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Proprietary relief in *Boardman v Phipps*

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1 Introduction

The extent to which acquisitive breaches of fiduciary obligation trigger a constructive trust remains one of the most difficult and controversial issues in equity and the law of restitution. The cases are now in such a confused state that a decision of the Supreme Court is necessary.[1] When the opportunity arises the court will have to deal with the leading authority of *Boardman v Phipps*.[2] The case is known to generations of law students as the leading case illustrating the harshness, even unfairness, of equity's strict prophylactic duty of fiduciary loyalty. However, in recent years it has become as important, if not more so, in the debate over the role of the constructive trust in cases of wrongful fiduciary gain. As a decision of the House of Lords, *Boardman* cannot be ignored but precisely what it decides has proved a difficult question to answer.

The main reason for the difficulty is that lack of clarity in the reports of the case, coupled with ambiguity in the judgments, has generated considerable confusion over whether a constructive trust was in fact recognised or whether the defendants were made personally liable to pay the claimant the value of the net profit they derived from their breach of fiduciary obligation. The difference is crucial given the far-reaching consequences that flow from the recognition of a proprietary claim. This article resolves the confusion by returning to the printed case papers submitted by the litigants to the House of Lords.[3]

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1 *FHR European Ventures LLP v Mankarious* [2013] EWCA Civ 17, [2014] Ch 1 [116] (Sir Terence Etherton C). We will not have to wait long for a decision of the Supreme Court. Permission to appeal the decision of the Court of Appeal in the FHR case was granted by the Supreme Court by Order dated 3 July 2013. The appeal is scheduled for a three day hearing in June 2014.

2 [1967] 2 AC 46 (HL).

3 A copy of these papers was deposited with and survives at Lincoln's Inn library, where House of Lords printed case papers were regularly deposited until recently. The papers include: the Petition of Appeal to the House of Lords, Case for the Appellants, Case for the Respondent, Writ of 1 March 1962, Statement of Claims, Defence Statement, Order of Mr Justice Wilberforce, Notice of Appeal to Court of Appeal, and Order of Court of Appeal. My thanks to Sarah Wheeler and Guy Holborn of Lincoln's Inn library for supplying me with a copy of the papers and further information regarding the deposit of such papers with the library.

These papers, which were not thought to have survived,[4] demonstrate that a constructive trust was indeed recognised and underpinned the claimant's recovery. However, ultimately the claimant did not seek a transfer of the shares acquired in breach of fiduciary obligation but was content with a personal claim for the value of the net profits made on the shares.

The printed case papers also facilitate a better understanding of the foundation of the constructive trust that was recognised. The orthodox view has long been that, if a constructive trust was recognised in *Boardman*, it must have been triggered by the mere acquisition of gain in breach of fiduciary obligation. However, closer examination of the case reveals that one of three additional elements arguably influenced the recognition of a constructive trust: (1) a finding that the gain was acquired by a fiduciary acting as an agent for his principal; (2) a finding that the gain was obtained by exploiting trust property; or (3) a finding that the gain derived from an opportunity of the claimant. Although it is now possible to confirm that a constructive trust was recognised in *Boardman* the case cannot therefore stand as authority for the broad principle for which it is commonly cited, namely, that the mere acquisition of gain in breach of fiduciary obligation triggers a constructive trust. In *Boardman* at least something more was required, although what that 'something' was did not receive a uniform answer.

2 Background

(A) The solicitor and the ungrateful beneficiary

Thomas Gray Boardman succeeded at most things. He was the recipient of a Military Cross for his part in an assault on a German stronghold during the Normandy landings in 1944. He was a solicitor and successful businessman who served on the boards of numerous companies, including the National Westminster Bank of which he was chair between 1983 and 1989. He was a Conservative Member of Parliament between 1967 and 1974, after taking the previously safe Labour seat of Leicester South-West, and held the offices of Minister for Industry (1972–1974) and Chief Secretary of the Treasury (1974) in the Heath government. He was made a life peer in 1980 and was active in the House of Lords until shortly before his death in 2003.[5] Yet to many people, particularly law students, Tom Boardman is known as the unfortunate solicitor of the Phipps family trust, whose best intentions put him on the wrong side of an ungrateful beneficiary and the harsh application of equitable doctrine.

In the year that Boardman landed on the Normandy beaches the trust that was to cause him so much trouble came into effect. Charles William Phipps died leaving his residuary estate to provide an annuity for his wife, Ethel, for her life and thereafter to be distributed five-eighteenths to each of his three sons (Richard, John and Tom) and three-eighteenths to his daughter (Mrs Noble). Ethel Phipps, Mrs Noble and an accountant, Wilfred Fox, were

4 *Sinclair Investment (UK) Ltd v Versailles Trade Finance Ltd (in administrative receivership)* [2010] EWHC 1614 (Ch) [47] (Lewison J). It seems the papers have not survived in the House of Lords Parliamentary Archive. Nor, apparently, have the trial documents or the Order of Wilberforce J survived in the archives of the Royal Courts of Justice: M Conaglen, 'Thinking about Proprietary Remedies for Breach of Confidence' [2008] IPQ 82, 86.

5 For further details of Tom Boardman's business and political life, see 'Boardman' in *Who was Who* (online edn OUP 2007); 'Lord Boardman' *The Times* (London, 12 March 2003) 35; 'Obituary of Lord Boardman Tory Minister Charged with Managing the Government's Emergency Measures during the Three Day Week' *The Daily Telegraph* (London, 12 March 2003) 29; 'Lord Boardman: Discreetly Rightwing Tory Minister and NatWest Chief' *The Guardian* (London, 12 March 2003) 27; 'Lord Boardman: Conservative Minister and Chairman of NatWest' *The Independent* (London, 12 March 2003) 18; 'Boardman to Lord it at Nat West' *The Guardian* (London, 27 January 1983) 20.

the trustees, although Ethel, who suffered from senile dementia, took no active role in the trust affairs at the material time.

The residuary estate included 8000 shares in Lester & Harris Ltd., an underperforming private company with issued share capital of 30,000 £1 ordinary shares. Boardman, the trust's solicitor and first defendant/appellant, and Tom Phipps, a trust beneficiary and second defendant/appellant, attended the company's annual general meeting in December 1956 as representatives of the trust holding. Boardman sought information regarding the company and attempted, unsuccessfully, to get Tom Phipps elected onto the board of directors. Following the meeting, the defendants concluded that the best way to protect the trust shareholding was to gain control of the company. Mr Fox was keen to see control of the company in friendly hands but was of the firm opinion that the trust should not purchase further shares 'under any circumstances'.[6] The terms of the trust, moreover, did not permit it.[7] The only way this legal impediment could be removed was by application to the court to sanction the purchase of further shares. That was something a court was unlikely to do,[8] either under its inherent emergency and salvage jurisdiction,[9] or under the powers conferred by s 57 of the Trustee Act 1925.[10] First, the trust was close to termination since the residuary estate was distributable to the remaining beneficiaries upon the death of Ethel Phipps, whose health was deteriorating rapidly.[11] Second, the trust had no money with which to make the investment.[12] Third, the purchase of further shares in a poorly run company is likely to have been considered speculative and imprudent.[13] Boardman and Tom Phipps therefore proposed to purchase further shares in the company with their own funds and at their own risk.

There followed three stages of negotiations for the shares. Phase 1 took place between January and April 1957, during which time Boardman made an offer to purchase Lester & Harris shares at £3 per share. The offer was accepted by the holders of 2925 shares. Phase 2 ran from April 1957 to October 1958. During this phase of negotiations, in which it was proposed to divide the assets of the company between the Phipps family and the other principal shareholder group, Boardman obtained information about the factories of Lester & Harris in Coventry and Nuneaton and its property in Australia. He also obtained detailed trading accounts of the English and Australian arms of the business. Throughout this phase

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6 [1967] 2 AC 46 (HL) 73.

7 The investment powers of the trustees were limited to the purchase of the trustee securities listed in the Trustee Act 1925, s 1.

8 [1967] 2 AC 46 (HL) 76 (Viscount Dilhorne), 119 (Lord Upjohn).

9 In *Re New* the Court of Appeal upheld the exercise of the jurisdiction to sanction the repurchase of shares by some trusts in a reconstituted company. However, the reconstitution carried little risk to the trusts since the new company was the same as the old except for a larger capital and the power to issue debentures. The courts, said Romer LJ, 'will not be disposed to sanction transactions of a speculative or risky character' [1901] 2 Ch 534 (CA) 545. Subsequently, the Court of Appeal refused to exercise the jurisdiction to sanction acts by trustees merely because they were considered desirable and beneficial to a trust: see *Re Tollemache* [1903] 1 Ch 955 (CA) 956, where Cozens-Hardy LJ described *Re New* as the 'high water mark of the exercise by the court of its extraordinary jurisdiction in relation to trusts'. The jurisdiction was interpreted restrictively in the years immediately prior to *Boardman*: see *Re Chapman* [1954] AC 429 (HL) 454 (Lord Morton).

10 The section permits a court to confer on trustees a power to make investments not otherwise authorised if it 'is in the opinion of the court expedient'. The Variation of Trusts Act 1958, s 1, which extended the court's powers, was inapplicable.

11 Ethel Phipps died in November 1958, although the estate was not distributed to the remaining beneficiaries until early 1960. The delay in distribution was the result of events unconnected to the litigation.

12 [1967] 2 AC 46 (HL) 108–09 (Lord Hodson), 119 (Lord Upjohn).

13 Lord Upjohn thought a court would have considered the purchase of further shares to be 'throwing good money after bad': ibid 119. Similar views were expressed by Viscount Dilhorne and Lord Cohen: ibid 92, 103.

Boardman represented to the chair of Lester & Harris, Mr Smith, that he was acting for the trust. Phase 3 began in October 1958 when Mr Smith informed Boardman he was prepared to sell his shares and to recommend to his associates they do likewise. This led to the purchase of 14,567 shares by the defendants at £4 10*s* per share. A further 4494 shares were purchased at the same price and 2925 shares were purchased pursuant to the earlier offer of £3 per share. During this phase Ethel Phipps died, at which point the residuary estate vested absolutely in the remaining beneficiaries under the will.

Having taken control, Boardman installed himself as chair of the company and liquidated its unprofitable assets. This generated total capital dividends of £5 17*s* 6*d* per share, £3 per share being paid in 1960 following the sale of the Australian business and £2 17*s* 6*d* per share being paid in 1961 following the sale of the Coventry factory.

(B) The relief claimed

Following the payment of the second capital distribution, Boardman approached the claimant John Phipps, a beneficiary under the will and the brother of Tom Phipps, and offered to purchase his shares in Lester & Harris. At this point John Phipps questioned the defendants' conduct and issued a writ claiming:

(1) a declaration that the defendants held five-eighteenths of the shares for him as constructive trustees;

(2) an account of profits made by the defendants on the shares; and

(3) an order that the defendants transfer to the claimant the shares held by them as constructive trustees for the claimant and pay to the claimant five-eighteenths of the profit found to have been made by the defendants on the taking of the account.[14]

Wilberforce J, a unanimous Court of Appeal (Lord Denning MR, Pearson and Russell LJJ) and a bare majority of the House of Lords (Lords Cohen, Hodson and Guest, Viscount Dilhorne and Lord Upjohn dissenting) held that Boardman and Tom Phipps stood in a fiduciary relationship to the trust[15] and had breached their fiduciary obligations.[16] They were, accordingly, accountable.

3 The nature of the defendants' accountability

(A) Sources of remedial confusion

Much of the disagreement over the nature of the relief ordered in *Boardman* can be traced to differing reports of the trial Order and the seemingly inconsistent language used in the various judgments. The All England Reports state that Wilberforce J made an Order 'for the declaration sought by para (i) of the claim in the statement of claim (viz, a declaration of the constructive trusteeship . . .) and for an account of profits as claimed in para (ii) of the claim in the statement of claim'.[17]

14 Writ dated 1 March 1962; amended statement of claim 18 July 1963, claims 1–3. The relief claimed is reported accurately in both trial reports: [1964] 2 All ER 187 (Ch) 189; [1964] 1 WLR 993 (Ch) 1005.

15 There was no consensus as to the underlying foundation of the defendants' fiduciary positions: see below nn 84–89 and accompanying text.

16 There is a similar lack of consensus regarding the aspect of the fiduciary obligation of loyalty that was breached by the defendants. Some thought there had been a breach of the no-profit rule while others thought both the no-profit and the no-conflict rules had been breached. The no-conflict aspect was not pleaded at trial but introduced by Lord Denning MR in the Court of Appeal, almost as an afterthought: [1965] Ch 992 (CA) 1020.

17 [1964] 2 All ER 187 (Ch) 208.

There is no considered discussion of the Order in the appeals. However, Lord Justice Pearson,[18] Lord Cohen[19] and Lord Guest[20] each referred to the Order as declaring the defendants held five-eighteenths of the shares 'as constructive trustees' and were accountable on that basis. Moreover, the defendants were characterised as 'constructive trustees' on three occasions in the House of Lords – once by Lord Hodson[21] and twice by Lord Guest. The Lester & Harris shares, said the latter:

> are the shares of which the courts below have held the appellants to be constructive trustees and in respect of which as to 5/18ths the appellants are accountable to the respondent for the profits arising from such purchase. The question, and the only question before this House, is whether the appellants are constructive trustees of these shares.[22]

Having considered the facts and surveyed the law, Lord Guest expressed 'no hesitation in coming to the conclusion that the appellants hold the Lester & Harris shares as constructive trustees and are bound to account'.[23]

On the other hand, the report in the Weekly Law Reports does not state that a constructive trust was declared. Rather, it reports that Wilberforce J declared the defendants 'were accountable' with '[f]urther consideration of Order to transfer the shares held by the defendants . . . and payment of profit found on taking of the account adjourned'.[24] In the absence of further consideration of the transfer of the shares during the rest of the litigation, and in the absence of any evidence that the shares were in fact transferred, this might be taken to imply that no constructive trust was recognised.

Some judgments in *Boardman* also contain references to the defendants' liability to account for profits rather than their liability to account for the shares or 'as constructive trustees'. Thus, at trial Wilberforce J stated that the question for determination was whether the defendants were fiduciaries 'so as to be accountable to the trust for any profit which they made'.[25] In the House of Lords, Lord Hodson expressed 'the proposition of law involved' in the case in similar terms[26] while Lord Cohen concluded that the claimant was fortunate 'in that the rigor of equity enables him to participate in the profits'[27] and that each appellant is 'accountable to the respondent for his *share of the net profits* they derived from the transaction'.[28] Indeed, a passage in the judgment of Lord Denning MR in the Court of Appeal suggests that payment of the defendants' net profits rather than the transfer of the shares was sought by the claimant:

18 [1965] Ch 992 (CA) 1021.

19 [1967] 2 AC 46 (HL) 99.

20 Ibid 112.

21 Ibid 105.

22 Ibid 114.

23 Ibid 117. Lord Upjohn, dissenting, also formulated the defendants' liability in terms of constructive trusteeship but could 'see nothing to make them constructive trustees': ibid 129–30.

24 [1964] 1 WLR 993 (Ch) 1018. The Order of Wilberforce J is similarly reported in the report of each appeal in the Law Reports: [1965] Ch 992 (CA) 993, 1007; [1967] 2 AC 46 (HL) 46, 47, 61.

25 [1964] 1 WLR 993 (Ch) 1006, see also 1019.

26 [1967] 2 AC 46 (HL) 105.

27 Ibid 104.

28 Ibid (emphasis added). But compare Lord Cohen's earlier formulation of the issue for determination which he identified as whether the defendants were 'in such a fiduciary relationship *vis-à-vis* the trustees that they must be taken to be accountable to the beneficiaries *for the shares and for any profit derived by them therefrom*': ibid 100 (emphasis added).

> the plaintiff [claims the defendants] ought not to be allowed to retain *the profit they have made on the shares* and ought to account for it to the estate and that he, the plaintiff, should have his 5/18ths. He does not suggest any dishonesty or bad faith on their part. He simply says that in the circumstances they are *accountable for the profit*. He acknowledges that they have done a lot of hard work and are entitled to full and generous remuneration for what they have done; but he says *they should not take the whole of this large profit for themselves*.[29]

It is also notable that the principle of *Regal (Hastings) v Gulliver*[30] was influential and considered dispositive of the case by Wilberforce J,[31] Pearson LJ,[32] and the members of the majority in the House of Lords.[33] In *Regal* the directors were personally liable to the company for profits made on the sale of shares in a subsidiary, the shares having been acquired by the directors in breach of fiduciary obligation, notwithstanding that the company itself was financially disabled from purchasing the shares. Lord Porter was clear that the shares themselves never became the property of the company[34] while Lord Wright referred favourably to *Lister & Co v Stubbs*[35] as authority for the proposition that the relationship between principal and fiduciary in secret profit cases 'is that of debtor and creditor, not trustee and *cestui que trust*'.[36] The cases, he said in a passage quoted by Lord Cohen in *Boardman*,[37] establish the general rule that 'an agent must account for net profits secretly . . . acquired by him in the course of his agency'.[38] Reliance on *Regal* by the majority in *Boardman* is therefore arguably inconsistent with the recognition of a constructive trust triggered by the simple appearance of gain acquired in breach of fiduciary obligation.

(B) THREE INTERPRETATIONS

The lack of remedial clarity in *Boardman* has generated three competing interpretations of the case.

