvage payments but instead loans from the bank to the defendant,<sup>135</sup> but the Court of Appeal reversed and imposed the lien.<sup>136</sup> However, the House of Lords reinstated the decision of O'Connor M.R.; and their Lordships did so, not on the basis that the doctrine did not exist, but on the basis that its terms had not been fulfilled.<sup>137</sup> For example, Lord Parker held that "there can be no doubt that a mortgagee has a lien on the mortgaged premises for moneys paid by him to preserve the subject-matter of his security".<sup>138</sup> Similarly, in *Chapman v Chapman*,<sup>139</sup> though they declined to expand it, the House of Lords nevertheless strongly affirmed an analogous extension, also founded on notions of necessity and also described as salvage. Furthermore, a salvage argument was entertained on its merits in *In re Downer Enterprises Ltd.*<sup>140</sup> Pennycuik J. held that a party, Schick, who was secondarily liable for rent and had paid it, was entitled to be subrogated to the landlord's claims against the party primarily liable for the rent. Schick's case was also put in salvage terms, that "by paying the rent, Schick had preserved this asset for the benefit of the company in liquidation and, accordingly, Schick ought to be recouped its expense in so preserving the asset".<sup>141</sup> For Pennycuik J., the "answer to that attractive argument . . . [was that Schick had] paid this sum not by arrangement with the liquidator, but because Schick was bound to pay it under the general law . . .".<sup>142</sup> The "attractive" salvage failed, not because such an argument was unstateable, but instead for a reason entirely consistent with the elements of the lien: the fourth of the four conditions distilled above – the claimant must not have made the payment in the performance of another duty or obligation for which he or she is not primarily liable – is plainly not fulfilled because Schick was bound to make the payment under the general law.

These cases are consistent with recent academic commentary arguing for the resurgence of equitable lien<sup>143</sup> and with high modern judicial authority once again recognising its importance. For example, the High Court of Australia in *Hewett v Court*<sup>144</sup> liberalised the lien from the shackles of the recognised

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<sup>133</sup> See above, text with and in nn.23-57, 62.

<sup>134</sup> [1918] A.C. 372 (HL (Ir))

<sup>135</sup> [1916] 1 I.R. 313.

<sup>136</sup> *ibid.*

<sup>137</sup> [1918] A.C. 372 at 390 *per* Lord Kinson, 394 *per* Lord Parker, 401 *per* Lord Wrenbury.

<sup>138</sup> [1918] A.C. 372 at 394.

<sup>139</sup> [1954] A.C. 429 (HL) (nn.41-57 above); see also *Rafidain Bank v Saipem* (CA, unreported, 2 March 1994).

<sup>140</sup> [1974] 2 All E.R. 1074.

<sup>141</sup> *ibid.*, 1084.

<sup>142</sup> *ibid.* However, an alternative claim in subrogation succeeded: see n.220 below.

<sup>143</sup> See nn.127-128 above.

<sup>144</sup> (1983) 149 C.L.R. 639 (HCA); see I. Hardingham "Equitable Lines for the Recovery of Purchase Money" (1985) *M.U.L.R.* 65; M. Christie "The Equitable

categories and unselfconsciously imposed a lien over a pre-fabricated home to secure the part-payment of the purchase price, where the contract to purchase the home had gone off due to the builder's insolvency;<sup>145</sup> whilst the House of Lords in *Napier and Ettrick v Kershaw*<sup>146</sup> held that, having indemnified the insured, the insurer has a lien over any sums recovered by the insured. To be sure, the purchaser's lien at issue in *Hewett* differs in important respects from the insurer's lien at issue in *Napier*, and they both differ in turn from the salvage lien at issue here. Nevertheless, they are relevant to each other by analogy to illustrate the ongoing revitalization of liens generally; in particular, the fact of that development with the purchaser's and insurer's liens provides strong support for the argument that a similar development is also possible in the context of the salvage lien.

Hence, although the equitable salvage lien for compulsion or necessitous intervention has been lost outside of Ireland, nevertheless, the effect of the hyperbole in *Leslie* and *Falcke* can be diluted or displaced by *Yourell* and *Chapman*, and this species of lien could quite easily form part of the emerging *zeitgeist* represented by *Hewett* and *Napier*. A minimal development would simply accept the salvage lien as just another recognised category of lien; more expansively, it could form a central element in the current rediscovery of the equitable lien.<sup>147</sup> Either way, an appreciation of how the equitable salvage lien for compulsion or necessitous intervention fits into the modern landscape of the law is crucial, and that is the work of the next part of this article.

### III. The Place of the Equitable Salvage Lien in the Modern Law

#### Connections and Accommodation

The equitable salvage lien might simply be a *sui generis* doctrine, occupying its own obscure corner of Irish equity, and susceptible of no further explanation. Nevertheless, the doctrine plainly has echoes of, if not indeed connections with, at least<sup>148</sup> three relatively well established categories in the modern law: unjust enrichment, maritime salvage, and subrogation. An analysis of these three possible homes in which the equitable salvage lien

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Lien in a Commercial Context: Some Recent Australian Developments' (1986) 14 *A.B.L.R.* 435; D. Malcolm "The Penetration of Equity Principles into Modern Commercial Law" (1987) 2 *Aust. Bar. Rev.* 185.

<sup>145</sup> Worthington, n.128 above; Burns, n.127 above, 13-24. *Morris v Morris* [1982] 1 N.S.W.L.R. 61; *Electrical Enterprise Retail v Rodgers* (1989) 15 N.S.W.L.R. 473. In *In re Barrett Apartments* [1985] I.R. 350; [1985] I.L.R.M. 679 (noted Coughlan "Land Law – Equitable Mortgages and Charges" (1992) 14 *D.U.L.J. (ns)* 171) the Irish Supreme Court declined to extend this to a lien over property to secure a booking deposit paid in respect of the intended purchase of such property.

<sup>146</sup> [1993] A.C. 713 (HL); W. Gummow "Names and Equitable Liens" (1993) 109 *L.Q.R.* 159; Rotherham, n.102 above, pp.281-292; cf *Foskett v McKeown* [2001] 1 A.C. 102 (HL).

<sup>147</sup> Another route is to track the similarities with the constructive trust: H. Monaghan "Constructive Trust and Equitable Lien: Status of the Conscious and the Innocent Wrongdoer in Equity" 38 *U. Det. L. Rev.* 10 (1960); Wright, n.127 above.

<sup>148</sup> The analogous *Chapman* extension has already been discussed (see text with and nn.41-57, 139 above).

might be accommodated in the modern law is the work of this part of the article.

Whilst assimilation of the equitable salvage lien with its maritime counterpart or its absorption by the law of subrogation may ultimately prove neither necessary nor profitable, an unjust enrichment explanation of the equitable salvage lien is entirely plausible: claims for the recovery of benefits transferred pursuant to compulsion or necessity form a significant part of the modern law of restitution for unjust enrichment, and the equitable lien for compulsion or necessitous intervention might easily find a comfortable home with them. If so, then elements of the lien might come to be better understood and explained in unjust enrichment terms. Moreover, because the equitable salvage lien cases demonstrate that a finding of necessity is certainly possible, this could contribute to, and perhaps even secure, necessity as a factor rendering an enrichment unjust. In so doing, problems with cases relating both to the equitable salvage lien and to the unjust factor of necessity can be resolved, and some light might even be shed on the fraught question of the principled availability of proprietary restitutionary claims. It is to these issues that the analysis in the following sections of this part is directed.

### Unjust Enrichment and the Equitable Salvage Lien

The connections between unjust enrichment and equitable liens have long been recognised,<sup>149</sup> and it is in fact a very straightforward task to align the four conditions necessary to establish a salvage lien with the terms of the principle against unjust enrichment.

Recall that, to make a successful claim to an equitable salvage lien (i) the claimant must have been acting under compulsion or necessity or something akin to it; (ii) the claimant's actions must have had the effect of saving, for the benefit of everyone interested, property, or an interest or estate in property, which would otherwise have been lost; (iii) the claimant must have had a subsidiary rather than the main interest in the property or estate or interest thereby saved, or something akin to such an interest, such as a sufficient relationship with the owner of the main interest in the property or with the property itself; and (iv) the claimant must have made the payment in that capacity, and not on the basis of some other capacity or in the performance of another duty or obligation on which he or she is primarily liable. Moreover, on any claim for restitution of unjust enrichment, four questions arise:<sup>150</sup> is there (i) an enrichment to the defendant (ii) at the

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<sup>149</sup> *Cp* R. Sutton, n.9 above. See also D. Waters "Restitution. The Need for Reform" (1964) 17 *C.L.P.* 42 at 52 (suggesting that the courts could "evolve a true equitable restitutionary lien" by analogy with the vendor's lien cases); M. Cope *Constructive Trusts*, p.35 (on the use of the equitable lien more generally to prevent unjust enrichment). In *Cadorange Pty Ltd v Tanga Holdings Pty Ltd* (1990) 20 N.S.W.L.R. 26, Young J. imposed a lien by analogy with *Hewett v Court* in support of a personal claim to reverse an unjust enrichment.

<sup>150</sup> The terms of the principle against unjust enrichment emerge, for example, from, Birks, n.108 above, pp.7, 21; *Dublin Corporation v Building and Allied Trades Union* [1996] 1 I.R. 468 (Ir SC) 483 *per* Keane J. (noted E. O'Dell "Restitution and *Res Judicata* in the Irish Supreme Court" (1997) 113 *L.Q.R.* 245; E. O'Dell "Bricks and Stones and the Structure of the Law of Restitution" (1998) 20

expense of the claimant, (iii) in circumstances in which the law will require restitution (that is, the ‘unjust’ phase of the enquiry), (iv) where there is no reason why restitution will be withheld (defences and policy).

The four conditions necessary to establish a salvage lien align smoothly with the terms of the principle against unjust enrichment: the lien’s requirement of compulsion or necessity or something akin to it can be seen as a requirement of an unjust factor; the requirement that the lien benefit everyone, including the defendant, can be seen as a strict requirement of enrichment;<sup>151</sup> and the requirements that the lien claimant be the owner of an interest in property (or something akin to that) and pay in that capacity can be seen as a very tight requirement that the enrichment be at the expense of the claimant. In this way, the four conditions emerging from the cases as necessary to establish the equitable salvage lien equiperate with ease with the three elements of the principle against unjust enrichment that establish causes of action in restitution, and the conclusion that the lien is entirely directed to reversing unjust enrichment becomes almost impossible to resist.

Perhaps the strongest indication that the salvage lien is a response to unjust enrichment follows from that fact that when causes of action in restitution other than necessity are made out and the other three conditions are satisfied, a claim for a salvage lien will lie. Thus, we have already seen the extension from compulsion of law to practical compulsion or necessity; but there are cases in which mistaken payments<sup>152</sup> have generated salvage claims; and the aspect of *In re Power’s Policies* in which the salvage claim succeeded is a classic example of free acceptance:<sup>153</sup> Mrs Hearne knowing that the benefit would not be conferred gratuitously and with the opportunity to reject it nevertheless permitted Kelly to continue to make the payments.<sup>154</sup> That

*D.U.L.J.* (ns) 101); *Banque Financière de la Cité v Parc (Battersea)* [1999] 1 A.C. 221 (HL) 227 *per* Lord Steyn. Birks’ restatement in P. Birks *Unjust Enrichment* (2nd ed., 2005), seeking to replace unjust factors with an overarching absence of basis, does not expressly consider cases of compulsion and necessity; and it is difficult to see how it can accommodate them; see n.171 below.

<sup>151</sup> Indeed, since there can be difficulties associated with establishing enrichment in necessity cases (Kortmann, n.108 above, 170-171) such a strict requirement would mean that enrichment is more easily established in the salvage cases than it is in many necessity cases.

<sup>152</sup> *In re Sargent’s Trusts* (1897) 7 L.R. (Ir) 66 (Sullivan M.R.) (estate of mistaken payor of premiums had lien on proceeds of policy); *cp Cooper v Phibbs* (1867) L.R. 2 H.L. 149 (after rescission of a contract of sale of a fishery from uncle to nephew on the grounds that the nephew already owned the fishery, the House held that the uncle was entitled to a lien to secure his expenditure on it); see also R. Sutton, n.9 above, p.96.

<sup>153</sup> In *Hamilton v Denny* (1809) 1 Ball. & B. 199 (n.61 above) the claimant made two payments; in respect of both, the unjust factor probably is practical compulsion; but in respect of the second, it might also be free acceptance: knowing that the claimant had paid the first renewal fine, the defendant permitted him to make the second. See also *Ahearne v McSwiney* (1874) I.R. 8 CL 568 (n.7 above).

<sup>154</sup> Indeed, this may be a more satisfactory explanation for the importance of Mrs. Hearne’s letter, which the Court of Appeal treated as changing the capacity in which Mr Kelly acted (nn.83-84 above). It might, therefore, have been better to hold that he acted in the same capacity throughout, and that whilst there was no unjust factor before the letter, her response to it generated the unjust factor of free acceptance.

being so, it would follow that the first condition necessary to establish the salvage lien would need modifying, to provide that the claimant must have been acting under compulsion or necessity or something akin to it, *such as another cause of action in restitution*.

Consequently, a restitutionary explanation of salvage may be not only possible but also wholly appropriate. If so, then the equitable salvage lien, founded on notions of compulsion and necessity, would have much to contribute to modern debates about the extent to which such concepts should properly found claims to restitution for unjust enrichment. Recall, for example, that compulsion, necessity and the like, are of the essence of the salvage lien,<sup>155</sup> and that the courts have been careful not to make such findings too easily, in particular, where they find that preservation or repairs may be necessary but that maintenance or improvements will usually not be.<sup>156</sup> Hence, not only do the salvage lien cases quite properly counsel caution in finding that a claimant has acted out of necessity, but they also demonstrate that where the facts so warrant, a finding of necessity is entirely possible. Indeed, to the extent that compulsion and necessity do constitute causes of action in restitution, then the equitable salvage lien cases would stand as examples where causes of action were properly and successfully established.

For example, just as the common law action for money had and received extended recovery from cases of legal compulsion to cases of practical compulsion or necessity, so too has the equitable salvage lien extended from cases of compulsion to cases of necessity.<sup>157</sup> The extension of the common law action has been tentative,<sup>158</sup> reflecting an unresolved (perhaps irresolvable) tension between the Victorian “philosophy of robust individualism”<sup>159</sup> underlying the hyperbolic *dicta* in *Falcke* and a more

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<sup>155</sup> See text with and nn.13-26 above.

<sup>156</sup> See text with and nn.33-38 above.

<sup>157</sup> See text with and in nn.22-57, 62, 133 above.

<sup>158</sup> With the cases nn.19-20 above, contrast *Edmunds v Wallingford* (1885) 14 Q.B.D. 811 (CA); see also *Beresford v Kennedy* (1887) 21 I.L.T.R. 17 (Andrews J.); *Gormley v Johnston* (1895) 29 I.L.T.R. 69 (Gibson J.).

<sup>159</sup> *Peel v Canada* (1993) 98 D.L.R. (4<sup>th</sup>) 140 (SCC) 152 per McLachlin J. On that ethic, see, e.g. Kortmann, n.108 above, pp.84-90, 164; E. Hope “Officiousness” 15 *Cornell L.Q.* 25 (Part 1), 205 (Part 2) (1929-1930) at 29-30. L. Aitken “*Negotiorum Gestio* and the Common Law: A Jurisdictional Approach” (1988) 11 *Syd. L. Rev.* 566 suggests that this ethic was stronger in the common law courts hostile necessity claims than in admiralty or ecclesiastical courts which were more influenced by civilian conceptions less hostile to necessity claims (on the civilian approach, cp C. von Bar *et al*, *Principles of European Law on Benevolent Intervention in Another’s Affairs*; see also J. Dawson “*Negotiorum Gestio*. The Altruistic Intermeddler” 74 *Harv. L. Rev.* 817 (Part 1), 1073 (Part 2) (1961); S. Stoljar “*Negotiorum Gestio*” in E. von Caemmerer and P. Schlechtriem (eds) *International Encyclopedia of Comparative Law* vol X “Restitution – Unjust Enrichment and *Negotiorum Gestio*”, chpt.17; T. Krebs “Unrequested Benefits in German Law” in J. Neyers, M. McInners and S. Pitel (eds.) *Understanding Unjust Enrichment*, p.247; Kortmann, n.108 above, pp.44-50, 99-111; Sheehan, n.108 above). Victorian classical economics are reflected in modern neo-classical theories of law and economics, which take a similarly narrow view of claims based upon necessity; see, e.g. W. Landes and R. Posner “Salvors, Finders, Good Samaritans and Other Rescuers: An Economic Study of

altruistic philosophy encouraging good Samaritan intervention<sup>160</sup> underlying potential necessity claims. Nevertheless, *Falcke* itself is now rather easily brushed aside;<sup>161</sup> and there are several pockets of authority (for example, the burial cases,<sup>162</sup> agency of necessity,<sup>163</sup> and cases concerning the supply of necessary services to an *incapax*<sup>164</sup>) in which there are clear and strong traces of necessity as an unjust factor.<sup>165</sup> Moreover, there are good arguments that the lines between these pockets have been “too firmly drawn” in the cases,<sup>166</sup>

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Law and Altruism” 7 *J.L.S.* 83 (1978); R. Long “A Theory of Hypothetical Contract” 94 *Yale L.J.* 415 (1984).

<sup>160</sup> H. Dagan *The Law and Ethics of Restitution*, chpt. 4; *cp* H. Dagan “In Defense of the Good Samaritan” 97 *Mich. L. Rev.* 1152 (1999); Kortmann, n.108 above, pp.91-98, 165. See, generally, T. Nagel *The Possibility of Altruism*; J. Mansbridge (ed) *Beyond Self-Interest*; E. Paul, F. Miller and J. Paul (eds) *Altruism*.

<sup>161</sup> *Surrey Breakdown Ltd v Knight* [1999] R.T.R. 84 (CA) (however, the claim failed on the facts: police request, and not necessity, set the claimants in motion; *cf* Kortmann, n.108 above, pp.167-168, 184-185).

<sup>162</sup> Kortmann, n.108 above, pp.118-120, 122-123; Sheehan, n.108 above, 272; M. Marasinghe “The Place of *Negotiorum Gestio* in English Law” (1976) 8 *Ottawa L. Rev.* 573; *Jenkins v Tucker* (1788) 1 H. Bl. 90; 126 E.R. 55; *Tugwell v Heyman* (1812) 3 Camp. 298; 170 E.R. 1389; *Rogers v Price* (1829) Y. & J. 28; 148 E.R. 1080; *Shallcross v Wright* (1850) 12 Beav. 558; 50 E.R. 1174; *Ambrose v Kerrison* (1851) 10 C.B. 776; 138 E.R. 307; *Bradshaw v Beard* (1862) 12 C.B. (NS) 344; 142 E.R. 1175; s.46(5) of the Public Health (Control of Disease) Act 1984 (UK).

<sup>163</sup> G. Jones (ed.) Lord Goff of Chieveley and G. Jones *The Law of Restitution* (6th ed., 2002) pp.448-452 [17.002]-[17.007]; W.B. Williston “Agency of Necessity” (1944) 22 *Can. Bar. Rev.* 492; G. Treitel “Agency of Necessity” (1953) 3 *U.W.A.L.Rev.* 2; Kortmann, n.108 above, pp.127-136, 166-169; Sheehan, n.108 above, 269-272; *Prager v Blatspiel Stamp and Heacock* [1924] 1 K.B. 566 (McCardie J.); *Burns Philp v Gillespie Bros* (1947) 74 C.L.R. 148 (HCA); *China Pacific v Food Corpn of India (The Winson)* [1982] A.C. 939 (HL) (after salvage pursuant to contract came to an end, a bailment of necessity arose in respect of the salvaged goods, so that the salvors were entitled both to a salvage award for the rescue of the goods and remuneration for the expenses of their subsequent storage; and the House of Lords declined to answer the question whether the claimants would have been entitled to a lien for the expenses; see, generally, Kortmann, n.108 above, pp.136-139); *Surrey Breakdown Ltd v Knight* [1999] R.T.R. 84 (CA); *Guildford Borough Council v Hein* [2005] EWCA Civ. 979 (27 July 2005) (n.126, above). *Cf* F. Reynolds “Agency of Necessity” [1990] *J.B.L.* 505; I. Brown “Authority and Necessity in the Law of Agency” (1992) 55 *M.L.R.* 414.

<sup>164</sup> J.P. Dawson “Rewards for the Rescue of Human Life?” in K.H. Nadelmann, A.T. von Mehren and J.N. Hazard (eds.) *Twentieth Century Comparative and Conflicts Law: Legal Essays in Honour of H.E. Yntema* p.142; reprinted J.M. Ratcliffe (ed) *The Good Samaritan and the Law*, p.63; R.A. Albert “Restitutionary Recovery for Rescuers of Human Life” 74 *Calif. L. Rev.* 85 (1986); Sheehan, n.108 above, 272-274; *Nelson v Duncombe* (1846) 9 Beav. 211; 50 E.R. 323; *In re Rhodes* (1890) 44 Ch.D. 94 (CA); *Matheson v Smiley* (1932) 2 D.L.R. 787 (Man CA).

<sup>165</sup> See generally *In re F (mental patient: sterilisation)* [1990] 2 A.C. 1 (HL) 74-76 *per* Lord Goff. Indeed, even *Nicholson v Chapman, British Empire Shipping Co v Somes*, and *Great Northern Railway v Swaffield* (text above, with and in nn.119-126) all seem to support the possibility of a personal claim, though they deny that it could be secured by a lien.

<sup>166</sup> Goff & Jones, n.163 above, pp.447-448 [17.001].

and that these pockets should be generalised into a single category of necessity as an unjust factor or cause of action in restitution.<sup>167</sup>

Common law diffidence about necessity might once have cast cases in which necessity claims have failed on the facts<sup>168</sup> as undermining, even denying, necessity as an unjust factor. However, in many of these cases, the claims failed not because the law did not recognize actions founded upon necessity but simply because essential elements of such actions were not made out. Furthermore, whilst the equitable salvage cases quite properly counsel caution in finding that a claimant has acted out of necessity, they also demonstrate that where the facts so warrant, a finding of necessity is both possible and proper. If the equitable salvage lien is indeed to be understood as responding to unjust enrichment, then the salvage cases which turn on necessity would provide another pocket of authority containing clear and strong examples of necessity as an unjust factor.<sup>169</sup> Moreover, since necessity is understood in the equitable salvage cases to arise by analogy with compulsion, the assimilation of the salvage lien into an unjust factor of necessity lends support to the view that such an unjust factor indeed arises by analogy with compulsion<sup>170</sup> rather than in response to a general policy to encourage intervention to preserve health and property,<sup>171</sup> though of course the policy serves to bolster the conclusion drawn from the analogy with compulsion. Besides, there are at least two authorities in which personal

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<sup>167</sup> *ibid.*, p.467 [17.026]; Virgo, n.38 above, pp.300, 315, Burrows, n.69 above, pp.314-316; Sheehan, n.108 above; McCamus, n.120 above, Marasinghe, n.162 above. The limits of such an action are explored in E. Hope, n.159 above; J. Wade "Restitution for Benefits Conferred Without Request" 19 *Vand. L. Rev.* 1183 (1966) 1186-1205. Birks and Mitchell, n.121 above, pp.582-583 [15.159]-[15.160] are less confident; and S. Hedley *A Critical Introduction to Restitution*, chpt. 3 is decidedly sceptical. For a different generalisation from the cases, see S. Stoljar "Unjust Enrichment and Unjust Sacrifice" (1987) 50 *M.L.R.* 603. See also Kortmann, n.108 above, pp.164-191.

<sup>168</sup> *E.g.* personal claims in money had and received failed in *Macclesfield Corporation v Great Central Rly* [1911] 2 K.B. 528 (CA) and *Hackett v Smith* [1917] 2 I.R. 508 (Lord Campbell C.J.) (on *Hackett*, cf *Ferguson v Ferguson* (1886-1887) 17 L.R. Ir. 552 at 563-564 *per* Porter M.R.; *Gebhart v Saunders* [1892] 2 Q.B. 452 (QBD)); whilst proprietary claims for liens failed in the cases in nn.119-126, personal claims may have been available in those cases (n.165 above).

<sup>169</sup> *Cp* Sheehan, n.108 above, 261.

<sup>170</sup> Birks, n.108 above, pp.193-203; Virgo, n.38 above, pp.302-304 (thereby constituting a consent-related unjust factor).

<sup>171</sup> Burrows, n.69 above, p.315; Birks and Mitchell, n.121 above, p.580 [15.156]; Sheehan, n.108 above (thereby constituting a policy-motivated unjust factor). Of course, on Birks' final restatement, it makes no sense to speak in terms of unjust factors at all. In the first edition of *Unjust Enrichment* (2003) he excluded all necessity cases (*ibid.*, pp.21-22); in the second edition (n.150 above), he accepted a small category of unjust enrichment by necessity (*ibid.*, p.24; presumably for policy reasons (*cp* Birks and Mitchell, n.121 above). Either way, for him, the excluded *negotiorum gestio* cases would not trigger gain-based remedies in unjust enrichment (n.150 above 22-26), potentially leaving them in a (perhaps Germanic (Sheehan, n.108 above 263)) reliance-based category (*cp* Stoljar (n.167 above); P. Jaffey *The Nature and Scope of Restitution*, pp.77-84) of reimbursement (Birks and Mitchell, n.121 above 583 [15.160]) possibly along the lines suggested by von Bar (above n. 159).

claims to restitution of the value of benefits transferred out of necessity succeeded, and the salvage cases directly influenced their outcomes.

The first example is the decision of Porter M.R. in the Irish case of *In re Pike*.<sup>172</sup> The hall door of 2 Synge Street, Dublin being ajar, the Dublin Metropolitan Police were called, and they found an old lady semi-unconscious, helpless and dying. They brought her to hospital, and took the necessary steps to protect the house and contents, including cash, jewellery, and bank-books, by posting a guard on the house until the old lady had died. The Commissioner successfully claimed in the administration of her estate for the amount of the pay of the constables who had guarded the property and therefore been “the means of preserving, for the benefit of the persons now entitled to it, this large amount of property . . .”.<sup>173</sup>

It is a short judgment; no cases are cited, and no doctrines expressly adverted to; but it has been treated as a salvage case in the literature.<sup>174</sup> Of course, it shares with the salvage cases a similar understanding of necessity; and in so far as those cases were the foremost source of necessity reasoning in Irish law at the time when *Pike* was decided, it is unsurprising that echoes of salvage can be heard in that case. But it should now be regarded as a straightforward example of necessity,<sup>175</sup> without any recourse to salvage. Indeed, it is difficult to see how all four elements of the salvage lien are satisfied. The element of necessity satisfies the first; and the actions of the police did have the effect of saving the vulnerable property of the dying old lady, thus satisfying the second; but the police had neither an interest in the property saved nor a sufficient relationship with the old lady or the property, thus failing to fulfil the third condition; and because they did not have such an interest or relationship, the fourth condition, requiring that the claimant have acted in that capacity, cannot be fulfilled; indeed, because the police presumably acted out of their general duty, the fourth condition would also not be satisfied for that reason.<sup>176</sup> *Pike* then should be regarded as an example not of a claim for an equitable salvage lien but rather as a straightforward claim to restitution of the value of services rendered in which necessity supplied the relevant unjust factor (and the penumbra of salvage cases in the Irish courts provided support for necessity as the basis of the claim).

Salvage cases also influenced the decision of Edward Nugee Q.C., sitting as a Deputy High Court Judge, in *In re Berkeley Applegate*,<sup>177</sup> which, like *Pike*,

<sup>172</sup> *In re Pike. Burke v Burke* (1889-1890) 23 L.R. I.R. 9.

<sup>173</sup> *ibid.*, 12.

<sup>174</sup> See the sources cited in n.14 above.

<sup>175</sup> This is how it is regarded in McCamus, n.120 above, 317; Hedley, n.167 above, pp.69, 78 n.4; Goff & Jones, n.163 above, p.454 [17.010] n 65; *cp Restatement of Restitution* (American Law Institute, 1937) §117 comment b (restitution for claimants who take possession of property in an emergency, such as on the death of the owner).

<sup>176</sup> Indeed, because they were performing their public duty, it may be that there should have been no finding of necessity either. *Cf Surrey Breakdown Ltd v Knight* [1999] R.T.R. 84 (CA) in which there was no necessity where the police requested the claimant to remove the defendant’s car from a pond.

<sup>177</sup> *In re Berkeley Applegate (Investment Consultants) (in liq)* [1989] Ch. 32 (Edward Nugee Q.C.). See also *In re Regent’s Canal Ironworks Co* (1876) 3 Ch.D. 411 (CA); *In re Staffordshire Gas and Coke Co* [1893] 3 Ch. 523 (Kekewich J.); *In re*

probably stands as another example of necessity as an unjust factor. Here, the judge was influenced by the *Chapman* salvage element of the inherent jurisdiction to administer trusts. One aspect of that jurisdiction, at issue in *In re Duke of Norfolk's Settlement Trusts*,<sup>178</sup> is the power of the court to authorize the payment of remuneration to trustees or to increase the remuneration authorised by the trust instrument;<sup>179</sup> and this was in turn applied by analogy in *Berkeley Applegate*. An investment company went into voluntary liquidation. Most of the company's assets were held on trust for its investor clients; the few remaining assets were insufficient to pay the expenses of the liquidation; and the liquidator sought an order that, notwithstanding the absence of statutory authority, he was entitled to be paid out of the trust assets. Edward Nugee Q.C. held that, as with *Downshire*,<sup>180</sup> the "situation which existed in the present case immediately before the commencement of the winding up could similarly fairly be called an emergency",<sup>181</sup> and that by his work, the liquidator had "added to the estate in the sense of carrying out work which was *necessary* before the estate could be realised for the benefit of the investors".<sup>182</sup> He discerned in the analogy with salvage an "underlying unity"<sup>183</sup> in various aspects of the inherent jurisdiction of the court to administer trusts, including *Norfolk's*. As a consequence, he held that ". . . where a person seeks to enforce a claim to an equitable interest in property, the court has a discretion to require as a condition of giving effect to that equitable interest that an allowance be made for costs incurred and for skill and labour expended in connection with the administration of the property. It is a discretion which will be sparingly exercised . . ." <sup>184</sup> but one which he was prepared to exercise on the facts before him.

*Berkeley Applegate*, though not a direct<sup>185</sup> application of salvage, nevertheless proceeds by analogy with it, drawing on *Chapman*-type salvage

*Northern Milling Co* [1908] 1 I.R. 473 (Barton J.); *Parsons v Thompon* (High Court of New Zealand, unreported, 19 February 2003, Venning J.). The policies identified in J. Dawson "Lawyers and Involuntary Clients: Attorney Fees From Funds" 87 *Harv. L. Rev.* 1597 (1974) might, *mutatis*, also underpin the outcome in these cases.

<sup>178</sup> [1979] 1 Ch. 37 (Walton J.); [1982] 1 Ch. 61 (CA); see also *Foster v Spenser* [1996] 2 All E.R. 672 (Judge Paul Baker Q.C.) (treated as an example of reimbursement rather than restitution in Sheehan, n.108 above, 277).

<sup>179</sup> At first instance in *Norfolk's*, Walton J. saw "the cases in which the court acts to secure the services of a particular trustee. . . [as] closely analogous to 'salvage'" ([1979] 1 Ch. 37 at 59; *cp* [1982] 1 Ch. 61 (CA) 77 *per* Fox L.J.). This power was derived by analogy with the salvage aspect of the inherent jurisdiction, but see now Trustee Act 2000, Part V.

<sup>180</sup> Above, text with and in nn.43-48.

<sup>181</sup> [1989] Ch. 32 at 52.

<sup>182</sup> *ibid.*, 50; the work is outlined *ibid.*, 39-41.

<sup>183</sup> *ibid.*, 51.

<sup>184</sup> *ibid.*, 50; see also n.236 below.

<sup>185</sup> In the end, nor could it be: the standard salvage lien pattern requires three parties (recall, for example, the common chain of head-landlord, tenant, and sub-tenant, which forms the core of the discussion in part II, above) but *Berkeley Applegate* – like *Pike* – is a classic two-party case, where the claimants conferred the benefits directly upon the defendants without any trace of additional parties with superior interests.

cases – in particular, *Downshire* and *Norfolk's* – for their understanding of necessity. They provide a context to explain an otherwise curious case; in particular, they constitute the source for the necessity reasoning upon which the judge relied; and they afford a basis upon which to regard the case as an example of the unjust factor of necessity.

Plainly, therefore, the equitable salvage lien cases assist in establishing or bolstering necessity as an unjust factor in the modern law of restitution for unjust enrichment. Of course, necessity might underpin several legal claims other than unjust enrichment<sup>186</sup> and give rise to several remedies other than restitution.<sup>187</sup> Indeed, generalisations of necessity from this patchwork of various doctrines might well go all the way towards establishing necessity as a broad category of claim in its own right.<sup>188</sup> Be that as it may, the point here is the much more limited one that the salvage cases provide support for the modest development of necessity as an unjust factor the law of restitution for unjust enrichment rather than for any more radical project.

The support the salvage cases give to necessity as an unjust factor is not the only contribution they are capable of making; on the fraught issue of voluntariness,<sup>189</sup> – that is, on the question of whether the actions of any given claimant should properly be characterised as motivated by necessity or simply by self-interest<sup>190</sup> – the salvage lien cases reveal a deftness of touch largely absent in other necessity contexts.

For example, in considering the first of the four conditions necessary to establish a salvage lien (that is, whether compulsion, or necessity, or another unjust factor, or the like, has been made out on the facts), the courts have been astute to exclude liens in cases where the necessary degree of compulsion was not in fact made out because the claimant was motivated simply by self-interest<sup>191</sup> and was therefore held to have acted voluntarily. Moreover, the third and fourth conditions are directed to ensuring that the

<sup>186</sup> Kortmann, n.108 above, pp.111-164 considers various legal bases for granting a claim to the necessitous intervener: implied promise, agency of necessity, bailment, tort (*cp* E. O'Dell "Danger Invites Rescue. The Tort of Negligence and the Rescue Principle" (1992) 14 *D.U.L.J.* (ns) 65), see also the Good Samaritan Bill, 2005), equity (where, presumably, the salvage lien would find a home), and maritime salvage.

<sup>187</sup> Kortmann, n.108 above, pp.80-83, 179-183 distinguishes between five (reimbursement, compensation, remuneration, reward and restitution), whilst Birks and Mitchell, n.121 above, p.583 [15.160] distinguish between three (reward, restitution of enrichment, and reimbursement of expenses).

<sup>188</sup> This is the theme of Kortmann, n.108 above, *passim*.

<sup>189</sup> In this context "voluntary" and "officious" are both used, often interchangeably, in the cases and the literature. However, because "officious" carries pejorative judgmentalist overtones, it is left aside here, except where those overtones are intended.

<sup>190</sup> Hope, n.159 above; Wade, n.167 above; McCamus, n.120 above; J. Dawson "The Self-Serving Intermeddler" 87 *Harv. L. Rev.* 1409 (1974); D. Friedmann "Unjust Enrichment, Pursuance of Self-Interest, and the Limits of Free Riding" 36 *Loyola. LA. L. Rev.* 831 (2003).

<sup>191</sup> See above, nn.17-18. Indeed, un compelled maintenance and improvements (see above, text with and nn.33-38, 156) can similarly be described as motivated simply by self-interest and therefore voluntarily. Likewise, mere expediency is insufficient to found the *Chapman* jurisdiction (n.57 above).

claimant did not act voluntarily, or officiously. Thus, for example, the (third) requirement that the claimant have a subsidiary interest in the property or estate or interest saved, excludes from the lien both the ultimate owner and strangers to the estate: the actions of the ultimate owner in paying off his or her own debts are motivated simply by self-interest; whilst those of strangers are regarded by the law as entirely voluntary.<sup>192</sup> This is all reinforced by the additional requirement (in the fourth of four salvage conditions) that the claimant must have made the payment in the capacity of a party interested in the property rather than on the basis of some other capacity or in the performance of another primary duty or obligation.<sup>193</sup> Performance pursuant to some other capacity or obligation is a performance motivated simply by self-interest; as with the excluded claims of the ultimate owner, such claimants are motivated simply by the self-interest of discharging obligations for which they are already *primarily* liable. Hence, a claimant who discharges a primary liability (because the claimant is the full owner or is acting pursuant to another obligation) is – or will be regarded as – motivated simply by self-interest; whilst a paying stranger is – or will be regarded as – acting voluntarily; and, in neither case, will such a claimant get an equitable salvage lien.

In all of these ways, therefore, claims are excluded where claimants' actions are voluntary or motivated entirely by self-interest. This is as it should be. "Except in special cases (such as marine salvage) English law does not reward someone who voluntarily confers a benefit on another".<sup>194</sup> Hence, if a volunteer cannot maintain the underlying personal claim in an action for money had and received,<sup>195</sup> then neither should one be able to maintain the more potent proprietary claim to a lien. Indeed, many of the difficult leading cases relating to the underlying personal claim make more sense in the light of the insights to be gained from the salvage lien cases. For example, the burial cases<sup>196</sup> only arise because the person with the primary responsibility to bury the deceased has not done so, and someone else is – *secondarily* – compelled by the circumstances to act instead. On the other hand, in *Falcke v Scottish Imperial Insurance Company* the claim of the owner of the main interest in the policy quite properly failed because it was a payment in

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<sup>192</sup> Above, text with and in nn.69-76; see also text with and in nn.27, 110-112.

<sup>193</sup> Above, text with and in nn.76-84, 140-142.

<sup>194</sup> *Stovin v Wise (Norfolk C.C., 3rd party)* [1996] A.C. 923 (HL) 945 *per* Lord Hoffmann; see also nn.27 and 110 above.

<sup>195</sup> See, generally, Goff & Jones, n.163 above, p.51 [1.063], pp.64-68 [1.078]-[1.082]; *Mara v Ryan* (1838) 2 Jones 715; *Taylor v Laird* (1856) 25 L.J. Ex. 329, *Re Leslie*; *Leslie v French* (1883) 23 Ch.D. 552 (see above, nn.96-105, esp. n.104); *Leigh v Dickeson* (1884) 15 Q.B.D. 60 at 64-65 *per* Brett M.R.; *Falcke v Scottish Imperial Insurance Co Ltd* (1886) 34 Ch.D. 234 (see above, nn.106-114, esp. nn.110-111); *Macclesfield Corporation v Great Central Rly* [1911] 2 K.B. 528 (CA); *Hackett v Smith* [1917] 2 I.R. 508 (Lord Campbell C.J.); *In re Cleadon Trust* [1939] Ch. 286 (CA). The principle is sound, though such voluntariness might too readily have been found on the facts in some of these cases. On the exclusion of the personal claim on voluntariness grounds in the context of the head-landlord, tenant, and sub-tenant chain, see *Ahearne v McSwiney* (1874) I.R. 8 CL 568 at 574 *per* O'Brien J., 576 *per* Fitzgerald J.; *Ryan v Byrne* (1894) 17 I.L.T.R. 102 at 103 *per* Palles C.B.; *Grogan v Regan* [1902] 1 I.R. 196.

<sup>196</sup> See n.162 above.

discharge of a *primary* liability.<sup>197</sup> Similarly, in *Owen v Tate*,<sup>198</sup> the defendant had taken a loan from a bank, secured by way of a legal mortgage over the property of a friend who was then replaced as guarantor by the claimant. After the bank recovered from the claimant, he sought to recover in turn from the defendant. The case turned on the Court of Appeal's controversial characterisation of the claimant's actions in replacing the friend as guarantor as voluntary and not compelled; and the claimant's claim therefore failed. Whatever about the merits of this characterisation, it is nevertheless clear, in the light of the salvage cases, that a principled legal distinction between voluntariness and compulsion such as that drawn in *Owen v Tate* can successfully be maintained.<sup>199</sup>

Characterisation of claimants' conduct as voluntary serves in many contexts to ensure that not 'just anyone' can intervene in the affairs of another; but, beyond that, it is notoriously difficult to pin down this concept of voluntariness.<sup>200</sup> Conduct sufficient to preclude a personal claim in money had and received or a proprietary one to an equitable salvage lien is spread along an extended spectrum of intervention, from the straightforward officious intermeddling of strangers, through the pursuit of self-interest of those primarily liable, to genuinely altruistic volunteers. The salvage cases, simply by providing more examples in which these issues have been grappled with, help to clarify how and when this conduct defeats such claims.

Since the four conditions emerging from the cases as necessary to establish the equitable salvage lien equiperate so effortlessly with the three elements of the principle against unjust enrichment that establish causes of action in restitution,<sup>201</sup> the conclusion that the lien is entirely directed to reversing

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<sup>197</sup> (1886) 34 Ch.D. 234 (CA) 250-251 *per* Bowen L.J.; 253 *per* Fry L.J. (see above, text with and in nn.106-114, esp. nn.108-109); *cp Re Leslie; Leslie v French* (1883) 23 Ch.D. 552 at 563 *per* Fry J. (see above, text with and in nn.96-105, esp. n.104).

<sup>198</sup> *Owen v Tate* [1976] Q.B. 402; W. Cornish "Interveners and Unjust Enrichment" (1975) 38 *M.L.R.* 563; A.J. Oakley "The Position of the Officious Surety" [1975] *C.L.J.* 202; J. Beatson and P. Birks "Unrequested Payment of Another's Debt" (1976) 92 *L.Q.R.* 188 [reprinted in J. Beatson *The Use and Abuse of Unjust Enrichment*, p.177]; D. Friedmann "Payment of Another's Debt" (1983) 99 *L.Q.R.* 534; G. Muir "Unjust Sacrifice and the Officious Intervener" in P.D. Finn (ed) *Essays in Restitution*, p.297.

<sup>199</sup> As a consequence, relying on *Owen v Tate*, it was subsequently held that an unrequested payment by a surety where the principal debt is not in fact due is a voluntary payment, unless the surety was compelled or acted out of necessity: *The Zuhul K and the Selin* [1987] 1 Lloyd's Rep. 151 at 156 (Sheen J.); P. Watts "Guarantees Undertaken Without the Request of the Debtor" [1989] *L.M.C.L.Q.* 7. See generally Kortmann, n.108 above, pp.153-155, 169-173, esp. 154: "The fact is that the courts in both cases [*Owen* and *Zuhul*] *did* conclude that necessity could be a justification for recovery".

<sup>200</sup> E.g. Goff & Jones, n.163 above, p.130 [3.015] ("mercurial"); S. Hedley *Restitution: Its Division and Ordering*, p.123 ("the "weasel word"); see also *ibid.*, pp.127-132.

<sup>201</sup> Missing in this equiperation is the fourth question mandated by the principle against unjust enrichment (n.150, above), that is, whether there was any reason (by way of defences or policy) to withhold restitution. It would follow from a

unjust enrichment becomes overwhelmingly irresistible. As a consequence, and despite Victorian scepticism, the equitable salvage lien cases stand as excellent examples of cases where unjust factors such as necessity were successfully established, and they directly influenced the outcomes in *Pike* and *Berkeley Applegate* in which personal claims to restitution of the value of benefits transferred out of necessity succeeded. Moreover, the salvage cases demonstrate adroit handling of the vexing issue of voluntariness, illustrating that claims will properly fail for the straightforward officious intermeddling of strangers or the pursuit of self-interest of those primarily liable. All of these benefits flow readily from a restitutionary understanding of the equitable salvage lien. However, unjust enrichment is not the only category in the modern law with which the equitable salvage lien has potential connections; it has obvious affinities with the maritime salvage lien as well, and considering them is the work of the next section.

### Equitable Salvage and Maritime Salvage

On the one hand, the elements of the equitable salvage lien are not dissimilar to the elements of maritime salvage. “A salvage service may be briefly described as a necessary service voluntarily rendered which assists in saving a recognised subject of salvage from danger at sea”.<sup>202</sup> More particularly, the salvage service must have been rendered in respect of a danger on the high seas which was not brought about by the fault of the claimant; it must relate to a recognised subject of salvage, such as a ship or cargo, or one of the statutory extensions, including aircraft, and lives; it must have been carried out by someone from the recognised categories of salvors; it must have been rendered voluntarily rather than pursuant to a pre-existing obligation; and it must have achieved some success.<sup>203</sup> Hence, both the equitable salvage lien and the maritime salvage lien require that the claimant have been acting under something akin to necessity, that the claimant’s actions have achieved some benefit or success, that the claimant be properly connected with the property rescued, and that the claimant not be under a duty from some other source to effect that rescue. As a consequence, parallels have been drawn between the two species of lien.<sup>204</sup> Moreover, there are strong arguments that both species of lien are restitutionary in nature.<sup>205</sup> Hence, if there are

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restitutionary understanding of the equitable salvage lien that any defences to restitution claims should therefore, in principle, to equitable salvage claims.

