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Published four times yearly by SLS Legal Publications (NI),
Lansdowne House, 50 Malone Road, Belfast BT9 5BS,
Northern Ireland.

ISSN 0029-3105



THE CORPORATE SOCIAL RESPONSIBILITY MOVEMENT AND LAW'S EMPIRE: IS THERE A CONFLICT?

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ABSTRACT

At the heart of corporate governance and social responsibility discourse is recognition of the fact that the modern corporation is primarily governed by the profit maximisation imperative coupled with moral and ethical concerns that such a limited imperative drives the actions of large and wealthy corporations which have the ability to act in influential and significant ways, shaping how our social world is experienced. The actions of the corporation and its management will have a wide sphere of impact over all of its stakeholders whether these are employees, shareholders, consumers or the community in which the corporation is located. As globalisation has become central to the way we think it is also clear that "community" has an ever expanding meaning which may include workers and communities living very far away from Corporate HQ. In recent years academic commentators have become increasingly concerned about the emphasis on what can be called short-term profit maximisation and the perception that this extremist interpretation of the profit imperative results in morally and ethically unacceptable outcomes.¹ Hence demands for more corporate social responsibility.

Following Cadbury's² classification of corporate social responsibility into three distinct areas, this paper will argue that once the legally regulated tier is left aside corporate responsibility can become so nebulous as to be relatively meaningless. The argument is not that corporations should not be required to act in socially responsible ways but that unless supported by regulation, which either demands high standards, or at the very least incentivises the attainment of such

* This paper was first delivered at a conference at Queens University Belfast in October 2005. My thanks are due to the Institute for Accountable Governance for organising the event and inviting me to present. Thanks are due to Kieran Walsh BCL, BL who provided research assistance for this paper. Finally thanks are due to Professor Sally Wheeler for her intellectual interest and patience.

¹ Mitchell. Corporate Irresponsibility: America's Newest Export, (2001). Mitchell. Corporate Irresponsibility: America's Newest Export 70 *George Washington Law Review*. 2002. David Millon. "Why is Corporate Management Obsessed with Quarterly Earnings and What Should be Done about It?" 2002. *George Washington Law Review* 70: 890.

² Cadbury. The Company Chairman (1990)

standards such initiatives are doomed to failure. The paper will illustrate by reference to various chosen cases that law's discourse has already signposted ways to consider and resolve corporate governance problems in the broader social responsibility context.³ It will also illustrate how corporate responsibility can and must be supported by legal measures. Secondly, this paper will consider the potential conflict between an emphasis on corporate social responsibility and the regulatory approach.⁴ Finally, this paper will place the current interest in corporate social responsibility within the broader debate on the relationship between law and non-legally enforceable norms and will present some reflections on the norm debate arising from this consideration of the CSR movement.

Introduction

At the heart of corporate governance and social responsibility discourse is recognition of the fact that the modern corporation is primarily governed by the profit maximisation imperative coupled with moral and ethical concerns that such a limited imperative drives the actions of large and wealthy corporations which have the ability to act in influential and significant ways, shaping how our social world is experienced. The actions of the corporation and its management will have a wide sphere of impact over all of its stakeholders whether these are employees, shareholders, consumers or the community in which the corporation is located. As globalisation has become central to the way we think it is also clear that "community" has an ever expanding meaning which may include workers and communities living very far away from Corporate HQ. In recent years academic commentators have become increasingly concerned about the emphasis on what can be called short-term profit maximisation and the perception that this extremist interpretation of the profit imperative results in morally and ethically unacceptable outcomes.⁵ Hence demands for more corporate social responsibility.

Following Cadbury's⁶ classification of corporate social responsibility into three distinct areas, this paper will argue that once the legally regulated tier is left aside corporate responsibility becomes so nebulous as to be relatively meaningless. The argument is not that corporations should not be required to

³ *United States of America v Beech-Nut Corporation and Niels L. Hoyvald* 925 F. 2d. 604. *In re: A.H. Robins Company Inc. Debtor Alexia Anderson et al* 42 F. 3d. 870 and *R v P & O Ferries* (1990) 93 Cr. App. Rep. 72.

⁴ Commission of the European Communities COM (2001) 366. *Corporate Social Responsibility*. Social Committee and the Committee of the Regions on Promoting Core Labour Standards and improving social governance in the context of globalisation. Com (2001) 416 [18.7.2001].

⁵ Mitchell *Corporate Irresponsibility: America's Newest Export*, (2001). "Corporate Irresponsibility: America's Newest Export" 2002. 70 *George Washington Law Review*. Millon, "Why is Corporate Management Obsessed with Quarterly Earnings and What Should be Done about It?" (2002) 70 *George Washington Law Review* 890.

⁶ Cadbury. *The Company Chairman* (1990)

act in socially responsible ways but that unless supported by regulation, which either demands high standards, or at the very least incentivises the attainment of such standards such initiatives are doomed to failure. The paper will illustrate by reference to various chosen cases that law's discourse has already signposted ways to consider and resolve corporate governance problems in the broader social responsibility context.⁷ Secondly, this paper will consider the potential conflict between an emphasis on corporate social responsibility and the regulatory approach.⁸ Finally, this paper will consider the implications for the broader debate on the relationship between law and non-legally enforceable norms raised by this analysis of the corporate social responsibility movement.⁹

The paper is divided into three parts, the first will consider what we mean by corporate social responsibility. The second will consider some cases and materials within the legal domain which have illustrated that there has always been a clear understanding that corporations should and do act beyond a minimum level of legal compliance and that corporate law and theory clearly supports and understands this idea. In particular over considerable periods of time chancery courts on both sides of the Atlantic have resolved potential conflicts between shareholder primacy and welfare, or indeed its less attractive version, the shareholder wealth maximisation principle¹⁰ on the one hand and socially responsible actions on the other. The third part considers how the modern emphasis on corporate social responsibility fits with the more theoretical analysis regarding norms and behaviour generally and in doing so highlights some difficulties with the voluntary approach which are a source of concern, asking in particular how meaningful an emphasis on voluntary behaviour actually is.

⁷ *United States of America v Beech-Nut Corporation and Niels L. Hoyvald* 925 F. 2d. 604. *In re: A.H. Robins Company Inc. Debtor Alexia Anderson et al* 42 F. 3d. 870 and *R v P& O Ferries* (1990) 93 Cr. App. Rep. 72.

⁸ Commission of the European Communities COM (2001) 366. *Corporate Social Responsibility*. Social Committee and the Committee of the Regions on Promoting Core Labour Standards And Improving Social Governance In The Context Of Globalisation. Com (2001) 416 [18.7.2001].

⁹ See "Law, Economics and Norms" (1996) 144 *University of Pennsylvania Law Review* 1643 and "Social Norms, Social Meaning and the Economic Analysis of Law" (1998) 27 *Journal of Legal Studies*, 537. See further "Norms and Corporate Law" (2001) 149 *University of Pennsylvania Law Review*.

¹⁰ Millon in his article mentioned at n.2 *supra* develops the distinction between the shareholder primacy principle and the shareholder wealth maximisation principle, the latter he argues is an aberrant version of the former principle, not necessarily required under corporate law principles, but driven more by an emphasis on short termism, which in turn is driven by an over emphasis on the importance of the capital markets as a corporate governance device. In consideration of the case law it is clear that even though the principle of shareholder primacy is all important as the driving principle as far as stakeholder distribution, it is clear that the courts do not, and have never, required managers to sacrifice all other stakeholder well being at the altar of short-termism. Millon's article provides a lucid theoretical distinction between these principles.

Part I: What is meant by CSR?

From a lawyer's perspective the current fashionable interest in CSR leads not to clear answers as to what is meant but to many questions about motivation, purpose and so on. A number of large consulting firms have formed CSR units to advise their corporate clients on how to act in more socially responsible ways. Justifications for CSR range from reputational benefits accruing to the company to financially beneficial outcomes. However it is hard to escape the suspicion that sometimes and perhaps at best (because there may be more worrisome motivations, described below) corporate interest in overt CSR matters is a movement fitting more into the PR or image building side of things than hard core financial accounting. What is puzzling about the CSR movement is what lies beneath this "new" idea that a company should act in socially accountable and responsible ways. In fact companies and their managers have always been accountable to the broader society in which they are placed and have always been not only required, but also, in many cases, positively motivated to act responsibly. The idea is not new, but it is argued here that what is new about CSR is the attempt to move the forum of discourse about accountability and responsibility away from law's empire¹¹ or dominion. The question raised in this article is why has this happened and what are the implications for regulation of corporate activities.

CSR is normally considered as influencing the corporation's actions in relation to the following areas of activity: The Workplace and Employee Relations; The Community in which the corporation is located; Supply Chain Management; Customer Relations; Environmental concerns and Sustainable Development.

Typically, in the corporate and accounting context, different CSR indices are measured such as input measures, for example staff turnover, absences and staff grievances and output measures such as staff satisfaction surveys, and perception measures for staff in the workplace area. Community outputs measure employee voluntarism in the community and support for this. Concern with suppliers could include as an input measurement the average creditor days, the number of successful legal actions taken and output could include quality of supply and of the supply chain. This kind of CSR reporting is becoming an integral part of many businesses.¹²

What is unclear about the classification of many of these initiatives as CSR initiatives is the relationship between these actions and actions which are legally required or which at the very least facilitate compliance with legal standards. The articulation of the close connection is lacking within the CSR movement. In relation to the example provided above relating to creditors, any contract will provide for timely payment, any missed payment will trigger legal consequences¹³ so it is unclear how such compliant behaviour is

¹¹ Dworkin. *Law's Empire* (1988).

¹² Hill. "How Finance can help move CSR up the Agenda" *Finance Magazine*, September 2005. See also for a flavour of the corporate/accounting approach www.deloitte.com. Accessed January 12, 2007.

¹³ Note that under s.213(e) of the 1963 Companies Act, any creditor owed more than x can petition the court for liquidation if demand letters are not met. The time

classified as responsible in the same way as measures taken by the corporation to support voluntary activity within the community. Similarly in the workplace much of what is given as examples in the CSR literature actually reflects the need to comply with legal standards or at the very least to show that the corporation is doing what it can to comply with legal standards. Hill proffers the example of gender bias in the supermarket retail sector where there is a high proportion of women employed at lower levels compared with the proportion of women employed as managers. CSR, it is argued, can provide data on employment levels and on improvements to indicate the corporation is serious about being socially responsible. In reality however, any corporation involved in the retail sector or indeed in any other sector where there is a gender imbalance between the lower grades of workers and the higher grades of workers would be advised to do this kind of data collection to protect themselves against potential litigation of the kind which occurred in the US between the EEOC and the department store chain Sears Roebuck.¹⁴

CSR has benefited in recent times from the attention of the European Commission. In considering the publications on this area emanating from the Directorate General of Employment and Social Affairs¹⁵ and other sections including the Directorate General for Enterprise and the Information Society, it is clear that the global context is extremely significant in relation to European style CSR. The attempt to ensure socially responsible actions in supply chain management, movement of capital and other areas of corporate activity across the globe seems to be the main focus of the EU CSR documents. The emphasis on labour rights and sustainable development in environmental terms is also very clear.

“Within the company, socially responsible practises primarily involve employees and relate to issues such as investing in human capital, health and safety and managing change, while environmentally responsible practices relate mainly to the management of natural resources used in production.”¹⁶

Management of industrial change is also a key issue.

frame is surprisingly short as is the threshold amount owed which entitles any creditor to standing to petition to liquidate a company. Of course the application of the short demand time is not reflected in practice, nevertheless it is surprising that compliance with payment of creditors would be considered to be a ‘socially responsible’ action rather than a legally required one.

¹⁴ *EEOC v Sears, Roebuck & Co.* 628 F. Supp. 1264 (N. D. Ill 1986) (Sears II).

¹⁵ DG Employment and Social Affairs: Green Paper: Promoting a European Framework for Corporate Social Responsibility. July 2001. This paper is based on COM (2001) 366 final. See also ABC of the Main Instruments of Corporate Social Responsibility, DG Employment and Social Affairs. 2004, in particular pages 32-35 where Directives and other national legislative instruments in this area are listed. Both these documents can be down loaded from the EU website www.europa.eu.int. Accessed on 4 Oct. 2005. In addition the Multi-Stakeholder Forum established in 2004 has pursued an active agenda with a recent meeting and agenda setting exercise in December 2006. http://ec.europa.eu/enterprise/csr/forum_2006_index.htm. Accessed 14 Jan. 2007.

¹⁶ ABC of the Main Instruments of Corporate Social Responsibility, DG Employment And Social Affairs. 2004, Para.2:1 forward.

“Recent high-profile announcements of large-scale redundancies have put the spotlight on the way firms interact with their employees in such situations, and management of change is one of the key aspects of corporate social responsibility that the Green Paper discusses.”¹⁷

As a policy initiative at EU level the emphasis on CSR is also tied in with the objectives of the Lisbon Agenda initiated in 2000 and revised at its mid-term point in 2005. Questions must be asked about the success of these initiatives at this point in time when the Lisbon Agenda itself is acknowledged to be in serious difficulties.¹⁸ This document notes the difference between legal compliance and voluntary socially responsible actions and encourages companies to “go beyond compliance” noting that there is a relationship between proactive actions and improved competitiveness, an assertion that is not proved by the document. However importantly it is noted that

“Corporate Social responsibility should nevertheless not be seen as a substitute to regulation or legislation concerning social rights and environmental standards, including the development of new appropriate legislation. In countries where such regulations do not exist efforts should focus on putting the proper regulatory or legislative framework in place in order to define a level playing field on the basis of which socially responsible actions can be developed.”¹⁹

CSR has also caught the populist imagination and is very much seen as the way forward by those interested in issues ranging from the perceived threat of globalisation, exploitation of workers and communities in developing economies, to protection of the supply chain for many consumable goods including food products such as coffee etc.

Although areas of concern can thus range from companies acting nicely in their own neighbourhood to companies acting generously across the globe, it is even more difficult to pin down exactly the nature of the focus of the CSR²⁰ movement. It is clear that it is concerned with behaviour which it

¹⁷ Press release from DG Employment and Social Affairs and DG Enterprise and Information Society on launch of Green Paper.

¹⁸ See further COM (2005) 24 /final Working Together For Growth and Jobs: A New Start For The Lisbon Strategy: Communication from President Barroso in agreement with the Vice-President Verheugen. COM (2005) 330 final entitled Common Actions for Growth and Employment: The Community Lisbon Programme.

¹⁹ *Supra* n.16, para.2.

²⁰ World Bank Report: ‘Strengthening implementation of Corporate Social Responsibility in Global Supply Chain’, 2003. The difficulties of establishing the truth which lies between real working conditions and reported working conditions is illustrated in many reports from organisations such as Fairtrade. See www.fairtrade.org. See Chap.3 Time to Play Fair regarding abuses in the sportswear industry. Even though corporate social responsibility movements can highlight the need to improve matters and abuses which take place, it is clear even from these kind of reports that there are aspirations to ensure that ILO labour standards are complied with, that governments in these countries comply by enacting legislation reflecting these standards and that in particular trade unions

views as beyond mere compliance with regulatory norms. But as we have seen many of the proponents of CSR are not clear about the role of law in this endeavour, nor is it clearly acknowledged within CSR discourse that many types of behaviour which are considered responsible are also legally required. (The law is no stranger to responsibility!) Many within the CSR movement are also not clear as to whether these voluntary responsible corporate actions are a precursor to legal regulation or whether encouraging such behaviour should be regarded as a substitute to legal regulation. At least the EU documents are clear about this latter point and reiterate that CSR is not a substitute for regulation.

“Some may see the rapid development of codes as a dangerous trend towards a “privatisation” of social rights.

Clearly, codes can only complement and not replace national and international legislation or social dialogue and collective bargaining.”²¹

A further point can be made regarding CSR which is very clear from EU documents and that is the importance of CSR in the context of globalisation. It is primarily in relation to developing countries that the EU seeks to extend the CSR influence, but here two preliminary critical points can be made. Firstly, although addressing a global context, EU documents fail to recognise that most of the world’s regulatory environments in the area of labour rights and environmental standards are a lot more flexible than that of Europe. Here we can distinguish between developed economies and others. In the developed world, outside of the European Union, the United States, in the area of employment and labour rights presents an entirely different picture from Europe.²² Canada and Australia present broadly similar pictures to the European one, but Japanese employment structures seem to work on a voluntary rather than regulatory basis.²³ In many other less developed countries the level of protections afforded to European workers is unheard of, presenting therefore questions regarding the naivety of statements described in the Green Paper. Secondly, references are made to incorporation of ILO standards and other international standards without addressing whether this is practical in the short term or addressing the possibility that non-compliance with acceptable labour standards for example could be addressed closer to home.

The distinctions made between legal regulation and CSR encapsulated in the idea that CSR goes beyond legal compliance and represents an investment in human capital and sustainability which may yield competitive benefits resonates with the more theoretical school of thought on corporate action, the school which explores the potential of non legally enforceable norms as a way of regulating corporate behaviour. Norms scholars who have turned to

are permitted to act on behalf of indigenous workers. This represents some challenges to companies seeking low-cost manufacturing locations.

²¹ *Supra*, n.16 para.1.3.

²² Lynch-Fannon. *Working Within Two Kinds of Capitalism*. (2003). Freeman. *Working Under Different Rules*. (1994). Note that the EU ABC document *supra* n.16 refers to transatlantic meetings on core labour standards in relation to improving work standards in developing countries. *Supra*, n.16 p.9.

²³ Learmount. *Corporate Governance, What can be learned from Japan?* (2002).

corporate governance matters, hypothesise that corporate law principles and rules are designed to facilitate behaviour which is largely governed by non legally enforceable norms and that in reality in many corporate governance systems NLERs play very significant role in governing corporate action. However, as we will see in the final section most norm scholarship is concerned with “maintream corporate governance” in other words the relationship between the corporation, the management and the shareholders. It does not in general address CSR issues, but this article will seek to place CSR within this paradigm. For the moment however it is interesting to note that one of the most prominent US corporate governance scholars identified Scandinavian countries as possessing corporate governance systems where NLERs play highly significant roles. Coffee hypothesises by that in very competitive countries such as the Scandinavian countries NLERs are important and goes on to make assertions regarding the relationship between regulation or lack of regulation and competitiveness which are unfortunately unsupported by the evidence. Nevertheless the identification of reference to norms within the Scandinavian experience is not misplaced and indeed this would seem to reflect the European experience where it is acknowledged that the influence of Scandinavian thinking on competitiveness matters has influenced further development of the European Social model of corporate governance.²⁴

Conclusion

In conclusion of this part, a definition of CSR therefore can immediately clarify that CSR is focussed on non-legally regulated behaviour. It seems to be by and large focussed also with concerns regarding non shareholding stakeholders, such as communities, in particular global communities, workers, environment, consumers and so forth. Central to our understanding of CSR, both in terms of what it is and what it is not, is a clear articulation of its relationship to legally enforced standards. Unfortunately this question seems to generate a number of different approaches. CSR is seen by some as a step towards standards which will eventually be regulated. This is where we could regard the EU approach in a general sense.²⁵ Others see CSR as

²⁴ For a description of the Scandinavian influence on the development of the Social Policy see further Lynch-Fannon. “The European Social Model of Corporate Governance: Prospects for Success in an Enlarged Europe” in Ali *et al* (Eds.) *International Corporate Governance after Sarbanes-Oxley* (2006), pp.423-443.

²⁵ Some of the major steps in the EU approach to CSR matters are described chronologically below. The approach is characterised by a willingness to take steps in converting voluntary corporate action into matters of public record through accounting disclosure. Measurement and accountability thus become integral to CSR actions, converting purely private voluntary corporate action to a matter of public record and dialogue.

On 27 October 2004, the European Commission adopted a proposal for a Directive concerning annual accounts. This Directive proposal (COM(2004) 725) indicates that EU-based listed companies must disclose an annual corporate governance statement as part of their annual report. The Directive also indicates that within their corporate governance statement and where relevant, companies may also provide an analysis of environmental and social aspects necessary to understand their development, performance and position. While not mandating reporting on

perhaps an antidote to over-regulation. It is possible that the majority of those currently writing as norm scholars within corporate law scholarship are in this camp. Others see CSR as providing a feel-good factor in relation to how our corporations act in the world, this seems to have caught the populist imagination but also has caught the imagination of our marketing gurus. Unfortunately the latter two statements resonate with cynicism to which the author readily admits, but it is hard to see how from a lawyer's perspective this approach has any other meaning. However, on a more positive note, it is acknowledged that it is important not to be totally dismissive particularly when one considers the good work of lobby groups such as the Fairtrade movement and in the US the Domini group www.domini.com which has been active as a socially responsible funds investor in the retail clothing sector. It is important to try to focus on the question of what CSR can deliver that law is not delivering and to consider how both can compliment each other rather than compete.

Part II: The Courts and the Legislature.

This section seeks to provide the reader with some illustration of how the legal regulation of companies will find a place for CSR. Legal regulation will include judicial statements in decided cases and statutory material. The section also aims to clearly articulate the legal basis and theory underlying

CSR issues, the Directive recognizes the relevance of environmental and social issues in the context of corporate governance. http://europa.eu.int/comm/internal_market/accounting/otherdocs_en.htm. In its communication entitled 'Corporate social responsibility: a business contribution to sustainable development', COM(2002) 347, the Commission invited the European Multistakeholder Forum on CSR to develop commonly agreed guidelines and criteria for measurement, reporting and assurance by mid-2004. The CSR Forum presented the Commission a final report with its conclusions on 30 June 2004. http://forum.europa.eu.int/irc/empl/csr_eu_multi_stakeholder_forum/info/data/en/CSR%20Forum%20final%20report.pdf.

The Forum has pursued a relatively active agenda and its latest meetings in December have been referred to above. *Supra* n.15. In its Report on The Commission Green Paper on promoting a European framework for corporate social responsibility, the European Parliament has invited the Commission to bring forward a proposal on the appropriate directive (the fourth company law directive) for social and environmental reporting to be include alongside financial reporting requirements. In its Communication On The EU Strategy For Sustainable Development, COM(2001) 264, the Commission invited all publicly quoted companies with at least 500 staff to publish a 'triple bottom line' in their annual reports to shareholders that measures their performance against economic, environmental and social criteria. In 1998, the High-Level Group on Economic and Social Implications of Industrial Change set-up at the invitation of the European Council, invited companies of more than 1,000 employees to publish voluntarily a 'Managing change report', *i.e.* an annual report on employment and working conditions (*e.g.* employee consultation and social dialogue, education and training, health and safety, equal opportunities) to be developed in consultation with employees and their representatives in accordance with national traditions. See further ABC of the main instruments of Corporate Social Responsibility referred to at *supra* n.16.

the limited liability corporation and to identify a proper role for voluntary behaviour aimed at non shareholder, stakeholder welfare.

The chancery courts have always considered managerial activity in an expansive way. There has always been room for what is now described by some as CSR ever since Lord Hutton recognised that, “The law does not say that there are to be no cakes and ale, but there are to be no cakes and ale except such as are required for the benefit of the company. . .”²⁶ It is of course important that generosity and responsible action within the paradigm of company law must be linked to the overall prosperity of the company and this is equally true in modern discourse on CSR where different kinds of justifications for adoption of CSR policies are inevitably linked to corporate benefit. It may sound harsh to point this out but in reality both legally and theoretically it would be unacceptable to propose any thing else. In other words it would be unacceptable to present the corporation as a vehicle for achieving any sort of broad based social goods which were not referred back to the primary function of the corporation, to make money and profits for its shareholders. The argument here is that corporate law has already understood this. Many cases grapple with this balancing act. The famous US case of *Shlensky v Wrigley*²⁷ which involved a shareholder action alleging that the directors and in particular the defendant were delinquent in not installing lights to facilitate night games of baseball recognised that the directors of a company who exercise the legitimately delegated power of the shareholders will not be subject to the control of the courts over decisions which are discretionary in nature as to the direction of the business. This is the case even if other decisions may be demonstrably wiser or may render the business more successful or profitable. The plaintiff had alleged that the directors were dominated by the defendant majority shareholder’s view that baseball was a “daytime sport” and that installing lights would affect the character of the surrounding neighbourhood. The court speculated that perhaps a long term view of the value of the property might have motivated this refusal but more importantly emphasised that the court’s role was not to second guess management decisions: “Directors are elected for their business capabilities and judgment and the courts cannot require them to forego their judgement because of the decisions of directors of other companies. The court reiterated that for it to decide that a decision of the directors was a correct one is “beyond its jurisdiction and ability. We are merely saying that the decision is one properly before the directors and the motives alleged in the amended complaint showed no fraud, illegality or conflict of interest in their making of that decision.”²⁸ Similarly on this side of the Atlantic, in *Howard Smith Ltd v Ampol Petroleum Ltd*²⁹ the court stated that it will “necessarily give credit to the bona fide opinion of the directors, if such is found to exist, and will respect their judgment as to matters of management; having done this, the ultimate conclusion has to be as to the side of a fairly broad line on which the case falls.” On the other hand in *Dodge v Ford*

²⁶ *Hutton v West Cork Rwy Co.* (1883) 23 Ch. D. 654, 672.

²⁷ *Shlensky v Wrigley et al* 95 Ill. App. 2d 173; 237 N.E. 2d 776; 1968 Ill. App. LEXIS 1107.

²⁸ See further M Dooley, *Fundamentals of Corporation Law* (New York, The Foundation Press, 1995), 206–210.

²⁹ [1974] AC 821, 835,

*Motor Co.*³⁰ the court was of the view that the socially altruistic desire of Henry Ford to invest all company profits in making the cheapest cars to make cars generally available to the American public and to generate more quality jobs in the community had to be balanced fairly against the interests of the shareholders who sought some distribution of the profits as dividends. The court expressed the view that the re-investment of all profits was “not only far from related to the good of stockholders, but amounted to a change in the ends of the corporation and that this was not a purpose contemplated or allowed by the corporate charter.” Accordingly, the plaintiff who owned 10% of the stock in the Ford Motor Co. successfully obtained an order that some of the corporate profits would be paid in dividends, but was unsuccessful in enjoining the company from further expansion as the court was of the view that it could not interfere with the decision of the directors to expand the business, stating that “The judges are not business experts.”³¹

Many cases illustrate quite clearly the understanding that altruistic and responsible behaviour can benefit the company and its shareholders, but on the other hand the Ford Motor Case illustrates that the courts are also mindful of the basic tenets of company law and corporate law theory, namely that the company is ultimately there for the benefit of its shareholders and other goals can only be pursued through this prism. Interestingly the courts draw a rather stringent line in relation to altruistic behaviour when the company is insolvent and approaching liquidation. In these cases the courts indicate that at this point in a company’s life it is too late for this kind of largesse, the point being that an insolvent company has nothing to gain and disbursement of funds should be curtailed so that as much as possible is available to creditors.³² The courts have long recognised that the imposition of directors legal liability and duties are not amenable to application of broadly similar rules across the board. The law allows for entrepreneurial and managerial behaviour. It supports the concept of risk taking. The rule in *Smith (Howard) Ltd v Ampol Petroleum Ltd.*³³ states that “it would be wrong for the court to substitute its opinion for that of the management, or indeed to question the correctness of the management’s decision . . . if *bona fide* arrived at. There is no appeal on merits from management decisions to courts of law: nor will courts of law assume to act as a kind of supervisory board over decisions within the powers of management honestly arrived at.”

In the US this approach has been characterised as the business judgement rule and is more highly articulated as it has become very significant in litigation regarding takeovers and mergers³⁴ but it has always been important regarding a whole range of decisions by managers regarding corporate actions, such as those exemplified in *Shlensky* and indeed in *Dodge*. The

³⁰ 204 Mich. 459; 170 NW 668.

³¹ *ibid.*, p.684.

³² *Parke v Daily News Ltd* [1962] Ch. 927 where gratuitous payments to employees at the end of a company’s life were overturned by J. Plowman even though most shareholders supported the initiative. This could not be for the benefit of the company at this point as there was no reputational gain. See also *Re W & M Roith* [1967] 1 W.L.R. 432. *Re Horsely & Weight Ltd.* [1982] 3 All.E.R. 1045. See also *Russell Kinsela etc.* regarding creditors.

³³ [1974] A.C. 821, 831.

³⁴ *Smith v Van Gorkom Time Paramount etc.*

standard for review of business decisions in the US is now contained in section 102(b)(7) of the Delaware Corporate Code which was enacted after the response to the court's decision in *Smith v Van Gorkom*³⁵ and requires that there must be "a showing of fraud, illegality or conflict of interest." The legal framework which imposes a broadranging duty of care and loyalty on corporate managers also protects them from liability for mistaken decisions or decisions which might not always directly benefit the shareholder wealth maximisation principle as long as these decisions are made in good faith. Thus in most cases shareholders cannot insist on short term profit maximisation at the expense of long term decisions which will benefit the company in different ways. Decisions to support workers, communities, customers and so forth all come within this subset of decisions, they are unassailable in the corporate law paradigm and in fact are actually encouraged through many examples of judicial rhetoric, support for managerial discretion protects directors who want to act in socially responsible ways.

However, there are limits to this rosy picture and this is particularly the case in a category of cases where employees interests as stakeholders directly conflict with the rights of shareholders as residual claimants and also with the rights of creditors. These cases have a common strand and that is that they address this conflict in the context of insolvency or more broadly speaking in cases where corporate coffers are not flowing and the money is tight. Thus in *Parke v Daily News Ltd.*³⁶ the courts could not countenance ex gratia payments to employees, in the Irish case of *Re Frederick Inns*³⁷, the courts could not allow funds from one company to be used to pay creditors of another. In Yongstown Ohio the courts tried to grapple with the worst case scenario where a company removes itself from a community but could find no legal principles where it could restrain a company from doing so. It is difficult to see how a court could cut across this fundamental principle which allows for capital mobility.³⁸

A theoretical limitation which clouds existing legal support for socially responsible managerial action emanates from the emphasis on capital market

³⁵ *Smith v Van Gorkom*, 488 A. 2d. 858 (Del. 1985).

³⁶ [1962] Ch. 297.

³⁷ Interestingly in both these cases the somewhat harsh effect of the decision has been reversed by legislative provisions. See Companies Act (Ireland) 1990, s.52 and Companies Act 1985, s.309(1). See further Sealy, *Cases and Materials in Company Law* (1996), 281–82. Similar statutes exist in some American jurisdictions. For a general discussion see M. O'Connor, "Corporate Malaise—Stakeholder Statutes: Cause or Cure?" (1991) 21 *Stetson Law Review* 3. EW Orts, "Beyond Shareholders: Interpreting Corporate Constituency Statutes" (1992) 61 *George Washington Law Review* 26. In all cases the effect of the legislative provisions is that managers are now explicitly permitted to consider the welfare of employees as stakeholders, but not mandated to do so, nor are there any clear rules as to how the differing interests of employees as stakeholders which might conflict with shareholders' interest can be resolved. See further Lynch-Fannon *Working Within Two Kinds of Capitalism* (2003). Interestingly the regulatory landscape has also imposed extensive obligations in relation to plant closure at European level leading Mark Roe to famously comment regarding his experience with German restructuring, that "these companies really care about their people."

³⁸ *US States Steelworkers v United States Steel* 631 F. 2d. 1264 (6th Cir. 1980).

responsiveness. This will be considered below. Another interesting area where the courts have again identified the importance of legal discourse in the CSR context is represented by the US case of *Nike v Kasky* regarding the ability of Nike Inc to engage in public debate regarding allegations made against it about its use of sweatshop labour. Although settled, the judiciary were conscious of this important social activity and the dissenting judgement of J. Kennedy in noting the public interest in a public debate on corporate activity rightly identified the role of the courts in encouraging corporate involvement in this debate. Over all however, the Nike story isn't good because it highlights how difficult it is for CSR alone to achieve desirable goals.

Apart from cases on director's duties which have been developed over time in many jurisdictions, different kinds of regulation has developed in recent years which has been derived from statutes.³⁹ Under these statutes the courts have also grappled with the standard of risk taking which they consider acceptable within the modern regulatory legislative framework exemplified by legislation providing for directors disqualification and restriction.⁴⁰ This legislation introduced in all three jurisdictions of United Kingdom, Northern Ireland and Republic of Ireland in the late 1980s and 1990 has received quite a bit of judicial attention. This legislation is particularly directed at the protection of non-shareholding stakeholders such as creditors and to some extent employees, although of course shareholders will also benefit from the standards imposed. However a hypothesis proffered in this article is that even though rhetorically the legislation aspires to imposing higher standards of behaviour than those already imposed in the common law, the courts are still immersed in the culture of non interference and respect for risk taking. (Not entirely a bad thing!) The judgment of J. Peart in *Re USIT World plc*⁴¹ is infused with respect for the exciting life of the entrepreneurial risk-taker and the contribution he or she makes to our world.

“A risk taken against such a background of planning and knowledge, and with appropriate advice taken, might be reasonably characterised as a calculated risk without any element of carelessness, rashness or recklessness attached to it which could attract the tag of irresponsibility. Clearly the greater the amount of money involved in the risk the greater is the obligation on all concerned to ensure that appropriate care is taken in all aspects of its planning, so that all factors, reasonably foreseeable, which may cause the venture to fail, will be anticipated and guarded against.

³⁹ Note, Norman Veasey has remarked in relation to the extending of Federal legislation in the US with the introduction of the Sarbanes Oxley Act that this will bring in a development of corporate law away from litigation over fiduciary duties to a focus 'on litigation going after officers as the actors in fraud cases'. See Veasey N: 'The Judiciary's Contribution to the Reform of Corporate Governance' [2004] JCLS 225. This is even more likely on this side of the Atlantic because of the difficulty of mounting shareholder actions against management as distinct from the US.

⁴⁰ See Company Directors Disqualification Act (UK) 1986. Part V 1990 Companies Act (ROI) as amended by Company Law Enforcement Act 2001 (ROI).

⁴¹ [2005] IEHC 285.

If an entrepreneur were to be obliged, on pain of being found irresponsible and of being restricted under the section, to avoid taking any decision which at some date in the future might be found to have risk attached to it, the business life and a large component of the economic driver of the economy of the State would stultify. I do not believe that this is what the legislature had in mind when enacting section 150.”

Conclusion

All corporate regulation must be justified by reference to some developed corporate law theory regarding the function of the corporation, the role of its management and the role of shareholders. Thus in Allen’s analysis some years ago of the debate between the European model and the US model of corporate governance concerning non-shareholding stakeholders he referred to the “managerialist” conception of the corporation, a view of corporate function which is both more pragmatic and more predominant in reality than either the communitarian or contractarian approaches which he also describes. The managerialist view is the theory which best fits what Allen describes as managerial practise in most corporations and the judiciary’s understanding of corporate function, both of which he had occasion to understand as Chancellor of the Delaware Court.⁴² The cases referred to in this section reflect this more pragmatic approach. In the context of CSR the principle of shareholder primacy *as distinct from shareholder wealth maximisation* is the constraining principle. Corporate law theorists have recognised that the current emphasis on short termism has threatened responsible corporate action. Perhaps this is why we have had a concurrent growth in the CSR movement. For example, Laurence Mitchell has asked us whether Wealth is a Value⁴³ echoing the concerns expressed by Dworkin in the mid 80s as the law and economics school of thought reached an ascendancy in Chicago and beyond.⁴⁴ Mitchell deplores the growth in corporate irresponsibility, particularly in the context of globalisation, and wonders whether from an ethical perspective wealth can be pursued as a free-standing value. David Millon has usefully distinguished shareholder primacy and shareholder wealth maximisation.⁴⁵ The argument is that acceptance of orthodox corporate law theory which places shareholder primacy at the centre does not necessarily imply a slavish loyalty to shareholder wealth maximisation at all costs. This point must be emphasised in light of misunderstandings as to what is meant by shareholder primacy or shareholder value. In a commentary on Lawrence Mitchell’s *Corporate Irresponsibility*,⁴⁶ Millon considers the issues identified by Mitchell surrounding current management practices in corporate America. In

⁴² Allen, “Contracts and Communities” (1993) 50 *Washington and Lee Law Review* 1. The discussion of Allen’s views and quotations are all derived from this article. See also Lynch-Fannon. *Working Within Two Kinds of Capitalism* (2003) and Lynch-Fannon. ‘Employees as Corporate Stakeholders: Theory and Reality in a Transatlantic Context.’ 4 *Journal of Corporate Law Studies* 155 (2004).

⁴³ Mitchell. *Corporate Irresponsibility: America’s Newest Export* (2001). Chap.4.

⁴⁴ Dworkin. Is Wealth A Value? 9 *J. Leg. Stud.* 191 (1980) reprinted in *A Matter of Principle*.

⁴⁵ Millon, “Why is Corporate Management Obsessed with Quarterly Earnings and What Should be Done about It?” (2002) 70 *George Washington Law Review* 890

⁴⁶ *Supra.* n.43.

particular, the pressure felt by management to maximise shareholder profit, which Millon describes as “the SPM” goal, (shareholder profit maximisation) is considered. In his work the SPM goal is clearly separated out from other concepts that are central to our understanding of corporate function. Millon makes it clear that in his understanding of Mitchell’s work SPM can be “condemned without embracing a corporate social responsibility agenda . . .” which Millon views as being too radical. The importance of this point is quite simply that rejecting SPM is not necessarily a radical step or as radical a step, for example, as the adoption of a corporate responsibility theory which might well go so far as to require the acceptance of equal claims to corporate wealth for other constituencies such as employees, creditors, and community interests in environmental welfare. Millon’s understanding of corporate social responsibility is perhaps overstated. What is important is the view that rejecting the current SPM *modus operandi* is or could be acceptable to a broad range of corporate law theorists. Thus, as we have seen the courts on both sides of the Atlantic have always tolerated a wide area of managerial discretion under some version of the business judgement rule. Company law principles and the cases derived from these principles clearly illustrate that shareholder wealth maximisation is not a goal that must be pursued with short term ruthlessness and that, in fact, many management decisions, for example, relating to spending what would otherwise be distributable profits on advertising, political contributions, sporting and cultural events and philanthropic donations, have always been protected by the courts. As we have seen, even in the dark ages of the early nineteenth century it was recognised that some benefits, in this case, cakes and ale for the employees might bring benefits to the company in terms of performance incentives! The broad discretion given to management under fiduciary duty principles underlines the point similarly. In common law jurisdictions which have enacted “other stakeholder statutes”, it is clearly indicated that a slavish adherence to shareholder wealth maximisation is not required. In summary, therefore, these statutes, together with judicial pronouncements in common law jurisdictions in relation to managerial discretion, acknowledge that although orthodox corporate law theory continues to support shareholder primacy (shareholder value), shareholder wealth maximisation, particularly the ruthless pursuit of short-term shareholder wealth, is neither required nor necessarily desirable.