(i) Broad proprietary constructive trust principle

The first interpretation is premised on the assumption that the defendants were declared constructive trustees of the shares for the claimant. It is assumed to follow that, since the defendants acted honestly and caused the trust no loss (indeed, the trust benefitted from the defendants' actions), the mere appearance of gain acquired in breach of fiduciary obligation must be sufficient to trigger a constructive trust. Thus, in *Sinclair Holdings SA v Versailles Trade Finance*,[39] Rimer J, as he then was, agreed that *Boardman* demonstrates:

> unauthorised profits acquired by a fiduciary in breach of his fiduciary duty are (if identifiable) held by the fiduciary upon a constructive trust for the person to whom the fiduciary duty is owed, who thereby obtains an immediate proprietary interest in them.[40]

29 [1965] Ch 992 (CA) 1016 (emphasis added).
30 [1942] 1 All ER 378 (HL), reproduced [1967] 2 AC 134n.
31 [1964] 1 WLR 993 (Ch) 1010–12.
32 [1965] Ch 992 (CA) 1022 (Pearson LJ). See also the briefer references to the case by Lord Denning: ibid 1019.
33 [1967] 2 AC 46 (HL) 103 (Lord Cohen), 108–09 (Lord Hodson), 117 (Lord Guest).
34 *Regal* (n 30) 395.
35 (1890) 45 Ch D 1 (CA).
36 *Regal* (n 30) 393.
37 [1967] 2 AC 46 (HL) 101–02.
38 *Regal* (n 30) 392.
39 [2007] EWHC 915 (Ch).
40 Ibid [105].

Similarly, in *Attorney General for Hong Kong v Reid,* the Privy Council considered that *Boardman* demonstrates 'the extent to which equity is willing to impose a constructive trust on property obtained by a fiduciary by virtue of his office'.[41] The remedial principle of *Boardman* is therefore broad and simple: the acquisition of gain in breach of fiduciary obligation is sufficient to trigger a constructive trust.[42]

(ii) Purely personal relief

The second interpretation of *Boardman* rejects the claim that a constructive trust was recognised. Rather, it is argued that *Boardman* involved nothing more than the recognition of a purely personal claim to five-eighteenths of the value of the net profits derived by the defendants from the purchase of the shares. The defendants were not, and were never declared to be, proprietary constructive trustees of the shares.[43]

Those pressing this interpretation focus on the report of the Order in the Weekly Law Reports, noting that nothing in 'the words of the court's order contain the least indication of a proprietary liability'.[44] They also argue it is important not to place 'too much reliance . . . on the mere language of constructive trusteeship'.[45] Not only do the speeches in the House of Lords 'collectively blur the distinction'[46] between personal liability to account and constructive trusteeship, but the language of constructive trusteeship does not of itself indicate any concrete conclusion. For these reasons, it is said, *Boardman* is best interpreted 'only as authority for personal liability and not as one involving a proprietary constructive trust'.[47]

(iii) Declaration of proprietary constructive trusteeship possible but irrelevant

In recent years those anxious to limit the reach of proprietary claims have provided a third interpretation of *Boardman*. They accept that some aspects of the case have a 'proprietary flavour' and may indicate a constructive trust was formally recognised. However, they dismiss a proprietary claim as unnecessary and irrelevant. Thus, it is said that, while the views of reasonable people 'may differ about whether the remedy awarded . . . was or was not proprietary',[48] the point was never argued and 'apparently did not matter'.[49] Most notably, there is nothing to suggest that the shares were transferred to the claimant and

41 [1994] 1 AC 324 (PC) 338. The New Zealand Court of Appeal had been much more cautious, noting that while *Boardman* involved the recognition of a constructive trust 'it would be a mistake to assume that by a side wind their Lordships . . . intended to overrule *Lister & Co v Stubbs*': *Attorney General for Hong Kong v Reid* [1992] 2 NZLR 385, 391.

42 For similar interpretations of *Boardman* see *Force India Formula One Team Ltd v Malaysia Racing Team Sdn Bhd* [2012] EWHC 616 (Ch), [2012] RPC 29 [376] (Arnold J); *Dyson Technology Ltd v Curtis* [2010] EWHC 3289 (Ch) [183]–[187] (Grant J); *Clearview International Ltd v PWH Com Ltd* [2008] EWHC 1494 (Ch) [97] (Judge Purle QC); *Daly v Hubner* (Ch, 9 July 2001) [185], [187] (Etherton J); *News International plc v Clinger* (Ch, 17 November 1998) [220]–[221] (Lindsey J); *Carlton v Halestrap* (1988) 4 BCC 538 (Ch) 540 (Morritt J); *Islamic Republic of Iran Shipping Lines v Denby* [1987] 1 Lloyd's Rep 367 (QB) 371 (Leggatt J); *Normalec Ltd v Britton* [1983] FSR 318 (Ch) 322 (Walton J). The final case is particularly interesting as a decision of Sir Raymond Walton QC, who appeared as lead counsel for the claimant in *Boardman.*

43 *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch), [2006] FSR 17 [1546] (Lewison J).

44 P B H Birks, 'Personal Restitution in Equity' [1988] LMCLQ 128, 133.

45 D Crilley, 'A Case of Proprietary Overkill' [1994] RLR 57, 61.

46 Ibid.

47 D Hayton, 'Developing the Law of Trusts for the Twenty-First Century' (1990) 106 LQR 87, 102. More recently, Professor Hayton has argued that *Boardman* should be interpreted as a case recognising a proprietary constructive trust: D Hayton, 'No Proprietary Liability for Bribes and Other Secret Profits?' (2011) 25 Tru LI 3.

48 *Sinclair* (n 4) [47].

49 Ibid [43], [44], [47]. Lord Neuberger MR expressed agreement with this point on appeal: *Sinclair Investment (UK) Ltd v Versailles Trade Finance Ltd (in Administrative Receivership)* [2011] EWCA Civ 347, [2012] Ch 453 [70].

there was no risk that the defendants were or might become bankrupt thereby limiting the value of a personal claim. This, it is said, explains the lack of clarity on the constructive trust point: it was not the subject of debate or considered observation because nothing turned on its recognition or absence. If recognised, the constructive trust was but a convenient mechanism for reaching an outcome identical to one which could have been reached without a constructive trust. Since nothing turned on the point, *Boardman* has little authoritative value on the issue of constructive trusts.

4 What was ordered?

(A) The order of Wilberforce J and its treatment in the appeals

The second interpretation, that a purely personal claim was ordered but there was no proprietary constructive trusteeship, can be discounted immediately. The Order of Mr Justice Wilberforce dated 25 March 1964, a copy of which is included in the House of Lords printed case papers, states:

> THIS COURT DOTH DECLARE that the Defendants Thomas Gray Boardman and Thomas Edward Phipps hold five eighteenths of the 21.986 Ordinary Shares of £1 each in Lester & Harris Limited mentioned in the Statement of Claim as constructive trustees for the Plaintiff
>
> AND THIS COURT DOTH ORDER that the following account and inquiry be taken and made that is to say
>
> (1) An Account of the profits come to the hands of the Defendants Thomas Gray Boardman and Thomas Edward Phipps and each of them from the said shares and
>
> (2) An Inquiry what sum is proper to be allowed to the Defendants Thomas Gray Boardman and Thomas Edward Phipps or either of them in respect of their or his work and skill in obtaining the said shares and the said profits in respect thereof
>
> AND IT IS ORDERED that no proceedings be taken on the said Account or on the said Inquiry . . . until after the expiry of the [time limit] for serving notice of appeal from this Order and if notice of appeal is served within such period then until after the disposal of the said appeal.
>
> AND IT IS ORDERED that the Defendants Thomas Gray Boardman and Thomas Edward Phipps do pay the Plaintiff his costs of this Action . . .
>
> THE further consideration of this Action is adjourned.

No proceedings were taken on the Account or the Inquiry since the defendants issued notice to appeal to the Court of Appeal, within the prescribed time limit, on 2 July 1964, and sought to have the Order set aside. The Court of Appeal dismissed the appeal and declared that 'the said Order dated 25th March 1964 be affirmed'.[50] The defendants appealed this Order to the House of Lords. Both the Order of Wilberforce J and the Order of the Court of Appeal were submitted to the House as part of the printed case. The only question for determination by the House, the appellants submitted, was 'whether the Appellants are accountable to the Respondent as constructive trustees of certain shares in Lester & Harris Limited which were purchased by them'.[51]

It is therefore clear that the defendants formally were declared constructive trustees of five-eighteenths of the shares and that this declaration was affirmed in successive appeals.

50 Order of the Court of Appeal, 26 January 1965.

51 Case for the appellants, para 2.

The report of the Order in the Weekly Law Reports is misleading since it omits reference to the declaration of the constructive trusteeship as sought in paragraph one of the Statement of Claim, stating simply that the defendants were 'accountable'. However, it reports that consideration of the relief claimed in paragraph three of the Claims, which included the transfer of the shares, was adjourned. This creates the impression that no decision was reached on the defendants' constructive trusteeship. We can now be sure that it was.

(B) THE NATURE OF THE DEFENDANTS' CONSTRUCTIVE TRUSTEESHIP

Although it is clear the defendants were declared constructive trustees of the shares in the Order of Wilberforce J, and the Order was affirmed in the successive appeals, two questions remain. First, were the defendants declared *proprietary* constructive trustees of the shares in the Order? Secondly, if the defendants *were* declared proprietary constructive trustees of the shares was the proprietary nature of the constructive trusteeship recognised when the Order was affirmed in the successive appeals? The mere use of the language of constructive trusteeship is indeterminate since it may carry one of two meanings. In its more usual sense 'constructive trustee' denotes a person who holds identifiable property on constructive trust for another person who holds an equitable proprietary interest in the property subject to the constructive trust. However, the language of constructive trusteeship may also function as 'a formula for equitable relief' to denote simply that a defendant who is not a trustee in the strict sense is to be treated for a particular purpose 'as though he were'.[52] When employed in this latter sense 'constructive trusteeship' does not describe a proprietary relationship.[53]

The wording of the Order of Wilberforce J points to proprietary constructive trusteeship: the defendants, it was declared, 'hold' the shares as constructive trustees. Moreover, the Order was framed to grant that which the claimant sought. The complaint was that the defendants 'failed or refused to transfer to the Plaintiff 5/18ths of the shares in the Company purchased by them . . . or to account to the Plaintiff for 5/18ths of the profit made by them on such shares'.[54] The claimant therefore sought a declaration of constructive trusteeship of five-eighteenths of the shares as a means of obtaining a transfer of the shares and payment of the profits made thereon in the interim. Wilberforce J granted the declaration of constructive trusteeship and ordered an account be taken. The order to transfer the shares and pay over the profit was, however, held over until after the account had been taken and an inquiry made as to a proper sum to be awarded to the defendants for their work and skill since both the account and inquiry affected the terms on which the shares would be transferred.

There is nothing to suggest that the members of the Court of Appeal were not clear that they were affirming the defendants' proprietary constructive trusteeship. However, in the House of Lords, Lord Hodson appeared to employ constructive trusteeship not in its proprietary sense but as a formula for recognising that the defendants were accountable as if they themselves were trustees. The defendants, he said, 'are not trustees in the strict sense but are said to be constructive trustees by reason of the fiduciary position in which they stood'.[55] Drawing upon *Barnes v Addy* he went on to note the circumstances in which the

52 *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 1 WLR 1555 (Ch) 1582 (Ungoed-Thomas J).

53 Thus, it is said that a constructive trust may 'create or recognise no proprietary interest': *Giumelli v Giumelli* (1999) 161 ALR 473 (HCA) 475. See also *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 (HL) 705 (Lord Browne-Wilkinson); L Smith, 'Constructive Trust and Constructive Trustees' [1999] CLJ 294, 299–300.

54 Amended statement of claim, 18 July 1963, para 23.

55 [1967] 2 AC 46 (HL) 105.

responsibilities of a trustee 'may be extended in equity to others who are not properly trustees'.[56] Having concluded the defendants had acted openly and honestly in the instant case he observed that '[i]f, however, they are in a fiduciary position they are *as trustees* bound by' the duty not to place themselves in a position of conflict with the trust.[57] The defendants' 'constructive trusteeship' therefore took its meaning from its contrast with trusteeship in the strict sense as an expression of liability to the trust. Though not strictly trustees the defendants were treated *as if they were* and were therefore accountable if they placed themselves in a position in which their personal interests conflicted with the interests of the trust.

However, such reasoning does not necessarily preclude the recognition of a proprietary claim. It tells us simply that the defendants were to be treated in the same way *as if* they were profiting trustees. It also must have been clear from the submissions of both parties that proprietary constructive trusteeship of the shares was at stake. As noted already, the claimant's complaint was that shares which belonged to him in equity had not been transferred to him by the defendants. The question to be determined by the House, said counsel for the defendants, was 'were the circumstances such that the consciences of the appellants were so affected that under the principles of equity that which in law is their property must nevertheless be held by them for the benefit of the respondent?'[58] Consequently, it is difficult to see how Lord Hodson or any other member of the House could view the constructive trusteeship in the Order of Wilberforce J in anything other than proprietary terms.

5 Was proprietary constructive trusteeship a live issue?

What, then, of the third interpretation of *Boardman* that, regardless of whether a constructive trust formally was declared, its recognition was not a live issue and 'simply did not matter'?[59] This claim is based largely on the absence of any evidence that the disputed shares were in fact transferred to the claimant.[60]

It is indeed correct that the litigation did not result in a transfer of any shares to the claimant. After the House of Lords dismissed the appeal the claimant did not seek to have the shares transferred to him. Boardman retained all of his shares and remained chair of Lester & Harris until the demands of a ministerial role in the Heath government required him to relinquish the role.[61] Moreover, long before the end of the litigation (and perhaps even at the trial stage), it was clear that a transfer of the shares was not in the claimant's interests. First, the shares were worth roughly half of the amount that the defendants had paid for them. In these circumstances it was unlikely the claimant would have wanted to pay the counter-restitution necessary to secure the transfer of the shares. The cost of the counter-restitution in all likelihood could not have been met fully from the dividend profits after the deduction of an allowance for the defendants' time and skill.[62] Had the claimant wanted the shares he

56 [1967] 2 AC 46 (HL) 105, quoting *Barnes v Addy* (1874) 9 Ch App 244 (CA) 251 (Lord Selborne LC).

57 [1967] 2 AC 46 (HL) 105–06.

58 Ibid 61.

59 *Sinclair* (n 4) [47].

60 See e.g. ibid [43].

61 Email from Nigel Boardman to the author (6 January 2012). Nigel Boardman, a practising solicitor, is the son of Thomas Boardman. On Thomas Boardman's ministerial roles, see n 5 above and accompanying text.

62 The cost of five-eighteenths of each of the three parcels of shares amounted to £28,786 while the gross capital distributions received by the defendants on the same proportion of the shares amounted to £35,885. However, the allowance that was to be deducted for the defendants' skill and work was to be assessed liberally and may have been as much as 60 per cent of the net profit: Email from Nigel Boardman to the author (6 January 2012). Mr Boardman's recollection of this aspect of the case is, however, admittedly hazy.

would have been required to dip into his own pocket to meet some of the cost of the counter-restitution. Secondly, the claimant, a farmer with little understanding of commercial matters, had never taken an interest in the family businesses and was simply 'concerned to get his share of the estate'.[63] Talk of the recovery of profits dominates in the judgments because the defendants' profits, rather than the shares, are what the claimant wanted.

It is, however, arguable that Wilberforce J's declaration of constructive trusteeship was more than mere window-dressing for a purely personal claim for net profits. An underlying proprietary claim to the shares may have been considered necessary to the identification and quantification of the net profit for which the defendants were personally liable. Although the shares were worth less than the amount that the defendants had paid for them, their purchase was profitable since the fall in share value was more than offset by the capital dividends received on the shares in January 1960 and June 1961 and the ordinary dividends received on the shares in the years since their purchase in 1959.[64] An underlying proprietary claim to the shares may have been considered necessary in order to capture some or all of these gains.

The problem with founding a personal claim to the profits directly on the underlying breach of fiduciary obligation is that claims to profits derived from wrongdoing are subject to cut-off points. This is the so-called 'remoteness of gain' issue. According to Birks' formulation gains consequential upon the 'first non-subtractive receipt' generally are considered too remote from the wrong to be recoverable.[65] This suggests that in *Boardman* a claim resting solely on breach of fiduciary obligation would not have allowed recovery of the capital dividends or the ordinary dividends since these were gains consequential upon the first non-subtractive receipt – the purchase of the shares in breach of fiduciary obligation.

The limits of remoteness of gain are not, however, clear and more recently less restrictive approaches have been preferred.[66] Virgo, for example, notes that in the context of breaches of fiduciary obligation there is some evidence that the remoteness of gain principle is weaker and fiduciaries may be compelled to account for gains derived indirectly as well as directly from the breach.[67] A weaker approach to remoteness is also more consistent with equity's strict policy of deterring breaches of fiduciary obligation. Applying this approach it is probable that the capital distributions in *Boardman* would not have been considered too remote from the breach of fiduciary obligation. The liquidation of unprofitable company assets was after all an expected source of profit and indeed motivated the breach of fiduciary obligation complained of. But it is more difficult to make a similar argument for the recovery of at least some of the ordinary dividends paid on the shares between 1960 and 1966, particularly those paid in the later years. Personal liability for gains made on the shares could not go on indefinitely; there had to be some cut-off point.