<sup>202</sup> Goff & Jones, n.163 above, p.470 [18.001]. See, generally, Kennedy & Rose, n.129 above; and Kortmann, n.108 above, pp.158-163, 173-174.

<sup>203</sup> Goff & Jones, n.163 above, pp.471-478 [18.004]-[18.014]. See, generally, Kennedy & Rose, n.129 above, p.1 [1].

<sup>204</sup> See, e.g. W. Fisher (1<sup>st</sup> ed., n 9 above, 5) pp.408-409 [726]; cf J. Lightwood *Fisher* (7th ed., n.9 above, 5) p.253.

<sup>205</sup> For assessments of the extent to which the maritime salvage lien is properly restitutionary, see F. Rose “Restitution for Inland Salvage” (1986) 102 *L.Q.R.* 185; F. Rose “Restitution for the Rescuer” (1989) 9 *O.J.L.S.* 167; F. Rose “Restitution and Maritime Law” in E. Schrage (ed.) *Unjust Enrichment and the Law of Contract*, p.367. See also F. Rose “General Average as Restitution” (1997) 113 *L.Q.R.* 569 for the argument that general average, a sub-species of maritime salvage, is restitutionary (but cf Sheehan, n.108 above, 275). For an equitable salvage case where an analogy is drawn with general average, see *Allison v Jenkins* [1904] 1 I.R. 341 at 346 per Porter M.R.. For an assessment of

connections between the two species, then if one species is restitutionary, this would lend support to the argument that the other species ought also to be so regarded.

On the other hand, although the equitable and maritime salvage liens share some similar elements, nevertheless, there are also some important differences between the two species of lien. In particular, the recognised categories of salvors are far more limited for the equitable lien than for the maritime lien,<sup>206</sup> and the remedy available for the equitable lien is confined to the benefit conferred by the service whilst that for the maritime lien encompasses such benefit but goes far beyond it, to reward individual salvors and to encourage other salvages in the future.<sup>207</sup> Furthermore, although there are some affinities between maritime salvage and restitution, the general view is that because maritime salvage is “a mixed question of private right and public policy”,<sup>208</sup> reflected in the reward and encouragement aspects of the remedy, it is not entirely directed to the reversal of unjust enrichment;<sup>209</sup> rather “the salvage ‘reward’ serves to compensate, reimburse, remunerate, and reward the salvor”.<sup>210</sup> Moreover, there are several judicial denials that maritime salvage can apply on land,<sup>211</sup> which would – to say the least – tend against the assimilation of the equitable salvage lien with the maritime salvage lien. However, these are objections to allowing *strangers*, who would have the benefit of a maritime lien for rescues at sea, to have the benefit of a lien for rescues on land; but they do not impugn the much more limited equitable salvage lien where any intervention is not by strangers but by parties having an interest in the property preserved.

Overall, while there are plainly some affinities between the maritime and equitable liens, there are also some significant differences; the affinities

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the extent to which the equitable salvage lien is properly restitutionary, see above, text with and in nn.149-156 above.

<sup>206</sup> The equitable lien is available only to those with an interest in the property saved (see above, text with and in nn.62-77, 112) but not to strangers, whereas the maritime lien is available not only to those with such an interest but also to strangers who have in fact rendered the salvage services (see Goff & Jones, n.163 above, pp.472-473 [18.006]; Kennedy & Rose, n.129 above, chpt.6).

<sup>207</sup> Goff & Jones, n.163 above, pp.478-483 [18.015]-[18.022]; Kennedy & Rose, n.129 above, p.647 [1399], pp.672-674 [1453]-[1455].

<sup>208</sup> Goff & Jones, n.163 above, p.470 [18.001].

<sup>209</sup> Birks, n.108 above, pp.307-308; Virgo, n.38 above, pp.320-321; Hedley, n.167 above, pp.61-62; Birks and Mitchell, n.121 above, p.583 [15.160].

<sup>210</sup> Kortmann, n.108 above, p.162.

<sup>211</sup> *Nicholson v Chapman* (1793) 2 H. Bl. 254, 257; 126 E.R. 536, 538 *per* Lord Eyre C.J.; *Mason v Ship Blaireau* 6 U.S. (2 Cranch) 240 (US SC, 1840) 266 *per* Marshall C.J.; *Aitchison v Lohre* (1879) 4 App. Cas. 755 at 760 *per* Lord Blackburn; *Falcke v Scottish Imperial Insurance Company* (1886) 34 Ch.D. 234 (CA) 239 at 249 *per* Bowen L.J. (n. 113 above); *Sorrell v Paget* [1950] 1 K.B. 252 (CA) 260 *per* Bucknill L.J.: “salvage on land is not a recognised head of claim in the common law as it is by maritime law, sea”; 265 *per* Asquith L.J.: “‘salvage’ . . . strictly speaking, [is] not in law recoverable for services rendered on land, all; salvage by land is a legal chimera”; *The Tojo Maru* [1972] A.C. 242 (HL) 268 *per* Lord Reid; *The Goring* [1988] A.C. 831 (HL) 846, 857 *per* Lord Brandon (Lords Bridge, Fraser, Ackner and Oliver concurring): “salvage . . . unknown to the common law in respect of services voluntarily rendered to property in danger on land”.

should not be pushed too far, while the differences ought to be respected. On balance, then, while the two liens may be related, they are at best no more than long-lost cousins rather than siblings or even twins. In particular, the maritime salvage lien has little to contribute one way or the other to the discussion of whether the equitable salvage lien is or ought to be susceptible of a restitutionary explanation. Of course, the overwhelming preponderance of the argument on that discussion is that it would seem to be so susceptible. So also is the modern law of subrogation.<sup>212</sup> Like salvage, it operates on a three-party fact-pattern. Here, too, therefore, there are resemblances giving rise to potential family connections which will be considered in the next section.

### Equitable Salvage and Subrogation

That equitable salvage and subrogation are closely related emerges from a number of cases.<sup>213</sup> In *Lord Harborton v Bennett*,<sup>214</sup> Lord Hart L.C. held that a surety who pays a debt relating to land held by the principal debtor is entitled to be recouped out of the land,<sup>215</sup> which is a subrogation case which comes very close to salvage; *Carter v Carter*<sup>216</sup> is another example from the subrogation side of the line; and in *Patten v Bond*<sup>217</sup> Kay J. held that “the doctrine of subrogation applies: it is a clear salvage case”.<sup>218</sup> In *Hamilton v Denny*,<sup>219</sup> an example from the salvage side of the line, Lord Manners L.C. granted a salvage lien by analogy with subrogation principles. Indeed, as *Downer* demonstrates, the doctrines are often pleaded in parallel, though – since, in that case, the subrogation claim succeeded<sup>220</sup> but the salvage lien

<sup>212</sup> See, generally, C. Mitchell *The Law of Subrogation*.

<sup>213</sup> See, e.g. *In re Leslie, Leslie v French* (1883) 23 Ch.D. 552 at 560 per Fry L.J.; *Moore v Ulster Bank* (1909) 43 I.L.T.R. 136 at 138 per Meredith M.R.; *Foskett v McKeown* [2001] 1 A.C. 102 (HL) 118-119 per Lord Hope, 140 per Lord Millett; text with and in nn.95-104 *supra*. Cp R. Sutton, n.9 above, pp.79-86, 98-99.

<sup>214</sup> (1829) Beatty 386.

<sup>215</sup> But this principle will not apply where the creditor is a landlord and the principal debtor his tenant; in such circumstances, the remedy of a landlord when a tenant fails to pay the rent is to distrain or to forfeit the lease by re-entry; and the right of distress is neither a security within the meaning of s.5 of the 1856 Act nor a remedy which a surety paying the principal debtor’s debt is entitled to use: *B.S.E. Trading v Hands* (Court of Appeal, unreported, 23 May 1996).

<sup>216</sup> *Carter v Carter* (1829) 5 Bing. 406; 130 E.R. 1118; *In re Johnson* (1880) 15 Ch.D. 548; cp D. Wright “Proprietary Remedies and the Role of Insolvency” (2000) 23 *U.N.S.W.L.J.* 143 at 147 comparing “remedial subrogation and remedial equitable liens”.

<sup>217</sup> (1889) 60 L.T. 583.

<sup>218</sup> *ibid.*, 585; and this, despite a reference to *Falcke!* Cp A. Underhill and A. Cole *Fisher* (6th ed, n.9 above) pp.597-598 [1172].

<sup>219</sup> (1809) 1 Ball. & B. 199. *Ulster Railway v Banbridge, Lisburn and Belfast Railway* (1868) I.R. 2 Eq. 190 might be seen as a salvage claim very close to the *Wenlock* species of subrogation (see *Baroness Wenlock v The River Dee Company* (1884-1885) 10 A.C. 354; (1887) 19 Q.B.D. 155). In *Hewett v Court* (1983) 149 C.L.R. 639 (HCA) 645-646, Gibbs C.J. saw the purchaser’s lien as close to subrogation; see J. Phillips, n.127 above, 978-979. See also *In re Smith’s Settled Estates* [1901] 1 Ch. 689 at 691 per Buckley J. (n.21 above).

<sup>220</sup> [1974] 2 All E.R. 1074 at 1082-1084 per Pennycuick V.C.; *Kumar v Dunning* [1989] Q.B. 193 at 196 per Browne-Wilkinson V.C..

claim failed, both quite properly – it also suggests that they are separate doctrines. Whether this is right, or whether salvage can be assimilated by subrogation, can be assessed in two ways: first, by testing the lien against the various explanations of subrogation which have been advanced;<sup>221</sup> and, then, by comparing and contrasting how the lien and subrogation might actually work on any given set of facts.

As to the various explanations of subrogation, on the view taken by Meagher, Gummow & Lehane,<sup>222</sup> subrogation largely follows a similar pattern in a series of otherwise unconnected islands: they are content to set out the categories, which, for them, are not closed, and to conclude that there are no universally applicable criteria for the intervention of equity in such cases. On this view, salvage might simply form another such island. But even if it does, this atomistic view of subrogation would merely accept the existence of salvage as another head of subrogation without in any sense explaining it. Something more is required if subrogation is to guide the development of or provide an explanation for salvage.

On another view of subrogation, taken by Hedley,<sup>223</sup> and by Lord Salmon in *Orakpo v Manson Investments*,<sup>224</sup> there are some relatively loose connections between the specific contexts but only at an abstract level: Hedley argues for a broad general principle that (subject to defences) the claimant can exercise whatever rights the creditor would, but for the claimant's payment, have had against the debtor;<sup>225</sup> whilst Lord Salmon argued for an "entirely empirical . . . principle . . . that the doctrine will be applied only when the courts are satisfied that reason and justice demand that it should be".<sup>226</sup> But this too can be dismissed as an explanation of salvage; notwithstanding *dicta* referring loosely to concepts of natural justice,<sup>227</sup> nevertheless, because four precise conditions must be fulfilled to establish a salvage lien, it is not as open-textured as these views of subrogation suggest.

A third view of subrogation would seem to be open on the cases, that the claimant can be subrogated to the third-party's claims against the defendant because this was the presumed or actual intention of the parties.<sup>228</sup> Whatever

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<sup>221</sup> Of the various theories, none seems entirely satisfactory, and although one is in the ascendant at present, it doesn't really matter for the purposes of this analysis whether a universally accepted theory is just around the corner or not.

<sup>222</sup> R. Meagher, J. Heydon and M. Leeming *Meagher, Gummow and Lehane's Equity. Doctrines and Remedies* (4<sup>th</sup> ed., 2002) chpt. 9.

<sup>223</sup> S. Hedley, n.200 above, chpt. 5.

<sup>224</sup> [1978] A.C. 95 (HL).

<sup>225</sup> *ibid.*, 119-120, 124-125, 131, 148; *cp* S. Stoljar, n.38 above, 174.

<sup>226</sup> [1978] A.C. 95 at 110; *cf* Rotherham, n.102 above, pp.248-249; *In re TH Knitwear (Wholesale) Ltd* [1988] 1 Ch. 275 (CA) 286 *per* Slade L.J.; *Highland Finance v Sacred Heart College of Agriculture* [1998] 2 I.R. 180 (Ir SC) 192 *per* Blayney J.; C. Doyle "Reason and Justice in the Law of Subrogation" (1994) 12 *I.L.T. (ns)* 10; *cp* *Niru Battery Manufacturing v Milestone Trading (No. 2)* [2003] EWHC 1032 (Comm) (8 May 2003) [52]; [2003] 2 All ER (Comm) 365, 380 *per* Moore-Bick J. (*aff'd* on different grounds [2004] EWCA Civ. 487 (28 April 2004); [2004] 2 All ER (Comm) 289 (CA); below, n.232).

<sup>227</sup> Above, text with and in n.13.

<sup>228</sup> *E.g. Ghana Commercial Bank v Chandiram* [1960] A.C. 732 (PC) 745 *per* Lord Jenkins. See also *Patten v Bond* (1889) 60 L.T. 583 (Kay J); *Chetwynd v Allen*

the merits of this view of subrogation,<sup>229</sup> there is no trace whatsoever in the cases of salvage being explained in intention terms, and it is not easy to see how any such explanation might work.

However, a fourth view of subrogation has recently emerged: for Mitchell<sup>230</sup> and the House of Lords in *Banque Financière de la Cité v Parc (Battersea) Ltd*,<sup>231</sup> there are tight connections and similarities where the specific contexts are united and explained by the principle against unjust enrichment. Given that salvage may also be susceptible of an unjust enrichment explanation, it may therefore be possible to bring the salvage cases under subrogation's wing.

On the other hand, the unjust enrichment explanation of salvage arises independently of any analogy with subrogation<sup>232</sup> and works in its own terms; moreover, it is exceedingly difficult to see quite how subrogation can accommodate salvage. In subrogation, where one party, the claimant, subrogates to the position of a second *vis-à-vis* a third, the second party simply drops out of the picture and the claimant exercises the second party's rights against the third. Though there are three parties at the start of the story, there are only two at the end. Conversely, in salvage, where one party makes a payment to a second party for the benefit of the third, all three parties continue: for example, in the common chain of head-landlord, tenant, and sub-tenant, if the sub-tenant pays the tenant's outstanding rent to the head-landlord, there is no sense in which the sub-tenant takes over the landlord's rights against the tenant, the landlord necessarily continues in the picture, and the tenant – far from subrogating to the landlord's position<sup>233</sup> – instead gets an entirely separate right, the lien over the tenant's estate which the payment has salvaged. There are three parties at the start of the story, and – unlike subrogation – there are still three at the end. Furthermore, the rights available to the tenant would be different under both doctrines. The salvage lien allows the tenant to have an interest over the head-lease, and ultimately to have it sold to realize the debt for which the lien is the security.

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[1899] 1 Ch. 353 (Romer J); *Butler v Rice* [1910] 2 Ch. 277 (Warrington J); *Wylie v Carlyton* [1922] 1 Ch. 51 (Eve J); *Evandale Estates Pty v Keck* [1963] V.R. 647 (Hudson J); *Paul v Speirway* [1976] Ch. 220 (Oliver J); *Boodle Hatfield v British Films Ltd* [1986] F.L.R. 134 (Nicholls J.); *Highland Finance v Sacred Heart College of Agriculture* [1998] 2 I.R. 180 (Ir SC).

<sup>229</sup> It has been the subject of serious criticism: Mitchell, n.212 above, pp.12-14; *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 A.C. 221 (HL) 234 *per* Lord Hoffmann.

<sup>230</sup> See n.212 above.

<sup>231</sup> [1999] 1 A.C. 221 (HL).

<sup>232</sup> So that if the unjust enrichment view of subrogation were to fall (see the limitation of *Parc* in *Halifax Plc v Omar* [2002] EWCA Civ. 121 (20 February 2002) and *Eagle Star Insurance Co Limited v Karasiewicz* [2002] EWCA Civ. 940 (25 April 2002) rejected in *Cheltenham and Gloucester plc v Appleyard* [2004] EWCA Civ. 291 (15 March 2004) and *Filby v Mortgage Express (No 2)* [2004] EWCA Civ. 759 (18 June 2004)); see also *Niru Battery Manufacturing v Milestone Trading (No. 2)* [2004] EWCA Civ. 487 (28 April 2004) [27]-[28], [41], [53-56]; [2004] 2 All ER (Comm) 289 (CA) 298, 301, 304 *per* Clarke L.J.) the unjust enrichment view of salvage would not have to fall with it, or *vice versa*.

<sup>233</sup> Though of course this might happen *as well*.

On the other hand, subrogation of the tenant to the head-landlord's position would not achieve the same end: in the ordinary course of events, the head-landlord possesses nothing to which the sub-tenant might seek to subrogate; all that the head-landlord possesses to which the sub-tenant might seek to subrogate is the right to forfeit the lease, the very thing the sub-tenant wants to avoid!

In sum, therefore, any analogy with subrogation should not be pushed too far; in particular, although both operate in three-party configurations, and each is capable of an explanation in terms of the reversal of unjust enrichment, nevertheless it would seem that salvage cannot be rationalised as a species of subrogation. Salvage makes sense in its own terms, regardless of what might be said about subrogation. There is, however, one characteristic which subrogation and salvage share in common, and which in the modern law always needs separate explication. It is the proprietary nature of the claim, and it is to this that the analysis in the next section is directed.

### **The Proprietary Consequences of the Equitable Salvage Lien**

Recall the common chain – of head-landlord, tenant, and sub-tenant – with which this article began. If the sub-tenant discharged the tenant's liability to the head-landlord, the sub-tenant would then have various common law and statutory claims against the tenant,<sup>234</sup> but these are personal claims and are therefore vulnerable to the tenant's insolvency.<sup>235</sup> On the same facts, therefore, the equitable salvage lien, as a proprietary claim against the tenant's estate rather than as a personal claim against the tenant, is a very attractive proposition.<sup>236</sup> Because of this very great difference between the underlying common law claims and the lien,<sup>237</sup> such proprietary consequences – here as elsewhere<sup>238</sup> – call for justification.

As with common law possessory liens, the maritime salvage lien and other species of equitable lien, there is a certain logic and practical efficiency in locating the equitable salvage lien in the property preserved by the salvage payment. Moreover, in the early cases it is unsurprising the find property lawyers seeking the remedy in the property preserved. For example, recall that in *O'Geran v McSwiney*, O'Sullivan M.R. asked rhetorically: “[w]hat is

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<sup>234</sup> See text with and in nn.1-8 above.

<sup>235</sup> For example, the (unsuccessful) salvage and (successful) subrogation claims in *In re Downer Enterprises Ltd* [1974] 2 All E.R. 1074 (text with and in nn.140-142, 220 above) were motivated by insolvency. On the vulnerability of personal claims to an insolvency, see generally *Shanahan's Stamp Auctions v Farrelly* [1962] I.R. 386 (Ir HC) 444-445, 448 *per* Budd J.

<sup>236</sup> See above, text with and after n.9 above. *Quaere* whether in *In re Berkeley Applegate* (above, text with and in nn.177-185), the priority afforded the liquidator was the equivalent of proprietary? If so, then it too would require similar justification.

<sup>237</sup> See above, text with and in nn.119-126, 165, 168, where the personal common law claims were available, but the claimed proprietary liens were not.

<sup>238</sup> See generally, S. Worthington *Proprietary Interests in Commercial Transactions*; R. Grantham “Doctrinal Bases for the Recognition of Proprietary Rights” (1996) 16 *O.J.L.S.* 561; Rotherham, n.102 above; E. O'Dell “Fermat's Last Theorem and the Context of Proprietary Remedies” (2005) 19 *T.L.I.* 97. Similarly, on justifying proprietary subrogation; see Mitchell, n.212 above, chpt. 3.

more reasonable than that this interest, so set up by the payment of the sub-tenant's money, should be made to answer for the money which has saved it? It appears to me that there are many heads of equity which do not rest on grounds so high".<sup>239</sup> Again, in *Tharp*, Lord St Leonards L.C. held that the salvage payer "has a prior incumbrance to every other charge and interest, because, so far as any interest is left to anyone beyond the charge, it is acquired by that payment in the shape of redemption money".<sup>240</sup>

Moreover, if the salvage lien is accepted as responding to unjust enrichment, then all of this is reinforced by refracting the last three conditions necessary to generate a salvage lien through a restitutionary prism. Since they seem to be particularly burdensome fulfilments of the restitutionary requirement that the enrichment be at the expense of the claimant, they might even be presented as a sufficient justification to regard the remedy not only as restitutionary but also proprietary, not least because the salvage lien fulfils the leading modern tests for the imposition of a proprietary remedy. First, the authorities are dotted with comments as to the equity or justice of the case which could easily ground an unconscionability argument.<sup>241</sup> Second, the payer plainly does not take the risk of the insolvency of the party benefited – in the sub-tenant cases, for example, it is precisely because the sub-tenant does not take the risk of the tenant's insolvency that the sub-tenant pays the head-landlord.<sup>242</sup> Third, if non-assumption of risk needs to be combined with another element such as the swelling of the defendant's assets, this will by definition be satisfied where the salvage payment has saved the defendant's interest.<sup>243</sup> Fourth, if proprietary liability is somehow tied into the defendant's awareness of the claimant's claim, the defendant whose interest has been saved by the claimant's payment will by definition be aware of the persistence of the interest thereby saved, and will thus by definition be aware "of the factors which are alleged to affect his conscience".<sup>244</sup>

In sum, then, though proprietary status is never easy to justify, there would nevertheless seem to be sound arguments in favour of the proprietary nature of the equitable salvage lien.

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<sup>239</sup> (1874-1875) 8 Ir. Rep. Eq. 501, 504; *aff'd* (1874-1875) 8 Ir. Rep. Eq. 624.

<sup>240</sup> (1852) 2 Sm. & G. 578, 578-579; 65 E.R. 533, 533; *cp Hill v Browne* (1844) 6 Ir. Eq. Rep. 403 at 406 *per* Sugden L.C. (above, text with and in nn.87-88, 92).

<sup>241</sup> On this role for unconscionability, see Goff & Jones, n.163 above, pp.87-89 [2.010]-[2.014].

<sup>242</sup> On risk, see, *e.g. Space Investments v Canadian Imperial Bank of Commerce Trust Co* [1986] 1 W.L.R. 1072 (PC) 1074 *per* Lord Templeman; *cf In re Goldcorp Exchange* [1995] 1 A.C. 74 (PC) 104-105, 109 *per* Lord Mustill. See, generally, A. Burrows "Proprietary Restitution: Unmasking Unjust Enrichment" (2001) 117 *L.Q.R.* 412.

<sup>243</sup> On risk combined with the swelling of the defendant's assets, see, *e.g. C. Rotherham*, n.102 above, pp.84-85.

<sup>244</sup> On awareness, see *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] A.C. 669 (HL) 705 at 709 *per* Lord Browne-Wilkinson. On the role of awareness in the salvage lien *cp e.g. In re Power's Policies* [1899] 1 I.R. 6 at 18-19 *per* Lord Ashbourne L.C..

### **The Irish Doctrine of Equitable Salvage: An Equitable Proprietary Restitutionary Lien**

The equitable salvage lien, far from being an obscure Irish curiosity, has the capacity to shed important light on several important modern debates in the law relating to restitution for unjust enrichment.<sup>245</sup> Since the four conditions necessary to establish the salvage lien align so easily with the principle against unjust enrichment, it follows that the lien ought to be understood as restitutionary. The salvage cases therefore stand as excellent examples of the unjust factor of necessity in themselves and support that understanding of analogous cases; they help to clarify the vexed question of when such restitutionary claims will be met with a voluntariness bar; and they fulfil modern tests for proprietary liability. Many equitable proprietary doctrines often have a restitutionary pattern or component, and yet prove on closer analysis not be exclusively restitutionary;<sup>246</sup> however, the equitable salvage lien does not seem to be of this nature: if the analysis in this article is correct, then that lien is entirely directed to reversing unjust enrichment. On the other hand, despite affinities, the equitable salvage lien does not have sufficient connections with maritime salvage and subrogation to be assimilated with either. In conclusion, therefore, the Irish doctrine of equitable salvage provides an important modern example of an equitable proprietary restitutionary lien.

#### **IV. Conclusion: Lost and Found – Equitable Salvage Liens and Unjust Enrichment**

The principle of equitable salvage can give a person with an interest in property, who makes a payment which preserves a superior interest or the property itself which would otherwise have been lost or destroyed, a lien over the property or interest thereby preserved, provided that four conditions are satisfied. (i) The claimant must have been acting under compulsion or necessity or something akin to it, such as another cause of action in restitution. (ii) The claimant's actions must have had the effect of saving, for the benefit of everyone interested, property, or an interest or estate in property, which would otherwise have been lost. (iii) The claimant must have had a subsidiary rather than the main interest in the property or estate or interest thereby saved, or something akin to such an interest, such as a sufficient relationship with the owner of the main interest in the property or with the property itself. (iv) The claimant must have made the payment in that capacity, and not on the basis of some other capacity or in the

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<sup>245</sup> As well as supporting the analogical *Chapman* extension into the inherent jurisdiction.

<sup>246</sup> The leading example is the constructive trust. The traditional atomistic view (see now M. Cope *Constructive Trusts*; A.J. Oakley *Constructive Trusts* (3rd ed., 1997)) had been challenged by the argument that the constructive trust is exclusively restitutionary (see D.M.W. Waters *The Constructive Trust*) but further analysis suggests that whilst restitution may be one reason why constructive trusts arise, there are also others (see G. Elias *Explaining Constructive Trusts*. But subrogation (see Mitchell, n.212 above) and resulting trusts (see R. Chambers *Resulting Trusts*) have recently both moved from atomistic to exclusively restitutionary explanations; *quaere* whether explanations admitting of other bases as well can be far away?

performance of another duty or obligation on which he or she is primarily liable.

This seems to have been a well-accepted doctrine in chancery courts in both Ireland and England until perhaps the middle of the nineteenth century. Thereafter, the equitable salvage lien for compulsion or necessitous intervention largely fell into desuetude in English – though not in Irish – law. In retrospect, the break-point in English law can be seen rather starkly in the career of Sir Edward Sugden. He was the leading chancery barrister of his day,<sup>247</sup> and, as Lord Chancellor of Ireland, he decided three equitable salvage cases in the 1840s.<sup>248</sup> Yet, in 1852, as Lord St Leonards L.C., after he had been translated to the Woolsack in Westminster, he decided what seems to have been the last English case on this doctrine<sup>249</sup> before it was dismissed as an aberrant Irish doctrine and all but swept away<sup>250</sup> as part of the late nineteenth century's general retrenchment against expansive applications of equitable liens. It was disparaged in leading textbooks or dropped from them completely.<sup>251</sup> All the same, the hostile *dicta* are manifestly overstated; the lien has flourished in the Irish courts; and authoritative traces have quietly persisted even in England – for example, the House of Lords treated of it without demur in 1918;<sup>252</sup> it continued to be applied in settled land cases;<sup>253</sup> and the *Chapman* jurisdiction endured.<sup>254</sup> These clusters of authority may yet enable – perhaps even herald – the revitalization of the equitable salvage lien as part of the recent, current and ongoing revival of liens generally.<sup>255</sup>

This development would both buttress and draw great reinforcement from an analysis of the lien in restitutionary terms, an analysis which is virtually compelled by the ready equivalence of the lien's four conditions and the principle against unjust enrichment, where the salvage cases have much to contribute to the modern law's understanding both of necessity as an unjust factor and of voluntariness as a bar to such a claim. This assimilation into the modern law of an equitable proprietary restitutionary salvage lien would commendably rescue from unwarranted obsolescence an ancient (but not archaic) doctrine of great substance and utility. A prince, once lost, may yet be found again!

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<sup>247</sup> See J. Getzler, n.94 above.

<sup>248</sup> See n.92 above.

<sup>249</sup> See n.93 above.

<sup>250</sup> See nn.96-118 above.

<sup>251</sup> See nn.95, 115 above.

<sup>252</sup> See nn.134-137 above; admittedly, this was in an appeal from Ireland, though if their Lordships had concerns with the doctrine, one would have expected that they might have voiced them.

<sup>253</sup> See nn.23-57, 64, 133 above.

<sup>254</sup> See nn.41-57, 139 above.

<sup>255</sup> See nn.127-128, 143-146 above.

## THE ROLE OF JUDGES IN THE DEVELOPMENT OF CONSTITUTIONS

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### Introduction

The debate about the role of judges in the British constitution has been prolific and fierce in recent years. It has, though, tended to focus too much on history and not enough on possible futures. It has concentrated on the 'is' and not on the 'ought'. And, like many debates, it has degenerated into one where there are basically two opposing camps, neither of which is prepared to give much ground to the other. There are a few outliers, but these too tend to squabble over their exact position *vis-à-vis* the other protagonists rather than rising above the fray and adopting a more positive frame of mind. What is needed is a more holistic approach, one which recognises that there are advantages in both main positions, as well as in their variants, but which prefers to focus not on whether judges are more important than law-making politicians in maintaining constitutionalism but on what steps each of those élites should take to copper-fasten the constitution against the vicissitudes of 21<sup>st</sup> century living. Judges in most other countries do play a crucial role in developing their national constitutions. Judges in the UK have, on the whole, underperformed in that area, at least in the last few decades. Now is the time for them to raise their game.

The article begins by summarising the current debate. It then proceeds to review some of the contributions made by judges to constitutions elsewhere than in the United Kingdom. In its final section it makes and tries to justify ten suggestions as to how Britain's top judges should reform the British constitution. Throughout, the article takes a broad approach to the term 'constitution'. In particular it embraces within that term the rules and principles governing judicial freedom of action.

### The Current Debate

In March 2004 Adam Tomkins delivered his inaugural lecture as the Professor of Public Law at the University of Glasgow, a lecture which he later expanded into book form.<sup>1</sup> In this book he launched a passionate attack

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\* This is a version of my inaugural lecture, which was delivered under the same title at Queen's University Belfast on 27 April 2006. Although the overall thrust and main recommendations of the lecture have been maintained, there has been some slight restructuring and alteration of details. I am very grateful for comments made on a draft of the article by Dr Gordon Anthony. Remaining errors are, though, mine alone. I also wish to acknowledge more general indebtedness to Professor Desmond Greer, who was a wise and steady counsellor during my earlier employment at Queen's University from 1979 to 1991. I fear this article will not meet Des's high standards of scholarly rigour, which are legendary, but it is nonetheless dedicated to him with admiration and affection.

<sup>1</sup> Adam Tomkins, *Our Republican Constitution*. For reviews see T. R. S. Allan [2006] P.L. 172; Ian Loveland (2006) 122 L.Q.R. 340; Danny Nicol (2006) 69 M.L.R. 280.

against those who advocate the theory known as ‘common law constitutionalism’ – the idea that at the core of the British constitutional order lies the common law made by judges. Tomkins opposes the views of commentators such as Jeffrey Jowell and Dawn Oliver at University College London and Paul Craig at Oxford. He had the temerity to undermine that guru of the common law, Ronald Dworkin.<sup>2</sup> And he had a go, too, at Sir John Laws, the Court of Appeal judge who has extolled the virtues of the common law in extra-judicial writings<sup>3</sup> as well as in his own judgments.<sup>4</sup> Particular opprobrium, however, was reserved for Trevor Allan at Cambridge.<sup>5</sup> Tomkins described Allan as a ‘hardliner’ and labelled the breadth of his support for constitutional justice as ‘staggering’. To Allan, said Tomkins, ‘it seems that there is no constitutional problem that is incapable of being solved by the courts and [that] no constitutional problem is solved until it is solved by the courts’. Tomkins thought this was ‘legal constitutionalism at its most extreme’.<sup>6</sup>

Instead of relying upon the courts as the guardians of the constitution, Tomkins promotes the notion of ‘political accountability’. Prior to acquiring his chair he had written articles defending what he called ‘the political constitution’,<sup>7</sup> a throwback to the phrase used by John Griffith in the 1970s.<sup>8</sup> In such works Tomkins has to some extent been following the lead given by Martin Loughlin at the London School of Economics and Political Science, in three books published since 1992.<sup>9</sup> The reliance placed by Tomkins and Loughlin on the essentially political nature of the constitution is not so very far removed from the views of those who, like Christopher Forsyth and Mark

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<sup>2</sup> For Dworkin’s latest defence of his position, see *Justice in Robes*.

<sup>3</sup> ‘The Limitation of Human Rights’ [1998] P.L. 62; ‘The Constitution: Morals and Rights’ [1996] P.L. 622; ‘Law and Democracy’ [1995] P.L. 80; ‘Judicial Remedies and the Constitution’ (1994) 57 M.L.R. 213; ‘Is the High Court the Guardian of Fundamental Rights’ [1993] P.L. 59. For John Griffith’s views on these writings, see ‘The Brave New World of Sir John Laws’ (2000) 63 M.L.R. 159.

<sup>4</sup> E.g. *Thoburn v Sunderland City Council* [2002] 3 WLR 247, criticised by Geoffrey Marshall in ‘Metric Martyrs and Martyrdom by Henry VIII Clause’ (2002) 118 L.Q.R. 493 but praised by Mark Elliott in ‘Embracing “Constitutional” Legislation: Towards Fundamental Law?’ (2003) 54 N.I.L.Q. 25. Other prominent judicial advocates of common law constitutionalism include Sedley L.J. (see n.8 below), Lord Woolf (n.11 below), Lord Steyn (nn.78, 127 and 129 below) and Lord Cooke (see n.78 below).

<sup>5</sup> See, e.g. T. R. S. Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism and Constitutional Justice: A Liberal Theory of the Rule of Law*.

<sup>6</sup> *Our Republican Constitution*, n.1 above, p.20.

<sup>7</sup> ‘In Defence of the Political Constitution’ (2002) 22 O.J.L.S. 157.

<sup>8</sup> ‘The Political Constitution’ (1979) 42 M.L.R. 1. Tomkins discusses this article in *Our Republican Constitution*, n.1 above, at pp.36-38. See too John Griffith, *The Politics of the Judiciary*, first published in 1977 but now in its 5<sup>th</sup> edition (1997); ‘The Common Law and the Political Constitution’ (2001) 117 L.Q.R. 42; ‘Judicial Decision-Making in Public Law’ [1985] P.L. 564. Also Sir Stephen Sedley, ‘The Sound of Silence: Constitutional Law without a Constitution’ (1994) 110 L.Q.R. 270 and ‘The Common Law and the Political Constitution: A Reply’ (2001) 117 L.Q.R. 68.

<sup>9</sup> *Public Law and Political Theory; Sword and Scales: An Examination of the Relationship between Law and Politics; The Idea of Public Law*.

Elliott at Cambridge,<sup>10</sup> still maintain the rather Diceyan line that all judicial development of the law must ultimately be traced back to the supposed intention of Parliament. Tomkins' approach has to some extent been bolstered by the likes of Thomas Poole, who claims that common law constitutionalism fails to adequately explain the main features of the way judicial review actually operates in Britain.<sup>11</sup> Poole sees judges as aristocrats and moral imperialists.<sup>12</sup> Another lawyer at Glasgow, Gavin Anderson, makes three further criticisms of common law constitutionalism (or, rather, of what he calls 'rights constitutionalism'): he believes that it fails to control private, as opposed to public, power; it ignores the significance of the practices and actors of the global economy; and it considerably overstates the capacity of judges to be coherently instrumental.<sup>13</sup> In Anderson's words, 'judges, like other law-creating subjects, construct distinctive personal accounts of the legal world, whose mutual interaction necessarily leads to inconsistency and contradiction'.<sup>14</sup>

Not surprisingly, well-known attempts have been made to pigeon-hole those who write in this area by giving them fancy labels. Martin Loughlin describes people who place great emphasis on the work of the courts as 'conservative normativists'; those who prefer to place their trust in Parliament and in politics, Loughlin calls 'functionalists'.<sup>15</sup> He reserves a third label for people who believe that courts should not have the final say over everything but should at least articulate principles which can guide the executive in the exercise of its discretions. This category should, I think, embrace people like Sir William Wade (that much-lamented icon of British constitutional law who died in 2005<sup>16</sup>), Robert Stevens (still writing about British judges 50 years after his first article was published<sup>17</sup>) and Sir Neil MacCormick, the eminent legal philosopher at Edinburgh whose latest book, *Rhetoric and the Rule of Law*, provides many insights into the nature of

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<sup>10</sup> See, e.g. 'Of Fig Leaves and Fairy Tales: The *Ultra Vires* Doctrine, the Sovereignty of Parliament and Judicial Review' (1996) 55 C.L.J. 122.

<sup>11</sup> 'Questioning Common Law Constitutionalism' (2005) 25 L.S. 142. See too his 'Back to the Future? Unearthing the Theory of Common Law Constitutionalism' (2003) 23 O.J.L.S. 435; and 'Harnessing the Power of the Past? Lord Hoffmann and the Belmarsh Detainees Case' (2005) 32 J.L.S. 534. See also Lord Woolf, 'Judicial Review – The Tensions Between the Executive and the Judiciary' (1998) 114 L.Q.R. 579 and 'European Court of Human Rights on the Occasion of the Opening of the Judicial Year' [2003] E.H.R.L.R. 257. Danny Nicol (n.1 above, at p.284) praises Tomkins for 'swimming against the tide of judicialisation'.

<sup>12</sup> Thomas Poole, 'Dogmatic Liberalism? T R S Allan and the Common Law Constitution' (2002) 65 M.L.R. 463 at 474-5.

<sup>13</sup> *Constitutional Rights after Globalization*. Anderson uses the term 'rights constitutionalism' rather than 'common law constitutionalism', but there appears to be little difference between them. At p.4 he certainly favours 'legal pluralism' as the explanatory paradigm for constitutionalism: '[L]egal pluralism reveals the political character of our prevailing definitions of constitutionalism and demonstrates how state-centred accounts prevent us from asking questions of accountability with regard to *all* forms of political power'.

<sup>14</sup> *ibid.*, p.146. Anderson's prefers to rely on a theory which he calls 'legal pluralism'.

<sup>15</sup> Martin Loughlin, *Public Law and Political Theory*, chs. 7 and 8.

<sup>16</sup> See, especially, *Constitutional Fundamentals*.

<sup>17</sup> See, especially, *The English Judges: Their Role in the Changing Constitution*.

judicial reasoning. These people, in Loughlin's terms, are 'liberal normativists'. If, like me, you have an in-built aversion to such grandiose labels you might prefer the much more prosaic categories suggested by Carol Harlow and Richard Rawlings, who simply talk of red-light and green-light approaches.<sup>18</sup>

My own approach lies somewhere between red and amber. In Loughlin's terms I'd be a 'liberal-conservative normativist'. This means that, in my view, judges can and should play a very significant role in shaping constitutions. They should actively seek to control both the government and Parliament, preventing those institutions from damaging the rule of law and the separation of powers. There should be very few issues which are non-justiciable. At the same time, the power of judges should not be unbridled. The judiciary should be just one site in which sovereignty is located. Power must also reside in other sites,<sup>19</sup> and values other than legal ones must be promoted. But judges bring relative detachment, valuable experience and absolute integrity to their work. We should, therefore, give them a fairly free rein.<sup>20</sup> We should not, I think, adopt the approach of Horace Walpole, who in 1770 wrote in a letter: 'Everybody talks of the constitution, but all sides forget that the constitution actually works extremely well, if they would let it alone'.<sup>21</sup> Letting it alone should not be considered an option today.<sup>22</sup>

In any event, the critics of common law constitutionalism tend to ignore some important 'modern' features of the British legal system. For a start, they do not generally respect the influence of European institutions. Anyone wishing to remind themselves of that influence should consult the writings of Nicholas Bamforth.<sup>23</sup> He brings a dose of realism to the debate by observing that no theory about today's UK constitution can be valid unless it explains why a British court will 'disapply' an Act of Parliament if it is inconsistent with EC law or why, as a result of the Human Rights Act, courts are free to disagree with Parliament – not just with government – that a piece of primary legislation is compatible with the European Convention on Human Rights. Bamforth endorses what Gordon Anthony usefully describes as the 'spill-over' effect – the idea that courts in the UK are influenced by European considerations even though the specific matter at issue is not regulated by EC

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<sup>18</sup> *Law and Administration* (2<sup>nd</sup> ed., 1997), chs.2 and 3.

<sup>19</sup> Anthony Sampson believes it partly lies in Radio Four's *Today* programme: see *Who Runs This Place? The Anatomy of Britain in the 21<sup>st</sup> Century*, pp.222-227. Sedley LJ has argued for 'bi-polar sovereignty': see 'Human Rights: A Twenty-first Century Agenda' [1995] P.L. 386, 389.

<sup>20</sup> I have a lot of empathy with the views expressed by Daniek Farber and Suzanna Sherry in *Desperately Seeking Certainty: The Misguided Quest for Constitutional Foundations*.

<sup>21</sup> Letter to Sir Horace Mann, 18-19 January 1770.

<sup>22</sup> Cf. Lord Bingham in 'The Courts and the Constitution' (1996-97) 7 *King's College Law Journal* 12, reprinted in *The Business of Judging: Selected Essays and Speeches*; pp.225-238, who said (at p.237 of the latter): 'Constitutional arrangements, like motor cars, require periodic inspection and overhaul, so that worn-out parts may be renewed and ill-fitting parts adjusted. The fact that a constitution such as ours has been on the road for a very long time makes this attention more necessary, not less'.

<sup>23</sup> Especially 'Courts in a Multi-Layered Constitution', in Nicholas Bamforth and Peter Leyland (eds.), *Public Law in a Multi-Layered Constitution*, ch.11.

law or the Convention.<sup>24</sup> The main message coming from Bamforth's and Anthony's analyses, with which I agree, is that reports of the death of common law constitutionalism are greatly exaggerated.

And if such reports were exaggerated three or four years ago, they are even more so today because in the last few years there has been a renaissance of interest in the rule of law on the part of our top judges, the Law Lords. Those judges are, of course, about to metamorphose into Justices of the UK's Supreme Court,<sup>25</sup> although not, it seems, before October 2009.<sup>26</sup> When that occurs, their role as guardians of our constitution will surely become even more obvious.<sup>27</sup> As it is, Law Lords are already standing their ground against New Labour's increasing authoritarianism.<sup>28</sup> Their two recent decisions on the position of foreign detainees at Belmarsh prison are, it is to be hoped, not just straws in the wind but emblems of a whole new spirit of judicial activism.<sup>29</sup> At the end of 2004 eight Law Lords ruled that internment without trial under the Anti-terrorism, Crime and Security Act 2001 was contrary to the European Convention's guarantee of the right not to be deprived of liberty on a discriminatory or disproportionate basis.<sup>30</sup> They measured the Act against Article 15 of the Convention, which is not one of the articles incorporated by the Human Rights Act, so this is a further example of Anthony's 'spill-over' effect. A year later a unanimous bench of seven Law Lords ruled that no British court can rely upon evidence that may have been obtained anywhere in the world through the use of torture.<sup>31</sup>

A close reading of the judgments in both those cases could surely leave none in any doubt that the highest court in the land plays an absolutely crucial

<sup>24</sup> Gordon Anthony, *UK Public Law and European Law: The Dynamics of Legal Integration*.

<sup>25</sup> Constitutional Reform Act 2005, ss.23-60.

<sup>26</sup> Statement by the Lord Chancellor, Lord Falconer, on 1 March 2006: [www.dca.gov.uk/pubs/statements/2006/st060301b.htm](http://www.dca.gov.uk/pubs/statements/2006/st060301b.htm).

<sup>27</sup> The Constitutional Reform Act 2005, which creates the Supreme Court, states in s.1(a) that the Act 'does not adversely affect the existing constitutional principle of the rule of law'.

<sup>28</sup> For a recent journalistic blast at New Labour see Henry Porter, 'Only a constitution can save us from this abuse of power', *The Observer*, 2 April 2006.