Thus an alternative approach to corporate irresponsibility is presented in this article relying on two responses;

Firstly, a return to the realisation that the courts have always expected higher standards from managers beyond mere profit maximisation at all costs. A consequent emphasis on judicial guidelines on the role of directors and further analysis of judicial thought in this area is important.

Secondly an acceptance of the idea that the legislatures of jurisdictions in which most international companies reside, in addition to international institutions have a regulatory role to play in setting standards.

Part III: Corporate Law Theory and Norm Scholarship.

Contemporaneously in the United States we have seen a growth in scholarship in the role of norms in corporate governance. As interest in norms grew in the arena of corporate law scholarship a distinction was made,

pioneered by Rock and Wachter⁴⁷ between legally enforceable company law rules and NLERS, non-legally enforceable rules and standards and whilst admitting the inelegance of NLERS they chose this term to clarify the voluntary nature of the norms with which we are concerned, representing a context where behaviour is adhered to through a privately enforced system of rewards and penalties. They argue furthermore, although not central to the points made here, that if enforcement includes even “a judicial backstop”⁴⁸ the agreement in relation to certain kinds of behaviour is legally enforceable. But nevertheless despite their claim regarding the presence of the “judicial backstop” and the impact on whether a standard is legally enforceable or not, Rock and Wachter also claim that “important parts of corporate law can be understood as establishing a structure within which non-legally enforced self-governance can thrive.”⁴⁹ On the whole the majority of corporate governance scholars recognise the connection between good behaviour towards stakeholders to whom no legal duty is owed, for example employees expecting Christmas gifts, communities expecting arts and cultural sponsorship and the fulfilment of the shareholder primacy obligation required in corporate law and the role the courts have placed in guiding the way. That said much of the norm scholarship in the context of corporate governance focuses almost exclusively on the director-corporation-shareholder relationship and on the facilitating role of corporate law in guiding good managerial behaviour towards shareholders.⁵⁰ At least we can all agree with Rock and Wachter when they propose that “the structure of corporate law, whether embodied in statute or case law, is more fully understood if the effects of norm governance are included in the analysis.”

The Influence of Norm Scholarship.

There are essentially two kinds of norms scholars. Firstly, there are those who identify norms as standards of behaviour which are not legally enforceable but which inform in some cases the exposition and articulation of legal standards. This is a very apt analysis when we consider many decisions from a number of jurisdictions where the courts have traditionally expounded and considered issues at the edge of corporate law pathology.⁵¹ The second kind of norm scholar is one who seeks a broader definition of non legally enforceable norms developed in more recent times. This kind of norm scholar seeks to embrace the CSR movement. Here a school of thought puts forward the idea that norms will yield behaviour which is desirable but which it is argued law cannot and perhaps ought not deliver. This is a more difficult proposition.

The first kind of norm scholar will agree with the proposition that when one considers many judicial comments over the years, it is clear the courts have always embraced and understood that law will and can deliver very high

⁴⁷ University of Pennsylvania Symposium: Norms and Corporate Law, *supra* n.9.

⁴⁸ *ibid.*, 1613.

⁴⁹ *ibid.*, 1611.

⁵⁰ See Veasey, *supra* n.39 for summary.

⁵¹ Prentice, D: “Some Observations on the Teaching of Company Law”, coined this phrase in describing the company law undergraduate syllabus in Birks, PBH: Examining the Law Syllabus: Beyond the Core (Oxford University Press, Oxford, 1993).

standards of managerial behaviour. Here norms which describe more fully principles of good faith, loyalty,⁵² risk taking which is not reasonable or honest, impose upon corporate directors and management broad ranging obligations not always easy to grasp for the ordinary business person but which are very familiar to corporate lawyers. The difficult question for norms scholars is about process, how exactly does this work and what do the judges think they are doing? Having established the conceptual framework for asking the very important question as to what is going on when the courts attempt to deal with aspirational norms such as loyalty, and good faith but back away from enforcing liability for possible infringement of the rules, Rock and Wachter fail to make sense of the answer. They allow that the legal principle presents us with an undemanding standard of conduct, but also acknowledge that judges spend a lot of time considering these cases even though they, the judges, reiterate the business judgement rule as a jurisdictional boundary.⁵³ In their explanation they end up treating as exceptions two US cases where directors were reprimanded. Here however, it is argued that Rock and Wachter have reversed the analysis and laid the emphasis in the wrong place. As stated in the previous section, the courts have always understood and protected the director who is not focussed on shareholder wealth maximisation, i.e. the director who acknowledges the primacy of the shareholder but also recognises the importance of other stakeholders. The function of rules which protect managerial discretion allow directors to mediate in this way between competing claims. The function of the courts is to fill out the expansive nature of this protection and that is where the rhetoric contributes in an important way as Johnson mentioned. Shareholders wealth does not have to be attained at all costs. The only situation where the law will intervene to protect shareholders at all times is where the directors are themselves trying to benefit.⁵⁴

The Second School of Norms and What It Has To Do With The Dark Side of CSR.

Broadly speaking CSR will consist of a body of non-legally enforceable norms of good behaviour, for example pro-active environmental actions, community activism and other kinds of actions which will deliver beneficial results. However, it is clear that all CSR initiatives must be viewed within the currently understood paradigm of corporate function as expressed in corporate law and theory. Therefore shareholder primacy will and must guide all norm driven behaviour. In this context it is useful to ask why any corporation which is not legally obliged to do so would embrace CSR in any of its guises. The justifications must be inherent in our understanding of the purpose of the corporation that is shareholder wealth creation. The only way any CSR initiative can be justified is because it is financially beneficial to the company and consequently its shareholders. The benefit to the shareholders

⁵² Johnson, L: "After Enron: Remembering Loyalty Discourse in Corporate Law" 28 *Delaware Journal of Corporate Law* (2003) 27.

⁵³ Rock and Wachter: "Islands of Conscious Power: Law, Norms and the Self-Governing Corporation" 149 *University of Pennsylvania Law Review* (2001) p.1699.

⁵⁴ *ibid.* 1696.

can be described in public relations terms broadly speaking. This is not a cynical point. Many companies involved in CSR will state that it is good to be viewed as a good corporate citizen, to get the accolade of one of the best companies to work for⁵⁵ or to be known for example as a company which is involved in environmental protection initiatives,⁵⁶ or to be known as a company which protects the integrity of its supply chain.⁵⁷ This point also recognises that if good corporate citizenship is a response to populist demands for corporate social responsibility well that is a good thing too, insofar as it goes.

However a more unsavoury aspect to the push to advance CSR is the argument that CSR is good for companies and shareholders because it keeps governments and regulators at bay. CSR presents an attractive alternative to regulation. Regulation and law is viewed as hostile to business interests, enforcing non-voluntary standards that corporations will not accept. In a nutshell this is the part of CSR which prefers for example “family-friendly” policies to hard-core regulation, the approach currently favoured in the United States to balancing work and family which is so different to the European approach. It is a movement, perhaps more gravely, which prefers voluntary environmental measures to the Kyoto agreement and which would prefer initiatives in relation to their own workers in developing countries rather than support implementation of ILO standards. What is most worrying is that CSR will be hijacked in this way by those who want to keep the regulators away, reflecting what Chomsky has described as the “American passion for de-regulation”⁵⁸ a passion which reached its zenith of achievement in the late 1990s but perhaps is on the decline slightly since Sarbanes-Oxley⁵⁹ was passed. But here we find resonance with the rise in norm scholarship, with many norms scholars making such robust arguments for the facilitative role of company law that one can only conclude that the agenda is to resist further Federal or state regulation rather than explore the relationship between norms, corporate laws and good outcomes in any genuine way. For example, Coffee states that the idea that corporate behaviour “may be more shaped and determined by social norms than by legal rule seems to an idea whose time has come”.⁶⁰ This may well be true in a socially descriptive way but note that he does not shy away from the prescriptive position and goes on to state that commentators “have placed the relative efficacy of social norms as compared with legal rules at the centre of the debate over the judicial role in corporate law” and also notes the arguments that perhaps the courts should be less rigorous because social

⁵⁵ Continental Airlines ‘100 Best Companies to Work For’ Fortune Magazine 1998-2004. www.continental.com.

⁵⁶ ShellBP has its own ‘Environment and Society’ website. www.shell.com. Interface Inc. is the world’s largest manufacturer of carpet for use in offices and other public spaces. It has a website devoted to sustainable development at http://www.interfaceinc.com/goals/sustainability_overview.html, accessed January 2007.

⁵⁷ Gap Incorporated. http://www.gapinc.com/public/SocialResponsibility/sr_factories.Shtml.

⁵⁸ <http://www.zmag.org/zmag/articles/may97chomsky.html>.

⁵⁹ Sarbanes-Oxley Act 2002.

⁶⁰ Coffee: “Do Norms Matter? A Cross-Country Evaluation” 149 *University of Pennsylvania Law Review* 2151 (2001).

norms adequately govern behaviour. In testing these hypotheses out Coffee quite peculiarly identifies the Scandinavian countries as areas where norms seem to place an important role, but fails to acknowledge the equally if not more important fact of Scandinavian countries present a very highly regulated environment, particularly as regards the interests of non-shareholding stakeholders. Norman Veasey similarly decries further attempts at Federal regulation as exemplified by Sarbanes Oxley and argues that norms have operated quite well against the backdrop of the common law, again seeming to advocate a hands off approach for the statutory regulators. In conclusion of this part then two cautionary notes must be sounded. The first is that nonlegally enforceable norms will not yield uniform responses to issues which matter to us. Even though CSR can play a part in engaging in discourse with companies which might perceive an advantage in acting in a voluntary way, legal standards must articulate what is desirable for all. Law cannot it is argued be viewed as a minimum paving the way for responsible and socially altruistic behaviour, the function of law is to yield high standards in its own right through high legislative standards, effective enforcement and penalties. The second is the danger that the CSR movement will be hijacked by those who favour voluntarism in a cynical way. Those who are descendants of the law and economics school of thought who see again a theoretical argument for resisting what they consider to be "big government." Both of these dangers are interrelated. If CSR is used as a way of fending off "big" government or if CSR is advocated as the only way a particular problem can be solved we will find ourselves stuck in a mindset where our failure to address problems will be regarded with considerable shock and dismay by future generations.

Conclusion

As indicated in the previous section directors and managers of corporations have experienced increased pressure to maximise shareholder wealth in a short term way. In turn this pressure has derived support and impetus from those in the corporate governance movement who placed such emphasis on capital markets theory as the most appropriate governance and monitoring device. We can now accept that despite theoretical assertions of the market as the most efficient of governance devices which dominated literature in the late 1980s and 1990s, these theoretical descriptions did not and do not account for flaws in how the market operates in reality. Recently, informational asymmetries, including not least, the failure of analysts to act independently of each other, and recent revelations in relation to the shortcomings of auditing practices⁶¹ clearly illustrate the discrepancies between market value of shares and actual corporate performance. All of these events tend to support those (including this author) who have argued that although markets do function reasonably accurately, particularly in relation to established companies, they are not transparent and are not without flaws. It is in fact these corporate scandals which have prompted a wider group of scholars beyond those who were never convinced about the

⁶¹ For a very interesting description of the variation in auditing practices on both sides of the Atlantic and the difference this can make to the financial statement of particular companies see: G Meeks, "Reporting to Shareholders: The Proposals in the Company Law Review" (2003) 3 *Journal of Corporate Law Studies* 191.

capital markets theory in the first place, to revisit issues such as corporate responsibility, shareholder wealth maximisation and so forth.⁶² The DTT's consideration of competing views of corporate function concludes quite clearly (and correctly) that "shareholder value" is the primary principle which has been and will continue to be pursued by the company law regime.⁶³ The shareholder value principle can be equated with shareholder primacy. Whilst embracing shareholder value or shareholder primacy principles we can recognize that this does not imply a rejection of all stake holding claims and conversely recognition of the reality of stakeholders' claims does not imply a negation of the central *capitalist* principle of shareholder value or primacy. All that is required is a recognition of the possibility of balance and that government and regulation have a role in arriving at this balance.

"One underlying imperative exists and that is the acceptance that the corporation is indeed a public actor in relation to employee welfare issues. As such the corporation is subject to government regulation in pursuit of goals which may have little immediate effect on generating wealth for shareholders, but much to do with striking a desirable balance between this goal and the broader concerns of government and society."⁶⁴

The resolution of this distinction allows for the embracing of a different understanding of corporate function which is more nuanced than a simple shareholder wealth maximisation model. For example it will easily embrace the European Social Model of corporate governance which though clearly capitalist and shareholder driven also recognizes the importance of other stakeholders including employees and creditors, and the importance of locating the company within its societal context. Thus there is no contradiction between shareholder primacy and the Lisbon goal of regulating the corporation as one social element in achieving the goal of creating for the future "a dynamic knowledge based economy capable of sustainable economic growth with more and better jobs and greater social cohesion."⁶⁵ Quite clearly this resolution will also allow us to contemplate a legitimate place for CSR, but this will always be within the existing corporate law paradigm. . .

Finally, it is also important to emphasise that whilst traditional corporate law theory views the various non-shareholding constituencies as being outside

⁶² Veasey N. *supra* n.39 for description of bubble or boom in 1990s and its cause and effect.

⁶³ www.dt.gov.uk.

⁶⁴ Lynch-Fannon, *supra* n.2, 133–34.

⁶⁵ *Supra* n.95 and n.96. Understanding of the European goal of a knowledge based economy seems to resonate with Plender when he concludes that despite its supporters the "old model of capitalism" has "gone off the rails" and a new paradigm or set of rails must be found which "enable knowledge managers and workers to be incorporated into the corporate governance process. That points more in the direction of something akin to the currently unfashionable insider, or stakeholder, systems of capitalism, in which accountability is imposed by informed insiders rather than outside shareholders working through independent non-executive directors and a hostile takeover discipline." See further: Plender, *Going Off the Rails, Global Capital and the Crisis of Legitimacy* (Chichester, John Wiley & Sons Ltd, 2003) 264-70.

the remit of corporate law, that does not by any means preclude an acceptance of the fact that these constituencies are entitled to protect their position or their entitlement to corporate wealth “either by the terms of their contracts with the corporation or by means of favourable regulatory legislation obtained through the political process.”⁶⁶ Reference to the political process raises interesting questions regarding the acceptance of the recognition of other stakeholders in the corporation. In conclusion, adherence to shareholder primacy (or shareholder value) does not require that shareholder wealth is maximised in the short-term to such an extent that the accordance of corporate benefits to the community in the form of philanthropic activities or the distribution of some element of corporate wealth to stakeholders, for example employees have to be viewed continually against the demands of shareholder wealth maximisation, whether this is short-term or long-term or some odd and reflexive mixture of both. The costs entailed by giving benefits to employees do not have to be assessed crudely against shareholder wealth maximisation goals where certainly in the short-term view of wealth maximisation it will not make sense to be socially responsible. Good managers have always understood that distributing some share of corporate wealth to employees in terms of good working conditions and to the community in terms of involvement makes a lot of sense in terms of the long-term generation of wealth for the corporation and its shareholders. This view has been described⁶⁷ as the “managerialist” understanding of corporate activity, which reflects an understanding that knowledgeable and experienced corporate managers have always tried to behave with a balance in mind between profit generation and long-term planning. It is also clear that corporate law and corporate finance theory understand how good managers behave and that the courts have supported their discretionary actions for decades.

Elsewhere this author has written about resistance to employment regulation in the US and how strange this is from a European perspective. What is most interesting is the hostility to European style regulation disguised as academic argument, hostility which is given real and pragmatic expression in the US through lack of labour market regulation.⁶⁸ Now we are faced with many moral and ethical challenges presented to us by the demands of corporate and capital mobility. Is CSR the only response available to us? It is hoped that this is not that case and that law will recover her dominion and deliver mandated enforceable standards, even at a minimum level across the globe.

⁶⁶ Millon, *supra* n.45 at p.901.

⁶⁷ Allen: W. T: “Contracts and Communities in Corporation Law”. 50 *Washington and Lee Law Review* (1993).

⁶⁸ I. Lynch-Fannon: *supra* n.2.

RETAILERS' LIABILITY FOR THE ACTS AND WORDS OF OTHERS - THE LIFE OF A RETAILER MAY NOT BE A HAPPY ONE. . . .?

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Judicial notice was once taken of the fact that, "the life of a criminal is not a happy one. . ."¹ In the light of recent developments in consumer sales law, it may be that the same view might also be taken of the position of retailers who sell goods to consumer purchasers.

The Sale and Supply of Goods to Consumers Regulations 2002² give effect to the provisions of the EC Directive on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees³ (hereafter abbreviated to SCGD) by inserting additional provisions into the Sale of Goods Act 1979 and the Supply of Goods & Services Act 1982. The effect of these is to give consumers extensive rights in respect of the goods they purchase, all of which are exercisable against the retailer with whom they have contracted. It will be seen below that it had been in mind to expand the boundaries of liability for quality defects so as to create a form of joint and several liability to be shared by both retailers and producers. In its final form, the SCGD failed to put in place any such system of shared liability.

The purpose of this article is to examine four related issues. First, it is intended to identify the principal effects of the SCGD in order to identify those areas in which retailers have become subject to an extended liability to consumers. Secondly it is proposed to consider whether retailers are given any protection by the SCGD itself. Thirdly, it is intended to examine the principal difficulties associated with contractual chains of distribution which may adversely affect retailers. Finally, this paper considers whether retailers are likely to find any assistance in the law of tort where they have become subject to a contractual liability to a consumer, but have no means of redress within the chain of distribution.

1. The Content of the Conformity Standard and its Associated Remedies.

The general effect of the SCGD is to seek to define the requirement of conformity with the contract and to give to consumers a comprehensive,

¹ *Burns v Edman* [1970] 2 QB 541.

² S.I. 2002 No.3045. For wider discussion of the impact of the SCGD and the Regulations, see Bradgate & Twigg-Flesner, *Blackstone's Guide to Consumer Sales and Associated Guarantees*, OUP, 2003; Willett, Morgan-Taylor & Naidoo, *The Sale & Supply of Goods to Consumers Regulations*, (2004) JBL 94-120.

³ Dir 99/44/EC of the European Parliament and of the Council of 25 May 1999, OJ L171/12, 7 July 1999. For details of the development of the European quality standard, see Oughton & Willett, *Quality Regulation in European Private Law* (2002) 25(4) Journal of Consumer Policy 299-328.

additional range of remedies for breach of the conformity standard.⁴ However, it remains the case that under both the Directive and domestic law it is the final contractual supplier of goods to the consumer who bears the responsibility for ensuring that goods are in conformity with the contract, to the extent that they meet with the consumer's expectations of quality, fitness and compliance with the contract description.

According to article 2(2) of the Directive, goods are presumed to be in conformity with the contract if they:

- (a) comply with the description given by the seller and possess the qualities of the goods which the seller has held out to the consumer as a sample or model;
- (b) are fit for any particular purpose for which the consumer requires them and which he made known to the seller at the time of conclusion of the contract and which the seller has accepted;
- (c) are fit for the purposes for which goods of the same type are normally used;
- (d) show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labelling.⁵

These requirements, with the exception of that contained in article 2(2)(d), were considered by the United Kingdom Government to reflect the provisions as to description, satisfactory quality and fitness for purpose implied by the Sale of Goods Act 1979.⁶ However, it was also recognised that there should be circumstances in which the final seller should not be responsible for the promotional materials of others. Thus article 2(4)⁷ of the Directive provides that,

The seller shall not be bound by public statements, as referred to in paragraph 2(d) if he:

⁴ See Sale of Goods Act 1979 ss.48B-E, inserted by S.I. 2002 No.3045 reg.5. These remedies operate in a hierarchical fashion allowing consumers to seek from a retailer, initially, the remedies of repair or replacement and subsequently the remedies of price reduction and, as a last resort, rescission of the contract. Furthermore, these remedies, may be enforced, on an application by the consumer, by means of an order of specific performance under the Sale of Goods Act 1979 s.48E(6), inserted by S.I. 2002 No.3045 reg.5.

⁵ Implemented in the UK by means of the Sale of Goods Act 1979 s.14(2D) inserted by the Sale & Supply of Goods to Consumers Regulations 2002, S.I. 2002 No.3045 reg.3.

⁶ Sale of Goods Act 1979 s.13 (description), s.14(2) (satisfactory quality) and s.14(3) (fitness for purpose).

⁷ Implemented in the UK by means of the Sale of Goods Act 1979 s.14(2E) inserted by the Sale & Supply of Goods to Consumers Regulations 2002, S.I. 2002 No.3045 reg.3.

- shows that he was not, and could not reasonably have been aware of the statement in question⁷
- shows that by the time of conclusion of the contract the statement had been corrected, or
- shows that the decision to buy the consumer goods could not have been influenced by the statement.

The new remedial regime comprises a hierarchy of remedies which allows a consumer to require the seller, at his cost,⁸ to repair or replace non conforming goods.⁹ However, it is a remedial regime specific to consumer buyers that is bolted on to the existing remedial regime under the Sale of Goods Act 1979.

The new remedies of repair or replacement must not be requested if the remedy is impossible¹⁰ or disproportionate when compared with the other of the two remedies¹¹ or the remedies of price reduction or rescission.¹² For these purposes a remedy is regarded as disproportionate if it imposes costs on the seller which in comparison to those imposed by another remedy are unreasonable, taking account of the value of the goods had they conformed to the contract, the significance of the lack of conformity and whether the alternative remedy can be effected without significant inconvenience to the buyer¹³. However, a remedy not provided for in the SCGD is an action for damages, although this will not prevent an English consumer from pursuing an action for damages under the pre-existing remedial regime under the Sale of Goods Act 1979.

The remedies provided for in the SCGD are additional, in the sense that they have been superimposed upon the traditional remedial regime under the Sale of Goods Act 1979, applicable to all buyers, namely an action for damages for breach of warranty¹⁴ and/or a short-term, but immediate right to reject the goods and terminate the contract for a breach of condition, whether implied¹⁵ or express. In the case of express terms of the contract of sale, there is also the possibility that the right of rejection prevails in the event that the consequence of breach is deemed sufficiently serious under the common law innominate terms doctrine.¹⁶ There is nothing in the Sale of Goods Act 1979

⁸ Sale of Goods Act 1979 s.48B(2)(b).

⁹ Sale of Goods Act 1979 s.48B(1).

¹⁰ Sale of Goods Act 1979 s.48B(3)(a).

¹¹ Sale of Goods Act 1979 s.48B(3)(b).

¹² Sale of Goods Act 1979 s.48B(3)(a).

¹³ Sale of Goods Act 1979 s.48B(4).

¹⁴ Sale of Goods Act 1979 s.53.

¹⁵ Because the implied terms as to description, satisfactory quality and fitness for purpose in the Sale of Goods Act 1979 ss.13-14 are stated to be conditions of the contract. In non-consumer contracts of sale, a court may determine that a seller's breach of these implied terms is insufficiently serious to allow rejection of the goods by the buyer, by virtue of the Sale of Goods Act 1979 s.15A. However, this limitation on the buyer's remedy of rejection is inapplicable where the buyer is a consumer.

¹⁶ *Hong Kong Fir Shipping Co v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26; *Cehave NV v Bremer Handelsgesellschaft mbH, The Hansa Nord* [1976] QB 44; *Bunge Corp v Tradax Export SA* [1981] 2 All ER 513.

to prevent a consumer from relying on either the new remedies derived from the SCGD or from invoking the traditional remedy of rejection and termination of the contract, provided he is not deemed to have accepted the goods under the Sale of Goods Act 1979 section 35.

If the consumer chooses to reject goods on the ground that they are not of the desired standard of quality or fitness, the retailer will be responsible for those goods following rejection. But the retailer will have defective goods on his hands which are unlikely to demand a particularly spectacular resale price on the market, given their defectiveness. If a consumer insists on his or her automatic, but short-term right of rejection for breach of condition, or seeks the last resort remedy of rescission of the contract under the revised remedial regime,¹⁷ it is the retailer who will bear responsibility for disposal, repatriation or resale of those goods, wherever they may be situated following rejection or rescission of the contract. If a Portuguese consumer has purchased goods while cross-border shopping, on a mainland European holiday or via the Internet, from a UK retailer, that retailer will bear the responsibility of arranging for the repair, replacement or adaptation of goods that are defective. Any of these required actions is likely to impose on retailers a fairly substantial financial burden, yet it is not the retailer who has produced the defective product. However, it is the defectiveness of the goods that has placed the retailer in a vulnerable position.

Many of the additional costs faced by retailers of consumer goods might have been avoided, if, as was originally proposed in the 1993 European Commission Green Paper on Guarantees for Consumer Goods and After Sales Service,¹⁸ there was a form of joint and several liability for the quality of consumer goods to be shared between the retail supplier and the manufacturer or producer of the defective goods. However, the final form of the SCGD did not go so far.

2. Consequences of the Extended Liability

The idea that the final buyer of goods is entitled to pursue his remedies for non-conformity against his immediate supplier is a deep-rooted aspect of English law and the law of any State that has adopted the UN Convention on the International Sale of Goods 1980,¹⁹ so that it is no defence for a seller to argue that he was not at fault in introducing the defect to the goods.²⁰ However, history apart, there are strong grounds for arguing that both from a consumer perspective and from a retailer perspective, a system of producer liability for non-conforming goods is justified.

While it is the retailer who must accept liability where goods are defective and fail to meet the consumer's expectations, it is frequently not the retailer who generates those expectations, but rather the manufacturer or producer of the goods who may have promoted the product in the form of national advertising and sales promotion schemes and in the form of labelling of

¹⁷ *ibid.*, reg.5 inserting a new s.48C(2)(b) of the Sale of Goods Act 1979.

¹⁸ Com (93) 509. See also Bradgate & Twigg-Flesner, *Expanding the Boundaries of Liability for Quality Defects* (2002) 25(4) *Journal of Consumer Policy* 345-377

¹⁹ CISG 1980 art.45(1).

²⁰ See *e.g. Frost v Aylesbury Dairy Co Ltd* [1905] 1 KB 608.

goods.²¹ Moreover, it has been observed, that modern economies have shifted from a system based on crafts and small scale businesses to a system of mass production and distribution, to the extent that consumers place reliance on the product rather than the retailer.²² Consumers have come to rely on retailers to supply goods at the best price and with the best possible after-sales service, and that the retailer's advisory role on the matter of product quality has diminished.²³

The concept of conformity with the contract is more concerned with defectiveness rather than with non-conformity per se. In the past, it may have been the case that in certain markets sub-standard goods could be tolerated if the price was reduced, but in the modern consumer marketplace, the fact that goods suffer from a defect, may be sufficient to render the seller liable, even though he is not actually aware of the specific use to which the goods are to be put. For example in *Ashington Piggeries Ltd v Christopher Hill Ltd*²⁴ a farmer devised a recipe for animal feed, which he intended to feed to his mink. The seller made up the feed according to the buyer's recipe using herring meal supplied to him by his supplier, a Norwegian co-operative. The herring meal proved to be defective as it contained an ingredient that was fatal to mink and could seriously harm other species of animal. Although the Norwegian co-operative had no idea that the feed was to be given to mink, it was still held that they were responsible for the losses suffered by their buyer, which included liability to the consumer-farmer for his consequential losses. Although the SCGD is not concerned with consequential losses, it remains the case that consumers may still pursue their traditional remedies under the Sale of Goods Act 1979 and this does cover consequential loss. The seller in a case like *Ashington Piggeries* is particularly vulnerable since the defect was one that was inherent in the goods he supplied and would therefore be difficult or impossible to eradicate.

3. The Conformity Standard & Public Statements

In order to implement the SCGD article 2(2)(d), the Sale of Goods Act 1979 section 14(2D) now requires a court to have regard any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labelling, in determining whether goods are of satisfactory quality. This would appear to cover (a) factual material contained in the likes of brochures emanating from the seller that is available from the retailer or passed on by him²⁵ and (b) factual statements emanating from the seller that have not been conveyed by the retailer but are contained in the likes of general street or media

²¹ See also Bradgate & Twigg-Flesner, *Expanding the Boundaries of Liability for Quality Defects* (2002) 25 Journal of Consumer Policy 345, 349.

²² See EC Commission Green Paper on Guarantees for consumer goods and after-sales service Com (93) 509 p.86.

²³ *ibid.*

²⁴ [1972] AC 441.

²⁵ Such statements were covered by the requirement of fitness for purpose in the Sale of Goods Act 1979 s.14(3) before the introduction of the conformity standard in the SCGD: See *Wormell v RHM Agriculture Ltd* [1987] 1 WLR 1091.

advertising.²⁶ However, it is the retailer who bears the front-line responsibility for these statements even though they are made by the producer or his representative, and even if the statement is not passed on by the retailer. Accordingly, any redress available to the retailer will be dependent upon the terms of the retailer's contract with his immediate supplier.

As the requirements of section 14(2D) relate to the 'specific characteristics' of goods, it seems likely that this will not cover trade puffery as this is likely to be so vague in nature as to fail to relate to any specific characteristic and be incapable of objective verification. However, public statements on the specific characteristics of goods would extend to include all forms of objectively verifiable factual statement, such as those that identify the subject matter of the contract for the purposes of the Sale of Goods Act 1979 section 13. Furthermore, statements that describe a particular quality or attribute or which describe a process to which the goods have been subjected or claim that goods are suited to a particular use, while not pertaining to the identity of the goods, might be said to be descriptive of them.

A descriptive statement that comes in the form of an express guarantee of some particular feature or quality of goods will suffice and may be so specific as to give rise to direct contractual liability²⁷ or be treated as a collateral warranty on the part of the maker of the statement²⁸ (*i.e.* the producer or his representative) under common law principles. However, where the manufacturer's advertising contains factual descriptive statements that fall short of a guarantee, it is likely to be the retailer who bears primary responsibility for any disappointed consumer expectations. Thus if an advertisement suggests that goods possess a particular characteristic such as 'flameproof upholstery' or 'shatter-proof glass' this is likely to increase consumer expectations in respect of the product in question.²⁹

It has been observed that statements about goods that emanate from the manufacturer are very important in shaping the reasonable expectations of consumers about the goods they purchase. Moreover, the fact that these public statements have been singled out in the SCGD as factors to take into account in ascertaining whether goods reach the standard of quality expected appears to indicate that such statements are to be regarded as particularly important factors in determining whether the retailer is in breach of the quality obligation imposed by the Sale of Goods Act 1979, section 14(2).³⁰

²⁶ See Oughton & Willett, *Quality Regulation in European Private Law*, (2002) 25(3/4) *Journal of Consumer Policy* 299, 311.

²⁷ *Carlill v Carbolic Smokeball Co Ltd* [1893] 1 QB 256; *Bowerman v ABTA* (1995) 145 *New Law Journal Reports* 1815.

²⁸ *Wood v Letrik Ltd* (1932) *The Times*, 12 January (electric comb guaranteed to dispose of the problem of grey hair in 10 days); *Shanklin Pier Ltd v Detel Products Ltd* [1951] 2 KB 854 (paint guaranteed suitable for extreme weather conditions); *Wells (Merstham) Ltd v Buckland Sand & Silica Ltd* [1965] 2 QB 170 (sand suitable for propagating chrysanthemum plants).

²⁹ See Miller & Goldberg, *Product Liability*, 2nd ed, 2004, para. 4.77.

³⁰ See Willett, C in Howells (ed.) *Butterworth's Product Liability*, 2nd ed., 2007 chap.2, para.2.46.

Fortunately for the retailer there are three specified circumstances in which public statements about goods will not be relevant to the quality obligation. This will be the case, first, where the seller can show that, at the time the contract was made, the seller was not and could not reasonably have been aware of the statement.³¹ Thus, if the statement is made publicly, for the first time, after the contract with the consumer has been concluded, the retailer will not be liable. However, if the statement was made publicly before the goods are sold to the consumer, but after the seller has acquired those goods from his wholesale supplier, or directly from the producer, that public statement is still capable of shaping the consumer's expectations and will therefore be a matter that can be taken into account in determining whether the consumer goods are of satisfactory quality even though the retailer was not aware of the statement at the time he acquired the goods.³² In order to be able to raise this defence, the retailer would have to be able to prove that at the time the goods were sold to the consumer, he could not reasonably be expected to be aware of the statement that has been put in the public domain by the producer or his representative. In one respect, it is arguable that this defence is actually generous to the seller in that under the quality standard, generally, it is no defence for the retailer to prove that he could not have been aware of a latent defect in the goods.³³ Accordingly, what the Sale of Goods Act 1979, section 14(2E)(a) does is to provide the retailer with a reasonable care defence, when no such defence is available in respect of other aspects of the quality of goods.

A second reason why public statements about goods will not be relevant to the quality standard is that before the contract was made, the statement had been withdrawn in public or, to the extent that it contained anything incorrect or misleading, it had been corrected in public.³⁴

Thirdly, a public statement about goods will not be relevant to the quality obligation where the seller can show that the decision to buy the goods could not have been influenced by the statement.³⁵ This exception may be difficult to establish as it is undoubtedly the case that consumers do take account of statements made in advertising and the media generally and it may be difficult to rebut the initial presumption that consumers do rely on public statements. It would appear that this exception will apply where the public statement is published in a document to which the consumer does not have access or where the consumer admits that he has not placed any reliance on the statement. It might also be the case that some forms of trade puffery might fall within this exception on the basis that a reasonable consumer might not have taken it seriously. For example, it is probably the case that most consumers would not interpret literally the phrase "Red Bull gives you wings."³⁶

³¹ Sale of Goods Act 1979 s.14(2E)(a).

³² See Willett, Morgan-Taylor & Naidoo, *The Sale & Supply of Goods to Consumers Regulations* (2004) JBL 94, 97.

³³ See *Frost v Aylesbury Dairy Co Ltd* [1905] 1 KB 608; *Henry Kendall & Sons v William Lillico & Sons Ltd* [1969] 2 AC 31, 84 per Lord Reid.

³⁴ Sale of Goods Act 1979 s.14(2E)(b).

³⁵ Sale of Goods Act 1979 s.14(2E)(c).

³⁶ See also *Overton v Anheuser Busch* 517 NW 2d 308, 1994.

While the retailer can pass on any liability to consumers to his immediate supplier, the retailer still remains exposed, for reasons considered below, when there is a break in the distribution chain, and it is impossible to bring an action against the producer of the goods. The difficulty with the provisions in section 14(2D) and (2E) is that while they are relevant in consumer sales, they are not specifically relevant to non-consumer sales. However, if the public statement about the goods was made to the seller at the time those goods were sold to him, thereby indicating a feature of the goods, the retailer could argue that the statement was a "relevant circumstance" for the purposes of the requirement of satisfactory quality in the Sale of Goods Act 1979 section 14(2A).³⁷ However, as observed above, there may be circumstances in which a public statement about goods is made after those goods have been supplied to the retailer but before the retailer sells those goods to a consumer, in which case the public statement cannot be a relevant circumstance to be considered in determining whether the goods sold to the retailer are of satisfactory quality. Since the retailer's supplier is liable for the condition of the goods at the time of delivery or the time at which risk in those goods passes to the retailer,³⁸ it is unlikely that a public statement made after that time will be a relevant circumstance that can be taken into account in determining whether those goods were of satisfactory quality, unless the quality of the goods can be judged by reference to the standard a reasonable person would regard as satisfactory in the light of what might later be said about the product by the producer or his representative.

4. EC Directive on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees Article 4

(a) Introduction

It may be that the SCGD did intend Member States to take action on the matter of retailer redress, since article 4 provides,

"Where the final seller is liable to the consumer because of a lack of conformity resulting from an act or omission by the producer, a previous seller in the same chain of contracts or any other intermediary, the final seller *shall be entitled* to pursue remedies against the person or persons liable in the contractual chain. The person or persons liable against whom the final seller may pursue remedies, together with the relevant actions and conditions of exercise, shall be determined by national law."

It might be asked why was this provision incorporated in a Directive that, apart from article 4 itself, is concerned exclusively with consumer protection,³⁹ since article 4 does nothing at all for consumers. An interpretation of article 4 is that all it does is to state what the Directive does

³⁷ See also Sale of Goods Act 1979 s.14(2F) which confirms that a public statement about goods may be a relevant circumstance for the purpose of s.14(2A) whether or not the buyer deals as a consumer.

³⁸ Miller (ed) *Benjamin's Sale of Goods*, 6th ed., 2002, (Supplement, 2003) para.1-031 and see *Viskase Ltd v Paul Kiefel GmbH* [1991] 1 All ER (Comm) 641.

³⁹ See Bridge, *Article 4*, in Bianca & Grundmann (eds), *EU Sales Directive – Commentary*, Oxford: Intersentia, 2002, p.183, para.7.

not do, namely give consumers a right of direct access to the producer of defective goods.⁴⁰ However, it might be argued that the inclusion of article 4 does tend to provide protection at the end of the chain at which the parties' bargaining strength is the weakest. For example many manufacturers tend to be large scale operations that produce goods on a mass-production basis. If the retail outlets through which these goods are sold are only small to medium-sized businesses the disparity in bargaining strength may be substantial. However this will not always be the case given the tendency for retailers to amalgamate into larger groups of companies in order to operate on a national or international basis in the form of a chain of retail outlets. Thus the bargaining power of a major supermarket chain is likely to be substantially greater than that of many of its smaller-scale suppliers. Read in the light of the background to the adoption of the SCGD, article 4 might be regarded as a sop to compensate retailers in the light of the abandonment of the regime of joint producer-retailer liability proposed in the Green Paper.⁴¹

(b) *The scope of article 4*

An initial reading of the language of article 4 might suggest that a retailer who sells goods to a consumer may have a remedy against any intermediary who is responsible for the lack of conformity in the goods sold. However it has been observed that the reference to "any intermediary" may be redundant since it must be read in the light of the words that precede it, namely a reference to "the producer or a previous seller in the same chain of contracts". It has been argued that this confines 'intermediaries' to those who form part of the chain of distribution and would not include more remote third parties who may be the cause of the defectiveness.⁴² On this reading, a carrier would be an intermediary, but if 'intermediaries' are restricted to those forming part of the distribution chain, they would have to have been a 'seller' at some point. However, an alternative, wider view of the meaning of the word 'intermediary' is that it should include any person forming part of the network of contracts contributing to the process of distribution.

Initially, the language of article 4 is mandatory, in that it states that the retailer *shall* be entitled to pursue a remedy up the chain of distribution. However, it has been pointed out that this language is less than mandatory, in that all that article 4 permits is the pursuing of a remedy, but there is no guarantee that that pursuit will be successful.⁴³ Thus, it might appear to follow from this that a person in the distribution chain who is potentially liable to the retailer can choose to exclude or restrict that liability.