Such difficult questions would not need to be addressed if the shares in *Boardman* were held on proprietary constructive trust from the moment they were acquired by the defendants in breach of fiduciary obligation. In that case, since the shares were trust property, the defendants would be accountable for both the capital and ordinary dividends received thereon. The dividends would be the fruit of the trust property and therefore held

63 [1964] 1 WLR 993 (Ch) 1016, 1017; [1965] Ch 992 (CA) 995, 1016.

64 The reports are silent as to ordinary dividends but it is clear they were received on the shares and sought by the claimant: amended statement of claims, 18 July 1963, para 21.

65 P B Birks, *An Introduction to the Law of Restitution* (revd edn Clarendon 1989) 351–55.

66 See e.g. A Burrows, *The Law of Restitution* (2nd edn Butterworths Lexis-Nexis 2002) 500–01; K Barker, 'Riddles, Remedies and Restitution: Quantifying Gain in Unjust Enrichment Law' (2001) 54 CLP 255.

67 G Virgo, 'Restitutionary Remedies for Wrongs: Causation and Remoteness' in C E F Rickett (ed), *Justifying Private Law Remedies* (Hart 2008) 301, 321–23.

on the same trust as the asset that produced them. The constructive trust route would thus have allowed the claimant to circumvent the remoteness problem because there is no cut-off point for profits derived from trust property.

A non-proprietary route (founding the claim directly on the breach of fiduciary obligation) as well as a proprietary route to the profits was mooted by the claimant in the statement of claims[68] but, given the obvious difficulty with the former, the latter underpinned the claimant's case. It also formed the basis for the account in the trial Order which ordered, without limitation, that the defendants were liable to account for any profit found to have come into their hands from the shares.

6 Agency gain as the constructive trust trigger

(A) Wilberforce J's agency reasoning

This leads naturally to the question of the constructive trust trigger in *Boardman*. Given that a constructive trust was likely to have been viewed as a live issue in *Boardman*, does this lead to the conclusion that the first interpretation of the case is correct, namely, that it stands for the proposition that the mere appearance of gain acquired in breach of fiduciary obligation is sufficient to trigger a constructive trust? As the remainder of this article demonstrates, it is unsafe to reduce the remedial aspect of *Boardman* to such a simple proposition. In this section we see that the trigger for the constructive trusteeship in the trial Order is not as clear as is often supposed since Wilberforce J identified an additional element, beyond the simple appearance of gain, which may have provided an accepted narrower foundation for the recognition of a constructive trust.

A key issue at trial was whether the defendants occupied a fiduciary position since they did not fall into an established category of fiduciary relationship. Both defendants attended the annual general meeting of Lester & Harris on behalf of the trust and attempted to get Tom Phipps elected as a director of the company. These acts were undertaken to protect the trust shareholding. The claimant argued that the defendants were therefore agents of the trustees and, as such, subject to fiduciary obligations. The difficulty with this analysis is there was no contract of agency between the defendants and the trustees.[69] Wilberforce J nevertheless drew upon the agency concept to establish that the defendants 'assumed the character of *self-appointed agents* for the trustees, for the purpose of extracting information as to the company's business from its directors' and 'to strengthen the management of the company by securing representation on the board of the trust holding'.[70] Information used by Boardman during his successful negotiations for the shares was acquired while acting in the course of such agency. By making profitable use of information acquired in the execution of his fiduciary office, Boardman was accountable under the no-profit principle.

However, Wilberforce J also appears to have accepted that the negotiations for the shares, or some of them at least, were undertaken by the defendants for the trust. Having identified that the purpose of the 'self-appointed agency' was to extract information about the company and to secure trust representation on the board, Wilberforce J added that there was also an intention that the defendants 'should acquire additional shares with a view to

68 Amended statement of claim, 18 July 1963, para 20.

69 There were two reasons for this. First, in order to bind the trust all three trustees would have to join in the contract and it was quite clear that Ethel Phipps did not authorise anything. Secondly, there was anyway no intention on the part of Mr Fox and Mrs Noble to employ the defendants as agents: [1967] 2 AC 46 (HL) 100 (Lord Cohen), [1965] Ch 992 (CA) 1017 (Lord Denning MR).

70 [1964] 1 WLR 993 (Ch) 1007 (emphasis added).

obtaining control. This was no departure from the agency.'[71] Thus, the defendants' initial offer for the shares in 1957, which led to the purchase of 2925 shares, was considered a trust action undertaken by the defendants as agents of the trustees. Evidence of this was found in the letter of offer which represented that the defendants acted for the trust holding. Similar representations were made to the chair of Lester & Harris, who thought Boardman was acting as 'nominee' for the trust.[72] It was 'impossible to dismiss' such representations 'as not reflecting [the defendants'] relation to the trust'.[73] Indeed, Mrs Noble assumed that the money to pay for the shares would come from the trust. This, apparently, further demonstrated that she 'was not contemplating [the defendants] were acting or should act outside the trust'[74] but 'clearly accepted [their] action *as a trust action*, and the transaction and the proposed action *as trust matters*'.[75] The negotiations that led to the purchase of the initial parcel of shares, moreover, could not be separated from the negotiations for the second and third parcels.[76]

Although the trust could not, in the absence of a court order varying the terms of the trust, acquire any more shares beyond the 8000 shares that were part of the residuary estate and although the defendants had no mandate to carry out transactions for the trust, the theory seems to have been developed that the defendants could make recommendations and had 'authority to negotiate but not to bind the principal'.[77] This suggests that a constructive trust gave the principal what had been negotiated on his behalf by his agent. The case was therefore analogous to the numerous cases in which gain was, consistently with the fiduciary's undertaking, deemed to have been acquired as agent of the principal and therefore held for the benefit of the principal.[78] *Benson v Heathorn*[79] is illustrative. The defendant Heathorn was the director of a company established for the purpose of purchasing, building and hiring out steam vessels. Knowing that a request to purchase a ship suitable for carrying coals was imminent, Heathorn purchased the ship *Normahal* for £1340 before selling it to the company for £1500 a short time later. Heathorn was held accountable for the £160 profit. His actions 'indelibly and inextricably fixed him with the character of agent from the beginning of that transaction' so that he 'ought to be considered as having purchased the ship "Normahal" for £1340, as the agent and on behalf of the [company]'.[80]

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71 [1964] 1 WLR 993 (Ch) 1007.

72 Ibid 997–98.

73 Ibid 1008. The issue was considered central to the case by both parties, such representations being denied by the defendants: see amended statement of claim, 18 July 1963, para. 8; Re-amended Defence of the First and Second Defendants, 10 March 1964, paras 9, 16.

74 [1964] 1 WLR 993 (Ch) 997.

75 Ibid 1007 (emphasis added). Wilberforce J also concluded that Mr Fox thought the defendants were continuing to act for the trust: ibid 1008.

76 The accepted offers for the first parcel were, with the 8000 trust shares, used as leverage in later negotiations. Moreover, the defendants did not 'throw off their agency character' and Boardman 'continued throughout to represent the trust in his dealings with the directors'. This made it 'impossible to separate the activity of Boardman and Phipps in acquiring the shares from the rest of what they were doing' for and on behalf of the trust: ibid 1012.

77 Submission of counsel for the claimant before the Court of Appeal, suggesting the relationship 'was more like something of the estate agency nature': [1965] Ch 992 (CA) 1009.

78 See e.g. *Lees v Nuttall* [1829] 1 Russ & M 53, 39 ER 21; affd [1834] 2 My & K 819, 39 ER 1157; *Benson v Heathorn* [1842] Y & CCC 326, 62 ER 909; *Taylor v Salmon* (1838) 4 My & Cr 134, 41 ER 53.

79 *Heathorn* (n 78).

80 Ibid 340 (Knight Bruce VC). See also *Re Cape Breton Company* (1885) 29 Ch D 795 (CA) 803–06 (Cotton LJ), 811 (Fry LJ).

A related point is raised elsewhere in the judgment of Wilberforce J with regard to the negotiations for the shares during Phase 3. By this stage it seems to have been accepted that the defendants owed their duties directly to the beneficiaries, who had become absolutely entitled to the shares under the trust following the death of Ethel Phipps in November 1958.[81] The claimant, Wilberforce J suggested, had lost the opportunity to join the defendants' venture since information which showed that the risks of the venture were limited and the projected profits significant was not disclosed to him as it ought to have been. The claimant was therefore justified in thinking that he had been duped, albeit unintentionally,[82] into giving something away when 'he did not consider he was giving anything away'.[83]

(B) Removal of the possibility of an agency gain trigger on appeal

The case was viewed in very different terms in the appeals. Notably, agency played a marginal role.[84] Some, such as Lord Guest[85] and Russell LJ,[86] eschewed an agency analysis altogether.[87] Others considered 'agency' was simply 'a convenient way to describe'[88] the defendants. Lord Denning, for instance, identified the defendants' liability as a form of stranger liability flowing from their assumption of authority to act for the trust when in fact they had no such authority.[89] They were in essence agents *de son tort* and therefore agents as much as trustees *de son tort* are express trustees. Agency language indicated that the defendants owed fiduciary obligations to the trust but it was not the source of those obligations. Nor did the employment of the term necessarily imply any other legal incident commonly associated with the concept.

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81 The point is dealt with most clearly by Lord Cohen: [1967] 2 AC 46 (HL) 104.

82 Boardman was acquitted 'entirely of any intention to deceive or suppress material information' but had 'failed to appreciate the degree of explanation and the quantity of supporting documents which would be needed to enable someone coming fresh to it . . . to appraise it, or even to see that this was a matter which required careful consideration and expert advice': [1964] 1 WLR 993 (Ch) 1014.

83 Ibid 1017. Wilberforce J went on to conclude that full disclosure should have been made to the claimant so he 'had the opportunity of getting his expert to look into it for him'. While it could not be said with certainty what he would have done in the circumstances 'he ought to have had the opportunity' and it could not be assumed that 'some mutually acceptable arrangement [with the defendants] would not have been reached': ibid 1017.

84 By this stage of the litigation even counsel for the claimant tempered their agency argument, submitting that the defendants had 'placed themselves in a special position, the *nearest equivalent to which* is agency': [1967] 2 AC 46 (HL) 70 (emphasis added). For detailed consideration of the agency reasoning in *Boardman*, see G H L Fridman, 'Establishing Agency' (1968) 84 LQR 224, 231–39.

85 [1967] 2 AC 46 (HL) 118 (defendants placed themselves in a 'special position which was of a fiduciary character' and were accountable for the profit made out of such special position).

86 [1965] Ch 992 (CA) 1031 (fiduciary responsibilities flowed from the defendants' receipt of an 'aspect' of trust property transferred by the trustees in breach of trust).

87 Lord Upjohn was also explicit on this point, noting the defendants 'were never in fact agents': [1967] 2 AC 46 (HL) 126.

88 Ibid 108 (Lord Hodson). Lord Cohen thought the defendants were 'agents' of the trustees but acknowledged that, unlike agents in an orthodox or usual sense of the term, they had no power to affect legal relations between the trustees and third parties and for this reason the arrangement with the two active trustees was sufficient to place them in a fiduciary position *vis-à-vis* the trust: ibid 100.

89 [1965] Ch 992 (CA) 1017–18. See also ibid 1030 (Pearson LJ). Lord Denning drew upon numerous '*de son tort*' cases in which outsiders to a particular relationship were held accountable by virtue of assuming an authority they did not possess: see e.g. *Stamford's Case* (1573) 2 Leo 223, 74 ER 496 (executor *de son tort*); *Rackham v Siddall* (1850) 1 Mac & G 607, 41 ER 1400 (trustee *de son tort*); *Gawton and Lord Dacre's Case* (1590) 1 Leo 220, 74 ER 201 (bailiff *de son tort*). His Lordship drew further support from *Lyell v Kennedy* (1889) 14 App Cas 437 (HL). However, this case was determined by application of ordinary principles of agency by ratification, the House of Lords having found that the principal had ratified the defendant's acts: ibid 454–56, 457.

Moreover, having examined the undertakings of the defendants and the actions of the trustees it was accepted that at no point was responsibility assumed by the defendants to negotiate on behalf of the trust.[90] Viscount Dilhorne expressly rejected the apparent assertion that the acquisition of the shares was a trust action[91] while Lord Cohen could 'not understand why' it had been said that the defendants 'were making the initial offer as agents for the trustees'.[92] That was inconsistent with the evidence. There simply was a 'sound business arrangement' by which the defendants used the trust to extract useful information to assist in their purchase of the shares while the trustees saw control of the company pass to friendly hands and realised a profit without assuming the risk of loss.[93] However, the defendants made a vital mistake. On the occasions they *did* represent the trust they obtained information that was crucial in the negotiations for the shares and the opportunity to purchase such shares. They used the same without the consent of the trust beneficiaries (who were the principals following the death of Ethel Phipps) and were therefore accountable. This, admittedly, was harsh on the defendants while the claimant was the fortunate, even undeserving, recipient of an 'unreasonably large amount'.[94] However, this was necessary in order to 'do nothing to whittle away . . . the absolute responsibility' that fiduciary duties impose.[95]

7 'Property' as the constructive trust trigger

The affirmation of the Order of Wilberforce J in the appeals coupled with the undermining of a possible agency gain foundation for the defendants' constructive trusteeship might be taken to suggest that the simple appearance of gain acquired in breach of fiduciary obligation was considered sufficient to trigger a constructive trust. However, information acquired by Boardman and Tom Phipps and exploited when negotiating for the shares, as well as the opportunity to obtain the shares, was characterised as trust property throughout the litigation. This opens up the possibility that 'property' rather than the simple appearance of fiduciary gain triggered the constructive trust. In Birksian terminology there was a 'pre-existing proprietary base', albeit an intangible one. It is, however, important to note that two distinct approaches to property in information and opportunity were taken in *Boardman*. Only one of these approaches – the minority approach – is consistent with a proprietary base analysis.

(A) The minority approach

A minority of judges in *Boardman* treated information acquired by Boardman as property of the trust in the same sense as any other subject matter of a trust. Thus, Lord Hodson dissented 'from the view that information is of its nature something which is not properly to be described as property' and concluded that confidential information acquired by

90 Thus, it was pointed out that Boardman corrected Mrs Noble's misunderstanding that the trust was to fund the purchase of the shares, that thereafter Mrs Noble acquiesced in the defendants' plans and that Mr Fox, who would never have consented to the acquisition of the shares for the trust, positively encouraged Boardman's actions: [1965] Ch 992 (CA) 1017 (Lord Denning MR), [1967] 2 AC 46 (HL) 75–76, 84 (Viscount Dilhorne), 96, 100 (Lord Cohen), 108–09 (Lord Hodson).

91 [1967] 2 AC 46 (HL) 75–76.

92 Ibid 96.

93 [1965] Ch 992 (CA) 1022 (Pearson LJ). See also [1967] 2 AC 46 (HL) 117 (Lord Guest).

94 [1965] Ch 992 (CA) 1030 (Pearson LJ); [1967] 2 AC 46 (HL) 104 (Lord Cohen).

95 [1967] 2 AC 46 (HL) 105 (Lord Hodson). Similarly, Russell LJ expressed sympathy for defendants whom he considered victims of 'principles of equity whose rigidity is necessary if cases deserving of no sympathy are not to escape': [1965] Ch 992 (CA) 1032.

Boardman was 'properly regarded as the property of the trust'.[96] Similarly Lord Guest, who did not limit his observations to confidential information, saw 'no reason why information and knowledge [acquired by Boardman from his position] cannot be trust property'.[97] His Lordship, moreover, characterised the purchase of the shares as a transaction entered into with trust property.[98] In effect, the defendants were viewed as having made a gain by speculating with trust property. This suggests a constructive trust was viewed as vindicating the trust's ownership of the information by granting the same incidents of ownership in the assets purchased through its exploitation.[99]

The reasoning of Lords Hodson and Guest reflects the majority view on this point in the Court of Appeal and follows the argument made by the claimant before the House. The claimant submitted there was a proprietary link between information and opportunity belonging to the trust and the shares purchased through their exploitation. Information and opportunity acquired by Boardman, either by reason of his agency or (following the reasoning of Russell LJ in the Court of Appeal)[100] by use of the trust shareholding, became trust property and were held by the appellants as constructive trustees.[101] When such information and opportunity were exploited to purchase the shares, the shares were likewise 'held by [the defendants] as constructive trustees for the beneficiaries under the Will'.[102] This property foundation was, from the beginning, set up as the stronger alternative to a claim based on mere breach of fiduciary obligation.[103] The claimant's case, Pearson LJ said in the Court of Appeal, 'is based solely on property rights'.[104]

(B) The majority approach

This is not how the majority of judges in *Boardman* conceived of property in information and opportunity. For the majority, if information and opportunity were to be characterised as property at all it was for the limited purpose of denoting who, as between the trust and the defendants, was entitled to their beneficial use. At trial Wilberforce J asked 'whether the knowledge of which profitable use was made can be *described* as the property of the trust'.[105] His conclusion was that information was 'essentially the property of the trust' but only '*so far as* the expression can be used'.[106] Crucial to the issue was *Regal (Hastings) v Gulliver*,[107] which Wilberforce J read as providing a 'positive answer'[108] to the question of whether opportunity-related information can be described as 'property'.

96 [1967] 2 AC 46 (HL) 107.

97 Ibid 115.

98 Ibid.

99 See e.g. *Attorney General v Lui Lok* [1984] HKLR 275, 290 (suggesting *Boardman* was a case involving the tracing of trust property converted to the defendants' own use).