<sup>29</sup> Cf. *Secretary of State for the Home Department v MB* (12 April 2006), where Sullivan J held that s.3(10) of the Prevention of Terrorism Act 2005 did not give the respondent the fair hearing he was entitled to under the Human Rights Act 1998 because (in the judge's view) it confined the court to looking only at the one-sided material available to the Secretary of State at the time the order was made. The judge said that the thin veneer of legality which was sought to be applied by s.3 of the 2005 Act could not disguise the reality that the Convention rights of people subjected to control orders were being determined not by an independent court but by executive decision-making untrammelled by any prospect of effective judicial supervision. As it was not possible for the court to conclude that the Secretary of State's decisions were legally flawed upon the basis of the one-sided information then available to him, the control order had to continue in force but s.3(10) was declared to be incompatible with Convention rights.

<sup>30</sup> *A v Secretary of State for the Home Department* [2005] 2 A.C. 68. Lord Walker dissented. Lord Bingham's judgment in this case was to some extent presaged by his Romanes lecture delivered on 15 October 2002 and published as 'Personal Freedom and the Dilemma of Democracies' (2003) 52 I.C.L.Q. 841.

<sup>31</sup> *A v Secretary of State for the Home Department (No.2)* [2006] 1 All E.R. 575.

role not just in protecting human rights but in curbing the excesses of Parliament and the executive. Yet in his comments on the first of these decisions, Adam Tomkins damns with faint praise.<sup>32</sup> He claims that the Law Lords were ‘merely following a path already broken by others’ and that ‘the change of tone . . . should not mislead us into thinking that it heralds a change of approach’. His justification for this view is that after the judgments were issued the Belmarsh detainees were still in prison and the rest of the Anti-terrorism Act was still on the statute book. He seems to be saying that unless judges can completely usurp the functions of elected politicians they are entirely useless. To adapt his own phrase, this is surely republicanism at its most extreme.

To appreciate better the contribution judges could and should make to the UK’s constitution one needs to look abroad.<sup>33</sup> The next section of this article will conduct a brief survey of some leading liberal democracies to see what innovations could possibly be mirrored in Britain.

### Contributions to Constitutionalism Made by Judges Elsewhere

The American Constitution, one often reads, is be applauded for the way it permits the Supreme Court to invalidate Acts of Congress if they are ‘unconstitutional’. But of course that power was not conferred by the 1787 document signed by George Washington and others, nor by the first 10 amendments which were agreed in 1791 and which we call the Bill of Rights. Instead, the power was created *for itself* by the US Supreme Court. In *Marbury v Madison*,<sup>34</sup> in 1803, Chief Justice Marshall skilfully gave President Jefferson the result he was hoping for by holding that the attempt by the previous President, John Adams, to appoint a number of federal judges before he left office, was ineffective. This was because the Act of Congress<sup>35</sup> authorising the Court to enforce the appointments was held not to be valid. Under Article III of the Constitution the Court had been given a number of specific functions and without express authorisation Congress had tried to expand those functions. Very cleverly the Court denied to itself the lesser power to enforce judicial appointments but in the very act of doing so conferred on itself the much greater power to declare Acts of Congress to be unconstitutional.

It is on this slender foundation that the whole edifice of judicial review in America has subsequently been constructed, although instances of Acts being declared unconstitutional remain rare. It did occur when Franklin Roosevelt was pursuing his New Deal ideology in the 1930s, and the Supreme Court’s stance on that occasion is sometimes taken, wrongly I

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<sup>32</sup> ‘Readings of *A v Secretary of State for the Home Department*’ [2005] P.L. 259.

<sup>33</sup> For a useful comparison of constitutionalism in the UK, the US, France and Germany see Tim Koopmans, *Courts and Political Institutions*; and for specific information on comparativism in the human rights field see Christopher McCrudden, ‘A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights’ (2000) 20 O.J.L.S. 499.

<sup>34</sup> (1803) 1 Cranch 137; 5 U.S. 137. See William Nelson, *Marbury v Madison: The Origins and Legacy of Judicial Review*, reviewed by J O’Neill, ‘*Marbury v Madison* at 200: Revisionist Scholarship and the Legitimacy of American Judicial Review’ (2002) 65 M.L.R. 792.

<sup>35</sup> The Judiciary Act 1789.

think, as an illustration of judicial opposition in America to the notion of social and economic rights.<sup>36</sup> The truth is that the New Deal case turned on a different point altogether, namely on whether Congress had delegated too much power to an administrative agency without giving it adequate guidance on how to exercise that power. If anything, therefore, the decision was a blow in favour of constitutionalism and a few years later the Supreme Court had little difficulty in upholding different New Deal legislation which was more clearly drafted.<sup>37</sup>

But it is worth noting that in recent years considerable scepticism has been voiced in America about the current Supreme Court's commitment to constitutionalism. Disdain for judges' constitutional work has been displayed, for example, by Mark Tushnet of Georgetown Law School, in books with provocative titles such as *The New Constitutional Order* and *Taking the Constitution Away from the Courts*, where he argues that the credit usually accorded to the US Supreme Court for maintaining the rule of law is grossly overestimated. Others have taken up the same theme. Robert Bork, whose nomination to the Supreme Court by President Reagan was vetoed by the Senate in 1987, recently published a book condemning what he calls 'the world-wide rule of judges'.<sup>38</sup> Mark Levin, likewise, has written a study entitled *Men in Black: How the Supreme Court is Destroying America*. And Jeremy Waldron, a New Zealander now based in New York, maintains the same line.<sup>39</sup> Some legal academics are less sweeping in their condemnation, but in the lead-up to the not unexpected death of Chief Justice Rehnquist in 2005, and in the commentaries on the appointment of John Roberts as his successor, there have been numerous negative assessments of how little the US Supreme Court has contributed to constitutionalism in recent times.<sup>40</sup> Its somewhat half-hearted efforts to control the American government's excesses during the current 'war on terror' are, to many, symptomatic of the malaise.<sup>41</sup> If the UK's judges are failing to rise to constitutional challenges, it seems that American judges, despite having a much greater tradition in the field, and more 'weapons' at their disposal, are also in need of strong encouragement to be more active.

In America the review of the constitutionality of primary legislation can occur only *after* it has been enacted. In France it can occur only *beforehand*. The Constitution of the Fifth Republic, in place since 1958, created a body

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<sup>36</sup> *Schechter Poultry Corp v United States* (1935) 295 U.S. 495.

<sup>37</sup> *Yakus v United States* (1944) 321 U.S. 414.

<sup>38</sup> *Coercing Virtue: The World-wide Rule of Judges*.

<sup>39</sup> See e.g. *Law and Disagreement*.

<sup>40</sup> See, e.g. Herman Schwartz (ed.), *The Rehnquist Court*. For a more generous view see Thomas Keck, *The Most Activist Supreme Court in History*, esp. Part III ('The Rehnquist Court and the Splintering of Judicial Conservatism, 1994-2003').

<sup>41</sup> But see Tim Otty and Ben Olbourne, 'The US Supreme Court and the "War on Terror": *Rasul* and *Hamdi*' [2004] E.H.R.L.R. 558, where the authors say (at p.569) that in these two decisions the Court underscored in the strongest possible fashion the importance of the individual's right to liberty and affirmed the rule of law. The US Supreme Court's unwillingness to look abroad for guidance has also been much lamented; see, e.g. Cherie Booth and Max du Plessis, 'Home Alone? The US Supreme Court and International and Transnational Judicial Learning' [2005] E.H.R.L.R. 127.

known as the Constitutional Council (*Le Conseil constitutionnel*).<sup>42</sup> This body is not actually a court at all and its nine members are not judges, but one of its functions is to examine draft statutes (*lois*) to see if they conform with the Constitution. The Councillors do not read or listen to arguments put by advocates for the opposing points of view. They do their own thinking, taking account only of documents preceding the draft law and of the French Constitution itself. But they have been adept at reading into that Constitution additional criteria for assessing whether laws are in conformity with it.

The turning point came in 1971. A year earlier the French Cabinet had ordered the dissolution of a small left-wing political party, *La Gauche Prolétarienne*. In response to this, activists such as Jean-Paul Sartre and Simone de Beauvoir set up another group named after the newspaper of the banned party, *La Cause du Peuple*. The government directed the local prefect not to register this new group but a local administrative court rather bravely ruled that the prefect had no such power to refuse registration. The government then introduced a Bill to widen the prefect's powers and it was this Bill which the Constitutional Council struck down. It did so by implying into the Constitution the so-called 'fundamental principles recognised by the laws of the Republic', a phrase mentioned in the Preamble to the 1946 Constitution of the Fourth French Republic and deemed to be affirmed by the Preamble to the 1958 Constitution.<sup>43</sup> One of these principles, said the Council, was that of freedom of association. And it is on the back of that momentous decision that the Constitutional Council has since built an enviable reputation for guaranteeing civil liberties in France. Last year the Council pronounced on 18 draft laws. This year it has already invalidated parts of the proposed anti-terrorism law,<sup>44</sup> although it upheld the controversial youth employment law, which was found not to be in breach of the principle of equality.<sup>45</sup> Of course, political and popular pressure later conspired to force President Chirac to suspend that law, a move which prompted a recent commentator to suggest that the ritual of mass protests reversing unpopular governmental measures should actually be regarded as an informal part of the French constitution.<sup>46</sup>

The French Council has another important function – the supervision of elections. That responsibility also fell to the US Supreme Court when Al Gore challenged the electoral victory of George W Bush in 2000. The Court split 5 to 4 in favour of not permitting any further recounting of the votes in Florida, thereby handing the presidency to Mr Bush.<sup>47</sup> Analysts usually observe that there was an uncanny alignment between the supposed political views of the nine US justices and the ultimate outcome of the case, but

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<sup>42</sup> Arts. 56-63. For more details see Brice Dickson, *Introduction to French Law*, pp.52-53 and pp.85-89.

<sup>43</sup> Although technically the Preamble to the 1958 Constitution refers only to the human rights and principles of national sovereignty defined by the 1789 Declaration of the Rights of Man and confirmed and supplemented by the Preamble to the 1946 Constitution.

<sup>44</sup> Decision no. 2006-532 D.C. (19 January 2006).

<sup>45</sup> Decision no. 2006-535 D.C. (30 March 2006).

<sup>46</sup> Robert Tombs in *The Times Higher Education Supplement*, 21 April 2006, p.17.

<sup>47</sup> *Bush v Gore* (2000) 531 U.S. 98. See E J Dionne and William Kristol (eds), *Bush v Gore: The Court Cases and the Commentary*.

whether any of the judges actually allowed their personal political predilections to influence their voting is impossible to verify. Their political predilections could have been the *result* of, rather than the *cause* of, their conception of the role of judges in developing the constitution. Adam Tomkins condemned this case as another lamentable example of unhelpful judicial interference in constitutional affairs,<sup>48</sup> he would therefore also have to condemn the involvement of the *Corte di Cassazione* in Italy when, in April 2006, it confirmed the electoral victory of Romano Prodi. As we know from the experience of Germany last year and Iraq this year, courts may not be able to force politicians into coalitions, but they can at least determine who won most votes at an election. If a top court is not the right body to decide that, who is? And, by the way, according to opinion polls, the reputation of the American Supreme Court hardly suffered at all as a result of its intervention in *Bush v Gore*.<sup>49</sup>

The American Court has also been active in developing ‘unenumerated’ constitutional rights – rights which are not expressly mentioned in the Constitution, but which judges see as implicit. But we do not need to cross the Atlantic, or even the English Channel, to encounter judges who are prepared to invent such rights. Just down the road is a jurisdiction where the Supreme Court has been remarkably active in doing just that. Ireland even allows its judges to assess the constitutionality of legislation *either before or after* its enactment.<sup>50</sup> One of the unenumerated rights in Ireland is the right to privacy. The others include the right to strike, the right to earn a living, the right to communicate, the right to access the courts, the right to be legally represented if facing criminal charges, the right to protection of one’s health, the right to travel, the right to found a family and the right to know the identity of one’s natural mother. All of these rights are creations of the common law.<sup>51</sup> Not everyone is a fan of how the Irish judges have gone about their task – David Gwynn Morgan at Cork, for example, is critical of

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<sup>48</sup> “In defence of the Political Constitution” (2002) 22 O.J.L.S. 157 at 170.

<sup>49</sup> Just before the 2000 election an opinion poll suggested that 62% of the American public approved of the way the Supreme Court was handling its job, with only 25% disapproving. Surprisingly, the approval rate amongst Democrats was 10% higher than amongst Republicans [70% to 60%]. Immediately after the Court’s decision in *Bush v Gore* approval ratings dropped by 3% and disapproval ratings rose by 9%. The approval rate amongst Democrats was now 38% less than amongst Republicans. But a few months later, in June 2001, the overall approval and disapproval figures were back to what they had been pre-election and the differential between Democrats and Republicans had been reduced from 38% to 22%. And independent voters were more approving of the Supreme Court than they had been prior to the election [59% to 57%]. These statistics are taken from Robert McCloskey (rev. by Sanford Levinson), *The American Supreme Court* (4<sup>th</sup> ed., 2005), pp.177-178.

<sup>50</sup> But not on both occasions. Art. 34.3.3 provides: ‘No Court whatever shall have jurisdiction to question the validity of a law, or any provision of a law, the Bill for which shall have been referred to the Supreme Court by the President under Article 26 of this Constitution, or to question the validity of a provision of a law where the corresponding provision in the Bill for such law shall have been referred to the Supreme Court by the President under the said Article 26’. This provision is described by James Casey as a ‘serious disadvantage’: see his *Constitutional Law in Ireland* (3<sup>rd</sup> ed., 2000), at p.338.

<sup>51</sup> James Casey, *ibid.*, pp.394-433.

their inconsistency and of their reliance on principles which to him are not rational.<sup>52</sup> Furthermore, in the last few years a marked conservatism has become evident within the Irish Supreme Court.<sup>53</sup> Worrying examples are the case of Jamie Sinnott, a young autistic man who was, in effect, denied the right to education,<sup>54</sup> and the case of *TD*,<sup>55</sup> where only one judge, Mrs Justice Denham, was bold enough to order the government to provide support units for teenagers with behavioural difficulties – the other judges saw that as a step too far for the judiciary, a step that would breach the doctrine of separation of powers by allowing judges to do what was supposedly the preserve of Dáil Éireann.

In this respect the Irish Supreme Court has not followed the lead of the Supreme Court of India, which has come under attack not for being judicially *inactive* but for being judicially *over-active*. It has been particularly imaginative in developing the right to life and personal liberty, which is guaranteed by Article 21 of the Indian Constitution of 1950 but which, thanks to the Supreme Court, now embraces as well the right to shelter, the right to health, the right to work, the right to clean air and clean water and the right to information. In a recent case brought by a journalist, the Indian Supreme Court relied on the right to equality in Article 14 of the Constitution to order criminal justice agencies to investigate the alleged financing of terrorist organisations by high-ranking politicians.<sup>56</sup> This prompted one critic to remark that what was formerly judicial activism had evolved into judicial arrogance<sup>57</sup> and he warned that, unless the Supreme Court exercises restraint, ‘the activist profile may be the first footprints of an impending constitutional lawlessness in India’.<sup>58</sup>

Well, maybe the Indian court *has* gone too far, and maybe the Irish court *is* wise to be cautious. But in the UK judges are a long way from reaching those outer limits of constitutional activism. And they have far to go before coming anywhere near the role played by the Constitutional Court of South Africa or, in recent years, by the Supreme Court of Canada, although those courts do benefit from having very modern constitutional documents from which to work. It was apparent from its earliest judgments in the mid-1990s<sup>59</sup> that the South African Court was going to be one which grounded its decisions in a purposive interpretation of the country’s Constitution, which came to its conclusions only after considering how courts in other parts of the world – and not just courts based on the Anglo-Saxon model – had

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<sup>52</sup> ‘Judicial Activism – Too Much of a Good Thing’ in Tim Murphy and Patrick Twomey (eds.), *Ireland’s Evolving Constitution, 1937-97: Collected Essays*, ch 9.

<sup>53</sup> I wish to acknowledge assistance provided by Rossa Fanning of U.C.D. in this area.

<sup>54</sup> *Sinnott v Minister for Education* [2001] 2 I.R. 545.

<sup>55</sup> *TD v Minister for Education* [2001] 4 I.R. 259.

<sup>56</sup> *Vineet Narain v Union of India* [1998] A.I.R. S.C. 889.

<sup>57</sup> Shubhankar Dam, ‘*Vineet Narain v Union of India*: “A Court of Law and not Justice” – Is the Indian Supreme Court beyond the Indian Constitution?’ [2005] P.L. 239 at p.247.

<sup>58</sup> *ibid.*, p.241. For a less worried perspective see S.P. Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits*.

<sup>59</sup> ‘Protecting Human Rights Through a Constitutional Court: The Case of South Africa’ (1997) 66 *Fordham Law Review* 531. The Court heard its first case in 1995.

resolved similar issues, and which contained judges who couched their judgments not in vapid legal jargon but in inspirational phrases.<sup>60</sup> The Court has also been refreshingly pragmatic, best illustrated perhaps in its use of the power to suspend the invalidation of legislation until the government has had a reasonable time to amend it.<sup>61</sup> This is a power which the Federal Constitutional Court of Germany has also conferred upon itself.<sup>62</sup> And the South African Court has pronounced at length on the scope of social and economic rights, yet without usurping the mandate of elected politicians in that domain.<sup>63</sup>

Canada, too, has benefited from having a Supreme Court that is imaginative and internationalist in its outlook, although in the view of one commentator, there is 'no set of judges in the developed world who are treated by the general population with such glowering suspicion'.<sup>64</sup> My colleague Rory O'Connell has made a special study of the 'political' role of the court<sup>65</sup> and is currently analysing how it has innovatively developed the concept of equality. The leading Canadian scholar in this field, Kent Roach, has shown in his book *The Supreme Court on Trial*, that 'an independent and courageous judiciary is the best institution we have to remind us of' the effects of our actions on the unpopular and the disadvantaged.<sup>66</sup> One of the numerous decisions Roach highlights<sup>67</sup> is that where the Supreme Court read into the human rights code of Alberta the right not be discriminated against

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<sup>60</sup> Arthur Chaskalson and Albie Sachs have been particularly to the fore in this regard.

<sup>61</sup> S.172(1) of the Constitution of South Africa 1996 (formerly s.98(5) of the Interim Constitution 1994): 'When deciding a constitutional matter within its power, a court (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and (b) may make any order that is just and equitable, including (i) an order limiting the retrospective effect of the declaration of invalidity; and (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect'. The power to suspend a declaration of invalidity was first exercised in *S v Ntuli* 1996 (1) S.A.L.R. 1207, where the government was given some 16 months to produce corrective legislation. This deadline was later extended but ultimately the Constitutional Court held that the Minister's officials had failed to act promptly and diligently and that the order of invalidity must therefore stand: *Minister of Justice v Ntuli* (5 June 1997).

<sup>62</sup> Lars Mammen, 'A Short Note on the German Federal Constitutional Court and its Power to Review Legislation' [2001] E.H.R.L.R. 433.

<sup>63</sup> Most notably in *Republic of South Africa v Grootboom* 2000 (1) S.A. 46. See also Ivan Hare, 'Minister of Health v Treatment Action Campaign: The South African AIDS Pandemic and the Right to Healthcare' [2002] E.H.R.L.R. 624.

<sup>64</sup> M. A. Sanderson, reviewing K. Roach, *The Supreme Court on Trial* (2003) 52 I.C.L.Q. 542 at 543.

<sup>65</sup> *Legal Theory in the Crucible of Constitutional Justice: A Study of Judges and Political Morality in Canada, Ireland and Italy*.

<sup>66</sup> Preface, p.ix.

<sup>67</sup> *ibid.*, pp.195-6. See too *M v H* [1999] 2 S.C.R. 3, where the Court held that the exclusion of same-sex common law partnerships from the support provisions in Ontario's Family Law Act 1990 was unjustified discrimination against gays and lesbians. That case was cited to the Law Lords, although not relied upon in their judgments, in *Ghaidan v Godin-Mendoza* [2004] 2 A.C. 557.

on the basis of sexual orientation, even though the legislature had deliberately omitted that right.<sup>68</sup>

So, all over the world top courts have deployed considerable imagination in developing their national constitutions. And frequently they have achieved this without relying upon the specific wording of their constitution. New Zealand, like Britain, does not have a written constitution, but that has not stopped the highest court there from ruling that people should be compensated if their fundamental human rights are breached.<sup>69</sup> It is worth remembering, too, that *international* courts play an ever more important role in promoting constitutionalism. Some would say that the European Court of Justice, like the Indian Supreme Court, has been a little *too* enthusiastic in doing just that.<sup>70</sup> Steven Greer, at Bristol, argues that the European Court of Human Rights has devised both primary and secondary constitutional principles to guide its own adjudication processes.<sup>71</sup> Certainly that Court has judged important constitutional issues arising within Britain. It has ruled that it is not contrary to basic democratic principles to allow members of Parliament to be immune from being sued for whatever they say in Parliament.<sup>72</sup> It has also insisted, in a case that came from Guernsey, that judicial power must be wielded completely separately from executive or legislative power,<sup>73</sup> a decision which prompted the British Lord Chancellor to announce that he would no longer sit as a judge. And in what seems to me a less impressive decision, the European Court upheld the quaint rule that no-

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<sup>68</sup> *Vriend v Alberta* (1998) 156 D.L.R. 4<sup>th</sup> 385.

<sup>69</sup> See *Simpson v Attorney-General* [1994] 3 N.Z.L.R. 667. Appeals against the New Zealand Court of Appeal used to go to the Judicial Committee of the Privy Council in London. From 2004 they have gone to the new Supreme Court of New Zealand: see the Supreme Court Act 2003 (N.Z.).

<sup>70</sup> H. Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Lawmaking*. For a more recent playing out of the debate see T. Hartley, 'The European Court, Judicial Objectivity and the Constitution of the European Union' (1996) 112 L.Q.R. 95; A. Arnall, 'The European Court and Judicial Objectivity: A Reply to Professor Hartley' (1996) 112 L.Q.R. 411; and T. Tridimas, 'The Court of Justice and Judicial Activism' (1996) 21 E.L.Rev. 199. More generally see Miguel Poiars Maduro, *We the Court: The European Court of Justice and the European Economic Constitution*.

<sup>71</sup> 'Constitutionalizing Adjudication under the European Convention on Human Rights' (2003) 23 O.J.L.S. 405. See too A McHarg, 'Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights' (1999) 62 M.L.R. 671. The European Court will become even more of a constitutional body once the reforms envisaged by Protocol 14 to the European Convention kick in, a development which will delight the current Swiss President, Judge Wildhaber. See Luzius Wildhaber, 'A constitutional future for the European Court of Human Rights?' (2002) 23 H.R.L.J. 161. More generally see Steven Greer, 'Protocol 14 and the Future of the European Court of Human Rights' [2005] P.L. 83.

<sup>72</sup> Unless they exploit their position so as to gain an advantage over a personal adversary: compare *A v UK* (2002) 36 E.H.R.R. 917 with *Cordova v Italy* (App Nos 40877/98 and 45649/99; 30 January 2003).

<sup>73</sup> *McGonnell v UK* (2000) 30 E.H.R.R. 289.

one can sit in the British Parliament unless he or she is prepared to swear *personal* allegiance to the Queen.<sup>74</sup> That, surely, must be an aberration?

### Suggestions for How Judges Should Reform the UK Constitution

So courts elsewhere have managed to develop constitutions quite significantly. This final section of the article makes a number of suggestions as to how UK judges should amend the British constitution – without the need for Parliamentary or governmental approval. These changes would create a more ‘constitutionalised’ state, meaning that the distribution and exercise of power would be controlled in a more consistent and principled fashion and that people would be left with a greater sense of being citizens of the world rather than of one small corner of it. Within the last century British judges have been unnecessarily timid in the constitutional field.<sup>75</sup> The time has come for them to be more assertive.<sup>76</sup>

First, British judges should resurrect and develop the concept of ‘constitutional rights’. A few judges did flirt with this idea in pre-Human Rights Act days, in cases like *Leech*, *Witham* and *Simms*.<sup>77</sup> Now that that Act has embedded most of the Convention rights in our domestic law the time seems to me to be riper than ever for the enunciation of rights unenumerated in that Act. Such a position is supported by at least two former Law Lords,<sup>78</sup> and also by the Cambridge scholar Mark Elliott.<sup>79</sup>

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<sup>74</sup> *McGuinness v UK* (App. 39511/98; decision of 8 June 1999). Cf. *Buscarini v San Marino* (2000) 30 E.H.R.R. 208.

<sup>75</sup> See, generally, I. Harden and N. Lewis, *The Noble Lie: The British Constitution and the Rule of Law*. The claim that judges have been too timid in the specific field of judicial review is a different (and less defensible) claim; see, e.g. the comments by Lord Bingham in relation to Will Hutton’s criticism of the judges’ timidity, in ‘The Courts and the Constitution’, n.22 above, pp.231-4.

<sup>76</sup> At the end of her piece on the House of Lords’ decision in the Northern Irish case of *Robinson v Secretary of State for Northern Ireland* [2002] N.I. 390, Brigid Hadfield proclaims that ‘Judicial reserve or caution is justified no longer’: ‘Does the Devolved Northern Ireland Need an Independent Judicial Arbiter?’ in Nicholas Bamforth and Peter Leyland (eds.), *Public Law in a Multi-Layered Constitution*, ch.6, at p.156.

<sup>77</sup> E.g. *R v Secretary of State for the Home Department, ex parte Leech* [1994] Q.B. 198; *R v Lord Chancellor, Ex parte Witham* [1997] 1 W.L.R. 104; *R v Secretary of State for the Home Department, ex parte Pierson* [1998] A.C. 539; *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 A.C. 115 at 131 (per Lord Hoffmann, who spoke of ‘fundamental principles of human rights’); *R (Daly) v Secretary of State for the Home Department* [2001] 2 A.C. 532; *R (ProLife Alliance) v BBC* [2002] 2 All E.R. 756 at 773 (per Laws L.J.); *Cullen v Chief Constable of the RUC* [2003] 1 W.L.R. 1763, where Lord Millett described the right of access to a solicitor as a ‘quasi-constitutional right’. See generally J. Jowell, ‘Beyond the Rule of Law: Towards Constitutional Judicial Review’ [2000] P.L. 671 and David Feldman (ed.), *English Public Law* pp.345-6.

<sup>78</sup> Lord Steyn, ‘Democracy Through Law’ [2002] E.H.R.L.R. 723, where he states (at p.731): ‘The importance of the development of constitutional rights has not come to an end with the advent of the Human Rights Act’ and concludes (at p.734) that England, though inching towards it, cannot yet be described as a constitutional state. Also Lord Cooke, ‘The Road Ahead for the Common Law’ (2004) 53 I.C.L.Q. 273, where he asserts (at p.278): ‘. . . in a liberal democracy there must be a bottom line of minority rights, certainly sometimes difficult to define, which

Unfortunately, as I tried to indicate in the memorial lecture for Stephen Livingstone earlier this year,<sup>80</sup> Britain's Law Lords have been unwilling to go beyond Convention rights by affirming the existence of additional rights under the common law. In particular they failed to do so in the Northern Irish case of *Cullen*,<sup>81</sup> where a person held in custody was, in defiance of the rules, denied access to a solicitor at certain times. By 3 to 2 (with Lords Bingham and Steyn dissenting) the Lords refused to award any compensation for this breach of rights. Very regrettably, just a month ago the House set its face more firmly than ever against the idea of developing the concept of constitutional rights: in *Watkins v Home Office*<sup>82</sup> they held that if prison officers maliciously interfere with a prisoner's correspondence with his solicitor, they will not be liable to pay compensation if no actual loss has been suffered by the prisoner. Lord Bingham seemed to go back on what he said in *Cullen* and joined Lord Rodger in claiming that the fact that the Human Rights Act was now in force was a further reason for *not* developing the concept of constitutional rights. With respect, I think that is misguided.<sup>83</sup> There is surely much more to rights under the constitution than the concept of human rights? In my view the three key constitutional rights which judges should immediately develop, and provide compensation for if breached, are the right to access to justice,<sup>84</sup> the right to equality<sup>85</sup> and the right to fairness in decision-making.<sup>86</sup>

My second suggested reform is that judges should develop the idea of positive state duties as the corollary of constitutional rights. They should steal a march on their Strasbourg colleagues in this regard, for the latter have been a bit hesitant in fashioning duties out of Articles in the European Convention.<sup>87</sup> To some extent British judges have already developed

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cannot be crossed without a legal revolution. The legislative and judicial functions are complementary; the supremacism of either has no place'. See too Lord Cook's Hamlyn Lectures for 1996, *Turning Points of the Common Law*. Before being appointed a peer, Lord Cooke was President of New Zealand's Court of Appeal. He sat occasionally in the Appellate Committee of the House of Lords not as a Lord of Appeal but as a peer who had previously held high judicial office.

<sup>79</sup> 'Embracing "Constitutional" Legislation: Towards Fundamental Law?' (2003) 54 N.I.L.Q. 25. See n.4 above.

<sup>80</sup> *Safe in Their Hands? The Law Lords and Human Rights* (2006) 26 L.S. (forthcoming).

<sup>81</sup> *Cullen v Chief Constable of the RUC* [2003] 1 W.L.R. 1763.

<sup>82</sup> [2006] 2 All E.R. 353.

<sup>83</sup> Our law already allows exemplary damages to be awarded when there has been oppressive, arbitrary or unconstitutional action by servants of the government: see *Kuddus v Chief Constable of Leicestershire Constabulary* [2002] 2 A.C. 122.

<sup>84</sup> A starting point could be *R v Lord Chancellor, ex parte Witham* [1997] 2 All E.R. 778.

<sup>85</sup> Maybe a seed has been sown in *A v Secretary of State for the Home Department* [2005] 2 A.C. 68. See Sandra Fredman, 'From Deference to Democracy: The Role of Equality under the Human Rights Act 1998' (2006) 122 L.Q.R. 53.

<sup>86</sup> See, most recently, *R (Smith) v Parole Board* [2005] 1 W.L.R. 350 and, on the idea of 'good administration', *R (Nadarajah) v Home Secretary* [2005] EWCA Civ. 1363.

<sup>87</sup> Alastair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*.

positive duties based on Article 2,<sup>88</sup> but there is a lot more they could do vis-à-vis, say, Articles 3 and 8. For instance, if women have the right not to be subjected to domestic violence, should the state not be under a duty to provide refuges and other support facilities for abused women? And if we all have the right to be free from degrading treatment and personally secure, should judges not oblige the state to protect us against environmental degradation? The Indian Supreme Court has been severely criticised for inappropriate meddling in environmental issues,<sup>89</sup> but in Britain the courts have been almost completely silent in the area.

Thirdly, judges should assert more forcefully their power to review the exercise of Crown prerogatives. There is no need to follow Tomkins in calling for a Prerogative (Abolition) Act.<sup>90</sup> The decision in the *GCHQ* case, back in 1984,<sup>91</sup> was clearly a missed opportunity to subject the government more meaningfully to the rule of law. Although the European Court of Human Rights agreed that considerations of national security justified the British government's ban on trade unions at the site in question,<sup>92</sup> the House of Lords could surely have been more interventionist in assessing the strength of the government's claim. True, later cases have shown that the courts are sometimes willing to intervene on other prerogative powers, such as the power to issue passports,<sup>93</sup> to grant pardons<sup>94</sup> or to render diplomatic assistance to a British subject who is suffering violation of a fundamental human right as the result of the conduct of the authorities of a foreign state.<sup>95</sup> Given recent controversies over peerages for donors of money, maybe judges will soon get the opportunity to decide whether certain honours have been legally bestowed? And it is not inconceivable that the lawfulness of resort to foreign military action will sooner or later be justiciable, whether or not Parliamentary approval is also required.<sup>96</sup> But Britain still awaits its equivalent to the Watergate case in America.<sup>97</sup> There the Supreme Court recognised that the President does have the right to keep many conversations confidential, but it nevertheless held that the duty to ensure fairness in a criminal trial overrides that privilege. Richard Nixon resigned as President

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<sup>88</sup> *R (Amin) v Secretary of State for the Home Department* [2004] 1 A.C. 653; *R (Middleton) v West Somerset Coroner* [2004] 2 All E.R. 465; *R (Sacker) v West Yorkshire Coroner* [2004] 2 A.C. 182; *R (Takoushis) v HM Coroner for Inner North London* [2005] EWCA Civ. 1440; *R (D) v Secretary of State for the Home Department* [2006] EWCA Civ. 143.

<sup>89</sup> Shubhankar Dam, 'Polluting Environment, Polluting Constitution: Is a "Polluted" Constitution Worse than a Polluted Environment?' (2005) 17 J. Env'tl. L. 383.

<sup>90</sup> *Our Republican Constitution*, p.133.

<sup>91</sup> *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 A.C. 374.

<sup>92</sup> *Council of Civil Service Unions v UK* (1987) 50 D.R. 228.

<sup>93</sup> *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Everett* [1989] 1 All E.R. 655.

<sup>94</sup> *R v Secretary of State for the Home Department, ex parte Bentley* [1993] 4 All E.R. 443.

<sup>95</sup> *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ. 1598.

<sup>96</sup> The Armed Forces (Parliamentary Approval for Participation in Armed Conflict) Bill – a private member's measure – is currently before Parliament.

<sup>97</sup> *US v Nixon* (1974) 418 U.S. 683.

just two weeks after the Supreme Court's decision.<sup>98</sup> The closest Britain has come to this degree of scrutiny of executive privilege was probably during the recent Hutton Inquiry into the death of David Kelly.<sup>99</sup> The outcome of that inquiry is for present purposes irrelevant, but what *is* worth noting is the irony that a Law Lord who was not presiding in a court and who could not make any judgment as to civil or criminal liability was nevertheless supplied with more information than he would have been given if he had been so presiding – he even got to see Alastair Campbell's private diary!

My fourth suggestion is that the doctrine which allows foreign governments to claim sovereign immunity when sued in the United Kingdom needs to be restricted. The primacy of customary international law should be recognised. For example, people who are the victims of state-sponsored torture abroad should be able to sue the foreign governments in British courts<sup>100</sup> and, if they win, they should be able to enforce the judgment against the foreign government's assets in this country. As it happens, an appeal dealing with this point has just concluded in the House of Lords.<sup>101</sup> When they are writing their judgments let's hope the Law Lords in that case make as good a use of international law as they did in the two Belmarsh cases<sup>102</sup> and in the Pinochet case some years ago.<sup>103</sup>

Fifthly, as I argued in the Livingstone lecture,<sup>104</sup> judges should put a severe dent in the constitutional principle that international treaties ratified by the government have no effect within our national legal system unless they have been expressly incorporated into our law.<sup>105</sup> In the Northern Irish case of *McKerr*, two years ago,<sup>106</sup> Lord Steyn called for this dualist approach to international law to be reconsidered. A majority of judges in the High Court of Australia came to the same conclusion nearly 10 years before that,<sup>107</sup> though it is fair to say that the idea has not since taken root there and, apart from its work on the rights of indigenous peoples,<sup>108</sup> the Australian Court has a record that is probably worse than that of the House of Lords in implying constitutional rights.<sup>109</sup> Of course allowing treaties to have an *effect* does not

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<sup>98</sup> The court announced its decision on 24 July 1974; the President resigned on 8 August 1974.

<sup>99</sup> [www.the-hutton-inquiry.org.uk](http://www.the-hutton-inquiry.org.uk).

<sup>100</sup> Contrary to the outcome in *Al-Adsani v Kuwait* (1996) 107 I.L.R. 536.

<sup>101</sup> *Jones v Ministry of the Interior of Saudi Arabia*. For the Court of Appeal decision see [2004] EWCA Civ. 1394.

<sup>102</sup> See n.30 and n.31 above.

<sup>103</sup> *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)* [2000] 1 A.C. 147.

<sup>104</sup> See n.80 above.

<sup>105</sup> This is the so-called principle of dualism. It was approved by the House of Lords in what is known as The International Tin Council case, *i.e.*, *J H Rayner (Mincing Lane) Limited v Department of Trade and Industry* [1990] 2 A.C. 418. [2004] 1 A.C. 807.

<sup>106</sup> *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 C.L.R. 273.

<sup>107</sup> Notably in *Mabo v Queensland (No 2)* (1992) 175 C.L.R. 1. See, generally, Haig Patalan, *Judging Democracy: The New Politics of the High Court of Australia*, ch.5.

<sup>108</sup> David Kinley (ed.), *Human Rights in Australian Law*, pp.36-43 and Patalan, n.108 above, ch.3. But, unlike the House of Lords, the High Court retains the jurisdiction to declare Acts to be unconstitutional.

mean that they have to become *binding*: judges should develop a rebuttable presumption that national law *must* be read in a way which makes it consistent with ratified treaties unless there are very strong policy reasons why an inconsistency should be preserved. This would go further than the principle of statutory construction which is currently applied, namely, that statutes are to be read as consistent with ratified treaties only if they are reasonably capable of bearing such a meaning.<sup>110</sup>

Sixthly, judges should expand still further the sources they are prepared to look at before they decide cases. At present they very largely restrict themselves to 'legal' sources, ignoring information which is primarily economic or sociological in nature. They should, in short, accept American-style 'Brandeis briefs'.<sup>111</sup> Provided limits are placed on the size of such documents, and that resort to oral argument is more time-limited, as it is in the Washington and Strasbourg courts, there is no reason to believe that proceedings in British courts would be unduly lengthened as a result of this reform.

Seventhly, and this links to the point just made, judges need to commit themselves to a much more contextual approach to statutory interpretation, one that goes beyond the requirement in section 3 of the Human Rights Act 1998 that legislation must be read and given effect in a way which is compatible with Convention rights 'so far as it is possible to do so'.<sup>112</sup> An archetypal example of this *not* happening is the recent case of *R v J*,<sup>113</sup> where a man in his thirties who had allegedly had repeated sex with a 13-year-old girl was charged with indecent assault on a woman, contrary to section 14 of the Sexual Offences Act 1956. He was not charged with having unlawful intercourse with a girl under 16, contrary to section 6, because a prosecution for that offence had to be brought within 12 months and this one had not been.<sup>114</sup> The four male Law Lords allowed the defendant's appeal against conviction, on the basis that Parliament could have had no possible purpose in prohibiting a prosecution under section 6 after the lapse of 12 months if exactly the same conduct could then be prosecuted under section 14.<sup>115</sup> Lord Bingham said that any other result was 'impossible' and Lord Steyn thought the conclusion was 'inescapable'. Yet Lady Hale, who is so far the only woman to have been appointed to our top court, strongly dissented. For her the only unfairness in the case was that being done by her fellow judges to the young girl and the many like her.<sup>116</sup> Lady Hale said the Sexual Offences Act was a mess when it was enacted and was an ever greater mess when it

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<sup>110</sup> *Garland v British Rail Engineering Ltd* [1983] 2 A.C. 751. See the discussion in Murray Hunt, *Using Human Rights Law in English Courts*, pp.76-88.

<sup>111</sup> Louis Brandeis (later a justice of the US Supreme Court) first submitted a collection of medical and sociological evidence in *Muller v Oregon* (1908) 208 U.S. 412.

<sup>112</sup> S.3 was used quite imaginatively by the House of Lords in *R v A* [2002] 1 A.C. 45 and *Ghaidan v Godin-Mendoza* [2004] 2 A.C. 557.

<sup>113</sup> [2005] 1 A.C. 562. For comments see [2005] P.L. 193.

<sup>114</sup> S.37(2) of, and para.10(a) of Sch.2 to, the 1956 Act. The time limit was abolished from 1 May 2004 by the Sexual Offences Act 2003.

<sup>115</sup> Especially, they added, as the maximum penalty for both offences was the same – 10 years in prison.

<sup>116</sup> *ibid.*, para.69.

was amended. It simply was not possible to discern within it a Parliamentary intention along the lines suggested by her brethren. As she put it: ‘Although we do have to try to make sense of the words Parliament has used, we do not have to supply Parliament with the thinking that it never did and the words that it never used.’<sup>117</sup> I fervently hope that Lady Hale’s approach to statutory interpretation is the one that begins to prevail. As we all know, context is everything.

My eighth point is that senior judges should begin to exercise the power to overrule precedents for the future only. At present, when they overrule a precedent, one of the parties to the case at hand bears the consequences of the change to the law, even though that party might have thought the ‘old’ law was perfectly good and have based his or her conduct on it. Prospective overruling avoids this sense of injustice, allowing the case at hand to be decided in accordance with the pre-existing law but sending out a message to future litigants that for them the law has changed. The Federal Constitutional Court of Germany has given itself this power, where practical reasons demand it.<sup>118</sup> Seven Law Lords asserted it for themselves in the *Spectrum Plus* case last year, but they opted not to make use of it on the facts before them.<sup>119</sup> There seems to me to be particular scope for prospective overruling in criminal cases, where it is surely unjust that a defendant can find him – or herself punished for falling foul of a new interpretation of the law that did not exist at the time the alleged crime was committed.<sup>120</sup>

Ninthly, judges should be prepared to consider abstract legal questions, the so-called *actio popularis*. They are edging towards doing this, as is evident from cases such as the one taken by *The Guardian* against the statutory ban on campaigning to abolish the monarchy<sup>121</sup> or the one brought by the Family Planning Association here in Belfast against the uncertainty inherent in Northern Ireland’s abortion laws.<sup>122</sup> If judges did a lot more of this kind of judging they would help to clarify legal principles and in the process greatly enhance the rule of law.

Finally, and most radically, our top judges should claim for themselves the power to declare Acts of Parliament to be unconstitutional. We should never

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<sup>117</sup> *ibid.*, para.89.

<sup>118</sup> Lars Mammen, ‘A Short Note on the German Federal Constitutional Court and its Power to Review Legislation’ [2001] E.H.R.L.R. 433.

<sup>119</sup> *Re Spectrum Plus Ltd* [2005] 3 W.L.R. 58.

<sup>120</sup> Art.7 of the European Convention on Human Rights supposedly prohibits retrospective criminal law, yet the European Court still managed to find no breach of this when the House of Lords upheld the conviction of a man for raping his wife at a time when such behaviour was not thought to be criminal: *R v R* [1992] 1 A.C. 599 and *CR v UK* (1996) 21 E.H.R.R. 363. See, generally, Michael Zander, *The Law-Making Process* (6<sup>th</sup> ed., 2004), pp.397-403.

<sup>121</sup> *R (Rusbridger) v Attorney-General* [2004] 1 A.C. 357. The bar derives from s. 3 of the Treason Act 1848. See too *R v Secretary of State for the Home Department, ex parte Salem* [1999] A.C. 450, where the Lords said they had a discretion (not exercised in the case) to hear a point of public law of public interest, notwithstanding that the facts giving rise to the dispute have changed in favour of the party who initiated the proceedings.

<sup>122</sup> *Re Family Planning Association for Northern Ireland’s Application* [2005] N.I. 188. See too *Re E’s Application* [2003] N.I.J.B. 288.

forget that the doctrine of Parliamentary sovereignty, which supposedly lies at the base of our constitution, is itself a construct of the common law.<sup>123</sup> The current Attorney General, Lord Goldsmith, expressly stated this in an answer to a Parliamentary question asked by Lord Lester of Herne Hill two years ago.<sup>124</sup> Judges can therefore, if so inclined, modify the doctrine. This is what the Law Lords were invited to do last year when there was a challenge by the Countryside Alliance to the constitutionality of the Hunting Act 2004, passed by the House of Commons without the consent of the second Chamber.<sup>125</sup> While all nine Law Lords held the Act to be valid, because it was passed in accordance with the Parliament Act of 1949, which in turn had been passed in accordance with the Parliament Act of 1911, five Law Lords expressly stated<sup>126</sup> that if the House of Commons alone were to try to delete from the 1911 Act the section which prevents it from extending the maximum permitted life of a Parliament beyond five years, that would *not* be a constitutional Act. Lord Steyn went further, suggesting that courts should be able to invalidate Acts which seek to abolish any fundamental feature of our constitution, such as the right of access to judicial review.<sup>127</sup>

In 2004, when the government was pushing another of its Asylum and Immigration Bills through Parliament, it inserted a provision<sup>128</sup> which would have ousted the jurisdiction of the courts to hear challenges against decisions of the immigration appeal tribunals. There was a huge outcry, not least from Lord Woolf, the Lord Chief Justice.<sup>129</sup> Eventually the clause was dropped. But if Parliament had gone ahead and enacted it, would courts have held it to be unconstitutional? I very much hope so. Similarly, if in April 2006 the government had not climbed down on its Legislative and Regulatory Reform Bill, under which ministers could have done all sorts of things that only an elected Parliament should be able to do, I like to think that, had a challenge been raised in the courts against a government measure taken under the Act, judges would have declared it too to be unconstitutional. As Gibbon noted in *The Decline and Fall of the Roman Empire*, published around the same time as the American Constitution: ‘The principles of a free constitution are irrecoverably lost, when the legislative power is nominated by the

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<sup>123</sup> See, e.g. H.W.R. Wade, ‘The Legal Basis of Sovereignty’ (1955) 13 C.L.J. 172.