Moreover, what art 4 permits is that the retailer may pursue this remedy against the person or persons '*liable*' in the contractual chain. This is not the same as being given a remedy against the person *responsible* for the defect in the goods sold to the consumer. In any case, the circumstances may be such

⁴⁰ *ibid.*, p.195, para.27, citing Brüggemeier, JZ 2000, 529, 532.

⁴¹ See Bradgate & Twigg-Flesner, *Blackstones Guide to Consumer Sales & Associated Guarantees*, OUP, 2003, p.227.

⁴² See Bridge "Article 4" in Bianca & Grundmann, *EU Sales Directive – Commentary*, Oxford: Intersentia, 2002, p.183, para.7.

⁴³ *ibid.*

that there is no one in the chain of distribution who is *liable*, since it is quite possible that all parties higher up the chain of distribution have validly excluded their liability and there is nothing in the Directive that assists in determining who is to be liable for the defectiveness of the goods. It has been argued that it is tempting to regard art 4 as using the word 'responsible' rather than 'liable',⁴⁴ but that interpretation seems not to be tenable as an earlier draft of the proposed Directive contained the word 'responsible' but this was deliberately changed to 'liable'.⁴⁵ The concluding words of article 4 also present difficulties of another kind. This provides that 'the person or persons liable against whom the final seller may pursue remedies, together with the relevant actions and conditions of exercise, shall be determined by national law.' This has the effect of undermining any inference that the 'sop' offered to retailers is, in any way, mandatory. This is also confirmed by recital 9 which provides that the seller should be free to pursue a remedy against the producer, previous seller or other intermediary, provided he has not renounced that entitlement and provided he is able to do so according to national law. Furthermore, recital 9 also goes on to assert that nothing in the Directive is to affect the principle of freedom of contract as between the seller, the producer, a previous seller or any other intermediary.

The view taken by the Department of Trade and Industry on the content of article 4 was that the right of a retailer to maintain an action against his immediate supplier under the Sale of Goods Act 1979 sections 13 and 14 was sufficient to satisfy the requirements of article 4, despite the fact that liability to the retailer might be excluded or restricted by an exclusion or limitation clause.⁴⁶ However, this view could be open to question. In the first place, it is arguable that article 4 must have some impact otherwise its inclusion in the SCGD is entirely meaningless.

An alternative view of article 4 is that it places on Member States an obligation to make someone liable to the retailer, at least up to some limit set by Member States.⁴⁷ However, this is difficult to justify if the reference to 'renouncing' the retailer's entitlement to pursue a remedy in recital 9 is taken to permit the exclusion of liability.

An alternative view of recital 9 is that it permits a retailer to renounce his right to pursue his remedy, but that he must take active steps to do so, as if he was affirming the contract with knowledge of his right to take action or waiving his right to pursue his claim against his supplier. On this view,

⁴⁴ See Bradgate & Twigg-Flesner, *Blackstones Guide to Consumer Sales & Associated Guarantees*, OUP, 2003 p.227.

⁴⁵ See OJ L 171/12, 7 July 1999.

⁴⁶ See DTI, *Second Consultation on EC Directive 99/44/EC on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees*, DTI, London 2002, p.11, n.18 and Krummel, T & D'Sa, R (2001) Sale of consumer goods and associated guarantees: A minimalist approach to harmonised European Union consumer protection, 26 *European Law Review* 312-322, 320.

⁴⁷ See Schmidt-Kessel, M (2000) Der Rückgriff des Letzverkäufers. *Österreichische Juristen-Zeitung*, 55, 668-673, 672 and see also Bradgate & Twigg-Flesner, *Expanding the Boundaries of Liability for Quality Defects* (2002) 25 *Journal of Consumer Policy* 345-377, 359 and Willett, C in Howells (ed.) *Butterworth's Product Liability* chap.2 para.2.127.

merely agreeing to an exemption clause in the immediate supplier's contract with the retailer might not be sufficient to constitute a renouncement.⁴⁸

It appears that article 4 gives Member States the freedom to choose the person against whom an action may lie, the form of the action and any procedural limits, such as time limits, that may be placed upon that liability. Thus it appears that Member States may choose whether the producer or some other person in the distribution chain should accept liability and whether that action should be contractual, tortious, restitutionary or be imposed by some separate statutory regime.⁴⁹ While there is an argument to the effect that the United Kingdom has not done enough to properly implement the SCGD article 4, it will take a decision of the European Court of Justice to determine the precise scope of article 4. At present, any contractual action against someone in the distribution chain may be barred by the presence of an exemption clause that satisfies the reasonableness test in the Unfair Contract Terms Act 1977. Accordingly, a further question that arises in this context is whether the retailer might be able to pursue an alternative action against the producer sounding in the tort of negligence in respect of economic losses caused by the defectiveness of the goods.

5. The Legal Background

a) The Primacy of contract and the distribution chain

The principle of the primacy of contract, based upon the concepts of autonomy and freedom of choice between individuals, is highly influential. This dictates that economic relations should be governed by the market within a contract framework rather than through imposed law such as tort.⁵⁰ Statutory intervention⁵¹ has protected the consumer from the rigours of this doctrine but, hitherto, has left the retailer, who is generally assumed to be bargaining at arm's length with his supplier in a more fragile position. Where a retailer buys goods from his immediate supplier, any attempt by the seller to exclude or limit his liability for defects in quality or fitness of the goods is subject to the requirement of reasonableness set out in UCTA 1977 section 11.⁵² In determining whether an exemption clause in a contract for the sale of goods is reasonable, account is taken of the relative bargaining

⁴⁸ See H. Micklitz (1999) die Verbrauchsgüterkaufs-Richtlinie. *Europäische Zeitschrift für Wirtschaftsrecht*, 10, 485-493, 487.

⁴⁹ See C. Willett, in Howells (ed.) *Butterworth's Product Liability* chap.2 para.2.127.

⁵⁰ This view of contract is open to question. See e.g. P.S. Atiyah, *Essays on Contract* (Oxford) 1986 chap.2.

⁵¹ Such as the Unfair Contract Terms Act 1977 (UCTA) and the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999 No. 2083.

⁵² Unfair Contract Terms Act 1977 ss.6(3); 7(3). Additional protection equivalent to that given to consumers is available to those business purchasers who are deemed not to have bought goods in the course of a business: See *R & B Customs Brokers Ltd v United Dominions Trust Ltd* [1988] 1 All ER 847; *Feldarol plc v Hermes Leasing Ltd* [2004] EWCA Civ 747 (even a plc can be consumer). See also Law Comm No. 292, *Unfair Terms in Contracts* (2005) which proposes extension of some of the protective provisions of unfair terms legislation to cover small businesses, with fewer than 9 employees on the basis that they are as vulnerable as consumers. However, these proposals would not extend to cover a plc such as Feldarol plc.

strength of the parties⁵³ and in contracts between two businesses, much of the case law indicates that there is perceived to be a greater degree of equality of bargaining strength, thereby supporting the reasonableness of the exemption clause.⁵⁴ Nevertheless, there have been instances in which it has been recognised that one business contracting party is in a much stronger bargaining position than the other.⁵⁵ However, it might be said that those cases in which an exemption clause in a business-to-business contract has been held to be unreasonable have also involved considerations other than just the relative bargaining strength of the parties.⁵⁶ What is also significant is that there are frequent judicial statements to the effect that while an interventionist approach in favour of consumers is justified, courts should approach business contracts very cautiously and not interfere with agreed allocations of risk as a general rule.⁵⁷

The production and supply of goods are governed by a chain of contracts stretching from the producer to the consumer, known as the distribution chain. Liability for quality defects, as opposed to safety defects in the goods, is governed by this chain of contracts. The allocation of risk between the parties to this chain of contracts will depend on a number of complex factors including the relative bargaining strength of the parties dictated by their power in the market. A powerful commercial entity such as a large supermarket chain is in a position to dictate terms to its suppliers but small to medium sized retailers are not and under the contract regime will have to soak up the costs. So the medium to small businesses in retail sales are not in a strong position.

Where the goods emanate from abroad, the producer's remoteness can create difficulties for the final consumer, but there will be an importer who may be required to accept responsibility for defective goods, subject to the terms of his contract with others in the distribution chain. Furthermore, the chain may be complicated further by virtue of the fact that different parties in the chain may apply other processes to the goods, thereby adding value to them, but also creating doubt as to who is the "person responsible" for a defect.

Where the consumer/buyer has a successful claim against the retailer for non-conforming goods, the distribution chain will then operate in reverse and may result in the producer/seller having to accept ultimate responsibility. However this will not always be the case as the terms of the various contracts in the distribution chain may contain different provisions dealing with different events perceived to be possible risks by one of the contracting parties in the chain. The requirement of conformity with the contract is

⁵³ Unfair Contract Terms Act 1977 Sch.2 (a)

⁵⁴ *RW Green Ltd v Cade Bros Farm* [1978] 1 Lloyd's Rep 602; *Monarch Airlines Ltd v Luton Airport Ltd* [1997] CLC 698; *Watford Electronics Ltd v Sanderson CFL Ltd* [2001] EWCA Civ 317, [2001] 1 All ER (Comm) 696.

⁵⁵ See *St Alban's City & District Council v ICL Ltd* [1995] FSR 686; *Motours Ltd v Euroball (West Kent) Ltd* [2003] All ER (D) 165.

⁵⁶ In *St Alban's City & District Council v ICL Ltd* [1995] FSR 686 it was relevant that ICL were almost monopoly suppliers and that the council would have to recoup their losses by increasing tax or cutting public services.

⁵⁷ See, e.g. *Photoproduction Ltd v Securicor Transport Ltd* [1980] AC 827, per Lord Wilberforce; *Watford Electronics Ltd v Sanderson CFL Ltd* [2001] EWCA Civ 317, per Chadwick LJ.

dependent on what the contract itself provides. Thus as between one buyer and his seller and another buyer and his seller higher up the distribution chain, descriptions or required purposes may be different. Furthermore, determining whether goods are of satisfactory quality will also depend on the way in which the goods have been described, so even the requirement that goods should be fit for 'normal purposes' may be shaped by the description given. Furthermore, the terms of the contract may specifically preclude an action by one buyer even though, as a seller he may be liable to his buyer. For example in *Gloucestershire County Council v Richardson*⁵⁸ a main building contract required the contractor to obtain concrete beams from a nominated supplier who was only prepared to supply on terms that limited his liability. Under the main contract, the owner was not permitted to object to this nomination, although it would have been possible to object to an unsuitable sub-contractor. The end result appears to have been that the owner of the building had no remedy despite the fact that he and not the main contractor, had suffered the main loss.

It has to be assumed that in *Gloucestershire County Council v Richardson* there was a reason why the owner did not object to the position he found himself in. In contrast, if the parties to a contract are in positions of roughly equal bargaining strength, then undesirable results such as that which pertained in *Richardson* should not happen. Thus in a contract between manufacturer and retailer of roughly equal bargaining strength, the retailer ought to be able to negotiate terms that ensure that the manufacturer will bear responsibility for defective goods in the event of a consumer complaint. However this will not always be the case. For example, in the new car sales sector, car manufacturers tend to be multinational corporations whereas the sales outlets with whom they contract are very often family-owned small businesses. In contrast some retailers, such as many United Kingdom supermarket chains may be in a position to dictate the terms on which their manufacturer-suppliers sell to them.

Since the conformity of the goods, in a particular case, has to be judged by reference to the terms of that particular contract, it does not follow that because one buyer has succeeded under his contract, the same will follow for others. Consumers may complain that the goods they have purchased suffer from minor or cosmetic defects or that the goods are unsafe or that the goods are not sufficiently durable. In contrast, as between a retailer and his supplier, whether that is the manufacturer or an intermediate supplier the loss suffered is likely to be financial in nature. As between a consumer and a retailer, the contractual description of the goods may differ from the description given in a contract comprising part of the vertical chain from retailer to manufacturer. All of these factors may conspire to produce the result that a party who has been successfully sued by his buyer is unable to sue on his contract with his supplier.

Matters may be further complicated by the fact that the ultimate consumer may have suffered consequential loss. While such losses are not addressed by the SCGD, the manner in which the Directive has been implemented in the United Kingdom may exacerbate this problem, since the amendments called for by Directive 1999/44 have been 'bolted on' to the existing

⁵⁸ [1969] 1 AC 480.

provisions of the Sale of Goods Act 1979, which consumers may still rely upon and which do permit an action for damages that will include a claim for foreseeable consequential losses.

Other factors may also cause ultimate liability to rest otherwise than at the beginning of the chain of distribution such as default by an intermediary in the chain.⁵⁹ Such default may be regarded as the cause of the harm suffered by the consumer, in which case the manufacturer will be free from responsibility. Alternatively, the extent of the intermediate default may constitute contributory negligence which will not excuse the manufacturer altogether, but may result in an apportionment of the loss suffered as between the producer and the negligent intermediary. Such an instance might arise should the retailer wrongly advise a consumer that a cosmetic lotion can be applied to the skin and left overnight. Here awkward questions might arise over the manner in which losses are to be apportioned between the producer and the retailer.⁶⁰

Alternatively, the retailer's immediate supplier might have become insolvent, in which case the retailer will have to prove as an unsecured creditor and it will make no difference that there is a solvent supplier higher up the chain to whom the insolvent intermediary might have successfully passed responsibility for the defective or non-conforming goods. Furthermore, even if the retailer's supplier was insured against liability to the retailer, the retailer would have to be able to prove that the insured seller would have been liable before he will be entitled to proceed directly against the insurer.⁶¹

Simple practicalities of assiduously maintaining records may also impinge on the ability of a retailer to bring proceedings against his immediate supplier. What has been said so far is premised on the assumption that the retailer can identify his immediate contractual supplier. However, there may be circumstances in which the identity of that person is less than clear. For example suppose the retailer sells goods that are sold by weight, but obtains his supplies from a number of different sources. Unless the retailer has been careful in recording precisely which goods came from which source⁶², he may encounter difficulties in identifying his defendant where there is a complaint about the lack of conformity of the goods some several months after the goods were first sold to a consumer.

⁵⁹ See *Holmes v Ashford* [1950] 2 All ER 76 (hairdresser used hair dye without conducting a trial 'patch test').

⁶⁰ See Bridge, "Article 4" in Bianca & Grundmann (eds), *EU Sales Directive – Commentary*, Oxford: Intersentia, 2002, p.189, para.16.

⁶¹ See Third Party (Rights Against Insurers) Act 1930 and *West Wake Price & Co v Ching* [1957] 1 WLR 45 at 49 *per* Devlin J; *Post Office v Norwich Union Fire Insurance Society Ltd* [1967] 2 QB 363 at 373 *per* Lord Denning MR; approved in *Bradley v Eagle Star Insurance Co Ltd* [1989] AC 957. However, it will be sufficient for the third party retailer to show that he has been awarded an interim payment against his insolvent, immediate seller: *Cox v Bankside Members Agency Ltd* [1995] 2 Lloyd's Rep 437.

⁶² While modern stock control systems may assist in the identification of suppliers, the problem of inability to identify a contractual defendant has resulted in the House of Lords deciding that, in such circumstances, the retailer may sue the manufacturer directly: See *Lambert v Lewis* [1982] AC 225.

The Department of Trade and Industry stance on implementing the SCGD was the ‘ostrich’ approach, namely to assume there are no exemption clauses in the contractual chain back to the producer. This would appear to be unlikely unless the retailer is one of the retail ‘giants’ with sufficient bargaining strength to dictate terms to middlemen and producers.

Where there is an express term of the contract which clearly allocates risk, then subject to statutory intervention, a vitiating factor such as fraud, or the rules on penalty clauses, the loss will fall as allocated by the contract. No doctrine exists in English contract law to relieve a business from the consequences of a term of a contract concluded as a result of pure commercial pressure. The only role for the court in this situation would be the construction of the term in question to see if it covers the loss or damage in issue.

The further question arises in this context whether the retailer who has been placed in a vulnerable position as a result of the additional liabilities than now rest upon him in consumer contracts might be able to pursue an alternative action in tort against the producer. This requires consideration of the extent of negligence liability in respect of economic losses caused by the defectiveness of the goods, especially in the light of the inclusion of the provisions on public statements as a relevant consideration when judging the quality of the goods supplied to a consumer.

(b) *The role of Tort Law*

If the claim is between contracting parties this raises the question of concurrent liability. English law has followed the route of permitting concurrent liability whilst recognising the importance of respect for the will of the parties.

“A concurrent or alternative liability in tort will not be admitted if its effect would be to permit the plaintiff to circumvent or escape a contractual exclusion or limitation of liability for the act or omission that would constitute the tort. Subject to this qualification, where concurrent liability in tort and contract exists, the plaintiff has the right to assert the cause of action that appears to be the most advantageous to him in respect of any particular legal consequences. Subject to this qualification, where concurrent liability in tort and contract exists, the plaintiff has the right to assert the cause of action that appears to be the most advantageous to him in respect of any particular legal consequences.”⁶³

Courts have to be careful to avoid interfering with coherent bodies of law in other fields, particularly contract, by imposing a duty of care in negligence. The position was stated strongly by Posner J in *Miller v United States Steel Corp.*⁶⁴

⁶³ *Central Trust Co v Rafuse* (1986) 31 DLR (4th) 481, per Le Dain J. Approved by Lord Goff in *Henderson v Merrett* [1995] 2 AC 145.

⁶⁴ 902 F 2d 573 at 574 (1990).

“. . . tort law is a superfluous and inapt tool for resolving purely commercial disputes. We have a body of law designed for such disputes. It is called contract law.”

This does not, however, reflect English law. If it were accepted then it would reject any exceptions to the exclusionary rule. The existence of obligations under a contract would automatically deny liability in tort for pure economic loss.⁶⁵ However, in order to retain a coherent law of civil obligations, the existence of a contractual background must be born in mind when deciding whether to impose a duty of care.

Is tort law therefore restricted to gap filling in the law of contract in terms of pure economic loss?⁶⁶ This is a starting point, although it is not suggested that it reflects the existing law. Concurrent duties in contract and tort can exist, albeit sometimes informed by different rationales. The correct approach was stated by Lord Goff in *Henderson v Merrett Syndicates Ltd*:

“Mr. Kaye's approach involves regarding the law of tort as supplementary to the law of contract, *i.e.* as providing for a tortious liability in cases where there is no contract. Yet the law of tort is the general law, out of which the parties can, if they wish, contract; and... the same assumption of responsibility may, and frequently does, occur in a contractual context. Approached as a matter of principle, therefore, it is right to attribute to that assumption of responsibility, together with its concomitant reliance, a tortious liability, and then to inquire whether or not that liability is excluded by the contract because the latter is inconsistent with it... But even if I am wrong in this, I am of the opinion that this House should now, if necessary, develop the principle of assumption of responsibility as stated in *Hedley Byrne* to its logical conclusion so as to make it clear that a tortious duty of care may arise not only in cases where the relevant services are rendered gratuitously, but also where they are rendered under a contract. This indeed is the view expressed by my noble and learned friend, Lord Keith of Kinkel, in *Murphy v. Brentwood District Council* [1991] 1 A.C. 398, 466, in a speech with which all the other members of the Appellate Committee agreed.”⁶⁷

However Lord Goff sounded a note of caution:

“I wish however to add that I strongly suspect that the situation which arises in the present case is most unusual; and that in many cases in which a contractual chain comparable to that in the present case is constructed it may well prove to be inconsistent with an assumption of responsibility which has the effect of, so to speak, short circuiting the contractual structure so put in place by the parties. . . Let me take the analogy of the

⁶⁵ See J. Stapleton, *Duty of Care and Economic Loss* (1991) 107 LQR 249 at 253

⁶⁶ *Simaan General Contracting Co v Pilkington Glass Ltd (No2)* [1988] QB 758 at 782, *per* Bingham LJ.

⁶⁷ [1995] 2 AC 145 at 193.

common case of an ordinary building contract, under which main contractors contract with the building owner for the construction of the relevant building, and the main contractor sub-contracts with sub-contractors or suppliers (often nominated by the building owner) for the performance of work or the supply of materials in accordance with standards and subject to terms established in the sub-contract. I put on one side cases in which the sub-contractor causes physical damage to property of the building owner, where the claim does not depend on an assumption of responsibility by the sub-contractor to the building owner; though the sub-contractor may be protected from liability by a contractual exemption clause authorised by the building owner. But if the sub-contracted work or materials do not in the result conform to the required standard, it will not ordinarily be open to the building owner to sue the sub-contractor or supplier direct under the *Hedley Byrne* principle, claiming damages from him on the basis that he has been negligent in relation to the performance of his functions. For there is generally no assumption of responsibility by the sub-contractor or supplier direct to the building owner, the parties having so structured their relationship that it is inconsistent with any such assumption of responsibility.”⁶⁸

6. Pure Economic Loss in Negligence

English law until the 1960s largely adopted a bright-line exclusionary rule with regard to negligently caused economic loss. Several reasons were given for this. These included arguments based on the primacy of contract in this area, the need to avoid interfering with the pursuit of legitimate economic self-interest and the fact that cases involving economic loss frequently do not result in a net loss in social wealth, but only in transfers of wealth. The exclusionary rule was arguably removed by the House of Lords in *Hedley Byrne & Co v Heller & Partners Ltd.*⁶⁹ No action would be allowed where economic loss was no more than reasonably foreseeable. Instead, there had to be a ‘special relationship’ between the parties.

As the facts concerned negligently given advice, the House had to deal with the problem created by one of their previous decisions⁷⁰ which laid down that damages were not available for negligent misstatements. The judgments are therefore less concerned with the difficulties of whether economic loss can be recovered in negligence than the relevance of the absence of fraud to a claim for negligent misstatement.

This pocket of liability was also thought to be restricted to the advice of professional advisors⁷¹ but this later became advice given in the course of business.⁷² What was swept away and was important for future

⁶⁸ *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 at 195.

⁶⁹ [1964] AC 465.

⁷⁰ *Derry v Peek* (1889) 14 App Cas 337.

⁷¹ See *Mutual Life & Citizens' Insurance Co v Evatt* [1971] AC 793.

⁷² *Esso Petroleum v Mardon* [1976] QB 801.

developments was the principle that applying an exclusionary rule could be justified provided a person was pursuing their legitimate self interest. What was required in future was a balancing of interests based on the 'special relationship' principle.

An initial problem related to the pocket of liability that was thought to have been created was the requirement of 'reliance.' In order for there to be a 'special relationship' between the parties there had to be reliance by the claimant on the defendant's advice.⁷³ As liability was thought to be restricted to advice cases, an element of the duty equation was that the claimant had to have relied on the defendant. Cases where there was no clear reliance by the claimant presented difficulties and helped to restrict liability to the pocket of professional advice. Eventually, prompted by academic criticism, the courts incorporated issues of reliance in the question whether or not the defendant was the cause of the claimant's loss.⁷⁴ In the negligent wills cases there is no reliance by the disappointed beneficiary on the negligent solicitor but this does not prevent either duty or causation being established. The removal of the reliance requirement had the effect of opening up liability for pure economic loss. No longer was it restricted to pockets of liability or one type of conduct but could be extended to the negligent provision of services,⁷⁵ negligent construction of a building resulting in economic loss⁷⁶ and damage to property of a third party on which the claimant was economically dependent.⁷⁷

7. Developments in England and the Commonwealth

Whether the result of *Hedley Byrne* was to remove the exclusionary rule is arguable. One view is that the case did remove the exclusionary rule and this may certainly be the case today and is broadly the approach taken by Commonwealth courts. Another is that the rule remained in the sense that there was still a presumption against the recovery of economic loss but a pocket of liability relating to negligent words but not to negligent acts was created. The initial response in England by some members of the judiciary to economic loss claims was positive.⁷⁸ The view was that it was impossible to achieve a satisfactory distinction between economic losses and other damage.⁷⁹ For a time it appeared that this would be the prevalent view⁸⁰ but was rejected by the House of Lords in a series of decisions.⁸¹ The rejection came on a number of grounds, including keeping tort law in its place, the difficulty of setting standards in tort and the dangers of creeping welfarism.

⁷³ The expression 'reliance' is in itself misleading and the term 'influence' is probably preferable. J.Stapleton, "Comparative Economic Loss". (2002) 50 UCLA Review 1,12.

⁷⁴ *White v Jones* [1995] 2 AC 207.

⁷⁵ *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145.

⁷⁶ *Junior Books & Co Ltd v Veitchi Co Ltd* [1983] 1 AC 520.

⁷⁷ *Caltex Oil (Australia) v The Dredge "Willemstad"* (1976) 136 CLR 529

⁷⁸ *Dutton v Bognor Regis UDC* [1972] 1 QB 373 at 396 *per* Lord Denning MR; *Anns v Merton LBC* [1978] AC 728, *per* Lord Wilberforce.

⁷⁹ Cooke, (1991) 107 LQR 46.

⁸⁰ The high water mark was probably *Junior Books Ltd v Veitchi Co Ltd* [1983] 1AC 520.

⁸¹ Culminating in *Murphy v Brentwood DC* [1991] AC 398.

This rejection left a problem for English law in that cases on economic loss lacked the broad analysis used in novel physical damage cases and instead of analysing the substantive legal concerns for and against imposing a duty of care, the courts were concerned with factual issues which led to the use of concepts such as reliance and assumption of responsibility which tended to conceal the underlying moral, economic and other concerns relevant to the existence of tort liability.

Commonwealth courts on the other hand have broadly embraced the role to be played by tort law in this area and have embarked, particularly in Australia, on developing a matrix of factors which underlie recovery of economic loss and the relationship between contract and tort and markets and tort law.

(a) A New Matrix for Economic Loss?

The abandonment of the ‘pockets of liability’ approach by Commonwealth courts and to a certain extent by English courts has allowed the underlying themes in the courts’ reasoning to be exposed and a matrix of the substantive legal concerns that govern economic loss to be examined. This matrix can take account of first, the concern that tortious intervention may impinge on the competitiveness of markets. It may also take account of the argument that the boundaries of liability be normatively justifiable and that those boundaries should be ascertainable, while also taking account of the claimant’s opportunity to take appropriate forms of self protection and the vulnerability of the claimant.⁸²

(i) Tortious intrusion into the competitiveness of markets

This argument is concerned with interference with legitimate acts of trade. English law has never accepted the proposition that a person owes a duty of care to another person because they know that their careless act may cause economic loss. Leaving aside the economic torts, a person will generally owe no duty even though they intended to cause economic loss. The trader may increase his advertising or cut his prices even though this is done with the intention of taking the market share of rivals. This principle reflects the autonomy of the individual protected by the common law and the desire to give effect to individual choices. However, assuming the other indicators of duty are present, immunity should only extend to conduct which is a legitimate pursuit of one’s interests. What would not be a legitimate pursuit of one’s interests? Competitive acts not prohibited by law are legitimate unless they fall within the ambit of the economic torts. At the other end of the spectrum, conduct which involves deceit, duress or intentional acts prohibited by law is seldom regarded as the legitimate pursuit of one’s own interests.

One of the effects of the SCGD reflected in the Sale of Goods Act 1979 section 14(2D), as qualified by section 14(2E), is to make the retailer liable for any goods that are not of satisfactory quality by reason that they fail to live up to a reasonable consumer’s legitimate expectations of quality generated by ‘public statements’ about the goods emanating from the seller, the producer or his representative. This may include statements that the

⁸² J. Stapleton, *Comparative Economic Loss* (2002) 50 *UCLA Law Review* 1, 9.

retailer has not passed on to the consumer, but if the producer (or person other than the retailer making the 'public statement') is legitimately pursuing his own interest in advertising his product a court applying principles of the tort of negligence might be reluctant to impose a duty of care under the matrix. Nevertheless those public statements have given rise to legitimate expectations in the consumer which are not met by the goods and the consumer is contractually left with a loss as a result. However, the fact that a person is in breach of the law and the other indicators of a duty are present does not in itself amount to justification for removing the immunity. This needs to be considered in conjunction with the other features in the matrix.

(ii) Concern that the boundaries of liability be normatively justifiable and ascertainable.

Traditionally this subsumes the problem of indeterminacy of liability. The infliction of economic loss may have a ripple effect creating indeterminacy of the class of victims and the total loss flowing from the negligence. It is now clear that this need not be fatal to a claim for economic loss provided that there is a normatively justifiable basis for who can sue and the amount which they can claim for.

These questions are clearly demonstrated in cases involving relational economic loss. Relational economic loss will occur where physical damage is caused to one person's property or person which then causes economic loss to a third person. Again the contrast between English and Commonwealth courts is instructive.

In England the 'pockets of liability' approach has led to such loss being generally irrecoverable.⁸³ Even where there is no problem of indeterminacy the House of Lords concluded that liability would only be incurred where the claimant had a proprietary or possessory interest in the damaged property.⁸⁴ The plaintiff suffered economic loss when goods which he had contracted to purchase were damaged at sea. At the time of the damage the risk but not the ownership of the goods had passed to the plaintiff. The plaintiff claimed that he was owed a duty of care by the defendants who had damaged the goods. The loss was classified as economic loss rather than physical damage because at the time of the damage the goods belonged to a third party.

Lord Brandon stated:

“where a general rule, which is simple to understand and easy to apply, has been established by a long line of authority over many years, I do not think the law should allow special pleading in a particular case within the general rule to detract from its application . . . certainty of the law is of the utmost importance, especially but by no means only in commercial matters.”⁸⁵

⁸³ *Spartan Steel & Alloys Ltd v Martin & Co Ltd* [1973] QB 27; *Candlewood Navigation Corp v Mitsui OSK Lines Ltd* [1986] AC 1.

⁸⁴ *Leigh and Sullivan Ltd v Aliakmon Shipping Co Ltd* [1986] AC 785.

⁸⁵ *ibid.*, at 816-7.

The House of Lords invoked the exclusionary rule⁸⁶ and emphasised the primacy of contract in the recovery of economic loss⁸⁷ If a person wanted legal protection in these circumstances then they should protect themselves through contract with the property owner.⁸⁸

Commonwealth courts have taken a different approach and rejected the exclusionary rule. The problems of indeterminacy and primacy of contract raised by the English courts to justify blanket exclusion have been approached by a more sophisticated route. The approach to indeterminacy is treated as one aspect of basing legal rules and drawing boundaries on principles which are normatively justifiable.

An early example of such an approach came in *Caltex Oil v Dredge "Willemstad"*⁸⁹ in which a dredge negligently damaged an underwater pipe owned by AOR, which carried petrol from AOR's refinery to the Caltex terminal. Caltex recovered for the cost of transporting its petrol until the pipe was repaired. The High Court of Australia rejected an exclusionary rule and found that there was no indeterminacy problem. The defendants knew of the risk to Caltex as a specific individual and the claim was for expenditure necessarily incurred rather than loss of profits. As AOR and Caltex were involved in a common venture and if the loss had not been suffered by Caltex it would have been suffered by AOR there was no increase in the overall damages incurred by the defendants.

In *Norsk Pacific Steamship Co v Canadian National Railway*⁹⁰ a barge negligently collided with a railway bridge owned by a third party. The claimant railway company sued for economic loss incurred as a result of the non availability of the bridge. The Supreme Court of Canada found for the claimant. There was a joint venture of the type in *Caltex*. The claimant was specifically foreseeable in terms of this loss.

In both *Caltex* and *Norsk Pacific* the court was able to offer a normatively justifiable reasoning for restricting liability to certain classes of person and excluding others. The ripple effect of economic loss necessitates a line being drawn but not simply on the basis that the facts of the case do not sit within an established pocket of liability. If no normative justification is available for restricting and identifying meritorious claimants then liability should be rejected. The Canadian Supreme Court rejected liability where a courier delayed in delivering an envelope to a Land Office resulting in the claimant losing a valuable contract.⁹¹ The class of potential victims here was large and the court was unable to devise a normatively justifiable rule for distinguishing between victims of the negligence.

The sophisticated reasoning which is available to the courts is apparent in some of the Australian agriculture cases. Typically, infected seed is negligently supplied, with resultant physical damage and economic loss to various parties in the chain of contracts. In *McMullin v ICI Australia*

⁸⁶ *ibid.*, at 818-9.

⁸⁷ *ibid.*

⁸⁸ But see now the Carriage of Goods by Sea Act 1924, s.2(4).

⁸⁹ (1976) 136 CLR 529.

⁹⁰ [1992] 1 SCR 1021.

⁹¹ See *BDC v Hofstrand* [1986] 1 SCR 228.

*Operations Propriety Ltd*⁹² insecticide used on cotton contaminated cattle. Four classes of claimant were held to be owed a duty of care by the High Court of Australia. Graziers whose cattle were contaminated had their losses classified as physical damage. Persons who purchased already contaminated cattle and persons who owned meat which was found to be contaminated were owed a duty. Persons who incurred economic loss because of the cost of keeping contaminated cattle in their possession were classified as primary victims based on the normatively justifiable rule located in ownership/possession of contaminated meat. Other claims for economic loss were rejected as falling outside this normatively justifiable rule. In *Perre v Apand Propriety Ltd*⁹³ infected seed was supplied to a farmer who used it to grow a crop. Legal regulation then prevented growers within a twenty mile radius from selling their crops in the Western Australian market. Claims by growers, processors and landowners were allowed as these persons were primary victims exclusively dependent on the defendant taking care. Secondary victims such as truckers would not have been successful. By analogy, a retailer, who is exposed to economic loss by a producer making 'public statements' in relation to his product, could be classed as a primary victim. This would be normatively justifiable as a person who had had ownership of the goods and suffered loss as a result of the producer's breach of duty and the boundaries of loss are sufficiently ascertainable.

(iii) Self Protection and the Primacy of Contract

The argument that contract is the correct sphere for claims for economic loss continues to dominate English and US law. This is made apparent in actions in respect of unsafe products. Where a defect in a product causes physical damage then any foreseeable victim of the defect may have a claim. Where the defect is one of quality, the supremacy of contract and the inadvisability of interfering with sales warranties are stressed. Commonwealth courts appear on the whole to have rejected the primacy of contract approach and concentrated instead on whether contract would have provided a realistic alternative avenue of protection for the claimant. This operates in particular in cases where the claimant has suffered economic loss through the acquisition of defective property.⁹⁴ In another contaminated seed case the cost of weed eradication suffered by primary victims was recoverable.⁹⁵ The damage to the claimants was reasonably foreseeable and the defendant was not legitimately protecting or pursuing its business interests. The class of victims vulnerable to lack of warning by the defendant was limited and ascertainable and there was no indeterminacy of liability. There were sound policy reasons for encouraging people to avoid or mitigate loss. The decision would not interfere with Sale of Goods law or interrupt any contractual matrix and it was not a situation where farmers would protect themselves with contractual warranties.

⁹² (1997) 72 FCR 1.

⁹³ (1999) 198 CLR 180.

⁹⁴ *Rivtow Marine Ltd v Washington Iron Works* [1974] 1 SCR 1189 (Claim allowed against manufacturer of defective crane by person economically dependant on using the crane).

⁹⁵ *Wilkins v Dovuro Propriety Ltd* (1999-2000) 169 ALR 276.

There are two aspects to contractual protection. First, the claimant might be a powerful commercial entity able to extract protection from the defendant or a middle party in a way that would appropriate internal loss to the careless party and thereby eliminate commercial free riders. Secondly, where the claimant is less powerful and is unable to protect himself in this way, market forces seem to prevent the claimant from gaining appropriate contractual protection. In this situation the retailer is a reasonably foreseeable victim of the producer's breach of duty and it is arguable that the producer was not legitimately pursuing his business interest by making false claims in relation to the goods.

(d) Vulnerability

The final element and one not usually considered by English courts⁹⁶ is the vulnerability of the claimant. It is arguable that Tort law is concerned with the protection of the vulnerable⁹⁷ and that this is supported by both rights and deterrence theories.

Where it is reasonably open to the claimant to protect himself there will be no sound reason for imposing a duty on the defendant to protect the claimant against economic loss.⁹⁸ This reflects the first aspect of contractual protection. The second aspect of contractual protection, that the claimant could not really have protected himself in this way, indicates that the vulnerability of the claimant is a pre-requisite to imposing a duty to protect against economic loss.⁹⁹ One important factor in determining whether the claimant is vulnerable is whether he could have protected himself by protective action such as obtaining contractual warranties. Pecuniary losses are one of the ordinary risks of commercial life and a person taking steps to minimise these losses is normally more efficient than requiring another person to have regard to the risk that others might suffer economic loss. One question should be who is the best cost avoider and in the case of defective retail quality this would be the person responsible for the defect in the goods.¹⁰⁰

It is therefore arguable that the vulnerability of the claimant may be a justifiable, but not sufficient, reason for imposing a duty of care in respect of pure economic loss when the claimant could not have protected himself in contract. A contractual assumption is that the parties will bargain to protect their position. A claimant who cannot do this in any meaningful way is vulnerable and the law of negligence may fill the gap left by contract in its pursuit of corrective justice. This is illustrated by the negligent valuer cases

⁹⁶ However, contrast *Smith v Eric S Bush (a firm)* [1990] 1 AC 831 where the claimant was prevented by market conditions from obtaining contractual protection and although the House of Lords stated that the case was decided within 'settled principles', (pp.845-6) this is doubtful and claimant vulnerability is a factor which clearly influenced the House of Lords.

⁹⁷ *Perre v Apand Propriety Ltd* (1999) 198 CLR 180. See also *Hill v Van Erp* (1997) 188CLR 159.

⁹⁸ *ibid.*, at 214 *per* McHugh J.

⁹⁹ *ibid.*

¹⁰⁰ *ibid.*

where market conditions prevented a consumer from obtaining contractual protection, although the claimant was part of a contractual matrix.¹⁰¹

Even if there is a formal contractual matrix linking claimant and defendant there is no reason for tort law to refuse protection in appropriate cases.¹⁰²

The principle of caveat emptor still applies in the case of the sale of used buildings. The buyer cannot achieve contractual protection from builders whose shoddy work results in quality defects.¹⁰³ The fact that the action takes place against the background of a contractual matrix is regarded as more an argument for liability than against. Issues of proximity and standard of work can be measured against the contractual matrix. In the negligent valuation cases there is a contractual matrix but no way for a buyer to acquire contractual protection because of standard form contracts.¹⁰⁴ In the Lloyd's names cases such as *Henderson v Merrett Syndicates Ltd*¹⁰⁵ market conditions prevented names from bargaining for contractual protection against their agent's carelessness.

The principal tools used by English courts in economic loss cases are those of reliance and voluntary assumption of responsibility. Is claimant vulnerability synonymous with and capable of being subsumed within those concepts? Typically an economic loss case will involve a relationship of dependence (reliance) or an assumption of responsibility but these are probably best viewed as evidentiary indicators rather than sufficient or necessary criteria and the underlying principle is that of vulnerability.¹⁰⁶ Reasonable reliance can therefore be seen as an indicator of vulnerability either on its own or in conjunction with voluntary assumption of responsibility.