100 [1965] Ch 992 (CA) 1031. Russell LJ reasoned that one aspect of the trust's shareholding was the leverage it gave in negotiations and its potential use as a means of acquiring useful knowledge about the company. This 'aspect of trust property' was placed in the hands of the defendants in breach of trust 'and must in those hands have remained part of the trust assets'.

101 Case for the respondent, para 31, reasons 7–8.

102 Ibid reason 9.

103 Amended statement of claim, 18 July 1963, para 20.

104 [1965] Ch 992 (CA) 1031.

105 [1964] 1 WLR 993 (Ch) 1011 (emphasis added). This is not necessarily the same as asking whether information *is* property.

106 Ibid 1012 (emphasis added).

107 *Regal* (n 30).

108 [1964] 1 WLR 993 (Ch) 1011.

Regal makes no reference to 'property' in opportunity-related information. The liability of the directors rested squarely on the no-profit rule: information about the opportunity to purchase shares in the subsidiary came to the directors 'by reason, and only by reason of the fact that they were directors of Regal, and in the course of their execution of that office'.[109] By exploiting the opportunity, the directors thus made a profit from their fiduciary position and were, accordingly, accountable. However, no liability attached to one director, Gulliver, who did not personally exploit the information about the opportunity to purchase the shares. Gulliver passed the information to third parties which, though donees of the information, were free to exploit the information and to purchase the shares.[110] The opportunity-related information was therefore 'property' only to the extent that it denoted entitlement to its exclusive beneficial use as between the company and its directors. It did not denote entitlement as between the company and the world at large.

This is how 'property' in information was understood in *Aas v Benham*,[111] also relied upon by Wilberforce J. It is also how property in opportunity is understood in modern corporate opportunity cases. Corporate opportunity is described as 'property' for the purpose of excluding from its exploitation a director who resigns from the company to which the opportunity is said to 'belong'.[112] 'Property' expresses the idea that in the context of the bi-partite relationship between former director and company the opportunity is the company's to exploit and the former director is excluded, notwithstanding that he no longer owes the company fiduciary obligations.[113] The fact that opportunity is characterised as property for this purpose does not, however, necessarily imply any other incident commonly associated with the beneficial ownership of a resource. For instance, opportunity is not necessarily to be regarded as 'property' for the purpose of generating liability in knowing receipt since in this context the recognition of property in something as nebulous as commercial opportunity may risk an over-extension of the personal liability of strangers to fiduciary relationships and uncertainty in commercial dealings.[114] In this context, at least, 'property' is understood as a contingent rather than a unitary concept. A resource may be property for one purpose but not another.

In the Court of Appeal in *Boardman*, Lord Denning MR expressly adopted Wilberforce J's conclusions on property in the opportunity-related information and, having observed that knowledge acquired in furtherance of a fiduciary's undertaking is 'property' in the sense that an employee invention is the property of his employer,[115] agreed that such knowledge 'could properly be described as "the property" of the trust'.[116] Reference to

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109 *Regal* (n 30) 387 (Lord Russell). See also ibid 389, 391–92 (Lord Macmillan), 393 (Lord Wright), 395 (Lord Porter). Viscount Sankey established liability to account by application of the no-conflict rule: ibid 381–82.

110 Ibid 382 (Viscount Sankey), 389–91 (Lord Russell).

111 [1891] 2 Ch 244 (CA). The aspect of this case dealing with property in information is discussed in detail in D Kershaw, 'Does it Matter How the Law Thinks About Corporate Opportunities?' (2005) 25 LS 532, 549–51.

112 *CMS Dolphin v Simonet* [2002] BCC 600 (Ch) [96] (Lawrence Collins J); *Lapthorne v Eurofi Ltd* [2001] EWCA Civ 993 [22] (Tuckey LJ).

113 See e.g. *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch) [1355] where Lewison J noted a post-office director 'may be liable for the diversion of a business opportunity . . . because the business opportunity itself is to be *treated as* the property of the company (in the sense of an intangible asset) and hence *is treated for this purpose* as trust property' (emphasis added). See also *CMS Dolphin* (n 112) [95]–[96]; *Thermascan Ltd v Norman* [2009] EWHC 3694 (Ch) [14] (Judge David Donaldson QC).

114 *Commonwealth Oil & Gas Co Ltd v Baxter* [2009] CSIH 75, [2010] SC 156 [16]–[19] (Lord Hamilton P), [94]–[95] (Lord Nimmo Smith). But cf *CMS Dolphin* (n 112) [100]–[105].

115 [1965] Ch 992 (CA) 1018–19.

116 Ibid 1019. The use of parentheses ('the property') suggests an acknowledgment of the peculiarity of Wilberforce J's finding of property in the information, to which Lord Denning deferred and considered 'decisive of the case'.

employee inventions is particularly instructive. Prior to *Boardman*, information comprising a non-patented employee invention had been described on numerous occasions as 'property' held on trust for the employer.[117] However, it was also accepted that this was 'not a perfectly accurate'[118] characterisation since the invention does 'not have the character of property such as one usually finds a trust attaching to'.[119] Nevertheless, treating an employee invention as trust property encapsulated the positive and negative obligations of the employee to take whatever steps were necessary to place the invention at the disposal of the employer and to exclude himself from its benefit.[120]

A majority of the House of Lords was explicit as to the qualified nature of the claimant's property rights in the information. Viscount Dilhorne, who considered *Aas v Benham*[121] to be a case which 'throws some light on this question',[122] did not think the Phase 2 information 'was property of the trust in the same way as shares held by the trust were its property'.[123] Lord Cohen agreed that information is 'not property in the strict sense'.[124] 'In general', said Lord Upjohn in an oft-quoted passage, 'information is not property at all'. Even confidential information, he said, 'is not property in any normal sense'.[125]

For the majority of judges in *Boardman*, information was therefore 'property', if at all, in a limited sense. It was property for the limited purpose of indicating that those owing fiduciary obligations to the trust were excluded from its exploitation but it did not indicate a set of incidents more commonly associated with 'property'. Nor did it imply that the principal's right to exclude was a right *in rem*. Rather it was in essence a right *in personam* exercisable against a person or a closed list of persons, being those owing fiduciary obligations to the trust.

8 Appropriation of 'opportunity' as the constructive trust trigger

If the above analyses are correct, then five of the seven judges finding for the claimant arguably recognised that the presence of an additional element, beyond the mere acquisition of gain in breach of fiduciary obligation, was necessary to trigger the constructive trust so recognised. However, both Lord Cohen and Lord Denning MR undermined the agency foundation of Wilberforce J and adopted a qualified property analysis that cannot be understood as having provided an orthodox proprietary base. It may be that both of their Lordships accepted that a simple breach of fiduciary obligation was, without more, sufficient to trigger a constructive trust of the shares. It certainly is possible to read the speech of Lord Cohen and the judgment of Lord Denning MR in this way. However, there is nothing to indicate an intention of either to overrule *Lister* by a side wind, something which would be necessary were it to be accepted that a simple breach of fiduciary obligation is sufficient to trigger a constructive trust. Moreover, the reasoning employed might be read as supporting a narrower constructive trust trigger.

117 *British Celanese Ltd v Moncrieff* [1948] Ch 564 (CA). See also *Sterling Engineering Co v Patchett* [1955] AC 534 (HL) 543–44 (Viscount Simonds), 547 (Lord Reid); *Triplex Safety Glass Co v Scorah* [1938] Ch 211 (Ch) 217–18 (Farwell J).

118 *Moncrieff* (n 117) 581 (Lord Greene MR).

119 Ibid.

120 Ibid. Thus, 'it is for the employer to say whether it shall be patented, and he can require the employee to do what is necessary to that end': *Patchett* (n 117) 544 (Viscount Simonds).

121 *Aas v Benham* (n 111).

122 [1967] 2 AC 46 (HL) 90. Although he did not refer to *Aas v Benham*, the reasoning of Lord Cohen suggests a similar understanding of the nature of the 'property' in question: ibid 100–03.

123 Ibid 89–90.

124 Ibid 102.

125 Ibid 127–28.

Lord Cohen, who had the casting vote in the House of Lords,[126] placed great emphasis on the fact that:

> the company is a private company and not only the information but the opportunity to purchase these shares came to them through the introduction which Mr Fox gave them to the board of the company and in the second phase when the discussions related to the proposed split-up of the company's undertaking it was solely on behalf of the trustees that Mr Boardman was purporting to negotiate with the board of the company.[127]

Responding to the argument that the defendants were not accountable since information used in the purchase of the shares could never have been used for the same purpose by the trust, Lord Cohen said that this did not:

> give due weight to the fact that the appellants obtained both the information which satisfied them that the purchase of the shares would be a good investment and the opportunity of acquiring them as a result of acting for certain purposes on behalf of the trustees . . . His liability to account must depend on the facts of the case. In the present case much of the information came the appellants' way when Mr. Boardman was acting on behalf of the trustees on the instructions of Mr. Fox and the opportunity of bidding for the shares came because he purported for all purposes except for making the bid to be acting on behalf of the owners of the 8,000 shares in the company.[128]

Lord Denning similarly characterised the present case as one in which a fiduciary had acquired knowledge for the use of his principal but had turned it to his own use. Consequently, Boardman had 'gained an unjust benefit by the use of his principal's property' (in the qualified sense).

This suggests the defendants' constructive trusteeship may have been triggered not by the mere acquisition of gain in breach of fiduciary obligation but by the defendants' misuse of an opportunity or knowledge pursued or acquired on behalf of the claimant, notwithstanding that such information or opportunity was not the property of the claimant in an orthodox sense but only in some peculiar sense. Indeed, it will be recalled that elements of the judgment of Wilberforce J appear to suggest that the claimant was viewed as having been deprived of the opportunity to participate in the venture.[129] Some support for this interpretation can be found in the recent case of *FHR European Ventures LLP v Mankarious*.[130] In this case, Sir Terence Etherton C, having quoted from the speech of Lord Cohen, placed *Boardman* in the second category of Lord Neuberger's *Sinclair* categorisation of cases in which fiduciary gain triggers a constructive trust.[131] As such, it was a case in which 'the benefit has been obtained by the fiduciary by taking advantage of an opportunity which was properly that of the principal'.[132]

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126 Lord Cohen had retired as a Lord of Appeal in Ordinary in 1960 but continued to sit in the House by invitation. In *Boardman*, which was his last case, 'his four colleagues being equally divided, it fell to him, much to his anxiety, to give the casting decision': R Wilberforce, 'Cohen, Lionel Leonard, Baron Cohen (1888–1973)' in *Oxford Dictionary of National Biography* (revd online edn 2004).

127 [1967] 2 AC 46 (HL) 101.

128 Ibid 102–03.

129 See above nn 81–83 and accompanying text.

130 [2013] EWCA Civ 17, [2013] 3 All ER 29 [89]–[96].

131 See *Sinclair* (n 49) [88]–[89]. The categories identified were: (1) 'the asset or money is or has been beneficially the property of the beneficiary'; and (2) the fiduciary 'acquired the asset or money by taking advantage of an opportunity or right which was properly that of the beneficiary'. In all other cases the claimant is limited to a personal claim for the value of the gain derived by the fiduciary from the breach of fiduciary obligation.

132 *FHR European Ventures* (n 130) [83], [94].

9 Conclusion

The House of Lords printed case papers shed considerable light on the issue of proprietary relief in *Boardman v Phipps* and lead to a significant re-evaluation of this aspect of the case. We now know that: (1) a proprietary constructive trust of the shares was recognised in the Order of Wilberforce J and affirmed by the Court of Appeal and by a majority of the House of Lords; (2) in the end, the claimant did not seek to have the shares transferred to him but rather sought payment of the value of five-eighteenths of the net gain that the defendants derived from the purchase of the shares; and (3), arguably, the recognition of a constructive trust was a live issue since it facilitated recovery by allowing the claimant to capture profits some or all of which he could not otherwise have captured had his claim rested directly on a breach of fiduciary obligation. These three findings explain why both the language of constructive trusteeship and the language of accountability for net profits run throughout the case. The claimant wanted the net profits but their recovery was premised, at least in part, on the recognition of a proprietary constructive trust of the shares.

It is, however, more difficult to pin down the precise event that triggered the constructive trust on which the claimant's recovery rested. Of the seven judges that found for the claimant four (Lords Hodson and Guest and Pearson and Russell LJJ) appear to have adopted approaches consistent with the view that a constructive trust of the shares simply vindicated a pre-existing and continuing proprietary interest of the claimant. While Lord Neuberger did not appear to appreciate this in *Sinclair*, straining as he did to explain away *Boardman* on other grounds,[133] the judgments of a majority of those finding for John Phipps are (at least in form)[134] consistent with his Lordship's categorisation of cases in which fiduciary gain triggers a constructive trust. Whether the notion of an intangible proprietary base should play a role in the future classification of the cases is, however, doubtful. First, the majority view on the 'property' issue in *Boardman*, which included three of their Lordships, was inconsistent with an intangible proprietary base analysis. Secondly, the approach is inconsistent with the modern consensus against deducing outcomes by classifying a resource, particularly an intangible resource, as property.[135] Thirdly, in this context 'property' is a slippery concept with a low predictive yield; it is likely to generate uncertainty rather than clarity.[136]

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133 *Sinclair* (n 49).

134 An important normative distinction is that in the 'property' cases that Lord Neuberger had in mind the fiduciary's acts removed value from the principal and channelled it, via the hands of a third party, into the fiduciary's own hands: see *Re Caerphilly Colliery Company (Pearson's Case)* (1877) 5 Ch D 336 (CA); *Re Canadian Oil Works Corporation v Hay (Hay's Case)* (1874–75) 10 Ch App 593 (CA) (not cited by Lord Neuberger but cited in argument by counsel). In such cases the fiduciary's taking of gain undermines the objectives of the fiduciary relationship in a way in which acquisitive breaches of fiduciary obligation that cause no correlate loss to the principal do not.

135 Thus, it is now accepted that whether an intangible is 'property' for a given purpose is a conclusion that depends to a significant degree on context. The important issue is not whether a resource is or has been labelled 'property' but the purpose for which it is or has been so labelled. On this functional view a resource may be 'property' for one purpose but not another. For illustrations see *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch) [1373]–[1387] (Lewison J) (discussing and illustrating this point with reference to licences); *Gray v News Group Newspapers Ltd* [2011] EWHC 349 (Ch), [2011] 2 WLR 1401 [77] (Vos J) ('It is sometimes convenient to regard actions brought to protect commercially confidential information . . . as intellectual property claims. That does not mean they will be regarded as such for all purposes'); *Phillips v News Group Newspapers Ltd* [2012] UKSC 28, [2013] 1 AC 1 [20] (Lord Walker) (confidential information may be 'intellectual property' for the purpose of the Senior Courts Act 1981, s 72, even though in general it is not property in a strict sense).

136 See A Hicks, 'Constructive Trusts of Fiduciary Gain: *Lister* Revived?' [2011] Conv 62, 67–68.

Wilberforce J, on the other hand, appeared to view the negotiations for the shares as trust actions. The recognition of a constructive trust was thus presented in a manner that was consistent with a line of cases in which the fiduciary's gain was, in line with his undertaking to further a particular objective of his principal, deemed to have been acquired for his principal in furtherance of that objective. This would have provided an uncontroversial foundation for the constructive trust in *Boardman* were it not for the fact that this aspect of the analysis of Wilberforce J was inconsistent with the evidence and rightly undermined in the appeals.

The approaches of Lord Cohen and Lord Denning MR are less clear in terms of the foundations on which they rested the constructive trust. By rejecting the foundations of the agency and property approaches, both approached the matter in a manner that was more consistent with the recognition of the principle that a mere breach of fiduciary obligation is sufficient to trigger a constructive trust. However, the speech of Lord Cohen and the judgment of Lord Denning should, nevertheless, be interpreted more restrictively. 'Property', albeit in some imprecise and qualified sense, was always in the background and both thought the claimant had been deprived of an opportunity or benefit or 'property' of some kind. A restrictive interpretation would also avoid the disservice of attributing to two eminent equity judges the recognition of a constructive trust, without discussion of the point or consideration of the relevant authorities, on grounds that were controversial if not impossible to square with existing principle. The problem with restricting proprietary relief by reference to the concept of 'opportunity', however, is that (like 'property') it involves a degree of artifice and is somewhat uncertain.[137]

In the end analysis, *Boardman* was a case with peculiar facts that was pleaded in a peculiar way.[138] This, it seems, led to the recognition of divergent (though equally peculiar) constructive trust triggers, none of which were entirely satisfactory. Perhaps more importantly, although there was no consensus as to the constructive trust trigger in *Boardman*, the above analysis makes it possible to identify what did *not* trigger the constructive trust: a mere breach of fiduciary obligation. Along with *Keech v Sandford*[139] and *Tyrrell v Bank of London*,[140] *Boardman* has been taken by some to form a spine of authority, extending over three centuries, which supports the principle that the mere acquisition of gain in breach of fiduciary obligation triggers a constructive trust.[141] The present article completes the removal of the whole of that spine.[142]

137 *FHR European Ventures* (n 130) [84] (Etherton C).

138 It is important not to underestimate the impact of the written and oral arguments of counsel on judicial reasoning: see R Buxton, 'How the Common Law Gets Made: Hedley Byrne and Other Cautionary Tales' (2009) 125 LQR 60.

139 (1726) Sel Cas Ch 61, 25 ER 223.

140 (1862) 10 HL Cas 26, 11 ER 934 (HL).