<sup>124</sup> Hansard (H.L.), 31 March 2004, col. W.A. 160.

<sup>125</sup> *R (Jackson) v Attorney General* [2006] 1 A.C. 262. For a comment see Michael Plaxton, ‘The Concept of Legislation: *Jackson v Her Majesty’s Attorney General*’ (2006) 69 M.L.R. 249.

<sup>126</sup> Lord Nicholls (para.59), Lord Steyn (para.79), Lord Hope (para.122), Lady Hale (para.164) and Lord Carswell (para.175).

<sup>127</sup> *ibid.*, para.102 (‘In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish.’) For extra-judicial comments by Lord Steyn in the area of constitutional law see ‘Democracy Through Law’ [2002] E.H.R.L.R. 723.

<sup>128</sup> Clause 14.

<sup>129</sup> ‘the rule of Law and a Change in the Constitution’, Squire Centenary Lecture, Cambridge, 3 March 2004, available on the website of the Department for Constitutional Affairs. See too, ‘Lord Steyn’s Comments from the *Lester and Pannick* Book Launch’ [2004] J.R. 107.

executive'.<sup>130</sup> Or, as the US Supreme Court put it in 1966, 'Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them'.<sup>131</sup>

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<sup>130</sup> *The Decline and fall of the Roman Empire* (1776-88), ch.3.

<sup>131</sup> *Miranda v Arizona* (1966) 384 U.S. 436 at 491.

## HUMAN RIGHTS, CRIMINAL JUSTICE AND THE FUTURE OF THE COMMON LAW

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### Introduction

The considerable attention given to human rights in recent years raises the question whether the common law is being overshadowed by human rights jurisprudence. In the United Kingdom the enactment of the Human Rights Act 1998 has meant that increased prominence has been given to human rights points. In a recent lecture Brice Dickson has noted that in the last five years one in four of the 320 cases decided by the House of Lords involved a substantial examination of a Human Rights Act point and last year the figure was one in three.<sup>1</sup> Although Dickson refers to human rights not protected by the Human Rights Act and specifically to human rights protected by the common law of England and Northern Ireland, it would seem that there were by contrast only a handful of cases which raised human rights issues not involving the Human Rights Act.<sup>2</sup> Of course, these statistics do not by themselves illustrate that the common law has been overshadowed by the Human Rights Act. With the passage of an Act of such fundamental constitutional significance as the Human Rights Act which substantially incorporates the European Convention on Human Rights into UK law, it was inevitable that there would be many human rights points which would be tested in the courts. This does not mean that the common law does not continue to provide the bedrock for many of our fundamental liberties and guarantees against arbitrary government.

Another point is that it is misleading to set up the common and human rights law in some kind of opposition to each other. In his masterly account of the formation of the Convention, Brian Simpson has shown how in many respects the final draft was a triumph for common lawyers as they succeeded in enshrining many specific rights that were already constituted in the common law, although he illustrates how the establishment of a Court with the responsibility for developing a jurisprudence of rights over and above that developed by the member states was more a triumph for a civil law approach.<sup>3</sup> In his judgment in the House of Lords case upholding the right of Belmarsh detainees not to be detained without trial, Lord Hoffmann reminded us that the United Kingdom subscribed to the Convention because

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\* Thanks are due to Gordon Anthony, Brice Dickson and Sean Doran for their comments on an earlier draft. The errors that remain are the sole responsibility of the author.

<sup>1</sup> B. Dickson, "Safe in Their Hands? The Law Lords and Human Rights" (2006) The Stephen Livingstone Memorial Lecture, available at [www.law.qub.ac.uk/humanrts/hrevents/bdickson06.doc](http://www.law.qub.ac.uk/humanrts/hrevents/bdickson06.doc).

<sup>2</sup> The examples he refers to are, in his words, "outstanding examples. . . of principles derived from customary international human rights law" rather than examples of the application of common law.

<sup>3</sup> A. W. B. Simpson, *Human Rights and the End of Empire* (2001), especially chaps. 13 and 14.

it sets out the rights which British subjects enjoyed under common law.<sup>4</sup> Freedom from arbitrary arrest and detention, he declared, was not some special doctrine of European law, but a “quintessentially British” liberty.<sup>5</sup> In a similar fashion some of the basic principles of fairness contained in article 6 of the European Convention such as the right to an independent and impartial tribunal and the right to be heard derive from the common law principles of natural justice.<sup>6</sup> Others such as the presumption of innocence and the privilege against self-incrimination have long been hallmarks of the common law criminal trial.<sup>7</sup>

Albeit that many common law rights have been subsumed under the European Convention rights, however, the increasing attention given to the human rights standards under the Convention raises the question whether these are the standards that will now take the centre stage of our jurisprudence with the common law relegated to a much less significant role. For many years, citizens in common law countries have looked to the common law for protection against arbitrary abuse of power and for upholding the rule of law. Nowhere has this been more evident than in the field of criminal justice where the courts have used remedies such as habeas corpus and, more recently, abuse of process to protect the citizen from governmental abuse.<sup>8</sup> Now under sections 2 and 3 of Human Rights Act the courts must take into account the Strasbourg jurisprudence and so far as possible read and give effect to legislation in a way which is compatible with Convention rights. This raises the question whether the torch for protecting our “fundamental freedoms” – the term used in the full title of the European Convention - has passed from the common law to the human rights standards of the Convention.<sup>9</sup>

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<sup>4</sup> *A and others v Secretary of State for the Home Department; X and another v Secretary of State for the Home Department* [2004] UKHL 56.

<sup>5</sup> *ibid.*, para.88. See also T. Poole, “Harnessing the Power of the Past? Lord Hoffman and the *Belmarsh Detainees Case*” (2005) 32 *J.L.S.* 534

<sup>6</sup> “The common law principles of natural justice anticipated by many years the concept of a fair trial that has been elaborated by [art 6]”: *Bow Spring (owners) v Manzanilli II (owners)* (2004) EWCA Civ. 1007.

<sup>7</sup> The point has been made, however, that judges and lawyers have paid greater attention to the more prosaic rules of evidence specifying the burden and standard of proof than to the “more grand-sounding constitutional principle of the presumption of innocence”: see P. Roberts and A. Zuckerman, *Criminal Evidence* (2004), p. 327. For an analysis of the privilege against self incrimination in English law and a critique of the human rights jurisprudence in this field, see Lord Justice Sedley, “Wringing out the Fault: Self-Incrimination in the 21<sup>st</sup> Century” (2001) 52 *N.I. L.Q.* 107.

<sup>8</sup> For an analysis of these doctrines, see A.D.R. Zellick and R. J. Sharpe, *The Law of Habeas Corpus* (2006), A. Choo, *Abuse of Process and Judicial Stays of Criminal Proceedings* (1994).

<sup>9</sup> This is not the first time that questions have been asked about the future of the common law. The growing influence of European Union law and international legal regimes such as the European Convention provoked such questions before the Human Rights Act was enacted. Cf. J. Beatson, “Has the Common Law a Future?” (1997) 56 *Camb. L.J.* 291 and Lord Goff, “The Future of the Common Law” (1997) 46 *I.C.L.Q.* 745. For the view, however, that the entire British Constitution including “constitutional statutes” such as the Human Rights Act and the European Communities Act 1972 is underpinned by the common law, see the judgment of

Dickson points towards this possibility in the conclusion of his lecture when, against the background of a generally positive account of the manner in which the House of Lords has protected human rights in recent years, he laments that there have been a number of instances where the House of Lords has failed to grasp the opportunity to widen the protection of rights beyond what is required by the European Convention. The two examples he gives from the criminal justice field, both pre-dating the Human Rights Act, are the failure to rule that compensation is available to someone wrongfully denied access to a solicitor and the failure to rule that terrorist suspects have a right to have their solicitor present during police interviews.<sup>10</sup> Although the latter right was subsequently recognised in published codes of conduct,<sup>11</sup> the ruling that there was no such right at common law is an illustration of what might be regarded in the new human rights era as the limited and static role that the common law is reduced to when faced with a government determined to cut back on civil liberties.<sup>12</sup> Against the background of the curtailment of the right to silence in Northern Ireland under the Criminal Evidence (Northern Ireland) Order 1988, it was argued by counsel for the appellants that even if it could not be said that the common law recognised a right in every person to have the advice and assistance of a solicitor during police interviews, the House of Lords should now recognise such a right because the curtailment of the right of silence had transformed the landscape of the criminal trial. Delivering the opinion of the House of Lords, Lord Browne-Wilkinson accepted that the attenuation of the right of silence gave some force to the argument that the House should now by analogy with the right to consult a solicitor outside the interview room recognise a right to be accompanied by a solicitor in a police interview. But such an argument could not be divorced from the legislative framework in which Parliament had clearly omitted to provide for such a right for terrorist suspects. It was impermissible for the House to develop the law in a direction which was contrary to the expressed will of Parliament and it was its clearly expressed will that terrorist suspects should not have the right to have a solicitor present during police interviews. His Lordship referred to the recently decided case of *Murray v United Kingdom*<sup>13</sup> in which the European Court of Human Rights ruled that it was a breach of an accused's right to a fair trial for a court to draw inferences from an accused's silence under police questioning when he had been denied access to a solicitor. But the Court had declined to rule whether a refusal to allow a solicitor to be present during police interviews violated article 6. The clear message from the House of Lords in the pre-Human Rights Act landscape was that if there was to be recognition of a right to have a solicitor present during police questioning, accused persons would have to seek a ruling from Strasbourg and there could be no reliance on the common law.

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Laws LJ in *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin) and the commentary in M. Elliott, "Embracing Constitutional Legislation: Towards Fundamental Law" (2003) 54 *N.I.L.Q.* 25.

<sup>10</sup> See respectively *Cullen v Chief Constable of the RUC* [2003] 1 WLR 1763 and *R. v Chief Constable of the RUC, ex p. Begley, R v McWilliams* [1997] 1 WLR 1475.

<sup>11</sup> See Northern Ireland Office, *Terrorism Act 2000 (Section 99) Code of Practice* (2001), s.6.7.

<sup>12</sup> For commentary on this case, see S. Doran and J. Jackson, "Evidence", *All E R Annual Review* 1997, pp.218 – 219.

<sup>13</sup> (1996) 22 EHRR 29.

What will be argued in this article, however, is that despite or, perhaps more accurately, because of the enactment of the Human Rights Act there is still an important role for the common law to play in the protection of our rights and freedoms. One of the interesting developments to have taken place in criminal justice in recent years has been the increase in the number of oral judicial proceedings that must be conducted in order to determine whether prisoners should be released.<sup>14</sup> Human rights jurisprudence has been instrumental in shaping this development towards a fairer process for prisoners but it will be shown that in certain judgments judges have chosen to rely on the common law and not on human rights standards and jurisprudence as the basis for their rulings. Using these developments as an example, it will be argued that the role that the common law has played in the new Human Rights Act era is far from marginal. Just as years ago the common law played a significant role in informing the delineation of the human rights to be found in the European Convention on Human Rights, so today it can play a dynamic role in helping to inform and develop human rights jurisprudence.

### **The Continuing Dynamism of the Common Law**

One of the best examples of the role that the common law is continuing to play in protecting rights in the new human rights era is to be found in a case which is not about criminal justice at all. In *A and others v Secretary of State for the Home Department*<sup>15</sup> the House of Lords had to rule on whether the Special Immigration Appeals Commission (SIAC) hearing an appeal under section 25 of the Anti-terrorism, Crime and Security Act 2001 could rely on evidence that may have been procured by torture inflicted by officials of a foreign state without the complicity of the British authorities. Although the appellants argued that a negative answer was dictated by article 6 of the European Convention of Human Rights, by the principles of public international law and by the common law of England, their Lordships considered that the principles of common law standing alone compelled such an answer.<sup>16</sup>

The Secretary of State argued that since there was no restriction on the information that the Secretary of State could consider in forming a belief or suspicion that a person's presence in the UK was a risk to national security or that he was a terrorist and the function of SIAC was also to decide whether there were reasonable grounds for such a belief or suspicion, an exclusionary rule would produce a mismatch between the evidence the Secretary of State could rely on and the evidence which SIAC could rely on. In addition Rule 44(3) of the Special Immigration Commission (Procedure) Rules 2003 provided that the Commission may receive evidence that would not be admissible in a court of law. Their Lordships, however, considered

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<sup>14</sup> See generally S. Livingstone, T. Owen and A. MacDonald, *Prison Law* (2003, 3<sup>rd</sup> ed). For the impact this has had on the Parole Board in England and Wales, see N. Padfield, "The Parole Board in Transition" [2006] *Crim. L.R.* 3.

<sup>15</sup> [2005] UKHL 71.

<sup>16</sup> Although Lord Bingham added: ". . . the principles of the common law do not stand alone. Effect must be given to the European Convention which itself takes account of the all but universal consensus embodied in the Torture Convention." (para.52).

that the Commission's function was a judicial one and not an executive one. According to Lord Hoffmann, Parliament in setting up a court to review the question whether reasonable grounds existed for suspicion or belief was expecting the court to behave like a court. In the absence of a clear express provision to the contrary, that would include the application of the standards of justice which have traditionally characterised the proceedings of English courts and this excluded the use of evidence obtained by torture, whatever might be its source. The rejection of torture by the common law not only had special iconic importance as the touchstone of a human and civilised legal system, its rejection also had a constitutional resonance for the English people in their historic struggle to make government subject to law.

Although a number of their Lordships were content to take the view that the common law as it stood forbade the reception in evidence of any statement obtained by the use of torture, it was difficult to point to a specific ruling which gave such wholesale expression to the inadmissibility of such evidence under all circumstances. Lord Carswell considered that such a principle may well be justified historically but even if it required some expansion of the common law he was of the clear opinion that the principle could be accommodated. In a strong expression of the continuing dynamism of the common law which is particularly relevant to the argument of this article, his Lordship declared in a passage that is worth quoting in full:<sup>17</sup>

“We have long since ceased to give credence to the fiction that the common law consists of a number of pre-ordained rules which merely require discovery and enunciation. Two centuries ago Lord Kenyon recognised that in being formed from time to time by the wisdom of man it grew and increased from time to time with the wisdom of mankind: *R v Lord Rusby* (1800) Pea (2) 189 at 192. Sir Frederick Pollock referred in 1890 in his *Oxford Lectures*, p.111 to the ‘freshly growing fabric of the common law’ and McCardie J spoke in *Prager v Blatspiel, Stamp and Heacock Ltd* [1924] 1 KB 566 and 570 of the demand of an expanding society for an expanding common law. Similarly, in the US Supreme Court 121 years ago Matthew J said in *Hurtado v California* (184) 110 US 516 at 531 that:

‘as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mould and shape it into new and not less useful forms.’

“As Peter du Ponceau said of the common law (*A Dissertation on the Nature and Extent of the Jurisdiction of the Courts*, (1824), Preface):

‘Its bounds are unknown, it varies with the successions of ages, and takes its colour from the spirit of the times, the learning of the age, and the temper and disposition of the

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<sup>17</sup> *ibid.*, para.152.

Judges. It has experienced great changes at different periods, and is destined to experience more. It is by its very nature uncertain and fluctuating, while to vulgar eyes it appears fixed and stationary.”

Lord Carswell concluded that whether or not it has ever been affirmatively declared that the common law declines to allow the admission of evidence obtained by the use of torture, it is quite capable now of embracing such a rule. If that was an extension of the existing common law, it was a modest one, a necessary recognition of the conclusions which should be drawn from well established principles.

The question whether the common law could be extended to forbid the reception of any statement obtained by torture is reminiscent of an old debate which took place when Northern Ireland was in the throes of conflict and violence in the early 1970s as to whether the courts could extend the common law concept of an involuntary confession to exclude evidence obtained by any oppressive conduct or oppressive circumstances. The Diplock Commission which was established by the British Government to make recommendations on how to combat the upsurge in violent activity appeared to criticise the Northern Ireland courts for ruling that any interrogation set-up which makes it more likely that those who do not want to speak will eventually do so rendered inadmissible any confession subsequently made.<sup>18</sup> The suggestion appeared to be made that the courts had failed to exercise a discretion to admit involuntary statements in the emergency situation that existed in Northern Ireland at that time. Yet as Desmond Greer made clear in an article in this Journal at the time,<sup>19</sup> the Northern Ireland courts had no such discretion as it was a rule of common law that involuntary confessions had to be excluded as evidence. The only question was whether it was legitimate to extend the common law rule to include confessions obtained in oppressive circumstances and Greer demonstrated that there was support for the view that it could. It was the insistence by the Northern Ireland courts that the common law rules be so strictly adhered to that led Parliament on the recommendation of the Diplock Commission to amend the law so that the admissibility of confessions should no longer depend on the principle of voluntariness but instead on the absence of torture, inhuman or degrading treatment, a standard which was derived from article 3 of the European Convention.<sup>20</sup> This serves as an interesting example of how human rights standards were invoked in order to *lower* the safeguards of the common law.<sup>21</sup>

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<sup>18</sup> Diplock Commission, *Report of the Commission to consider legal procedures to deal with terrorist activities in Northern Ireland* (1972), Cmnd. 5185, para.83. Although the report did not name the decision, it was clearly referring to *R v Flynn and Leonard* [1972] NIJB (May).

<sup>19</sup> D. S. Greer, “Admissibility of Confessions and the Common Law in Times of Emergency” (1973) 24 *N.I.L.Q.* 199.

<sup>20</sup> See s.6 of the Northern Ireland (Emergency Provisions) Act 1973. This provision survived until 2002 when the PACE test for the admissibility of confessions which superseded the common law voluntariness test was extended to cover persons arrested under the Terrorism Act 2000.

<sup>21</sup> The gap opened up between the voluntariness test and the new emergency test was narrowed to some extent, however, by the Northern Ireland courts on occasions

One issue that divided the Law Lords in the *A* case was how SIAC should approach the question of the burden of proof on whether a statement had been obtained by torture. Under the Northern Ireland emergency legislation, the accused had first to adduce prima facie evidence that he was subjected to torture or inhuman or degrading treatment and the prosecution had then to satisfy the court that the statement was not obtained in this way.<sup>22</sup> In the *A* case the appellants argued that it was for the party seeking to adduce evidence to establish its admissibility if this was challenged. The Secretary of State submitted that it was for the party seeking to challenge the admissibility of evidence to substantiate the factual grounds on which the challenge was based. There was general agreement that a conventional approach to the burden of proof was inappropriate in a proceeding where, as Lord Bingham of Cornhill put it, the appellant may not know the nature or identity of the author of an adverse statement relied on against him, may not see the statement or know what the statement says, may not be able to discuss the adverse evidence with the special advocate appointed to represent his interests and may not know what witnesses to call to rebut assertions of which he is unaware.<sup>23</sup> Once the issue of torture was raised, the onus passed to SIAC to assess the information and look at the facts in detail. Where their Lordships differed was on the test to be applied in reaching a conclusion. The majority considered that SIAC should refuse to admit the evidence only if positively satisfied that the evidence was obtained by torture while the minority considered that it should refuse to admit the evidence if unable to conclude that there was not a real risk that the evidence had been obtained by torture. Given the difficulties in establishing how such statements have been obtained, however, the majority view risks, as Lord Nicholls of Birkenhead said at the conclusion of his judgment, nullifying the very principle against the admission of evidence procured by torture that their Lordships so unanimously and vigorously supported.<sup>24</sup>

### **The Common Law Right to an Oral Hearing**

The issue that arose in *A* as to what standards of justice are appropriate for bodies that have to act as a court has been at the centre of a number of recent judgments involving prisoner releases. In a series of decisions over a number of years, the European Court of Human Rights has held that leaving decisions of risk and dangerousness in the hands of the executive after the punitive element of a life sentence – the so-called tariff period – has been served is in breach of article 5 (4) of the European Convention on Human Rights which prescribes that everyone who is deprived of his liberty shall be

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using their common law discretion to exclude confessions which were strictly admissible under the emergency test. For discussion of this further use of the common law to promote the interests of justice within the framework of the emergency laws, see D. S. Greer, "The Admissibility of Confessions under the Northern Ireland (Emergency Provisions) Act" (1980) 31 *N.I.L.Q.* 205, J. Jackson, *Northern Ireland Supplement to Cross on Evidence* (5<sup>th</sup> ed.) (1983), pp.151–154 and J. Jackson and S. Doran, *Judge without Jury: Diplock Trials in the Adversary System* (1995), pp.37–38. The discretion was later given a statutory footing under s.11(3) of the Northern Ireland (Emergency Provisions) Act 1978.

<sup>22</sup> Section 6(2) of the Northern Ireland (Emergency Provisions) Act 1973.

<sup>23</sup> [2005] UKHL 71, para.55.

<sup>24</sup> *ibid.*, para.80.

entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court.<sup>25</sup> As a result of the landmark decision in *R v Secretary of State for the Home Department ex p Anderson*,<sup>26</sup> all mandatory as well as determinate life sentence prisoners in the UK became entitled after the expiry of their tariff to an oral hearing. But if the European Convention provided the momentum for this particular decision, the House of Lords decision in *R (on the application of Smith) v Parole Board; R (on the application of West) v Parole Board*<sup>27</sup> relied on the common law to extend the principle of an oral hearing to other categories of prisoners challenging the revocation of their licence.

In *Smith and West* two prisoners were recalled to prison on the ground that each had breached the conditions of his licence. In each case the Parole Board considered the appellant's written representations but rejected them and the issue before the House of Lords was whether the appellants should have been offered an oral hearing. Under section 32 of the Criminal Justice Act 1991, when considering whether to release prisoners after the revocation of their licences, the Parole Board was permitted to hold an oral hearing (in the form of an interview by a Parole Board member) if it thought it necessary or desirable to do so but was not expressly required to do so. The greater part of the argument in the appeals centred on whether there had been compliance with articles 5 and 6 of the European Convention. Their Lordships expressed no clear view as to the applicability of article 6 but agreed that the protection offered by article 5(4) came within the ambit of licence revocation cases because article 5(4) conferred a right on a prisoner to have his detention lawfully reviewed by a court when a new situation of detention arose for the prisoner, as it did when his licence was revoked. The difficulty was that article 5(4) says little about how a court should conduct these proceedings. Although their Lordships made some reference to the European authorities on what was required by article 5(4),<sup>28</sup> they chose to read the common law requirements of procedural fairness into article 5(4). The Parole Board's review of the decision to revoke a prisoner's licence satisfied the requirements of article 5(4) provided it was conducted in a manner which met the requirements of procedural fairness. According to Lord Hope of Craighead, although procedural fairness was not a requirement of article 5(4) it was built into the convention requirement because article 5(4) required that the continuing detention must be judicially supervised and under domestic common law bodies acting judicially must conduct their proceedings in a way that was procedurally fair.<sup>29</sup>

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<sup>25</sup> See, e.g. *Thynne, Gunnell and Wilson v United Kingdom* (1991) 13 EHRR CD 135, *Hussain v United Kingdom* (1996) 22 EHRR 1, *Stafford v United Kingdom* (2002) 35 EHRR 32.

<sup>26</sup> [2002] UKHL 46.

<sup>27</sup> [2005] UKHL 1.

<sup>28</sup> Lord Bingham referred to a number of European cases where the European Court considered that the possibility of a detainee being heard in person or through some form of representation had been recognised as a fundamental procedural guarantee in matters of deprivation of liberty: see, e.g. *De Wilde v Belgium (No 1)* (1971) 1 EHRR 373 at 407 (para.76), *Winterwerp v Netherlands* (1979) 2 EHRR 387 at 409 (para.60), *Sanchez-Reisse v Switzerland* (1987) 9 EHRR 71 at 83 (para.51).

<sup>29</sup> [2005] UKHL 1, para.75.

The Parole Board did not dispute that it had to act in a procedurally fair manner and accepted that in some cases, as where there is a dispute on an issue of fact material to the outcome, procedural fairness may require it to hold an oral hearing at which the issue may be contested. But it resisted the view that there should be any presumption in favour of an oral hearing in these cases. In order to determine what was procedurally fair, their Lordships considered that account must be taken of the interests at stake. According to Lord Bingham:<sup>30</sup>

“On one side is the safety of the public with which the Parole Board cannot gamble . . . On the other is the prisoner’s freedom. This is a conditional, and to that extent precarious freedom. In *Weeks v UK* (1988) 10 EHRR 293 at 307 – 308 (para 40), the European Court of Human Rights . . . recognised the freedom enjoyed by a discretionary life sentence prisoner as ‘more circumscribed in law and more precarious than the freedom enjoyed by the ordinary citizen’ but as, none the less, a state of liberty for the purposes of art 5 of the convention. The value of freedom to a prisoner, even when conditional, was acknowledged by the Supreme Court of the United States in *Morrissey v Brewer* (1972) 408 US 471 (para.12) and by Dickson J, dissenting (although not on this point), in the Supreme Court of Canada in *Howarth v National Parole Board* (1974) 50 DLR (3d) 349 at 358.”

His Lordship considered that while an oral hearing was most obviously necessary to achieve a just decision in a case where facts are in issue which may affect the outcome, there were other cases in which an oral hearing may well contribute to achieving a just decision. His Lordship went on to quote from a passage in the United States Supreme Court case of *Goldberg v Kelly*,<sup>31</sup> where Brennan J said that oral presentations permitted the recipient to mould his argument to the issues the decision maker appeared to regard as important in a manner that was not possible with written submissions. Although, in Lord Bingham’s view, the common law duty of procedural fairness did not require the Parole Board to hold an oral hearing in *every* case where a determinate prisoner resists recall if he does not decline the offer of such a hearing, the duty should not be as constricted as it had hitherto been held in previous rulings. Even if important facts were not in dispute, they may be open to explanation or mitigation or may lose some significance in the light of other new facts. While the Parole Board’s task was to assess risk, it may be greatly assisted in discharging it by exposure to the prisoner or the questioning of those who have dealt with him. It may often be very difficult to address effective representations without knowing the points which are troubling the decision maker. The prisoner should have the benefit of a procedure which fairly reflects, on the facts of his particular case, the importance of what is at stake for him.

As in the *A* case, it is not entirely clear whether their Lordships were stating what the common law required in these circumstances or whether they were adopting an expansive interpretation of the common law. What is clear is that

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<sup>30</sup> *ibid.*, para.30.

<sup>31</sup> (1970) 397 US 254 at 269.

they were giving a more expansive interpretation of what procedural fairness required than had been considered necessary by the Court of Appeal and by previous rulings. Their Lordships did not require an oral hearing in every case where a prisoner has had his licence revoked. But as David Pannick has argued, given that the liberty of the prisoner is a matter on which there is much at stake both for the prisoner and society, it is difficult to see that there will be many cases where denial of an oral hearing is consistent with the principle of fairness when the Board is minded to require the prisoner to remain in custody and the prisoner asks for a hearing.<sup>32</sup> Pannick concluded by saying that “as is the way with the common law, in a few months the novel principle stated by the House of Lords will ... have become orthodox practice”.<sup>33</sup>

The case also serves as an example of the way in which the courts can use the common law to put flesh on the bones of rather general and uncertain human rights standards. Although article 5(4) requires the lawfulness of a person’s detention to be decided by a court, it has been unclear what procedures should govern such a “court”. In some instances the European Court has ruled that the right to be heard is a fundamental procedural guarantee in matters of liberty but the scope of this right has not been altogether clear.<sup>34</sup> The common law was therefore able to be used to establish more clearly what the bounds of such a right were. Common law rights and convention rights have different roots. As Lord Hope said,<sup>35</sup> the introduction of Convention rights into domestic law by the Human Rights Act provides a minimum standard of human rights protection. But it does not restrict any other right or freedom which the law confers and this is where the common law is able to step in and impose those conditions of procedural fairness that it requires of a court. Both sets of rights are therefore able, as Lord Hope put it, to “inform” each other.<sup>36</sup> The Convention informs the common law as it is the Convention which requires there to be a judicial review of detention in the first place but the common law in turn is able to inform the Convention through its requirement of procedural fairness.

### **The Common Law Right to Disclosure of Information**

If *Smith and West* represents to date the high water mark of common law protection in the context of prisoner release cases, two more recent decisions of the House of Lords raised questions as to how much further the common law principle of procedural fairness should be extended in such cases. The certified issue in *Roberts v Parole Board*<sup>37</sup> was whether the Parole Board was able within the powers granted by the Criminal Justice Act 1991 and compatibly with article 5 of the Convention to withhold material relevant to the appellant’s parole review from the appellant’s legal representatives and instead to disclose that material to a specially appointed advocate who would represent the appellant in the absence of the appellant and his legal

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<sup>32</sup> D. Pannick, Parole Board Annual Lecture, 6 April 2005, available at [www.paroleboard.gov.uk](http://www.paroleboard.gov.uk)

<sup>33</sup> *ibid.*, p.8.

<sup>34</sup> See S. Trechsel, *Human Rights in Criminal Proceedings* (2005), pp.482-3. [2005] UKHL 1, para.73.

<sup>36</sup> *ibid.*, para.74.

<sup>37</sup> [2005] UKHL 45.

representative at a closed hearing. A similar issue arose in *Re McClean*<sup>38</sup> decided by the House on the same day as *Roberts* in the somewhat different context of a hearing established to determine whether a prisoner was entitled to accelerated release under the scheme for prisoner release agreed under the terms of the Belfast Agreement. The panel of sentence review commissioners in this case had revoked a declaration of eligibility for release made in McClean's favour after an incident while he was on pre-release from prison. In the course of the hearing the panel had granted an application from the Secretary of State to rely on secret intelligence information which was not disclosed to the prisoner and had applied for a special advocate to represent his interests. The case raised important issues as to whether articles 5 and 6 of the Convention applied to this particular prisoner release scheme and issues as to what procedural fairness required under this scheme but in the event the Law Lords did not need to decide these questions as they considered that the procedures did not in fact work unfairly to McClean in the instant case. He had been given the gist of the case against him and the commissioners had declared that they had taken no account of the damaging information submitted by the Secretary of State because it was not necessary to do so to reach its decision.

In *Roberts* the appellant, a prisoner whose tariff period of 30 years for the murder of three unarmed police officers expired in 1996, was moved from an open prison to a closed prison in 2000 apparently on the basis of alleged breaches of trust committed by him while he was held in open conditions. The Parole Board ruled that certain "sensitive material" should be withheld from the appellant on the grounds that the safety of the source of the information would be at risk if the material was disclosed and that the material should be disclosed instead to a specially appointed advocate. The Court of Appeal and the House of Lords were not required to rule on whether this proposed procedure was unfair to the appellant. The question was a narrower one as to whether as a matter of principle the special advocate procedure could ever be adopted.

As in *Smith and West* a core argument centred upon what was required under article 5(4) of the Convention given that the appellant had a right under this article to have his detention reviewed by a court. But again, as in *Smith and West*, their Lordships drew more strongly upon principles of common law procedural fairness than upon European jurisprudence in deciding what was required under article 5(4). At stake here was the fundamental principle of judicial process that a party is entitled to the disclosure of all materials which may be taken into account by the court when reaching a decision adverse to that party. Their Lordships agreed that the use of the special advocate procedure could never, as Lord Woolf put it,<sup>39</sup> be a "panacea" for the grave disadvantages of a person not being aware of the case against him. There appeared to be some difference of emphasis, however, between their Lordships as to just how debilitating such a procedure could be. Lord Woolf considered that the use of such a procedure could mitigate these disadvantages. A special advocate could persuade the tribunal that there could perfectly properly be disclosure subject to no restrictions. The

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<sup>38</sup> [2005] UKHL 46.

<sup>39</sup> [2005] UKHL 45, para.60.

advocate may be able to destroy the credibility of a witness whose evidence is not disclosed. Although the advocate could not communicate with the prisoner, in appropriate circumstances he may be authorized to communicate with his legal representative or he may receive useful information before he has been instructed. Other Law Lords appeared to be less sanguine about the ability of a special advocate to mitigate the disadvantages of not knowing the case against one. Although Lord Rodger of Earlsferry did not consider the analogy apposite,<sup>40</sup> Lord Carswell and Lord Steyn considered that the prisoner against whom unfounded allegations have been made is in a “Kafkaesque” situation.<sup>41</sup> According to Lord Carswell, he may be altogether in the dark about the allegations made and unable to divine what they may be and give instructions about rebutting them.<sup>42</sup> The special advocate was necessarily limited in the steps which he can take to challenge them bearing in mind his inability to take instructions from the prisoner. Lord Steyn was the strongest in his criticism of the special advocate procedure:<sup>43</sup>

“Once the special advocate becomes aware of the case against the prisoner he may not divulge that information to the prisoner. It is not to the point to say that the special advocate procedure is ‘better than nothing’. Taken as a whole, the procedure completely lacks the essential characteristics of a fair hearing. It is important not to pussyfoot about such a fundamental matter: the special advocate procedure undermines the very essence of elementary justice. It involves a phantom hearing only.”

Although their Lordships expressed somewhat different views as to how debilitating the special advocate procedure could be to the presentation of the prisoner’s case, the ultimate question was whether the Parole Board had the power to authorise such a procedure and on this question their Lordships were more seriously split. Unlike the statutory schemes in Northern Ireland for the release of paramilitary prisoners and life sentence prisoners,<sup>44</sup> the Parole Board was not given an express power to adopt such a procedure either under primary legislation or under its rules of procedure. Lord Bingham and Lord Steyn took the view that in the absence of such an express power it was not lawful for the Parole Board to depart from the ordinary rules of procedural fairness. According to Lord Bingham,<sup>45</sup> the fact that Parliament had made provision in other situations for the use of the special advocate procedure showed that if Parliament intends to depart from the ordinary rules of procedural fairness, it legislates to confer such a power in clear and express terms. According to Lord Steyn,<sup>46</sup> the special advocate

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<sup>40</sup> *ibid.*, para.110..

<sup>41</sup> *ibid.*, paras.95, 126.

<sup>42</sup> *ibid.*, para.126.

<sup>43</sup> *ibid.*, para.88.

<sup>44</sup> See in relation to the paramilitary release scheme, the Northern Ireland (Sentences) Act 1998, Sch.2. In Northern Ireland the release of life sentence prisoners is governed by the Life Sentences (Northern Ireland) Order 2002, Sch.2 to which empowers the Secretary of State to make rules to withhold evidence from a prisoner and provides for the appointment of a special advocate.

<sup>45</sup> [2005] UKHL 45, para.30.

<sup>46</sup> *ibid.*, para.93.

procedure struck at the root of the prisoner's fundamental right to a fair procedure; if such a departure were to be introduced it had to be done by Parliament.<sup>47</sup>

The other Law Lords, however, took the contrary view that in order to meet its statutory obligations the Board was empowered to take steps in exceptional circumstances to authorize the special advocate procedure. Under paragraph 1(2)b of Schedule 5 to the Criminal Justice Act 1991 the Board had the power to do "such things and enter into such transactions as are incidental to or conducive to the discharge of its functions". The Board had a particular statutory duty under section 28(6) of the Crime (Sentences) Act 1997 not to release a life prisoner unless it was satisfied that it was no longer necessary for the protection of the public that the prisoner should be confined. In order to discharge this function it was essential that it had before it all material information necessary for the determination of this issue of public safety and if, as Lord Carswell put it,<sup>48</sup> the only effective way to get that information from reluctant informants was to use the special advocate procedure then the use of that procedure was incidental to or conducive to the discharge of its functions.

Two questions arise from the reasoning of the majority. First, what then is the status of the common law principle of disclosure? Lord Woolf specifically endorsed the declaration in *Smith and West* that the prisoner should have the benefit of a procedure which fairly reflects the importance of what was at stake for him as for society.<sup>49</sup> But their Lordships spoke of a "triangulation" or "triumvirate" of interests that had to be taken into account by the Parole Board in executing its statutory duty – the interests of the prisoner, the interests of society and, as part of this obligation, the interests of third parties who may be at risk if their evidence is disclosed to the Parole Board.<sup>50</sup> Lord Woolf accepted the submission of the appellant's counsel that there is at common law and under article 5(4) a core, irreducible minimum entitlement for a prisoner to be able effectively to challenge any evidence which decisively bears on the legality of his detention.<sup>51</sup> But the question was what that minimum was and here a balancing test had to be carried out to determine whether the minimum was crossed. As this was an appeal based on a matter of principle, their Lordships could not properly perform that balancing procedure in the case before them, but, according to Lord Woolf, they could not determine the matter of principle on the basis that there were no circumstances in which there could be no disclosure of any evidence which decisively bears upon the legality of the prisoner's detention which would justify the appointment of a special advocate.

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<sup>47</sup> There are a number of examples where the courts have invoked the interpretative presumption that fundamental rights may only be interfered with where primary legislation expressly or by necessary implication authorises the interference. See, e.g. *Raymond v Honey* [1982] 1 All ER 756, *R v Home Secretary ex p. Leech* (No 2 [1993] 4 All ER 539 and *R v Lord Chancellor, ex p. Witham* [1998] QB 575.

<sup>48</sup> [2005] UKHL 45, para.131.

<sup>49</sup> *ibid.*, para.46.

<sup>50</sup> "Triangulation of interests" is the term used by Lord Woolf, *ibid.*, at para.48 and by Lord Carswell at para.128. "Triumvirate of interests" is the term used by Lord Woolf at para.76.

<sup>51</sup> [2005] UKHL 45, para.68.

Earlier in his judgment, Lord Woolf referred to Lord Bingham's judgment in *R v H*<sup>52</sup> where his Lordship considered that there could be some derogation from the golden rule of full disclosure in order to protect the public interest in the investigation of crime and considered it could be justified to appoint a special advocate in exceptional circumstances. Although in *H* Lord Bingham was considering whether such a procedure was compatible with the accused's right under article 6 to a fair trial, his statements were, in Lord Woolf's view,<sup>53</sup> even more apposite in the context of a hearing where issues of guilt or innocence were not at stake and where although the decision was of the greatest importance to the prisoner, it was not one that was irreversible. In *H* Lord Bingham had said that "fairness is a constantly evolving concept" and that it was important to recognise that "standards and perceptions of fairness may change, not only from one century to another but also, sometimes, from one decade to another."<sup>54</sup> Lord Bingham's response at the end of his judgment in *Roberts* was that the issue in *H* could be distinguished from that which had to be determined in *Roberts*.<sup>55</sup> In *H* the House held that a special advocate might exceptionally be appointed in a criminal case to help resolve an issue whether a trial could be fairly conducted if material favourable to the defendant were not disclosed to him. It was not suggested that any part of the prosecution case against the defendant could be properly withheld from the defendant and his legal representative. Although the issues were different in each case, Lord Bingham's reference to fairness as an evolving concept is an illustration of how the common law can be adapted to deal with changing circumstances.<sup>56</sup> If the *Smith and West* case is an example of the common law principle of procedural fairness evolving to take full account of the need to hear prisoners when matters of liberty are at stake, *Roberts* is an example of the principle adapting to the need for the Parole Board to carry out its statutory obligation. The question here is whether their Lordships took full enough account of the fact that although charged with carrying out a statutory duty, the Parole Board has for the purposes of article 5(4) of the Convention to operate as a judicial body and to comply with the principles of fairness that are consonant with a judicial body.

This leads on to the second question which is how the majority judgments can be reconciled with the human rights duty under article 5(4) for the body reviewing the detention of the prisoner to act as a court. There were earlier rulings of the European Court set out by Lord Carswell in his judgment where the Court had held that the inability to challenge the prosecution case

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<sup>52</sup> [2004] 2 AC 134.

<sup>53</sup> [2005] UKHL 45, para.42.

<sup>54</sup> [2004]2 AC 134, para.11.

<sup>55</sup> [2005] UKHL 45, para.31.

<sup>56</sup> See also *Lloyd v McMahon* [1987] AC 625, 702 where Lord Bridge of Harwich commented that "the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better encapsulates the underlying concept, what the requirements of fairness demand when any body, domestic, administrative, or judicial, has to make a decision which will affect the rights of individuals depends upon the character of the decision making body. The kind of decision it has to make and the statutory or other framework in which it operates."

in various respects constituted a breach of article 5(4).<sup>57</sup> Lord Carswell referred to Lord Bingham's statement in *H*<sup>58</sup> that the consistent practice of the Strasbourg court has always been to declare principles and apply these on a case by case basis according to the particular facts of the case but to avoid laying down rigid or inflexible rules.<sup>59</sup> He also referred to Lord Bingham's statement in *Brown v Stott*<sup>60</sup> that the court pays very close attention to the facts of particular cases coming before it and recognizes that there is always a need for a fair balance between the general interest of the community and the personal rights of the individual. In this case their Lordships had to balance competing interests on the question of principle as to whether a prisoner could ever be denied sufficient knowledge of the allegations made against him and a special advocate appointed to represent his interests. On this question Lord Carswell considered that the interests of the informant and the public must prevail over those of the prisoner, although he stressed that the use of the special advocate procedure should be rare and exceptional and he accepted that there could well be cases in which it would not be sufficiently fair for such a procedure to be used.<sup>61</sup>

Lord Bingham's view of how the European Court has perceived its balancing role in relation to article 6 of the Convention has been criticized on the ground that the Court has not consistently applied such a broad balancing approach.<sup>62</sup> A similar criticism could be made of the way in which Lord Carswell characterized the manner in which competing interests should be balanced for the purposes of article 5(4). But however the Court has perceived its balancing role, the case by case approach of the Court has limited the manner in which it has been able to develop its jurisprudence. The European Court has rarely determined issues of principle of the kind which their Lordships had to consider in *Roberts*. Instead it has had to approach cases on the basis of whether in the particular circumstances of each case before it the proceedings *as a whole* upheld the standards of fairness required under article 6 or under article 5(4). This points, as Lord Carswell said,<sup>63</sup> to a difference of approach between the manner in which the European Court and our domestic courts decides cases and illustrates a problem with drawing too heavily on the Strasbourg jurisprudence.

The difference can be illustrated in the judgment of Lord Bingham. Although his Lordship considered that the special advocate procedure that the Parole Board proposed to adopt in resolving the appellant's parole review infringed the basic principles of common law and considered that these principles could not be overridden without an express power given to it by Parliament, his Lordship felt unable to rule that the adoption of this procedure was necessarily incompatible with article 5(4). In view of the

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<sup>57</sup> *Lamy v Belgium* (1989) 11 EHRR 529, *Nikolova v Bulgaria* (1999) 31 EHRR 64, *Garcia Alva v Germany* (2001) 37 EHRR 335.

<sup>58</sup> [2004] 2 AC 134, para.33.

<sup>59</sup> [2005] UKHL 45, para.140.

<sup>60</sup> [2003] 1 AC 681, 704.

<sup>61</sup> [2005] UKHL 45, para.144.

<sup>62</sup> See A. Ashworth, *Human Rights, Serious Crime and Criminal Procedure* (2002), Hamlyn Lectures. See also A. Ashworth and M. Redmayne, *The Criminal Process* (3<sup>rd</sup> ed., 2005), pp.41-42.

<sup>63</sup> [2005] UKHL, para.140.

“dramatic impact of deprivation of liberty on the fundamental rights of the individual”,<sup>64</sup> his Lordship doubted whether a decision of the Board adverse to the appellant based on evidence not disclosed to him which neither he nor his legal representatives has had an opportunity to challenge could be held to meet the fundamental duty of procedural fairness required by article 5(4). Lord Steyn for his part appeared to have no hesitation in considering that the “phantom hearing involving a special advocate” could not meet the minimum standards of fairness under art 5(4) and domestic law.<sup>65</sup> But as Lord Bingham said the practice of the European Court is to consider the proceedings in question as a whole and its judgment was almost necessarily made in retrospect when there is evidence of what actually happened. He continued:<sup>66</sup>

“Save where an issue of compatibility turns on a pure question of statutory construction, the House should in my opinion be similarly reluctant to rule without knowing what has actually happened.”