It is submitted that these principles can be used in cases of retailer vulnerability.

Retailer Vulnerability

Where defective goods have been supplied and cost has been incurred as a result of the defect, the approach of English law, and that of the SCGD, is to treat losses caused by quality defects as being dealt with by the contractual matrix. Had the original proposal in the European Commission Green Paper on Guarantees for Consumer Goods and After Sales Service¹⁰⁷ been accepted there would have been a form of joint and several liability for the standard of consumer goods shared between the manufacturer and the retailer. Instead,

¹⁰¹ *Smith v Eric S. Bush (a firm)* [1990] AC 1.

¹⁰² J.G. Fleming, *Employee's Tort in a Contractual Matrix*, (1993) 13 OJLS 430.

¹⁰³ Protection in tort through a claim for economic loss in negligence has been rejected in England; *D & F Estates Ltd v Church Commissioners* [1989] AC 177; *Murphy v Brentwood DC* [1991] AC 398; but has been accepted in some other Commonwealth jurisdictions; *Bryan v Maloney* (1995) 182 CLR 609. (Australia); *Invercargill CC v Hamlin* [1994] 3 NZLR 513 (New Zealand); *Winnipeg Condominium Corp v Bird Construction* [1995] 1 SCR 85. (Canada).

¹⁰⁴ *Smith v Eric S Bush (a firm)* [1990] 1 AC 831.

¹⁰⁵ [1995] 2 AC 145.

¹⁰⁶ *Esanda Finance Corp Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241 at 263-4 per Toohey J.

¹⁰⁷ Com (93) 509.

what we are left with is a position in which retailers must accept primary responsibility for the defective goods they have sold, but at the same time, they appear to derive little assistance from the SCGD article 4 and will be subject to the vagaries of the distribution chain. In times past, it might have been correct that the retailer should accept responsibility for the quality of consumer goods as the retailer is the first point of contact with consumers. However, it has been observed already that modern trading conditions have changed and that consumers are more likely to rely on brand images created by advertising campaigns run by producers rather than retailers, for the most part. Article 4 of the Directive appears to indicate that Member States should do something about 'network liability' so that the retailer does not soak up all the costs, but what that 'something' is, is far from clear.

Where defective goods are supplied by the producer to the retailer and the goods are resold to a consumer who rejects them or asks for repair or replacement of them due to their lack of conformity with the contract it needs to be asked how principles of tort law will affect any claim by the retailer against the manufacturer. In the case of the costs associated with repair or replacement questions need to be answered. Is it the retailer or the producer who must repair or replace the goods? In principle this is dealt with through the contractual matrix. Recovery of any loss suffered by the retailer will be dependent on the contract with the producer. Although the scenario satisfies the requirement of vulnerability if the retailer is not in a strong enough position to negotiate for redress from the producer and the boundaries of liability are ascertainable and normatively justified, the primacy of contract and the theoretical opportunity to obtain protection through contract will bar any recovery through tort law. The roles of contract and tort are so firmly entrenched that any change would probably have to be made either in contract law on the basis of unequal bargaining, or through legislation.¹⁰⁸ If there has been misleading labelling on the product which has given rise to the consumer claim, could the retailer then claim on the basis of assumption of responsibility by the producer to the retailer that the goods would comply with the claims on the label? If the contract firmly excludes any producer liability for economic loss caused by consumer claims, could the retailer argue breach of contract by the producer in respect of the misleading labelling amounts to a breach of condition which sweeps away the exclusion clause?

If a wholesaler is interposed, would tort law have a role to play? If the retailer could satisfy the requirement of vulnerability in the sense that he could not reasonably have obtained contractual protection from the wholesaler, a case would turn on the requirements of assumption of responsibility and reasonable reliance. Assumption of responsibility could currently be defeated by the argument that the producer's contract with the wholesaler indicated what he did and did not assume responsibility for. Could this argument be defeated by the labelling point made above?

¹⁰⁸ The latter appears to be the preferred judicial approach. See *Pao On v Lau Yiu Long* [1980] AC 614 at 634-635 *per* Lord Scarman; *National Westminster Bank v Morgan* [1985] AC 686 at 707-708 *per* Lord Scarman, rejecting the view of Lord Denning MR in *Lloyd's Bank Ltd v Bundy* [1975] QB 326.

Conclusion

The new remedial regime imposed by the SCGD is bolted on to the existing remedial regime under the Sale of Goods Act 1979 and requires the retailer, at his expense, to repair or replace non conforming goods. One effect of the new regime is that retailers are likely to find life more arduous financially. This is particularly likely in regard to 'public statements' which are made by manufacturers in respect of their products and turn out to be misleading. The retailer will, in many cases have to foot the bill to the consumer.

As the SCGD has imposed extra costs on retailers it is legitimate to ask whether any protection is given to retailers by the SGCD itself. A solution was originally proposed in the 1993 Green Paper¹⁰⁹ in the form of joint and several liability for the quality of consumer goods. However, this was not incorporated into the SGCD and Article 4 provides that national law shall determine the extent to which the retailer can pursue an action up the contractual chain against the person liable for costs incurred. Whether the SCGD intended Member States to take action on the issue of retailer redress is arguable. The Department of Trade took the view that the right of the retailer was to maintain an action against his immediate supplier despite the possible existence of exclusion/limitation clauses or other barriers to recovery. If this view is accepted then it would appear to render the inclusion of Article 4 in the SCGD otiose. Whatever the intended situation under the SCGD, in English law a retailer is left to obtain redress under existing English national law. The options are contractual or tortious.

In contract law the problems are the usual ones of privacy, exclusion/limitation clauses in the chain of contracts and possibly the insolvency of a party in the contractual chain. Whilst statutory intervention has done much to protect the consumer from the rigours of the freedom of contract doctrine, the courts are more reluctant to intervene in business to business contracts. The position is complicated by differences in trading conditions. In some areas of commerce, the retailer (*e.g.* a supermarket chain) may be in the stronger bargaining position. In many other areas it is the manufacturer who is in the dominant position when it comes to negotiating contracts. At present there is no doctrine in English contract law which will relieve a business from the consequences of a term of a contract concluded as a result of pure commercial pressure.

Any change in the contractual position would undoubtedly require legislation as the courts would probably see this as a step too far for them to take. The rationale for legislative intervention would be that retailers have had an additional cost imposed as a result of legislation and require an adjustment in their legal position as a result.

At present English negligence law on economic loss will not be of any assistance because of the primacy of contract law in this area. Previous attempts to introduce negligence principles to address the issue of defective product quality¹¹⁰ have not succeeded. One solution would be for English law to abandon the pockets of liability approach to pure economic loss

¹⁰⁹ *Guarantees for Consumer Goods and After Sales Services* (Com) (93) 509.

¹¹⁰ *Muirhead v Industrial Tank Specialities Ltd* [1986] QB 507.

claims and to adopt the more open textured approach taken by Commonwealth courts in order to develop a more flexible approach. Key to this issue is the acceptance of vulnerability as a factor in whether or not to impose a duty of care. Australian courts have rejected reliance and assumption of responsibility as unifying criteria in cases of pure economic loss and have treated them as indicators of the claimant's vulnerability to harm from the defendant's conduct. It is the concept of vulnerability rather than these evidentiary factors which is the relevant criterion for determining whether a duty of care exists.¹¹¹ English courts have shown a recent willingness to abandon embedded legal rules in order to avoid an injustice to the vulnerable in the mesothelioma cases¹¹² and the legislature has intervened where the courts have attempted to mitigate the effect of their decision on insurance companies.¹¹³ The concept of assumption of responsibility would be of no assistance as the manufacturer does not currently assume tortious responsibility to the consumer for quality defects. To say that they assumed responsibility to the retailer for financial losses arising from their products would at present be regarded as usurping the role of contract law.

The preferable solution is contractual through legislation. This is a specific problem and legislation is better equipped to deal with specific issues than case law. This is particularly the case where consumer protection is concerned. Given the lack of clarity over the precise scope of the SCGD article 4 and whether the Department of Trade and Industry has properly implemented article 4 (if it does impose an obligation on Member States), there appears to be a need to legislate in favour of retailers where they have been rendered particularly vulnerable.

¹¹¹ *Perre v Apand Propriety* (1999) 198 CLR 180.

¹¹² *Fairchild v Glenhaven Funeral Services* [2002] 3 All ER 305.

¹¹³ Compensation Act 2006 s.3.

RISK, LEGITIMACY AND ASYLUM ADJUDICATION

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1. Introduction

The concept of asylum is a simple one: a foreign national present in a host country who can demonstrate a risk of persecution, torture or ill-treatment on return to their country of origin must be granted international protection.¹ However, the task of deciding whether or not a claimant qualifies for asylum is perhaps the most problematic adjudicatory function in the modern state. It has been noted that the superficial simplicity of asylum adjudication conceals “a mass of detailed, difficult and very problematic factual and legal issues”.² The National Audit Office has stated that in many instances decision-makers “face a significant challenge in determining whether the rules governing asylum status are met” while the courts have observed that “[t]he difficulty of the fact-finding exercise is particularly acute in asylum cases”.³ Such difficulties arise in part because of the nature of the asylum decision problem: the decision-maker must prognosticate the prospective risk of persecution or ill-treatment often on the basis of incomplete and limited evidence. Furthermore, there is the diverse nature of the asylum claimant population which comprises 146 different nationalities and originates overwhelmingly from non-western countries.

The problematic nature of the asylum decision is matched by the grave consequences of erroneous decision-taking. The purpose of the decision-making process is to ensure that those who have demonstrated a risk of persecution or ill-treatment will be awarded protection while also ensuring that those who do not qualify can be removed from the UK. Asylum adjudication raises the constant problem of either refusing protection to the genuine claimant or affording protection to the non-genuine claimant. The importance of asylum decision-making does not though arise solely from its error costs but also in light of its current scale. While asylum decision-making may seem an arcane area of administrative law adjudication, it has become increasingly familiar owing to the unprecedented number of asylum claims. In 2005, the Home Office made 27,395 initial decisions and 600 Immigration Judges of the Asylum and Immigration Tribunal (AIT)

* The author wishes to thank Charles Blake, Rodney Brazier, Nicola Glover-Thomas, Neville Harris and Gary Lynch-Wood for their valuable comments on an earlier draft. The usual disclaimer applies.

¹ Refugee Convention 1951, Article 1(A); European Convention on Human Rights, Article 3; Refugee Qualifications Directive 2004/83/EC (OJ L304 30.9.04 p.12).

² C.G. Blake, “Judicial Review, Second Tier Tribunals and Legality” in M. Partington (ed.), *The Leggatt Review of Tribunals: Academic Seminar Papers* (2001), p.68.

³ National Audit Office, *Improving the Speed and Quality of Asylum Decisions* (2003-04 HC 535), p.37; *HK v Secretary of State for the Home Department* [2006] EWCA Civ 1037, para.27 (Neuberger LJ).

determined 33,940 appeals.⁴ Asylum also continues to provide a substantial amount of work for the higher courts.⁵

In this context, this article considers the nature of asylum decision-making and proposals for reform. In so doing, three major and interrelated themes are examined. The first concerns the risk assessment task which is at the centre of the determination of each asylum claim. The language of risk assessment has become familiar in many areas of government, such as risk-based regulation and internal risk management.⁶ However, asylum adjudication illustrates a distinct form of risk assessment – case-management risk – which requires a qualitative evaluation of the risk posed either by or to an individual.⁷ Such decisions typically have substantial implications for an individual’s personal liberty and are taken against the backdrop of broader public security concerns. While the technique of case-management risk can be identified in a variety of different contexts – parole, mental health, immigration and terrorism – asylum decision-making poses a particularly acute tension between the risk to an individual’s basic human rights and the public interest in maintaining legitimate immigration control.⁸ To appreciate the nature of this risk assessment task, the legal tests need to be situated within their policy and administrative context. There is also the question of the appropriate standard of proof that a successful claimant must discharge.

The second theme concerns the crucial task of fact-finding. After all, the vast majority of administrative and tribunal determinations turn on their own individual facts; asylum claims, in particular, are highly fact-sensitive. Consideration of the range of information available to decision-makers on which to assess the risk of persecution is central as to how decision-makers approach the fact-finding task. As will be seen, asylum adjudication illustrates both the inherent difficulties in fact-finding and how governments may seek to influence this task. Furthermore, the peculiar nature of asylum adjudication, requiring decision-makers to assess the political and social situation in countries generating claims, creates scope for controversy over who possesses the appropriate expertise to make such assessments.

⁴ Home Office, *Asylum Statistics United Kingdom 2005* (2006).

⁵ See Department for Constitutional Affairs, *Judicial Statistics 2005 (Revised)* (Cm 6903, 2006).

⁶ See National Audit Office, *Managing Risks to Improve Public Services* (2003-04 HC 1078); P. Hampton, *Reducing administrative burdens: effective inspection and enforcement* (2005). For discussion, see J. Black, “The Emergence of Risk-Based Regulation and the New Public Risk Management in the United Kingdom” [2005] *PL* 512 at 514-518. On risk and law generally, see R. Baldwin (ed.), *Law and Uncertainty: Risks and Legal Processes* (1997); B. Hudson, *Justice in the Risk Society* (2000).

⁷ M. Dean, “Risks, calculable and incalculable” in D. Lupton (ed.), *Risk and Sociocultural Theory: New Directions and Perspectives* (1999), p.131, 143-144.

⁸ R. Hood and S. Shute, *The Parole System at Work: a Study of Risk-based decision-making* (2000); J. Peay, *Decisions and Dilemmas: Working with Mental Health Law* (2003); R. Thomas, “Immigration Appeals for Family Visitors Refused Entry Clearance” [2004] *PL* 612 at 614-620; Lord Carlile of Berriew QC, *First Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005* (2006).

Adjudicative legitimacy provides the third theme. While legitimacy is central to administrative law, it assumes critical importance when analysing risk assessment regimes. What justificatory arguments do decision-makers draw upon? To what extent does the actual performance of decision-makers fulfil such values? Examination of this issue is complex because of the involvement of three actors in the determination process. First, there is an administrative agency, the Immigration and Nationality Directorate (IND) of the Home Office, responsible for the initial assessment of claims; secondly, a legal decision-maker, the AIT, which provides a single merits appeal; and thirdly, there are professional experts, which in this context includes both medical and country experts, the latter being those with a specialist knowledge of the conditions in countries of origin. As an essay on administrative justice, this article will adopt the familiar assumption that each of these actors reflects a different model of adjudication – bureaucratic, legal, and professional judgment – which in turn espouse competing legitimising values.⁹ If so, then the quest for legitimacy is likely to involve a complex competition between different adjudicatory processes. Asylum adjudication then might illustrate how a case-management risk regime can become an area of intense contestation between not only different institutional actors but also competing models of adjudication.

Briefly, the structure is as follows. The first section considers the legal tests governing asylum determination and the asylum risk assessment problem. The next section examines the difficulties involved in assessing asylum claims, in particular, the assessment of credibility and country conditions. Subsequent sections examine the tensions concerning expert evidence, the contest for adjudicative legitimacy and reform proposals.

2. Risk and Asylum Adjudication

Risk assessment is central to asylum adjudication. The basic question posed by the Refugee Convention is whether a claimant will, on return to their country of origin, face a real risk of persecution for reasons of their race, religion, nationality, membership of a political social group or political opinion.¹⁰ This obligation is now complemented by Article 3 ECHR – the prohibition against torture or inhuman or degrading treatment – which, owing to its “extra-territorial” effect, prevents the UK from returning a foreign national to a place where there may be subjected to such ill-treatment.¹¹ The task of adjudicating an asylum claim requires the decision-

⁹ See J. Mashaw, *Bureaucratic Justice: Managing Social Security Disability Claims* (1983), pp.23-34; M. Adler, “A socio-legal approach to administrative justice” (2003) 25 *Law & Policy* 323 at 329-336.

¹⁰ Refugee Convention 1951, Art.1A(2). See generally J. Hathaway, *The Law of Refugee Status* (1991); G. Goodwin-Gill, *The Refugee in International Law* (1996). On UK asylum law, see C. Harvey, *Seeking Asylum in the UK: Problems and Prospects* (2000); D. Stevens, *UK Asylum Law and Policy: Historical and Contemporary Perspectives* (2004).

¹¹ On the “extra-territorial” effect of Article 3, see *Soering v United Kingdom* (1989) 11 EHRR 439; *R. v Special Adjudicator Ex p.Ullah; Do v Secretary of State for the Home Department* [2004] Imm AR 419. Removal may also be contrary to Article 8 ECHR (the right to private and family life) if the claimant has developed a family life in the UK though only if the case is truly exceptional on its individual

maker to assess the future risk of persecution or ill-treatment that the claimant might receive on return to their country of origin. In most, if not all, Article 3 cases, the concept of risk has the same or closely similar meaning to that in the Refugee Convention of a “well-founded fear of persecution”, save that it is confined to a risk of Article 3 forms of ill-treatment and not restricted to conduct with any particular motivation or by reference to the conduct of the claimant. Article 3 may also in exceptional circumstances prevent removal where there is a risk of death arising from the non-availability of medical treatment for, for instance, HIV/AIDS infection and there are compelling humanitarian grounds or where there is a risk of suicide or other self-harm that a claimant may inflict on removal.¹² This brief summary of asylum law cannot though do justice to its complexities and uncertainties which have arisen in part because of the absence of a single judicial body to provide authoritative rulings.¹³

While asylum adjudication is governed by the legal obligations of the Refugee Convention and ECHR, it is also directly concerned with the maintenance of immigration control. Indeed, the risk assessment task frequently involves an unavoidable conflict between the legal obligation to protect those at risk of persecution or ill-treatment and the public interest in maintaining legitimate immigration control. There are important policy justifications for imposing such controls: the need to discourage illegal and economic migration, people trafficking, health and welfare tourism; the prevention of the admission of a potentially unlimited volume of asylum applicants; and the protection of social cohesion. The social and economic conditions in countries producing applicants may involve considerable hardship for individuals who consequently desire a better life; the imposition of ordinary immigration controls may leave only one possibility: seeking political asylum.

The asylum decision-maker will then continuously have before them the risk of either being unduly lenient – and therefore risk falling into error by granting status to the undeserving – or unjustifiably mistrustful – and therefore risk committing error by refusing the truly genuine claim. Both types of error clearly involve serious adverse consequences. Refusing protection to the genuinely entitled claimant represents a basic failure to fulfil the purpose of the Refugee Convention to provide surrogate protection to those in need because the claimant’s own state is either unable or unwilling to protect its own nationals.¹⁴ It also poses considerable risk to the

facts. See *Huang, Abu-Qulbain and Kashmiri v Secretary of State for the Home Department* [2005] Imm AR 240, 269 (Laws LJ).

¹² *D v United Kingdom* (1997) 24 EHRR 423; *Bensaid v United Kingdom* (2001) 33 EHRR 10; *N v Secretary of State for the Home Department* [2005] Imm AR 353; *J v Secretary of State for the Home Department* [2005] Imm AR 409.

¹³ As the AIT has noted, in *LK v Secretary of State for the Home Department (AA applied) Zimbabwe* [2006] Imm. AR 67, 74: “both the principles of procedure and interpretation of international Conventions have developed in a way which is unusually piecemeal because it has been based on a constantly changing background of the statutory jurisdiction of the Immigration Appellate Authorities and the occasional interaction of judicial review as well as appeals to the higher courts.”

¹⁴ *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489.

individual's life and limb; the price of indifference to genuine refugees seems almost incalculable.¹⁵ It is precisely because the costs of such decisions to individual appellants are so high that they must be scrutinised closely. Public confidence in the asylum process may be undermined if genuinely entitled claimants are wrongfully rejected. On the other hand, affording international protection to those who do not face persecution confers on them a status, such as refugee status with the rights and privileges it entails, which they do not deserve. This clearly poses a threat to the policy justifications for maintaining legitimate immigration control and public confidence in the asylum process. Furthermore, aspiring entrants who have applied under ordinary immigration procedures may feel aggrieved that others have been able to jump the queue.

While the risk of error is ever-present, some decision-making process is nevertheless required. The "all or nothing" nature of asylum adjudication compels a decision either way: either the individual is recognised to be in need of international protection and therefore not to be removed from the country or is not in need of protection and to be removed. As the error costs of incorrect decisions are so high, the decision-making process is continually subject to both enormous stress and political controversy. On one side of the debate are those who fear that decision-makers will adopt a sceptical approach and risk rejecting genuine claimants while others voice the concern that decision-makers will overlook the risks posed to society by unmeritorious claimants.¹⁶

Aligned to the centrality of assessing risk is the appropriate standard of proof. While the burden of proof is always on the claimant to demonstrate their case, the standard of proof adopted is lower than the civil standard of proof, the balance of probabilities test; the asylum claimant must demonstrate a reasonable degree of likelihood of persecution or a real risk of ill-treatment on return.¹⁷ The adoption of the lower standard of proof relates to the establishment of risk on return and reflects the difficulties claimants may experience in proving the nature of future risk by allowing "a more positive role for uncertainty."¹⁸ It is precisely because the imposition of the burden of proof on the applicant may pose some difficulties that the evidence is viewed in a more benevolent manner than in other legal proceedings; by requiring something less than proof positive, asylum law deliberately errs on the side of caution. The civil standard of proof, typically applied to ascertain the probability that past events happened, is inapplicable in this context as

¹⁵ See A.C. Helton, *The Price of Indifference: Refugees and Humanitarian Action in the New Century* (2002), chap.1.

¹⁶ For treatments of asylum policy debate in the UK, see N. Steiner, *Arguing About Asylum: The Complexity of Refugee Debates in Europe* (2000), pp.97-132; L. Schuster, *The Use and Abuse of Political Asylum in Britain and Germany* (2003), pp.131-179; M.J. Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees* (2004), pp.107-131.

¹⁷ *Sivakumaran v Secretary of State for the Home Department* [1988] A.C. 958; *Kacaj v Secretary of State for the Home Department (Article 3 – Standard of Proof – Non-State Actors) Albania* (Starred determination) [2002] Imm AR 213; Refugee Qualifications Directive, n.1 above, articles 5 and 8.

¹⁸ *Kaja v Secretary of State for the Home Department* [1995] Imm AR 1, 8.

asylum adjudication primarily focuses upon an assessment of the future risk of persecution or ill-treatment that a claimant may suffer on their return.

The leading judicial discussion of risk assessment in asylum claims is to be found in *Karanakaran*.¹⁹ Here the Court of Appeal recognised that as asylum adjudication concerns future risk, it is an administrative-legal decision-making process differing in important ways from civil litigation. Decision-makers are not constrained by the rules of evidence adopted in civil litigation but must instead take into account all relevant considerations when assessing future risk.²⁰ Nothing should be excluded from the assessment, such as a claim by the applicant that a certain event happened (*e.g.* they were tortured), unless there can be no real doubt that that the claimed event did not in fact occur. As the court explained, the question whether an applicant qualifies for international protection is not a head-to-head litigation issue; testing a claim does not ordinarily involve a choice between two conflicting versions of the truth but an evaluation of the intrinsic and extrinsic credibility, and ultimately the significance, of the applicant's case.²¹ The sources of information available to the decision-maker will frequently comprise: the claimant's oral testimony; country reports produced by government and non-governmental organisations; expert evidence; and, more recently, the AIT's country guideline determinations. Everything relevant must be taken into account when assessing risk. Further, the issues for a decision-maker are questions not of hard fact but of evaluation: "the facts, so far as they can be established, are signposts on the road to a conclusion on the issues; they are not themselves conclusions."²² Finally, as the assessment of risk must be undertaken on the basis of an often quickly changing factual situation, the decision-making process must take into account any changes that have occurred after the initial decision (*e.g.* a change of regime in the claimant's country of origin).²³

On the one hand, asylum adjudication bears the hallmarks of routine individualised decision-making by governmental administration. Individuals apply to a public authority to determine their eligibility: forms are completed and interviews conducted so that findings of fact can be made; decision-makers establish whether or not the relevant criteria have been fulfilled; unsuccessful claimants may appeal.

At the same time, this particular adjudicative process possesses its own distinctive features. Its purpose is to determine the eligibility of people who claim that they will be persecuted or tortured in their own country and who as foreign nationals would not otherwise qualify to remain in the country. An asylum decision possesses distinct and considerable social and moral

¹⁹ *Karanakaran v Secretary of State for the Home Department* [2000] 3 All ER 449.

²⁰ See the Asylum and Immigration Tribunal (Procedure) Rules SI 2005/230, r.51(1).

²¹ *Karanakaran*, n.19 above, 479 (Sedley LJ).

²² *ibid.*

²³ The asylum appeal system is therefore an "extension of the decision-making process" rather than simply a means of reviewing decisions already taken: *Sandralingham and Ravichandran v Secretary of State for the Home Department*; *Rajendrakumar v Immigration Appeal Tribunal and Secretary of State for the Home Department* [1996] Imm. AR 97, 112 (Simon Brown LJ). See also Nationality, Immigration and Asylum Act 2002, s.85(4).

importance. A positive decision on an asylum claim is an implicit recognition that the moral worth in protecting an individual outweighs the public security in enforcing immigration control. It is also an indication that a foreign country, in some cases a country with which the UK has close relations, is either incapable or unwilling to provide basic protections to its own citizens.

When compared with other case-management risk assessment contexts, the risks involved in asylum claims are far more pronounced.²⁴ Most fundamentally, asylum adjudication involves an evaluation of the prospective risk of persecution or ill-treatment that a claimant may face on return on the basis of facts at the date of decision. Asylum adjudication, Sedley LJ has explained, “is not a conventional lawyer’s exercise of applying a litmus test to ascertained facts; it is a global appraisal of an individual’s past and prospective situation in a particular cultural, social, political and legal milieu, judged by a test which, though it has legal and linguistic limits, has a broad humanitarian purpose.”²⁵

3. Assessing Claims

As in other case-management risk contexts, the assessment of risk in each asylum claim depends on its own individual facts. It is unsurprising then that as fact-finding in asylum cases is a highly problematic enterprise, it consumes the majority of initial and appellate decision-maker’s time. There is often considerable difficulty in obtaining reliable evidence of the facts that gave rise to the fear of persecution. The fact-finding exercise is often complex and difficult to manage as it usually involves an assessment of both the particular circumstances of the individual’s case and the general social and political situation in the country from which refuge is sought. The decision-maker must first assess whether or not the claimant’s account is credible and then whether this fear is objectively well-founded by reference to conditions in the relevant country. In light of the dual nature of the asylum test, in which the claimant alone possesses almost all the relevant personal knowledge and the decision-maker is best placed to deal with general country conditions, there is a mutually owed, two-way obligation between the claimant and the decision-maker to co-operate in ascertaining and evaluating the facts.²⁶ Furthermore, evaluating the significance of facts can

²⁴ For instance, a prisoner refused release by the Parole Board and an individual sectioned under the Mental Health Act will be eligible for a subsequent assessment while a refused visa applicant may re-apply or appeal. By contrast, the appeal determination is usually the end of the asylum decision-making process. The Home Office does not monitor the treatment of failed applicants on return and does not undertake any further risk assessment prior to removal. Under the Immigration Rules (HC 395 1997), r.353 an unsuccessful asylum applicant may lodge a fresh asylum claim before removal but only if the new submissions are significantly different and have a realistic prospect of success. See *R. (Rahimi) v Secretary of State for the Home Department* [2005] EWHC Admin 2838.

²⁵ *R. v Immigration Appeal Tribunal and Secretary of State for the Home Department Ex p. Shah* [1997] Imm. AR 145, 153.

²⁶ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and 1967 Protocol relating to the Status of Refugees* (1992), para.196; *Secretary of State for the Home Department v RK (Obligation to investigate) Democratic Republic of Congo* [2004] UKIAT00129, para.46.

be stressful because of the underlying and constant tension between being either unduly mistrustful or unduly lenient.²⁷

Assessing Credibility

Assessing the credibility of an asylum claimant is one of the primary functions of the decision-maker since it will “lead to the establishment of much of the factual matrix for the determination of the case. In some cases, but by no means all, the issue of credibility may be the fulcrum of the decision as to whether the claim succeeds or fails.”²⁸ Credibility is “at the core of the asylum process” because, in contrast with civil litigation, evaluation of the evidence is often only concerned with the applicant’s version of events.²⁹ Most claimants are compelled by circumstances to rely on their own statements to prove their cases as it can be very difficult for them to acquire other evidence. Many, if not most, claims will not then be corroborated by either a witness or documentary evidence and will stand or fall on the decision-maker’s acceptance or rejection of the credibility of the claimant’s story.³⁰ Under the Refugee Qualifications Directive, the decision-maker must take into account all relevant facts when considering an asylum claim.³¹ While past persecution may be a serious indicator of future risk, it is by no means conclusive; equally, a claimant who has entirely escaped past persecution may be able to establish a future risk.

Assessing credibility is a familiar problem in many areas of administrative and legal decision-making.³² In essence, the issue is whether the decision-maker is able correctly to determine whether or not the applicant is telling the truth. Even in ordinary conditions, this task is extremely difficult. Studies in the field of experimental psychology, for example, indicate that people habitually overrate their ability to delineate truth and falsity and are only able to do so successfully some 50 per cent of the time.³³ Asylum adjudication, however, poses some further difficulties. The evaluation of claims must be undertaken bearing in mind the stress generated by making the claim, the

²⁷ Added to this are the time pressures decision-makers are under to produce decisions. Immigration judges must produce a determination 10 days after an appeal hearing: Asylum and Immigration Tribunal (Procedure) Rules SI 2005/230, r.22 and r.23.

²⁸ *SW v Secretary of State for the Home Department (Adjudicator’s questions) Somalia* [2005] UKIAT00037, para.20.

²⁹ C.G. Blake, “Judging Asylum and Immigration Claims: the Human Rights Act and the Refugee Convention” (2001) 21 *Public Money & Management* 25 at 27.

³⁰ *Kasolo v Secretary of State for the Home Department* (13190), date notified 1.4.1996. See also the Immigration Rules (HC 395 1997), r.339L.

³¹ Refugee Qualifications Directive, n.1 above, article 4(3) as transposed into UK law by the Immigration Rules (HC 395 1997), r.339I-J. See further R. Thomas, “Assessing the credibility of asylum claims: EU and UK approaches examined” (2006) 8 *Journal of Migration and Law* 79 at 86-92; G. Noll, “Evidentiary assessment in refugee status determination and the EU Qualification Directive” (2006) 12 *EPL* 295.

³² E.g. social security adjudication; prison disciplinary adjudication.

³³ A. Vrij, *Detecting Lies and Deceit: the Psychology of Lying and the Implications for Professional Practice* (2000); P. Ekman, *Telling Lies: Clues to Deceit in the Marketplace, Politics, and Marriage* (2001); A. Memon, A. Vrij and R. Bull, *Psychology and Law: Truthfulness, Accuracy and Credibility* (2003).

possible consequences if refused and the process of giving of evidence in the highly formalistic atmosphere of an interview or appeal hearing. Claimants may be frightened, bewildered, perhaps even desperate, and will often not understand the process. Most applicants will not be able to speak English; their evidence will have to be translated raising potential communicative, cross-cultural and linguistic difficulties.³⁴ Furthermore, the evidence presented will often be fragmented, incomplete and confused. Even the most basic facts of an individual's claim, such as their nationality, may be in doubt. The IND has, for instance, argued that some individuals who claim to be from well-known refugee producing countries, such as Somalia and Afghanistan, are in reality economic migrants from neighbouring countries in search of a better life. In such "disputed nationality" cases, the decision-maker who concludes that the claimant is claiming a false nationality is entitled simply to say so.³⁵

Given such evidential uncertainty, decision-makers require some methodology for assessing credibility. However, each of the three methods commonly employed can be problematic in some respect.³⁶ First, the decision-maker may doubt an individual's credibility if there are internal inconsistencies in their account. Such inconsistencies may, however, be explicable on the basis of the fallibility of human memory, the claimant's inability to recall their story fully or a reluctance to do so in light of traumatic experiences suffered.³⁷ At the same time there is a risk that the non-genuine claimant may be able to present a consistent and coherent story albeit false. The Tribunal has been reluctant to give guidance other than exhorting decision-makers to use their "common sense and experience" to decide whether an account which frays at the edges is nevertheless truthful or alternatively whether the applicant has got themselves into difficulties through unplanned departures from a pre-rehearsed and unreliable script.³⁸

A related issue concerns the appropriate procedure through which the claimant provides evidence: interviews; adversarial hearings; or solely the production of documentary material. IND's initial interview process has

³⁴ See W. Kälin, "Troubled communication: cross-cultural misunderstandings in the asylum-hearing" (1986) 20 *International Migration Review* 230; S. Pöllabauer, "Interpreting in asylum hearings: issues of role, responsibility and power" (2004) 6 *Interpreting* 143; R. Rycroft, "Communicative barriers in the asylum account" in P. Shah (ed.), *The Challenge of Asylum to Legal Systems* (2005), p.223.

³⁵ *Khan v Secretary of State for the Home Department (Disputed Nationality – Removal Directions) Afghanistan* (Starred determination) [2002] UKIAT04412; *MY v Secretary of State for the Home Department (Disputed Somali Nationality) Somalia* (Starred determination) [2004] Imm AR 359.

³⁶ A. Weston, "'A witness of truth' – credibility findings in asylum appeals" (1998) 12 *Immigration & Nationality Law & Practice* 87 at 88-89; G. Coffey, "The Credibility of Credibility Evidence at the Refugee Review Tribunal" (2003) 15 *IJRL* 378 at 385-395.

³⁷ J. Cohen, "Questions of Credibility: Omissions, Discrepancies and Errors of Recall in the Testimony of Asylum Seekers" (2002) 13 *IJRL* 293; J. Herlihy, P. Scragg and S. Turner, "Discrepancies in autobiographical memories – implications for the assessment of asylum seekers: repeated interviews study" (2002) 324 *British Medical Journal* 324.

³⁸ *K v Secretary of State for the Home Department (Democratic Republic of Congo)* [2003] UKIAT00014, para.10.

been criticised for aggressive questioning and publicly funded representation is no longer generally available though claimants may request that interviews be tape-recorded.³⁹ Oral hearings are the norm at the appeal level; credibility assessments based on oral evidence will only very rarely be capable of being overturned on appeal.⁴⁰ However, it may equally be doubted whether oral evidence is superior to examining documentary evidence in demonstrating that an unconvincing claimant is truthful or that a convincing one has been either deluded or lying.⁴¹

A second method of assessing credibility is to test the external credibility of a claim, *i.e.* whether the claimant's story is consistent with objective country evidence. However, such evidence typically comprises general rather than specific information on country conditions and may in any event be ambiguous as to whether or not certain events did actually occur. Thirdly, decision-makers may simply test the plausibility of a claimant's story. This too though can be problematic. Making visceral judgments as to the plausibility that certain claimed events happened risks a greater role for the decision-maker's own values and preconceptions; events that appear implausible may nevertheless have actually occurred.⁴² Furthermore, as the courts have stressed, rejecting a claimant's story because of its inherent implausibility "can be a dangerous, even a wholly inappropriate, factor to rely on in some asylum cases" as much of the evidence will refer to societies with customs and circumstances which are very different from those within the experience of the decision-maker.⁴³

All of the methods to assess credibility are, however, complicated further by the cultural distances separating applicants and decision-makers. Asylum claimant populations are often highly diverse. There is a substantial risk that decision-makers will make decisions from their own western assumptions unaware of the importance of cultural differences between themselves and claimants.⁴⁴ What may seem plausible for a person in a western environment may be completely implausible for someone in a non-western environment; decision-makers must take great care in not allowing their own perceptions and values to influence that judgment.⁴⁵ As Sir Thomas Bingham, in a

³⁹ *R. (Dirshe) v Secretary of State for the Home Department* [2005] 1 WLR 2685.

⁴⁰ *Subesh, Suthan, Nagulanathan and Vanniyasingam v Secretary of State for the Home Department* [2004] Imm AR 112, 131 (Laws LJ).

⁴¹ *R. v Secretary of State for the Home Department Ex p. Yousaf and Jamil* [2000] 3 All ER 649, 657 (Sedley LJ).

⁴² As the Tribunal noted in *MM v Secretary of State for the Home Department (DRC – plausibility) Democratic Republic of Congo* [2005] Imm AR 198, 202: "A story may be implausible and yet may properly be taken as credible; it may be plausible and yet properly not believed."

⁴³ *HK v Secretary of State for the Home Department*, n.3 above, para.29 (Neuberger LJ).

⁴⁴ See M. Coussey, *Annual Report of the Independent Race Monitor 2004-05* (London: Home Office, 2005), para.3.21; P.A. Granhag, L.A. Strömwall and M. Hartwig, "Granting asylum or not? Migration Board personnel's beliefs about deception" (2005) 21 *Journal of Ethnic and Migration Studies* 29.

⁴⁵ *Ibrahim Ali v Secretary of State for the Home Department* [2002] UKIAT07001, para.3. As the Tribunal once put it, in *Ivanov v Secretary of State for the Home Department* (12583), date notified 10.10.1996, a claim might well be credible although it seemed bizarre when viewed "from the safety of the Strand".

passage cited frequently in this context, has explained, “[n]o judge worth his salt could possibly assume that men of different nationalities, educations, trades, experience, creeds and temperaments would act as he might think he would have done or even – which may be quite different – in accordance with his concept of what a reasonable man would have done.”⁴⁶ However, while the Tribunal has stressed the dangers inherent in assessing credibility by reference to a claimant’s demeanour in light of the cultural differences, empirical evidence suggests that it may play an important role in decision-making.⁴⁷

Given the difficulties created by this cultural gap, decision-makers may again look to country information for assistance. Indeed, the Tribunal has recognised that country evidence may perform a crucial role in showing that adverse inferences based on the claimant’s evidence can be apparently reasonable when based on an understanding of life in a western country but are less reasonable when the circumstances of life in the country of origin are exposed. However, to pre-empt subsequent discussion, the question of what comprises reliable country evidence – whether provided by the Home Office or country experts – is a particularly contested issue. The Tribunal has rejected the Court of Appeal’s suggestion that, owing to the difficulty of assessing credibility in a cross-cultural situation, immigration judges need all the help provided by a country expert: there could be no ready acceptance of country experts’ views as that would substitute trial by expert for trial by immigration judge.⁴⁸

Claimants may also rely upon corroborative medical or psychiatric evidence which deal with the risks they might face on return in light of their medical or psychiatric history. Again, the role of such expert evidence is contested. Initially, the Tribunal’s view was that such reports deserved careful and specific consideration as evidence of possible ill-treatment or trauma.⁴⁹ However, more recently the Tribunal has doubted whether such reports assist in assessing credibility.⁵⁰ For instance, a medical report corroborating an individual’s claim that their scars resulted from ill-treatment does not necessarily have to be accepted as the scars could have been caused by other means. Similarly, psychiatric reports diagnosing post-traumatic stress disorder may be of limited value as a non-genuine claimant has an obvious interest in exaggerating or feigning such symptoms. The AIT is unlikely to accept without more diagnostic conclusions, which are dependant upon assertions by the claimant whose truthfulness is at issue before the immigration judge but not before the doctor. Furthermore, post-traumatic

⁴⁶ T. Bingham, “The Judge as Juror: the Judicial Determination of Factual Issues” (1985) 38 *CLP* 1 at 14 as cited by the Tribunal in *Kasolo*, n.30 above.