141 See e.g. *Reid* (n 41) 332, 338; Lord Peter Millett, 'Bribes and Secret Commissions Again' [2012] CLJ 583, 605–11.

142 As to *Keech* see A Hicks, 'The Remedial Principle of *Keech v Sandford Reconsidered*' [2010] CLJ 287. As to *Tyrrell*, see P Watts, '*Tyrrell v Bank of London* – An Inside Look at an Inside Job' (2013) 129 LQR 526, especially the forceful critique of Lord Peter Millett's analysis of *Tyrrell* at 552–56.

NILQ 65(1): 23–37

The remedial response to bribes and secret commissions in a fiduciary relationship

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When a fiduciary receives a bribe to subvert his or her duties, what remedies are available to the principal to recover the bribe or its exchange product and any derivative profits? The classic authority of *Lister & Co v Stubbs*[1] provides a restrictive answer. The principal is confined to a personal claim against the errant fiduciary.[2] On strict proprietary reasoning, the bribe money is deemed the property of the recipient and although he or she is liable to account for this sum, the resultant obligation is only a debt. This has profound consequences. The viability of a claim *in personam* is dependent on the defendant's solvency. If, as is not uncommon, the defendant is improvident in his or her own financial affairs as well as dishonest, the principal's claim will be reduced to that of an unsecured creditor. Conversely, the assertion of a proprietary claim confers priority over the *res*, which does not form part of the insolvent defendant's estate. If the property has been transferred or substituted for other assets, the principal may follow the asset *in specie* or trace in equity.[3] Moreover, a proprietary claim enables the principal to capture any increase in value of the property or its exchange product, together with any profits it has generated.

In *Attorney General for Hong Kong v Reid*,[4] the Privy Council rejected the reasoning of *Lister v Stubbs* and held that bribe money and its proceeds were held on constructive trust for the principal. The principal therefore acquires beneficial ownership of the bribe and can trace its value into identifiable substitutes. In a notable development, in *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd*,[5] the Court of Appeal declined to follow *Reid* and argued that proprietary relief is misconceived unless the fiduciary has taken an asset that is beneficially the property of the principal or has acquired property by exploiting an opportunity or right belonging to the principal.[6]

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1 (1890) 45 Ch D 1 (CA).

2 This may take the form of an action for money had and received or for recovery of an equitable debt. Alternative claims in tort and contract are not considered here.

3 In both cases the claim is defeated if the property passes to a *bona fide* purchaser for value (*Foskett v McKeown* [2001] 1 AC 102 (HL) 127).

4 [1994] 1 AC 324 (PC).

5 [2011] EWCA Civ 347, [2012] Ch 453.

6 Ibid [88].

This paper will explore the implications of these distinctions against a common set of facts. There are many contexts for bribery, from abuse of public office to betrayal of an employer's interests. For present purposes bribery will be considered in relation to an employee or an agent who is responsible for acquiring property or services on behalf of his or her employer or principal, or who deals with third parties who seek to purchase property, goods or services from the employer or principal.

1 Elements of the modern debate

Lister & Co v Stubbs concerned a purchasing agent, Stubbs, who received bribes from a trade supplier to induce him to breach his duty to his employer and place purchase contracts with the briber.[7] When his actions were discovered, Stubbs' employer applied for an interlocutory injunction to restrain him from disposing of certain freehold properties and investments that represented the proceeds of the bribes. To advance this claim, the employer sought to establish an interest in the funds. At first instance,[8] the application was dismissed. Stubbs' conduct was plainly a breach of duty but the bribe money had not originated from the employer and was therefore not clothed with a trust in the hands of the employee.[9]

The judgment was upheld by the Court of Appeal,[10] which held that receipt of a bribe by an employee merely gives rise to a debtor–creditor relationship between employer and employee. In this setting, breach of fiduciary duty failed to kindle a trustee–beneficiary relationship. This reflected a strict proprietary analysis of the parties' interests: the bribe money was deemed the property of the dishonest employee and although he was accountable for this to his employer, the resultant liability was only a debt. To rule otherwise was to confound ownership with obligation.[11] The employer was therefore unable to assert a proprietary claim and could not trace the bribe money into substituted assets.[12]

7 The plaintiff was engaged in silk-spinning and dyeing. The defendant, Stubbs, was a foreman entrusted with purchasing dyeing materials. In consideration for placing large orders with the firm of Varley & Co, Stubbs received secret commissions.

8 (1890) 45 Ch D 1.

9 The conclusion would be different if money was given by the employer to the employee for payment of goods ordered on the employer's behalf: ibid 4.

10 The court comprised a strong bench of Cotton, Lindley and Bowen LJJ.

11 (1890) 45 Ch D 1, 15 *per* Lindley LJ.

12 The rejection of the constructive trust argument created the anomaly that a rogue who accepted a bribe was in a more favourable position than an 'honest' fiduciary who made an unauthorised profit (see, for example, *Boardman v Phipps* [1967] 2 AC 46 (HL)). The preponderant academic view was that the analysis of *Lister v Stubbs* had been outstripped by modern equitable doctrines. In particular *Lister* had become increasingly difficult to reconcile with equity's enforcement of fiduciary obligations and the expansive application of constructive trusts. See R Goff and G Jones, *The Law of Restitution* (3rd edn Sweet & Maxwell 1986) 656–57; J Martin (ed), *Hanbury and Maudsley's Modern Equity* (13th edn Stevens & Sons 1989) 627–28; D J Hayton and O R Marshall, *Cases and Commentary on the Law of Trusts* (8th edn Stevens & Sons 1986) 444–46; *Jacobs' Law of Trusts in Australia* (5th edn Butterworths 1986) 297–99; R P Meagher, W M C Gummow and J R F Lehane, *Equity: Doctrines and Remedies* (3rd edn Butterworths 1992) 153–56; A J Oakley, *Constructive Trusts* (2nd edn Sweet & Maxwell 1987) 55–58; P Pettit, *Equity and the Law of Trusts* (6th edn Butterworths 1989) 152. Contra: P Birks, *An Introduction to the Law of Restitution* (revd edn Clarendon Press 1989) 388–89; A A Burrows, *The Law of Restitution* (Butterworths 1993) 409ff; R Goode, 'Ownership and Obligation in Commercial Transactions' (1987) 103 LQR 433.

Despite reservations,[13] *Lister v Stubbs* remained good law[14] until a century later, when the fundamental distinction between legal and equitable duty was robustly swept aside by the Privy Council in *Attorney General for Hong Kong v Reid.*[15] In this case, the defendant, Reid, held senior positions in the legal department of the government of Hong Kong, where he was responsible for the prosecution of major commercial frauds. During this time he accepted bribes for obstructing the prosecution of certain offences. In 1990 he was convicted under the Prevention of Bribery Ordinance and ordered to pay the Crown HK$12.4 million, which sum was presumed to be derived from bribes. Part of the funds were used by Reid to acquire three freehold properties in New Zealand. The Attorney General for Hong Kong lodged caveats against these properties on the grounds that they represented the proceeds of bribes received in breach of Reid's fiduciary duty to his employer, the Crown, for whom they were held on constructive trust. Proceedings were subsequently commenced to prevent the caveats from lapsing.

It was held at first instance[16] that, on the authority of *Lister v Stubbs*, Reid was accountable for the bribes on a debtor–creditor basis only. He was not a constructive trustee of the monies or their substitutes and accordingly the Crown had no proprietary interest in the New Zealand properties. This was affirmed by the Court of Appeal of New Zealand.[17] Richardson J, delivering the judgment of the Court, accepted that *Lister v Stubbs* was a settled authority which had been properly applied in this case.

On further appeal, the Privy Council rejected *Lister v Stubbs*, in a doctrinaire judgment that affirmed equity's antipathy towards corrupt fiduciaries. Delivering the advice of the Board, Lord Templeman noted that Reid, as a servant of the Crown, stood in a fiduciary relationship to his employer.[18] It was accepted that at law the bribe money belonged to the recipient, Reid.[19] However, equity views illicit gains by a fiduciary with repugnance. Acting *in personam*, equity insists that it is unconscionable for the fiduciary to retain any benefit resulting from a breach of duty.

From this, the Board invoked a key principle which effectively overreaches a *Lister v Stubbs* analysis. As equity regards as done that which ought to be done, as soon as the bribe money was received by the fiduciary, the money or its proceeds was held on constructive trust for the principal.[20] Reid was effectively treated as lacking status or capacity in equity to hold the bribe. In language which suggested that the delinquent fiduciary was incapable *ab initio* of acquiring any beneficial interest in the money, it was said:[21]

13 *DPC Estates Pty Ltd v Grey* [1974] 1 NSWLR 443 at 470–71; *Queensland Mines v Hudson* [1976] ACLC 28,658, 28,708; *Sumitomo Bank Ltd v Thahir* [1993] 1 SLR 735 (HC).

14 Although concerns were voiced as to the *Lister v Stubbs* principle, the decision was generally followed. See *Powell & Thomas v Evan Jones & Co* [1905] 1 KB 11; *Attorney-General's Reference (No 1 of 1985)* [1986] 1 QB 491; *Daly v Sydney Stock Exchange* (1986) 160 CLR 371; *Islamic Republic of Iran Shipping Lines v Denby* [1987] 1 Lloyd's Rep 367.

15 [1994] 1 AC 324 (PC).

16 High Court, Hamilton, 13 September 1991, Penlington J.

17 [1992] 2 NZLR 385 (CA).

18 A fiduciary relationship is readily inferred in such circumstances. See, for example, *Attorney-General v Goddard* (1929) 98 LJKB 743 (policeman) and *Reading v Attorney-General* [1951] AC 507 (HL) (army sergeant).

19 As the board bluntly acknowledged: 'Money paid to the false fiduciary belongs to him.' ([1994] 1 AC 324 at 331).

20 In line with cases such as *Keech v Sandford* (1726) Sel Cas t King 61, 25 ER 223, and *Boardman v Phipps* [1967] 2 AC 46 (HL), it was irrelevant that the principal could not have obtained that particular benefit. The principal's inability to pursue a gain is even more demonstrable as regards bribes, where the gain is unlawful.

21 [1994] 1 AC 324, 331 *per* Lord Templeman, delivering the advice of the Privy Council.

> As soon as the bribe was received it should have been paid or transferred instanter to the person who suffered from the breach of duty. Equity considers as done that which ought to have been done. As soon as the bribe was received, whether in cash or in kind, the false fiduciary held the bribe on a constructive trust for the person injured.

Attorney General for Hong Kong v Reid has generally held sway in English jurisprudence,[22] although it has not been universally followed.[23] An abiding concern is the elision of fundamental understandings as to the nature of personal and proprietary obligations. As Professor Birks has pointed out, proprietary restitution is only justified where the claim is founded on a proprietary base, as where the fiduciary misapplies the principal's property. In contrast, bribe money derives from a third party, not the principal.[24]

In a major development, the Court of Appeal in *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd*[25] declined to follow *Reid* and stated, as a general proposition,[26] that a fiduciary will only be *personally* accountable for a profit obtained in breach of fiduciary duty. *Sinclair* arose from a complex fraudulent scheme involving inter-company dealings. Mr Cushnie, a director of T Ltd, fraudulently applied T Ltd's funds to artificially inflate the value of V Ltd, a company in which he held shares. Subsequently, Cushnie sold the shares in V Ltd for £28.69 million.

In civil proceedings,[27] the claimant, as assignee of the interests of T Ltd, asserted an equitable proprietary interest in the proceeds of the shares sold by Cushnie in breach of his fiduciary duties as director of T Ltd. Although Cushnie was personally accountable for the profit, the claimant sought a constructive trust over the gains and their substitutes to obtain priority over all claimants except a *bona fide* purchaser for value without notice. The problem from the claimant's perspective was that, while T Ltd and its resources were instrumental in the unlawful scheme, the gain was achieved by disposing of shares in an independent entity.

Lewison J (as he then was)[28] found that Cushnie had acquired the shares in V Ltd before T Ltd had been incorporated and before he had assumed any fiduciary duties to the latter. T Ltd could not establish any proprietary interest in the shares and the only claim by T Ltd was in relation to the gains made on their sale as a result of share manipulation involving T Ltd. This gave rise to a personal claim only.[29] T Ltd could not therefore assert a proprietary interest in the proceeds of the shares or pursue such claim against traceable proceeds.[30]

Delivering the judgment of the Court of Appeal, Lord Neuberger of Abbotsbury MR,[31] explained that, while no bribes or secret commissions were alleged, the relevant principles derive from this area of law. Accordingly, 'if a claimant beneficially owns

22 For example, *Ocular Sciences Ltd v Aspect Vision Care Ltd* [1997] RPC 289 (Ch) 412–13; *Daraydan Holdings Ltd v Solland International Ltd* [2004] EWHC 622 (Ch), [2005] Ch 119 [86]; *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1634 (Ch) [1490]. Cf *Halifax Building Society v Thomas* [1996] Ch 217, 229 (CA); *Attorney General v Blake* [1997] Ch 84, 96.

23 *Reid* has also been mired by conflicting views as to the precedent of a Privy Council decision in relation to domestic courts, including the Court of Appeal.

24 Birks (n 12) 386.

25 [2011] EWCA Civ 347, [2012] Ch 453.

26 See below for discussion of cases where a proprietary claim can be sustained.

27 Cushnie's actions also led to a criminal prosecution resulting in conviction and a term of imprisonment.

28 [2010] EWHC 1614 (Ch). For earlier proceedings, see [2007] EWHC 915 (Ch) (Rimer J).

29 Ibid [81].

30 T Ltd was successful in a separate claim in respect of moneys from T Ltd which had passed to another company and became mixed with the latter's funds. Here, the Court of Appeal upheld the finding that T Ltd was entitled to trace the funds and assert a proprietary claim against third parties.

31 Richards and Hughes LJJ concurring.

a bribe received by a fiduciary, it follows that TPL's [T Ltd] proprietary claim to the proceeds of sale of the shares [in V Ltd] must succeed'.[32] After detailed analysis, the Court of Appeal upheld the finding below that Cushnie was personally accountable to T Ltd, but the proceeds were not held on constructive trust. The claimant's proprietary argument was soundly rejected.[33]

At the core of his rejection of *Reid*, Lord Neuberger MR distinguished between the exploitation by a fiduciary of property or opportunities subject to fiduciary obligations, and the wrongful exploitation of a fiduciary position, resulting in unauthorised gains:[34]

> In cases where a fiduciary takes for himself an asset which, if he chose to take, he was under a duty to take for the beneficiary, it is easy to see why the asset should be treated as the property of the beneficiary. However, a bribe paid to a fiduciary could not possibly be said to be an asset which the fiduciary was under a duty to take for the beneficiary. There can thus be said to be a fundamental distinction between (i) a fiduciary enriching himself by depriving a claimant of an asset and (ii) a fiduciary enriching himself by doing a wrong to the claimant.

It was only in the first category that an asset should be treated as the principal's property, to be held on constructive trust. Receipt of a bribe fell in the second category. Such conduct was manifestly wrongful, but there was no duty to obtain the bribe for the principal. Similarly, on the facts of *Sinclair*, the defendant was under no duty to obtain, on behalf of the claimant, the profit from the sale of his shares. The claimant accordingly had no proprietary basis for a constructive trust. His Lordship elaborated that a beneficiary is entitled to an equitable account in respect of any asset acquired by a fiduciary in breach of his or her duty, but a proprietary claim could not arise:[35]

> unless the asset or money is or has been beneficially the property of the beneficiary or the trustee acquired the asset or money by taking advantage of an opportunity or right which was properly that of the beneficiary.

Sinclair's analysis arouses concerns as to the apparent exemption of one of the more serious breaches of fiduciary duty from the customary rigour of equitable doctrine.[36] This has attracted the rebuke that:[37]

> To exclude the bribed fiduciary from the deterrent effect of the constructive trust is . . . to make it unavailable in the very situations where deterrence is likely to be the most needed. Bribery at its most naked breeds the crudest form of fiduciary infidelity. To privilege the dishonest fiduciary in this way is to create an incentive which should not be tolerated.

The restriction of proprietary relief to an 'opportunity or right which was properly that of the beneficiary' is contentious, in the context of bribes and more widely.[38] It is not

32 [2011] EWCA Civ 347, [2012] Ch 453 [56].

33 As a matter of authority, it was held that *Reid* was inconsistent with earlier Court of Appeal decisions (particularly *Lister & Co v Stubbs* (1890) 45 Ch D 1), and the House of Lords (*Tyrell v Bank of London* (1862) 10 HL Cas 26). Lord Neuberger MR stated that the Court of Appeal was not required to follow the Privy Council decision of *Reid* in preference to judgments of the Court of Appeal unless there are domestic authorities which indicate that the latter were *per incuriam* or of doubtful reliability. Absent powerful reasons to the contrary, the Court of Appeal should follow its own previous decisions ([2011] EWCA Civ 347, [2012] Ch 453 [73]).

34 [2011] EWCA Civ 347, [2012] Ch 453 [80].

35 Ibid [88].

36 Compare with *FHR European Ventures LLP v Mankarious* [2013] EWCA Civ 17, [2014] Ch 1. See n 43 below. See further P Devonshire, *Account of Profits* (Thomson Reuters 2013) 50–58.

37 *Grimaldi v Chameleon Mining NL (No 2)* [2012] FCAFC 6 [576].