In the present context his Lordship went on to say that there were some outcomes where the use of a specially appointed advocate would not offend article 5(4). The Board could reject the sensitive material tested by the special advocate or having heard the material tested it might decline to continue the review unless the sensitive material were disclosed to the appellant’s legal representatives or the Board might devise a way of redacting or summarising the sensitive material or the Board might reach a decision without relying on the sensitive material, as indeed happened in *McClean*. If any of these possibilities materialised, there would not be a violation of article 5 (4).

The sensitivity of the European Court to the facts of each case in applying human rights principles and the retrospective approach which it has adopted points then to a defect in the development of human rights jurisprudence as compared with the common law. It has meant, as Lord Bingham said, that the Court has eschewed rigid and inflexible rules but it has also made it difficult for principles to develop in the same manner as the common law. This suggests that there is a continuing role for the common law in the post Human Rights Act era. Not only can it play a role in developing the principles that are required under the Convention as illustrated in the *Smith and West* case but as *Roberts* indicates, cases involving matters of fairness may still have to take autonomous account of common law principles. In *Roberts* their Lordships disagreed over how far the common law principles of procedural fairness should extend in a context where a body like the Parole Board has a fundamental duty to protect the public from risk. But the continuing relevance of these common law principles was clearly evident in the judgments.

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<sup>64</sup> *ibid.*, para.19 citing the European Court in *Garcia Alva v Germany* (2001) 37 EHRR 335, para.39.

<sup>65</sup> *ibid.*, para.96.

<sup>66</sup> *ibid.*, para.19.

### The Burden of Proof

The importance of the common law right to a fair decision making process can be further illustrated by the *McClellan* case where there was some doubt expressed as to whether article 5(4) and article 6 of the Convention applied to the accelerated prisoner release scheme.<sup>67</sup> We have seen that their Lordships did not consider that any unfairness arose from the use of the intelligence information supplied by the Secretary of State as the sentence review commissioners did not take this into account in reaching their decision. A further issue in the case, however, concerned where the burden of proof lay on the question whether the prisoner represented a danger to the public. In reaching their decision, the commissioners had proceeded on the basis that the burden of proof lay on the prisoner to prove that he would not be a danger to the public. On a judicial review of this decision, the Northern Ireland High Court concluded that it was neither unfair nor disproportionate to require Mr McClellan to establish on the balance of probabilities that he would not be a danger to the public. But the Northern Ireland Court of Appeal in a majority decision considered that the commissioners should not have placed an onus on the prisoner to prove that he would not be a danger to the public if released immediately. The House of Lords reversed the decision of the Court of Appeal and held that there was no error of principle in the Commissioners' approach.

A number of their Lordships, however, questioned the aptness of speaking of a burden on the prisoner on this question. In the Northern Ireland Court of Appeal *McClellan* LJ had considered that it was inappropriate to place a burden of proof on the prisoner because the conclusion whether someone is a danger to the public was in the nature of an "opinion or impression" and not the establishment of a fact that either party could be asked to prove.<sup>68</sup> In his judgment Lord Carswell agreed that this question was a pure exercise of judgment.<sup>69</sup>

". . . more akin to many administrative decisions than the ordinary judicial process of deciding whether a matter requiring proof has been established. Decisions of the latter type require sufficient evidence to be adduced by the party who wishes to establish it, and if he does not succeed in doing so it may properly be said that he has failed to discharge the burden resting upon him. Although the prisoner obviously wants the Commissioners to find that the conditions have been established, it is not a *lis inter partes*, and it is not the function of the Secretary of State to prove the case for keeping him in custody.

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<sup>67</sup> Although some Law Lords considered it was unnecessary to express a view on this question as the prisoner had not suffered any unfairness at the hands of the sentence review commissioners, a view was expressed by Lord Scott of Foscote that art.5(4) was not relevant to the proceedings because the prisoner's human rights did not entitle him to any early release scheme ([2005] UKHL 46, paras.51 and 52). Lord Brown of Eaton-under-Heywood considered there was "force" in this view (para.105).

<sup>68</sup> [2004] NICA 14, para.77.

<sup>69</sup> [2005] UKHL 46, para.73.

Support for this view could be found in the observation of Lord Bingham in *R v Lichniak*<sup>70</sup> when he said of the Parole Board that he doubted whether there was a burden on the prisoner to persuade the Parole Board that it was safe to recommend release, since this was an “administrative process requiring the board to consider all the available material and form a judgment”. It followed that it was the duty of the commissioners to conduct a full review of the case without imposing a burden of proof either on the prisoner or on the Secretary of State, their object being to determine whether in their opinion the conditions required to be satisfied for release remain satisfied.

This approach is reminiscent of that adopted by the majority in *Roberts* in considering how the Parole Board should carry out its statutory functions. Although a “court” when it is conducting a review of detention for the purpose of article 5(4), the Parole Board does not operate on the basis of an adversarial procedure whereby it is for one party to prove matters of risk to the satisfaction of the board. The Board itself has a statutory function to satisfy itself whether a prisoner is any longer a danger to the public. Although it may be a misnomer to speak of a burden of proof in the conventional sense, however, Lord Bingham acknowledged in his judgment in *McClean*, as he had done in *Lichniak*, that in the last resort any reasonable doubt which the commissioners properly entertain whether if released immediately, a prisoner would be a danger to the public must be resolved against the prisoner.<sup>71</sup> While this may be the correct approach in the context of the accelerated release scheme in Northern Ireland where prisoners had no expectation of release under human rights law, the question remains whether this is the correct approach in the context of a life sentence prisoner who is entitled to have the lawfulness of his detention reviewed after the tariff period has expired.

*Lichniak* was distinguished in *R (on the application of Sim) v Parole Board and another*<sup>72</sup> which was an extended sentence case in which the prisoner had been recalled to prison during the extended licence period. Like the judge below, Keene LJ considered that whereas the objective of the sentencing court which imposes an indeterminate sentence is that a person is not to be released unless and until it can be shown that he no longer presents a danger to the public, in an extended sentence case the object of the sentence is not to subject the prisoner to detention for the extended licence period but rather to manage the risk in the community rather than in prison albeit that it is recognised that it may be necessary to resort to further detention if that aim fails. As he put it, “The offender is not on licence as an alternative to prison; rather he is on licence as an alternative to liberty”.<sup>73</sup> The Court of Appeal then applied section 3 of the Human Rights Act to read and give effect to section 44 of the Criminal Justice Act 1991 in a way which was compatible with article 5(4) of the Convention by requiring the Board to direct the offender’s release unless positively satisfied that it was necessary for the protection of the public that he be confined.

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<sup>70</sup> [2002] UKHL 47, para.16.

<sup>71</sup> Para.29.

<sup>72</sup> [2003] EWCA Civ. 1845.

<sup>73</sup> *ibid.*, para.46.

This case was decided before *Smith and West* where it was held that any prisoner who is entitled to have the lawfulness of his detention reviewed by a court for the purposes of article 5(4), is entitled also to a standard of procedural fairness consonant with the interests at stake. It will be recalled that Lord Bingham there said that on the one side there is the safety of the public, with which the Parole Board cannot gamble; on the other the prisoner's freedom. Although a life sentence prisoner is not entitled to unconditional freedom after the period of his tariff is served, his freedom is conditional and to that extent precarious but it is nonetheless a state of liberty to which he is entitled under the Convention if no longer a danger to the public. Even though for the reasons given by Lord Carswell, this should not necessarily impose a burden of proof on any party, it may be argued that because an issue of liberty is at stake (albeit a conditional one) the Parole Board should direct the prisoner's release on the expiry of the tariff period unless positively satisfied that it is necessary for protection of the public that he be confined. This would not diminish the Parole Board's statutory obligation to determine the issue of risk but it would give weight to the principle, arguably as embedded in the heritage of the common law as in human rights law, that when someone becomes entitled to release albeit under conditions then he should be released unless those conditions are not satisfied.

### **The Right to Cross-Examination**

A final question which has yet to be definitively answered is whether prisoners who are given a right to an oral hearing to have the lawfulness of their detention determined have also a right to cross-examine key witnesses in these hearings. Recent Court of Appeal decisions in England and Wales have failed to give a conclusive answer to this question, although the arguments were framed around the common law as well as human rights law. One of the other arguments made for the prisoner in *Sim* was that the Board should not have considered hearsay evidence in the oral hearing that was provided for the prisoner after his licence was revoked. It was accepted that the Board could take account of hearsay evidence but it was argued that both in terms of common law fairness and under article 5(4) that the prisoner should have been able to cross-examine witnesses on contested matters of fact and to the extent that he was unable to do so, the evidence in question should not have been taken into account by the Parole Board. Reliance was placed on the decision of the European Court of Human Rights in *Hussain v UK*<sup>74</sup> where it was held that where a substantial term of imprisonment may be at stake, article 5 (4) requires an oral hearing in the context of an "adversarial procedure" involving legal representation and the possibility of calling and questioning witnesses. Giving the judgment in the Court of Appeal, Keene LJ did not accept that *Hussain* was seeking to proscribe the use of hearsay.<sup>75</sup> *Hussain* was centrally concerned with the question whether a life sentence prisoner should have been entitled to an oral hearing and the reference to the possibility of calling witnesses was only descriptive of the normal processes of an oral hearing and did not mean hearsay evidence could not be taken into account. He did not believe that the Strasbourg

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<sup>74</sup> *Hussain v UK* (1996) 22 EHRR 1, para.60.

<sup>75</sup> [2003] EWCA Civ. 1845, para.55.

jurisprudence added anything of significance to the test of fair procedure required by the common law.

This is another demonstration of the limitations of the Strasbourg jurisprudence as guidance for the resolution of concrete issues. As in other cases discussed in this essay, his Lordship preferred to seek guidance from the common law. There was considerable authority at common law which established that it was not necessarily unfair to admit hearsay even where the deprivation of liberty was at stake. However in an *obiter dictum* that was to form a central argument in the later case of *R (on the application of Brooks) v Parole Board*,<sup>76</sup> his Lordship added that, like the judge below:<sup>77</sup>

“ . . . I can envisage the possibility of circumstances where the evidence in question is so fundamental to the decision that fairness requires that the offender be given the opportunity to test it by cross-examination, before it is taken into account at all. As so often, what is or is not fair will depend on the circumstances of the individual case.”

This statement would appear to be another example of how the courts are developing the common law to take account of what fairness requires within the context of an oral hearing required by human rights law. In *Sim* the Court dismissed the argument that the prisoner should have been able to cross-examine witnesses on disputed matters of fact on the ground that these matters were not key factors in the Parole Board's decision on the question of risk. But disputed matters of fact were central in the *Brooks* case where the question was whether the panel should have directed the Secretary of State to produce a reluctant witness who had made serious allegations of rape against the prisoner which had led to his arrest and the revocation of his licence. The case was complicated by the fact that the panel had wrongly taken the view that there was no power to compel the witness to attend. In fact the Board had the power to direct the Secretary of State to arrange for the attendance of witnesses if necessary by obtaining a witness summons from the High Court pursuant to rule 34.4 of the Civil Procedure Rules. No request was made by the prisoner's solicitor for the panel to direct the Secretary of State to issue a witness summons and the majority of the Court of Appeal took the view that the Board was entitled to proceed as it did in the absence of the witness, taking into account all the relevant information that was available including the hearsay evidence. Clarke LJ, however, took the view in a dissenting judgment that if the true legal position had been appreciated it would have been much more likely than not that a summons would have been issued because the panel had made it clear in correspondence before the hearing that they regarded the witness's oral evidence as crucial.

*Brooks* is a somewhat unsatisfactory case because the panel, and it would seem the parties as well, failed to appreciate the nature of the powers of the Board. Kennedy LJ and Clarke LJ both agreed with Keene LJ's view that there could be circumstances where the evidence is so fundamental that

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<sup>76</sup> [2004] EWCA Civ. 80.

<sup>77</sup> [2003] EWCA Civ. 1845, para.57. The statement derives from the judgment of Elias J in *R (Sim) v Parole Board and another* [2003] EWHC Admin 152, para.59.

fairness requires that the offender be given an opportunity to test it by cross examination but the question as to when these circumstances might arise was left unresolved by the case. According to Kennedy LJ,<sup>78</sup> fairness could require cross examination when there is a witness who is willing to testify. In this case, however, if the witness had been prevailed upon to attend, she would probably have refused to testify and if she did agree to testify she would have been very unlikely to repeat her allegations against the prisoner, as there was evidence that she had tried to withdraw her allegations. Consequently, her evidence would have added very little to what the Parole Board already knew from the documentation to be her position. For their part, Clarke LJ and Wall LJ considered that it was wrong to speculate as to what might have happened if the witness had been required to testify. Clarke LJ considered that the circumstances of this case were such as to fall within the principle stated by Keene LJ. Wall LJ did not specifically endorse Keene LJ's dictum and was uneasy about divorcing the issue of fairness from the function which the Board had to perform.<sup>79</sup> Although the issue in this case was whether or not the prisoner had raped the complainant, the Board was not conducting a criminal trial and the Board had to balance the hardship and injustice of continuing to imprison a man who is unlikely to cause serious injury to the public against the need to protect the public interest against a man who is not unlikely to cause such injury. In the final balance, however, the Board had to give preponderant weight to the need to protect innocent members against any risk of significant injury.

Wall LJ's reference to the need to consider the Board's statutory duty is one which we have seen featured prominently in the *Roberts* and *McClellan* cases. As in these cases, questions may be asked as to whether sufficient account was taken of the human rights principle that such proceedings must also operate in a judicial manner. It is clear that this does not require a fully fledged common law trial along conventional adversarial lines. In his judgment Kennedy LJ commented that generally speaking unless a request has been made by or of behalf of one of the parties the chairman of the panel should be slow to direct the Secretary of State to produce a witness for cross-examination, especially if he or she is a witness upon whom the Secretary of State does not intend to rely, because the hearing is going to take place "in the context of an adversarial procedure".<sup>80</sup> The reference to "the context of an adversarial procedure" would seem to be directly attributable to the European Court of Human Rights' judgment in *Hussain* referred to above. In *Sim*, as we saw, Keene LJ did not attach much significance to this statement and it is important in any event to bear in mind that the context of adversarial procedure within the European context may be quite different from the notion of adversarialism associated with common law proceedings.<sup>81</sup> It is hard to see why a body such as the Parole Board with the statutory duty of protecting the public should have any hesitation about directing the Secretary

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<sup>78</sup> [2004] EWCA Civ. 80, paras.36 and 37.

<sup>79</sup> *ibid.*, para.71.

<sup>80</sup> *ibid.*, para.33.

<sup>81</sup> For an exploration of the meaning of "adversary procedure" within the European context, see J. Jackson, "The Effect of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment?" (2005) 68 *M.L.R.* 737.

of State to produce a witness where it considers that the witness could give valuable information to the Board and the fact that no request is made by the parties should not deter the Board from doing this. Wall LJ's dictum may best be seen in the context of the facts of the case in hand where the witness was a reluctant witness and it was unclear what good would therefore be served by requiring her to testify. But even where the Board does not believe that a witness may provide further valuable information, the question remains whether fairness should not require that the prisoner be given an opportunity to test the evidence of a crucial albeit reluctant witness where this is requested, provided sufficient protection can be given to the witness in question. It would seem that further clarification is needed on this question.

### Conclusion

This article has argued that the common law still has an important part to play in safeguarding individual rights in the post Human Rights Act era. In arguing thus, I do not wish to minimise the significance of what has been termed the "human rights revolution".<sup>82</sup> Our domestic law must now take account of the requirements of the Convention and we see this in the way in which new principles such as the principle of proportionality are increasingly becoming part of common judicial parlance. In the field of criminal justice, the jurisprudence of the European Court of Human Rights which must be taken into account under the Human Rights Act has played a role in protecting the rights of the defendant in a number of areas. Examples include the constraint which the Court has put upon the manner in which inferences may be drawn from silence under the Criminal Evidence (Northern Ireland) Order 1988 and the strict limits it has set upon departures that are made from the defence right to disclosure of evidence before trial.<sup>83</sup> It has been argued elsewhere that European procedures must now align themselves to models of proof that are neither traditionally adversarial nor inquisitorial in character.<sup>84</sup> Although the principles of fair trial set out in the Convention have a distinctly common law hue, the European Court has developed its own autonomous principles of fairness and has departed from the strait jacket of the specific rights contained in article 6 (2) and (3).

But this does not mean that as new procedures are developed there is no role for the common law to play and this can be clearly seen in the post-conviction phases of proof that are being developed in prisoner release cases. We have seen that the European Court was responsible through its interpretation of article 5(4) for requiring that judicial hearings are put in place to govern the release of life sentence prisoners but the common law has played a role in extending these to licence revocation cases. In his classic account of the development of pre-trial prosecution procedures in England

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<sup>82</sup> See C. Harvey, "Governing after the Rights Revolution" (2006) available at [www.law.qub.ac.uk/humanrts/hrevents/charvey06.doc](http://www.law.qub.ac.uk/humanrts/hrevents/charvey06.doc).

<sup>83</sup> Key judgments on the silence legislation include *Murray v United Kingdom* (1996) 22 EHRR 29, *Condron v United Kingdom* (2001) 31 EHRR 1 and *Beckles v United Kingdom* 2002 36 EHRR 13. Key judgments on disclosure include *Rowe and Davis v United Kingdom* (2000) 30 EHRR 1, *Fitt v United Kingdom* (2000) EHRR 1, *Jasper v United Kingdom* (2000) 30 EHRR 1 and *Edwards and Lewis v United Kingdom* (2005) 40 EHRR 24.

<sup>84</sup> *Supra* n.81 above.

and Wales, Lord Devlin once argued that the story was one of a constant drift always in the same direction from unfettered administrative action to regulated judicial proceeding.<sup>85</sup> We are now witnessing a similar story at the other end of the criminal justice spectrum of a gradual transformation of the procedures governing prisoner releases from executive and administrative action to regulated judicial proceedings. As this story unfolds, human rights jurisprudence and the common law are interacting together to develop a framework as to how these proceedings should operate.<sup>86</sup> This development is still in a state of evolution and the full story has yet to be completed but what is clear is that the common law rules of procedural fairness are playing a part in this jurisprudence.

We have referred already to the passage in Lord Carswell's judgment in the *A* case highlighting the ability of the common law to adapt to changing circumstances.<sup>87</sup> After concluding that the common law was quite capable of embracing a rule which forbade the admission of evidence obtained by the use of torture, his Lordship added that it was only right that this should be done in what Tennyson described as:<sup>88</sup>

“A land of settled government  
A land of just and old renown  
Where Freedom slowly broadens down  
From precedent to precedent.”

Tennyson wrote these lines after the passage of the Reform Bill of 1832 and they expressed his satisfaction that so revolutionary a measure had been made law by constitutional means without resort to violence. History has shown that Parliament cannot always be relied upon to defend basic fundamental freedoms and the common law has also played an important role in this respect. Now recourse may also be had to international human rights standards. The passage of the Human Rights Act has strengthened this international dimension as domestic courts must give effect to the human rights and fundamental freedoms laid down under the European Convention and take account of the jurisprudence of the European Court of Human Rights. This is an important new development but it should not serve to overshadow the common law. The common law has proved its ability to adapt to changing circumstances over many centuries and it is quite capable of accommodating this new development.

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<sup>85</sup> P. Devlin, *The Criminal Prosecution in England* (1960), p.10.

<sup>86</sup> This may be seen as an example of what Laws LJ has referred to as a “municipal law of human rights” being developed by the incremental method of the common law taking account of the Strasbourg jurisprudence as the courts are enjoined to do under s.2 of the Human Rights Act: see *Runn Begum v Tower Hamlets London Borough Council* [2002] 1 WLR 2491, 2500 and *R(M) v Commissioner of the Police of the Metropolis* [2001] A.C.D. 508.

<sup>87</sup> See text at *supra* n.17.

<sup>88</sup> From “You Ask Me, Why” (1842) verse iii. See *Poems of Lord Tennyson* (1954), 440- 441.

## THE ROAD TO SHANKLIN PIER, OR THE LEADING CASE THAT NEVER WAS

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On the night of 15<sup>th</sup> October 1987 a huge storm hit the south of England. It was recorded as the greatest storm to hit the area since the Great Storm of 1703.<sup>1</sup> In places the wind reached a speed of over 100 knots. 18 people were killed, and an estimated 15 million trees were lost. In some cases the landscape was changed irrevocably.<sup>2</sup>

One of the casualties of the storm was the Victorian pier at Shanklin, on the Isle of Wight. According to the BBC website,<sup>3</sup> this pier was built under statutory powers by the Shanklin Esplanade and Pier Company and opened to the public in the summer of 1890. From then on the pier had a relatively uneventful career for most of its existence. We are told that the pier was used for a number of activities, including fishing and clay pigeon shooting. Cruises were provided round the island from the landing stage, and those who felt more adventurous could sail to Brighton or Eastbourne, or even to Cherbourg in France. Regattas and water carnivals were popular, and there was always entertainment from local stunt men, including “Professor Wesley”, a one-legged man who dived into the sea from a flaming tower on the pier.

During the Second World War suffered a fair degree of damage, being bombed by German aircraft. It was then partly demolished to prevent it being used as a landing stage for invading troops. After the war ended steps were taken to refurbish the pier, and it is at this stage that we move into legal territory, for as a footnote to the BBC website records, one incident that occurred during the plans to re-open Shanklin Pier was the painting of the pier. This gave rise to what the website terms the “landmark Contract Court Case” of *Shanklin Pier Ltd v Detel Products Ltd*.<sup>4</sup> However, most contract lawyers would agree that this gives the case more importance than it deserves; though it is certainly a significant case, it is not a landmark case for the law of contract as *Donoghue v Stevenson*<sup>5</sup> is a landmark case for the law of tort. There is no notice on the sea front at Shanklin, as there is at the site of Minchella's Café on Wellmeadow Street in Paisley. Academic lawyers do not organise pilgrimages to Shanklin.<sup>6</sup> Paint makers do not run competitions

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<sup>1</sup> [www.dandantheweatherman.com](http://www.dandantheweatherman.com)

<sup>2</sup> As in Sevenoaks, Kent, where the famous trees that gave the town its name were reduced to a single specimen.

<sup>3</sup> [www.bbc.co.uk/dna](http://www.bbc.co.uk/dna), “The Guide to Life, the Universe and Everything”.

<sup>4</sup> [1951] 2 K.B. 854.

<sup>5</sup> [1932] A.C. 562.

<sup>6</sup> Compare the 1990 “Pilgrimage to Paisley” organised by the Canadian Bar Association, the Faculty of Advocates and the Law Society of Scotland. This culminated in a conference in Paisley Town Hall attended by over two hundred judges, lawyers and academics from around the world: see the Scottish Council of Law Reporting website at [www.scottishlawreports.org.uk](http://www.scottishlawreports.org.uk).

asking customers to compose a slogan on the lines “Blenkinsop’s Paint will not peel off your pier because . . .”<sup>7</sup>

Yet it is the purpose of this paper to argue that *Shanklin Pier Ltd v Detel Products Ltd*, had it been properly appreciated and applied, could indeed have been a case as important as *Donoghue v Stevenson*. More than that, the “collateral contract” analysis used in that case could have been used to provide consumers with a remedy against the manufacturer as effective, if not more so, than the tort of negligence as developed in *Donoghue v Stevenson*. In the pages which follow we shall begin by looking at the background to *Shanklin Pier Ltd v Detel Products Ltd*, and at the judgment of McNair J. in that case. We shall then look at how a similar set of doctrines was used to develop a key consumer remedy in the United States. Finally, we shall see how and why these developments failed to take hold to the same extent on this side of the Atlantic.

### The Law of Warranties

The seller’s warranty was described by Prosser as “a freak hybrid born of the illicit intercourse of tort and contract”.<sup>8</sup> Nowadays the word “warranty” is used, at any rate in the context of the sale of goods, to mean a minor term of the contract, breach of which may give rise to a claim for damages but not to the right to treat the contract as repudiated.<sup>9</sup> However, prior to the nineteenth century the word was used in a very different sense; indeed, the action for breach of warranty originally had nothing to do with the law of contract at all,<sup>10</sup> being older by a century than special *assumpsit*.<sup>11</sup> The original nature of this action is can be seen from *Chandelor v Lopus*,<sup>12</sup> decided at the beginning of the seventeenth century. Here the buyer of a jewel claimed that the seller, a goldsmith who specialised in precious stones, had affirmed it to be a bezoar stone when in fact it was nothing of the sort. The buyer’s action succeeded in the Court of King’s Bench, but the decision was reversed in the Exchequer Chamber for error of law, “because the declaration contains not matter sufficient to charge the defendant, viz.: that he warranted it to be a Bezoar stone, or that he knew that it was not a Bezoar stone; for it may be that he himself was ignorant whether it were a Bezoar stone or not”. Thus it was established that a buyer could not claim damages in respect of a false

<sup>7</sup> A few years ago a competition of this sort was run by Fentiman & Co Ltd, a soft drinks manufacturer. Bottles of Fentiman’s Ginger Beer were marketed with a picture of a snail substituted for the usual company logo of a German Shepherd dog, and customers were invited to complete the slogan “You will not find a snail in a bottle of Fentiman’s Ginger Beer because. . .” The prize was £7,400, the equivalent in contemporary terms of the damages awarded to the pursuer in *Donoghue v Stevenson*.

<sup>8</sup> “The Assault on the Citadel” (1960) 69 Yale L.J. 1099 at 1126. “A more notable example of legal miscegenation could hardly be cited than that which produced the modern action for breach of warranty” (1929) 42 Harvard L.R. 414.

<sup>9</sup> Sale of Goods Act 1979, s.11(3).

<sup>10</sup> Street, *Foundations of Legal Liability* (1906), Vol 1 ch XXVII; Williston, “What Constitutes an Express Warranty in the Law of Sales” (1908) 21 Harvard L.R. 555; Greig, “Misrepresentations and Sales of Goods” (1971) 87 L.Q.R. 179; *Williston on Sales* (4<sup>th</sup> ed., by Squillante and Fonseca, 1974), Vol 2 chap.15.

<sup>11</sup> See below, n.19.

<sup>12</sup> (1603) Cro Jac 4.

representation made by the seller in the absence of proof either of fraud or breach of warranty on his or her part. The action for fraud, of course, developed into the modern tort of deceit; it is the action for breach of warranty that we are concerned with in this context. Generally speaking, this required the buyer to prove three things: (1) that a false representation had been made; (2) that this representation amounted to a warranty; and (3) that he or she had acquired the goods in reliance on this misrepresentation.<sup>13</sup> The question of whether an affirmation amounted to a warranty in any given case was later said to be one of intention,<sup>14</sup> but the early cases do not indicate that anything more was required than that the affirmation be such as to lead a reasonable man to believe that a statement of fact was made to induce the bargain.<sup>15</sup> Thus in *Crosse v Gardner*<sup>16</sup> the plaintiff bought two oxen from the defendant, who affirmed that they belonged to him. In fact the seller had no title, and the true owner later recovered them from the buyer. It was held that the seller was liable in damages even in the absence of fraud on his part. The same reasoning was applied to the sale of a lottery ticket in *Medina v Stoughton*;<sup>17</sup> once again, the buyer was later dispossessed by the true owner and recovered damages, it being said that where one having possession of a chattel sells it, the bare affirmation of title amounted to a warranty on which action could be brought.

As we have seen, the action for breach of warranty originally had nothing to do with contract; if anything, it was grounded in tort rather than contract.<sup>18</sup> However, by the middle of the eighteenth century actions for breach of warranty began to be pleaded in *assumpsit*,<sup>19</sup> the eventual result being that the law of warranty was, in the words of Street, “transferred almost bodily into the domain of contract”.<sup>20</sup> One result of this was that the notion of intention to warrant took on a different significance. This is well illustrated by the case of *Hopkins v Tanqueray*, decided in 1854.<sup>21</sup> Here the defendant sent his horse to Tattersalls for sale by auction. The day before the auction he came across the plaintiff inspecting the horse’s legs, and said to him: “Oh, you need not trouble yourself to examine the horse’s legs; you may rely on me that the horse is sound in every respect; you have nothing to look for.” At the auction the following day the plaintiff bought the horse, which proved to be unsound. An action was brought to recover damages, at which

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<sup>13</sup> Greig, *op. cit.* at n.10, pp.179-180.

<sup>14</sup> *Pasley v Freeman* (1789) 3 T.R. 51 at 57 (Buller J). According to Greig, *op. cit.*, pp.181-183, this *dictum* was unnecessary to the decision and was in any event misunderstood in later cases.

<sup>15</sup> Williston, (1908) Harvard L.R. 555 at 560.

<sup>16</sup> (1688) Carth 90.

<sup>17</sup> (1700) 1 Salk 210.

<sup>18</sup> *Williston on Sales*, para.15.2. Thus for instance, as with the modern doctrine of misrepresentation, it only applied to representations of existing fact. “The warranty can only reach things in being at the time of the warranty made, and not things *in futuro*; as, that a horse is sound at the buying of him, not that he will be sound two years hence”: Blackstone, 3 Comm 165.

<sup>19</sup> The first reported case of this sort was *Stuart v Wilkins* (1778) 1 Dougl 18, but the practice of pleading on the basis of *assumpsit* was said in that case to be well established.

<sup>20</sup> *Op. cit.* at n.10, p.399.

<sup>21</sup> (1854) 15 C.B. 130.

evidence was given that horses sold at Tattersalls were without warranty unless indicated otherwise in the catalogue. The defendants argued that the assertion made to the plaintiff on the day before the sale was a mere statement of opinion rather than a warranty, that it was a mere representation which could provide no ground of action in the absence of fraud, and that the statement was not intended to form part of the contract.<sup>22</sup> It was held by the court that there was no evidence of a warranty fit to go to the jury. According to Jervis C.J., the defendant had made no more than “a bona fide representation of what he believed to be the fact”,<sup>23</sup> while Maule J. said that there was “not the smallest ground upon which the jury could infer that the parties intended or understood from what passed on that occasion that the defendant would be liable to an action if the horse turned out to be unsound”.<sup>24</sup> Cresswell J. said that there was no evidence of “a formal contract of warranty at the time of the sale”,<sup>25</sup> Crowder J., adding that “[a] representation, to constitute a warranty, must be shewn to have been intended to form part of the contract”.<sup>26</sup> Though the judgments differed in their emphasis, the upshot of this case was that a seller who induced a buyer to purchase goods on the faith of some affirmation, be it never so persuasive or positive, could now escape liability by convincing the court that the affirmation in question was not intended as an offer to enter into a contract:<sup>27</sup> that is to say, that the statement in question was not a warranty but a “mere representation”.<sup>28</sup>

Even where there was no doubting the seller’s intention to “warrant” the accuracy of the assertion in the contractual sense, problems could still arise where an oral assertion was followed by a written contract which made no reference to the assertion in question. This was because of the parol evidence rule, that is to say the “firmly established ... rule of law that parol evidence cannot be admitted to add to, vary or contradict a deed or other written instrument”.<sup>29</sup> One way around this rule was to construe the oral assertion in terms of a supplementary or “collateral” contract between the parties.<sup>30</sup> In *Lindley v Lacey*<sup>31</sup> the plaintiff was induced to sign a written contract for the sale of a business by the defendant’s oral promise to settle an action brought against the plaintiff by a third party. The court held that this promise could be enforced as an agreement distinct from the main contract: it was as if there was a written agreement ready to be signed and that one of the

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<sup>22</sup> *ibid.*, at 131.

<sup>23</sup> *ibid.*, at 139.

<sup>24</sup> *ibid.*, at 140.

<sup>25</sup> *ibid.*, at 141-142.

<sup>26</sup> *ibid.*, at 142.

<sup>27</sup> *Williston on Sales*, para.15.3.

<sup>28</sup> *Power v Barham* (1836) 4 A & E 473; *Behn v Burness* (1863) 1 B & S 751; Treitel, *The Law of Contract* (11<sup>th</sup> ed., 2003), pp.353-356; Willis, *The Law Relating to the Contract of Sale of Goods* (1929), pp.123-124.

<sup>29</sup> *Jacobs v Batavia & General Plantations Trust* [1924] 1 Ch. 287 at 295 (Lawrence J).

<sup>30</sup> Wedderburn, “Collateral Contracts” [1959] C.L.J. 58.

<sup>31</sup> (1864) 17 C.B. (NS) 578; *Morgan v Griffith* (1871) L.R. 6 Ex. 70; *Erskine v Adeane* (1873) L.R. 8 Ch. 756; *Angell v Duke* (1875) L.R. 10 Q.B. 174; Wedderburn, *op. cit.*, pp.64-65.

parties said to the other: “If you put your name to that, I will do so and so.”<sup>32</sup> This reasoning was extended to an oral warranty in *De Lasalle v Guildford*,<sup>33</sup> where a tenant was induced to take out a lease by the landlord’s assurance that the drains were in good order. The collateral contract device proved to be a useful technique not only for getting round the parol evidence rule, but also in cases where the main contract was defective for one reason or another;<sup>34</sup> it could even be used to enforce promises or affirmations which appeared at first sight to contradict the terms of that contract.<sup>35</sup> Some judges were suspicious of this device, it being said by Lord Moulton in *Heilbut, Symons & Co v Buckleton*<sup>36</sup> that proof of a collateral contract required evidence not only of the terms of such contracts but also of an *animus contrahendi* on the part of those involved.<sup>37</sup> However, when used properly the collateral contract was said to be a necessary and useful weapon in the modern law of contract.<sup>38</sup>

So far all the cases we have been considering involve only two parties: A makes a certain statement to B, on the faith of which B enters into a contract with A. However, it often happens that the person who makes the statement is not the person with whom the contract is ultimately made. Here the situation is slightly different: A makes a statement to B, on the faith of which B enters into a contract with C.<sup>39</sup> In *Brown v Sheen and Richmond Car Sales Ltd*<sup>40</sup> the plaintiff agreed to buy a car from the defendants after being told by the manager that it was in perfect condition and “good for thousands of trouble-free miles”. Since the plaintiff needed to acquire the car on credit terms, the defendants sold it to a finance company, which then let it out on hire purchase to the plaintiff. The car turned out to be defective, and the plaintiff sued the defendants for the cost of the necessary repairs. It was held by Jones J. that even though there was no direct contract of sale between the parties damages could still be recovered on the following grounds: (1) the defendants had given a warranty as to the condition of this car; (2) the plaintiff was induced by the warranty to enter into the hire-purchase agreement; (3) the warranty was broken; and (4) the plaintiff suffered damage through the breach as he paid a larger sum under the hire-purchase agreement for the car than it was worth and he would have paid if the warranty had not been given.<sup>41</sup> This gave rise to the following question: what about the very common situation where a customer buys goods from a retailer on the faith of assertions made by the manufacturer? Here we have another situation in which A makes a statement to B, on the faith of which B enters into a contract with C. It is this situation with which *Shanklin Pier Ltd v Detel Products* is concerned.

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<sup>32</sup> *ibid.*, at 585 (Erle J).

<sup>33</sup> [1901] 2 K.B. 215.

<sup>34</sup> Wedderburn, *op. cit.* at n.30, pp.69-75.

<sup>35</sup> *Webster v Higgin* [1948] 2 All E.R. 127; *Harling v Eddy* [1951] 2 K.B. 739; *City and Westminster Properties Ltd v Mudd* [1958] 2 W.L.R. 312.

<sup>36</sup> [1913] A.C. 30.

<sup>37</sup> *ibid.*, at 47.

<sup>38</sup> Wedderburn, *op. cit.* at n.30, p.77.

<sup>39</sup> *Op. cit.*, pp.68-69.

<sup>40</sup> [1950] 1 All E.R. 1102.

<sup>41</sup> *ibid.*, at 1104.

### The Shanklin Pier Case

*Shanklin Pier Ltd v Detel Products Ltd* is but a case at first instance, and is only briefly reported.<sup>42</sup> The whole report is only four pages long, and the judgment of McNair J. takes up little more than two of those pages. The background to the case is, as we have already seen,<sup>43</sup> the decision to refurbish the pier, which had fallen into disrepair during the war. To this end the plaintiff company signed a contract with a firm of contractors to have the necessary repairs effected, and to have the whole pier repainted.<sup>44</sup>

Early in 1946 the plaintiffs were approached by one of the directors of the defendant company, with a view to obtaining a contract for the supply of the paint.<sup>45</sup> He told them that a certain paint manufactured by the defendants known as “DMU” would be suitable for the work, showed them a pamphlet detailing its properties, and assured them that if used it would last for at least seven years if not more.<sup>46</sup> Acting on the faith of these statements the plaintiffs, who were entitled to vary the specifications of their contract with the contractors, amended the relevant specification by ordering the use of two coats of DMU paint. However, the paint proved to be most unsatisfactory and lasted for only three months. As a result of this the plaintiffs were put to extra expense amounting to over £4,000.<sup>47</sup>

The plaintiffs now sought to recover this in damages from the defendants on the basis of breach of warranty. The defendants however argued that no such warranty had ever been given, and that in any event it could not apply in the present situation since the paint had been sold to the contractors and not to the plaintiffs.<sup>48</sup> So was there a warranty here, and if so what was its scope?

On the first point, McNair J, after reviewing the evidence of the negotiations between the parties, had no difficulty in deciding that the defendants had indeed warranted the soundness of their paint. The cases established that an affirmation at the time of sale was to be taken as a warranty, provided it appeared on evidence to have been so intended.<sup>49</sup> So did it make any difference that the sale was to the contractors rather than to the plaintiffs themselves? The answer was that it did not. In the words of McNair J

“Counsel for the defendants submitted that in law a warranty could give rise to no enforceable cause of action except between the same parties as the parties to the main contract in relation to which the warranty was given. In principle this submission seems to me to be unsound. If, as is elementary, the consideration for the warranty in the usual case is the entering into of the main contract in relation to which the warranty was given, I see no reason why there may not be an enforceable warranty between A and B supported by the

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<sup>42</sup> [1951] 2 K.B. 854.

<sup>43</sup> Above at n.4.

<sup>44</sup> [1951] 2 K.B. at 854.

<sup>45</sup> *ibid.*

<sup>46</sup> *ibid.*, at 854-855.

<sup>47</sup> *ibid.*, at 855.

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

<sup>49</sup> *Crosse v Gardner* (1688) Comb 142; *Medina v Stoughton* (1700) 1 Salk 210.

consideration that B should cause C to enter into a contract with A or that B should do some other act for the benefit of A.”<sup>50</sup>

The importance of this in the commercial context cannot be exaggerated. As has been pointed out,<sup>51</sup> we now live in a world where purchasers, whether in the consumer or business context, rely on a daily basis on representations by manufacturers as to the quality of their goods. Under traditional principles of contract law, the doctrine of privity prevents the purchaser claiming damages from the manufacturer on the basis of such representations.

In *Shanklin Pier Ltd v Detel Products Ltd* we have a simple and elegant solution to the problem in the shape of a collateral contract in which the manufacturers say to the ultimate consumers of the goods: “If you buy our product from the retailer, we will warrant that it is suitable for the purpose”.

### Warranties in the United States

The problem of manufacturers’ advertising and the law of privity was addressed extensively in the United States, where the old law of warranties played a very prominent part in the development of remedies in the field of consumer protection.<sup>52</sup> The leading case here is *Baxter v Ford Motor Co*,<sup>53</sup> a case decided in the Supreme Court of Washington State in 1932. In this case the plaintiff purchased a Ford Model A sedan from a dealer who had in turn purchased it from the defendants. The defendants’ catalogue contained the following statement: “All of the new Ford cars have a Triplex shatter-proof glass windshield – so made that it will not fly or shatter under the hardest impact.”<sup>54</sup> Having seen the catalogue, the plaintiff bought the car. Six months later he was driving along the road when the windshield was shattered by a pebble from a passing car, causing injuries including the loss of an eye. In an action against the defendants for damages it was argued that there could be no implied or express warranty without privity of contract, and that the statement in the catalogue should not have been admitted into evidence. However, the court held that the defendants were liable for breach of warranty, saying that the plaintiff here was in a position similar to that of the consumer of a wrongly labelled drug. The rule in such cases did not rest on contractual obligations, but rather on the principle that the original act of delivering an article was wrong when, because of the lack of those qualities which the manufacturer represented it as having, the absence of which could not be readily detected by the consumer, the article was not safe for the purposes for which the consumer would ordinarily use it. As Herman J. commented:

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<sup>50</sup> [1951] 2 K.B. at 856.

<sup>51</sup> See the comments of Herman J. in *Baxter v Ford Motor Co* 12 P. 2d 409 (1932), below at n.55, and of Judge Fuld in *Randy Knitwear Inc v American Cyanamid Co* 226 N.Y. Supp. (2d) 363 (1962), below at n.73.

<sup>52</sup> See generally Jaeger, “Privity of Warranty: has the Tocsin Sounded?” (1963) 1 *Duquesne University L.R.* 1; Prosser, “The Assault on the Citadel” (1969) *Yale L.J.* 1099.

<sup>53</sup> 12 P. 2d 409 (1932).

<sup>54</sup> *ibid.*, at 411.

“Since the rule of caveat emptor was first formulated, vast changes have taken place in the economic structures of the English speaking peoples. Methods of doing business have undergone a great transition. Radio, billboards, and the products of the printing press have become the means of creating a large part of the demand that causes goods to depart from factories to the ultimate consumer. It would be unjust to recognize a rule that would permit manufacturers of goods to create a demand for their products by representing that they possess qualities which they, in fact, do not possess, and then, because there is no privity of contract existing between the consumer and the manufacturer, deny the consumer the right to recover if damages result from the absence of those qualities, when such absence is not readily noticeable.”<sup>55</sup>

A similar approach can be seen in *Hamon v Digliani*,<sup>56</sup> where a consumer of detergent was allowed to recover damages for personal injury from the manufacturer in an action for breach of warranty. Saying that the plaintiff had been induced to buy the goods by the manufacturer’s advertising, the Supreme Court of Connecticut based its decision fairly and squarely on the old law of warranties. In the words of Murphy AJ:

“These cases, and others of similar import, rely on the original concept of an action for breach of warranty, that is, that it sounds in tort and is based on the plaintiff’s reliance on deceitful appearances or representations rather than on a promise.”<sup>57</sup>

So far we have been considering the problem of “vertical” privity: that is to say cases where a buyer of goods seeks to recover damages for breach of warranty from someone other than the seller.<sup>58</sup> However, actions for breach of warranty can also be brought in many United States jurisdictions in cases of “horizontal” privity: that is to say cases where a seller of goods is sued by persons other than the buyer.<sup>59</sup> This problem is addressed by section 2-318 of the Uniform Commercial Code, which reads as follows:

“A seller’s warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.”

Most jurisdictions have adopted the provision in this form, but some states have incorporated a wider version making the seller liable to any natural person who may reasonably be expected to use, consume or be affected by the goods and who was injured in person by breach of the warranty.<sup>60</sup>

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<sup>55</sup> *ibid.*, at 412.

<sup>56</sup> 174 A. 2d 294 (1961).

<sup>57</sup> *ibid.*, at 296.

<sup>58</sup> White and Summers, *Uniform Commercial Code* (5<sup>th</sup> ed., 2000), para.11-2.

<sup>59</sup> *ibid.*

<sup>60</sup> White and Summers, *op. cit.* at n.58, para.11-3.

In the years up to 1960 the action for breach of warranty was the normal technique used in the United States for overcoming the problem of privity in the field of personal injury to consumers.<sup>61</sup> However, following the seminal decisions of the Supreme Court of New Jersey in *Henningsen v Bloomfield Motors Inc*<sup>62</sup> and the Supreme Court of California in *Greenman v Yuba Power Products*<sup>63</sup> breach of warranty in this context was largely superseded by the imposition of strict liability in tort without any reference to any warranty whether express or implied.<sup>64</sup> But what about cases where the plaintiff seeks to recover for purely economic loss? This brings us on to the decision of the New York Court of Appeals in *Randy Knitwear Inc v American Cyanamid Co*, to which we shall now turn.