⁴⁷ *Loy Hope Luwuzi v Secretary of State for the Home Department* [2002] UKIAT07186, para.6; *B v Secretary of State for the Home Department (Democratic Republic of Congo)* [2003] UKIAT00012, para.7; C. Jarvis, “The Judge as Juror Re-visited” (2005) 9 *Immigration Law Digest* 16.

⁴⁸ *R. (Es Eldin) v Immigration Appeal Tribunal* (Court of Appeal, 29.11.2000, unreported), para.18 (Brooke LJ); *Zarour v Secretary of State for the Home Department* (01TH00078), date notified 2.8.2001, paras 20-21.

⁴⁹ *Ibrahim v Secretary of State for the Home Department* [1998] INLR 511.

⁵⁰ *HE v Secretary of State for the Home Department (DRC – credibility and psychiatric report) Democratic Republic of Congo* [2005] Imm AR 119.

stress disorder may arise not just from previous ill-treatment but from other causes such as the prospect of being removed to their country of origin which may not be a pleasant place to which to return. While the Tribunal has expressly doubted the quality of some medical reports, medical experts themselves have argued that the Tribunal has been too willing to dismiss their reports without good reason.⁵¹

While the difficulties in assessing credibility seem substantial, there is a further problematic dimension: the introduction of evidentiary rules prompted by executive mistrust of initial and appellate decision-making. IND has long entertained concerns arising from abuse of the asylum process and has introduced various measures to combat it. One difficulty has been that as the substantive rules governing eligibility are contained in international human rights conventions and therefore subject to judicial interpretation, IND is relatively powerless to alter them. An obvious alternative has then been to introduce evidential rules to reduce the scope for such perceived abuse. Section 8 of the 2004 Act therefore requires a decision-maker to take into account, as damaging a claimant's credibility, any behaviour which is either designed or likely to conceal information or to mislead, obstruct or delay the handling or resolution of a claim.⁵² For instance, a failure without reasonable explanation to produce a passport to an immigration officer, the production of a false passport, the destruction of a passport or travel tickets and the failure to answer a question must be taken into account as damaging credibility.⁵³ The concern with section 8 is that it establishes an evidential presumption that just because the claimant has behaved in a specified manner, their credibility to be in need of international protection is damaged. It has long been accepted that claimants may feel apprehensive and unable to speak freely and give a full and accurate account of their case and that untrue statements by themselves are not a reason for refusing refugee status.⁵⁴ Delays in either claiming asylum or revealing the full details of a claim may result from the claimant's shame or trauma resulting from the torture, sexual violence or other persecutory treatment they have suffered. Section 8, however, goes further by stating that a claimant who has not taken advantage of a reasonable opportunity to claim asylum in a safe third country has damaged their credibility, thereby reversing case-law that such a failure cannot "conceivably by itself throw doubt on whether . . . [the claimant] . . . is indeed a genuine asylum seeker."⁵⁵

⁵¹ In *HE, ibid.*, at 125 the Tribunal remarked that "the quality of reports is so variable and sadly often so poor and unhelpful, that there is no necessary obligation to give weight to them merely because they are medical or psychiatric reports." See also D. Rhys Jones and S. Verity Smith, "Medical evidence in asylum and human rights appeals" (2004) 16 *IJRL* 381.

⁵² Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, ss 8(1) and (2).

⁵³ Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, s.8(3).

⁵⁴ See, e.g. UNHCR, n.26 above, paras.198 and 199.

⁵⁵ Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, s.8(4); *R. (Degirmenci) v Immigration Appeal Tribunal* [2003] EWHC Admin 324, para.11 (Collins J). See also *R. v Uxbridge Magistrates' Court Ex p. Adimi* [2001] QB 667.

While structuring discretion is a key theme in administrative law,⁵⁶ section 8 gives a deliberate steer toward reaching negative credibility assessments.⁵⁷ It has for this reason been viewed as an interference with the independence and fairness of the decision-making process.⁵⁸ For its part, the AIT has recognised that section 8 will inevitably distort the fact-finding process by interfering with the well-established rule that the fact-finder should look at the evidence as a whole, giving each item of it appropriate weight.⁵⁹

Given the conditions under which the truthfulness of an asylum claimant's story has to be evaluated, it is clear that the assessment of credibility is a formidable task. As one immigration judge has noted, asylum adjudication requires critical judgments to be made but without any set of clearly defined parameters.⁶⁰ This in turn has prompted criticism that there are substantial inconsistencies in decision outcomes. Of course, there is always the risk that the outcome of a claim will largely depend on the identity of the individual decision-maker. However, the alternative course of involving a greater number of decision-makers to make collective decisions in individual cases would both lengthen the process and increase costs. In the majority of cases therefore the credibility findings of an immigration judge will, in the absence of any error of law, be final.⁶¹

Country of Origin Information

While credibility is often decisive, it is just one aspect of the risk assessment task. The decision-maker must also assess whether or not the fear of persecution is objectively well-founded by reference to country conditions. Further, credibility does not displace the need to assess the risk on return that might arise irrespective of an individual's circumstances. An asylum claim can be generated not just on the basis of the personal risk of harm to an individual but also on the basis of a serious risk to all people generally.⁶² This underlines the need to assess conditions in countries of origin. This task though raises its own problematic issues. Is it possible to obtain relevant and accurate information concerning conditions in refugee producing countries? When, if at all, can such information properly be considered to be objective? Who is best placed to collect and assess country of origin information?

⁵⁶ K.C. Davis, *Discretionary Justice: A Preliminary Inquiry* (1971).

⁵⁷ J. Ensor, A. Shah and M. Grillo, "Simple myths and complex realities – seeking the truth in the face of section 8" (2006) 20 *Immigration, Asylum and Nationality Law* 95.

⁵⁸ See, e.g. Joint Committee on Human Rights, *Asylum and Immigration (Treatment of Claimants, etc.) Bill* (2003-04 HL 35 HC 304), para.26.

⁵⁹ *SM v Secretary of State for the Home Department (Section 8: Judge's process) Iran* [2005] Imm AR 673, 675-676.

⁶⁰ T. Talbot, "Credibility and risk: one adjudicator's view" (2004) 10 *Immigration Law Digest* 29 at 30.

⁶¹ See Nationality, Immigration and Asylum Act 2002, s.101; Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, s.26; *CA v Secretary of State for the Home Department* [2004] Imm AR 640.

⁶² See *Hariri v Secretary of State for the Home Department* [2003] EWCA Civ 807, para.8 (Laws LJ); *Batayav v Secretary of State for the Home Department* [2003] EWCA Civ 1489, paras 38-39 (Sedley LJ).

One answer to this last question is that the collection of country information is simply an administrative task. From the administrative perspective, IND caseworkers require country information in order to determine claims. Since 1996, IND has then published country reports prepared by its Country of Information Policy Unit (CIPU). This unit initially provided IND caseworkers with country of origin information and also developed policy on country specific issues. However, in 2004 the government agreed to split these functions; country information is now provided by the Home Office's Country of Origin Information Service (COI Service).⁶³ The sole purpose of the COI Service is to provide accurate, objective, sourced and up-to-date information on asylum seekers' countries of origin, for use by IND officials involved in the asylum determination process.

Country information reports are regularly published on the top 20 asylum producing countries.⁶⁴ A country report is a collation of material already in the public domain which concentrates on the issues most commonly raised in asylum claims. These reports are the means through which IND co-operates with claimants; it does not and should not simply require a claimant to produce the general background material relevant to the case. The reports are integral to the determination process as they are commonly relied upon as evidence in support or otherwise of an asylum claim throughout both the initial and appellate stages of the process. It is therefore essential that the information they provide is accurate, fairly represented and comprehensive. However, the reports have received criticism on two fronts.

First, the location of the unit responsible for producing objective country evidence within the government department responsible for asylum policy raises obvious concerns with regard to the objectivity and independence of the reports. As the House of Lords EU Committee has noted, an improved asylum process should "ensure that authoritative and credible country of origin information is available" but the Home Office's country reports are not generally accepted to be "authoritative, credible and free from political or policy bias".⁶⁵ Recent experience suggests that it is too much to assume that government produced reports or dossiers can be entirely free from political interference. Secondly, it has been argued that the reports have contained basic inaccuracies, lacked objectivity, used out of date material, omitted

⁶³ Hansard HC Debs., vol.424, col.119WS, September 8, 2004 (Minister for Citizenship and Immigration). This Unit is now located within the Home Office's Research Development and Statistics Service rather than IND.

⁶⁴ The reports are available from the Home Office website.

⁶⁵ House of Lords European Union Committee, *Handling EU asylum claims: new approaches examined* (2003-04 HL 74), paras 104 and 115. Similar concerns have been expressed with regard to US State Department reports, occasionally relied upon in asylum appeals. See, e.g. *Gramatikov v Immigration and Nationality Service*, 128 F.3d 619, 620 (7th Circuit 1997): "[t]here is a perennial concern that the [State] Department softpedals human rights violations by countries which the United States wants to have good relations with."; *Said v Netherlands* (application no.2345/02, 5 July 2005), European Court of Human Rights (Judge Loucaides): US State Department reports "cannot by definition be relied on as a neutral and impartial exposition of the facts mentioned therein."

potentially relevant material and given a falsely positive outlook on country conditions.⁶⁶

A frequent suggestion for the improvement of the asylum determination process has been the establishment of an independent documentation centre in order to collect, analyse and disseminate credible and trustworthy country of origin information and which is patently free from any political interference. While IND has steadfastly refused to act upon this suggestion, it has, in response to continued concerns over country information, established the Advisory Panel on Country Information (APCI) to consider and make recommendations about the content of country information.⁶⁷ As a quality control mechanism, APCI has sought to provide rigorous external scrutiny of the reports following their publication and highlighted a number of shortcomings in the published reports. Independent expert reviews of the reports on major refugee-producing countries – Sri Lanka and Somalia, for instance – have identified a number of weaknesses such as selective and misrepresentative quoting of source material, use of outdated material, lack of independent analysis, exclusion of relevant material and even reliance on material produced by government sources.⁶⁸ Such reviews have not been wholly negative and the Home Office has responded constructively by updating or changing its reports. The panel though can only review country information after it has been produced; it has no prior input.

Difficult questions arise here for the Tribunal: how can it retain the perception of judicial independence if it invariably relies upon reports prepared by the government department which is a party to each appeal and also responsible for both initial decision-making and enforcing immigration control? On the other hand, given that immigration judges are not expected to have knowledge or experience of conditions in countries of origin, what other sources of information could be used? In light of the continuing refusal to establish an independent documentation centre, the Tribunal has had little option but to rely upon the reports. While recognising that they are “partisan” and “cannot be regarded as comprising *independent* evidence”, the Tribunal has noted that the reports are “little more than a compendium of material from other published sources” and provide a “reliable, reasonably impartial and up-to-date assessment”.⁶⁹ The Tribunal is not, however, itself able to assess the veracity of sources used in the reports. Furthermore, the Home Office’s assessment of country conditions can also condition the appeal process by requiring that claimants from designated safe countries may only

⁶⁶ N. Carver (ed.), *Home Office Country Assessments: An Analysis* (2003).

⁶⁷ Nationality, Immigration and Asylum Act 2002, s.142(3).

⁶⁸ See C. Woolf and N. Van Hear, “Commentary on Home Office CIPU Sri Lanka Country Report of October 2003” (2004); A. Abdi and R. Black, “Commentary on October 2003 CIPU Report on Somalia” (2004); A. Abdi and R. Black, “Commentary on October 2004 CIPU Report on Somalia” (2005) available from www.apci.org.uk/.

⁶⁹ *Devaseelan v Secretary of State for the Home Department (Second Appeals - ECHR - Extra-Territorial Effect) Sri Lanka* (Starred determination) [2003] Imm AR 1, 26; *AW v Secretary of State for the Home Department (Article 3 – Risk – General Situation) Somalia* [2003] UKIAT00111, para.25.

pursue their appeal from outside the UK.⁷⁰ As such “non-suspensive” appeals may increase appellants’ difficulties in establishing their credibility and maintaining contact with a representative, they may not provide a sufficient safeguard against inaccurate decision-making.⁷¹

4. Country Expertise

Given the concerns surrounding Home Office country reports, who else can be called upon to provide country information? One answer would be that as awareness of country conditions requires specialist knowledge, we should look to those with the requisite professional expertise. Many appellants do commission an expert, typically an academic or other expert with specialist knowledge of the particular country, to prepare a report on their home country.⁷² In comparison with ordinary civil litigation, where each party may each engage an expert or the court itself can appoint a single joint expert, in asylum cases experts are commissioned solely by the claimant while IND will invariably rely on its own country report.⁷³

The issue of the extent to which the Tribunal can rely upon such expert reports is though highly contentious: while country experts claim they possess specialist knowledge of the relevant country, the Tribunal has repeatedly questioned their objectivity. For instance, the Tribunal has roundly rejected the Court of Appeal’s view that it is “bound to place heavy reliance on the views of experts and specialists”.⁷⁴ In the Tribunal’s opinion, many experts “have their own points of view which their reports seek to justify.”⁷⁵ While the quality of country experts may vary, “all suffer from the difficulty that very rarely are they entirely objective in their approach...Many have fixed opinions about the regime in a particular country and will be inclined to accept anything which is detrimental to that regime.”⁷⁶ For the AIT, a country expert will frequently act more as an advocate than as an impartial witness.

⁷⁰ Nationality, Immigration and Asylum Act 2002, s.94; Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, s.27.

⁷¹ S. Woodhouse, *Annual Report of the Certification Monitor 2004* (2005) and *Annual Report of the Certification Monitor 2005* (2006).

⁷² Many country experts are listed in Immigration Law Practitioners’ Association, *Directory of Experts on Conditions in Countries of Origin and Transit* (1997).

⁷³ Civil Procedure Rules 1998, pt.35.

⁷⁴ *S. and Others v Secretary of State for the Home Department* [2002] INLR 416, 436 (Laws LJ).

⁷⁵ *Secretary of State for the Home Department v SK (Return – Ethnic Serb) Croatia CG* (Starred determination) [2002] UKIAT05613, para.5.

⁷⁶ *Slimani v Secretary of State for the Home Department (Content of Adjudicator Determination) Algeria* (Starred determination) (01TH00092), dated notified 12.2.2001, para.17. For a similar exchange of views, see *Karankaran*, n.19 above, 472, where Brooke LJ stated that it was “completely wrong” for the Tribunal to reject reports produced by four country experts as “pure speculation”, and *Karanakaran v Secretary of State for the Home Department* (00TH03086), date notified 12.9.2000 where the Tribunal subsequently determined that the views contained in the experts’ reports were contradictory, unsatisfactory and “profoundly unhelpful to a Tribunal that has to make its own evaluation”. Disagreement between the specialist tribunal, accustomed to dealing with a high volume of asylum appeals, and the Court of Appeal, a superior court but dealing

Turf warfare has then broken out with injuries to both parties: country experts dislike having their professional reputations publicly attacked while the AIT has been forced to place greater reliance on the Home Office's country reports. The Tribunal has even gone so far as to criticise an expert on the basis that their report did not demonstrate "an understanding of the legal concepts to be applied in evaluating risk."⁷⁷ Conscious that it does not want to cede any control over decision-making to country experts, the Tribunal has emphasized that for it to attach weight to a report depends upon the expert's demonstrable objectivity in addition to the requisite expertise.⁷⁸ In order to assess whether expert evidence is independent and reliable, the Tribunal will compare it with other sources of country information and then decide what weight it is to be accorded.⁷⁹

The Tribunal's concerns have not though gone unchallenged. Good, a social anthropologist and Sri Lankan country expert, has argued that the Tribunal's insistence on obtaining objective evidence with regard to conditions in countries of origin is mistaken as it is impossible to assemble objective evidence free from any prior theoretical framework.⁸⁰ The Tribunal may dismiss an expert's report on grounds of bias because it implicitly assumes that the report does not conform with established notions of objectivity but from an expert's perspective merely expecting such objectivity is hopelessly naïve as experts necessarily operate within explanatory paradigms in which facts are interpreted.⁸¹ For Good, the key point is that lawyers take matters which have been established to the appropriate standard of proof to be facts in an absolute sense whereas for anthropologists, "facts" are products of a particular theoretical approach; the "truth" is always more provisional and contested than legal processes habitually acknowledge.⁸² While tribunal members are knowledgeable of specific country conditions, they lack the necessary expertise to interpret their cultural significance. From this perspective, the Tribunal is to be criticized for its double-standards: while country expert reports are often rejected for their alleged partiality, the Tribunal often relies the Home Office's country reports even though they are merely compilations by UK based civil servants with no expertise on the country concerned.

with fewer asylum cases as a proportion of its general casework, has been a recurrent theme in this jurisdiction.

⁷⁷ *GH v Secretary of State for the Home Department (Former KAZ – Country Conditions – Effect) Iraq CG* [2004] Imm AR 707, 727.

⁷⁸ *ibid.*, 726-727.

⁷⁹ *AZ v Secretary of State for the Home Department (risk on return) Ivory Coast CG* [2004] UKIAT00170, para.49.

⁸⁰ A. Good, "Undoubtedly an expert"? Country experts in the UK asylum courts" (2004) 10 *Journal of the Royal Anthropological Institute* 113; A. Good, "Expert Evidence in Asylum and Human Rights Appeals: an Expert's View" (2004) 16 *IJRL* 358; A. Good, *Anthropology and Expertise in the Asylum Courts* (2007).

⁸¹ Cf. T. Kuhn, *The Structure of Scientific Revolutions* (1996).

⁸² Good traces the differential approaches between the tribunal and country experts to the basic differences in the professional training of lawyers and social scientists and suggests that this dispute is only one aspect of the continuing power struggle between the judiciary and professional experts. See generally C.A.G. Jones, *Expert Witnesses: Science, Medicine and the Practice of Law* (1994); M. Redmayne, *Expert Evidence and Criminal Justice* (2001).

While questions of credibility and prospective risk are for the AIT alone to determine, a proper expert understanding of what may be a complex situation in a particular country may be essential if the risk assessment is to be made on the best available information. This may be especially the case when existing country information contains important omissions, is out of date or merely details recent empirical facts and not the underlying causes of a conflict. As the Court of Appeal has recently reminded the AIT, while it is not bound to accept an expert's view, it should provide an adequate explanation for not accepting it.⁸³

While the Tribunal has been reluctant to change its attitude toward experts, it has developed its own technique for providing its views on country conditions: country guideline (CG) determinations. These determinations have enabled the Tribunal itself to assess country conditions and provide authoritative guidance on the "line" to be adopted toward certain claimants. The Tribunal has, for instance, issued country guidance on such diverse issues as: the risk of persecution to Christian apostates on return to Iran; whether removal to face imprisonment in the Ukraine would breach Article 3; and the current risk to a former member of the Lord's Resistance Army in Uganda.⁸⁴ The AIT has utilised a number of different techniques for assessing risk. One technique is to state that no individual will qualify for protection unless there is a change of conditions in the country concerned or special circumstances can be shown in the individual case.⁸⁵ Another has been to identify factors to be taken into account when assessing the risk of persecution on return.⁸⁶ Another has been to identify certain categories of person at particular risk.⁸⁷

A good illustration of the complexity of fact-finding and decision-making, country guidance also demonstrates the continuing political and legal controversy attached to the assessment of risk on return. Consider the protracted issue surrounding the risks facing returned Zimbabweans.

⁸³ *K v Secretary of State for the Home Department* [2005] EWCA Civ 1627. See also *Jasim v Secretary of State for the Home Department* [2006] EWCA Civ 342.

⁸⁴ See *Secretary of State for the Home Department v FS and others (Iran – Christian Converts) Iran CG* [2004] UKIAT00303; *PS v Secretary of State for the Home Department (prison conditions; military service) Ukraine CG* [2006] UKAIT00016; *PN v Secretary of State for the Home Department (Lord's Resistance Army) Uganda CG* [2006] UKAIT00022. Current country guideline determinations are available from the AIT's website.

⁸⁵ See, e.g. *TJ v Secretary of State for the Home Department (Risk – Returns) CG Sri Lanka* [2002] UKIAT01869.

⁸⁶ See, e.g. *Secretary of State for the Home Department v IA HC KD RO HG (Risk – Guidelines – Separatist) Turkey CG* [2003] UKIAT00034; *HM v Secretary of State for the Home Department (Risk factors for Burmese citizens) Burma CG* [2006] UKAIT00012.

⁸⁷ See, e.g. *IN v Secretary of State for the Home Department (Draft evaders – evidence of risk) Eritrea CG* [2005] UKIAT001606; *KS v Secretary of State for the Home Department (Minority Claims – Bajuni – ability to speak Kibajuni) Somalia CG* [2004] UKIAT00271; *DW v Secretary of State for the Home Department (Homosexual Men – Persecution – Sufficiency of Protection) Jamaica CG* [2005] UKAIT000168; *AB and DM v Secretary of State for the Home Department (Risk categories reviewed – Tutis added) Democratic Republic of Congo CG* [2005] UKIAT00118.

Between 2002 and 2004, IND did not forcibly remove failed Zimbabwean applicants in light of the deteriorating situation in that country.⁸⁸ However, the government lifted its moratorium on removals because of concerns that it was acting as a pull factor for unmeritorious claims but again came under pressure to stop enforcing removals.⁸⁹ The AIT subsequently issued country guidance, drawing on expert evidence, that any failed applicant, however unmeritorious their claim, could not be safely returned. Moreover, this determination was highly critical of the Home Office's "alarming" lack of interest in the process by which failed claimants are forcibly returned and of a Home Office fact-finding mission to Zimbabwe which "may have had existing policy in mind rather more than the discovery of new facts."⁹⁰ The minister objected on the basis that this would leave the system open to abuse.⁹¹ After the Court of Appeal sent the case back to the AIT, the Tribunal reversed its position.⁹² Unsuccessful applicants returned involuntarily would not face a risk of persecution but the Tribunal did identify more specific risk categories.⁹³ Country guidance therefore highlights the Tribunal's role in influencing asylum policy.

While country guideline determinations enable the Tribunal to provide authoritative guidance on such issues, the principal motivating impetus behind the project has been the need to minimize inconsistency in the assessment of country conditions, for which the Tribunal had received criticism from the higher courts. In 1997, the Court of Appeal stated that it would be beneficial for the general administration of asylum appeals if the Tribunal gave its views on the general situation in a particular country; consistency in the evaluation of objective considerations is important to the integrity of the adjudication process.⁹⁴ While the Tribunal did provide such guidance, different tribunals continued to reach different conclusions on the same countries.⁹⁵ In 2003, the Court of Appeal again expressed "concern that the same political and legal situation, attested by much the same in-country data from case to case, is being evaluated differently by different

⁸⁸ Hansard HC Deb., vol.426, col.78WS, November 16, 2004 (Minister for Citizenship and Immigration).

⁸⁹ Hansard HC Deb., vol.435, cols.1023-1035, June 27, 2005.

⁹⁰ *AA v Secretary of State for the Home Department (Involuntary returns to Zimbabwe) Zimbabwe CG* [2005] UKAIT00144, paras.146 and 155.

⁹¹ See "Zimbabwe deportation policy in chaos after tribunal ruling", *The Times*, 15th October 2005.

⁹² *AA v Secretary of State for the Home Department; LK v Secretary of State for the Home Department* [2006] EWCA Civ. 401.

⁹³ *AA v Secretary of State for the Home Department (Risk for involuntary returnees) Zimbabwe CG* [2006] UKAIT00061. See also *SM and Others v Secretary of State for the Home Department (MDC – internal flight – risk categories) Zimbabwe CG* [2005] UKIAT00100.

⁹⁴ *Manzeke v Secretary of State for the Home Department* [1997] Imm AR 524, 529 (Lord Woolf MR) and 532 (Brooke LJ).

⁹⁵ For instance, in 2002 one tribunal panel, decided that a low level supporter of a Kurdish separatist political party would not face a real risk of persecution on return to Turkey (*Polat v Secretary of State for the Home Department* [2002] UKIAT04332); in 2003, a differently constituted panel arrived at exactly the opposite conclusion (*Hayser v Secretary of State for the Home Department* [2003] UKIAT07083).

tribunals.”⁹⁶ The principal reason for any inconsistency arises from the nature of the task: it is evident that different immigration judges may reach different conclusions concerning the risk of persecution when evaluating the same country evidence. The problematic nature of evaluating the significance of facts is further underlined.

The pragmatic solution of the country guideline determination has enabled the senior AIT judiciary to ensure like treatment of like cases by signalling the broad approach to be adopted by immigration judges toward certain nationalities and countries.⁹⁷ As the AIT has noted, country guideline determinations ensure that generally recurring factors relating to country conditions are periodically the subject of careful and authoritative assessment.⁹⁸ Conscious of the ever-present risk of multiple appeals further prolonging the decision-making process, the higher courts have been keen to legitimise this distinctive technique in the asylum fact-finding process because of its “very great importance...in achieving consistency in decision-making.”⁹⁹ For Laws LJ, while the notion of a factual precedent is “exotic”, in the context of the AIT’s responsibilities, the production of country guideline determinations is both “benign and practical” as it is an important function of the specialist tribunal to give such guidance.¹⁰⁰ The Tribunal must though ensure that its guidance “is effectively comprehensive.”¹⁰¹

The country guideline project has though not been unproblematic. First, while intended to reduce the risk of inconsistency, there is the pervasive risk that claims will not be considered on their own individual circumstances but on the basis of categorisation which undermines the principle of individualised risk assessment. An adverse country guideline determination may, for instance, lead to a refusal of legal aid, a certification by the IND that a claim is manifestly unfounded or the Administrative Court declining a judicial review challenge. Furthermore, country guideline determinations appear to detract from the need to assess risk on the basis of facts in existence at the date of decision: if asylum decisions should be reached on the basis of current and not historical facts, then the application of a previous country guideline determinations runs the risk of evaluating the reasonable likelihood of future persecution on out of date country information.¹⁰² The Tribunal has emphasized though that country guidance is not set in stone; the system does not have the rigidity of legally binding precedent but the

⁹⁶ *Shirazi v Secretary of State for the Home Department* [2004] 2 All ER 602, 611 (Sedley LJ).

⁹⁷ Country guideline determinations are determined by a legal panel of the AIT. In recognition of the importance to be attached to such determinations, Parliament has provided for a direct right of appeal to the Court of Appeal as opposed to a review by the Administrative Court, which is the remedy available from the determination of a single immigration judge. See the Nationality, Immigration and Asylum Act 2002, s.103E as inserted by the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, s.26.

⁹⁸ *KA v Secretary of State for the Home Department (draft-related risk categories updated) Eritrea CG* [2005] UKAIT00165, para.10.

⁹⁹ *R. (Iran) & Others v Secretary of State for the Home Department* [2005] INLR 633, 662 (Brooke LJ).

¹⁰⁰ *S & Others*, n.74 above, 435 (Laws LJ).

¹⁰¹ *ibid.*, 436 (Laws LJ).

¹⁰² See C. Yeo (ed.), *Country Guideline cases: benign and practical?* (2005).

flexibility to accommodate individual cases, changes in country conditions and fresh evidence.¹⁰³ Country guideline determinations are therefore not accurately understood as “factual precedents”. However, since 2005 the system has been formalised and country guideline determinations have a statutory underpinning; any failure to follow an apparently applicable country guideline determination is likely to be an error of law.¹⁰⁴ To what extent can country guideline determinations produce an agreeable compromise between consistency and the correct assessment of each individual appeal?

Secondly, the appropriateness of adversarial procedures for promulgating country guidance might be questioned especially when the guidance might be determinative of subsequent appeals. After all, representatives to the instant case may neither be able nor sufficiently prepared to present all the relevant country information raising the risk that the Tribunal’s guidance is not effectively comprehensive; the Tribunal has though made few steps toward a more proactive, inquisitorial approach.¹⁰⁵

Thirdly, there is the contested legitimacy of country guideline determinations. In seeking to justify its role in promulgating country guidance, the Tribunal has drawn upon the familiar and broader justification that, as a tribunal, it possesses its own specialist expertise.¹⁰⁶ According to a senior immigration judge, the Tribunal is “recognised as possessing its own level of expertise as a specialist tribunal, not only in the legal issues for its determination, but also in its knowledge of country situations”.¹⁰⁷ Elsewhere, the Tribunal has noted that it “builds up its own expertise in relation to the limited number of countries from which asylum seekers come.”¹⁰⁸ However, the concern here is that judicial declarations of expertise in country of origin information merely because Tribunal members have determined many asylum appeals may not be warranted and may become unjustifiably self-

¹⁰³ In *NM and Others v Secretary of State for the Home Department (Lone Women – Ashraf) Somalia CG* [2005] UKIAT00076, para.140, the Tribunal stated that applicable country guideline determinations should be followed unless: (i) there is evidence that circumstances have changed; (ii) significant new evidence shows that the views originally expressed require revision or refinement; or (iii) the passage of time or substantial new evidence warrants a re-examination of country conditions.

¹⁰⁴ Asylum and Immigration Tribunal, *Practice Directions* (2005), para.18.4. Under the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, Sch.2, para.22(1), the Tribunal’s practice directions may “require the Tribunal to treat a specified decision of the Tribunal as authoritative in respect of a particular matter.” According to the AIT, in *HGMO v Secretary of State for the Home Department (Relocation to Khartoum) Sudan CG* [2006] UKAIT00062, para.142: “[t]here is thus a statutory basis that underpins the CG system and which requires Country Guidance issues to be treated by all divisions of the Tribunal as authoritative.”

¹⁰⁵ For discussion, see A. Shah, “‘An Inquisitorial Quality’: are country guideline cases appropriate in an adversarial legal system?” in C. Yeo, n.102 above.

¹⁰⁶ See, e.g. Sir Andrew Leggatt, *Tribunals for Users – One System, One Service* (2001), para.1.12.

¹⁰⁷ J. Barnes, “Expert Evidence – the Judicial Perception in Asylum and Human Rights Appeals” (2004) 16 *IJRL* 349.

¹⁰⁸ *SK*, n.75 above, para.5.

reinforcing. The fact that the Tribunal has determined many asylum appeals from a particular country may equally induce a case-hardened approach which needs to be supplemented by expert evidence. For Good, Tribunal members are not, irrespective of claims to the contrary, experts on country conditions: the interpretation of facts is as important as the knowledge of facts, which is why specialist country expertise is so essential.¹⁰⁹ From this perspective, country guideline determinations are, absent greater input from professional experts, deeply problematic as the Tribunal lacks sufficient expertise with which to interpret the cultural significance of facts. The AIT has though yet to experiment with integrating country experts more fully into the country guidance process either through court appointed experts or a special advocate figure.

5. Risk and Adjudicative Legitimacy

Some general points might be distilled from the discussion so far. Asylum adjudication is a complex and intrinsically problematic form of case-management risk assessment requiring binary decisions within a highly political context. The ongoing controversy over who is a refugee arises from the lack of any external, objective standard against which to assess the correctness of decisions. As an adjudicatory norm, accuracy is simultaneously fundamental but also permanently elusive. From one perspective, this uncertainty is emblematic of the “asylum lottery” but from another perspective, it arises from the very nature of the risk assessment task inherent in asylum adjudication. At the level of individual decision-making this means that much may depend on the judgment of the decision-maker. As risk scholars have emphasized, any form of risk assessment, irrespective of context, is dependant upon the ascription of value, not just probability, to potential outcomes.¹¹⁰ In other words, decision outcomes are inevitably conditioned by the degree of weight decision-makers are willing to place on the protection of foreign nationals relative to that of maintaining immigration control. Such sentiments appear to be shared by some decision-makers themselves who have recognised that making the right decision on future risk can be very difficult but this itself raises the question what is meant by the “right” decision.¹¹¹

At the level of policy debate, the point familiarly made is that while the UK should accept genuine asylum applicants, the problem is with those non-genuine applicants who are misusing the process. The difficulty with this though is that, as the preceding discussion indicates, determining who is genuine and non-genuine is hardly self-evident. Having unpacked the task of adjudicating asylum claims, it can be seen that decisions are contingent on many and various different factors.

Given this context, how are we to assess and ascribe legitimacy to decision-making? It is here that the idea of competing models of adjudication is relevant as there are different understandings of legitimacy in this context of

¹⁰⁹ Good, n.80 above.

¹¹⁰ See M. Douglas and A. Widavsky, *Risk and Culture: An Essay on the Selection of Technological and Environmental Dangers* (1982), pp.80-81; J. Steele, *Risks and Legal Theory* (2004), p.25.

¹¹¹ Talbot, n.60 above, 31.

case-management risk. The tensions between IND, the AIT and experts may be viewed as a struggle between competing models – bureaucratic, legal and professional judgment – of adjudicative legitimacy. Each model illustrates a different and competing way of handing the risk assessment task. Furthermore, these models are highly competitive; achieving an agreeable compromise between their distinct values is difficult to attain and likely to appear to be incoherent. In other words, trade-offs between the competing legitimising values are inevitable. While this approach has been utilised to analyse administrative-legal decision-making systems, it also seems appropriate when focusing on case-management risk regimes.¹¹² As Fisher explains, disputes over risk are endemic and self-generating because the assessment of risk will always involve the assertion of one culture over another.¹¹³

The bureaucratic model, the purpose of which is to implement policy, prioritises the values of efficiency and accuracy. Whereas the AIT solely determines appeals regarding immigration status, IND is also concerned with the implementation of decisions either by granting some form of leave or enforcing removal. From this perspective, legitimacy stems from effective implementation of policy. By contrast, the legal model adopts a very different conception of legitimacy. As its principal goal is dispute resolution, the legitimacy of the legal model is derived from the operation of a fair and independent decision-making process. The goal of the professional judgment model is service to the client; asylum applicants are treated as patients requiring treatment through the application of specialist, professional knowledge. Identification of such models, however, raises questions as to both their appropriateness and operation.

The appropriateness of the bureaucratic model arises from the policy dimension of asylum adjudication. As there is legitimate public concern as to the integrity of immigration control, it is appropriate that the task of determining asylum claims be allocated to the public agency responsible to ensure the effective achievement of public goals. However, IND has experienced difficulties in achieving the bureaucratic model's promise of accurate and efficient decision-making and has been repeatedly criticised for variable decision-making quality making as well as its inefficiencies, delays and poor enforcement. The concerns here are familiar: decisions taken by low-level, poorly trained staff under immense pressure to turnaround claims quickly are unlikely to be of uniformly high quality.¹¹⁴ Furthermore, there are more general concerns that bureaucratic decision-making may exhibit its more pathological tendencies: the inclination toward rigid and narrow decision-making at the expense of the circumstances of individual cases and

¹¹² Competing decision-making models can be identified in other case-management risk contexts. See, e.g. J. Peay, *Tribunals on Trial: A Study of Decision-Making under the Mental Health Act 1983* (1989); N. Padfield, "The Parole Board in Transition" [2006] *Crim LR* 3.

¹¹³ E. Fisher, "The Rise of the Risk Commonwealth and the Challenge for Administrative Law" [2003] *PL* 455 at 470.

¹¹⁴ See House of Commons Home Affairs Committee, *Asylum Applications* (2003-04 HC 218), paras.118-145; Amnesty International, *Get it right: how Home Office decision-making fails refugees* (2004).

a focus on process and on politically driven organisational imperatives rather than quality.

To its credit, IND has instigated a number of initiatives designed to raise decisional quality including: (i) both internal and external quality assurance of initial decisions by the Treasury Solicitor; (ii) a quality initiative project with the UNHCR; (iii) a “new asylum model” under which a single case-worker is responsible for handling the same case throughout the whole process; and (iv) the Legal Services Commission is to pilot new arrangements which will “front-load” the provision of legal advice and assistance to ensure the reality of the shared duty to ascertain and evaluate facts through joint-working between representatives and IND.¹¹⁵ The purpose of getting more decisions right first time is to avoid lengthy and costly appeal proceedings; speedier and better quality decisions are of benefit not only to the public interest but also genuine claimants.

One particular issue of concern has been that as a directorate within the Home Office, IND has clearly been placed under considerable political pressure to process asylum claims as speedily as possible to reduce the opportunity for abusive claimants to prolong the determination of their claim. Moreover, ministerial rhetoric that many claims are abusive may provide a steer for the front-line decision-makers. Consequently, there have been repeated calls for the transfer of decision-making to an independent agency immune from such political pressure. Such a move, if taken, would represent a step away from the bureaucratic model toward the legal model. Ministers have though resisted this suggestion on the basis that they must retain ultimate political responsibility for decision-making while the courts have held that asylum decisions are excluded from the scope of the right to a fair trial under Article 6 ECHR and therefore need not be taken by a body independent of the executive.¹¹⁶ More recently, the Home Office has announced its intention to establish IND as an executive agency but it remains to be seen how this will affect the culture of decision-making.¹¹⁷

What of the further justification for the bureaucratic model: its focus on policy implementation? It is only the bureaucratic model that focuses on policy implementation rather than other values but there is again a mismatch between promise and performance. The removals process is under-resourced and there is a considerable backlog of failed applicants to be removed; “on current performance, it will take many years to remove failed asylum

¹¹⁵ National Audit Office, no.3 above, pp.41-43; UNHCR, *Quality Initiative Project: A UNHCR review of the UK Home Office Refugee Status Determination Procedures* (2005); Home Office, *Controlling our borders: making migration work for Britain* (Cm 6472, 2005), pp.35-36; Legal Services Commission, *Improving asylum decisions through early advice and representation* (2006).

¹¹⁶ *Maaouia v France* (2001) 33 EHRR 42; *MNM v Secretary of State for the Home Department (Surendran guidelines for Adjudicators) Kenya* (starred determination) [2000] INLR 576. Compare this approach to Article 6 ECHR with that adopted by the courts in the context of sentencing decisions, see *R. (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837.