38 See *Cadogan Petroleum plc v Tolley* [2011] EWHC 2286 (Ch) [27]; *Page v Hewetts Solicitors* [2011] EWHC 2449 (Ch).

immediately apparent where the principle begins and ends. It would probably comprehend the interception of specific property that was, or realistically could have been, enjoyed by the principal. More problematic would be the 'corporate opportunity' class of cases where a director, without authority, diverts potential customers from the company, to his or her own competing business.[39] In some cases the opportunity may have been causally remote and, by extension, uncertainty may surround the value of the actual opportunity. It is questionable whether proprietary relief is appropriate in such cases, where there is no apparent proprietary base and the claimant's interest cannot be readily quantified. At the same time, there is support for the contrary view, namely that a maturing business opportunity should be regarded as the property of the company. In some cases this has been described as a species of trust property, potentially exposing the faithless director to proprietary relief in the form of a constructive trust over the fruits of the exploited opportunity.[40] Arguably, *Sinclair*'s endorsement of proprietary relief where a fiduciary takes advantage of an opportunity provides impetus for this reasoning.

More broadly, *Sinclair* raises uncertainties regarding constructive trusts. The traditional vehicle for equitable proprietary relief is, perhaps unwittingly, threatened by a side wind, if Lord Neuberger MR's prescription in relation to secret commissions has general application. Absent a proprietary base, the constructive trust would be curtailed in proceedings for breach of fiduciary duty, unless the principal can establish an interest or right which is sufficiently proximate to the fiduciary's acquisition.[41] If the remedy is circumscribed in this way, then the fiduciary who enriches him or herself by committing a wrong[42] to the principal is personally accountable in equity, but beyond the reach of proprietary relief. It seems that the balance struck in *Sinclair* threatens to inhibit the effective enforcement of equity's most hallowed principles, such as the profit and conflict rules.[43]

2 Receipts and subtractions

In some instances a bribe or secret commission is treated as a receipt by the fiduciary on behalf of the principal.[44] Such funds in the hands of the false fiduciary, as agent or

39 For example, *CMS Dolphin Ltd v Simonet* [2001] 2 BCLC 704 (Ch); *Harris v Digital Pulse Pty Ltd* [2003] NSWCA 10, (2003) 56 NSWLR 298.

40 *Cook v Deeks* [1916] AC 554 (HL) 564 (Lord Buckmaster LC); *Brown v Bennett* [1999] BCC 525 (CA) 531 (Morritt LJ); *CMS Dolphin Ltd v Simonet* [2001] 2 BCLC 704 (Ch) [96] (Lawrence Collins J); *Lindsley v Woodfull* [2004] 2 BCLC 131, 140 (Arden LJ); *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch) [1344] (Lewison J).

41 This reflects the established view of English law that the existence of a proprietary interest is a matter of property law, not discretion. See *Foskett v McKeown* [2001] 1 AC 102 (HL) 109 *per* Lord Browne-Wilkinson. In line with this thinking, English law has adopted an institutional constructive trust in preference to a remedial model.

42 That is, a wrong unconnected to the principal's proprietary interests.

43 Significantly, in *FHR European Ventures LLP v Mankarious* [2013] EWCA Civ 17, [2014] Ch 1, the Court of Appeal took a different stance. In *Mankarious*, the defendant was the agent for the claimants in negotiating the purchase of a hotel. The defendant failed to disclose that it had entered into a brokerage agreement with the owner. When the property was sold to the claimants, the defendant received the agreed commission of €10 million from the owner. The Court of Appeal accepted that the claimants did not, strictly, retain any proprietary interest in the payment to the vendor. Nor was there any proprietary link between the secret commission and the claimants. However, in a practical sense, the brokerage agreement and the secret commission were part of the overall transaction and a constructive trust was imposed over the proceeds. The court renounced the narrow proprietary focus of *Sinclair v Versailles* and affirmed the rigour of equitable doctrine in respect of a breach of fiduciary duty. For comment on *Mankarious*, see R Chambers, 'Constructive Trusts and Breach of Fiduciary Duty' [2013] Conv 241; P Devonshire, 'Defining the Boundaries of Personal and Proprietary Relief Against Secret Commissions' (2013) 24 King's Law Journal 392.

44 See further Sir Peter Millett, 'Bribes and Secret Commissions' [1993] Restitution Law Review 7, 27–30; M McInnes, 'Interceptive Subtraction, Unjust Enrichment and Wrongs: A Reply to Professor Birks' [2003] CLJ 697, 713.

employee, belong to the principal. There is no additional need to invoke *Reid*'s reasoning in order to characterise the receipt as the principal's property. A proprietary wrong arises in the case of interceptive subtraction of incoming and outgoing funds of the principal. Typically, the former occurs where the agent deducts a secret commission from funds originating from a third party which are intended for the principal. A similar conclusion can be drawn where the defendant deducts a secret commission from the principal's funds before remitting the net proceeds to the intended recipient.[45] *Daraydan Holdings Ltd v Solland International Ltd*[46] is an example of the latter. The claimants remitted funds to the defendants for undertaking the refurbishment of the claimants' properties in London and Qatar. The contracts were arranged by an employee of the claimants. The employee was a fiduciary. The employee required the defendants to pay him a secret commission in respect of these contracts. Without the claimants' knowledge, the contract price was increased by the amount of the bribe and the defendants remitted the illicit gain to the employee. Lawrence Collins J (as he then was) held that the claimants were entitled to a restitutionary remedy because there was a proprietary basis for the claim and the bribes derived directly from the claimants' property.[47]

Conceptually, a distinction can be drawn between subtracting a bribe from the principal's funds and receipt of a bribe directly from the briber as a separate and discrete transaction. On the authority of *Lister* and *Sinclair*, where the fiduciary receives a bribe directly from a third party, there is no proprietary base and the claimant is confined to a personal order. However, in terms of outcome and intent, the distinction is less palpable, and it is questionable whether the nature of the relief should be subordinated to the form of the wrongdoing. It is submitted that proprietary relief should theoretically be possible in every purchase and sale transaction where a bribe is received directly from the briber. In both cases a bribe payment can be rationalised as an accretion to, or deduction from, the principal's wealth. This is particularly appropriate given that it is only the fiduciary's deception which prevents the principal from receiving the benefit directly. Where the principal is the vendor, a bribe or secret commission paid by the purchaser can be treated as forming part of the consideration. That is, the purchaser was willing to pay the contract price plus a further sum to acquire the principal's goods or services. Similarly, where the principal is a purchaser, a bribe received by the principal's agent or employee can be treated as a rebate on the purchase price because the vendor was prepared to sell for less than the sum that had apparently been agreed.[48]

This interpretation is not necessarily inconsistent with certain statements in *Sinclair*. The briber is prepared to pay a premium by way of a bribe to the fiduciary to effect a purchase to, or from, the principal. In both cases the fiduciary failed to press this economic advantage on behalf of his or her principal. The genesis of the wrongful enrichment is therefore an opportunity or right 'properly that of the beneficiary', conferring upon the latter a proprietary interest in the proceeds. Moreover, the additional consideration, or reduced

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45 In *Lister & Co v Stubbs* (1890) 45 Ch D 1 (CA), it was observed that if the moneys had been paid by the plaintiff to the agent for the payment of goods ordered by the plaintiff, then the agent would have received the funds in a fiduciary capacity and 'they would have come into his hands clothed with a trust' (4 *per* Stirling J, affirmed by the Court of Appeal). See further C Needham, 'Recovering the Profits of Bribery' (1979) 95 LQR 536.

46 [2004] EWHC 622 (Ch), [2005] Ch 119.

47 Ibid [87].

48 *Fawcett v Whithouse* (1829) 1 Russ & M 132, 39 ER 51. To rule otherwise is to adopt the agent's wrongdoing as a basis for denying the principal's beneficial interest in such sums. In *Reid* it was accepted that the bribe belonged in law to the false fiduciary. The bribe was an inducement to commit a crime. Unlike the present example, the receipt of money in *Reid* could not be equated to a lawful bargain.

purchase price, is a pecuniary benefit that falls within the fiduciary's remit to the principal.[49] As Neuberger MR frankly concedes:[50]

> In cases where a fiduciary takes for himself an asset which, if he chose to take, he was under a duty to take for the beneficiary, it is easy to see why the asset should be treated as the property of the beneficiary.

Yet the Court of Appeal considered that proprietary restitution is generally unavailable for wrongs where the conduct in question involves receipt of a bribe.[51] This creates an anomalous exemption,[52] for the interception of value that is rightfully due to the principal[53] is surely the exemplar of 'an opportunity or right which was properly that of the beneficiary'.[54]

Sinclair's analysis relegates the principal to a personal judgment and enables the errant fiduciary to retain consequential gains. In the Court of Appeal it was argued that as a matter of equitable policy a fiduciary should not be allowed to profit from his or her breach. Neuberger MR considered that this should be addressed 'by extending, or adjusting, the rules relating to equitable compensation rather than those relating to proprietary interests'.[55] His Lordship opined that the law relating to equitable compensation was more flexible than the law of property and that an extension of the former would interfere less with the legitimate interests of other creditors.[56]

In response it may be said that, firstly, it is not immediately clear how equitable compensation would serve as a medium for gain-based relief. Secondly, in fulfilling its traditional compensatory function, the context of bribery poses challenges with respect to the measure of loss. Thirdly, assumptions as to the rights of creditors must be assessed against the interests of the betrayed principal. Each will be considered in turn.

3 Equitable compensation

(A) Gain-based relief

With regard to the first point, if the law is developed along the lines suggested by Neuberger MR in *Sinclair v Versailles*, it would be necessary to fundamentally recast the concept of damages, to encompass the disgorgement of gains. Support for this view is at best sporadic. Occasionally, the gauntlet has been thrown down, urging a broader classification of remedies in place of historical reliance on a 'formulaic division between

49 It has been suggested that a constructive trust is only justified in limited cases where the fiduciary acquires an opportunity he or she was required to pursue on behalf of the principal. It is argued that the improperly acquired property must possess unique significance to the principal or it must have been virtually certain that the principal would have acquired the asset but for the wrongful interception. See P Watts, 'Constructive Trusts and Insolvency' (2009) 3 Journal of Equity 250, 260; P Birks, 'At the Expense of the Claimant: Direct and Indirect Enrichment in English Law' in D Johnston and R Zimmermann (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (CUP 2011) 493. It is submitted that the receipt of a bribe meets even this restrictive standard. The economic return to the principal is invariably the most important aspect of a sale or purchase transaction.

50 [2011] EWCA Civ 347, [2012] Ch 453 [80].

51 That is, in respect of conduct falling outside the formula prescribed by the Court of Appeal. See ibid [88], quoted in text above at n 35.

52 For recent application of this restrictive approach, see *Cadogan Petroleum plc v Tolley* [2011] EWHC 2286 (Ch); *Page v Hewetts Solicitors* [2011] EWHC 2449 (Ch); *FHR European Ventures LLP v Mankarious* [2011] EWHC 2999 (Ch).

53 Increased price as seller or reduced price as purchaser.

54 [2011] EWCA Civ 347, [2012] Ch 453 [88].

55 Ibid [90].

56 Ibid.

different wrongs'.[57] From this perspective the concept of compensation is not necessarily confined to loss and potentially subsumes gain-based awards. Thus it has been suggested that an account of profits serves a compensatory function in cases where there is no identifiable loss.[58] In similar vein, the term 'damages' has been expounded as a generic concept on the premise that all monetary relief [59] is a species of damages and therefore awards under this head are not tied exclusively to compensation for loss.[60]

It is, however, questionable whether gain-based relief can be strictly aligned with the orthodox remedy of compensatory damages. At a certain level of abstraction it is, of course, true that all monetary awards provide recompense for wrongs. But, as the focus sharpens, it is apparent that each disposition fulfils a distinct function[61] of effecting either restitution, disgorgement or compensation.[62] From this perspective, it is doubtful whether equitable compensation can fulfil the comprehensive profit-stripping function envisaged by Neuberger MR. Nor does it offer any obvious basis for proprietary relief against an asset that has increased in value.

(B) Measure of loss

Equitable compensation, by definition, compensates for loss. This is usually achieved in one of two ways. In the case of the wrongful paying-away of trust assets in an orthodox trust, the defaulting trustee comes under an immediate duty to reconstitute the trust estate. If specific restitution is not possible then payment must be made to compensate for such loss.[63] Equitable compensation is not confined to breach of an express trust and finds application more generally in respect of equitable wrongs, particularly in relation to breach of fiduciary duty.[64] In either case, compensation is intended to restore the injured party to the position which existed before the wrong.

If bribery is rationalised from a compensatory perspective, the determination of loss is problematic. One approach is to adopt the defendant's gain as the measure of the claimant's loss. This reasoning is not without precedent,[65] but it is counter-intuitive to rationalise a claim to funds from an unlawful source in this manner. A more principled approach, consistent with the economics of commercial bargaining, is to quantify loss by reference to the sum the third-party purchaser or vendor would have paid or accepted, but for the corrupt services of the claimant's agent.[66] That is, the increased amount the third party would have paid for the claimant's goods or services (the agreed price plus the bribe) or the reduced amount the claimant would have had to pay the third-party vendor (the agreed price minus the bribe). However, this only takes the claim so far. Equitable compensation treats the proceeds of bribery as a notional loss that can be recovered by the claimant. It does not provide a further explanation for stripping the fiduciary of gains deriving from the

57 *Devenish Nutrition Ltd v Sanofi-Aventis SA (France)* [2008] EWCA Civ 1086 [68] *per* Arden LJ.

58 *WWF-World Wide Fund for Nature v World Wrestling Federation Entertainment Inc* [2007] EWCA Civ 286, [2008] 1 WLR 445 [59] (Chadwick LJ). For criticism of this decision, see R Cunnington, 'Changing Conceptions of Compensation' [2007] CLJ 507.

59 With the exception of debt and claims under statute.

60 *Stevens v Premium Real Estate Ltd* [2009] NZSC 15, [2009] 2 NZLR 384 [98], [99].

61 See *Charter plc v City Index Ltd* [2007] EWCA Civ 1382, [2008] Ch 313 [64]ff.

62 J Edelman, *Gain Based Damages* (Hart Publishing 2002) 65ff. See further R Cunnington, 'The Assessment of Gain-Based Damages for Breach of Contract' (2008) 71 MLR 559.

63 *Nocton v Lord Ashburton* [1914] AC 932 (HL) 952; *Target Holdings Ltd v Redferns* [1996] 1 AC 421 (HL) 434.

64 *Day v Mead* [1987] 2 NZLR 443 (CA); *Canson Enterprises Ltd v Boughton & Co* (1991) 85 DLR (4th) 129 (SCC).

65 See, for example, *Attorney General v Blake* [2001] 1 AC 268 (HL) 278.

66 See discussion above.

original bribe. While the claimant's interest can be adjusted by way of a credit for unpaid consideration or an unpaid rebate, any additional gains made by the fiduciary are incidental to the bribe transaction. Such receipts are a more distant consequence of the wrong and the principal's claim is at best tenuous.

(C) THE INTERESTS OF THE FIDUCIARY'S CREDITORS

In balancing the appropriate remedial response to bribery, Neuberger MR was conscious of the interests of the fiduciary's creditors. His Lordship considered that such persons required a degree of protection in a contest with the defrauded principal.[67] Such concerns have frequently been raised by judges and academic commentators in respect of bribery proceedings.

As noted, the Court of Appeal in *Lister & Co v Stubbs* defined the relationship between the deceived principal and its fiduciary as one of debtor and creditor. If, on a contrary view, the principal acquired a proprietary interest in the proceeds of bribery, then this would prejudice the fiduciary's creditors in the event of his bankruptcy. For Lindley LJ such a conclusion:[68]

> would involve consequences which, I confess, startle me. One consequence, of course, would be that, if *Stubbs* were to become bankrupt, this property acquired by him with the money paid to him by Messrs. *Varley* would be withdrawn from the mass of his creditors and be handed over bodily to *Lister & Co*. Can that be right?

The interests of the fiduciary's creditors has commonly been cited in support the decision.[69] In *Sinclair v Versailles*, Neuberger MR suggested that the Privy Council's advice in *Attorney General for Hong Kong v Reid* 'may have given insufficient weight to the potentially unfair consequences to the interests of other creditors'.[70]

First, and fundamentally, it must be recognised that if the status of bribes is based on such considerations, then the discussion has shifted from principle to policy. This is an undesirable re-arrangement of the argument.[71] The rights of creditors should be subordinate to the primary decision as to the nature of the wrong and its remedial implications. The impact on creditors is simply a consequence of that decision.[72] The solvency (or potential insolvency) of the fiduciary should not drive the conclusion. If a

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67 See *Katingal Pty Ltd v Amor* [1999] FCA 317 for discussion of the status of a constructive trust in relation to the rights of creditors in the debtor's insolvency.

68 (1890) 45 Ch D 1 (CA) 15.

69 For example, *Re North Australian Territory Company (Archer's Case)* [1892] Ch 322 (CA) 338.

70 [2011] EWCA Civ 347, [2012] Ch 453 [83]. While the authorities in this area focus on the interests of unsecured creditors, it should not be overlooked that the interests of some classes of secured creditors may be similarly affected. For example, persons who are unaware of the source of the fiduciary's asset may lend money on an equitable security over the property. See P Watts, 'Bribes and Constructive Trusts' (1994) 110 LQR 178, 179.

71 The argument is exposed to the criticism that has been levied at *Attorney General for Hong Kong v Reid*, namely that the outcome was policy-driven (in *Reid*, to reinforce the element of trust and confidence inherent in senior employment relationships).