In *Randy Knitwear Inc v American Cyanamid Co*<sup>65</sup> the defendants were the manufacturers of a resin called “Cyana”, which was designed to prevent fabric shrinkage. In connection with this labels were produced for use on garments made out of fabric treated with the resin. These read as follows:

<p>A CYANA FINISH This Fabric Treated for SHRINKAGE CONTROL Will Not Shrink or Stretch out of Fit CYANAMID</p>
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Quantities of the resin were sold to fabric manufacturers, Apex and Fairtex, who used it to make up fabrics. These were then sold on to the plaintiffs, who used the fabrics to manufacture garments. Despite the assurances of the defendants, the fabrics suffered from shrinkage, and as a result the plaintiffs incurred loss of profits amounting to over \$200,000. The plaintiffs now sought to recover this sum from the defendants, who argued that they were not liable in the absence of privity of contract.<sup>66</sup> The judgement was delivered by Judge Fuld,<sup>67</sup> who began by referring to the previous decision of

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<sup>61</sup> Prosser, *op. cit.* at n.52, pp.1125-1126

<sup>62</sup> 161 A. 2d 69 (1960).

<sup>63</sup> 377 P. 2d 697 (1963).

<sup>64</sup> Restatement 2d., Torts, section 402A (1965); Prosser, “The Fall of the Citadel” (1965-1966) 50 Minnesota L.R. 791; Tebbens, *International Product Liability* (1979) paras. 2.1.1.2 and 2.1.1.3.

<sup>65</sup> 226 N.Y. Supp. (2d) 363 (1962); *Southland Milling Co v Vege Fat Inc* 248 F. Supp. 482 (1965); *Jackson v Benson Motors Inc* 216 N.W. 2d 396 (1974); *Klages v General Ordnance Equipment Corp* 367 A. 2d 304 (1976); *County of Chenango Industrial Development Agency v Lockwood Greene Engineers Inc* 114 A. 2d 748 (1985); *Oak Point Associates v Southern States Screening Inc* 1992 US Dist LEXIS 11505.

<sup>66</sup> 226 N.Y. Supp (2d) 363 at 365-366.

<sup>67</sup> One of the great innovative judges of the New York Court of Appeals, famous also for his celebrated judgement in the conflict of laws case of *Babcock v Jackson* 140 N.Y.S. 2d 743 (1963).

the same court in *Greenberg v Lorenz*<sup>68</sup> the previous year, a case of “horizontal privity” in which it was held that in cases involving foodstuffs and other household goods the implied warranties of fitness and merchantability ran from the retailer to the members of the purchaser’s household, regardless of privity of contract.<sup>69</sup> The question was now whether the traditional privity limitation could also be dispensed with in an action for express warranty by a remote purchaser against the manufacturer who induced the purchase by representing the quality of the goods in public advertising and on labels which accompanied the goods.<sup>70</sup> Referring to *Baxter v Ford Motor Co*,<sup>71</sup> the judge said that there was no good reason for restricting the doctrine of that case to personal harm or injury, adding that since the basis of liability in this sort of case turned not on the character of the product but on the representation, there was no justification for a distinction on the basis of the type of loss suffered or on the type of article or goods involved.<sup>72</sup> More generally, Judge Fuld said that while it once may have been true to say that warranties which induced the contract of sale were normally express terms of that contract, in modern conditions the significant warranty was that given by the manufacturer through mass advertising and labelling to ultimate business users or consumers with whom there was no direct contractual relationship. In the words of Judge Fuld:

“The world of merchandising is . . . no longer a world of direct contract; it is, rather, a world of advertising and, when representations expressed and disseminated in the mass communications media and on labels (attached to the goods themselves) prove false and the user or consumer is damaged by reason of his reliance on those representations, it is difficult to justify the manufacturer’s denial of liability on the sole ground of the absence of technical privity. Manufacturers make extensive use of newspapers, periodicals and other media to call attention, in glowing terms, to the qualities and virtues of their products, and this advertising is directed at the ultimate consumer or at some manufacturer or supplier who is not in privity with them. Equally sanguine representations on packages and labels frequently accompany the article throughout its journey to the ultimate consumer and, as intended, are relied upon by remote purchasers. Under these circumstances, it is highly unrealistic to limit a purchaser’s protection to warranties made directly to him by the immediate seller. The protection he really needs is against the manufacturer whose published representations caused him to make the purchase.”<sup>73</sup>

Whatever the legal theory underpinning these decisions may be, it has been pointed out by White and Summers in their commentary on the Uniform Commercial Code that most courts allowing recovery rely on one of two

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<sup>68</sup> 213 N.Y.S. 2d 39 (1961).

<sup>69</sup> Compare U.C.C. s.2-318, above at nn.59-60.

<sup>70</sup> 226 N.Y. Supp. (2d) 363 at 366.

<sup>71</sup> 12 P. 2d 409 (1932): above at nn.53-55.

<sup>72</sup> 226 N.Y. Supp. (2d) 363 at 367

<sup>73</sup> *ibid.*, at 367-368.

rationales to justify allowing non-privacy consumers to recover for direct economic loss.<sup>74</sup> The first is that manufacturers induce customers to purchase their products by representations of quality; merely putting the product on the market is to represent to all who might ultimately buy the product that it is at least merchantable. Secondly, some courts reason that even absent extensive advertising, manufacturers are the “real” sellers upon whom the consumers rely, the buyer’s immediate dealer acting merely as a “conduit” between the manufacturer and the consumer purchaser. The authors indicate that they are doubtful as to this second rationale, and it is interesting to note that the first rationale is not far from the reasoning used by McNair J. in the *Shanklin Pier* case: by putting the goods on the market the manufacturer is saying to the ultimate purchaser: “Buy my product, and I will promise that it is suitable for its purpose.” However, as we shall now see the courts in England did not take the opportunity to develop the law in this direction, and as a result *Shanklin Pier Ltd v Detel Products Ltd* never achieved its full potential.

### A Lost Opportunity?

*Shanklin Pier Ltd v Detel Products Ltd* is authority for the proposition that where a manufacturer or producer makes a direct representation to a particular buyer, on the faith of which he or she acquires the goods from a third party, the buyer may be able to sue the manufacturer on the basis of a collateral warranty. In *Wells (Merstham) Ltd v Buckland Sand and Silica Ltd*<sup>75</sup> the plaintiffs’ manager, R, went to the defendants and told their manager, C, that he needed sand for propagating chrysanthemums. C then suggested that a particular type of sand would meet the plaintiffs’ needs, and gave R a sample with an accompanying chemical analysis. On the faith of this R ordered several consignments of sand, some direct from the defendants and some through a third party. The sand turned out to be totally unsuitable, and damages were claimed. In relation to the sand that had been ordered direct from the defendants there was no problem, there being a clear breach of the implied terms under the Sale of Goods Act, but what about the sand which had been ordered through the third party? In an extensive judgement Edmund Davies J. held that in this case the plaintiffs could recover for breach of collateral warranty on the basis of the *Shanklin Pier* case, saying that two ingredients were necessary to establish such a warranty, namely: (1) a promise or assertion by the supplier as to the nature, quality or quantity of the goods which the customer might reasonably regard as being made *animo contrahendi*, and (2) the acquisition of those goods by the customer in reliance on that promise or assertion.<sup>76</sup> He added that a warranty might be enforceable notwithstanding that no specific main contract was discussed at the time it was given, though the necessary *animus contrahendi* would be unlikely to be inferred unless the circumstances showed that it was within the contemplation of the parties that such a contract would be entered into.<sup>77</sup>

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<sup>74</sup> *Op. cit.* at n.58, para.11-5.

<sup>75</sup> [1965] 2 Q.B. 170.

<sup>76</sup> *ibid.*, at 180.

<sup>77</sup> *ibid.*

As we have seen, the collateral warranty device was also used to circumvent the problems of privity in the hire purchase context.<sup>78</sup> In *Andrews v Hopkinson*<sup>79</sup> the defendant, who was a car dealer, showed a car to the plaintiff and said, "It's a good little bus! I would stake my life on it; you'll have no trouble with it!" On the faith of this the plaintiff agreed to take the car, which was sold to a finance company and then let out on hire purchase to the plaintiff. In fact the car was seriously defective, and shortly afterwards the steering failed, causing a collision in which the plaintiff was injured and the car totally destroyed. The defendants were held liable in negligence for putting a dangerous car on the road, but McNair J. also held them liable for breach of collateral warranty. This was on the basis of the defendant's express representation, but the judge also canvassed the possibility of implying a warranty into a collateral contract in cases such as this on the basis of section 14 of the Sale of Goods Act. This would have indeed been a bold move, but one in line with the approach seen in the United States.<sup>80</sup>

A third situation which is relevant in this context is the manufacturer's guarantee. Where a customer buys electrical or other goods from a retailer, they are often accompanied by a guarantee in which the manufacturer agrees to repair the goods or replace them free of charge if any defects appear within the specified period. The enforceability of these guarantees has been said to be conjectural, on the grounds of lack of privity between the manufacturer and the customer. One way round this problem is to construe the guarantee, assuming that the customer is aware of it at the time when the goods are purchased, as a promise to abide by its terms if the customer agrees to buy the goods.<sup>81</sup> This analysis is fully in accordance with *Shanklin Pier Ltd v Detel Products Ltd*.

Finally, it seems that collateral warranties are often relied on in the construction industry in cases of economic loss caused by building or design defects.<sup>82</sup> Prior to 1990 these could be dealt with under the umbrella of negligence,<sup>83</sup> but in *Murphy v Brentwood District Council*<sup>84</sup> the House of Lords held that the mere existence of such defects were not normally actionable in negligence in the absence of a special relationship of reliance between the parties. This led to a growth in the use of formal collateral warranty agreements in connection with building developments, but even in the absence of such agreements the collateral contract device is still sometimes used to enforce liability.<sup>85</sup> Such a case was *George Fischer*

<sup>78</sup> Above at n.40.

<sup>79</sup> [1957] 1 Q.B. 229.

<sup>80</sup> Uniform Commercial Code, para.2.318, above at nn.59-60; *Kassab v Central Soya* 246 A. 2d 848 (1968); *Israel Phoenix Assurance Co Ltd v SMS Sutton Inc* 787 F. Supp. 102 (1992). However, in *Greater Nottingham Co-operative Society Ltd v Cementation Piling and Foundations Ltd* [1989] 1 Q.B. 71 the English Court of Appeal refused to countenance such a move.

<sup>81</sup> Harvey, *The Law of Consumer Protection and Fair Trading* (6<sup>th</sup> ed., by Harvey and Parry, 2000), p.158.

<sup>82</sup> Simons, "Parallel Lines: a Reappraisal of Collateral Contracts" (1991) 21 *Trett Digest* 2.

<sup>83</sup> *Anns v Merton London Borough Council* [1978] A.C. 728; *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 A.C. 520.

<sup>84</sup> [1991] 1 A.C. 398.

<sup>85</sup> Simons, *op. cit.*

*Holdings Ltd v Multi-Design Consultants*,<sup>86</sup> in which the plaintiffs, the owners of a warehouse, claimed damages from the defendant designers MDC in respect of a leaky roof. In the negotiations leading up to the building contract it was originally envisaged that MDC would construct the building itself, but in the end the work was done by Multi Group, an associated company, with whom the contract was eventually signed. By the time the defect came to light Multi Group had been dissolved, so the only recourse the plaintiffs had was against MDC, with whom they had no direct contractual relationship. It was held by His Honour Judge Hicks QC that MDC were liable to the plaintiffs for breach of a collateral contract; the main contract having come into existence with direct input from MDC, the necessary reliance on their skill and judgement could be shown.<sup>87</sup> This case, though obviously not of high precedent value, is of interest as it shows how the collateral contract analysis can be used in cases not involving an express representation of existing fact.

However, any hopes of *Shanklin Pier Ltd v Detel Products Ltd* being used to establish a broader principle of liability were dashed by the decision of the Court of Appeal in *Lambert v Lewis*.<sup>88</sup> This was a case involving a complex web of litigation arising out of a fatal motor accident. A manufacturer (M) produced and marketed a towing hitch, which was advertised as being “foolproof” and needing no maintenance. M then sold it to a wholesaler (W) who then sold it to a dealer (D). D then fitted the hitch to a Land Rover belonging to a customer (C), for use in his farm and building business. While the vehicle was being driven with a trailer by one of C’s employees (E), the hitch came loose and the trailer swerved across the road, causing a collision with a car being driven in the opposite direction. In this collision the plaintiffs (PP), who were the occupants of the car, were killed.<sup>89</sup>

PP now brought an action for negligence against C, E, D and M. At the same time C and E sued D in third party proceedings on the basis of the Sale of Goods Act. D in turn sued M in fourth party proceedings both for negligence and also for breach of a collateral warranty on the basis of the assertions made in the advertisement.<sup>90</sup> It is with these fourth party proceedings that we are particularly concerned in the present context, but it is worth noting that the case raised problems both of “vertical” privity (in relation to the liability of the manufacturer to the dealer) and of “horizontal” privity (in relation to the liability of the dealer to the plaintiffs).

At first instance the trial judge found in the main action that C, E and M had been negligent but not D. The third party proceedings against D were also dismissed, on the ground that though the towing hitch was clearly unmerchantable and unfit for its purpose, the negligence of C and E in fitting the hitch had broken the chain of causation between the breach of the Sale of Goods Act and the subsequent accident. This meant that the issue raised by the fourth party proceedings did not arise.<sup>91</sup> C and E then appealed to the

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<sup>86</sup> [1998] C.I.L.L. 1392; Simons, *op. cit.*

<sup>87</sup> Simons, *op. cit.*

<sup>88</sup> [1982] A.C. 225, *sub nom Lexmead (Basingstoke) Ltd v Lewis*.

<sup>89</sup> *ibid.*, at 229.

<sup>90</sup> *ibid.*

<sup>91</sup> *ibid.*

Court of Appeal both in the main action and in the third party proceedings, arguing that they had not been negligent, but that if they had they could claim an indemnity from D on the basis of the Sale of Goods Act.<sup>92</sup> Since a successful appeal in the third party proceedings would have raised the question of whether the manufacturer was liable to D, the Court of Appeal also had to consider the issue in the fourth party proceedings.

The appeal in the main action was dismissed by the Court of Appeal, which found that C and E had indeed been negligent in the fitting of the trailer.<sup>93</sup> At the same time the appeal in the third party proceedings was allowed, on the basis that D's liability under the Sale of Goods Act had contributed significantly to the accident.<sup>94</sup> So the court now had to decide the question raised in the fourth party proceedings: could D claim an indemnity from M, either on the basis of a collateral warranty or under the tort of negligence?<sup>95</sup>

In his claim on the basis of collateral warranty, D relied on the *Shanklin Pier* case and on *Wells (Merstham) Ltd v Buckland Sand and Silica Ltd*,<sup>96</sup> arguing that the assertions made in the manufacturer's advertisements were intended to be relied on and were so relied on.<sup>97</sup> In response to this M argued that the assertions were mere representations and that there was no proof of the necessary *animus contrahendi*, and that in the event the necessary reliance could not be shown.<sup>98</sup> The Court of Appeal held that though the element of reliance had been established, the claim failed on the first ground. Though the assertions made by the manufacturer in the present case were certainly more than mere puffs, they could not be shown to have warranted their accuracy in the full sense.<sup>99</sup> It was also pointed out that the present facts differed from those in the *Shanklin Pier* case and the *Wells* case in one essential respect: the assertions had been made to the world in general, and not with any particular contract in mind.<sup>100</sup> This being so, the necessary requirements of a collateral contract had not been made out. The court went on to rule that the manufacturers were not liable to D in tort either, since the loss suffered by D was purely economic and no "special relationship" had been established on the basis of *Hedley Byrne & Co v Heller and Partners*.<sup>101</sup>

D then appealed to the House of Lords in relation to both the third party and the fourth party proceedings.<sup>102</sup> His appeal in the third party proceedings was allowed, it being held that he was not liable to the plaintiffs under the Sale of

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<sup>92</sup> *ibid.*, at 229-230.

<sup>93</sup> *ibid.*, at 235-256.

<sup>94</sup> *ibid.*

<sup>95</sup> *ibid.*, at 256-259.

<sup>96</sup> [1965] 2 Q.B. 170; above, n.75.

<sup>97</sup> [1982] A.C. 225 at 256-258.

<sup>98</sup> *ibid.*, at 258-259.

<sup>99</sup> *ibid.*, at 262-263; *Howard Marine and Dredging Co Ltd v Ogden and Sons (Excavations) Ltd* [1978] 1 Q.B. 574.

<sup>100</sup> An attempt by the appellants to argue on the basis of *Carlill v Carbolic Smoke Ball Co* [1893] 1 Q.B. 256 failed, that case being distinguished on the ground that the evidence of intention to be bound was exceptionally strong.

<sup>101</sup> [1964] A.C. 465; [1982] A.C. 225 at 263-267.

<sup>102</sup> *ibid.*, at 268-271.

Goods Act, so once again the question in the fourth party proceedings became purely academic.<sup>103</sup>

The House of Lords therefore never got to make a decision on the scope of the *Shanklin Pier* case, and the law remains as stated by the Court of Appeal: for a collateral warranty to arise in such cases there must be proof of *animus contrahendi*, which means in practice showing that the assertion was made by the producer or manufacturer to a particular customer with a particular contract in mind. This is unfortunate for two reasons. First of all, as we have seen, the requirement of *animus contrahendi* never applied in the original law of warranties; it was imported when these came to be enforced on the basis of *assumpsit* at the end of the eighteenth century, and it has been argued that the importation of this requirement was based on a misunderstanding of the law.<sup>104</sup> Secondly, it prevented the law developing as it did in the United States, where as we have seen the law of warranties has provided a very useful weapon for the armoury in cases of consumer protection.<sup>105</sup>

One reason why the courts may have been reluctant to develop a broad set of principles based on the collateral warranty analysis is that there are already other tools available. In the United States, as we have seen, warranties were used extensively for many years in cases of product liability for personal injury.<sup>106</sup> But by the time of *Lambert v Lewis* this field, as far as English law was concerned, was already occupied by the tort of negligence,<sup>107</sup> and now as in the United States we have principles of strict tort liability in place to do the work.<sup>108</sup> However, where a false statement causes economic loss liability in tort is harder to establish; if the statement was made by another party to the contract, section 2(1) of the Misrepresentation Act 1967 applies,<sup>109</sup> but otherwise one must fall back on the tort of negligent misstatement and prove the existence of a “special relationship” under *Hedley Byrne*.<sup>110</sup> One cannot help feeling that the collateral warranty could have been a useful technique for cases such as this.<sup>111</sup>

All in all, the result of *Lambert v Lewis* was to deny *Shanklin Pier Ltd v Detel Products Ltd* of its claim to be considered a leading case, and to relegate it to a short paragraph at most in the contract textbooks. One of the coastal walks which makes the Isle of Wight such a delightful place for a holiday is the walk from Sandown up to the Yarborough Monument on Culver Down. One of the highlights of this walk is the splendid view it provides over Sandown Bay and over the town of Shanklin. But for the contract lawyer there is always a note of regret, as he contemplates the gap

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<sup>103</sup> *ibid.*, at 271-278.

<sup>104</sup> Williston, *op. cit.* at n.10, pp.560-561; Greig, *op. cit.* at n.10, pp.181-183.

<sup>105</sup> Above at nn.52-74.

<sup>106</sup> Prosser, *op. cit.* at n.52, pp.1125-1126; above at n.61.

<sup>107</sup> *Donoghue v Stevenson* [1932] A.C. 562.

<sup>108</sup> Consumer Protection Act 1987; Consumer Protection (NI) Order 1987.

<sup>109</sup> Misrepresentation Act 1967, s.2(1); Misrepresentation Act (NI) 1967, s.2(1); *Howard Marine and Dredging Co Ltd v Ogden and Sons (Excavations) Ltd* [1978] 1 Q.B. 574.

<sup>110</sup> *Hedley Byrne & Co v Heller and Partners* [1964] A.C. 465.

<sup>111</sup> See *Simaan General Contracting Co v Pilkington Glass Ltd (No 2)* [1988] Q.B. 758.

once occupied by the noble structure of Shanklin Pier. “Of all sad words of tongue or pen, the saddest are these: ‘It might have been!’”<sup>112</sup>

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<sup>112</sup> John Greenleaf Whittier (1807-1982).

## THE DEMISE OF THE ADVOCATE'S IMMUNITY

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### Introduction

The story of this essay spans the entirety of Des Greer's academic career. When he began teaching as a Legal Method Instructor at the University of Pennsylvania in 1964 it was common knowledge that a barrister could not be sued for negligence in the presentation of a case in court. The basis for this was not entirely clear but was thought to rest on the inability of counsel to contract for the provision of his or her services and the concomitant inability to sue for fees.<sup>1</sup> That basis was undermined by the seminal decision of the House of Lords in *Hedley Byrne and Co Ltd v Heller and Partners Ltd*.<sup>2</sup> That case decided, *inter alia*, that the absence of a contract did not prevent the imposition of tortious liability for economic loss caused by professional negligence, just as the absence of a contract had not blocked recognition of a manufacturer's duty of care for personal injury in *Donoghue v Stevenson*.<sup>3</sup> The potential impact of *Hedley Byrne* on the barrister's immunity was stated by Lord Denning M.R. in the Court of Appeal in *Rondel v Worsley* as follows:-

“As soon as the House in May, 1963, stated this principle, the profession were quick to see that it was wide enough to apply to a barrister in all his work, both in court and out of it. So at once they asked whether the barrister's immunity had gone. No one suggested that the House had given any thought to it. The speeches contain no word about a barrister. Nevertheless the principle was there. It made plain that the immunity can no longer be justified on the ground that a barrister cannot sue for his fees. If the rule is to be justified, it must be on some better ground.”<sup>4</sup>

This essay will first explain what that “better” ground was and its extension to all advocates, whether barristers or solicitors. It will then trace its gradual disintegration over a third of a century until the House of Lords consigned it to history in *Arthur JS Hall v Simons*.<sup>5</sup> An effort will be made to evaluate this latter decision and to state whether the arguments for no immunity are preferable to the immunity arguments. This task is particularly interesting at the present time because the High Court of Australia has recently upheld advocates' immunity in *D'Orta-Ekenaike v Victoria Legal Aid*<sup>6</sup> and the

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<sup>1</sup> See Ronald F. Roxburgh, “*Rondel v Worsley*: The Historical Background” (1968) 84 L.Q.R. 178, and “*Rondel v Worsley*: Immunity of the Bar” (1968) 84 L.Q.R. 513.

<sup>2</sup> [1964] A.C. 465.

<sup>3</sup> [1932] A.C. 562.

<sup>4</sup> [1967] 1 Q.B. 443, at 501.

<sup>5</sup> [2002] 1 A.C. 615.

<sup>6</sup> [2005] H.C.A. 12.

Supreme Court of New Zealand is considering the same issue in *Chamberlains v Lai*.<sup>7</sup>

### Immunity: Restatement and Extension

The late United States Supreme Court Justice, Louis Dembitz Brandeis, believed that a thorough knowledge of the facts of a case was critical to effective understanding of the legal issues. In a chapbook he wrote:-

“Know thoroughly each fact. Don’t believe client witnesses. Examine documents. Reason; use imagination. Know bookkeeping-the universal language of business; know persons....Know not only specific cases, but whole subjects. Can’t otherwise know the facts. Know not only those facts which bear on direct controversy, but know all the facts and law that surround.”<sup>8</sup>

When *Rondel v Worsley*<sup>9</sup> reached the House of Lords the basis of advocates’ immunity was restated but the facts of the case were extremely important. As the summary below will show the claim was about as devoid of merit as one could possibly imagine. It is difficult to escape the thought that had the claim possessed at least some merit the outcome might have been different.<sup>10</sup>

Norbert Fred Rondel, known to his Soho comrades as “Freddie the Ear” because of his propensity for biting off ears, was a rent collector and caretaker for the notorious London East End slum landlord, Peter Rachman. He was also a professional wrestler and claimed to be proficient in judo and karate.<sup>11</sup> After an incident in the East End in the late 1950s he found himself in the dock at the Old Bailey charged with grievous bodily harm. As he had no counsel to represent him and was not granted legal aid he secured the services of Mr Worsley of counsel on a dock brief, for which Mr Worsley was paid £2 4s 6d. Mr Rondel was convicted and sentenced to six years’ imprisonment. After serving his time he brought a professional negligence claim against Mr Worsley, preposterously arguing, *inter alia*, that Mr Worsley had procured the dock brief fee fraudulently. Mr Rondel was not represented in this civil claim until the case reached the Court of Appeal but he received a great deal of help from the first instance judge, Lawton J, in rendering his statement of claim semi-intelligible. Aside from the claim of fraud Mr Rondel’s main complaint against his counsel was not so much that negligent advocacy caused him to be wrongly convicted but that the jury

<sup>7</sup> [2005] N.Z.S.C. 32 (13 June 2005) granting leave to appeal. In *Lai v Chamberlains* [2005] N.Z.C.A. 37 the Court of Appeal had decided that advocates’ immunity was no longer part of the law of New Zealand.

<sup>8</sup> Undated memorandum, “What the Practice of Law Includes,” Louis D. Brandeis Papers, University of Louisville Law Library, Louisville, Kentucky; quoted in Melvin I. Urofsky, “Louis D. Brandeis: Advocate Before and On the Bench” (2005) 30 *Journal of Supreme Court History* 31, at 33.

<sup>9</sup> [1969] 1 A.C. 191.

<sup>10</sup> For similar views see P.C. Heerey, “Looking Over The Advocate’s Shoulder: An Australian View of *Rondel v Worsley*” (1968) 42 A.L.J. 3.

<sup>11</sup> These fascinating details are taken from *Heerey, ibid*; R.W. Harding, “Comment” (1967-68) 8 West. Aust. L.R. 242; Marvin A. Catzman, “Comment on *Rondel v Worsley*” (1968) 46 Can. Bar Rev. 505.

were not persuaded that a man of his experience in the noble arts of self defence needed no knife to rip open his victim's hand. Mr Rondel's insistence was that he accomplished this feat with his bare hands. Before the Court of Appeal he said of the tearing of the victim's hand – "It sounds difficult in cold blood but I can demonstrate it." Lord Denning M.R. assured the reader that "[w]e did not accept the offer."<sup>12</sup>

Against this factual background their Lordships rejected the no contract basis for immunity and rested it upon four public policy grounds. First, it was argued that recognition of a duty of care in tort would lead to advocates preferring their duties to clients over their public duty to the administration of justice. Thus advocates might ask every conceivable question and make every conceivable argument to defend themselves against negligence suits from unsuccessful clients.<sup>13</sup> In emphasising the primacy of the duty to the administration of justice Lord Morris said that "[t]o a certain extent every advocate is an *amicus curiae*."<sup>14</sup> Lord Upjohn pointed out that counsel in a criminal trial should take the point of an irregularity when it happens instead of reserving it for appeal.<sup>15</sup> Secondly it was pointed out that advocates have immunity from defamation for things said in court<sup>16</sup> and that judges, jurors, parties and witnesses<sup>17</sup> have a general immunity from negligence as well. It would be inconsistent with this if advocates could be sued in negligence.<sup>18</sup> Thirdly, it was argued that as the cab rank rule obliged a barrister to accept a brief except in very limited circumstances, there could be no voluntary assumption of responsibility and it would be unfair to impose a duty of care.<sup>19</sup> Fourthly, their Lordships were all troubled by the prospect that the only way of establishing whether or not an advocate had been negligent would be to re-litigate the case. Lord Reid pointed out that where the alleged negligence was in a criminal trial different standards of proof would apply between the criminal trial and the negligence case.<sup>20</sup> Lord Morris asked whether jurors or the bench might be called as witnesses to say whether they would have convicted anyway.<sup>21</sup>

It will be argued below that *Hall v Simons*<sup>22</sup> has the better of the arguments on whether advocates should owe a duty of care. For the moment, however, two further matters must be addressed. First, their Lordships stated *obiter* that the immunity re-established on public policy grounds was the immunity of the advocate, not the barrister. Thus it applied to solicitors doing

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<sup>12</sup> [1967] 1 Q.B. 443, at 494.

<sup>13</sup> [1969] 1 A.C. 191, at 228 (Lord Reid), 247 (Lord Morris), 267-268 (Lord Pearce), 282-283 (Lord Upjohn).

<sup>14</sup> *ibid.*, at 247.

<sup>15</sup> *ibid.*, at 282.

<sup>16</sup> Under *Munster v Lamb* (1883) 11 Q.B.D. 588.

<sup>17</sup> The immunity of witnesses has recently been extended to the bringing of disciplinary proceedings against them for evidence given in court. See *Meadow v General Medical Council* [2006] E.W.H.C. 146 (Admin).

<sup>18</sup> [1969] 1 A.C. 191, at 229-230 (Lord Reid), 270 (Lord Pearce).

<sup>19</sup> *ibid.*, at 264 and 275-276 (Lord Pearce), 281 (Lord Upjohn).

<sup>20</sup> *ibid.*, at 230.

<sup>21</sup> *ibid.*, at 249.

<sup>22</sup> [2002] 1 A.C. 615.

advocacy work as much as to barristers doing the same.<sup>23</sup> Secondly, a majority of their Lordships believed that the immunity of barristers should not be extended to non-court work such as advisory work and drafting documents (*e.g.* wills, settlements, conveyances, real property contracts, commercial contracts, charterparties) unconnected with court proceedings.<sup>24</sup> Pleadings and subsequent steps in litigation were within the immunity as acts connected with court proceedings. Lord Upjohn suggested that the advocate's immunity should begin at the letter before action when taxation of party and party costs begins.<sup>25</sup> In principle it makes sense that an immunity based on the restated grounds of *Rondel v Worsley* should apply to advocacy work and all advocates performing it. However history has supported Lord Pearce's scepticism about delineating the "jagged edge"<sup>26</sup> between court work and other work in the context of litigation, especially when solicitors are brought into the picture.<sup>27</sup>

The decision in *Rondel v Worsley* was not on the whole well received by commentators. The present author's researches only turned up two comments that were supportive of the ruling.<sup>28</sup> Among the sceptical comments contemporaneous with the decision one remarked that it did not look good for ex-barristers to rule that advocates could not be sued when all other professional persons could.<sup>29</sup> Another was sceptical of the litigation/non-litigation divide.<sup>30</sup> A third drew attention to the plaintiff's lack of worthiness as a factor in the decision.<sup>31</sup> Dr. North raised a question to which further consideration will be given later – could the negligence of defence counsel in a criminal case be a ground of appeal?<sup>32</sup> Subsequent commentary was also unfavourable. David Carey Miller<sup>33</sup> and Jonathan

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<sup>23</sup> [1969] 1 A.C. 191, at 232 (Lord Reid), 267 (Lord Pearce), 284-285 (Lord Upjohn), 294 (Lord Pearson). Lords Upjohn and Pearson recognised that solicitors would remain liable for negligence in non-advocacy matters connected with litigation. Drawing the line between the two kinds of work was acknowledged to be difficult.

<sup>24</sup> *ibid.*, at 232 (Lord Reid), 285-286 (Lord Upjohn), 293-294 (Lord Pearson).

<sup>25</sup> *ibid.*, at 286.

<sup>26</sup> As Louis Blom-Cooper, counsel for Mr Rondel, put it in argument.

<sup>27</sup> [1969] 1 A.C. 191, at 276-277.

<sup>28</sup> J.A. Jolowitz, "The Immunity of the Legal Profession" (1968) 26 C.L.J. 23, described the decision as a firm and satisfactory basis for the future development of the law. Marvin A. Catzman (1968) 46 Can. Bar Rev. 505 thought it not unlikely that *Rondel v Worsley* would be followed in Canada, a prediction that *Demarco v Ungaro* (1979) 95 D.L.R. (3d) proved to be wide of the mark. A more accurate prediction of the attitude of Canadian courts thus came from the Honorable Bora Laskin in the 21<sup>st</sup> Hamlyn Lectures, *The British Tradition in Canadian Law* (1969) pp.25-26.

<sup>29</sup> P.C. Heerey, *supra* n.10.

<sup>30</sup> H. W. Wilkinson, "Public Policy and the Immunity of Advocates" (1968) 31 M.L.R. 329.

<sup>31</sup> See R. W. Harding, *supra* n.11. For further sceptical comments of that time see the editorial (1967) 117 N.L.J. 1255, and Brian Davis (1968) S.L.T. 45.

<sup>32</sup> P. M. North, "*Rondel v Worsley* and Criminal Proceedings" (1968) Crim. L.R. 183.

<sup>33</sup> D.L. Carey Miller, "The Advocate's Duty to Justice: Where Does it Belong?" (1981) 97 L.Q.R. 127.

Hill<sup>34</sup> both wrote extensive critiques, the latter particularly questioning whether immunity was necessary in the light of the formidable difficulties a litigant would have in proving negligence and causation. In a socio-legal study Velanowski and Whelan argued that the immunity had not been empirically justified and that nothing rebutted the presumption that potential civil liability would act as a powerful incentive to high professional standards.<sup>35</sup> In his celebrated book on *Advocates* David Pannick QC offered his professional colleagues no solace in a powerful rebuttal of the arguments for immunity.<sup>36</sup> The National Consumer Council believed that the arguments in favour of immunity were not of sufficient strength to “outweigh the hardship to consumers who may fall victim to an advocate’s negligence.”<sup>37</sup>

Notwithstanding the less than overwhelmingly positive reception of *Rondel v Worsley* advocates’ immunity expanded in the decade immediately after this decision. In this regard the decision of the New Zealand Court of Appeal in *Rees v Sinclair*<sup>38</sup> was particularly significant. This court held that the immunity applied to pre-trial work so intimately connected with the conduct of the cause in court that it can fairly be said to be a preliminary decision affecting the way the cause is to be conducted at hearing.<sup>39</sup> Advice to settle a matrimonial case where the hearing had already commenced was subsequently held to be included in this<sup>40</sup> but it was emphasised that the immunity should be no wider than necessary. Notwithstanding this cautionary guidance, however, the test has proved to be more than a little difficult to apply in practice. It is no surprise that the issue of preliminary work was first considered in detail in a jurisdiction where most practitioners practise as barristers *and* solicitors. But it must always be remembered that the immunity is that of the advocate, not the barrister.

This section of the paper may be concluded by a brief examination of the reception of advocates’ immunity in Australia. This only extended advocates’ immunity in the territorial sense but the recent refusal of the High Court of Australia to join hands with the House of Lords in rejecting advocates’ immunity gives this development considerable significance, especially in light of the New Zealand Supreme Court’s reconsideration of *Rees v Sinclair*. The reception of advocates’ immunity in Australia was perhaps a little surprising given its earlier decisive rejection by Canada, another jurisdiction where practitioners tend to be both barristers and solicitors.<sup>41</sup> *Giannarelli v Wraith*<sup>42</sup> recognised advocates’ immunity in the

<sup>34</sup> J. Hill, “Litigation and Negligence: A Comparative Study” (1986) 6 O.J.L.S. 183.

<sup>35</sup> C.G. Velanowski and C.J. Whelan, “Professional Negligence and the Quality of Legal Services – An Economic Perspective” (1983) 46 M.L.R. 700.

<sup>36</sup> D. Pannick, *Advocates* (Oxford, 1992), pp. 197-206.

<sup>37</sup> National Consumer Council, *Ordinary Justice* (London, HMSO, 1989), p. 223.

<sup>38</sup> [1974] 1 N.Z.L.R. 180.

<sup>39</sup> *ibid.*, at 187 (McCarthy P.).

<sup>40</sup> *Biggar v McLeod* [1978] 2 N.Z.L.R. 9 (C.A.).

<sup>41</sup> See the decision of Krever J in *Demarco v Ungaro* (1979) 95 D.L.R. (3d) 385 (Ontario High Court). His honour pointed out that in Canada a lawyer could always contract with his or her client so the pre-*Rondel v Worsley* immunity of England never applied there. The public policy reasons favoured by the House of Lords were all rejected for reasons essentially similar to those given in *Hall v Simons*. Concern was expressed about lawyers giving lawyers sole professional immunity and it was stated that potential liability would be a good spur towards

state of Victoria. This was in part based upon various constructions of section 10(2) of the Legal Profession Practice Act (Vict.) 1958 but the majority of the High Court who recognised advocates' immunity thought this to be the common law of Australia as well. Reliance was placed upon all of the public policy grounds of *Rondel v Worsley* but Brennan J placed particular emphasis upon the need for counsel to perform their primary duty to the court "free from the chilling threat of civil suit by the parties to the litigation."<sup>43</sup> It is respectfully suggested that both the difficulty of proving negligence and that a different outcome would have been reached in its absence render this fear somewhat overblown. Discussion of *D'Orta-Elenaïke v Victoria Legal Aid*,<sup>44</sup> where the High Court reaffirmed advocates' immunity, will be postponed until the impact of *Hall v Simons* has been considered.

### The Reduction of Advocates' Immunity

The road that led to *Hall v Simons* and the demise of the advocate's immunity began in 1978 with *Saif Ali v Sydney Mitchell & Co.*<sup>45</sup> The plaintiff was injured in a road traffic accident when the van in which he was travelling was in collision with a car owned by an individual whose wife was driving it. A barrister advised suing the owner and by the time this was corrected the plaintiff's action against the wife was time-barred. The plaintiff sued his solicitors for professional negligence but the proceedings reported concerned the third party action the solicitors commenced against the barrister who advised suing the husband. By a 3-2 majority the House of Lords determined that advice on the proper party to sue did not come within the advocate's immunity. This clearly disapproves *Rondel v Worsley* so far as it applies to pleadings. It also illustrates the difficulty of delineating the "jagged edge" between court and non-court work. Lord Diplock believed that only the advocate's primary duty to the court and the risk of relitigation were reasons capable of supporting the advocate's immunity.<sup>46</sup> In fact he thought it was unsatisfactory that the House had not heard more argument on whether *Rondel v Worsley* should still be followed in light of subsequent developments in negligence law.<sup>47</sup> Cases following upon *Saif Ali* will now be examined under the headings "civil cases" and "criminal cases".

### Civil Cases

In *McFarlane v Wilkinson*<sup>48</sup> Rix J held that a professional negligence claim against two barristers (one silk and one junior) for failing to add a claim for breach of statutory duty to a statement of claim in a personal injury case came within the immunity for court related work. This seems difficult to

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professional competence. For favourable commentary on *Demarco v Ungaro* see Allan C. Hutchinson (1979) 57 Can. Bar Rev. 346; for critical commentary see Stephen E. Traviss (1979) 13 *Law Soc of Upper Canada Gazette* 262.

<sup>42</sup> (1988) 165 C.L.R. 543.

<sup>43</sup> *ibid.*, at 579.

<sup>44</sup> [2005] H.C.A. 12.

<sup>45</sup> [1980] A.C. 198.

<sup>46</sup> *ibid.*, at 221-223.

<sup>47</sup> *ibid.*, at 223.

<sup>48</sup> [1996] 1 Lloyds Rep. 406.

reconcile with *Saif Ali* and the decision was understandably doubted by Lord Bingham of Cornhill C.J. at the Court of Appeal stage of *Hall v Simons*.<sup>49</sup>

*Atwell v Michael Perry*<sup>50</sup> also illustrates the acute difficulty in distinguishing work within from work without the immunity. The defendant barrister represented the plaintiff in a boundary dispute case in the county court. The plaintiff lost and the barrister advised that there were no prospects for an appeal. When the plaintiff changed solicitors (for the second time) another barrister advised that there was a very good prospect of success on appeal on a point not considered by the first barrister. The appeal was successful and the plaintiff sued the first barrister alleging negligence (a) in assessing the strengths of the case before trial, and (b) in advising that there were no grounds for an appeal. Sir Richard Scott V-C held that formulation of the case plan could not be distinguished from conducting the case in court so the first allegation of negligence was struck out as falling within the immunity. The second allegation of negligence was not struck out on immunity grounds because neither advice on whether to bring an action nor advice on the prospects of an appeal were sufficiently connected with the conduct of the case in court to bring it within the immunity. The jaggedness of the jagged edge can be seen in all its jaggedness in this distinction! The claim was still struck out, however, because the plaintiff had been unable to particularise the damage sustained as a result of this alleged negligence.

*Kelley v Corston*<sup>51</sup> was concerned with a complex issue that arises in matrimonial proceedings in particular. The defendant barrister advised the plaintiff wife in ancillary relief proceedings. The proceedings were settled at the door of the court and an order of consent was made by the judge under section 33A of the Matrimonial Causes Act 1973. The order recorded that the judge had read the affidavit evidence of the parties and considered it just to make the order in the terms proposed. The plaintiff found that the effect of the order was that she was unable to finance the repayment of the mortgage on the former matrimonial home after it was transferred into her name. The Court of Appeal held that immunity applied to the barrister's actions but for reasons which differed amongst the members of the court. Judge L.J. held that the trend was increasingly to limit the extent of the immunity, that advice as to settlement once the hearing had commenced was closely connected to the conduct of the case in court, but that settlements at the door of the court were not. However the immunity applied here because the judge had to certify his consent to the settlement and a negligence action would thus be a collateral challenge to the decision of the court.<sup>52</sup> Pill L.J. held that advice as to settlement once the hearing had commenced and settlements requiring the approval of the court were within the immunity. However the judicial intervention point had not been pleaded so his Lordship felt that he could not decide the case on this ground. Advice as to settlement at the door of the court did attract immunity as it could not be differentiated from settlement advice once the hearing had commenced.<sup>53</sup> Butler-Sloss L.J. held that both "at the door of the court" settlements and consent orders were

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<sup>49</sup> [2002] 1 A.C. 615, at 646.

<sup>50</sup> [1998] 4 All E.R. 65.

<sup>51</sup> [1998] Q.B. 686.

<sup>52</sup> *ibid.*, at 688-702.

<sup>53</sup> *ibid.*, at 702-712.

within the immunity, although her opinion on the latter was strictly obiter. Settlement advice was not normally within the immunity so advice in chambers or the day before the hearing would not come within it. Notwithstanding the illogicality of the distinction between advice on the day of the hearing and other contexts, a “clear working rule” was needed for advice at the door of the court. That could not be distinguished from settlement after the hearing had commenced so would come within the immunity. It would not be in the public interest to have any kind of enquiry as to how carefully the judge had considered the consent order or as to what discussions went on in chambers before a consent order was made.<sup>54</sup> Lord Bingham C.J.’s comment in *Hall v Simons* that *Kelley v Corston* is difficult to follow is certainly not an overstatement.<sup>55</sup>

### ***Criminal Cases***

The principal issue in most criminal cases has been whether allowing the client to sue would amount to a collateral challenge to the decision of the trial court. In *Somasundaram v M. Julius Melchior and Co*<sup>56</sup> the plaintiff pleaded guilty to a charge of maliciously wounding his wife. On the instructions he gave his counsel he had no defence and was quite properly advised to plead guilty. His appeal against conviction, on the ground that he was pressurised by his solicitors and counsel into pleading guilty, was dismissed although his sentence was reduced from two years’ imprisonment to 18 months. After serving his sentence he sued both solicitors and counsel for professional negligence on the same ground and this was struck out because the advice to plead guilty was clearly correct so the action was frivolous, vexatious and an abuse of the process of the court. The Court of Appeal said *obiter* that advice as to plea was so closely connected with the conduct of the case in court that it was within the advocate’s immunity. Allowing a negligence action like this would impugn the decision of a court of competent jurisdiction and this would be a further abuse of process. Solicitors would share this immunity only if acting as advocates so it did not avail the plaintiff’s solicitors in this case. But they had a strong defence based upon their reliance on counsel’s advice. This meant either that they had not been negligent or that counsel’s intervention broke the chain of causation. Once again problems are apparent in delineating the extent of the advocate’s immunity.

It seems that in *Smith v Linskills*<sup>57</sup> advocates’ immunity was not in issue and the negligence action was barred simply on the ground that it amounted to a collateral challenge to the decision of a court of competent jurisdiction. The

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<sup>54</sup> *ibid.*, at 712-719.

<sup>55</sup> [2002] 1 A.C. 615, at 646. See also M. Seneviratne, “The rise and fall of advocates’ immunity” (2001) 21 L.S. 644, at 649, where it is pointed out that *Kelley v Corston* has attracted much academic criticism, principally because so little judicial consideration often goes into making the consent order. It was not followed in *Griffin v Kingsmill* [1998] P.I.Q.R. 24, where an infant’s settlement was approved by a Master because the latter was not a court of trial and did not give judgment on the merits. This looks more like an attempt to avoid *Kelley v Corston* than a genuine attempt to distinguish it.

<sup>56</sup> [1988] 1 W.L.R. 1394.