¹¹⁷ Home Office, *Fair, effective, transparent and trusted: Rebuilding confidence in our immigration system* (2006).

seekers, undermining the whole asylum application process.”¹¹⁸ The tensions here between IND’s attempts to enforce removal and the legal model are evident: repeated criticism of its failure to remove, has prompted IND to engage in a more expedited, rushed removal process following long delays within its decision-making, which has also been criticised.¹¹⁹

The principal alternative to the bureaucratic model – the legal model – has some clear advantages. Individualised adjudication seems particularly appropriate for enabling individuals to participate in “yes-no” questions.¹²⁰ Furthermore, an independent appellate process can insulate decision-making from political pressures. The legal model can then ameliorate the concerns regarding decision-making quality by providing a fair, judicial process. At the same time, however, the legal model can increase costs and add delays which hinder effective implementation. Unsurprisingly, the legal model has then been particularly susceptible to changes introduced by the executive. Concerned at the length and cost of the appeal process, the government has reduced legal aid entitlement and continually reformed the appeal process to reduce delays.¹²¹ While the government’s notorious attempt to oust judicial review was aborted, onward rights of challenge from AIT decisions are more limited than in any other jurisdiction through short time-limits and retrospective legal aid arrangements.¹²² This in turn has put the legitimizing values of the legal model – independence and fairness – under particular

¹¹⁸ House of Commons Public Accounts Committee, *Returning failed asylum applicants* (2005-06 HC 620), p.4. See also National Audit Office, *Returning failed asylum applicants* (2005-06 HC 76); C. Phuong, “The removal of failed asylum seekers” (2005) 25 LS 117.

¹¹⁹ See *JM v Secretary of State for the Home Department (Rule 62(7); human rights unarguable) Liberia (Starred determination)* [2006] UKAIT00009, para.33: “A very small proportion of those who lose immigration and asylum appeals are ever subject to involuntary removal; when removal does take place it is often a very considerable time after the appeal decision.”; *R. (Collaku) v Secretary of State for the Home Department* [2005] EWHC Admin 2855, para.14: “The Home Office practice involving delay in deciding a claim but then of arresting and serving the refusal at one and the same time with a view to removal within a day or two, often at weekends and frequently early in the morning, is one that is to be deplored” (Collins J). There also continue to be examples of the Home Office removing applicants despite injunctions from the Administrative Court prohibiting removal: see, e.g. “Mother of three was deported after court ruled she could stay”, *The Times*, August 16, 2006.

¹²⁰ J. Jowell, “The Legal Control of Administrative Discretion” [1973] *PL* 178 at 198-199. For the same reason, alternative dispute resolution mechanisms, such as mediation or conciliation, would appear to have little, if any, potential role in this context.

¹²¹ See House of Commons Constitutional Affairs Committee, *Immigration and Asylum: the Government’s proposed changes to publicly funded immigration and asylum work* (2002-03 HC 1171); *Asylum and Immigration Appeals* (2003-04 HC 211); R. Thomas, “Evaluating tribunal adjudication: administrative justice and asylum appeals” (2005) 25 LS 462.

¹²² On the ouster clause, see R. Rawlings, “Review, Revenge and Retreat” (2005) 68 *MLR* 378. On the new review and reconsideration process, see House of Commons Constitutional Affairs Committee, *Legal aid: asylum appeals* (2004-05 HC 276); The Tribunals Service, *The AIT Review Report* (2006), chs 8 and 9; R. Thomas, “After the ouster: review and reconsideration in a single tier tribunal” [2006] *PL* 674.

strain. The Tribunal has come under great pressure to process appeals quickly. Novel aspects of this jurisdiction – legislative intervention with the Tribunal’s fact-finding role through section 8, the refusal to establish an independent documentation centre, non-suspensive appeals – threaten the perception of judicial independence. The actual workings of IND – variously described in the law reports as “verging on the contumacious”, “notoriously inefficient” and “a public disgrace” – have also presented real difficulties.¹²³ In the occasional extreme case, there has been “an unacceptable disdain by the Home Office for the rule of law”.¹²⁴ Moreover, in light of the politicised context of asylum, the legal model is under constant pressure to yield to the broader public and political perception that most claimants are in reality economic migrants. At the same time, it may be questioned whether the legal model possesses the appropriate expertise with which to assess country conditions.

What then of the professional judgment model? The argument in favour of this model is that experts, unlike IND caseworkers and immigration judges, possess specialist, expert judgment. Only country experts, it is argued, have the necessary knowledge with which to interpret the cultural significance of facts affecting the risk of persecution on return. From the perspective of this model, tribunal members are unable to claim expertise in country conditions or medical assessments because they lack the necessary knowledge and training, the influence of the professional judgment model has though been constrained. The Tribunal’s scepticism toward expert evidence is explicable on the basis that a move toward greater reliance on such experts would result in a concomitant reduction in the tribunal’s own control over the determination process. A greater role for medical expertise could – given a sympathetic doctor-patient relationship – result in more generous decisions as could reliance on country experts given claimants’ selection of experts with views favourable to their case.

Perhaps it is too easy to ascribe the Tribunal’s scepticism solely to its wish to retain influence over decision-making. Underlying the tension between the AIT and experts is a profound difference of method toward fact-finding. Experts are accustomed to making intuitive, professional judgments relying on their accumulated knowledge. For the Tribunal, this type of intuitive fact-collecting subject to professional judgment eschews precisely the systematized fact-finding procedures that the legal model values. The Tribunal is then highly sceptical of placing greater reliance on experts as it would result in decisions based on more subjective and intuitive modes of decision-making and therefore also more inconsistency and unpredictability.

¹²³ *Benkaddouri v Secretary of State for the Home Department* [2004] INLR 1, 3 (Sedley LJ); *M v Secretary of State for the Home Department (Chad)* [2004] UKIAT00044, para.4; *Secretary of State for the Home Department v Akaeke* [2005] Imm AR 701, 704 (Carnwath LJ).

¹²⁴ *R. (Karas and Miladinovic) v Secretary of State for the Home Department* [2006] EWHC Admin 747, para.87 (Munby J). For recent illustrations of IND’s “conspicuous unfairness” see, e.g. *R. (Rashid) v Secretary of State for the Home Department* [2005] Imm AR 608; *R. (S) v Secretary of State for the Home Department* [2006] EWCA Civ 1157.

There are also obvious concerns over the quality of some experts given the Tribunal's view that medical reports are often of variable quality and that country experts are not even self-regulated. The Tribunal has been able to limit the influence of medical experts by stressing that it is always ultimately for immigration judges to decide what, if any, weight should be attached to their evidence. Similarly, while country guideline determinations buttress a key legal principle – treat like cases alike – they may also serve to constrain the influence of country experts by ensuring that immigration judges follow the Tribunal's own assessment of country conditions rather than that of experts. The Home Office has only been prepared to make very limited concessions to professional treatment model by allowing country experts to comment on its country reports through the APCI while the Tribunal has been able effectively to limit the influence of medical and country experts.

In summary, the compromise between the competing models seems highly unsatisfactory. The bureaucratic model is the predominant model but suffers from inefficiency. The high risk nature of asylum adjudication seems to justify reliance on legal processes but the legal model has been constrained. Equally, both the bureaucratic and legal models have limited the influence of experts.

6. Conclusion

Asylum adjudication is quite unlike most other decision-making systems. Few other processes are regularly required to produce decisions which have such serious consequences for an individual; it is no exaggeration to state that in some cases, the life of the claimant will depend on the outcome reached. At the same time, the government has consistently argued that the decision process is unusual in that a small but significant minority of claimants seek to exploit the process in order to extend their stays in the UK for as long as possible. Few other systems are subject to such constant political and broader public pressure to succumb to the view that many, if not most, claimants are unmeritorious and are merely seeking to exploit and abuse the system; while there is sometimes social and media pressure for a criminal court to secure a conviction, this is at least an intermittent rather than a constant occurrence. Indeed, it might be argued that the pressures in the context of asylum adjudication are more prominent and potentially more damaging precisely because of the difficulties in gathering hard and reliable evidence as to the risks facing claimants.

It is unlikely that there is any simple panacea for the problems presented here. As an exemplar of case-management risk, asylum adjudication requires the decision-maker to assess prospective risk when the actual risks may be unknowable. Furthermore, enough has been said to demonstrate that the Home Office's management of the process has only compounded the problems. Placing immense pressure on decision-makers to ensure that claims are processed as quickly as possible has only served to heighten concerns as to the quality of decisions. Nevertheless, it is possible to advance the following suggestions as to how some of the difficulties might be ameliorated in practice.

First, the assessment of credibility. "Hard-law" measures such as section 8 seem far too blunt an instrument to be of assistance in the sensitive task of fact-finding and have rightly been criticised as an attempt to interfere with

this task in order to produce negative decisions for claimants. An obvious alternative is the utilisation of more appropriate “soft-law” techniques such as guidelines setting out best practice to provide guidance to decision-makers on how to approach the task of assessing credibility. To date, the AIT has only issued gender guidelines.¹²⁵ Why could not IND and the AIT agree guidelines on the assessment of credibility? Such guidelines would not, of course, resolve the difficulties associated with assessing credibility but they might provide a more appropriate framework for this task. Moreover, the guidelines could be augmented by good quality training to enhance decision-making.

Secondly, the quality of country information could be improved further. Here the Home Office’s stubborn refusal to establish an independent documentation centre presents an obstacle to improving the quality of country information. However, it might be asked: if the Home Office continues to maintain that its country reports are independent, what then is to be gained from its intransigence toward an independent documentation centre? Such a centre could be established on a statutory basis to collect and disseminate country information with input from all interested parties (Home Office, UNHCR and NGOs) and ensure independent analysis of country information. Equally, improvements could also be made at the Tribunal level. Country guideline determinations seem here to stay. If so, then surely this justifies either the establishment of a research unit within the AIT to compile extensive country materials or a court appointed expert to assist the Tribunal in providing comprehensive country guidance. In particular, there is a need for more mutual understanding between the Tribunal and country experts: little can be lost here if both seek to have a constructive dialogue concerning their respective roles in providing good quality country of origin material.

Thirdly, long overdue structural reform of the Home Office is now underway.¹²⁶ Establishing IND as an executive agency along with an independent immigration regulator might act as a catalyst for improving performance and accountability structures. Clearly the rate of removals needs to improve. The large-scale failure to remove failed applicants threatens to undermine the necessity for the risk assessment task. But at the same time, more could be done to monitor the safety of returnees. Why couldn’t UK overseas missions work together with NGOs and the International Organisation for Migration to monitor whether or not returnees face the persecution or ill-treatment for which they sought asylum?

While these proposals might improve asylum decision-making, it should not be forgotten that the uncertainties presented by the case-management risk assessment required by asylum adjudication are permanent and not transient obstacles. Ultimately, it is impossible to assess the correctness of decisions

¹²⁵ N. Berkowitz and C. Jarvis, *Gender Guidelines* (2000). By contrast, Canada’s Immigration and Refugee Board has issued various guidelines on *inter alia* assessing credibility and weighing evidence.

¹²⁶ See Home Office, n.117 above; House of Commons Home Affairs Committee, *Immigration Control* (2005-06 HC 775) and Home Office, *The Government Reply to the Fifth Report from the Home Affairs Committee on Immigration Control* (Cm. 6910, 2006).

where the “truth” is unknowable. As the evaluation of “facts” can be conditioned by the decision-maker’s own values, it behoves decision-makers to investigate and scrutinise their own predispositions as carefully as the factual basis of each asylum claim.

MOVING INTO THE MAINSTREAM: AN ANALYSIS OF REGULATORY RESPONSES TO IMPACT ASSESSMENT IN EQUALITY AND SUSTAINABLE DEVELOPMENT

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Introduction

Equality and sustainable development present two of the most complex challenges for government in the 21st century. The key to the achievement of these aims is the need to address discrimination and environmental damage in our society. The modern era of environmental protection and anti-discrimination legislation began in the 1970s with, for example, the Equal Pay Act 1970 and the Control of Pollution Act 1974. By the 1990s, however, the limits of this ‘control and command’ type legislation in both areas were clearly apparent,¹ and a number of positive legal duties to promote sustainable development and equality of opportunity were introduced.² These duties are important elements of a new approach to the implementation of ‘cross-cutting’ issues referred to as ‘mainstreaming’. There are many examples of ‘cross-cutting’ issues such as social justice and rural poverty but the leading examples of the ‘mainstreaming’ initiative are found in relation to the issues of equality and sustainable development.

‘Mainstreaming’ involves ensuring that an objective, such as equality or sustainable development, is integrated into policy-making throughout an organisation. Policy impact assessment is arguably, the central tenet of an effective system of ‘mainstreaming’, although there are many structural issues that will affect its success.³ Early examples of policy impact

* The authors would like to thank Patrick Bishop, Swansea University, School of Law and Professor David Miers at Cardiff Law School for their comments on earlier drafts. Any errors are, of course, our own.

¹ This term which is common in environmental law describes a process in which standards are put in place and subject to an ongoing process of regulation by an administrative agency. The basic tenets of such a system can also be seen to apply to anti-discrimination legislation. See further Wolfe and Stanley *Principles of Environmental Law* (2002) at 7-10.

² E.g. the duty in the Race Relations (Amendment) Act 2000 to have due regard to the need to eliminate racial discrimination and promote equality of opportunity and good relations between people of different ethnic groups and the duty of the Environment Agency to contribute to the achievement of sustainable development. See generally on equality O’ Cinneide *Taking Equal Opportunities Seriously: the extension of positive duties to promote equality* (2003) and on sustainable development Jenkins “Placing Sustainable Development at the Heart of Government in the UK: the role of law in the evolution of sustainable development as the central organising principle of government” (2002) 22(4) *LS* 578-601.

³ See further in the context of sustainable development for example, Ross “The UK Approach to Delivering Sustainable Development in Government: A Case Study

assessment in both fields relied on ‘soft law’ mechanisms; the success of which relied on a strong system of political accountability in which decision makers would be held to account by senior managers and politicians. In practice, these regimes often failed to attract high level political support and were heavily criticised for a lack of accountability. In some instances however, accountability was achieved by a process of audit. The extension of audit as a mechanism of accountability from its traditional use in the financial sphere to the social and environmental context is well documented.⁴ The relative merits of such an approach have also been discussed,⁵ but the main difficulty in relation to the early examples of policy impact assessment was the quality of the audit process itself. In contrast, more recently moves have been made in the field of both equality and sustainable development to introduce a policy impact assessment regime in ‘hard law.’

This paper will explore the nature and value of the regulatory response to impact assessment by considering two key examples - strategic environmental assessment (SEA) and equality impact assessment (EQIA). These two regimes emerged at different times and in very different circumstances. SEA was introduced by an EU Directive, in 2004, and involves environmental impact assessment of plans and programmes. It has however, been clearly linked to the achievement of sustainable development.⁶ It expands upon the existing regime for environmental impact assessment at project level (EIA), introduced in 1988, which was the first legal regime to attempt to regulate the discretion of decision makers. EQIA was introduced by the Northern Ireland Act 1998 as part of the process of devolution in the UK. This has consequently been elevated to a constitutional requirement.⁷

Definitional Issues and Legal Approaches to Equality and Sustainable Development

In defining equality a distinction has been made between the principle of equal treatment and that of equal opportunity.⁸ The principle of equal treatment is believed to underlie early anti-discrimination legislation that outlawed direct discrimination. The problems with this approach resulted in a new wave of action to tackle indirect discrimination under the principle of

in *Joined-Up Working*” (2005) 17(1) *JEL* 27-49 and Equal Opportunities Commission *Mainstreaming Equality* (2003).

⁴ Hollingsworth “Environmental Monitoring of Government – the Case for an Environmental Auditor” (2000) 20(2) *LS* 241-263, at 246.

⁵ Oliver *Constitutional Reform in the UK* (2003) at 54.

⁶ Art.1 Directive 2001/42 of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment states that its objective is “to provide for a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation adoption of plans and programmes with a view to promoting sustainable development”.

⁷ See *Robinson v Secretary of State for Northern Ireland* [2002] 32, especially Lord Bingham and Lord Hoffman: The Northern Ireland Act 1998 is a constitutional document so must be interpreted against its background, *i.e.* the political situation in NI and the Good Friday Agreement

⁸ Fredman, *The Future of Equality in Britain* (2002), Chap.2.

equality of opportunity. This concept is, arguably however, only useful if understood in a substantive sense that “requires measures to be taken to ensure that persons from all sections of society have a genuinely equal chance of satisfying the criteria for access to a particular social good.”⁹ Therefore, although anti-discrimination laws have made an important contribution to the achievement of equality, such laws have proved to be limited in many respects. Subsequently, calls have been made to provide a new concept of equality, integral to which is “the positive duty to promote equality, through such strategies as mainstreaming and positive action.”¹⁰

The relationship between the notion of environmental protection and that of sustainable development is similar to that of discrimination and equality, in that early laws focusing on environmental protection have proved insufficient in moderating the relationship between humans and nature. Early environmental laws focused on the protection of the environment from the use of natural resources in human development and was characterised by a bid to plan the management of nature.¹¹ Recognition of the limitations of this approach led to the search for new means to understand the relationship between development and environmental protection. This search ultimately resulted in the emergence of the concept of sustainable development. Sustainable development was originally defined by the World Commission on Environment and Development in 1987 as:

“Development that meets the needs of current generations without jeopardising the ability of future generations to meet their own needs.”¹²

The need to protect the environment is based on the principle of inter-generational equity. The sustainable use of environmental resources and control of pollution are fundamental to the achievement of sustainable development but it is argued that environmental sustainability can only be achieved by a careful balance of social, economic and environmental considerations. Sustainable development can, therefore, be viewed as an overarching aim of society that actually incorporates the need to achieve equality.

Equality and sustainable development are both controversial notions because they conflict with the basic values of liberty and modern economic concerns, yet there is also widespread agreement about their importance in modern society.¹³ They have both been described as protean concepts and are clearly

⁹ Fredman *Discrimination Law* (2002) at 15.

¹⁰ *Op. cit.* 8.

¹¹ Winter “Perspectives for Environmental Law – Entering the Fourth Phase” (1989) 1(1) *JEL* 38-47 at 40.

¹² World Commission on Environment and Economic Development *Our Common Future* (1987). It is used as the key definition with the UK Government’s national strategy for sustainable development *Securing the Future: Delivering the UK Sustainable Development Strategy* (2005) Cm. 6467.

¹³ *Op. cit.* 9 at 2 and 23-26. With regard to sustainable development, Redclift has noted that “‘Sustainable development’ remains a confused topic. Like motherhood and God, it is difficult not to approve of it. At the same time, ‘sustainable development’ is fraught with contradictions.” Redclift M. and Sage C., *Strategies for Sustainable Development: Local Agendas for the Southern Hemisphere*, (1994) at 17.

influenced by individual value judgements.¹⁴ Therefore, they are essentially contested concepts, which may be difficult to utilise in a legal environment in which definitional issues are paramount.¹⁵ Nevertheless, as outlined above, a number of positive legal duties exist in respect of equality and sustainable development.¹⁶ The nature of these duties has been considered in detail elsewhere.¹⁷ At the very least, these general duties are believed to have value as political statements which can be important in trying to engender the necessary culture change within a government office in order to achieve these aims.¹⁸ Nevertheless, this process is unlikely to be wholly successful without the support of an effective means of mainstreaming such objectives within the organisation. Therefore, it has been argued in the context of equality that general duties will be most effective where they are supported by specific legal requirements to support measurable policy impact assessment.¹⁹

The Role of Policy Impact Assessment in Regulating Government Decision Making

Equality and sustainable development are both described as ‘cross-cutting’ policy issues because they are not easily addressed by traditional approaches to policy making in departmental government.²⁰ ‘Joined-up government’ is defined as:

“relating to, or designating a political strategy which seeks to co-ordinate the development and implementation of policies across government departments and agencies, especially with the aim of addressing complex social problems such as social exclusion and poverty in a comprehensive, integrated way.”²¹

Policy impact assessment (PIA) was considered to be an important tool in addressing “cross-cutting issues” and in 1999 the White Paper “Modernizing Government” made a commitment to introduce an integrated system of impact assessment and appraisal tools.²² However, PIA is widely considered

¹⁴ See for example the observations of Mcleod J. in the case of *Fairlie* “the concept of sustainability is comparatively new to the environmental field, is protean in meaning and extremely difficult to define in any precise sense” *Fairlie and others v SS for Environment and Another* (1997) CA 12.05.97. The individuals making these values judgments are those whose judgments matter to the approach to equality and sustainable development: judges, politicians, government officials, international and non-government organisations etc.

¹⁵ See further *op. cit.* 2.

¹⁶ *ibid.*

¹⁷ *ibid.*

¹⁸ Jenkins *op. cit.* 2 and O’ Cinneide “Positive Duties and Gender Equality” (2005) 8(1) *IJDL* 91-119.

¹⁹ O’ Cinneide *ibid.*, at 9.

²⁰ During the 1990s the need for ‘joined-up government’ was central to the Labour government’s agenda for modernizing government that was so prominent on its accession to power. See further Bogdanor *Joined-Up Government* (2005) at 178-180.

²¹ Oxford English Dictionary quoted in Bogdanor *ibid.*, at 1.

²² *Modernizing Government* (1999) Cm. 4310 at para.12.

to be a necessary but not sufficient condition for mainstreaming.²³ Such regimes need to be supported by other measures such as institutional structures, hence the UK government has both a Women and Equality Unit and Sustainable Development Unit in Whitehall.²⁴ The aim of this paper however, is to focus more narrowly on the role of impact assessment as a tool within this process.

The process of PIA can provide an important mechanism for ensuring transparency, accountability and participation in government decision making, which are all key objectives of the Government's good governance agenda.²⁵ The opportunities presented by PIA for ensuring public participation in government decision making also play a significant role in moving towards a model of participative democracy as another important element of recent constitutional reform in the UK.²⁶ The system of PIA will clearly however, only achieve its objectives if it is applied in a systematic and effective way. This in turn presupposes an effective means of monitoring and accountability albeit public, political or legal.

The Initial Response to PIA – A ‘Soft Law’ Approach

Environmental policy appraisal (EPA) was originally introduced in 1990 in response to the UK's first environmental strategy - *This Common Inheritance*,²⁷ and was later identified as an important element of the Conservative Government's strategy for sustainable development.²⁸ On its accession to power, the Labour government continued this process by publishing a revised policy appraisal document.²⁹ Furthermore, a Parliamentary Environmental Audit Committee (EAC) was established to scrutinise the policies and programmes of all departments of government to ensure that they were contributing to environmental protection and sustainable development, and to audit their performance against Ministerial

²³ Nott "Accentuating the Positive: Alternative Strategies for Promoting Gender Equality" in *Making Women Count* (2000) 247-276 at 271.

²⁴ See further Ross *op. cit.* 3 and Beveridge "Making Women Count" in *ibid.*, 163-190 at 185.

²⁵ *Op. cit.* 5 Chap.3.

²⁶ *ibid.*, at 35-38. More recently discussion has focused on 'deliberative democracy'. This is described as a 'variant' of participatory democracy. "It envisages that citizens will actively discuss together and with officials the solutions to problems. The purpose again is to enable a learning process to take place in the citizenry that will improve understanding of the complexities of decisions that government has to take which will help legitimate decisions. Agreement on important values can also emerge from the process." *Op. cit.* 5 at 35.

²⁷ Also introduced at this time was a network of 'green ministers' to provide a point of contact on environmental issues in all departments and a standing committee of cabinet ministers to consider how the issues raised in the White Paper should be taken forward. *This Common Inheritance: Britain's Environmental Strategy* (1990) Cmnd. 1200.

²⁸ *Sustainable Development: The UK Strategy* Cm. 2426 (1994). This was a response to United Nations Conference on Environment and Development that created a global action for sustainable development – Agenda 21. This was to be supported by individual national action plans.

²⁹ *Policy Appraisal and the Environment* (1998).

targets.³⁰ The existence of the EAC was widely heralded as an important development in efforts to ensure the success of this initiative,³¹ but has been criticised as follows:

“The EAC is . . . providing a high level scrutiny role, as is befitting of a parliamentary committee. What it has not done is systematically review the extent to which individual departments are integrating the environment into policy making . . .”

The EAC believes that this weakness in its role should be strengthened by the establishment of an Environmental Auditor General within the National Audit Office to mirror the arrangements for performance audit of public spending.³² This view is supported by academic opinion, but the UK Government’s response was lukewarm.³³

The first guidelines on Policy Appraisal and Equal Treatment (PAET) were also introduced in the UK in the 1990s.³⁴ These guidelines outlined how the impact of policies on a wide number of disadvantaged groups should be considered but were not supported by any form of audit.³⁵ The guidelines on PAET were introduced at the same time as the Northern Ireland guidelines on Policy Appraisal and Fair Treatment (PAFT), but the background to the introduction of PAFT is very different. The question of equality has consistently been a contested part of the political landscape of Northern Ireland since its creation in 1922. It is generally agreed that the recent conflict was in large part triggered by the discrimination suffered by the minority Catholic population, both in political and economic terms,³⁶ and the legislative response has traditionally focused primarily on political and religious discrimination in government and employment. PAFT followed the limited impact of measures such as the Fair Employment Act 1976 to address the inequality prevalent in the province. However, the guidelines on PAFT also addressed discrimination against a number of disadvantaged groups. It included a limited form of monitoring as an annual report by the Central Community Relations Unit. The lack of an effective monitoring regime and means of accountability under both PAFT and PAET was the subject of much criticism.³⁷ On the failure of PAFT, strong calls were made for the introduction of a regulatory response to this issue rather than a more

³⁰ For further analysis of the work of the EAC see Ross “Greening Government - Tales From the New sustainability Watchdog” (2000) 12(2) *JEL* 175-196. .

³¹ *Op. cit.* 4 at 245.

³² *Environmental Audit: The First Parliament* (Session 2000-2001) HC 67-I.

³³ *Government’s response to the Environmental Audit Committee’s Report on Environmental Audit: The First Parliament* (2001). For further information on the academic debate see *op. cit.* 4.

³⁴ For the most recent version see *Policy Appraisal for Equal Treatment* (1998).

³⁵ Beveridge *op. cit.* 24.

³⁶ See McKeever *et al.*, “Thinking Globally, Acting Locally; Enforcing Socio-Economic Rights in Northern Ireland” [2004] Vol.2 *EHRLR* 166 and Ni Aolain *The Politics of Force Conflict Management and State Violence in Northern Ireland* (2000).

³⁷ McCrudden “Equality” in Harvey *Human Rights, Equality and Democratic Renewal in Northern Ireland* (2001) 75-113 at 82 and *op. cit.* 23.

effective means of monitoring and auditing progress.³⁸ This resulted in the provisions of the Northern Ireland Act 1998 to be discussed below.³⁹

As we move into the 21st century, both the Northern Ireland and UK governments have begun to adopt an integrated approach to policy appraisal. As outlined above, in 1999 the White Paper on Modernizing government made a commitment to introduce an integrated system of impact assessment and appraisal tools.⁴⁰ This initiative was specifically linked to the need to achieve sustainable development.⁴¹ Initially, this took the form of a 'policy makers' checklist' of impact assessment and appraisal tools, and sources of guidance. As outlined above, equality is an important element of the achievement of sustainable development, hence the sources of guidance included both EPA and PAET.⁴² A similar approach was adopted in Northern Ireland and the sources to be considered include reference to the statutory duties in relation to equality impact assessment under the Northern Ireland Act 1998.⁴³ More recently, as part of its revision of the sustainable development strategy, the Government has made moves to incorporate the system of integrated policy appraisal within the existing regime for Regulatory Impact Assessment (RIA).

Traditionally, RIA has measured only the financial costs and benefits of policy proposals, but the current advice provides that it should now be considered as the main tool for integrating sustainable development into central government policy. Hence, RIA must also *always* take into account the whole lifecycle costs, the human rights implications and an assessment of both the rural impacts and race equality impacts. Other assessments, such as reference to EPA, are decided on a case by case basis.⁴⁴ There is a real danger, therefore, that, despite the new guidance, social and environmental considerations will simply be given lip service in the interests of economic efficiency. Indeed, the EAC has expressed serious doubts as to whether the system of RIA alone will ensure that "appraisal processes take sufficient

³⁸ *ibid.*, McCrudden at 86.

³⁹ More recently in line with developments in the EU, attention has focused on gender impact assessment. The EU has traditionally placed special emphasis on gender equality because equal treatment for men and women in respect of employment has been a key consideration of the EC since its inception in 1957. Equality more generally, and equality for men and women outside the occupational sphere, only surfaced within the EC Treaty in the late 1990s under the Treaty of Amsterdam. Current progress on gender mainstreaming is outlined in the Commission's framework strategy on gender equality Commission of the European Communities *Towards a Community Framework Strategy on Gender Equality (2001-2005)*.

⁴⁰ *Op. cit.* 22 at para.12.

⁴¹ *ibid.*

⁴² The list covered sustainable development; scientific evidence; risk; the Human Rights Act; the EU dimension; regulatory impact assessment; environmental appraisal; rural proofing; equal treatment; health; health and safety and consumer impact. *Policy Makers Checklist: Using Impact Assessment and Appraisal – A Toolkit* (1999).

⁴³ *Integrated Impact Assessment in Northern Ireland* available at <http://www.ofmdfmi.gov.uk/iia>.

⁴⁴ *Checklist for Policy Makers* (2005).

account of environmental priorities.”⁴⁵ Nevertheless, the system of RIA has an effective monitoring regime with scrutiny by both the Better Regulation Executive within the Cabinet Office⁴⁶ and the National Audit Office.

The Regulatory Response to Impact Assessment: Strategic Environmental Assessment (SEA) and Equality Impact Assessment (EQIA)

SEA

The SEA regime was introduced in the UK in response to an EU Directive. The central tenets of the systems of environmental impact assessment under this regime are as follows:

- The regulations apply to plans and programmes that set the framework for future development consents. There are two categories of such plans and programmes. If the framework created by the plan or programme relates to development consents for a project listed in the Directive, an environmental impact assessment is mandatory. If the framework created by the plan or programme relates to any other type of project, an assessment is only required if the project is “likely to have significant effects on the environment.”⁴⁷
- Where an impact assessment is required it takes the form of an environmental statement identifying, describing and evaluating the likely significant effects on the environment of the project, plan or programme and reasonable alternatives.⁴⁸
- The draft environmental report must be the subject of consultation with the public and environmental authorities.⁴⁹
- The environmental report and all results of the consultation must be taken into account before a decision is made on a project.⁵⁰

The SEA regime is, in fact, an extension of the regime for environmental impact assessment (EIA) that is carried out at project level and was first introduced in 1988.⁵¹ At this time, EIA was considered to be a unique form

⁴⁵ *The Sustainable Development Strategy: Illusion or Reality?* Session 2003-2004 Vol.1 HC 624-IP.37 at 38.

⁴⁶ The name of this unit has changed many times most recently, in May 2005, from the Regulatory Impact Unit to the BRE. However, the remit has remained largely the same and dates back to the creation of the Deregulation Unit under the Conservative Government’s drive to reduce legislative burdens on small businesses and increase competitiveness during the 1980s.

⁴⁷ Art.5 Environmental Assessment of Plans and Programmes Regulations 2004 SI 1633. These regulations are accompanied by non-statutory guidance - OPDM A *Practical Guide to the Strategic Environmental Assessment Directive* (OPDM, 2005).

⁴⁸ *ibid.*, art.12.

⁴⁹ *ibid.*, art.6.

⁵⁰ *ibid.*, art.8.

⁵¹ The original EIA Directive, negotiations on which actually started in the late 1970’s, was inspired by the introduction of EIA under the National Environmental Policy Act 1969 in the USA. Interestingly, the first draft of the Directive applied

of regulation setting out as it does a procedure for decision making.⁵² It was not without controversy in the UK and was implemented largely through the planning system.⁵³ Procedurally, the most important difference is that the statement of environmental impacts is produced by the developer, a private interest. It has been argued that in case of EIA, where the person creating the environmental statement is a developer, and that person has a great deal of discretion in doing so, the process can actually serve to legitimize their interests. In the process of policy assessment the person creating the statement is the public authority, which may have as much interest in legitimizing its position and is now both information gatherer and decision maker. Furthermore, SEA itself is not strictly a form of *policy* impact assessment as in the example of EQIA. The differences between policies, plans and programmes have been identified as follows:

“The policy is the inspiration and guidance for action, the plan provides for the co-ordination and timing of objectives and the programme sets out the projects to be implemented.”

The differences between policies and projects are even greater:

“In practice . . . policies and projects do differ in terms of the wider ranging impacts from policies compared to projects, the greater uncertainty of policy impacts, and the probable smaller chance of being able to quantify policy impacts. In turn, if policies go wrong they are likely to have wider impacts

not just to projects but policies, plans and programmes. This was met with considerable political pressure and, hence, the final version applied only to projects. As a result, the focus of the Directive is on land-use and spatial planning. Almost as soon as the original Directive on EIA was passed, the Commission continued to push for an extension of EIA to policies, plans and programmes. This was considered to be a logical extension of EIA that was, by its very nature, reactionary, and failed to adequately consider the cumulative impacts of projects or the issue of alternatives. Once more the original SEA Directive was drafted to include policy impact assessment, but succumbed to political pressure. See further Sheate “From Environmental Impact Assessment to Strategic Environmental Assessment: Sustainability and Decision Making” in Holder *The Impact of EC Environmental Law in the UK* (1997).

⁵² Holder *Environmental Impact Assessment: The Regulation of Decision Making* (2004) at 244.

⁵³ Council Directive 85/337 on the Assessment of the Effects of Certain Public and Private Projects on the Environment. See further Zetter *Environmental Impact Assessment: Has it had an Impact?* in Holder *op. cit.* 51. The original EIA Directive was amended in 1998 to deal with some of the difficulties that arose in the relation to the original Directive and to comply with the EU's accession to the Aarhus convention on public participation and access to justice. Council Directive 97/11 amending Directive 85/337 on the assessment of the effects of certain public and private projects on the environment and Directive 2003/35 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337 and 96/61. The EIA Directive is therefore, currently implemented by the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 SI 293. Guidance on the procedures is found in Circular 02/99.

whereas projects . . . may fail and not have major feedback effects . . .”⁵⁴

However, all these forms of impact assessment use similar techniques and, indeed, the problems that have been encountered in implementing SEA and project impact assessment are recognised to be very similar.⁵⁵

EQIA

The failure of the PAFT guidelines to have a real impact on government policy-making, as outlined above, was influential in calls for the negotiations for a political settlement to include rights and equality as essential constituents for any agreement.⁵⁶ The Northern Ireland Act 1998 subsequently included a duty to promote equality of opportunity that became applicable from 1st January 2000.⁵⁷ It is arguably the most advanced form of ‘mainstreaming’ equality within the UK, and shifts the emphasis from addressing individual discrimination to focusing on the societal impact of inequality against a background of division and conflict.

Section 75 (1) of the Northern Ireland Act 1998 provides that a public authority shall, in carrying out its functions relating to Northern Ireland, have due regard to the need to promote equality of opportunity:

- between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation;
- between men and women generally;
- between persons with a disability and persons without; and
- between persons with dependants and persons without”

The implementation of this general duty is outlined in Schedule 9 of the 1998 Act. Under the schedule a public authority is under a duty to produce an equality scheme, which is then submitted to the Equality Commission for approval.⁵⁸ The scheme must demonstrate how the authority proposes to fulfil the duty imposed by section 75 of the Act, including, *inter alia*, the arrangements for assessing and consulting on the likely impact of policies adopted or proposed.⁵⁹ The requirements of the legislation are reinforced by statutory guidelines from the Equality Commission.⁶⁰

⁵⁴ *Review of Technical Guidance on Environmental Appraisal* at para.2.

⁵⁵ Glasson *et al* *Introduction to EIA: Principles and procedures - process, practice and prospects* (1994).

⁵⁶ Examples of policies that were affected by a PAFT appraisal were limited. See further Hadden *et al* “Equal But Not Separate: Communal Policy Appraisal” (1998) *Fortnight supplement* 371.

⁵⁷ Northern Ireland Act 1998.

⁵⁸ *ibid.*, sch.9, para.2, 3.

⁵⁹ *ibid.*, sch.9 para.4 (b).

⁶⁰ Equality Commission for Northern Ireland *Section 75 of the Northern Ireland Act 1998: Guide to the Statutory Duties* (2005). The Equality Commission is responsible for monitoring the implementation of the non-discrimination legislation as well as the statutory duties.

Regulatory Responses to Impact Assessment: Developing an Analytical Framework

In assessing the regulatory response to impact assessment this paper will consider the potential success of the enforcement mechanisms associated with these legal regimes in ensuring the proper application of the law. However, the success of these regimes also depends upon the development of an effective framework for impact assessment in the first place. There are five key issues to consider in this respect – the political environment; screening and scoping; staff training; consultation; and, transparency and monitoring.

The Political Context

PIA is a complex process in which the person carrying out the process maintains a great deal of discretion. Furthermore, any legal regime for impact assessment does not operate in a vacuum but is heavily influenced by the political environment. Guidelines, statutory or otherwise, can lay down the assessment procedure to be followed by the assessor but even if the assessor carries out all the steps laid down the quality of decision making cannot be assured. In other words, there is always a danger that the process will simply become a ‘tick and bash’ procedure.⁶¹ Paradoxically, the impact assessment procedure itself can act as an important means of bringing about the ‘culture change’ necessary to avoid this.⁶² There are certain elements of the regime that are particularly important in engendering this culture change such as providing a clear objective.

As outlined above, both equality of opportunity and sustainable development are inherently difficult to define. The following section on compliance and enforcement will highlight the difficulties that have been encountered in attempting to adjudicate the meaning of equality of opportunity in the context of section 75 of the Northern Ireland Act 1998.⁶³ The EU Directive on SEA states that its objective is “to provide for a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes with a view to promoting sustainable development”⁶⁴ There is nevertheless, some academic disagreement as to the effectiveness of SEA as a tool for

⁶¹ Rees *Mainstreaming equality in the European Union: education, training and labour market policies* (1998) at 191-192.

⁶² *Op. cit.* 52 at 282.

⁶³ Some attempt to have been made to analyse the concept in this context by McCrudden who concludes that “the concept of equality of opportunity in section 75, as interpreted by the authoritative statutory body and consistent with the approach to the meaning of equality of opportunity in other areas of Northern Ireland and EC law, . . . incorporates but goes beyond any of the limited concepts of discrimination . . . section 75 involves not only a duty . . . to eliminate discrimination . . . but actively to take steps to promote greater equality of opportunity.” McCrudden “Mainstreaming Equality in Northern Ireland 1998-2004: A Review of Issues Concerning the Operation of the Equality Duty in section 75 of the Northern Ireland Act 1998 in McLaughlin and Faris, *The Section 75 Equality Duty – An Operational Review Vol.1* (2004) at 18-19.

⁶⁴ *Op. cit.* 6.

achieving sustainable development.⁶⁵ However, the procedural objective of the SEA regime in identifying and describing the environmental impacts of a plan or programme are undoubtedly easier to deal with in definitional terms than the objective of sustainable development.

Screening and Scoping

There are two key stages in the process of impact assessment – screening and scoping.