72 See further Millett (n 44) 9–10.

proprietary claim is sustained, then the asset is simply withdrawn from the insolvent's estate,[73] with whatever consequences flow from that.[74] It has aptly been said that:[75]

> [T]he entitlement to avoid the rules of *pari passu* in insolvency is one of the consequences of a finding of a proprietary claim *but it is not a reason for such a claim to exist or not* . . . the existence or otherwise of proprietary relief should be determined without reference to the interests of the unsecured creditor, since those interests are only valid interests as such if the claimant does *not* have a proprietary right to those assets.

Secondly, the creditors' claim to priority is unconvincing. A common argument is that the fiduciary's creditors have given value[76] and should not be postponed to a party who has given nothing and lost nothing. These claims overlook the point discussed above, regarding the principal's transactional loss or unrealised gain. It must also be remembered that creditors have voluntarily assumed the risk of default, whereas the betrayed principal is an involuntary creditor in the fiduciary's insolvency.

More generally, it is submitted that it is an arid exercise to attempt to define priorities between a betrayed trust and an unfulfilled promise of payment to a party who has extended credit. With respect to the latter, Professor Goode comments that 'the debtor's default has swelled his assets at [the creditor's] expense'.[77] This is of course true. The same may be said of a bribe, subject to the proviso that the bribe is not, at least in a pecuniary sense, acquired at the expense of the principal. However, even the latter qualification can be discounted in light of the earlier suggestion that, depending upon the form of the transaction, a bribe represents either unpaid consideration or an unpaid rebate to the principal.

There will of course be situations where the principal's claim to a constructive trust must be relegated to a personal order ranking *pari passu* with general creditors. Not uncommonly the proceeds of bribery are used to fund a business venture or an investment.[78] Its future value may reflect the benefit of dealings with innocent third parties.[79] In such cases a constructive trust would unjustly enrich the principal at their expense. The fiduciary's assets should not be withdrawn from the general body of creditors when such parties have contributed to its value.[80]

4 The proprietary argument

Despite differing views as to the remedial response to bribery, there is consensus that such wrongdoing is an 'evil practice',[81] which is patently inconsistent with expectations of fiduciary duty. It goes further. Bribery is a criminal offence.[82] But the gravity of the wrong

73 In other contexts this is uncontroversial. For example, trust assets do not form part of a deceased trustee's estate.

74 A rejoinder is that the role of proprietary relief in enforcing the deterrent principle must be re-examined in the context of insolvency. Arguably, deterrent reasoning is redundant when insolvency supervenes. The apportionment of assets and the preference of one class of claimant over another is a matter of personal irrelevance to the delinquent fiduciary. In this setting the betrayed principal and the fiduciary's general creditors should rank equally. See P Watts, 'Constructive Trusts and Insolvency' (2009) 3 Journal of Equity 250, 280.

75 P McGrath, 'Constructive Trusts: An Analysis of *Sinclair v Versailles*' [2012] LMCLQ 517 at 521 (emphasis in original).

76 Typically by extending credit for goods and services, or by advancing a loan.

77 R Goode, 'Ownership and Obligation in Commercial Transactions' (1987) 103 LQR 433, 444.

78 *Attorney General for Hong Kong v Reid* and *Lister & Co v Stubbs* are both instances of this.

79 Such parties may, for example, extend credit with or without security over the disputed assets.

80 'Value' in this sense is economically neutral in that it is not confined to gains.

81 *Attorney General for Hong Kong v Reid* [1994] 1 AC 324 (PC) 330; *Daraydan Holdings Ltd v Solland International Ltd* [2004] EWHC 622 (Ch), [2005] Ch 119 [1].

82 See the Bribery Act 2010.

can work to the disadvantage of the betrayed principal. According to Professor Goode, the plaintiff's claim can only be elevated to the status of a proprietary right if the bribe derives from the principal's property or is a benefit the defendant was under a duty to acquire for the principal.[83] In *Sinclair v Versailles* this finds expression in the requirement that the money must be beneficially the principal's property, or the benefit acquired by the fiduciary was an opportunity or right belonging to the principal.[84] Otherwise, the principal is confined to a personal restitutionary order. It is said that this conclusion is justified because the defendant was not engaged to solicit or receive bribes[85] and was under a negative duty to refrain from such conduct. The fiduciary's actions fell outside the scope of his employment or retainer. The bribe and any gain therefrom would never have accrued to the principal because 'if the defendant had honoured his obligations he would never have received the bribe in the first place'.[86]

Paradoxically, this affords protection from proprietary relief for the more extreme and egregious abuse of office. This runs counter to the development of equity and common law and is the wrong focus for determining relief. It is submitted that the more appropriate question is whether there is proximity between the corrupt acts and the fulfilment of the defendant's services. It is anomalous and unacceptable that the barrier to an affirmative response is the fiduciary's own corruption. There are instances where even the common law has shrugged off the distortion of such reasoning. For example, it was formerly held that a master was not vicariously liable for fraudulent or dishonest acts committed by a servant for his own benefit, because such conduct was outside the scope of his employment.[87] This reasoning was rejected by the House of Lords in *Lloyd v Grace, Smith & Co*[88] and denounced in later cases as an affront to common sense.[89]

In discussing *Reid*, it was seen that equity exposes bribe payments to the full measure of personal and proprietary relief. It is submitted that the Privy Council's advice is unsatisfactory, not in outcome, but in method. This is a teleological judgment directed to a remedial outcome that reflects the court's abhorrence of certain conduct.[90] The maxim 'equity regards as done that which ought to be done', which is central to the decision, is a sparse rationale for the shift from personal to proprietary obligation. It is not an objective in itself, but a normative statement without an obvious outcome. It simply begs the question as to the appropriate remedy. Thus, it is equally tenable to speak of an account of profits as it is to postulate a trust relationship. Moreover, as a technique, the equitable maxim does not fit comfortably, or effectively, with the context. The maxim more appropriately supports a primary decision founded on substantive principles and pre-existing rights. It is essentially

83 R Goode, 'Ownership and Obligation in Commercial Transactions' (1987) 103 LQR 433, 443–44.

84 [2011] EWCA Civ 347, [2012] Ch 453 [88]. At that point, the claimant can elect whether to assert a proprietary claim. If bribe proceeds have been used to acquire property, the claimant may or may not wish to claim the asset *in specie*. If the fiduciary acquired a diminishing asset, the claimant may prefer to assert a personal claim, subject to an equitable lien or charge over the property as security for any unpaid balance. See *Foskett v McKeown* [2001] 1 AC 102 (HL) 130.

85 [2011] EWCA Civ 347, [2012] Ch 453 at [80]. See further R Goode, 'Property and Unjust Enrichment' in A A Burrows (ed) *Essays on the Law of Restitution* (Clarendon Press, 1991) 215, 230–31.

86 R Goode, 'Proprietary Liability for Secret Profits – A Reply' (2011) 127 LQR 493, 494.

87 *British Mutual Banking Co Ltd v Charnwood Forest Railway Co* (1887) 18 QBD 714 (CA); *Cheshire v Bailey* [1905] 1 KB 237 (CA); *Ruben v Great Fingall Consolidated* [1906] AC 439 (HL).

88 [1912] AC 716 (HL).

89 Perhaps most notably in the landmark case of *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716 (CA) at 735–36 (Diplock LJ) and 738-740 (Salmon LJ).

90 The purposive nature of this decision is captured by Lord Templeman's comment that the fiduciary 'is not allowed by any means to make a profit out of the breach of duty' ([1994] 1 AC 324, 332).

a secondary rule designed to recognise rather than create rights. Most commonly it is applied in consensual transactions to enforce an informal agreement to transfer property or create a legal interest.[91] In this setting, the maxim supports an obligation to transfer property. In contrast, where the fiduciary receives a bribe directly from the briber, there is no transactional link between the bribe and the fiduciary's duty to his or her principal. Accordingly there is no identifiable *res* to which the maxim can apply.[92]

The equitable maxim which insists on due performance is reflected in the 'good person' fiction which is invoked to reverse the effects of wrongdoing by a fiduciary.[93] As Professor Finn (as he then was) expresses the point:[94]

> The fiduciary is normally not permitted to say that the benefit derived was derived other than for his beneficiary, even though this is transparently contrary to his real intentions when deriving it.

This is affirmed in evidential presumptions that reinforce the strict standards of fiduciary duty. For example, the rule in *Re Hallett's Estate*[95] that in the discharge of a fiduciary's duties it is presumed that, whenever an act can be done rightfully, the fiduciary is not allowed to maintain against his principal that he has done so wrongly.[96] Similar principles apply in assessing loss. For example, where a trustee mismanages trust assets, the court may presume that the principal was deprived of the highest economic return for the property.[97]

The good person fiction and related evidential rules impose what is essentially an irrebuttable presumption of probity on conduct that is clearly tainted. In this regard, Lord Templeman was emphatic in stating:[98]

> [E]quity insists on treating him as having acted in accordance with his duty; he will not be allowed to say that he preferred his own interest to that of his principal. He must not obtain a profit for himself out of his fiduciary position. If he has done so, equity insists on treating him as having obtained it for his principal; he will not be allowed to say that he obtained it for himself. He must not accept a bribe. If he has done so, equity insists on treating it as a legitimate payment intended for the benefit of his principal; he will not be allowed to say that it was a bribe.

This, then, becomes the substituted performance of the fiduciary's overriding duty to act selflessly in the interests of his principal.[99] Manifestly, the putative good faith performance of bad faith actions does not respond to the argument that proprietary restitution is only justified where the claim has a proprietary base. It simply assumes – or more adventurously, creates – the premise[100] which is so critical to restitutionary reasoning. The two positions do not connect. The internal logic of each is at times compelling, but these are parallel arguments, without an obvious point of intersection.

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91 *Walsh v Lonsdale* (1882) 21 Ch D 9 (CA).

92 P Birks, 'Obligations and Property in Equity: *Lister v Stubbs* in the Limelight' [1993] LMCLQ 30, 32.

93 For recent discussion, see D Hayton, 'No Proprietary Liability for Bribes and Other Secret Profits?' (2011) 25 Trust Law International 3.

94 P D Finn (ed), *Essays on Restitution* (Lawbook Co 1990) 221.

95 (1879) 13 Ch D 696 (CA).

96 Ibid 729 *per* Sir George Jessel MR.

97 *Guerin v The Queen* [1984] 2 SCR 335.

98 [1994] 1 AC 324 (PC) at 337, citing Millett (n 44) 20.

99 D Hayton, 'No Proprietary Liability for Bribes and Other Secret Profits?' (2011) 25 Trust Law International 3, 4, 14.

100 As compendiously expressed in *Reid*: 'As soon as the bribe was received . . . the false fiduciary held the bribe on a constructive trust' ([1994] 1 AC 324, 331).

With respect to the equitable position, it is preferable to acknowledge an objective wrong than to assert a fictitious right. The latter is an unconvincing foundation for defining substantive proprietary interests. It is submitted that the remedial implications of bribery should be absorbed within equity's general governance of fiduciary wrongs. On orthodox reasoning, the receipt of a bribe is a breach of the profit rule. More expansively, such misconduct is, or should be, encompassed by an obligation to disgorge unauthorised benefits, including gains derived from the wrongful exploitation of a fiduciary position. Australian jurisprudence in particular has embraced this approach, adopting the constructive trust as a vehicle for reversing gains where a fiduciary has misused his or her position for personal advantage.[101] As Mason J observed in *Hospital Products Ltd v United States Surgical Corporation*:[102]

> A fiduciary is liable to account for a profit or benefit if it was obtained (1) in circumstances where there was a conflict, or possible conflict of interest and duty, or (2) by reason of the fiduciary position or by reason of the fiduciary taking advantage of opportunity or knowledge which he derived in consequence of his occupation of the fiduciary position . . . Any profit or benefit obtained by a fiduciary in either of the two situations already described is held by him as a constructive trustee . . . Neither principle nor authority provide any support for the proposition that relief by way of constructive trust is available only in the case where a profit or benefit obtained by the fiduciary was one which it was an incident of his duty to obtain for the person to whom he owed the fiduciary duty . . . What is important is that the advantage has accrued to him in breach of his fiduciary duty or by his misuse of his fiduciary position.

This approach addresses the mischief of fiduciary wrongs and avoids narrow qualifications directed to whether the interest was acquired from, or acquired on behalf of, the principal, or whether the defendant received, subtracted or intercepted the illicit gain.

Conclusion

The ability of the betrayed principal to assert a proprietary claim against a bribe or its proceeds in the hands of the errant fiduciary is dependent on the vagaries of the particular bribe arrangement. If the bribe has been subtracted directly from the principal's property or intercepted from funds destined for the principal, there is a sufficient base for a proprietary restitutionary response. *Reid* indicates that such actions would similarly attract proprietary relief in equity, typically by means of a constructive trust. However, on the authority of *Lister* and *Sinclair*, where the fiduciary receives a bribe directly from the briber, there is no proprietary base and the claimant is confined to a personal order. This is unduly restrictive. It has been argued that there is a sufficient proprietary nexus because the bribe represents withheld consideration or an unpaid rebate. It has also been submitted that a proprietary response is consistent with *Sinclair*'s concession in respect of benefits that the fiduciary was under a duty to obtain for the principal.

A corollary of the *Lister–Sinclair* model is that the faithless fiduciary may be able to retain gains deriving from the bribe. Neuberger MR's suggestion that this can be redressed by equitable compensation is problematic, not least because of the difficulty of reconciling disgorgement with the traditional compensatory function of damages.

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101 Contrast with *Sinclair*'s restrictive view that an asset or money acquired in breach of a trustee's duties to the beneficiary which 'could not have been obtained if he had not enjoyed his fiduciary status' will not necessarily be held on trust for the principal ([2011] EWCA Civ 347, [2012] Ch 453 [89]).

102 (1984) 156 CLR 41, 107–08. See also *Keith Henry & Co Pty Ltd v Stuart Walker & Co Pty Ltd* (1958) 100 CLR 342, 350; *Chan v Zacharia* (1984) 154 CLR 178, 198–99.

The concern expressed in *Lister* and *Sinclair*, that proprietary relief will prejudice the interests of the fiduciary's general creditors, is an argument of policy, not principle. In espousing the creditors' position, there is a tendency to marginalise the principal's status. For example, while creditors have given value, this must be weighed against the principal's transactional loss. Again, it is often overlooked that the betrayed principal is an involuntary creditor, whereas third parties have voluntarily assumed the risk of default.

Reid's attempts to overcome the absence of a transactional link where a bribe is received directly from a third party is unconvincing. The Privy Council's doctrinaire application of equitable principle does not respond to the objection that proprietary restitution requires a proprietary base. The restitutionary and equitable arguments simply reflect different philosophical positions and the protagonists are shadow-boxing on different planes. As matters stand, the status of bribes is governed by narrow, often accidental, factual variations. The nature and taxonomy of the wrong has attracted vigorous debate. A pragmatic unitary response is needed. It has been suggested that the remedial consequences of bribery should be absorbed within the general governance of equitable wrongs,[103] where proprietary relief can appropriately be granted to reverse enrichments from the corrupt exploitation of a fiduciary's position.

103 See further *Grimaldi v Chameleon Mining NL (No 2)* [2012] FCAFC 6 [577].

NILQ 65(1): 39–61

Better the second time around? Department of Justice Registered Intermediaries Schemes and lessons from England and Wales

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Abstract

In 2012 the Department of Justice (DoJ) Northern Ireland recruited and trained a cohort of Registered Intermediaries in preparation for the commencement in 2013 of pilot schemes to assist vulnerable witnesses and defendants to communicate their evidence. This article reviews the history of intermediaries and critically analyses the lessons learnt from the Ministry of Justice (MoJ) Witness Intermediary Scheme (WIS) operating in England and Wales over the last decade. It compares the schemes which, though similar, are distinct and significantly different in respect of defendants and suggests what more is required in Northern Ireland in order to support the introduction of Registered Intermediaries.

Introduction

> Our languages of communication are rough-hewn devices, sometimes coarse and sometimes marvellously subtle, reflecting insights and purposes of past cultures, which in part continue to be vital to the present, but in part to be alien and irrelevant.[2]

On 13 May 2013 the DoJ Northern Ireland launched the Registered Intermediaries Schemes (RIS) pilot to assist vulnerable witnesses and defendants to communicate with those in the criminal justice system who question them. In England and Wales the MoJ WIS began to help witnesses early in 2004. It is available in all criminal courts throughout England and Wales. The WIS has provided a template but not a blueprint for Northern Ireland. The English and Northern Irish schemes operate independently of one another. Though they share a common purpose, those intermediaries accredited in one jurisdiction are not accredited in the other.

1 Professor Penny Cooper and David Wurtzel work with the DoJ (Northern Ireland) and the MoJ (England and Wales) teaching and advising Registered Intermediaries; they also co-author the procedural guidance manuals for Registered Intermediaries. This article is based on their paper 'Victims and Vulnerable Witnesses in the Criminal Process' (Criminal Bar Association Conference, Belfast, 12 May 2012). The authors are particularly grateful to Norma Dempster at the DoJ for her assistance with this article. Thanks are also due to the anonymous reviewer of the draft article and to Jason Connolly and Joyce Plotnikoff for their comments on the earlier conference paper. The usual caveat applies.

2 S S Tomkins, 'The Varieties of Shame and its Magnification' in E Virginia Demos (ed), *Exploring Affect: The Selected Writings of Silvan S Tomkins* (CUP reprinted 2004) 397.