<sup>57</sup> [1996] 1 W.L.R. 763.

plaintiff had been convicted of aggravated burglary and sentenced to seven years' imprisonment. After an unsuccessful appeal and his release from prison the plaintiff commenced this action against his solicitors alleging that the negligent preparation of his defence led to his conviction. The particulars of negligence were as follows – failure to request an old-style committal; failure to visit the plaintiff sufficiently while in prison to take instructions from him; failure to provide the plaintiff with copies of the case depositions and to take his instructions on them; failure to arrange an identity parade; failure to take statements from three witnesses despite the plaintiff's repeated requests; failure to trace and take a statement from another witness; failure to follow an obvious enquiry as to the motives of key prosecution witnesses for giving evidence against the plaintiff; and failure to brief counsel in timely fashion and to arrange a pre-trial conference before the day of the trial. It is no denigration of the importance of these steps to say that none of it amounts to advocacy work. The case was struck out as an abusive collateral challenge upon the decision of the trial court. The importance of the decision lies in its explanation of what amounts to an abusive collateral challenge. Sir Thomas Bingham M.R. first stated that not all collateral attacks were necessarily abusive. Where the plaintiff has had a full opportunity of contesting the decision of the trial court the negligence action would be abusive. The negligence of the plaintiff's lawyers would not mean there had been no such opportunity as otherwise every convicted defendant could have some plausible ground for a civil claim.<sup>58</sup> In general the better approach to situations where the defendant in a criminal case may have been wrongly convicted would be an appeal against conviction. In criminal cases there is a relatively low threshold for the admission of new evidence and wide powers for the Court of Appeal to order a new trial. The Home Secretary may refer a case back to the Court of Appeal, now after a recommendation from the Criminal Cases Review Commission. These routes were better ways to rectify an injustice than allowing a civil court to come to a different conclusion.<sup>59</sup> It will be argued below that this is the preferable way to afford justice to criminal defendants who have been victims of negligence either from their advocates or their solicitors in pre-advocacy preparation. In *Smith v Linskills* it was also said that two further considerations militated against allowing civil claims by unsuccessful parties to previous litigation. A long time after the event the conditions of the previous trial cannot be recreated and finality in litigation is very important. As Sir Thomas Bingham M.R. pointed out there was a wide perception that the present rule was created by judges to protect their professional brethren. But the legal profession's interests were arguably better served by endless re-litigation. "If, as suggested in *Bleak House*, "The one great principle of English law is, to make business for itself..." there could be no better way of doing so."<sup>60</sup>

*Acton v Graham Pearce and Co*<sup>61</sup> concerned similar issues, although on this occasion the plaintiff's conviction had been quashed on appeal. No negligence action was allowed on the last two grounds of *Smith v Linskills*.

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<sup>58</sup> *ibid.*, at 769-770.

<sup>59</sup> *ibid.*, at 773.

<sup>60</sup> *ibid.*

<sup>61</sup> [1997] 3 All E.R. 909.

Chadwick J was particularly worried about the prospect of an acquittal in the Court of Appeal followed by a civil trial which decided that even with the negligence of the advocate the defendant would have been convicted anyway.<sup>62</sup> The initial reaction to this could be “damned if you win your appeal and damned if you don’t”, but this would be unfair. The decision illustrates how appeal against conviction is, as will be argued below, the better way of addressing professional negligence in this area. Another important feature of this decision is Chadwick J’s acknowledgement that for “out of court” work the “intimate connection” test of McCarthy P in *Rees v Sinclair*<sup>63</sup> is the law.<sup>64</sup>

*Walpole v Partridge & Wilson*<sup>65</sup> was another case of collateral challenge absent advocates’ immunity. The alleged negligence was the failure of a firm of solicitors to lodge a case stated appeal against conviction despite counsel’s advice that the Crown Court had arguably erred in law. The Court of Appeal decided that there was no abuse of process here because no re-litigation of issues decided in earlier proceedings would be involved. An argument that the point of law could have been taken before the current proceedings and should not be taken now was rejected on the basis that such a stance would bring the law into disrepute more than any apparent re-litigation. This is surely correct as the significance of points of law is often not apparent before the facts have been found. Where new evidence comes to light the test is quite rightly different – was it previously available? The decision of the Crown Court was not final and the plaintiff had been deprived of an opportunity of securing justice in the most appropriate way. This case shows that some times advocates’ negligence cannot always be addressed via an appeal against conviction.

### **Summary**

Decisions post *Saif Ali v Sydney Mitchell* threw up a lot of problems. In civil cases it became increasingly clear that advocates’ immunity rested upon unsustainable distinctions. In criminal cases there was the understandable reluctance to allow civil courts to come to potentially different conclusions than criminal trial courts, whether the defendant’s conviction were quashed or not. But it can not be right to refuse to address the effects of professional negligence in criminal cases altogether. If a negligence action is barred then the appellate process has to fill the void. The whole area was ripe for the re-examination it received in *Hall v Simons*.

### ***Hall v Simons* and the End of Advocates’ Immunity in the United Kingdom**

The seven member panel of the House of Lords which decided *Arthur JS Hall & Co v Simons*<sup>66</sup> was unanimous that advocates’ immunity should not be retained for civil cases and, by a majority of four to three, also abolished the immunity for criminal cases. *Rondel v Worsley* was not overruled;

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<sup>62</sup> *ibid*, at 925.

<sup>63</sup> [1974] 1 N.Z.L.R. 180, at 187.

<sup>64</sup> [1997] 3 All E.R. 909, at 924.

<sup>65</sup> [1994] Q.B. 106.

<sup>66</sup> [2002] 1 A.C. 615.

merely described as no longer reflecting public policy. The discussion which follows will focus first on civil cases. The arguments for rejecting advocates' immunity in general terms were mainly considered there. Then the focus will shift to criminal cases and why these were thought to present special difficulties.

### *Civil Cases*

The speeches of their Lordships largely demolished the four reasons for advocates' immunity originally set out in *Rondel v Worsley*.

First, their Lordships did not believe that the recognition of a duty of care to clients would lead to advocates preferring it over their overriding duty to the court. Lawyers are not the only professionals that have to reconcile ethical conflicts. Doctors often have to grapple with similar problems and nobody argues that they should be immune from suits in negligence.<sup>67</sup> Lord Hoffmann said this was really a vexation argument – as advocates have to perform a difficult task it would be unfair to impose a duty of care on them. Like Lord Steyn he could see no reason why advocates should have more protection here than other professionals like doctors.<sup>68</sup> Reforms to civil procedure introduced by the Civil Procedure Rules 1998, such as summary dismissal of unsustainable claims under rule 24.2, and the obvious difficulty in obtaining legal representation for these cases provide as much protection as lawyers deserve in this area.<sup>69</sup> Prolixity was a serious problem as things stood and it was difficult to believe that the abolition of immunity would make the situation worse.<sup>70</sup> Lord Steyn was much impressed by Canadian experience. There is no immunity there as the discussion above has shown and no sign that this has been inimical to the public interest.<sup>71</sup> Aside from all of this it will be difficult for disappointed clients either to prove negligence or that better advocacy would have produced a different outcome.<sup>72</sup> Negligence requires proof that the advocate presented the case as no qualified person should reasonably have done.<sup>73</sup> There is a world of a difference between that and proof that with the benefit of hindsight different tactics might have been more fruitful.

The immunity for those participating in court proceedings, *i.e.* the parties, witnesses, and judges, was dismissed as having little to do with the immunity claimed for advocates. The former is designed to encourage freedom of speech but the latter is an excuse for negligence.<sup>74</sup> As Lord Hoffmann explained – “The fact that the advocate is the only person involved in the trial process who is liable to be sued for negligence is because he is the only person who has undertaken a duty of care to his client.”<sup>75</sup>

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<sup>67</sup> *ibid.*, at 680 (Lord Steyn).

<sup>68</sup> *ibid.*, at 690.

<sup>69</sup> *ibid.*, at 691-692 (Lord Hoffmann). See also Lord Steyn at 682.

<sup>70</sup> *ibid.*, at 693 (Lord Hoffmann).

<sup>71</sup> *ibid.*, at 681.

<sup>72</sup> *ibid.*, at 682 (Lord Steyn).

<sup>73</sup> *ibid.*, at 737 (Lord Hobhouse).

<sup>74</sup> *ibid.*, at 679 (Lord Steyn).

<sup>75</sup> *ibid.*, at 698. Lord Hope said (at 714) that the witness immunity argument was a “make-weight argument.”

Their Lordships did not believe that the “cab rank” rule had sufficient impact on the administration of justice to justify depriving a client of a remedy in negligence for serious financial loss. Thus Lord Steyn pointed out that barristers’ clerks could filter out unwelcome cases. Fees could be raised within limits. Work could be declined if not within the advocate’s field of practice.<sup>76</sup> Lord Hoffmann pointed out that a vexatious client will usually have acquired the services of a solicitor first.<sup>77</sup> Those more familiar with a Bar Library system, like Lord Hope of Craighead, should be similarly sceptical of the significance of the “cab rank” rule in practice.<sup>78</sup> Lord Hobhouse pointed out that other professions, doctors and common carriers for example, were obliged to serve all who requested their services, and were subject to duties of care.

The re-litigation of cases or collateral challenges to decisions of courts of competent jurisdiction is not a reason for advocates’ immunity in civil cases. As Lord Steyn argued the principles of *res judicata*, issue estoppel and abuse of process should be sufficient to prevent any inappropriate re-litigation.<sup>79</sup> Lord Browne-Wilkinson said that in civil cases conflicting decisions were undesirable but far from unknown.<sup>80</sup> Lord Hoffmann described the collateral challenge rule as “burning down the house to roast the pig; using a broad-spectrum remedy when a more specific remedy without side effects can handle the problem equally well.”<sup>81</sup> Referring to matrimonial cases where terms of settlement are put before the judge for incorporation into an order of the court, Lord Hoffmann pointed out that the judge’s approval was dependent on the information provided by the advocates.<sup>82</sup> In relation to civil (including matrimonial) cases generally Lord Hoffmann thought that it would seldom be an abuse of process to sue an advocate for the handling of the case. One case where the original successful party might have reason to complain about subsequent proceedings against the losing party’s advocate is where a defendant fails to justify a serious libel.<sup>83</sup> Lord Hope drew attention to the difficulty in civil cases of defining the limits of immunity, especially in the context of out of court settlements.<sup>84</sup> Lord Hobhouse placed considerable reliance on what he saw as the fundamental difference between civil and criminal cases in this regard. He believed that a successful claim against a negligent lawyer does not attack the position of the other party to the original litigation. And the boundary between advocacy attracting immunity and other work outside the immunity could not be drawn clearly, a problem amplified under the Civil Procedure Rules.<sup>85</sup>

In addition to the above the House of Lords believed that abolition of the immunity would be a force for good. Lord Steyn stressed that “one of the

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<sup>76</sup> *ibid.*, at 678.

<sup>77</sup> *ibid.*, at 696.

<sup>78</sup> *ibid.*, at 714.

<sup>79</sup> *ibid.*, at 680.

<sup>80</sup> *ibid.*, at 684.

<sup>81</sup> *ibid.*, at 703.

<sup>82</sup> *ibid.*, at 705.

<sup>83</sup> *ibid.*, at 707.

<sup>84</sup> *ibid.*, at 724, referring to *Rees v Sinclair* [1974] 1 N.Z.L.R. 180 and *Kelley v Corston* [1998] Q.B. 686. See also Lord Hutton at 729.

<sup>85</sup> *ibid.*, at 745.

functions of tort law is to set external standards of behaviour for the benefit of the public.”<sup>86</sup> While he was confident that general standards at the Bar were high “[a]n exposure of isolated acts of incompetence ... will strengthen rather than weaken the legal system.”<sup>87</sup> Public confidence in the legal system could not be enhanced by the law singling out its own for protection no matter how flagrant the negligence.<sup>88</sup>

### *Criminal Cases*

A defendant in a criminal case who alleges that he was convicted or received a harsher sentence because of his advocate's negligence should ordinarily appeal conviction or sentence before entertaining any thoughts of suing the advocate in negligence.<sup>89</sup> As Lord Hoffmann pointed out there may be some cases like *Walpole v Partridge & Wilson*<sup>90</sup> where taking the line that failure to appeal bars a negligence action would be a denial of justice because the negligence consists of a lawyer's failure to process the appeal. From this it follows that the negligence of the defence advocate has to be a ground for appeal. Apparently it is. In *R v Irwin*<sup>91</sup> defence counsel's failure to consult the defendant about a decision not to call two alibi witnesses rendered the conviction unsafe. In *R v Clinton (Dean)*<sup>92</sup> a conviction was held to be unsafe because defence counsel failed to call evidence on the defendant's behalf to rebut the prosecution case.

If the principal remedy for advocates' negligence in criminal cases lies in appeal against conviction and/or sentence then any negligence action against the advocate would be in respect of losses not made good by a successful appeal. These losses may well be substantial. A defendant may have spent time in prison serving a sentence he would not have received if his counsel had done a competent job. Loss of earnings, including loss of employment, could have been considerable.<sup>93</sup> Despite this there is strength in the argument of those members of the House who would have preferred to preserve advocates' immunity in criminal cases. A meaningful appeal based on the negligence of an advocate will have to be undertaken by a different advocate. But the assistance of the allegedly negligent advocate will be needed to allow the appellate court to determine whether anything went seriously wrong in the court below. If a defence advocate knows that any assistance rendered to the appellate court is likely to provide ammunition for a subsequent negligence action against him how candid is that advocate

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<sup>86</sup> *ibid.*, at 682.

<sup>87</sup> *ibid.*

<sup>88</sup> *ibid.* See also Lord Hoffmann at 689.

<sup>89</sup> *ibid.*, at 679 (Lord Steyn), 685 (Lord Browne-Wilkinson – save in truly exceptional circumstances the only permissible challenge to a criminal conviction is by way of appeal), 703 (Lord Hoffmann), 730 (Lord Hutton).

<sup>90</sup> [1994] Q.B. 106.

<sup>91</sup> [1987] 2 All E.R. 1085.

<sup>92</sup> [1993] 1 W.L.R. 1181. See also *Anderson v HM Advocate* 1996 S.C. 29.

<sup>93</sup> Lord Hobhouse believed that the remedy for advocates' negligence in criminal cases was only by way of appeal. Defendants acquitted on appeal in the absence of negligent advocacy receive no compensation so the successful appellant (on whatever ground) has to accept any loss accompanying conviction as the price to be paid for “enjoying the protection of the criminal law.” See [2002] 1 A.C. 615, at 748.

likely to be in assisting the appellate court?<sup>94</sup> It is worth stating that none of the appeals before the House concerned criminal cases so that, as Lord Hobhouse pointed out, full argument had not been heard on this issue.<sup>95</sup> In a short speech Lord Millett rejected retention of the immunity for criminal cases for two reasons – one the difficulty of distinguishing all criminal cases from civil cases, and the other his perception that the public would be unlikely to understand the distinction.<sup>96</sup>

### **Discussion**

In abolishing the advocate's immunity the speeches do not place great reliance on the difficulty of distinguishing advocacy work from non-court work. In the main they appear to treat the issue as one of general principle and, with the exception of criminal cases, find no substantial merit in the immunity. Yet it remains very likely that two decades of gradual attrition sufficiently weakened the immunity that it was ripe for plucking by the time *Hall v Simons* came to be decided. It is submitted that the only arguments for advocates' immunity worthy of any respect are the arguments from conflict between the duty owed to the client and the duty to the court and the re-litigation/collateral challenge argument.

The conflict of duty argument is ultimately unpersuasive because proof of negligence is such a difficult task and any preference of the duty to the court should not ever raise any question of negligence. The advocate's immunity is a classic example of the dilemma courts have faced in contexts like medical negligence, police investigation of crime, and the discharge of statutory duties by public authorities. It is necessary in these situations to control the floodgates of liability. This can be done either by requiring very clear proof of negligence<sup>97</sup> or by denying the existence of a duty of care altogether.<sup>98</sup> The House of Lords has emphasised that the striking out of a negligence case on the ground that no duty of care is owed can only be justified in the most exceptional of circumstances.<sup>99</sup> One case where this was done, *D v East Berkshire Health NHS Trust*,<sup>100</sup> was a claim brought by parents suspected of sexually abusing their children. This is clearly different from advocates' immunity. A duty of care was owed to the children so recognition of a duty of care to the parents would have left professionals vulnerable to civil suit in a notoriously difficult field from whichever party

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<sup>94</sup> [2002] 1 A.C. 615, at 719 (Lord Hope), 747 (Lord Hobhouse).

<sup>95</sup> *ibid.*, at 735.

<sup>96</sup> *ibid.*, at 752.

<sup>97</sup> Such as the medical negligence test of *Bolam v Friern Hospital Management Committee* [1957] 1 W.L.R. 582, at 587 – “A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art.” (McNair J).

<sup>98</sup> For police investigation of crime see *Hill v Chief Constable of West Yorkshire* [1989] A.C. 53 and *Brooks v Metropolitan Police Commissioner* [2005] U.K.H.L. 24, [2005] 2 All E.R. 489. For claims against health care professionals and social workers investigating child sexual abuse see *D v East Berkshire Health NHS Trust* [2005] U.K.H.L. 23, [2005] 2 All E.R. 443.

<sup>99</sup> The infamous decision of the European Court of Human Rights in *Osman v United Kingdom* (2000) 29 E.H.R.R. 245 is thought to have made the courts more cautious in striking out cases.

<sup>100</sup> *Supra* n.98.

proved to be the victim of misdiagnosis. The conflicting duties in advocates' cases are not conflicting duties of care.

Initial experience after *Hall v Simons* suggested that the difficulty of proving negligence was controlling the floodgates.<sup>101</sup> Unfortunately a less sanguine perspective is offered by the case of *Moy v Pettmann Smith*.<sup>102</sup> The claimant had earlier been a claimant in a personal injury case seriously mishandled by his solicitors. They had failed, despite the advice of counsel, to obtain all necessary evidence relating to causation and prognosis. Before trial the defendants in this case offered to settle for £150,000, a sum which the claimant's counsel, who was very experienced in personal injury litigation, considered to be inadequate. To have a realistic chance of beating the offer and escaping liability for costs counsel knew she had to persuade the trial court to admit up to date evidence on causation and prognosis late. Counsel advised her client to reject the offer, whereupon she made the application for admission of the new evidence. The judge rejected that application and the claimant was awarded a sum less than £150,000 from which he had to meet the defendants' costs. Of course he was able to recover his liability in costs and the shortfall in damages from his solicitors for negligent case preparation. But the Court of Appeal held that counsel had to share in the responsibility for the debacle because she should have advised her client that he had a choice. He could either allow her to make the application for late admission of evidence and go on to try and obtain full compensation on the day of the trial; or he could accept the £150,000 and sue his solicitors for the inadequate compensation he obtained due to their negligence. Of course the option of suing the solicitors for all losses incurred was still open after counsel's plan failed and would not have been necessary had her plan succeeded. Counsel's reasoning in acting as she did was prompted by two considerations. One was trying to get her client full compensation on the day. The other was trying to save her instructing solicitors from a negligence action in the knowledge that her client could still sue them if her preferred course of action did not succeed. The Court of Appeal took the view that counsel should have told her client the full story and left it to him to decide which course of action to follow. But with respect to the Court of Appeal it could not be said that counsel had followed a course of action which no responsible body of professional opinion would have sanctioned. It is disturbing that it took a further appeal to the House of Lords where a unanimous appellate committee joined in the leading speech of Lord Carswell and corrected this fundamental error.

In relation to the re-litigation/collateral challenge argument the House of Lords was correct in seeing that civil and criminal cases presented different issues. In a criminal case there is no public interest in seeing someone wrongly convicted through advocates' negligence. Save for exceptional cases, such as losing a right to appeal because of lawyers' negligence, the better way of dealing with advocates' negligence in criminal cases is to make

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<sup>101</sup> See M. Seneviratne, "The rise and fall of advocates' immunity" (2001) 21 L.S. 644, at 662, where it was reported that little over a year after the House of Lords' decision there had only been two cases where barristers had been found liable in negligence and liability premiums charged by the Bar Mutual Management Company had not been increased.

<sup>102</sup> [2005] U.K.H.L. 7.

it a ground for appeal against conviction and/or sentence. All that remains after that is to decide whether someone acquitted on appeal should be allowed to sue their advocate for loss not made good by the appeal. Notwithstanding Lord Millett's concern that retention of immunity in criminal cases would be difficult to explain to the general public,<sup>103</sup> it is submitted that Lord Hope's concerns about the effect of a negligence action upon the assistance defence counsel gives to the appellate court should carry the greatest weight here. The first priority here must be to rectify the miscarriage of justice and if this is obstructed because of defence counsel's concerns that co-operation with the appeal will provide a basis for suing him then miscarriages may not be rectified as they should.

In civil cases it seems that their Lordships got their priorities correct. There is no public interest in upsetting the verdict of the civil court by allowing an appeal based on advocates' negligence. Neither is there any reason why the winning party should be deprived of success fairly won because an opponent's advocate has represented his or her client inadequately. The opponent's advocate should be accountable to his or her client for losses negligently caused, and this will only rarely have any impact upon the decision of the civil court.

### **The Antipodes: A Twist in the Tail**

Rumours of the demise of the advocate's immunity may be exaggerated, at least so far as jurisdictions in the southern hemisphere are concerned. It has already been seen that the High Court of Australia upheld advocates' immunity in *Giannarelli v Wraith*.<sup>104</sup> That decision was clearly enough on the common law of Australia but was sufficiently influenced by the Legal Profession Practice Act 1958 (Vict.) that a reconsideration of the issue would have been easier than the task facing the House of Lords in *Hall v Simons*. In between the Court of Appeal and House of Lords' decisions in *Hall v Simons* the High Court was able to avoid the issue in *Boland v Yates Property Corporation Pty Ltd*,<sup>105</sup> although Kirby J delivered an opinion sceptical about drawing the "jagged edge" between court and non-court work and confining *Giannarelli v Wraith* to criminal cases.

When *D'Orta Elkenaike v Victoria Legal Aid*<sup>106</sup> another Victorian case, came before the High Court five years after *Hall v Simons*, the issue seemed ripe for reconsideration. The very strong reaffirmation of *Giannarelli* given by a majority of the High Court<sup>107</sup> is surprising and the reasons seem tired and unconvincing. Essentially the High Court took the opposite view to the House of Lords on the main policy questions without basing this on any arguments insufficiently answered by the House of Lords. Two arguments are worthy of specific comment. First, it was said in some of the opinions that the House of Lords' decision was influenced by the imminent coming

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<sup>103</sup> Lord Millett's other argument about the difficulty of distinguishing between civil and criminal cases is a point not likely to be troublesome very often.

<sup>104</sup> (1988) 165 C.L.R. 543.

<sup>105</sup> (2000) 74 A.L.J.R. 209.

<sup>106</sup> (2005) H.C.A. 12.

<sup>107</sup> Only Kirby J dissented and he repudiated the preparedness he had shown in *Boland* to confine advocates' immunity to criminal cases.

into force of the Human Rights Act 1998. With respect, this is simply not so, and the absence of any discussion of this issue in the commentary above is an accurate reflection of the importance their Lordships attached to it. Secondly, it was said that the organisation of the legal profession in Australia was different so a different rule on negligence liability was appropriate. One should always exercise restraint when commenting upon developments in a jurisdiction with which one is unfamiliar. But the principal difference between the legal professions in Australia on the one hand and the United Kingdom and Ireland on the other seems to be that in the former practitioners are often barristers *and* solicitors whereas in the latter they are either one or the other. As the “jagged edge” between court work and non-court work must be more difficult to delineate in a profession that is not so clearly split this looks more like an argument *in favour* of adopting *Hall v Simons* than against it. One cannot help thinking that it was just too soon after *Giannarelli* for the High Court to change and that Australia may just have wanted to go its own way in any event.

The situation in New Zealand is uncertain at present. Two days before *D’Orta Elkenaike* was decided the New Zealand Court of Appeal handed down judgment in *Lai v Chamberlains*.<sup>108</sup> By a four to one majority (Anderson P dissenting) the Court of Appeal decided to abolish advocates’ immunity in civil cases. Criminal cases were left undecided as that issue was not before the court and family cases were also left in an uncertain position. In addition to viewing the policy issues differently from the House of Lords in *Hall v Simons* the dissenting judgment of the President of the Court stressed the absence in New Zealand of the same sort of case management processes as existed in England for weeding out vexatious claims and the apparently easier task a litigant would have in New Zealand in obtaining legal aid. It is, with respect, doubtful whether these issues were regarded as particularly weighty by the House of Lords. The President also argued that the matter was governed by section 61 of the Law Practitioners Act 1982 in any event. That provision states that “barristers of the Court shall have the powers, privileges, duties, and responsibilities that barristers have in England.” Anderson P held that this provision had no ambulatory effect and conferred on advocates the same *privilege* against negligence suits that advocates had in England under *Saif Ali v Sydney Mitchell & Co*. More plausible, it is submitted, is the argument of the majority of the court delivered by Hammond J, that whether section 61 is ambulatory or not, advocates had an *immunity* and not a *privilege*. An appeal to the Supreme Court was heard in mid-October 2005 but judgment is not expected until late April 2006 or even later. It is very difficult to predict which way the appeal will go. The issue is less one of principle than one which is a mixture of values and empirical questions not easy to assess in civil proceedings. The author takes the position that *Hall v Simons* had the better of the arguments but it should also be accepted that New Zealand may prefer to go the same way as Australia on this question.

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<sup>108</sup> [2005] NZCA 37.

### **Conclusion**

Little point is served in producing a conclusion that is a summary of all that has been said already. The author believes that advocates' immunity cannot be justified for civil cases but that there may be good reason for preserving it in criminal cases. The law in England and Wales has now largely been brought into line with other parts of the common law world with the exception of the antipodes. To that extent one can comfortably speak of the demise of the advocate's immunity. If the New Zealand Supreme Court allows the appeal in *Lai v Chamberlains* it may be necessary to retitile this essay "The Fall and Rise of the Advocate's Immunity".

## THE NEGLIGENCE LIABILITY OF PUBLIC AUTHORITIES: WAS THE OLD LAW THE RIGHT LAW?

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### Introduction

This is an article about three recent House of Lords judgments on the vexed issue of public authority liability in negligence and the performance of public, or governmental, functions.<sup>1</sup> The judgments – *Gorringe v Calderdale M.B.C.*,<sup>2</sup> *D v East Berkshire Community Health N.H.S. Trust*,<sup>3</sup> and *Brooks v Metropolitan Police Commissioner*<sup>4</sup> – centred on whether the defendant authorities owed common law duties of care to individuals who suffered injury as a result of, respectively: a car accident that was argued to have been caused by an absence of road markings; erroneous accusations that parents had abused their children; and the manner in which the police had treated the victim of a crime. In holding that no duties were owed, the House of Lords has seemingly moved the tort liability of public authorities away from the more “consumerist” model of negligence that had underscored its earlier judgments in child welfare and education cases such as *Barrett v Enfield L.B.C.*<sup>5</sup> and *Phelps v Hillingdon L.B.C.*<sup>6</sup> The prospect of increased liability in those cases has, instead, ceded in the more recent cases to an emphasis on the wider public/community interest as better served when there is limited scope for damages actions against public authorities (whether as directly or vicariously liable).<sup>7</sup> While the child welfare and education cases thus remain as important precedents – they were expressly considered and reaffirmed in *Gorringe* and *D*<sup>8</sup> – their reasoning does not appear to extend

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<sup>1</sup> On the long-standing complexity in the case law see, e.g. R.A. Buckley, ‘Negligence in the Public Sphere: Is Clarity Possible?’ (2000) 51 N.I.L.Q. 25 and C. Booth and D. Squires, *The Negligence Liability of Public Authorities*, chap.1. On public/governmental functions P. Cane, *Administrative Law* (4<sup>th</sup> ed., 2004) chaps.1 & 3.

<sup>2</sup> [2004] 1 W.L.R. 1057.

<sup>3</sup> [2005] 2 A.C. 373.

<sup>4</sup> [2005] 2 All E.R. 489.

<sup>5</sup> [2001] 2 A.C. 550.

<sup>6</sup> [2001] 2 A.C. 619. The term “consumerist” was used by Duncan Fairgrieve when analysing *Phelps*: see ‘Pushing Back the Boundaries of Public Authority Liability: Tort Law Enters the Classroom’ [2002] P.L. 288 at 307. See also J. Bell, ‘Introduction’ in D. Fairgrieve, M. Andenas and J. Bell (eds.) *Tort Liability of Public Authorities in Comparative Perspective* p.xv.

<sup>7</sup> On the (increasing) appeal of notions of community in legal reasoning see P. Seters (ed), *Communitarianism in Law and Society*.

<sup>8</sup> See, in *Gorringe*, e.g. [2004] 1 W.L.R. 1057 at 1968, para.39 (Lord Hoffmann) and [2004] 1 W.L.R. 1057 at 1079, para.73 (Lord Scott). And in *D* see, [2005] 2 A.C.

beyond immediately analogous disputes. The consumerist cases have, in that sense, arguably become exceptions to a more general rule that militates against increased liability for public service providers such as highway authorities, social welfare agencies, and the police.

The purpose of this article is to consider how far *Gorringe, D*, and *Brooks* thereby mark a return to what may be termed the “old” common law approach to the negligence liability of public authorities. The “old” approach can for these purposes be taken as that which pre-dominated pre-*Barrett* and which entailed that duties of care were rarely owed by public authorities when they were acting under statutory powers and duties or, in the case of the police, investigating crime.<sup>9</sup> The corresponding pre-*Barrett* rationale was, again, that the interests of the wider public/community were better served when public service providers with limited resources were not subject to the ready threat of litigation;<sup>10</sup> and the approach took form in practice in the striking-out of negligence actions at a preliminary stage on the ground that the proceedings disclosed no reasonable cause of action.<sup>11</sup> While *Barrett* in turn represented a departure from striking-out – a change that was part prompted by the European Court of Human Rights (ECtHR) finding in *Osman* that striking-out in that case had violated Article 6 ECHR<sup>12</sup> – the fact that both *D* and *Brooks* were appeals against striking-out orders on the grounds of no duty suggests a return to a practice that was previously regarded as problematic. The fact that *Gorringe, D*, and *Brooks* have drawn upon essentially the same arguments of public policy that guided the pre-*Barrett* case law also suggests a continuance in reasoning that transcends any wider change that *Barrett* was thought to signify.<sup>13</sup>

A related point of enquiry concerns the extent and nature of any interaction between the ECHR and the common law in the cases,<sup>14</sup> as was addressed in a number of *obiter* comments (the disputes each arose prior to the coming into force of the Human Rights Act 1998 and the ECHR was not directly in issue<sup>15</sup>). Although the decision in *Barrett* was part influenced by *Osman*, the ECtHR subsequently held, in the light of domestic judicial criticism of *Osman*, that its finding on Article 6 ECHR had been misguided and that striking-out should instead be considered under the Article 13 ECHR right to

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373 at 391-2 (Lord Bingham, dissenting) and [2005] 2 A.C. 373 at 417, para.124 (Lord Brown).

<sup>9</sup> See, most famously, *Hill v Chief Constable of West Yorkshire* [1989] A.C. 53; *X v Bedfordshire C.C.* [1995] 2 A.C. 633; and *Stovin v Wise* [1996] A.C. 923, considered below. But for an exception to, in this instance, *Hill* see *Swinney v Chief Constable of Northumbria (No. 1)* [1997] Q.B. 64.

<sup>10</sup> *Hill v Chief Constable* [1989] A.C. 53 at 63 (Lord Keith).

<sup>11</sup> On striking-out see, in England and Wales, CPR, r.3.4.

<sup>12</sup> *Osman v U.K.* (2000) 29 E.H.R.R. 245.

<sup>13</sup> The leading discussion of *Barrett* remains P. Craig and D. Fairgrieve, ‘*Barrett*, Negligence and Discretionary Powers’ [1999] P.L. 626. See also D. Fairgrieve, *State Liability in Tort: A Comparative Perspective* p.68 ff.

<sup>14</sup> See also J. Jackson, ‘Human Rights, Criminal Justice and the Future of the Common Law’, this issue.

<sup>15</sup> The House of Lords has held consistently that the Human Rights Act 1998 does not have retrospective effect: see, in the context of tort proceedings, *Wainwright v Home Office* [2004] 2 A.C. 406.

an effective remedy.<sup>16</sup> At one level, such judicial “dialogue” merely illustrates the point that national and international legal systems may approach the same issues from different and sometimes conflicting perspectives,<sup>17</sup> but it can also be said to run prior to the much more profound challenge of merging the common law and European human rights standards in an era of globalisation and interlocking legal orders.<sup>18</sup> For instance, Jane Wright argued at the time of the coming into force of the Human Rights Act 1998 that the common law was ill-suited to the challenge of absorbing the values and reasoning of the ECHR, largely because of the common law’s lack of familiarity with overarching principles that correspond to a more general rights consciousness.<sup>19</sup> However, while there are statements in *Gorringe*, *D*, and *Brooks* that lend support to Wright’s disjuncture thesis – aspects of the judgments envisage that domestic tort law principles can exist at one remove from the ECHR and that they should be affected by the ECHR only insofar as is strictly necessary<sup>20</sup> – there are other statements that arguably parallel central features of the ECHR system. This is particularly true of judicial appeal to notions of community in *D* and *Brooks*,<sup>21</sup> as such notions have been argued to resonate with the margin of appreciation doctrine and its emphasis on moral sentiment and related local values.<sup>22</sup> So do the *dicta* in the cases suggest a compartmentalisation of the common law and ECHR as fundamentally distinct bodies of law, or do they reveal the common law as in any event at one with much of the ECHR and open to development in its light? And what, if anything, does the return to striking-

<sup>16</sup> For criticism of *Osman* see *Barrett* [2001] 2 A.C. 550 at 558-60 (Lord Browne-Wilkinson) and Lord Hoffmann, ‘Human Rights and the House of Lords’ (1999) 62 M.L.R. 159 at 164. For the ECtHR’s acceptance of the some of the criticisms see *Z v U.K.* (2002) 34 E.H.R.R. 97 at 135, para.91 ff, referring to Lord Brown-Wilkinson’s opinion in *Barrett*; and for its corresponding finding in respect of Article 13 ECHR see *Z v U.K.* (2002) 34 E.H.R.R. 97 at 139, para.105 ff. For commentary see C. Gearty, ‘Unravelling Osman’ (2001) 64 M.L.R. 159 and ‘Osman Unravels’ (2002) 65 M.L.R. 86. But on the continuing and more generally problematic nature of Article 6 ECHR in the domestic setting see, e.g. *Matthews v Ministry of Defence* [2003] 1 A.C. 1163; and T. Hickman, ‘The “uncertain shadow”: Throwing Light on the Right to a Court Under Article 6(1)’ [2004] P.L. 122.

<sup>17</sup> The term “dialogue” was used by A.C.L. Davies: see, ‘The European Convention and Negligence: Osman “Reviewed”’ (2001) 117 L.Q.R. 521 at 524. And on the sometimes problematic interaction of different legal orders see, e.g. J. Allison, ‘Transplantation and Cross-fertilisation’ in J. Beatson and T. Tridimas (eds), *New Directions in European Public Law* p.169.

<sup>18</sup> See further M. Hunt, *Using Human Rights Law in English Courts* chpts. 1-3; G. Anthony, *UK Public Law and European Law: The Dynamics of Legal Integration* chaps. 1, 7 & 8; and P. Birkinshaw, *European Public Law*, chaps. 1, 13 & 14.

<sup>19</sup> *Tort Law and Human Rights*. Although for further analysis of the significance of the Act see T. Hickman, ‘Tort Law, Public Authorities, and the Human Rights Act 1998’ in Fairgrieve, Andenas and Bell (eds.) n.6 above, p.17.

<sup>20</sup> See, e.g. *D v East Berkshire* [2005] 2 A.C. 373 at 408-9, paras.92-5 (Lord Nicholls).

<sup>21</sup> See also, e.g. in the context of nuisance proceedings against a public authority – in this instance a privatised utility – *Marcic v Thames Water Utility* [2004] 1 All E.R. 135.

<sup>22</sup> See R. Mullender, ‘Tort, Human Rights, and Common Law Culture’ (2003) 23 O.J.L.S. 301 at 312 ff.

out in the cases mean in terms Article 13 ECHR – which is not included in Schedule 1 to the Human Rights Act 1998<sup>23</sup> – and future cases in which ECHR guarantees are directly in issue?

The article begins with a section that outlines the significance of the *Barrett* judgment and related case law that suggested a more expansive approach to duties of care and liability. It next divides into two sections that outline the findings and reasoning in *Gorringe, D*, and *Brooks*, both as reflect upon *Barrett* and upon debates about the relationship between the common law and the ECHR. The central point made here is that *Gorringe, D* and *Brooks* do mark a return to the old law of negligence liability, and that *Barrett* is now apparently constrained by a number of emerging distinctions between different categories of cases. In terms of the ECHR, it will moreover be suggested that the majority decision in *D* (in particular) has set the common law at one remove from the ECHR and the Human Rights Act 1998 in a manner that may ultimately prove problematic for reasons associated with existing case law under the Act.<sup>24</sup> Although there are aspects of the cases that suggest that the ECHR and common law exist in a complementary relationship, the majority approach in *D* proceeds on the understanding that cases that fall under the Human Rights Act 1998 should be dealt with on that basis and that there is no need for the common law to provide an alternative cause of action. The conclusion thus offers some more general comments on the shift back to the old and queries whether the approach adopted in *D* will finally prove sustainable.

### **The (Original) Significance of *Barrett***

Prior to *Barrett*, the House of Lords' case law on the negligence liability of highway authorities, social welfare agencies, and the police had become synonymous with its judgments in *Stovin v Wise*,<sup>25</sup> *X v Bedfordshire C.C.*<sup>26</sup>, and *Hill v Chief Constable of West Yorkshire*<sup>27</sup>. The cases, which concerned appeals against a finding of liability (*Stovin*) and the striking-out of proceedings (*X* and *Hill*), provided seminal statements of the then judicial approach to the liability of public service providers in circumstances falling outside established duty of care situations (such as the provision of medical treatment).<sup>28</sup> Each case was of course specific to its own context, and the

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<sup>23</sup> Sch.1 lists those provisions of the ECHR that are given further effect under the Act, namely, Arts.2-12 & 14 ECHR, Arts.1-3 of Prot 1, and Arts.1-2 of Protocol 6, as read with Arts.16-18 ECHR.

<sup>24</sup> Principally *R v Secretary of State for the Home Department, ex p. Greenfield* [2005] 1 W.L.R 673.

<sup>25</sup> [1996] A.C. 923.

<sup>26</sup> [1995] 2 A.C. 633.

<sup>27</sup> [1989] A.C. 53.

<sup>28</sup> Related case law on the liability of highway authorities, welfare agencies, the police, and other public service providers and authorities includes: *Haydon v Kent C.C.* [1978] Q.B. 343; *Rowling v Takaro Properties Ltd.* [1988] A.C. 473; *Calveley v Chief Constable of Merseyside* [1989] A.C. 1228; *Lonrho plc v Tebbit* [1992] 4 All E.R. 280; *R v Deputy Governor of Parkhurst Prison, ex p. Hague* [1992] 1 A.C. 58; *Alexandrou v Oxford* [1993] 4 All E.R. 328; *Osman v Ferguson* [1993] 4 All E.R. 344; *Ancell v McDermott* [1993] 4 All E.R. 355; *Metcalfe v Chief Constable of R.U.C.* [1995] N.I. 446; *Elguzouli-Daf v Commissioner of the Police* [1995] Q.B. 335; *Capital and Counties plc v Hampshire C.C.* [1997] Q.B.

House of Lords variously considered: questions of proximity;<sup>29</sup> the relevance of the (much criticised) “policy/operational” dichotomy;<sup>30</sup> whether an act or omission that was underscored by a statutory duty or power must have been *Wednesbury* unreasonable/irrational before it could found a negligence action;<sup>31</sup> whether the policy of the governing legislation was to afford a remedy in damages;<sup>32</sup> and whether it would have been “fair, just and reasonable” to impose duties of care on public authorities that were working within a statutory framework and in tandem with other agencies.<sup>33</sup> But whatever the context specific issues, the reasoning in each judgment relied, either expressly or implicitly, on the argument of public policy that favours limited liability in the interests of the wider public.<sup>34</sup> Hence in *Stovin v Wise*, where the defendant had joined the authority as partly liable for a car accident because it had failed to use its statutory powers to compel improvements to land adjoining the highway, it was held that no duty had been owed by the authority because the omission had not been irrational and because there was nothing in the policy of the statute to suggest that compensation should be paid. And in *X v Bedfordshire C.C.*, where the various claimants were children affected by a range of welfare and education decisions, it was held that the grafting-on to statutory duties of a common law duty of care would only serve to complicate the already “extraordinarily delicate” tasks performed by the relevant authorities.<sup>35</sup> The corresponding

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1004; *O.L.L. Ltd v Secretary of State for Transport* [1997] 3 All E.R. 297; and *Goodes v East Sussex C.C.* [2000] 1 W.L.R. 1356. Although on the relevance of resource considerations in the context of medical negligence see C. Witting, ‘National Health Service Rationing: Implications for the Standard of Care in Negligence’ (2001) 21 O.J.L.S. 443.

<sup>29</sup> *Hill* [1989] A.C. 53 at 60-62.

<sup>30</sup> *X* [1995] 2 A.C. 633 at 736 ff (Lord Browne-Wilkinson). The value of the distinction – which was introduced in *Anns v Merton* [1978] A.C. 728 – was doubted by Lord Hoffmann in *Stovin* [1996] A.C. 923 at 951. And for a long-standing academic critique see SH Bailey and MJ Bowman, ‘The Policy/Operational Dichotomy – A Cuckoo in the Nest’ (1986) 45 C.L.J. 430.

<sup>31</sup> *X* [1995] 2 A.C. 633 at 736-7 (Lord Browne-Wilkinson) and *Stovin* [1996] 2 A.C. 923 at 953 (Lord Hoffmann). On *Wednesbury* unreasonableness/irrationality see *Associated Provincial Picture Houses v Wednesbury Corporation* [1943] 1 K.B. 223 and *Council of Civil Service Unions v Minister for the Civil Service* [1985] A.C. 374 at 410-11 (Lord Diplock). But note that *Wednesbury*’s place in domestic law is increasingly being supplanted by the proportionality principle: see *R (Daly) v Home Secretary* [2001] 3 All E.R. 433, in particular at 447 (Lord Cooke).

<sup>32</sup> *X* [1995] 2 A.C. 633 at 731 (Lord Browne-Wilkinson, addressing the related question of whether an action for breach of statutory duty could be sustained) and *Stovin* [1996] 2 A.C. 923 at 953 (Lord Hoffmann).

<sup>33</sup> *X* [1995] 2 A.C. 633 at 739 (Lord Browne-Wilkinson), applying *Caparo Industries plc v Dickman* [1990] 2 A.C. 605.

<sup>34</sup> On arguments of public policy see Booth and Squires n.1 above, chap.4. And for further and related arguments against the imposition of liability see, e.g. B. Feldthusen, ‘Failure to Confer Discretionary Public Benefits: The Case for Complete Negligence Immunity’ [1997] Tort L. Rev. 17; C. Keenan, ‘A Plea Against Tort Liability for Child Protection Agencies in England and Wales’ (2003) 42 Washburn L.J. 235; and P. Leyland, ‘The Human Rights Act and Local Government: Keeping the Courts at Bay’ (2003) 54 N.I.L.Q. 136 at 150 ff.