In any system of impact assessment, for reasons of practicality, there has to be a system of screening to identify the projects, plans, programmes or policies that are most likely to have a significant impact. Nevertheless, the screening process creates an obvious avenue for abuse of the system:

“Public authorities might take advantage of this to evade impact assessments of the most difficult issues, or might screen out policies simply because they did not identify any problem that needed to be considered further because of the absence of statistical data, even when others would.”⁶⁶

Scoping refers to the content of the impact assessment report after screening has revealed a report is needed and this is crucial to the process of environmental assessment. The statement should provide good quality information on environmental/equality impacts that specifically discusses alternative options and, indeed, the possibility of no action. Where negative impacts are found it should also provide details of the measures that can be taken to mitigate these.

Providing the right level of detail in relation to the processes of screening and scoping is a difficult issue. Both the PAET guidelines and guidance on EPA were revised to reduce the level of detailed advice. In the case of PAET this has been described as lamentable,⁶⁷ but in the case of EPA it has been welcomed. With regard to EPA, it was felt that less detailed guidance was more appropriate for senior management that require “a robust yet more impressionistic account of environmental impacts of policy measures.”⁶⁸ In developing a regulatory response to PIA, a careful balance must be achieved between the need for clear guidance as to how to assess key impacts and concerns to avoid “the imposition of excessive, alienating and throttling bureaucratic requirements.”⁶⁹ Also important in this respect is the quality of staff training to ensure that the guidance is used and applied effectively.

⁶⁵ Glasson et al believe that “SEA is . . . likely to be one of the most direct and effective ways of ensuring that human activities are carried out at a level that is environmentally sustainable over time.” *Op. cit.* 55 at 313. However, Therivel *et al* believe that the system of SEA will result simply in the extension of green policies rather than ensuring that sustainable development is considered to be the central objective in all plans and programmes Therivel *et al* *Strategic Environmental Assessment* (1992). The OPDM guidance on SEA does not address this question but does provide some information on the nature of the concept of sustainable development *op cit* 47 at 20.

⁶⁶ *Op. cit.* 63 at 8.

⁶⁷ *Op. cit.* 23 at 266.

⁶⁸ DETR Review of Technical Guidance on Environmental Appraisal (1999).

⁶⁹ *Op. cit.* 18 at 9.

Screening

The approach in SEA is to produce lists of plans and programmes for which assessment is mandatory but to subject others to a test of “likely significant effects on the environment.” The latter is very difficult because it basically requires a preliminary assessment of the effects of a measure. There are a number of detailed criteria laid out in the regulations which must always be taken into account in carrying out the screening process,⁷⁰ but no further details are provided in the guide to SEA.⁷¹

With reference to EQIA the guidance states that *all* policies are to be screened in order “to identify those policies that are likely to have a significant impact on equality of opportunity so that greatest resources can be devoted to these.”⁷² It includes both mandatory screening criteria and suggests the use of indicators in making such decisions. These set out four questions that must be asked:

- is there any indication or evidence of higher or lower participation or uptake by different groups?
- is there any indication that different groups have different needs, experiences, issues and priorities in relation to the policy?
- is there any indication that previous consultations indicate particular policies create problems specific to them?
- is there an opportunity to better promote equality by altering the policy?

If the answer to any of these is yes, the authority must consider if the policy should be subject to an EQIA.⁷³ The circular on EIA also includes indicative criteria and thresholds that provide broad indications of the type or scale of development that is likely to fall within the definition. The experience here demonstrates the problems associated with this approach as the original thresholds had to be revised following allegations that some were arbitrary and/or set very high.⁷⁴

In fact the most difficult questions in respect of the initial stages of the EQIA process have been experienced in identifying “which parts of a designated

⁷⁰ S.9(2) and Sch.1 *op cit* 47. These criteria focus on the characteristics of and plans and programmes themselves, including the relevance of the plan or programme for the integration of environmental considerations in particular with a view to promoting sustainable development. It also includes the effects, such as the risks to human health, and the cumulative nature of the effects; the area likely to be affected, such as the magnitude and spatial extent of the effects; and the value and vulnerability of the area due to special natural characteristics/cultural heritage, the exceedance of environmental quality standards or limit values and intensive land use.

⁷¹ *Op. cit.* 47.

⁷² *Op. cit.* 60 S.4, para.3(a).

⁷³ S.4, para 3(a) (ii) *ibid.*

⁷⁴ See further Circular 02/99 *op. cit.* 53 and Moore, *A Practical Approach to Planning Law* (2000) at 244. This circular was in fact revised when the original EIA Directive was amended but despite the subsequent changes problems still remain. See further Stookes “Getting to the Real EIA” (2003) JEL 15(2) 141-151 at 147.

public authority's work constitute 'a policy' for the purposes of section 75⁷⁵ and then prioritising those to be screened. The guidance gives criteria for prioritising the policies for assessment including social need, effect on daily lives, effect on economic, social and human rights, effect on expenditure and strategic importance.⁷⁶ This outline refers to the second version of statutory guidance provided. In fact, the poor quality of the initial guidance on screening was identified as a key problem in this regime.

Scoping

A major criticism of the PAFT guidelines was the undefined nature of the scope of any equality assessment carried out by the authority. Hence, schedule 9 of the 1998 Act provides authorities with a duty to state the aims of the assessed policy and give details of consideration given to measures to mitigate any adverse impact on equality of opportunity and to alternative policies which might better achieve promotion of equality of opportunity.⁷⁷ There is also clear duty under the 1998 Act for the authority to take into account any equality impact assessment in its policy decision making.⁷⁸ The statutory guidance details what this means in practice. Clear evidence must be provided of its consideration of mitigation of adverse impact or alternative policies where adverse effects have been identified. Recommendations on impact assessments must also justify decisions not to mitigate impact or devise alternate policies. The authority must also give reasons where no adverse impacts have been identified and must continue to monitor the policy.⁷⁹

The regulations on SEA provide a general duty to identify, describe and evaluate the likely significant effects on the environment of implementing the plan or programme and reasonable alternatives, with a more detailed list of criteria whose use is discretionary.⁸⁰ The environmental report and all results of the consultation on the draft plan or programme must be taken into account during its preparation and before its adoption or submission to the legislative procedure.⁸¹ It has been noted in relation to the EIA regime, that at the moment no special 'weight' is given to the environmental information provided by the environmental assessment process which is also true of SEA.⁸² The EU Commission has proposed that the EIA Directive could be amended to oblige authorities to refuse a project that could cause significant environmental damage but also recognise that this would be "politically controversial and potentially contrary to the subsidiarity principle."⁸³

⁷⁵ See McLaughlin and Faris *The Section 75 Equality Duty – An Operational Review Vol.1* (2004) Chap.2.

⁷⁶ S.4 para.4 (a) (iii) *op. cit.* 60.

⁷⁷ Sch.9 para.9 (1) (a) *op. cit.* 57.

⁷⁸ Sch.9 para.9(2) *ibid.*

⁷⁹ Annex 1 para.6 *op.cit.* 60.

⁸⁰ S.12 and Sch.2 *op. cit.*47

⁸¹ S.8(3) *ibid.*

⁸² *Op. cit.* 52 at 267.

⁸³ *ibid.*, at 208.

Staff training

The EQIA regime includes a duty for authorities to make provision for staff training in their equality schemes, and given the remit of the scheme this will necessarily include training in respect of impact assessment. This raises this practical requirement for a successful PIA process to the level of a statutory duty.⁸⁴ Unfortunately, there is no such requirement in relation to SEA.

Consultation

There are broadly two models of impact assessment that have been described in the context of gender mainstreaming. The expert-bureaucratic approach views the assessment process simply as a procedure to be carried out by policy makers or other experts in the field whilst the participatory-democratic approach focuses on the importance of participation.⁸⁵

Early regimes such as EPA, PAET and PAFT did not include any reference to consultation in the PIA process,⁸⁶ but this has since been recognised as key to the consideration of policy impacts. In the environmental context, it is argued that, participation can lead to better decision-making as well as building public confidence in those decisions.⁸⁷ Participation is also important in the environmental field because many decisions are based on uncertain scientific evidence, *e.g.* assessing the level at which air pollution becomes dangerous.⁸⁸ Scientific knowledge is not an issue in considering the reasons for participation in decisions relating to equality, but here it may be argued that those best placed to comment on the discriminatory impacts of new policies are people within the disadvantaged groups themselves. Furthermore, it is arguable that the involvement of such groups in creating policy also contributes to the inherent goal of their empowerment.⁸⁹

It is vital that participation in the process of decision making is meaningful because there is a danger that it may legitimate a process which might otherwise be considered to have little merit:

“Participative decision making also contributes to trust being placed in those decisions, although from a critical perspective this raises the issue of undue legitimacy or symbolic reassurance via proceduralization.”⁹⁰

However, a number of difficulties arise in ensuring an effective consultation process. A key issue is the capacity of individuals, voluntary and community

⁸⁴ Sch.9 para.4(b) *op. cit.* 57.

⁸⁵ *Op. cit.* 23 at 269.

⁸⁶ See, *e.g.* on PAFT *op. cit.* 56 and McCrudden “Mainstreaming Fairness? A Discussion Paper on Policy Appraisal and Fair Treatment” (1996).

⁸⁷ Steele “Participation and Deliberation in Environmental Law: Exploring a Problem Solving Approach” (2001) *OJLS* 21(3) 415-442.

⁸⁸ Environmental policy in the UK dictates that such issues should be dealt with according to the precautionary principle, *i.e.* that if the effects of an activity are unknown it should not be undertaken. This is one of several principles in the environmental field that have been adopted as legal principles within the EU. See further Macrory *Principles of European Environmental Law* (2004).

⁸⁹ *Op. cit.* 23 at 270.

⁹⁰ *Op. cit.* 52 at 196.

groups to respond to the consultative process in terms of time and resources (both financial and intellectual). Furthermore, the process of consultation also raises expectations which may not be met in all circumstances.

In the SEA regime, environmental authorities must be consulted in the screening process on any case by case examination. The authority also has a duty to consult environmental authorities on the scope and level of detail of the information in the screening report.⁹¹ However, controversially, there is no obligation for the responsible authority to involve the public at this stage.⁹² Nevertheless, once in draft, the plan or programme and the environmental report must be made available to the public and the environmental authorities,⁹³ and the consultees and the public must be given “an effective opportunity to express their opinion on the documents.”⁹⁴ The original EIA Directive was heavily criticised for a lack of genuine commitment to effective consultation and in comparison, the requirements of the SEA regime are a great improvement.⁹⁵

The need for consultation has also been identified as an important constituent of the equality agenda in Northern Ireland.⁹⁶ The guidance on EQIA states that the screening process must include consultation with relevant groups⁹⁷ and the Act itself provides the authority with a duty to make arrangements for assessing and consulting on the impact of policies in the scoping process.⁹⁸ The latter must include relevant interest groups as well as the Equality Commission, other public bodies, voluntary, community, trades union and other groups with a legitimate interest in the matter. Perhaps most importantly, this must include those “directly affected” by the policy to be assessed, “whether or not they have a direct economic or personal interest.” Early research into the operation of section 75 highlighted a culture of participation being adopted with the creation of formal links between government and civil society.⁹⁹ However, the perennial difficulties with consultation outlined above have surfaced in this context. The main concerns involve capacity, expectation and funding.¹⁰⁰ Whether or not both

⁹¹ S.12 (5) *op. cit.* 47.

⁹² *ibid.*

⁹³ S.13 *ibid.*

⁹⁴ S.13(3) *ibid.*

⁹⁵ *Op. cit.* 74 at 150.

⁹⁶ See further *op. cit.* 96.

⁹⁷ *Op. cit.* 60 at 62.

⁹⁸ Sch.9 para.4 (2) *op. cit.* 57.

⁹⁹ Donaghy ‘Mainstreaming: Northern Ireland’s participative-democratic approach’ *Policy and Politics* 2004 32 (1) 48-62.

¹⁰⁰ There is a shortage of resources and capacity among voluntary and community groups who represent the equality duty groups, with some being overwhelmed by the consultation documents they receive. Others complained that public bodies rely on too few groups, quantitative instead of qualitative indicators and do not give enough feedback to consultees. Public bodies noted that some groups expect too much from consultation or fail to respond when detailed consultation is put in place. See McLaughlin and Faris *The Section 75 Equality Duty – An Operational Review Vol 1* (2004) at para.6.4 and Equality Commission *Report on the implementation of the Section 75 Equality and Good Relations Duties by Public Authorities* (1 April 2003 – March 2004) at 12. There is also a lack of funding for consultees *op. cit.* 99. In response to this a recent task force

the SEA and EQIA regimes represent a democratic/participative model is a difficult question, and has only been the subject of academic debate in the context of EQIA. In fact, they are probably both best viewed as a combination of the two.¹⁰¹

Transparency and Monitoring

The provisions for both transparency and monitoring are important in holding decision makers to account for their actions. As outlined above, transparency is an important element of good governance and is necessary to ensure that those affected are aware of decisions made. Under the SEA regime, when the plan or programme is adopted the authorities and the public must be informed and the plan or programme made available to them.¹⁰² Equally, in relation to EQIA, authorities are required by the 1998 Act and the guidance to publish their decisions including possible alternatives and any consideration of measures which might mitigate any adverse impacts.¹⁰³ The duty to provide reasons for the authorities' decisions also extends to screening decisions under EIA/SEA and EQIA.¹⁰⁴

There are two key aspects in respect of monitoring. The first is post-project monitoring which is considered vital to the process of "culture change" within an organisation by "encouraging learning through feedback loops."¹⁰⁵ This is an essential element of equality impact assessment in Northern Ireland and public authorities must publish their reports in this regard.¹⁰⁶ The statutory guidance provides that a system must be established to carry out ongoing monitoring of the impact of policies and the results should be reviewed on an annual basis. If the monitoring over a two year period demonstrates that the policy results in greater adverse impact than was predicted, or opportunities arise allowing for greater equality of opportunity, then the policy must be revised.¹⁰⁷ Similarly, under the regime for SEA, authorities have a duty to monitor the significant environmental effects of the implementation of plans and programmes subject to impact assessment in order, *inter alia*, to identify at an early stage unforeseen adverse effects and to be able to undertake appropriate remedial action.¹⁰⁸

recommended a ten year plan to improve community/voluntary sector capacity including streamed funding from government. It has also been recommended that public bodies and groups approach consultation strategically with groups improving capacity by working together at targeting areas. See *Investing Together: Report of the Task Force on Resourcing the Voluntary and Community Sector* (2004). Available from www.taskforcevcsni.gov.uk.

¹⁰¹ These models, as outlined above, were developed by Nott. She believes that s.75 represents a democratic/participative model *op. cit.* 23. However, Harvey has argued that it is in fact a combination of the two. Harvey "Governing After the Rights Revolution" (2000) *JLS* 27 61-97.

¹⁰² S.16 *op. cit.* 47.

¹⁰³ Sch. 9 paras.9(1) and 4(2) (d) *op. cit.* 57.

¹⁰⁴ S.9 *op. cit.* 47 and s.4 *op. cit.* 60.

¹⁰⁵ *Op. cit.* 52 at 289.

¹⁰⁶ Sch.9 para 4 (c) *op. cit.* 57.

¹⁰⁷ Annex 1 paras.7.1-7.2 *op. cit.* 60.

¹⁰⁸ S.17 (1) *op. cit.* 47.

The second and perhaps most important aspect of monitoring relates to the quality of impact assessment reports. This study focuses on accountability in the procedural context but it is only by monitoring the quality of impact statements that we can seek to ensure the substantive quality of the process. The EU Commission has a role in monitoring progress on SEA by receiving reports from the Member States on measures they have taken to ensure that environmental reports are of sufficient quality.¹⁰⁹ The guidance to planning authorities also includes a quality assurance checklist to be used by authorities who carry out SEA, organisations that they consult, inspectors, auditors, independent experts, and members of the public but suggests nothing further regarding the monitoring of the quality of environmental reports.¹¹⁰

With regard to equality, the Equality Commission was given responsibility to monitor the statutory duty under the Northern Ireland Act.¹¹¹ The central mechanism for this is its duty to formally approve all equality schemes and for public authorities to submit an annual report to the Equality Commission.¹¹² The Equality Commission also has to produce an annual report on the statutory duties and review progress on the implementation of the statutory duties every five years.¹¹³ As a statutory consultee, the Equality Commission also has an important role to play in the process of EQIA, not just procedurally but also substantively. It has issued practical guidance on the EQIA, offering non-statutory guidance as well as building up a database of good practice. Nevertheless, the Equality Commission does not formally monitor the quality of impact assessments. It has been suggested in the environmental context that we should have an independent commission to “oversee the compilation and evaluation of environmental statements.”¹¹⁴ However, the Government has stated that:

“The Government has no plans to create a dedicated body to carry out or oversee SEAs. In general, we believe the best approach is to integrate this role into the overall arrangements for oversight of plans or programmes. We are developing methods for quality assurance as part of a foundation of good practice.”¹¹⁵

¹⁰⁹ Article 12(2) *op. cit.* 6.

¹¹⁰ OPDM guidance *op. cit.* 47 at 54.

¹¹¹ Under the Act, the equality commission shall keep the effectiveness of the S.75 duties under review, offer advice to authorities and others and carry out designated functions. Sch.9 para.1 *op. cit.* 57.

¹¹² Sch.9 paras.2 and 3 *op. cit.* 57. The Secretary of State can either approve the scheme or direct the Authority to revise the scheme (again informing the Assembly) (Sch.9 paras.6-7 *op. cit.* 57). The duty with regard to an annual report is found in the statutory guidance (Chap.4, para.4.16, *op. cit.* 60).

¹¹³ The annual report is sent to the department of Economic development and then laid before the Assembly and the Secretary of State and through the Secretary of State, the report shall be laid before parliament (Schedule 8 *op. cit.* 57). Provision for the annual review is found in the Northern Ireland Act (Sch.9 para.8(3) *op. cit.* 57).

¹¹⁴ *Op. cit.* 52 at 296.

¹¹⁵ OPDM guidance *op. cit.* 47.

Conclusions

This discussion of the legal frameworks for SEA and EQIA in the light of previous experience with ‘soft law’ approaches and EIA suggests that it is possible to provide a ‘best practice’ model of impact assessment that would “work” in any context. The key elements are:

- A clear objective with definitional clarity
- Detailed guidance with regard to both screening and scoping
- Provision for staff training
- Provision for consultation
- Ensuring transparency in the process
- Monitoring of the quality of assessments and post-project monitoring

The key elements are similar whether applied at project, plan, programme or policy level, but the latter perhaps presents the biggest challenge because of the complex nature of policy making and number of assessments to be carried out. Any difficulties may however, be overcome by providing clear guidance on the definition of a policy and how to prioritise the policies to be screened.

The legal frameworks for SEA and EQIA have, to a large extent, addressed many of the problems associated with the non-statutory regimes for impact assessment and those identified under the EIA regime. A major issue however, is the lack of monitoring in respect of the quality of impact statements. As stated above, this is clearly very important in any qualitative assessment of the process, but it is also very resource intensive and hence, politically unpopular. The remainder of this paper will discuss the success of a legal strategy for the enforcement of these provisions in providing accountability in the procedural context.

Compliance and Enforcement

The SEA and EQIA regimes both create enforceable provisions that can be the subject of court action. However, given their recent introduction, there are still relatively few cases on EQIA and none to date on SEA. Therefore, this section will also consider the extensive experience of litigation in respect of the EIA regime in so far as it is relevant. The system of EQIA is also supported by a further compliance mechanism under which the Equality Commission is given the power to undertake its own investigations and hear complaints from individuals. This has proved very significant in ensuring accountability in the process.

Judicial Review Cases

Environmental Impact Assessment

The case law on EIA is well documented. It is sufficient therefore, to highlight a few of the salient points that are most relevant to the regimes for

SEA and EQIA.¹¹⁶ The initial approach of the courts to the discretion of decision makers in the process of EIA has been described as follows:

“The courts are deferential to executive discretion provided that it has some rational basis and does not violate what the court regards as widely accepted standards of morality.”¹¹⁷

This is perhaps best demonstrated by the case of *R v Poole Borough Council ex parte Bee Bee*. In this case the local council granted itself planning permission without any consideration of the need for an environmental impact assessment, but the Court refused to quash the permission on the grounds that when the local council made the decision it had all the relevant information before it that would have been contained in an environmental statement.

This approach was particularly lamentable in the context of EIA because the law should be interpreted in the light of the purpose of the Directive. There was however, little evidence of this in the early years of EIA.¹¹⁸ The procedural nature of EIA should not necessarily however, invoke this response from the courts.

“. . . liberal principles do not require the courts to be deferential in respect of ‘process’ matters. The courts should be able to ensure that the information provided is sufficient, that the viewpoint of all interested parties is given equal opportunity and that an assessment is carried out in the manner contemplated by the Directive.”¹¹⁹

A very different approach has however, been adopted more recently by the House of Lords. The case of *Berkely* is now the leading decision in this regard. This involved an application by Fulham Football Club to build a new stadium, incorporating and improving listed buildings, and to finance the project by building a block of flats on the boundary. The planning application did not include an environmental statement despite acknowledging that there was some disagreement between environmental organisations as to the effect of the building work on the adjacent river Thames. The House of Lords refused to accept that it was possible to retrospectively dispense with requirements of the EIA regulations on the ground that the outcome would have been the same or that the local planning authority or Secretary of State had all the information before them. Hence, in this case where the relevant information was in the public domain but would take a substantial amount of time to track down, the court stated that such a ‘paper chase’ was not equivalent to an environmental statement.

“The point about the environmental statement contemplated by the Directive is that it constitutes a single and accessible compilation, produced by the applicant at the very start of the

¹¹⁶ For a detailed analysis of the case law – see *op. cit.* 52

¹¹⁷ Alder ‘Environmental Impact Assessment – the Inadequacies of English Law’ *JEL* (1993) 5(2) 203-219 at 211-212.

¹¹⁸ *ibid.*

¹¹⁹ *ibid.*

application process of the relevant environmental information and the summary is in non-technical language.”¹²⁰

In reaching its decision the Court highlighted the importance of the consultation requirements within the procedure.

“The Directive requires not merely that the planning authority should have the necessary information, but that it should have been obtained by means of a particular procedure, namely that of an EIA ... an essential element in this procedure is that ... the environmental statement by the developer should have been made available to the public and that the public should have been given the opportunity to express an opinion.”¹²¹

This new approach would be certainly be welcome in respect of the enforcement of the SEA regulations. However, since the judgement in *Berkely* there appears to be something of a retreat from this approach, by the Court of Appeal, at least in respect of the screening process. In the case of *Younger Homes* the Court of Appeal was prepared to accept as evidence of a screening opinion a letter stating that the opinion had been made because the actual evidence of the opinion, which was in fact made in a handwritten note, had since been lost.

With regard to the question of the public authority’s judgement of the “significant” impacts of a proposal the approach is similarly to defer largely to the discretion of the decision maker. This question is considered to be a question of fact and even if there is some uncertainty as to the possible impacts on the environment, the decision as to whether or not to carry out a full environmental assessment is left entirely to the discretion of the decision maker subject to the *Wednesbury* principle.¹²² The judgement regarding the significance of the effects upon the environment is indeed a very complex one:

“A judgement about the potential significance of an impact includes several elements, in particular consideration of the receiving environment and intensity of the impacts including cumulative change. Context is therefore vitally important in judgements about significance.”¹²³

The deference of the courts to the discretion of the decision maker is, therefore, logical. It should however, be accompanied by a robust view of the need for vigilance in following the procedure of EIA as outlined in the *Berkely* case and in respect of the quality of the environmental statement. The latter has been demonstrated in the case of *Sweet* in which the Court of Appeal refused to accept an environmental statement made without any “significant professional involvement” resulting “in a document that is poorly presented and lacking in certain matters of fundamental importance in

¹²⁰ *Berkely v Secretary of State for the Environment Transport and the Regions and Fulham Football Club (Berkely No. 1)* [2000] 3 WLR 420.

¹²¹ *ibid.*

¹²² *R (Malster) v Ipswich Borough Council and Ipswich Town Football Club* [2001] All ER (D) 107 And *R (Jones) v Mansfield District Council* [2003] EWCA (civ.) 1408 discussed in detail in *op. cit.* 52 at 123-127.

¹²³ *Op. cit.* 52 at 103.

assessing the likely impact of the proposed development of the surrounding area.” In the context of SEA however, the environmental statement will be created by a central authority and, hence, the court may be more reluctant to intervene.

The case law on EQIA, as outlined below, includes a number of cases in which the court has referred to the definition of equality of opportunity. In the context of EIA however, the notion of environmental damage has proved much less contentious. One such case however, is that of *Malster*. This involved an application for the redevelopment of the North Stand at Ipswich Town Football Club’s stadium. The complainant was concerned about the shadowing effect that would be created by the new stand. The High Court considered that:

“The 1999 regulations are concerned to protect the environment in the public interest. Whilst this may have the effect of avoiding harm to residential amenity, the purpose of the 1999 regulations is not to protect the amenity of individual dwelling-houses.”¹²⁴

In the Court of Appeal a request to refer the question of the extent and meaning of the term environment to the European Court of Justice was refused.¹²⁵

Equality Impact Assessment

As outlined above, a number of cases regarding section 75 Northern Ireland Act 1998 have been concerned with the definition of equality of opportunity. Most of these have focused on the issue of religious and political discrimination,¹²⁶ but there are some examples of cases regarding other forms of discrimination. In fact, the most contentious litigation in this field has arisen in respect of discrimination on the basis of age. A series of cases have thus been brought in relation to the process of creating legislation on Anti-Social Behaviour Orders (ASBOs), all of which have focused on the basic issue that insufficient attention was given to the impact of such legislation on young people.

Three possible approaches to the meaning of equality of opportunity in this context have been identified:

“The first perspective is to view section 75 as essentially another piece of anti-discrimination legislation. In particular, this perspective views section 75 as not about outcomes, as

¹²⁴ *Malster* op cit 122 at 73.

¹²⁵ “I accept that situations could arise in which the point which it is sought to raise, the severe effect on a limited area, might involve a reference to the court for guidance as to how the Directive should be construed. In my judgement that does not arise upon the present facts.” Pill LJ at para 20.

¹²⁶ For instance, in the case of Connor Murphy a review was brought in respect of the decision of the Secretary of State for Northern Ireland to introduce regulations that required the flying of Union Jack flag on government buildings. It was found that “the flying of the Union flag is not designed to favour one tradition over another; it merely reflects Northern Ireland’s constitutional position as part of the UK.” *Re Connor Murphy* (High Court) 4th October 2001.

being about persons rather than groups, and not being about affirmative action...The second perspective views section 75 as broader than anti-discrimination approaches, imposing a positive obligation on public authorities but one that essentially concentrates on achieving fair procedures and is unconcerned with outcomes...The third perspective views section 75 as centrally concerned with outcomes and is radically more egalitarian than either of the first two..."¹²⁷

The courts' initial approach was based very much on the first of these perspectives, but some progress appears to have been made in the recent case of *Neill*. The judgement in *Neill* followed the case of *Re Northern Ireland Commissioner for Children and Young People* which involved an application for leave to review of the decision of Secretary of State to put legislation before Parliament on Anti-Social Behaviour Orders (ASBOs).¹²⁸ The Commissioner for Children and Young People argued that this legislation would have a particularly important and negative impact on young people, and that equality of opportunity should be interpreted to include the opportunity not to be disadvantaged. The High Court held however, that the legislation in question would apply to everyone in the same way; Girvan J stating that "All are free to obey the law". Not only does this approach go no further than a negative interpretation of non-discrimination rather than a positive duty but arguably, puts the emphasis when examining adverse impact on the reasons for the impact and motive for introducing the policy rather than the outcome of the policy. The implicit conclusion from the judgement is that criminal or quasi-criminal matters would fall outside the scrutiny of section 75.¹²⁹

The first instance decision in *Neill* was a related case brought on the grounds that the Northern Ireland Office (NIO), the body responsible for implementation of the legislation and policy, had failed to fulfil its statutory duty under section 75 by not carrying out an EQIA. The same arguments regarding the definition of equality of opportunity were raised in *Neill* and Girvan J responded differently, qualifying his previous decision. He now concluded that by finding that "All are free to obey the law", he had overstated the position and noted that the concept of equality of opportunity in the Northern Ireland Act 1998 derived from the Good Friday Agreement. Although the term is not defined in the Act, it is clear from the Agreement that it is intended to cover both the social and economic life of individuals.¹³⁰ A criminal or quasi-criminal matter regulating the social lives of individuals may potentially have an adverse impact on one or more of the disadvantaged groups protected by section 75. It is necessary to consider the policy stage of such legislation rather than simply to say that "once the law is enacted and the action is criminalised an individual from one of the affected groups can

¹²⁷ *Op. cit.* 63 at 14-15.

¹²⁸ (QBD) 2004 NIQB 40 (23rd June 2004).

¹²⁹ As argued by Counsel for the appellant in *Neill*. *In the matter of an Application by Peter Neill for Judicial Review* [2005] NIQB 66 at para 47 and see Briefing Note by the Committee on the Administration of Justice on the section 75 Challenge (2005).

¹³⁰ *ibid.*, Girvan J referred to the analysis of the introduction of the concept in the Good Friday Agreement by McCrudden in *op. cit.* 96.

have no grievance because he is simply bound to obey the law.”¹³¹ Hence, though the court has rejected a *legal* duty on public bodies to ensure due regard to equality of *outcomes*, in carrying out its policies they must have due regard to *potential* adverse impact, not merely less favourable treatment when the policy is made. Nor can a public body argue that the reason for the adverse impact is relevant to its decision to screen in or screen out policies for impact assessment.

In the context of EQIA, the duty on public bodies under section 75 is to produce an equality scheme which must outline how they intend to assess and consult on the likely impacts of policies. Few of the cases considered so far have dealt directly with the duty to make arrangements for PIA as laid down in Schedule 9 to the Act.¹³² The Court did however, refer to the duty to ensure “meaningful consultation” in the case of *Re Northern Ireland Commissioner for Children and Young People*. Somewhat worryingly for advocates of children’s rights, Girvan J noted the limited ability of children to be involved in “meaningful consultation.”¹³³ This argument could be used to support a lack of consultation with other groups such as those with learning or communication difficulties. Although the statement by Girvan J did not relate directly to section 75, it is hoped that public bodies do not use it as a basis for limited consultation.

The relationship between the Equality Commission complaints procedure and the role of the courts in judicial review has also been dealt with in the *Neill* litigation. At first instance, Girvan J considered the structure of section 75 and concluded that by establishing a complex complaints procedure Parliament intended that “alleged breaches of schemes are to be the subject of investigation and reporting with political consequences” and did not intend to confer rights to be assessed by “litigious means”.¹³⁴ On appeal however, it was argued that Girvan J was effectively imposing an ouster clause on the section which was not explicit therein, and that although the complaints procedure was intended to be the *main* remedy for a breach of an equality scheme it was not the *sole* remedy.¹³⁵ The Court of Appeal dismissed the case, agreeing with Girvan J that “the juxtaposition of sections 75 and 76 with contrasting mechanisms...strongly favours the conclusion that parliament intended that, in the main at least, the consequences of a failure to comply with section 75 would be political.”¹³⁶ However, the Court of Appeal accepted that there may be occasions where judicial review is available. It did not wish to hypothesise on such situations, but suggested that they be dealt with on a case by case basis.¹³⁷ As the case was dealing with a procedural point, it could be argued that such a case may arise where a public

¹³¹ *ibid.*

¹³² [2004] NIQB 64 1st October 2004.

¹³³ *Op. cit.* 128.

¹³⁴ Para.42 *op. cit.* 129.

¹³⁵ Robin Allen QC, Counsel for CAJ in intervention in Neill judgement *op cit* 129 and the Briefing Note *op cit* 129. The intervention also noted that the question of non-justiciability in similar legislation in Great Britain had not arisen, *e.g.* s.71 Race Relations Act 1976 and s.404 Greater London Authority Act 1999.

¹³⁶ [2006]NICA5 para.29.

¹³⁷ Para.30 *ibid.*

body failed substantively to fulfil the equality duty, such as putting in place an EQIA and then failing to follow it.

The Complaints Procedure

The Equality Commission is responsible for receiving complaints and dealing with them in a “quasi – judicial” function. It is important to note that the procedures are only open to alleged failures to comply with a part of the equality scheme drawn up by the authorities and not with a breach of the general duty to promote equality of opportunity under section 75(1).¹³⁸ The statutory guidance specifically states however that the former includes the failure to carry out the key elements of equality impact assessment which may amount to a breach of the equality scheme.¹³⁹ There are two different types of procedure. Under paragraph 10 of Schedule 9 to the Act the Equality Commission may bring a case on behalf on an individual that has been “directly affected” and under paragraph 11 of Schedule 9 the Equality Commission may bring a complaint of its own volition.

In relation to paragraph 10 investigations, the key issue is the definition of people “directly affected” by the equality scheme.¹⁴⁰ This issue was once again raised in the *Neill* judgement, as a complaint had been made to the Equality Commission by the Children’s Law Centre (CLC) under the Para 10 procedure.¹⁴¹ The Northern Ireland Office (NIO) responsible for introduction of the orders, argued that the CLC was not directly affected by the measure because the term “directly affected” should be construed more narrowly than the traditional judicial review test of “sufficient interest”. Girvan J agreed, stating it was clear that the CLC could never be a party to an ASBO. The fact that the NIO raised the issue of standing in this case has been criticised as an attempt to fetter the discretion of the Equality Commission and so undermine its work, as queries by public bodies of every aspect of an investigation will “tie the Commission in legal knots”¹⁴² and lead to an “arid legal formalism.”¹⁴³ However, Girvan J did note that any challenge on this ground would be likely to fail as the Equality Commission can opt to carry out its own investigation under Para 11 and, in most cases, would chose to do

¹³⁸ Sch.9 paras.10(1) and 11(1) *op. cit.* 57.

¹³⁹ Annex 1 *op. cit.* 60.

¹⁴⁰ Sch.9 para.10(2) *op. cit.* 57.

¹⁴¹ *Op. cit.* 129.

¹⁴² Briefing Note *op. cit.* 129 at 2. The Note also pointed out that constant challenges made against the investigatory powers of the Commission for racial equality in Great Britain undermined its work in the 1990s.

¹⁴³ Robin Allen QC, Counsel for Committee for the Administration of Justice (CAJ) in intervention in *Neill* judgement quoted *ibid.* Also note, the NIO contended in court that challenges could not come from representative of directly affected groups but that the Police Service of Northern Ireland (PSNI) could make a complaint. As the CAJ Briefing Note pointed out, to argue that the PSNI may make a complaint about a policy it will be responsible for implementing and consultees cannot, would suggest an undermining of the spirit and purpose of the equality duty. It should also be noted that the Children’s Law Centre was recognised as a consultee for the purposes of screening by the NIO.

so if a meritorious complaint was brought by someone not “directly affected.”¹⁴⁴

Once the Equality Commission has decided to bring a complaint, whether under paragraph 10 or 11, the first step is to put in place measures to attempt to deal with the complaint informally by conciliation with the authority in question. This encourages a collaborative approach and although there are no publicly available figures as to how many complaints are dealt with informally, the cooperative model seems to be working to the extent that there is little evidence of a refusal by public bodies to accommodate the Equality Commission’s findings, with the notable exception of the ASBOs case.

Where a formal investigation is carried out the Equality Commission adopts an inquisitorial approach and sends its report to the parties, the Secretary of the State and the Assembly. If the Authority fails to comply with the recommendations, the Equality Commission may ask the Secretary of State to issue directions to the Authority.¹⁴⁵ Few cases have involved a formal investigation by the Equality Commission and to date, the results of only ten investigations have been published.¹⁴⁶

The latest Equality Commission report states that overall, the number of complaints remains small but that the numbers are growing.¹⁴⁷ There is currently a lack of evidence on which to make any reliable conclusions about the success of the complaints procedure.¹⁴⁸ However, there is certainly some

¹⁴⁴ The Chief Commissioner of the Equality Commission has also stated he does not believe that the judgment on the definition of the term “directly affected” in *Neill* will hamper the investigatory powers of the Commissioner given its wider remit under para.11 (Bob Collins, Chief Commissioner, Equality Commission for Northern Ireland, speech delivered at a Conference held by the Human Rights Centre, School of Law, Queen’s University Belfast *The Nature, Impact and Future of Section 75 Northern Ireland Act 1998* (2006))

¹⁴⁵ Sch.9 para.11 (2) – (5) *op. cit.* 57.

¹⁴⁶ Of these, seven involved paragraph 10 investigations and three were paragraph 11 investigations. The paragraph 10 complaints involved complaints about failures to screen, failures to carry out a proper EQIA, failures to consult and failures to respond to complaints. Out of these cases, the Equality Commission found a breach of the equality scheme in five cases and either recommended action, such as an EQIA, or made no recommendations as the public body had agreed to re – screen or improve procedures. The Equality Commission found a breach of an equality scheme in one case where the public body had failed to carry out external consultation on a policy affecting provision for children with “special needs” (*Don Leeson and Department of Finance and Personnel* (SD1/04/04)). The Department agreed to improve its complaint procedures relating to Section 75. The paragraph 11 investigations involved screening and consultation *e.g.* *Belfast Education and Library Board* (SD1/01/04) in which no recommendations were made as the Board agreed to modify its consultation procedures. Notably, in three cases involving paragraph 10 investigations, the matter also went to judicial review (including the ASBOs litigation). See further Equality Commission website at <http://www.equalityni.org/publications/downloadlist.cfm?id=17>.

¹⁴⁷ Equality Commission NI *Report on the implementation of the Section 75 Equality and Good Relations Duties by Public Authorities* 1 April 2003 – March 2004.

¹⁴⁸ The Equality Commission is currently carrying out its five year review of the operation of S.75, which included examining compliance and enforcement issues.

evidence of dissatisfaction among consultees (specifically community and voluntary groups) with the responses from public bodies when complaints are made; in particular concerning the length of time taken to respond and the use of “legal jargon”.¹⁴⁹ The Equality Commission has also noted the lack of information it receives from public bodies about informal/formal complaints made and what effect these complaints have, if any, on policy. Statutory compliance is however, only one part of the Equality Commission’s legal work and to be more effective, it may need to target investigations at specific issues relating to the achievement of equality of opportunity.¹⁵⁰

Summary

The key issue in the case law surrounding section 75 of the Northern Ireland Act 1998 has been the definition of the term ‘equality of opportunity’. Definition is far less of an issue in relation to EIA and SEA which focus on environmental assessment as a tool for the achievement of sustainable development. This serves to highlight the difficulty of ensuring a clear understanding of objectives such as equality of opportunity and sustainable development. Recently the courts appear to be moving towards an acceptance of equality of opportunity as a positive duty rather than viewing it in the restrictive terms of anti-discrimination. This issue is vital to the success of this regime that seeks to move away from the narrow vision of previous anti-discrimination legislation. The case law also highlights the importance of the context in which it was introduced. The courts in Northern Ireland have recognised the importance of the context of devolution in Northern Ireland and the Good Friday Agreement whilst the case law on EIA demonstrates a growing acceptance of the need to interpret UK legislation in the light of the purpose of the EU Directive.¹⁵¹

Whilst recognising the necessary discretion of decision makers in carrying out impact assessment the courts should be able to ensure that the procedure is adhered to at every step. This approach has recently been realised in relation to EIA and it is hoped that it will be extended to SEA. In particular, it is important to protect the public’s rights to consultation under these regimes. Issues such as the question of “meaningful consultation” and the quality of the impact statement are really substantive questions although the courts have touched upon them both. However, in the context of EIA, questions of the significance of environmental impacts in both the screening and scoping process are considered to be questions of fact for the decision maker. The courts in Northern Ireland have yet to consider the issue of assessing adverse impact but are likely to adopt a similar approach.

Following the judgement in *Neill*, matters of process in respect of EQIA have largely been assigned to the Equality Commission’s complaints procedure. Legal accountability is superseded by this process based on political accountability. Nevertheless, the court in *Neill* has accepted that recourse to

¹⁴⁹ *Op. cit.* 148 at 13.

¹⁵⁰ See McLaughlin and Faris *op. cit.* 100.

¹⁵¹ See *Robinson v Secretary of State for Northern Ireland* [2002] 32. The court underlined the importance on the context of the Good Friday Agreement and Northern Ireland Act as part of a constitutional settlement.

the courts may be appropriate in some circumstances. This approach is to be welcomed because such cases will serve to highlight the worst infringements of the process.¹⁵²

Conclusions

The introduction of ‘hard law’ in respect of policy impact assessment has parallels with wider moves towards the juridification of the political process in British constitutionalism.¹⁵³ This is exemplified, most notably, by the introduction of the Human Rights Act 1998 that protects civil and political rights. This Act has been criticised for the way in which it excludes social equality and it may also be argued that a bill of rights should include a “right to a clean environment.”¹⁵⁴ In this context, regulation in respect of policy impact assessment can be seen to ‘fill the gap’ in protecting fundamental social values such as equality and sustainable development. This also raises a number of important questions about the most effective means of providing accountability in attempting to regulate decision making in government. Providing accountability through the courts is not of course without difficulty because of the problems of the cost and time involved in litigation. Furthermore, in the context of equality it has been argued that an overly litigious approach could lead public bodies to become defensive, uncooperative and overly bureaucratic.¹⁵⁵ The political context will also always be important to the success of any legal regime of this nature because of the level of discretion that government decision makers retain. However, a “litigation strategy” can be used to focus the attention of public bodies on their duties under the law as well as highlighting the importance of equality issues within wider civil society.¹⁵⁶

The EQIA model adopts an approach based on both legal and political accountability by incorporating a complaints procedure to be operated by the Equality Commission. The inclusion of a complaints procedure is particularly important in the historical context of Northern Ireland to ensure that complaints will be aired and dealt with in the political arena. The intention is to encourage a triangular approach between public bodies, the Equality Commission and consultees/complainants. In this way the promotion of equality of opportunity is collaborative rather than adversarial and so lends itself to the concept of participatory democracy. Although this process is still very much in its infancy, both the courts and academic commentators argue that this is the preferred model.¹⁵⁷

The alternative is to rely on a process of audit albeit subject to internal or external review. The models of audit that have arisen so far have proven to be less than effective but that is not to say that a more rigorous approach

¹⁵² *Op. cit.* 63 at 74.

¹⁵³ See for example, *op. cit.* 5 at 382-389 and generally see the various essays in Jowell and Oliver *The Changing Constitution* (2004).

¹⁵⁴ See further Ewing “The Unbalanced Constitution” in Campbell *Sceptical Essays on Human Rights* (2001) 103-119 and Hayward *Constitutional Environmental Rights* (2005).

¹⁵⁵ McLaughlin and Faris, *op. cit.* 100 at 36

¹⁵⁶ *Op. cit.* 63 at 74.

¹⁵⁷ See McLaughlin and Faris, *op. cit.* 100 and Donaghy, *op. cit.* 99.

could not be achieved. This has been demonstrated in relation to financial audit for many years. It is certainly true that a process of audit in relation to the quality of impact assessments would be widely welcomed to provide some accountability in terms of the substantive quality of the process. This may be subject to an internal review process but this would lack any real teeth without high level political support. It is probably therefore, best carried out by an independent review body. Under the EQIA process, the Equality Commission would be the obvious body to carry out this task but this would be extremely resource intensive and is thus unlikely at this stage. Nevertheless, the conclusion of this paper is that the most effective means of providing accountability in the impact assessment process is to adopt a three pronged approach based on political and legal accountability, as in the example of EQIA, as well as an audit process in respect of the substantive quality of assessments.¹⁵⁸

If we are to include regulation within this model, it is also important to ensure that the legal framework itself supports an effective process. The comparison of SEA and EQIA above appears to suggest that we have now reached a stage in which it is possible to provide a “best practice” model of policy impact assessment that might be applied in any field. The important question is to what extent we wish to continue developing such regimes in individual fields or would wish to develop a model of integrated impact assessment. From a practical point of view integrated impact assessment has great appeal and will meet the criticisms of decision makers with regard to overlapping duties.¹⁵⁹ However, there is a real danger that if too many issues are included the process of policy impact assessment will lose its value as decision makers and citizens fail to understand or take on board the individual objectives.¹⁶⁰ This may be an argument for focusing on a few key issues that are considered most fundamental to society outside the sphere of

¹⁵⁸ Community and voluntary groups have suggested that government inspectorates and the NI Audit office could be involved in monitoring Section 75 which would lead to more uniform and improved implementation. See Equality Commission Report *op. cit.* 100 at 10.

¹⁵⁹ *E.g.* under the Northern Ireland Act, S.75(2), public authorities also have a duty to have regard to good relations between people of different political opinion, religious belief and racial groups. Research is ongoing as to how this lesser duty (equality is *due regard*) is being implemented. The OFMDFM of the NI assembly in the report “*A Shared Future*” *Policy and Strategic framework for Northern Ireland*” (March 2005) stated that “A systematic assessment of the good relations impacts of new (or reviewed) policies and legislation will be introduced across departments. This will require departments, as part of integrated impact assessments, to assess the impact of proposed policies on the promotion of sharing, in a similar way to which policies are currently assessed for their impact upon equality and the targeting of social need” The Targeting Social Need (new TSN) programme is a non-statutory duty on public bodies in Northern Ireland to target resources at deprived areas.

¹⁶⁰ *E.g.* an audit of the good relations duty carried out by the Equality Commission found that whilst in some areas good progress was being made with audits and programmes being put in place, other public bodies stated that the duty was part of an equality scheme and not reported on separately or that the body had been concentrating on equality impact assessments and not on the specific good relations duty. Equality Commission *Audit of progress on the Good Relations Duty 2000-2003*

civil and political rights protected by the Human Rights Act 1998. There is a clear argument for including both equality and sustainable development as core values in society.¹⁶¹ Indeed, as outlined above, it can be argued that equality is an essential element of sustainable development. Sustainable development has certainly been the focus of ‘soft law’ approaches to integrated impact assessment to date. Sustainable development however, is an exceptionally difficult concept to define and has proven difficult to operationalise.¹⁶² In contrast, the courts in Northern Ireland appear to be rising to the challenge of defining equality of opportunity which does appear more concrete.¹⁶³ The best approach is to continue to focus on impact assessment for environmental protection and equality as two core values. Thus, the “best practice” model of impact assessment should be extended to policy level in the field of environmental protection and adopted in EQIA throughout the UK.

¹⁶¹ It could be argued that the good relations duty in Northern Ireland and the non-statutory duty with regard to new TSN are integral to the achievement of greater equality outcomes under S.75. “Good relations cannot be based on inequality between different religions of ethnic groups. Social cohesion requires equality to be reinforced by good community relations.” Dr. Marjorie Mowlam, Secretary of State for Northern Ireland, House of Commons, Official report, 27 July 1998. The revised Statutory Guidance makes it clear that although equality is the primary duty under the Northern Ireland Act, recognition of the interdependence of the two duties is crucial. Equality Commission for Northern Ireland *Section 75 of the Northern Ireland Act 1998: Guide to the Statutory Duties* (2005) para.2.14

¹⁶² See for example criticisms of the Welsh Assembly Strategy for Sustainable Development in Flynn *Living Differently? An Assessment of the First Four Years of the Welsh Assembly Government’s Sustainable Development Duty* (2003).

¹⁶³ *Op. cit.* 132.

PARTY HOSTS, INTOXICATED GUESTS AND NEGLIGENCE

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*In Donoghue v Stevenson, the House of Lords . . . recognized the existence of a “general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances” (page 580, per Lord Atkin). The general concept of a duty owed to those whom one might injure proved both powerful and practical. However, it brought with it a question — a question we wrestle with to this day. How do we define the persons to whom the duty is owed?*¹

Introduction

On New Year’s Eve, 1998, Julie Zimmerman and Dwight Courier hosted a party at their home in Ottawa, Canada. The event was a “BYOB” (“bring your own booze”) gathering combined with a “potluck supper”. The only alcohol served by the hosts was three-quarters of a bottle of champagne in one-and-a-half-ounce glasses at midnight. Among their guests was Courier’s long-time friend Desmond Desormeaux, who was known to be a heavy drinker and who had previous convictions for impaired driving. He enjoyed the hosts’ hospitality for approximately two and a half hours. During that time, he consumed twelve beers that he had brought with him. When Desormeaux walked to his car to leave the party, Courier accompanied him and asked, “Are you okay, brother?” Desormeaux responded “No problem”, got behind the wheel and drove away. He was accompanied by two passengers, his girlfriend and another friend, both of whom had attended the party and who were by this time intoxicated. Owing to his own intoxication, Desormeaux veered out of his own lane and collided head-on with another vehicle. One occupant of the other car was killed and another, Zoe Childs, then a teenager, was left paralysed from the waist down. Desormeaux pleaded guilty to a series of criminal charges arising from these events and received a 10-year sentence.

Childs instituted proceedings in negligence against both Desormeaux and the party hosts. She claimed that the party hosts, Zimmerman and Courier, had a legal duty to prevent Desormeaux from driving while intoxicated. The core question to be resolved in the case – which was appealed all the way to the Supreme Court of Canada – was thus whether social hosts owe a duty of care in negligence to third parties injured by guests who have consumed alcohol on the hosts’ premises.

At trial, Chadwick J held that a reasonable person in the position of the party hosts would have foreseen that Desormeaux might cause an accident and injure someone else.² Accordingly, the hosts owed Childs a duty of care

¹ Per McLachlin CJ in *Childs v Desormeaux* (“*Childs*”) [2006] SCC 18 [2006] 1 SCR 64 [9].

² (2002) 217 DLR (4th) 217.

because they were aware of Desormeaux's history of alcoholism; the resulting harm to Childs from Desormeaux's actions was therefore reasonably foreseeable. However, the *prima facie* duty of care to which this finding gave rise was negated, in the view of Chadwick J, by policy considerations. Such policy considerations included, *inter alia*, the "inordinate burden" which the imposition of a duty of care would place on all social hosts.³ An appeal to the Ontario Court of Appeal was dismissed, where an even more restrictive approach was taken: the appeal court ruled that the circumstances did not disclose even a *prima facie* duty of care.⁴ From this judgment Childs further appealed to the Supreme Court of Canada, urging the Court to impose a duty of care upon a social host in such a situation.

Part I: Judgment of The Supreme Court Of Canada

In approaching this question McLachlin CJ, delivering the judgment of a unanimous Court⁵, identified social host liability as a "novel"⁶ situation in which it was sought to impose a duty of care, not analogous to any existing duty of care. She observed that the closest parallel – that of imposing a duty on commercial alcohol providers to third-party road-users who are injured as a result of the drunken driving of a patron⁷ – was not a truly analogous situation. This was because there were significant differences between social and commercial hosts that made extending these duties, without regard to the dissimilarities between the parties, inappropriate. The Court identified three core differences between commercial and social hosts which justified the imposition of a duty of care on the former, but not the latter. These three core differences identified by the Court were as follows:

- supervising consumption of alcohol is an inherent function of the commercial host;
- the parameters of a commercial host's responsibilities are clearly articulated through legislation; and
- the benefit that commercial hosts derive from the sale of alcohol, namely profit, justifies the imposition of a duty to monitor its consumption for the public good.

³ *ibid.*, at 243.

⁴ (2004) 239 DLR (4th) 61. The judgment of the Court, which was delivered by Weiler JA did, however, contain an important qualification: the Court was careful to stress that its judgment did not mean that social hosts were immune from liability to third party users of the road for damage caused by impaired guests who drive a car. Weiler JA explained that he did "not foreclose social host liability particularly when it is shown that a social host knew that an intoxicated guest was going to drive a car and did nothing to protect innocent third parties" (at 67).

⁵ Bastarache, Binnie, LeBel, Deschamps, Fish and Abella JJ concurring.

⁶ *Childs*, at [23]. In so doing, McLachlin CJ was in agreement both with Chadwick J at first instance and with the Ontario Court of Appeal.

⁷ *Stewart v Pettie* [1995] 1 SCR 131.

Commercial Hosts v Social Hosts

It is instructive to consider how each of these three characteristics of commercial hosts was regarded by the Supreme Court of Canada as warranting a different approach to the question of whether a duty of care should be imposed upon social hosts.

(i) Supervising consumption is an inherent function of the commercial host

A number of different points were noted by the Court in regard to this supervisory function of commercial hosts. Not only was monitoring of alcohol consumption relatively easy for a commercial host – it was actually expected by the host, patrons and members of the public. Furthermore, there was a “special incentive” for commercial hosts to monitor consumption since they are paid for service. Finally, those serving alcohol could generally be expected to possess special knowledge about intoxication.⁸ According to the Court, all of these points illustrated the marked difference, in terms of supervisory function, between social and commercial hosts.

(ii) Commercial hosts are strictly regulated by legislation and bear a special social responsibility

The second distinctive feature surrounding commercial host liability identified by the Court was that the commercial sale of alcohol is strictly regulated by legislation. The Court identified such regulation as not only being “driven by public expectations and attitudes towards intoxicants”, but also serving, in turn, “to shape those expectations and attitudes”.⁹ The social responsibility of those who sell alcohol for profit was heavily stressed, with the Court observing that this social responsibility has many “very real and visible manifestations”.¹⁰ Examples included the practice of imposing of a “cut-off” at the bar and the employment of “bouncers” to monitor admission and to assist other members of staff who might have to deal with intoxicated patrons. The Court noted that these features have no equivalent in the non-commercial context: “a party host has neither an institutionalized method of monitoring alcohol consumption and enforcing limits, nor a set of expectations that would permit him or her to easily do so”.¹¹

(iii) There is a contractual relationship between commercial hosts and patrons

For the Court, the third distinguishing feature of commercial host liability was the contractual nature of the relationship between a commercial host serving alcohol and a patron consuming it. This structured relationship was said to be “fundamentally different” from the range of different social relationships that can exist between persons hosting and attending private parties. A key feature of the contractual relationship between commercial hosts and patrons was that profit is to be gained by the host from the contractual relationship. As a result, “[u]nlike the host of a private party, commercial alcohol servers have an incentive not only to serve many drinks, but to serve too many. Over-consumption is more profitable than responsible

⁸ *Childs*, at [18].

⁹ *ibid.*, at [19].

¹⁰ *ibid.*, at [21].

¹¹ *ibid.*

consumption.”¹² In addition, the costs of such over-consumption must be borne by the drinker himself or herself, by taxpayers and, sometimes tragically, by blameless third parties who may meet inebriated patrons on the roads. Conversely, the benefits of over-consumption – in the form of hefty profit margins – go to the commercial host alone. The existence of such a “perverse incentive”¹³ for commercial alcohol providers was said to support the imposition upon such providers of a duty to monitor consumption in the interests of the public.

The three core differences outlined above persuaded the Court that the existence of a duty on the part of commercial providers of alcohol could not be extended by simple analogy to private party hosts. Accordingly, the Court concluded that the duty proposed in *Childs* was novel, and fell to be assessed on an application of the two-stage *Anns*¹⁴ test, the test for establishing the existence of a duty of care which still applies in Canada.¹⁵

Application of the Duty of Care test to Social Hosts in *Childs*

On consideration of the first stage of *Anns*, the Court concluded that the necessary proximity had not been established and, consequently, that social hosts of parties where alcohol is consumed do not owe a duty of care to third-party road-users. Two reasons were offered for this conclusion. First, the injury to *Childs* was not reasonably foreseeable on the facts as found by the trial judge. Second, even if foreseeability were established, no duty would arise because the wrong alleged was a failure to act, or nonfeasance, in circumstances where there was no positive duty to act.¹⁶ We now consider the Court’s basis for each of these reasons in turn.

Foreseeability

As noted, the Court rejected the argument of *Childs* that the parties were linked by the foreseeability of physical harm due to the manner in which the party hosts exercised “control or influence over” the party at which Desormeaux was drinking. McLachlin CJ noted that the question of foreseeability was complicated by certain ambiguities of fact in the findings at first instance. For example, the trial judge had found that Desormeaux would have been displaying “obvious signs of impairment” after consuming twelve beers, but since there had been no finding that the hosts actually knew, or ought to have known, that the guest who was about to drive was impaired, McLachlin CJ did not accept that it could be said that they should have foreseen that allowing him to drive might result in injury to other motorists.¹⁷

¹² *ibid.*, at [22].

¹³ *ibid.*

¹⁴ *Anns v Merton London Borough Council* [1978] AC 728.

¹⁵ The *Anns* test was confirmed as representing Canadian law by the Supreme Court of Canada in *City of Kamloops v Nielsen* [1984] 2 SCR 2, and further endorsed, albeit with some modification, recently in *Cooper v Hobart* [2001] 3 SCR 537. For valuable comment see, *e.g.* Neyers (2002) 118 *LQR* 221.

¹⁶ *Childs*, at [26].

¹⁷ *ibid.*, at [28].

In this regard, two interesting features of the factual background to *Childs* should be noted. The first is that the hosts knew that Desormeaux had become drunk in the past and had then driven. The trial judge inferred from this that they should have foreseen that unless Desormeaux's drinking at the party was monitored, he would become intoxicated, get into his car and drive onto the highway. The Supreme Court of Canada rejected this inference. McLachlin CJ rejected the proposition that a history of alcohol consumption and impaired driving makes impaired driving, and the consequent risk to other motorists, reasonably foreseeable. She continued as follows:¹⁸

“The inferential chain from drinking and driving in the past to reasonable foreseeability that this will happen again is too weak to support the legal conclusion of reasonable foreseeability – even in the case of commercial hosts, liability has not been extended by such a frail hypothesis.”

The second important feature of the background to *Childs* was that one of the hosts, Courier, had accompanied Desormeaux to his car before the latter drove away from the party. Could this degree of contact with an intoxicated guest not give rise to the conclusion that the host would foresee the likelihood of harm being caused by the guest? Once again, this argument was rejected by the Supreme Court, principally because there had been no finding at first instance that Desormeaux had displayed signs of intoxication during this brief encounter.

Nonfeasance

The Supreme Court identified the “real complaint”¹⁹ in *Childs* in the following terms: that having organised the party, the hosts failed to prevent their guests from driving when intoxicated. In approaching its consideration of whether such circumstances could give rise to a duty of care in negligence, the Court emphasised the limited circumstances in which the law of negligence will impose a positive duty to act. Such situations are governed by special characteristics of the relationship between the plaintiff and the defendant which establish proximity. McLachlin CJ cited examples from decisions of the Canadian courts imposing such a duty where a defendant intentionally attracts and invites third parties to an inherent and obvious risk that he or she has created or controls²⁰; where paternalistic relationships of supervision and control, such as those of parent-child or teacher-student, exist²¹; and where a defendant either exercises a public function or engages in a commercial enterprise that includes implied responsibilities to the public at large.²² Surveying the caselaw, the Court noted that three themes pervaded

¹⁸ *Childs*, at [29].

¹⁹ *ibid.*, at [33].

²⁰ The Canadian authorities cited by McLachlin CJ in support of this proposition were *Hendricks v The Queen* [1970] SCR 237; *Horsley v MacLaren* [1972] SCR 441; *Arnold v Teno* [1978] 2 SCR 287; and *Crocker v Sundance Northwest Resorts Ltd.* [1988] 1 SCR 1186.

²¹ Relevant Canadian authorities on point, and cited in the judgment of the Supreme Court of Canada in *Childs*, include *Dziwenka v The Queen in right of Alberta* [1972] SCR 419; *Bain v Board of Education (Calgary)* (1993) 146 AR 321.

²² Canadian authorities cited in support of this proposition were *Dunn v Dominion Atlantic Railway Co.* (1920) 60 SCR 310; *Jordan House Ltd. v Menow* [1974]

the jurisprudence in which liability in negligence is imposed for a failure to act. The first theme was the defendant's "material implication in the creation of risk or his or her control of a risk to which others have been invited".²³ The second was a concern for the autonomy of the persons affected by the positive action proposed. As a general rule, the individualistic philosophy underlying the common law militates against the imposition of a duty to eliminate risk. The law "accepts that competent people have the right to engage in risky activities".²⁴ The law will only impinge upon individual autonomy when a special relationship or nexus exists or when the defendant has a material role in the creation or management of the risk which has eventuated. The final theme in the three paradigm cases of liability for nonfeasance identified by the Court, and outlined above, was the theme of reasonable reliance. Two questions thus fell to be considered: did the relationship between party hosts and their guests come within the scope of any of the three categories outlined above? If not, did it constitute an appropriate extension of them having regard to the three themes that underscore them?

The Supreme Court of Canada answered both questions in the negative. The Court first rejected the notion that a private social party fell within any of the three categories outlined above: holding a party – although it certainly may involve some risks – was not especially risky and was "a far cry from inviting participation in a high-risk sport or taking people out on a boating party"²⁵; secondly, since it was a gathering of one's peers there was no element of paternalism or power imbalance; and, thirdly, there was clearly no public element to the relationship between party hosts and their guests. Hence, the situation at issue in *Childs* did not fall within one of the established categories of cases in which it had been held to be appropriate to impose a positive duty to act.

The remaining question – whether the underlying themes present in cases of liability for nonfeasance also applied in this case – was again answered in the negative. Each theme in turn was considered but none was said to encapsulate the relationship at issue between the parties in *Childs*.

The first theme of special risk creation was held inapplicable to the facts of *Childs*. In holding a private party, the host "creates a place where people can meet, visit and imbibe alcohol, whether served on the premises or supplied by the guest", all of which "falls within accepted parameters of non-dangerous conduct".²⁶ Significantly, McLachlin CJ left open the possibility that a duty of care may be imposed upon a host who continues to serve alcohol to a visibly intoxicated person knowing that he or she will be driving home, since the host would have "become implicated in the creation or enhancement of a risk sufficient to give rise to a prima facie duty of care to third parties"²⁷, though this would be subject to a consideration of contrary

SCR 239; *Jane Doe v Metropolitan Toronto (Municipality) Commissioners of Police* (1998) 39 OR (3d) 487.

²³ *Childs*, at [38].

²⁴ *ibid.*, at [39].

²⁵ *ibid.*, at [42].

²⁶ *ibid.*, at [44].

²⁷ *ibid.*, at [44]. See above n.4.

policy considerations at the second stage of the *Anns* test. This point was expressly left open in the judgment of the Supreme Court of Canada in *Childs*. But it was very clearly stated that hosting a party where alcohol is served or consumed, without more, does not amount to the creation or exacerbation of risk of the level required to impose a duty of care on the host to members of the public who may be affected by a guest's conduct.

Similarly, the theme of respect for individual autonomy running throughout the caselaw militated against the imposition of a duty in *Childs*. A party guest was no less responsible for his or her conduct simply by accepting, without more, an invitation from a host. Moreover, the consumption of alcohol – coupled with the attendant assumption of risks of inebriation – was “a personal choice and an inherently personal activity”.²⁸ Outside the special considerations existing in the commercial context outlined above, an adult who voluntarily decided to consume alcohol must bear responsibility for the outcomes of that decision. The individualist philosophy on which this aspect of the judgment was based was memorably captured by McLachlin CJ when she commented that “[a] person who accepts an invitation to attend a private party does not park his autonomy at the door”.²⁹ Finally, the issue of public reliance was deemed to be of no relevance in a private context, and the lack of any reliance by party guests on monitoring by their hosts again only underlined the distinction between commercial hosts and private hosts.

Part II : Analysis

Before considering the policy arguments invoked to deny the duty of care in *Childs*, a number of preliminary points should be made. First, it should be noted that the Supreme Court of Canada has recently confirmed³⁰ that the appropriate test in that jurisdiction for establishing whether a duty of care exists is the two-stage test famously enunciated by Lord Wilberforce in *Anns v Merton London Borough Council*.³¹ As is well known, other courts have long since rejected the continued application of Lord Wilberforce's test and have supplanted it with the three-stage inquiry involving a consideration of whether it is “fair, just and reasonable” to impose a duty. This three-stage test was confirmed as representing the correct test for establishing a duty of care by the House of Lords in *Caparo Industries plc v Dickman*.³² The test comprises the following inquiry articulated by Lord Bridge:

“What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of ‘proximity’ or ‘neighbourhood’ and the situation should be one in which the court considers it fair, just and reasonable that the law should

²⁸ *ibid.*, at [45].

²⁹ *ibid.*

³⁰ See above n.15.

³¹ [1978] AC 728.

³² [1990] 2 AC 605. Compare *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 (High Court of Australia) and *Glencar Explorations plc v Mayo County Council (No.2)* [2002] 1 IR 84 (Irish Supreme Court).

impose a duty of a given scope upon the one party for the benefit of the other.”³³

Since the clear effect of the departure from *Anns* – and the introduction of the “incremental” approach to establishing whether a duty of care exists – was to render it more difficult to establish a duty of care, it is submitted that the result in *Childs* will likely be followed in those jurisdictions in which *Caparo* applies. However, it is instructive to consider various aspects of the approach adopted by the Supreme Court of Canada in *Childs* in the event of similar cases falling to be determined in those other jurisdictions.

Social Hosts v Commercial Hosts

As discussed above, the Court emphasised a number of distinctions between social and commercial hosts warranting the existence of a duty of care on the part of the latter but not the former. Of the three grounds on which such a difference was justified – supervision, regulation and contract – it is respectfully submitted that the latter two grounds are the most convincing. As to the first – the ease with which supervision can be exercised by the commercial host – could it not be said that social hosts are in fact more likely than commercial hosts to know of their guests’ susceptibility to (over-indulge in) alcohol, and will likely have more opportunities to monitor their guests’ state of sobriety given that they are likely to be interacting with them in the course of a party to an extent that would not normally be expected to pertain between a commercial host and a patron in a bar?³⁴ Moreover, it might be thought that social hosts would enjoy a broader range of options to diffuse a potentially dangerous situation and to prevent an intoxicated guest from driving. Commonplace examples might be to encourage guests to defer departure until the following morning; to arrange for guests to be escorted home by a fellow party guest who has not consumed alcohol; at parties where the guest is serving alcohol, to combine this with the serving of food and to cease serving alcohol some time before the party ends.

McLachlin CJ stressed the expectation of the general public that commercial hosts will monitor consumption. But it is respectfully submitted that this emphasis is somewhat undermined by her recognition that commercial hosts have a “perverse incentive” to oversupply alcohol to their customers: if this perverse incentive is such a live threat to patrons, then can it meaningfully be said that members of the public *expect* a commercial host to encourage – and to demand from its customers – restraint in consumption?

Considering the commercial/social host distinction posited in *Childs*, it is important to note that the imposition of a duty of care even upon commercial

³³ [1990] 2 AC 605, at 617-618.

³⁴ This point was implicitly noted by Gleeson CJ in the High Court of Australia in declining to impose liability upon a commercial host in *South Tweed Heads Rugby League Football Club Ltd* (2004) 217 CLR 469 where Gleeson CJ observed at [12]: “The capacity of a supplier of alcohol to monitor the level of risk to which a consumer may be exposed is limited. If a restaurant proprietor serves a bottle of wine to two customers at a table, the proprietor may not know what either of them has had to drink previously, the proportions in which they intend to share the bottle, or what they propose to do when they leave the restaurant. Few customers would take kindly to being questioned about such matters.”

hosts remains far from settled across the common law world. Thus in *Cole v South Tweed Heads Rugby League Football Club Ltd*³⁵ the majority of the High Court of Australia recently declined to impose a duty of care in a commercial alcohol provider case, with only two members of the Court (Kirby and McHugh JJ) finding that there was a duty of care in the case of commercial providers.³⁶

A similarly cautious approach in the context of commercial hosts was evinced by the Northern Ireland Court of Appeal in *Joy v Newell (t/a The Copper Room)*.³⁷ Although *Joy* concerned an action brought by a guest himself rather than a third party, the case is nonetheless relevant in the context of the present debate in terms of the attitude evinced by the Court to the relationship between alcohol providers and their guests. In that case, the plaintiff entered the defendant's bar in an intoxicated state, sat on a bar stool and ordered a drink. After a couple of sips, he fell off the stool and sustained injuries that caused paralysis. The plaintiff brought an action in negligence against the publican, arguing that the latter owed him a special duty of care because of the nature of the licensee and customer relationship, which meant that the publican had a positive duty to ensure the plaintiff's safety on his premises. The plaintiff contended that the positive duty had been breached by his being permitted to use a stool in his intoxicated state. At first instance³⁸, it was held that, although the defendant owed a positive duty of care by virtue of his licensee status, this had not been breached in the instant case. The Northern Ireland Court of Appeal dismissed the appeal. Carswell LCJ (as he then was) held that a positive duty to save someone from danger only arose where there had been an assumption of responsibility to ensure that person's safety. Despite it being a criminal offence for a licensee to serve alcohol to an obviously intoxicated customer, it was unreasonable to assume that a licensee had assumed a positive duty on the basis that a customer could become so drunk that he would be unable to take care of himself. It had not been proved that either the defendant or his barman knew the extent of the plaintiff's intoxication.

Clearly this latter point echoes the qualification entered by McLachlin CJ in *Childs* in the context of social hosts, that is, that a duty could arise where the host knew the extent of the guest's intoxication. The decision in *Joy v Newell* would suggest that the courts in Northern Ireland will be slow indeed to impose liability even on a commercial host in the absence of clear and

³⁵ (2004) 217 CLR 469. For comment see Orr and Dale, "Impaired judgements? Alcohol server liability and 'personal responsibility' after *Cole v South Tweed Heads Rugby League Football Club Ltd*" [2005] TLJ 7.

³⁶ See the judgment of Kirby J at [90] – [93] and that of McHugh J at [31]. Gummow and Hayne JJ specifically reserved (at [81]) their position as to whether or not there was a duty of care owed by commercial hosts. Significantly, even if there had been a duty of care on the defendant club, Gummow and Hayne JJ expressed the view that on the facts of *Cole* the duty would have been met merely by offering to provide a courtesy means of transport home to the intoxicated patron (at [80]). Gleeson CJ and Callinan J, in separate judgments, agreed that there had been no breach of duty, and went further in holding that no duty of care arose in the circumstances of the case. See above n.34, and the judgment of Gleeson CJ at [18] and that of Callinan J at [131].

³⁷ [2000] NI 91.

³⁸ [1998] NIJB 111.

manifest assumption of responsibility. In so holding, the Northern Ireland Court of Appeal approved and applied the decision of the Court of Appeal in *Barrett v Ministry of Defence*,³⁹ a decision evincing a similar reluctance to impose liability upon commercial hosts. Having also considered, *inter alia*, relevant jurisprudence from both the Supreme Court of Canada and from Australian courts, the Court concluded that it was “not attracted” by these authorities which were apt to impose an “unreasonable burden on licensees”.⁴⁰

Misfeasance or nonfeasance?

As we have seen, the complaint in *Childs* was characterised as involving a question of nonfeasance: the hosts did not commit an act of carelessness, but rather failed to perform a positive act of preventing another person from driving. We have seen that McLachlin CJ characterised the holding of a private party as a situation in which the host “creates a place where people can meet, visit and imbibe alcohol, whether served on the premises or supplied by the guest”, all of which “falls within accepted parameters of non-dangerous conduct”.⁴¹ This categorisation of the hosts’ role as one of nonfeasance may, however, be questioned. It can legitimately be said that the hosting of a party and the provision of a forum in which alcohol will be consumed constitutes an activity involving foreseeable risks of over-consumption. The effects of over-consumption are sufficiently well known for it to be deemed common knowledge that such an event carries with it the potential for injuries to guests – and to innocent third parties whom such guests will meet if they drive away from the party venue. Accordingly, is not the decision to undertake the staging of such an event indeed (despite the contrary position adopted by the Supreme Court of Canada⁴²) a decision to undertake to “create a risky situation and invite others into it”?

Another curious feature of the “nonfeasance” position adopted by the Supreme Court of Canada in *Childs* is that the findings of fact made by the trial judge – which were not disturbed at either level of appeal – included a determination that he was “satisfied on the evidence that Dwight Courier deliberately did not pay any attention to how much alcohol was brought in by the Desormeaux group or how much was consumed while on the premises.”⁴³ With respect, it is not altogether obvious how such a finding could lead to the conclusion that the facts of *Childs* amounted to nonfeasance – particularly since both Zimmerman and Courier knew that Desormeaux had a propensity to over-indulge in alcohol, and Courier escorted Desormeaux to his vehicle and thus knew that his guest was driving away.

Nor should the misfeasance/nonfeasance question necessarily be answered by consideration of whether the social party was one at which guests provided their own alcohol. As we have seen, in *Childs* the hosts had not provided alcohol save for small celebratory glasses of champagne at

³⁹ [1995] 1 WLR 1217.

⁴⁰ [2000] NI 91, 102.

⁴¹ *Childs*, at [44].

⁴² *ibid.*, at [35].

⁴³ *ibid.*, at [67].

midnight; the event was a “BYOB” gathering. The sole object of organizing a “BYOB” party is presumably to relieve the host(s) of the expense and inconvenience of supplying alcohol for all guests; beyond this, the host-guest dynamic remains intact and the event loses nothing of its original character: the gathering together of one’s friends to socialise while consuming alcohol. Whether or not that gathering will itself give rise to the imposition of a duty of care in negligence is a question which remains far from settled in many common law jurisdictions. The Supreme Court of Canada with its judgment in *Childs* has in principle answered “No”, though expressly recognising that certain instances may arise in which liability could be imposed.

Autonomy

As already noted, the Supreme Court of Canada in declining to impose a duty of care in negligence placed particular emphasis on personal autonomy and expressed concern lest such autonomy be diminished or eroded were the law to impose a duty of care upon social hosts in the position of the defendants in *Childs*. McLachlin CJ expressed in particularly strong terms her view that adult guests at a party must accept responsibility for their own conduct and the ramifications thereof. This aspect of the Court’s judgment is redolent of an increasing tendency of courts in a number of jurisdictions to have regard to autonomy principles so as to prevent recovery in the law of torts. One clear example of just such a philosophy was the decision of the House of Lords in *Tomlinson v Congleton Borough Council*.⁴⁴ It will be recalled that the claimant in *Tomlinson* suffered a serious injury when he dived into a park lake and struck his head on the bottom. He sued the defendant occupiers of the park. The House of Lords unanimously agreed that the defendants were not liable. The philosophy of *Tomlinson* was memorably captured by Lord Hobhouse in the following forceful passage⁴⁵ of his opinion:

“In truth, the arguments for the claimant have involved an attack upon the liberties of the citizen which should not be countenanced. They attack the liberty of the individual to engage in dangerous, but otherwise harmless, pastimes at his own risk and the liberty of citizens as a whole.... The pursuit of an unrestrained culture of blame and compensation has many evil consequences and one is certainly the interference with the liberty of the citizen.”

The general principle running through cases such as *Childs* and *Tomlinson* – the importance of individual autonomy – arguably militates against the recognition of a duty of care of the kind contended for in *Childs*. There, the Supreme Court of Canada fastened on the principle that “the common law is a jealous guardian of individual autonomy”.⁴⁶ It is perhaps ironic that although in recent years autonomy values have been consistently canvassed with a view towards achieving redress in tort law,⁴⁷ *Childs* illustrates that

⁴⁴ [2004] 1 AC 46.

⁴⁵ *ibid.*, at 97.

⁴⁶ *Childs*, at [31].

⁴⁷ Two notable examples are the majority decisions of the House of Lords in *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309 and *Chester v Afshar*

concerns about the promotion of autonomy can, too, be identified so as to disallow recovery through the vehicle of tort law.

Conclusion

We have seen that the decision in *Childs* was restrictive in nature and declined to extend liability in negligence to the social hosts in that case. Even if the approach in *Childs* is followed in other jurisdictions, however, there may still exist a number of situations in which social hosts could be held liable in negligence for the acts of their intoxicated guests. In this regard, a number of points occur from an analysis of the judgment in *Childs*. First, it is important to emphasise that the Supreme Court of Canada expressly reserved its position on whether a duty of care would exist in a situation where hosts are aware of the intoxicated state of their guest but nevertheless permit him or her to drive away intoxicated from a party.⁴⁸ Furthermore, the reference by McLachlin CJ to situations in which the social relationship is characterised by a paternalistic element – a characteristic which favours the imposition of a duty – suggests that a duty of care would likely be imposed upon, for example, parents who either invite or permit a group of teenagers to consume alcohol at a party. At a more conceptual level, it is of interest that the Court in *Childs* did not accept that a *prima facie* duty of care arose, then going on to consider any policy considerations which might have negated that duty.⁴⁹ Should a similar case fall to be considered in those jurisdictions applying the *Caparo* test, it may be that the application of the first two limbs of that test could yield an affirmative answer to the question of whether a duty should be imposed, with the matter then being determined on the application of the ever-malleable “fair, just and reasonable” third limb.⁵⁰

[2005] 1 AC 134. The latter case was discussed by Heywood in (2005) 56 *NILQ* 266.

⁴⁸ See above, text preceding n.27.

⁴⁹ As we have seen, this approach had been taken by Chadwick J at first instance but was not adopted at either level of appeal. In both the Ontario Court of Appeal and the Supreme Court of Canada, the facts were deemed not to disclose even a *prima facie* duty under the first stage of the *Anns* test.

⁵⁰ The malleability of this third limb was recently highlighted by the contrasting approaches of the House of Lords and the Court of Appeal in *Commissioners of Customs and Excise v Barclays Bank* [2006] UKHL 28; [2006] 3 WLR 1.