<sup>35</sup> [1995] 2 A.C. 633 at 751, Lord Browne-Wilkinson, referring specifically to the abuse cases.

public policy point was then put at its highest in *Hill* when, having held that there was an insufficiently proximate relationship between the police and a random victim of a serial killer, the House (famously) added:

“(T)here is another reason why an action for damages in negligence should not lie against the police in circumstances such as those of the present case, and that is public policy . . . The general sense of public duty which motivates police forces is unlikely to be appreciably reinforced by the imposition of such liability so far as concerns their function in the investigation and suppression of crime. From time to time they may make mistakes in the exercise of that function, but it is not to be doubted that they apply their best endeavours to the performance of it . . . (I)t would be reasonable to expect that if potential liability were to be imposed it would not be uncommon for actions to be raised against police forces . . . Many such decisions would not be regarded by the courts as appropriate to be called into question, yet elaborate investigation of the facts might be necessary to ascertain whether this is so. A great deal of police time, trouble and expense might be expected to have to be put into the preparation of the defence . . . The result would be a significant diversion of police manpower and attention from their most important function, that of the suppression of crime”.<sup>36</sup>

The significance of *Barrett* lay in the fact that the House of Lords there held that the question whether a duty of care was owed would, instead, often better be answered in the context of a full trial and that the courts should for that reason be cautious to strike-out proceedings at a preliminary stage. The claim for damages in the case had been brought by a man who had been taken into care at the age of 10 months and who claimed to have suffered psychiatric harm as a result of a variety of decisions taken by the defendant local authority (the case thereby differed from *X*, where the question in the child welfare cases had been whether duties could be owed in respect of decisions whether to take children into care<sup>37</sup>). While the House of Lords accepted that “policy” decisions taken by local authorities could not found a duty of care as such decisions are non-justiciable (the term policy corresponding to that used in the “policy/operational” dichotomy),<sup>38</sup> it held that other decisions could potentially found an action and that the central question at trial would be whether the imposition of a duty of care would be fair, just and reasonable (the House thereby jettisoned the public law tests that had been applied in previous child welfare cases<sup>39</sup>). In reaching this conclusion, the House was guided by a concern to heighten common law

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<sup>36</sup> [1989] A.C. 53 at 63 (Lord Keith).

<sup>37</sup> But for criticism of the distinction see Cane n.1 above at p.283.

<sup>38</sup> See, e.g. [2001] 2 A.C. 550 at 571 ff (Lord Slynn). The judgment was in this sense at one with *X*: see [1995] 2 A.C. 633 at 738. On justiciability see further Booth and Squires n.1 above, chap.2.

<sup>39</sup> Namely whether a decision was *Wednesbury* unreasonable. Although note that Lord Browne-Wilkinson had, in *X*, already doubted the need to use public law concepts to determine the private law liability of public authorities: see [1995] 2 A.C. 633 at 736-7.

protections for vulnerable children,<sup>40</sup> although it was, as noted above, also influenced by the ECtHR's judgment in *Osman v U.K.*<sup>41</sup> Lord Browne-Wilkinson, as the Law Lord who gave express consideration to the ECtHR's judgment, held that striking-out in the instant case could fall foul of the earlier *Osman* finding that striking-out on the basis of the *Hill* precedent had there represented a disproportionate interference with Article 6 ECHR rights of access to a court. Although his Lordship was at the same time critical of *Osman* – he considered that the ECtHR had misunderstood the dynamics of the duty of care element in domestic tort law and wrongly categorised the rule in *Hill* as constitutive of an immunity from liability – he held that the Article 6 ECHR point remained valid in the absence of its reappraisal by the ECtHR. His Lordship for that reason, among others, decided that the case should be allowed to proceed to trial; and the suggested reappraisal followed two years later – and largely in the light of Lord Browne-Wilkinson's comments – in the shift to Article 13 ECHR in *Z v U.K.*<sup>42</sup>

The immediate consequence of *Barrett* was, of course, for striking-out to become increasingly exceptional – and duties of care more apparent – in the lower courts.<sup>43</sup> It was, moreover, a change that was soon consolidated by other House of Lords judgments. The most important of these was *Phelps*,<sup>44</sup> which established that educational psychologists and teachers could owe common law duties of care to children affected by their advice and decisions.<sup>45</sup> This finding thereby marked the move towards the more consumerist model of liability that was noted above, as the judgment emphasised that parents would often be making important decisions on behalf of their children on the basis of the professional service provided to them.<sup>46</sup> In doctrinal terms, the change in emphasis then took further form in the fact that the local authorities were here sued as vicariously, rather than directly, liable for the loss suffered. While the option of direct liability was said to remain,<sup>47</sup> the focus on vicarious liability meant that there was no apparent need to consider whether a matter was one of policy that was, *per Barrett*, non-justiciable. The question, instead, was whether there was any overriding reason in principle why a professional ought not to owe a duty of

<sup>40</sup> The justification was not offered explicitly in *Barrett*, but has since been forwarded by Lord Brown in *Gorringe* – see [2004] 1 W.L.R. 1057 at 1086, para.100, considered below.

<sup>41</sup> (2000) 29 E.H.R.R. 245.

<sup>42</sup> (2002) 34 E.H.R.R. 97 at 135, para.91 ff, referring to Lord Browne-Wilkinson. The *Z* case was a petition arising from one of the child welfare decisions in *X v Bedfordshire C.C.*. See also *T.P. and K.M. v U.K.* (2002) 34 E.H.R.R. 42 and *D.P. and J.C. v U.K.* (2003) 36 E.H.R.R. 183.

<sup>43</sup> For cases in which duties were found to be owed see, e.g. *Kent v Griffiths* [2001] Q.B. 36, C.A.; *Larner v Solihull M.B.C.* [2001] R.T.R. 469, C.A.; and *Kane v New Forest D.C.* [2002] 1 W.L.R. 312, C.A., and *D v East Berkshire* [2004] 2 W.L.R. 58, C.A.. But for an early instance of post-*Barrett/Osman* striking-out see *S v Gloucestershire C.C.* [2001] 2 W.L.R. 909.

<sup>44</sup> *Phelps v Hillingdon L.B.C.* [2001] 2 A.C. 619. See also *W v Essex C.C.* [2002] 2 AC 592 and *Waters v Commissioner of the Police for the Metropolis* [2000] 1 W.L.R. 1607.

<sup>45</sup> The prospect of such liability had been held open by Lord Browne-Wilkinson in *X*: see [1995] 2 A.C. 633 at 764.

<sup>46</sup> For fuller analysis of the case see Fairgrieve n.6 above.

<sup>47</sup> [2001] 2 A.C. 619 at 658 (Lord Slynn).

care and why, if that duty was breached, the authority ought not to be vicariously liable. Having thus held that duties should in principle be owed – psychologists and teachers were equated with other professionals who already owe duties of care – the House concluded that vicarious liability would not impede the provision of educational services as the standards imposed would be at one with those expected in other professional contexts.

The significance of this move to a consumerist model of liability is returned to below, in particular in terms of how it might be reconciled with the community based reasoning of *D* and *Brooks*. However, one further point to be made here concerns the relationship between the duty and breach elements of negligence actions in the face of *Barrett* and *Phelps*. Although the judgments clearly gave rise to the possibility of increased liability – an award of damages to one of the claimants in *Phelps* was upheld by the House of Lords – judges and academic commentators suggested that the breach element of negligence actions might instead provide a mechanism for moderating liability.<sup>48</sup> The point here was simply that courts, when asking whether an authority has fallen beneath the standard of reasonable care, could account for traditional public policy concerns in the full hearing and on the question of breach, rather than at the preliminary stage associated with the duty of care and striking-out.<sup>49</sup> Subsequent case law has since suggested that this can and does occur,<sup>50</sup> although the merit of moderating liability at full trial should perhaps be juxtaposed with the House of Lords earlier concerns in *Hill*. The House, as quoted above, there held that striking-out on the question of the duty of care was to be preferred as the courts – and defendant authorities – could in that way avoid becoming engaged in an elaborate and costly investigation of facts. As will be seen below, this practical concern is one of several that have led the House of Lords back to the duty of care in *Gorringe*, *D*, and *Brooks*.

### ***Gorringe*, *D*, and *Brooks*: What was Decided, and Why?**

The appeals in *Gorringe*, *D*, and *Brooks* – as in *Stovin*, *X*, and *Hill* – were concerned with the correctness of a finding of liability (*Gorringe*) and of the striking-out of proceedings (*D* and *Brooks*). The finding of liability in *Gorringe* had been made at first instance, where the trial judge held that a car accident had been caused by Calderdale M.B.C.'s negligence in failing to provide sufficient road signs to alert drivers to dangers (the common law duty of care had been argued to co-exist with a statutory duty imposed by the Road Traffic Act 1988<sup>51</sup>). In holding that no duty had been owed, the House

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<sup>48</sup> See [2001] 2 A.C. 550 at 591 (Lord Hutton) and *Craig and Fairgreive* n.13 above. See also Lord Bingham's dissenting opinion in *D*: [2005] 2 A.C. 373 at 399-400 (para.49), considered below.

<sup>49</sup> See further P. Cane n.1 above at p.283 ff.

<sup>50</sup> See, e.g. in the education context *Bradford-Smart v West Sussex C.C.* [2002] E.L.R. 139, C.A.; *Liennard v Slough B.C.* [2002] E.L.R. 527; *Smith v Havering London L.B.C.* [2004] E.L.R. 629; and *Carty v Croydon L.B.C.* [2005] 2 All E.R. 517. But for education cases in which liability was established see, e.g. *D.N. v Greenwich L.B.C.* [2005] E.L.R. 133, C.A.; and *Devon C.C. v Clarke* [2005] E.L.R. 375, C.A..

<sup>51</sup> *Viz*, s 39(2)(3). It was accepted that this statutory duty did not give rise to a private law cause of action and that the common law duty was parasitical on its

of Lords ruled that it would be inconsistent with the policy of the statute to impose a common law duty of care when the statute in question did not itself give rise to a private law cause of action;<sup>52</sup> and it also applied its earlier *Stovin* ruling on liability for omissions while at the same time accepting criticisms of that judgment's reliance on the public law concept of irrationality.<sup>53</sup> The House then likewise drew upon pre-*Barrett* authority in *Brooks* when holding that it had been correct to strike-out the negligence action in that case on the basis of the *Hill* precedent (Mr Brooks, who had been with Stephen Lawrence on the night that he was murdered in a notorious racist attack,<sup>54</sup> claimed that he was both a witness and a victim of crime and that the police had breached their duty to treat him as such by, for instance, failing to offer him protection, support, assistance and treatment<sup>55</sup>). Although the House accepted that developments since *Osman* meant that the blanket approach in *Hill* was no longer appropriate – “Nowadays, a more sceptical approach to the carrying out of all public functions is necessary”<sup>56</sup> – it considered that the duties contended for still fell within even a reformulated statement of the *Hill* principle and that the claimant could only avail himself of his alternative causes of action.<sup>57</sup> And in *D*, where the issue

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existence (the finding of common law liability had been made at first instance in the light of *Larner v Solihull M.B.C.* [2001] R.T.R. 469, C.A.).

<sup>52</sup> [2004] 1 W.L.R. 1057 at 1066 (Lord Hoffmann), affirming the CA at [2002] R.T.R. 446. Note that it was also argued that there had been breach of the statutory duty contained in s.41(1) of the Highways Act 1980 (*i.e.* to “maintain the highway”). The argument failed on the authority of *Haydon v Kent C.C.* [1978] Q.B. 343, C.A. and *dictum* of Steyn L.J. in *Lavis v Kent C.C.* (1992) 90 L.G.R. 416 at 418, C.A..

<sup>53</sup> Lord Steyn doubted whether use of the concept had any merit in the context of private law proceedings, and referred to the shift away from public law precepts in *Barrett* and *Phelps*: see [2004] 1 W.L.R. 1057 at 1060. See also the approach of Lord Hoffmann, who accepted that use of the concept of irrationality may have been “ill-advised”, at [2004] 1 W.L.R. 1057 at 1067-1068, considered below.

<sup>54</sup> See *The Stephen Lawrence Inquiry: Report of an Inquiry by Sir William MacPherson of Cluny*, 1999, Cm 4262-I.

<sup>55</sup> The duty argued for was three-fold and framed thus: “to (1) take reasonable steps to assess whether [the respondent] was a victim of crime and then to accord him reasonably appropriate protection, support, assistance and treatment if he was so assessed; (2) take reasonable steps to afford [the respondent] the protection, assistance and support commonly afforded to a key eye-witness to a serious crime of violence; (3) afford reasonable weight to the account that [the respondent] gave and to act upon it accordingly”.

<sup>56</sup> [2005] 2 All E.R. 489 at 504, para.28 (Lord Steyn). See also Lord Steyn's comments at [2005] 2 All E.R. 489 at 504 para.27 where, having referred to the fate of the barrister's immunity enunciated in *Rondel v Worsley* [1969] 1 A.C. 191 and ended in *Arthur J.S. Hall & Co (A Firm) v Simons* [2002] 1 A.C. 615, he said: “More fundamentally since the decision of the European Court of Human Rights in . . . (*Z v U.K.*) . . . it would be best for the principle in *Hill* to be reformulated in terms of the absence of a duty of care rather than a blanket immunity”. For further reconsideration of the breadth of the principle in *Hill* see [2005] 2 All E.R. 489 at 493, para.3 (Lord Bingham) and at 494, para.6 (Lord Nicholls). And on *Rondel* and *Arthur J.S. Hall* see D. Capper. ‘The Demise of the Advocate's Immunity’, this issue.

<sup>57</sup> *E.g.* under s.20 of the Race Relations Act 1976. Although note that Mr Brooks was subsequently given an out of court settlement of £100,000 and an apology

was whether healthcare professionals owed duties of care to parents who they had wrongly suspected of abusing their children, the House drew upon arguments about the limited circumstances in which duties are owed to third parties<sup>58</sup> and about the paramouncy of the interests of the child<sup>59</sup> when holding that striking-out orders had there too been appropriate (several of their Lordships also read case law beginning with *Barrett* as establishing that duties of care are now owed to children in such cases<sup>60</sup>). While the House recognised that the interests of parents were deserving of protection, it nevertheless held that liability should sound only where there is an absence of good faith on the part of individual professionals who act on their suspicions of abuse.<sup>61</sup> Any other threshold, it was said, would place professionals in the impossible position of seeking to balance the interests of the child – which should be paramount – with the need to protect parents from unnecessary interference with their family life.<sup>62</sup>

The corresponding emphasis on the interests of the wider public, or community, was at its most pronounced in *D* and *Brooks*. In *Brooks*, for instance, Lord Steyn considered that the core reasoning in *Hill* remained valid as the imposition of duties of the kind argued for in *Brooks* would impede “the police’s ability to perform their public functions in the interests of the community, fearlessly and with despatch . . . It would, as was recognised in *Hill*, be bound to lead to an unduly defensive approach in combating crime”.<sup>63</sup> While this perhaps begs the question of how far notions of community can be developed with reference to politically contested services such as policing,<sup>64</sup> Lord Steyn nevertheless considered that a community based justification for limiting liability was consistent both with the essence of the common law and with the rights based jurisprudence of the ECHR.<sup>65</sup> Lord Brown then similarly relied upon notions of responsibility to

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from the Metropolitan Police in the light of their treatment of him: see <http://www.guardian.co.uk/crime/article/0,,1728650,00.html>.

<sup>58</sup> See, e.g. Lord Rodger’s opinion: [2005] 2 A.C. 373 at 409 ff.

<sup>59</sup> [2005] 2 A.C. 373 at 418, para.127 ff (Lord Brown).

<sup>60</sup> See [2005] 2 A.C. 373 at 391-2 (Lord Bingham, dissenting) and [2005] 2 A.C. 373 at 417, para.124 (Lord Brown). See also the judgment of the C.A. at [2004] 2 W.L.R. 58, reading *X* as an authority limited to its facts.

<sup>61</sup> [2005] 2 A.C. 373 at 407, para.77 ff (Lord Nicholls).

<sup>62</sup> See [2005] 2 A.C. 373 at 403, para.70 ff (Lord Nicholls). And see further, e.g., *D v Bury M.B.C.* [2006] 1 F.C.R. 148, applying the House of Lords ruling in *D*.

<sup>63</sup> [2005] 2 All E.R. 489 at 504, para.30.

<sup>64</sup> For wider and contemporary perspectives see I. Loader and N. Walker, ‘Policing as a public good: Reconstituting the connections between policing and the state’ (2001) 5 *Theoretical Criminology* 9.

<sup>65</sup> See [2005] 2 All E.R. 489 at 505, para.31, where his Lordship quotes from his earlier judgment in *Brown v Stott* [2003] 1 A.C. 681 at 707-708: “The inspirers . . . and the framers of the European Convention . . . realised that from time to time the fundamental right of one individual may conflict with the human right of another . . . They also realised only too well that a single-minded concentration on the pursuit of fundamental rights of individuals to the exclusion of the interests of the wider public might be subversive of the ideal of tolerant European liberal democracies. The fundamental rights of individuals are of supreme importance but those rights are not unlimited: *we live in communities of individuals who also have rights*. The direct lineage of this ancient idea is clear: the European Convention (1950) is the descendant of the Universal Declaration of Human Rights (1948)

wider society – or certainly groups within it – when justifying the finding that no duty was owed to the parents in *D*. Having acknowledged that the burden placed upon parents was onerous, his Lordship nevertheless viewed that burden as merited for purposes of the greater good: “(I)t is a price they pay in the interests of children generally. The well-being of innumerable children up and down the land depends crucially upon doctors and social workers . . . being subjected by the law to but a single duty: that of safeguarding the child’s own welfare”.<sup>66</sup>

Lord Brown’s judgment in *D* also referred to the practical problems associated with negligence actions going to full trial, where he noted that the imposition of duties would inevitably be followed by “costly and vexing litigation”.<sup>67</sup> This quite obviously echoes the understanding in *Hill* that striking-out is to be preferred because it enables public authorities to prioritise the full and effective provision of public services by ensuring that their limited financial resources are not diverted to the preparation and defence of proceedings. Related points of emphasis were also evident in other opinions in *D*<sup>68</sup> and (to a lesser extent) *Brooks*,<sup>69</sup> and they were equally apparent in *Gorringe* where the negligence action had proceeded to full trial. The judge at first instance in *Gorringe* had, as such, been influenced by Court of Appeal authority that had preferred a breach inquiry at full trial to one centred on the preliminary question of whether a duty of care is owed.<sup>70</sup> However, in criticising that authority – in which the Court of Appeal ultimately held on the facts that there had been no breach – Lord Hoffmann noted the practical consequences that proceeding to full trial had had in *Gorringe*. These included the council’s obligation to make disclosure of documents relating to its accident studies, to reveal the decision-making process by which it decided what measures to adopt in the light of those studies, to reveal the means by which those chosen measures were implemented, and to call a number of council officers as witnesses.<sup>71</sup> Given the time and expense involved, Lord Hoffmann considered that the “enthusiasm for a hostile judicial inquiry into the council’s administration” had been nothing other than counterproductive. He added: “If (the Road Traffic Act 1988) continues to provoke investigations of this nature, much of the road safety budget will be consumed in the cost of litigation”.<sup>72</sup>

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which in article 29 expressly recognised the *duties of everyone to the community and the limitation on rights in order to secure and protect respect for the rights of others*”. Emphasis added.

<sup>66</sup> [2005] 2 A.C. 373 at 422, para.138.

<sup>67</sup> [2005] 2 A.C. 373 at 422, para.137.

<sup>68</sup> See [2005] 2 A.C. 373 at 408-9, paras.92-95 (Lord Nicholls). But see also Lord Bingham’s dissenting opinion: [2005] 2 A.C. 373 at 382-400.

<sup>69</sup> The “lesser extent” followed from the H.L. acceptance that the *Hill* principle, as originally formulated, was too broad and that striking-out should not be resorted to too readily: see [2005] 2 All E.R. 489 at 493, paras.2-4 (Lord Bingham); and [2005] 2 All E.R. 489 at 498, para.16 (Lord Steyn).

<sup>70</sup> *Larner v Solihull M.B.C.* [2001] R.T.R. 469.

<sup>71</sup> [2004] 1 W.L.R. 1057 at 1068, para.33.

<sup>72</sup> *ibid*; and see [2004] 1 W.L.R. 1057 at 1079, para.74 (Lord Scott): “Quite apart from the objections of principle which, in my opinion, ought to be held to bar the creation of common law liability . . . the history of this case provides a very salutary example of the undesirability of opening the door to the possibility of the

### Consumers, communities, and the ECHR

One further issue addressed in *Gorringe* was, of course, how the shift back to duty in that case could be reconciled with the more consumerist tendencies in *Barrett* and *Phelps*. For Lord Hoffmann, the key to the difference between the cases lay in the fact of the performance of positive acts in *Barrett* and *Phelps* and the failure to act, or omission, in *Gorringe*. While his Lordship considered that the performance of positive acts could generate common law duties against the backdrop of statutory powers or duties – viz where authorities make decisions about children in care (*Barrett*) or about the educational welfare of children (*Phelps*) – he emphasised that the position was different when the authority had “not actually done acts or entered into relationships or undertaken responsibilities which give rise to a common law duty of care”.<sup>73</sup> Under those circumstances, the mere existence of a statutory duty could not generate a common law duty of care, and his Lordship modified *Stovin* when concluding that it was difficult to “imagine a case in which a common law duty can be founded simply upon the failure (however irrational) to provide some benefit which a public authority has a power (or a public law duty) to provide.”<sup>74</sup> Consumers, on this rationale, were to be solely those in respect of whom authorities had assumed a direct and individual responsibility and under circumstances in which the common law – not statute – imposed duties of care.<sup>75</sup>

A more general justification for the difference was also offered by Lord Brown. Having agreed with Lord Hoffmann’s distinction between positive acts and omissions, his Lordship added that, while road accidents are often caused by the error of the claimant driver, wronged children are “themselves wholly blameless” and for that reason deserving of the protection of the courts.<sup>76</sup> This thus represents the heightened common law protection of vulnerable children that was referred to above, and it arguably also reflects upon a levelling up of the common law and ECHR.<sup>77</sup> The Court of Appeal in *D*, for instance, noted how child abuse cases will often raise issues under Articles 3 and 8 ECHR and that the imposition of common law duties of care to children thereby ensures that domestic law protections parallel those of the international order.<sup>78</sup> Such parallelism in turn then also points to related

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creation of such liability. A tragic but simple road traffic accident, the cause of which was that Mrs Gorringe, driving too fast for the road, made a driving error, has led to a lengthy trial involving an extensive (and expensive) trawl through council documents going back many years in order to enable her to try and establish a breach by the council . . .”.

<sup>73</sup> [2004] 1 W.L.R. 1057 at 1068, para.38.

<sup>74</sup> [2004] 1 W.L.R. 1057 at 1067, para.32.

<sup>75</sup> See also Lord Scott’s opinion: [2004] 1 W.L.R. 1057 at 1079, para.73. And on liability for omissions more generally see S. Deakin, A. Johnston, and B. Markesinis, *Markesinis and Deakin’s Tort Law* (5<sup>th</sup> ed., 2003) p.149 ff.

<sup>76</sup> [2004] 1 W.L.R. 1057 at 1087, para.100.

<sup>77</sup> Arguments about levelling-up have also been seen in the context of domestic law’s relationship with EU law: see, most famously, the progression from *R v Secretary of State for Transport, ex p. Factortame (No 2)* [1991] 1 All ER 70 to *M v Home Office* [1993] 3 WLR 433. And see also, e.g. *Woolwich Building Society v Inland Revenue Commissioners (No.2)* [1992] 3 WLR 366, 395-396 (Lord Goff).

<sup>78</sup> See [2004] 2 W.L.R. 58 at 80, para.55 ff. See also, e.g. *E v U.K.* (2003) 36 E.H.R.R. 519.

debates about the relationship between the common law and ECHR, as it suggests that the common law is able to develop in manner that complements, and is compatible with, international standards. This is certainly the argument put forward by Richard Mullender, who notes an overlap between common law notions of community and the ECHR's "margin of appreciation" and "fair balance" doctrines (the former "identifying moral sentiment within particular communities at particular times as a concern salient to the proper application of Convention rights"; and the latter requiring "judges and other public officials to strike a 'fair balance between the . . . general interest of the community and . . . the protection of the individual's fundamental rights'").<sup>79</sup> Viewing community as important point of "intersection", Mullender thus concludes that it might facilitate common law compliance with the ECHR; and the example of Lord Steyn's subsequent appeal to community in *Brooks* would suggest that it is an intersection that is already being acted upon.<sup>80</sup>

The potential for a drifting apart of the common law and ECHR – as envisaged by Jane Wright<sup>81</sup> – can however also be seen in other aspects of the cases. For example, it was argued before the House of Lords in *D* that the duty of care element in negligence actions should in any event cede to a standard of care inquiry as this would be in keeping with the human rights approach whereby a court "look(s) backwards over everything which happened . . . (and) . . . makes a value judgment based on more flexible notions than the common law standard of reasonableness and does so freed from the legal rigidity of a duty of care".<sup>82</sup> This argument, if acted upon, would likely have ensured fuller common law compliance with *Z v U.K.* and the Article 13 ECHR guarantee of effective remedies, although it was ultimately rejected by Lord Nicholls.<sup>83</sup> While his Lordship accepted that the standard of care approach was "not without attraction" and was "appropriate in the field of human rights",<sup>84</sup> he was reluctant simply to transpose it onto the domestic law of negligence, particularly when the ECHR was not directly in issue in the case. For his Lordship, such transposition would only

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<sup>79</sup> n.22 above, at 313. The quote within the quote is taken from *Sporrong Lonnroth v Sweden* (1982) 5 E.H.R.R. 35 at 52, para.69; and for a further – and more recent – example of the ECtHR balancing individual rights against community interests see *Moreno-Gomez v Spain* (2005) 41 E.H.R.R. 40.

<sup>80</sup> The ECtHR's acceptance of the public policy argument used in *Brooks* was in evidence even in the *Osman* judgment. See (2000) 29 E.H.R.R. 245 at 316, para.149 ff: "The reasons which led the House of Lords in the *Hill* case to lay down an exclusionary rule to protect the police from negligence actions in the context at issue are based on the view that the interests of the community as a whole are best served by a police service whose efficiency and effectiveness in the battle against crime are not jeopardised by the constant risk of exposure to tortious liability. *Although the aim of such a rule may be accepted as legitimate in terms of the Convention. . .*" (emphasis added).

<sup>81</sup> n.19 and text.

<sup>82</sup> [2005] 2 A.C. 373 at 408-9, para.93, Lord Nicholls. The argument drew upon Fairgrieve, Andenas and Bell (eds.) n.6 above p.485. And on common law reasonableness see Lord Hutton, 'Reasonableness and the Common Law' (2004) 55 N.I.L.Q. 242.

<sup>83</sup> Note that Wright was highly critical of the reasoning in the ECtHR judgment in *Z*: see n.19 above at pp. xxiii-xxxvii.

<sup>84</sup> [2005] 2 A.C. 373 at 408-9, para.93.

generate further uncertainty in the law as the courts would then need to find another control mechanism that was sensitive to the wide range of considerations accounted for under the duty of care. In the absence of that mechanism, change of the kind urged was therefore not only inappropriate but also unnecessary, as future claims involving the ECHR could be brought directly under the Human Rights Act 1998.<sup>85</sup>

At one level, this willingness to leave future cases that engage the ECHR to the Human Rights Act 1998 can be read as unremarkable. Although Article 13 ECHR is not included in Schedule 1 to the Human Rights Act 1998<sup>86</sup>, sections 7-9 of the Act are intended to ensure access to effective remedies<sup>87</sup>, and proceedings under the Act should in that way provide for a full hearing in a manner that complies with Article 13 ECHR.<sup>88</sup> However, cast in terms of Jane Wright's argument that the common law cannot easily accommodate the logic of the ECHR, Lord Nicholls' apparent closing-off of the common law from cases under the Human Rights Act is of a different – and contestable – quality. For instance, Lord Bingham, dissenting, considered that the challenge for the common law in *D* was to “fashion appropriate remedies to contemporary problems” and that that process had already begun with the shift to breach in *Barrett* and *Phelps*.<sup>89</sup> While his Lordship at the same time emphasised that proof of breach would require evidence of a very clear departure from the ordinary standards of skill and care, he considered that such a test would be welcome “since the concept of duty has proved itself a somewhat blunt instrument for dividing claims which ought

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<sup>85</sup> *ibid*, para.94. See also, e.g. *Fairlie v Perth and Kinross Healthcare NHS Trust* 2004 S.L.T. 1200 at 1209, para.36 (Lord Kingarth). Although for an e.g. of an (unsuccessful) action that was brought both at common law and under the Human Rights Act see *Mitchell v Glasgow C.C.* 2005 S.L.T. 1100: no common law duty of care owed to a council tenant who was killed by another council tenant where the authority knew of, and had acted upon, the latter tenant's aggressive behaviour towards the deceased as such a duty would interfere with the authority's ability to carry out its statutory functions and lead to a significant diversion of resources; and a corresponding action under Art.2 ECHR could not be sustained as there was no evidence that the authority knew or ought to have known that there was a real and immediate threat to the life of the deceased. On the Art.2 ECHR (positive) obligations of public authorities see further, e.g. *Van Colle v Chief Constable of the Hertfordshire Police* [2006] E.W.H.C. 360, Q.B.: police liable in damages to a witness whom they had failed to protect in the light of threats from the person against whom evidence was to be given.

<sup>86</sup> n. 23 above.

<sup>87</sup> For a Parliamentary statement to this effect see 583 H.L. 475.

<sup>88</sup> On ss.7-9 see further A. Lester and D. Pannick, *Human Rights Law and Practice* (2<sup>nd</sup> ed, 2004) p.48 ff.

<sup>89</sup> [2005] 2 A.C. 373 at 400, para.50 (for his consideration of *Barrett* and *Phelps* see [2005] 2 A.C. 373 at 389, para.25 ff.). It should also be noted that Lord Bingham sat on the Appellate Committee in *Brooks*, where he agreed that the proceedings should be struck-out. His Lordship did, however, cross-refer to this opinion in *D* and emphasise that he is generally reluctant “to dismiss without any exploration of the facts a claim raised in a contentious and developing area of the law where fuller factual enquiry might enable a claimant to establish that a duty of care had been owed to him and had been broken”. Striking-out in *Brooks* was nevertheless merited because (a) the facts of the instant case had already been examined exhaustively and (b) because the claim fell within the reformulated statement of *Hill*. See [2005] 2 All E.R. 489 at 493, paras.3-4.

reasonably to lead to recovery from claims which ought not".<sup>90</sup> Having thus situated the shift to breach within the comparative experience of civil law jurisdictions<sup>91</sup> – his Lordship also distinguished comparative common law case law relied on by the majority<sup>92</sup> – he concluded that the central question for the domestic system was whether “the law of tort should evolve analogically and incrementally . . . or whether it should remain static, making only such changes as are forced upon it, leaving difficult and, in human terms, very important problems to be swept up by the Convention”.<sup>93</sup> His Lordship preferred evolution<sup>94</sup> and, it seems, an outcome that would have protected the Article 13 ECHR rights of the parents notwithstanding that their rights under the ECHR were not directly in issue in the case.<sup>95</sup>

Of course, such differences in judicial approach ultimately rest upon competing normative assumptions about the relationship between the common law and international law, and there are well-worn criticisms of the respective judicial positions (*viz* that a reluctance to embrace external norms is either to be welcomed as safeguarding national orders against the perils of legal transplantation or criticised for failing to embrace legal realities at a time of globalisation and overlapping legal processes).<sup>96</sup> Of more immediate relevance here, however, are the practical consequences of those normative assumptions when they result in human rights claims being brought under the Human Rights Act 1998 as opposed to a body of domestic tort law that

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<sup>90</sup> [2005] 2 A.C. 373 at 400, para.49.

<sup>91</sup> His Lordship cited, among others, B. Markesinis, J.B. Auby, D. Coester-Waltjen and S. Deakin, *Tortious Liability of Statutory Bodies*.

<sup>92</sup> Principally *B and others v Attorney-General of New Zealand* [2003] 4 All E.R. 833.

<sup>93</sup> [2005] 2 A.C. 373 at 400, para.50.

<sup>94</sup> See also, *e.g.* his Lordship’s joint dissenting opinion (with Lord Steyn) in *Cullen v Chief Constable of the R.U.C.* [2003] 1 W.L.R. 1763 at 1771, holding that actions for breach of statutory duty that engage fundamental rights at common law should be part developed in the light of – in this instance – EU law’s State liability doctrine. On the more general impact of EU law in the area public authority liability see Anthony n.18 above, chap.6; and Birkinshaw, n.18 above, chap.10.

<sup>95</sup> Although note that there are limits to Lord Bingham’s willingness to develop common law causes of action as an alternative to proceedings under the Human Rights Act. See, most recently, *Watkins v Home Office* [2006] 2 All E.R. 353, where his Lordship rejected the argument that the tort of misfeasance in public office should be actionable *per se* and without proof of damage when the claimant’s common law constitutional rights are in issue. See, in particular, 364-5, para.26: “Breach of a fundamental human or constitutional right would also, in all probability, found a claim under section 7 of the Human Rights Act 1998, as it would in this case where the violation occurred after the Act came into force. I have myself questioned, albeit in a lone dissent (in *D*), whether development of the law of tort should be stunted, leaving very important problems to be swept up by the European Convention . . . but the observation was made in a case where, in my opinion, the application of familiar principles supported the recognition of a remedy in tort, not a case like the present where the application of settled principle points strongly against one” (the settled principle is that proof of damage is required for a successful claim for misfeasance in public office). But for an earlier argument to the effect that an expanded tort of misfeasance in public office would complement the ECHR see M. Andenas and D. Fairgieve, ‘Misfeasance in Public Office, Governmental Liability, and European Influences’ [2002] 51 I.C.L.Q. 757.

<sup>96</sup> For a survey of the literature see Anthony n.18 above, chap.1.

evolves in the light of human rights principles. Claims under the Act must, in short, now be assessed in the light of a corresponding body of case law that suggests that awards of damages under the Act may be more limited than awards at common law.<sup>97</sup> Given the point, Lord Rodger in *D*, while concurring with Lord Nicholls, stated that he would “reserve his opinion as to whether, in (a future) case, it would be appropriate to modify the common law of negligence, rather than to found any action on the provisions, including section 8, of the Human Rights Act”.<sup>98</sup> The practical working through of the normative may yet prove problematic.<sup>99</sup>

## Conclusion

This article began by asking the question whether the old law on the negligence liability of public authorities was the right law. There are two points that can be made in response, and by way of conclusion. The first is that, as the old law of striking-out etc has now been returned to, it may, in that straightforward sense, be regarded as having been right. Whether “right” also equates to “good”, however, is a separate question that highlights the tension between consumerist and community based approaches to liability.<sup>100</sup> The shift away from striking-out in *Barrett* and *Phelps* was prompted partly by a concern that individual interests were insufficiently protected by the common law, and Lord Bingham’s dissenting opinion in *D* favoured the continuation of that trend. But the more general emphasis on community and corresponding arguments of public policy in *Gorringe*, *D*, and *Brooks* would suggest that “good” is, for the moment, to be associated with the “common good” or “greater good”.<sup>101</sup> While the distinctions drawn in *Gorringe* may thus mean that the consumerist model is not wholly without relevance, its reach is constrained by those very same distinctions and the related assumption that duty, not breach, provides the preferred means for moderating liability.

The second point concerns the longer-term relevance of the ECHR. The highpoint of the ECHR’s impact in *Barrett* has, as *per* the majority opinion in *D*, now been replaced by an understanding that claims raising novel human rights points may be better dealt with under the Human Rights Act 1998 and at one remove from existing law common law causes of action. The fact that this may result in a claim for damages under the Human Rights

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<sup>97</sup> See *R v Secretary of State for the Home Department, ex p. Greenfield* [2005] 1 W.L.R 673. The judgment of the House in this case was delivered by Lord Bingham, a point that is perhaps paradoxical given his judgment in *D* (but see also n.95 above).

<sup>98</sup> [2005] 2 A.C. 373 at 416, para.118.

<sup>99</sup> See further R. Clayton, ‘Damage Limitation: the courts and the Human Rights Act’ [2005] P.L. 429. See, in particular, 439, where he says that, “marginalising the role of Human Rights Act damages is unlikely to secure compliance with the Act or to promote a culture of rights”.

<sup>100</sup> For the beginnings of new proposals on public authority liability see the Law Commission’s discussion paper, *Monetary Remedies in Public Law* (2004) and the corresponding *Report of a Seminar* (2005), both available through <http://www.lawcom.gov.uk/publications.htm>. And see also C. Harlow, *State Liability - Tort Law and Beyond*.

<sup>101</sup> On these and related concepts see, e.g. D. Bell, *Communitarianism and its Critiques*.

Act 1998 being assessed on a less favourable basis than a claim at common law has, however, been noted by Lord Rodger, who has implied that the common law may need to evolve to allow human rights to be vindicated at common law too.<sup>102</sup> Should such evolution be required, it may be that Lord Bingham's dissenting opinion in *D* will assume an added significance and that breach will again become the moderating element in a negligence action.<sup>103</sup> And while debate about the merit of such change may focus once more upon the consumerism-community problematic, it may be that the human rights component to any case will require that understandings of the relationship between the interests of individuals and communities be reassessed. Human rights cases, as Lord Bingham stated in *D*, often involve, "in human terms, very important problems".<sup>104</sup> Viewed from this perspective, a common law award of damages may therefore be seen as concerned less with the rights of a consumer and more with the wider community interest in the vindication of an individual's "higher order" human rights.<sup>105</sup>

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<sup>102</sup> [2005] 2 A.C. 373 at 416, para.118. But see also his Lordship's opinion in *Watkins v Home Office* [2006] 2 All E.R. 353 at 375, para.64, where considerations of parallelism were taken to militate against the argument that the common law should develop monetary remedies in the form of exemplary damages that would exceed those available in an action under the Human Rights Act (the question in *Watkins* was whether the tort of misfeasance in public office should be actionable *per se* and without proof of damage when the claimant's common law constitutional rights are in issue – see further n. 95 above).

<sup>103</sup> But see also n.95 above.

<sup>104</sup> [2005] 2. A.C. 373 at 400, para.50.

<sup>105</sup> The term is used by Mullender: see n.22 above at p.314.

## BOOK REVIEW

***King's Inns Barristers 1868-2004* edited by Kenneth Ferguson, (Dublin, The Honorable Society of King's Inns in association with the Irish Legal History Society, Dublin, 2005) xiv + 446 pp.**

In his Introduction the editor explains that the present work is intended to be a continuation of, and companion to, the Irish Manuscripts Commission's *King's Inns Admission Papers 1607-1867* published in 1982. This description, and the title, might suggest to the casual reader that it would not repay further study as its contents are confined to details of those admitted to King's Inns between 1868 and 2004. Such a deduction would be sadly misplaced and would be to forgo the opportunity to consult an impressive work of scholarship which contains a mine of invaluable and fascinating biographical information relating to some six thousand individuals, as well as a substantial quantity of historical information which throws much light on the Irish Bar in the years before it divided into the two bodies which now exist in the two jurisdictions in Ireland.

*King's Inns Barristers 1868-2004* is divided into three parts. The greater part consists of the Alphabetical Index of Barristers' Memorials, 1868-1968. These entries have been compiled from the records of King's Inns by Mrs Julitta Clancy, M.B.E., an archivist and indexer by profession, assisted by Mrs Margaret Connolly in the later stages of the project. Each entry gives the date of birth and the names and addresses of the parents of each subject, details of his or her University degree, the date on which they were admitted as a student, and the year and term of their call to the Bar. Biographical annotations have been added to many entries by the editor. The effect of their combined efforts is to provide a veritable treasure trove of information of enormous value to historians and commentators in the future, to browse amongst which will be a source of endless fascination for the casual enquirer.

A few examples from two pages selected at random may convey a sense of what is to be found in this section. Between pages 146 and 147 we find illustrations of the familial, almost dynastic, involvement of so many in the law. There are entries for distinguished members of the judiciary in the form of F.G.O. Budd, a judge of the High Court and then of the Supreme Court, and his son, the present Mr Justice Budd, a judge of the High Court. Here too we find others active in public life, such as James Aloysius Burke, called in Trinity term 1916 and who became an M.P., T.D. and minister for Local Government; and James Michael Burke, a Cuman na nGael T.D. between 1933 and 1936. An entry on the opposite page illustrating a different political tradition is that of Francis Henry Browning, joint author of *Local Registration of Title in Ireland* who was second in command of the Irish Association of Volunteer Training Corps, and died on Easter Monday 1916 when his unit came under fire near Beggar's Bush Barracks. We learn at page 81 that as President of the Irish Rugby Football Union he had been a leading organiser of recruitment for the forces in Dublin, and a prime mover of the Pals battalion of the Royal Dublin Fusiliers, a unit commemorated in *The Pals at Suvla Bay* by Henry Hanna KC (the title page of which is

reproduced at page 80). The 'Pals' suffered heavy casualties at Gallipoli in 1915 when three of the five members of the Law Library who had joined were killed. Another entry on the same pair of pages is that of Robert Burgess, who died in France in December 1915. We also learn that John Owen died from influenza contracted whilst learning Irish in the Blasket Islands, and that John Alphonsus Burke, who, despite being a Brooke Scholar, "took a teaching post in England and never practised". These and other, perhaps less familiar, names tempt one to make further enquiries about the subjects of these entries. What was the history of Chevalier John Burke J.P. who was living in Corporation Street in the centre of Belfast when his sixth son Fitzstephen Burke was admitted a student in 1906, but had migrated to the more salubrious surroundings of Strandtown on the outskirts of East Belfast by 1915 when his fourth son Arthur Ulick was admitted? What prompted Arthur Ulick, four years older than Fitzstephen, to follow his younger brother to King's Inns nine years later in 1915?

Entries such as these demonstrate the range and detail of the information contained in this section of *King's Inns Barristers*, which not only makes this an invaluable reference work, but a rich seam of material for those who wish to pursue further research into the background of those called to the Bar during the period covered by this work, and their subsequent careers.

The Alphabetical Index only extends to 1968, a date which it is explained "emerged by accident" because this section of the work was completed by Mrs Clancy in 1998, and represented the observance of a 30 year "interval in according access to records". However, the gap from 1968 to the present day is partly filled by the next section which consists of the names of those included in each call to the outer bar from 1868 to 2004; to the inner bar from 1880 to 2004, and a catalogue of judges and law officers. These lists are also of great value, as they contain much information not readily available elsewhere. Thus we find not just lists of judges and law officers in the Irish Free State and Ireland, but a list of King's Inns-educated judges and law officers in Northern Ireland and England. It is clear that a conscious effort has been made to include information about those who held judicial office in Northern Ireland after 1921. Sir James Andrews LCJ, Lord MacDermott LCJ and Babington LJ appear amongst the many photographs. In this section one also finds such diverse information as a list of the peerages and baronetcies conferred on judges and law officers, and a description of the Lord Chancellor of Ireland's Levée in 1900 identifying the judges who appear in the group photograph at page 442, as well as a list of the auditors of the Law Students' Debating Society of Ireland 1860-2005 compiled by the Under Treasurer, Mrs Camilla McAleese

The third section of the work, and that which will have the greatest attraction to the general reader, consists of two essays which precede the Alphabetical Index, and, taken together, effectively comprise a monograph of just over 100 pages on the Irish Bar over the century from 1868 to 1968. The first, shorter, essay by Professor Niall Osborough deals with four aspects of the history of King's Inns up to the reduction in its jurisdiction by the formation of the Inn of Court of Northern Ireland, two of which are the entry of women and the events which led the Northern Committee of Benchers of King's Inns to set up their own Inn. The latter study throws new light on a topic that has been neglected in the past, although it relies heavily on the minutes of the

Benchers of King's Inn, and so the Northern side of this unhappy episode remains to be told.

The second essay by Dr Ferguson is entitled 'A portrait of the Irish Bar, 1868-1968', and a few of the 17 sub-headings must suffice to convey the breadth and depth of learning displayed. 'Lord Justice Fitzgibbon'; 'The Law Library'; 'The barrister M.P.s of the Irish Party'; 'The Bar and the Troubles'; 'The new order and the rise of the Sullivan clan, and 'The complacent years' are amongst the subjects that are dealt with in the 85 pages which make up this essay.

The Benchers of King's Inns are to be congratulated on publishing what will be recognized as a major contribution to the history of the legal profession in Ireland in the late nineteenth and early twentieth centuries, one that complements recent publications in this field such as *The Four Courts: 200 years* (1996), and *The Law Society of Ireland, 1852-2002 Portrait of a Profession* (2002). *King's Inns Barristers 1868-2004* is a handsome, well-produced, volume with many attractive illustrations, although the essays by Professor Osborough and Dr Ferguson deserve a general index, and the volume would also have benefited from an index of names. However, one suspects that this would have significantly increased the size, and hence the cost, of the volume. Priced at a modest 30 euro, plus 10 euro post and packing (which is not charged to personal callers), it represents remarkable value, and enquiries should be made to the Librarian, King's Inns Library, Henrietta Street, Dublin, or on line at [publications@kingsinns.ie](mailto:publications@kingsinns.ie).

*Mr Justice Hart*