In August 2012 the DoJ advertised for individuals to take part on a self-employed basis[3] in its RIS pilot 'to assist vulnerable witnesses and vulnerable defendants to communicate effectively during the police investigation and any subsequent trial'.[4] Initially the pilot schemes have operated in the Belfast Crown Court for offences that are triable only on indictment and that have occurred in the Belfast district council area. After three months the DoJ had received just 12 requests for a Registered Intermediary so it was decided to extend the scope of the pilot to all Crown Courts from 11 November 2013 in order to have sufficient numbers to evaluate the pilot effectively. Following evaluation of the pilot it is envisaged that the RIS will be rolled out across further court tiers.[5]

The DoJ sought applicants for Registered Intermediaries 'from a wide background of professional roles and occupations, including speech and language therapy, occupational therapy, psychology, social work, the mental health professions, counselling, teaching and nursing'[6] who would bring the skills and experience gained in these roles to their work as a Registered Intermediary. Over 150 people applied. Those who were selected took part in an intensive training and assessment course[7] consisting of a distance learning module, six days of training and four assessments covering legal procedure, report writing, the role and responsibilities of the intermediary and court work with a witness.[8] Registered Intermediaries from England travelled to Belfast and gave delegates the benefit of their experience; the group met members of the local judiciary and the Northern Irish Bar and they were able to use the actual court and witness facilities at Laganside for role-play training. In January 2013, 11 were assessed as having successfully completed the course.

The DoJ provision differs in some key respects from the MoJ's. In both jurisdictions Registered Intermediaries can assist prosecution or defence witnesses. However, in Northern Ireland vulnerable defendants, when giving evidence, will also be able to take advantage of the statutory scheme. In England and Wales there is parallel legislation which would allow that but it has not yet been brought into force. There are lessons to be learnt from the WIS but as regards Registered Intermediaries for defendants, the RIS will be breaking new ground.

History

Until relatively recently, the courts have been left to make proper allowances on an *ad hoc* basis in order to allow children and other vulnerable witnesses to give evidence, assuming that they were allowed to at all. A general view prevailed in respect of children that they made unreliable witnesses[9] and there was a tendency to treat children 'almost as if they were a different species'.[10] As recently as October 1986 the English Court of Appeal in *R v*

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3 Fees, which are reviewed annually, are payable at £36.00 per hour, £16.00 per hour for travel with an unsocial hours rate of £52 per hour. Source: DoJ Application Information Pack (August 2012) 7.

4 Ibid 2.

5 By mid-March 2014, under the pilot scheme, the DoJ had received in total 106 requests for assistance from a Registered Intermediary. Of these, four were assessed as not requiring a Registered Intermediary: information supplied by the DoJ by email to the authors, March 2014.

6 DoJ (n 3) 3.

7 Run by Kingston University London, designed and led by the authors.

8 An oral assessment carried out with an actor using Belfast Crown Court live-link facilities.

9 'The [psychology] studies from the beginning of this century which support this gloomy view . . . have now been widely criticised.': John Spencer and Rhona Flin, *The Evidence of Children: The Law and Psychology* (2nd edn OUP 1990) 286.

10 Ibid 287.

Wright and Ormerod[11] affirmed the 'validity of, and good sense' of the established proposition set out in *R v Wallwork*[12] that 'the jury could not attach any value to the evidence of a child of five: it is ridiculous to suppose they could'. The rule by which juries had to be given a warning about convicting the accused on the uncorroborated evidence of a child was not abolished in both jurisdictions until 1988.[13] There are no comparable *dicta* in respect of vulnerable adults. Until relatively recently scientists and doctors (let alone police officers and lawyers) had a limited understanding of conditions which can affect communication and could make adults and children vulnerable when questioned. For instance, dyslexia,[14] Alzheimer's disease[15] and autism[16] were identified less than 150 years ago and Asperger syndrome[17] was not identified until some 60 years ago. Today policy-makers and law-makers endeavour to find ways to assist those with speech, language and communication needs[18] but it was not until well into the twentieth century that the courts began to consistently make adjustments to take into account communication difficulties.

On 20 June 1988 the then Home Secretary, Douglas Hurd, MP, announced in the House of Commons the establishment of an advisory group to consider the use of video recordings as a means of taking the evidence of children and other vulnerable witnesses at criminal trials. He cited a growing body of support for change which had manifested itself during the passage of the Criminal Justice Bill. The chair of that advisory group was HHJ Thomas Pigot QC, the Common Serjeant of London. 'The Pigot Report'[19] in December 1989 recommended that at trials on indictment for violent and sexual offences and offences of cruelty and neglect and at comparable trials in the juvenile courts (now the youth courts), video-recorded interviews with children under the age of 14[20] conducted by police officers, social workers or those whose duties include the investigation of crime or the protection of the welfare of children should be admissible as evidence.

The advisory group went on to recommend pre-recorded cross-examination: there should be a preliminary hearing at which the child should watch the video recording, be asked to adopt it and to expand upon any aspects which the prosecution wishes to explore, and then to be cross-examined by the defence. This should happen outside the courtroom in informal surroundings and be video-recorded and in due course played to the jury. 'No child witness to whom our proposals apply should be required to appear in open court during a trial unless he or she wishes to do so', the Pigot Report stated. Pre-recorded cross-

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11 [1990] 90 CAR 9.

12 [1958] 42 CAR 153.

13 S 34(2) Criminal Justice Act 1988 in England and Wales and Article 13 Criminal Justice (Evidence, etc) (Northern Ireland) Order 1988 in Northern Ireland.

14 Identified by Oswald Berkhan in 1881, though the term was first used by Rudolf Berlin in his 1887 paper 'Eine besondere Art der Wortblindheit-Dyslexie'.

15 Identified by Alois Alzheimer in 1907.

16 Identified by Eugen Bleuler in 1911 but until at least the 1950s the medical professional usually diagnosed autism as a psychosis. Autism Spectrum Disorder or Autism Spectrum Condition (ASD or ASC) is now widely used as an umbrella term.

17 Asperger Syndrome, a form of autism, is named after the scientist Hans Asperger who identified it in 1944. Leo Kanner is also credited with having identified it in 1943.

18 The *Bamford Review of Mental Health Learning Disability* (Northern Ireland 2007); *The Bercow Report: A Review of Services for Children and Young People (0–19) with Speech, Language and Communication Needs* (DoE 2008); *Not a Marginal Issue: Mental Health and the Criminal Justice System in Northern Ireland (Criminal Justice Inspection Northern Ireland* (CJINI 2010); Autism Act (NI) 2011; and the consequent NI Department of Health 2012 consultation on autism services in Northern Ireland and the consultation *Getting it Right for Victims and Witnesses* (MoJ 2012) to give but a few examples.

19 Judge Thomas Pigot QC, *Report of the Advisory Group on Video Evidence* (Home Office 1989).

20 Under 17 if the offence is of a sexual nature.

examination has not yet happened in England and Wales,[21] however, in June 2013 the MoJ announced the government's plan to pilot pre-trial cross-examination for vulnerable and intimidated witnesses 'by the end of the year in three Crown Court locations – Liverpool, Leeds and Kingston-Upon-Thames'.[22] The Pigot Report also recommended that 'an adult person who is likely to suffer an unusual and unreasonable degree of mental stress by giving evidence in open court should be treated as a vulnerable witness'.

In England the Criminal Justice Act 1991 allowed children's interviews to be recorded and for the recording to be admitted as their evidence in chief. In order to provide good practice guidance for those conducting these interviews, in 1992 the Home Office and Department of Health published the 'Memorandum of Good Practice on Video Recorded Interviews with Children Witnesses for Criminal Proceedings'.[23] Article 20 of the Criminal Justice (Children) (Northern Ireland) Order 1998 allowed a child to give evidence unsworn and provided that the child's evidence 'shall be received unless it appears to the court that the child is incapable of giving intelligible testimony'. The concept of the 'vulnerable witness' took root in the report *Speaking up for Justice*,[24] which in turn led to the Youth Justice and Criminal Evidence Act 1999 and in Northern Ireland the Criminal Evidence (Northern Ireland) Order 1999 (the 1999 Order) and their identical ranges of special measures for children and vulnerable adult witnesses. 'Achieving Best Evidence' guidance (which replaced the Memorandum and quickly became known simply as ABE) was developed as part of the implementation of special measures and Northern Ireland and England and Wales have their respective versions.[25]

The current position

The 1999 Order recognises that certain witnesses are 'vulnerable' and makes them 'eligible for assistance on the grounds of age or incapacity'.[26] These special measures do not apply to the defendant.[27] What is available to defendants will be discussed below separately.

The Article 11–18 special measures are:

Article 11: the witness, while giving testimony or being sworn in court, is prevented by means of a screen or other arrangements from seeing the accused

21 S 28 of the 1999 Act provides for cross-examination of the witness, and any re-examination, to be recorded by means of a video recording but has not yet been brought into force. See J R Spencer and M E Lamb, *Children and Cross-Examination: Time to Change the Rules?* (Hart Publishing 2012). In January 2013 the DPP for England and Wales said 'further consideration needs to be given to how best to implement section 28' when making a press statement on the report of Alison Levitt QC on the Savile cases <www.cps.gov.uk/news/press_statements/dpp_statement_about_savile_cases> accessed 22 January 2013.

22 'The pilots will run for six months followed by an assessment period after which we will consider how best to take this measure forward.' Written Ministerial Statement dated 13 June 2013 on 'Pre-trial Cross-examination testing'.

23 *Memorandum of Good Practice on Video Recorded Interviews with Children Witnesses for Criminal Proceedings* (Home Office/DoH 1992).

24 *Speaking up for Justice: Report of the Interdepartmental Working Group on the Treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System* (Home Office 1998).

25 *Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, the Use of Special Measures and the Provision of Pre-trial Therapy* (DoJ 2012) and *Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measure*s (MoJ 2011).

26 Article 4 of the Criminal Evidence (Northern Ireland) Order 1999 mirrors the provisions of the 1999 Act. Note that other articles/sections of the 1999 Order/Act provide special measures for 'intimidated' witnesses but the intermediary is not available to them.

27 The accused is specifically excluded from eligibility for the special measures set out in this part of the legislation; see Article 5 of the 1999 Order and s 16 (1) of the 1999 Act.

Article 12: the witness gives evidence by means of live link

Article 13: evidence is given in private (by excluding people from the courtroom)

Article 14: the wearing of wigs or gowns is dispensed with during the witness's evidence

Article 15: the admission of the witness's video-recorded interview as evidence in chief

Article 16: the admission of video-recorded cross-examination or re-examination

Article 17: the examination of the witness through an intermediary

Article 18: the use of aids to communication

Apart from Article 16 (incorporating the Pigot Report proposal of video-recorded cross-examination or re-examination) they are all in force.[28] Article 17, commenced in 2013, states:

> A special measures direction may provide for any examination of the witness (however and wherever conducted) to be conducted through an interpreter or other person approved by the court ('an intermediary'). The function of the intermediary is to communicate to the witness, questions put to the witness, and to any person asking such questions, the answers given by the witness in reply to them, and to explain such questions or answers as far as necessary to enable them to be understood by the witness or person in question.[29]

A witness is eligible for the assistance of an intermediary if they satisfy the test in Article 4 of the 1999 Order:[30]

> (1) A witness in criminal proceedings (other than the accused) is eligible for assistance by virtue of this section (a) if under the age of 17 [now 18] at the time of the hearing; or (b) if the court considers that the quality of evidence given by the witness is likely to be diminished by reason or any circumstances falling within subsection (2).
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> (2) The circumstances falling within this subsection are (a) that the witness (i) suffers from mental disorder within the meaning of the Mental Health (Northern Ireland) Order 1986; or (ii) otherwise has a significant impairment of intelligence and social functioning; (b) that the witness has a physical disability or is suffering from a physical disorder.

Article 4(5) of the 1999 Order[31] states:

> (5) In this Chapter references to the quality of a witness's evidence are to its quality in terms of completeness, coherence and accuracy; and for this purpose 'coherence' refers to a witness's ability in giving evidence to give answers which address the questions put to the witness and can be understood both individually and collectively.

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28 Apart from Article 16 and Article 17, they came into operation in respect of persons under 17 on 30 June 2003. Apart from Articles 15 (examination in chief by live link), 16 and 17, provisions relating to adult witnesses came into operation on 8 November 2004 in summary proceedings before the magistrates' court and on 21 December 2004 in criminal proceedings before the county court. Article 15 came into operation in July 2009 for adult witnesses in summary proceedings before the magistrates' court. Such a distinction between adults and children was not made in England and Wales. In England and Wales special measures became available in July 2002 apart from examination of a witness through an intermediary and videoed cross-examination or re-examination.

29 Article 17 of the 1999 Order mirrors s 29 of the 1999 Act.

30 S 16 of the 1999 Act uses the same wording except it refers to the Mental Health Act 1983.

31 S 29(5) of the 1999 Act uses the same wording.

Note that children are eligible by virtue of age alone. Whether or not they require the assistance of an intermediary depends on the circumstances of the individual child; they may or may not be suffering from a disability or disorder; their communication needs may in fact relate simply to their age. The younger the child is, the greater the likelihood that an intermediary will be necessary to ensure developmentally appropriate communication. In England there have now been trials with children aged three or four giving evidence.[32]

Other countries use 'intermediaries' but quite differently. In South Africa, since 1993, they assist child witnesses in cases of sexual abuse 'for reasons of youthfulness or emotional vulnerability'. The child gives evidence via the intermediary in a separate room which is linked to the courtroom by closed-circuit television. The child does not see or hear anything that happens in court but the court can see and hear what happens in the live-link room. The intermediary, who is generally a social worker who prepares the child for the court appearance, hears the question through earphones. The intermediary translates questions for the child into suitable language but without changing the purpose of the question.[33] There is no government training or oversight. There are jurisdictions (such as Austria, Norway and Israel) where the questioning of children has been taken out of the hands of the advocates and given to experts or the judge. In 2011, in a New Zealand report,[34] consideration was given to three different intermediary models using mock examinations. The Northern Irish/English model is unique.

It was noted even before the legislation was brought into effect that the 1999 Act and Order do little to define the intermediary's role: the Act 'gives no hint as to the identity of the intermediary'[35] nor whether the intermediary 'must have some form of formal qualifications or . . . be completely independent of the witness and disinterested in the proceedings'.[36] There was conjecture that the intermediary would perform 'a relatively passive "translator" function, "reinterpreting" lawyers' complex language into a more developmentally appropriate and therefore accessible form'.[37] It was said that, since the legislation did not restrict the intermediary to acting purely as a conduit, 'the task of having to adjudicate disputes between the questioner and the intermediary will be unenviable'.[38] These fears turned out to be unfounded because the Registered Intermediary became a facilitator, transparently advising the police and courts and intervening in the event of miscommunication usually to advise the questioner how better to communicate with the witness. The introduction of the new 'ground rules hearing' (discussed below) became crucial to the effective use of intermediaries and proper questioning of vulnerable witnesses.

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32 See R Marchant, 'How Young is Too Young? The Evidence of Children under Five in the English Criminal Justice System' (2013) *Child Abuse Review* <www.wileyonlinelibrary.com> DOI: 10.1002/car.2273.

33 G Jonker and R Swanzen, 'Intermediary Services for Child Witnesses Testifying in South African Criminal Courts' (2007) 4(6) SUR – International Journal on Human Rights 91–114.

34 E Davies, K Hanna, E Henderson and L Hand, *Questioning Child Witnesses: Exploring the Benefits and Risks of Intermediary Models* (Institute of Public Policy, AUT University 2011). In the model thought to be most effective, dubbed the 'topic by topic model', the intermediary is briefed by both counsel before trial on which aspects of the child's testimony they want explored and tested, puts the questions, then refers back to the lawyer for further instructions before moving on to the next topic.

35 K McEwan, 'In Defence of Vulnerable Witnesses: The Youth Justice and Criminal Evidence Act 1999' (2000) 4(1) International Journal of Evidence and Proof 1–30, 11.

36 L Hoyano, 'Variations on a Theme by Pigot: Special Measures Directions for Child Witnesses' (2000) 4 Criminal Law Review 250–73, 271.

37 L Ellison, 'Cross-examination and the Intermediary: Bridging the Language Divide?' (2002) 2 Criminal Law Review 114–27, 116

38 Hoyano (n 36) 272.

The first MoJ intermediaries were trained in England in the autumn of 2003. The Home Office (prior to the creation of the Ministry of Justice in 2007) selected potential Registered Intermediaries who were already experts in communication in their own professional practice areas.[39] They were taught relevant criminal law and procedure on a week-long university training course.[40] They were taught that they must be impartial and neutral, that their paramount duty was to the court[41] and that they were bound by a Code of Practice and Code of Ethics.[42] It was of fundamental importance that they understood they were not witness supporters. That they were there to assist the administration of justice and not the vulnerable individual represented an important new professional perspective for many. They were trained in court practice and in writing a court report[43] based on their assessment of the witness and their communication needs.

The six pathfinder areas began to operate in 2004 but the take-up was uneven between areas. Police officers discovered that the involvement of a Registered Intermediary could make the difference between a prosecution going ahead and not. A report on the pathfinder projects[44] was produced in 2007 for the MoJ. It tracked 102 cases, 27 of which had ended after a suspect had been charged. It was considered by participants that at least half of the trial cases would not have reached the trial stage without the Registered Intermediary's involvement. Other conclusions were that almost all those who encountered the work of Registered Intermediaries in pathfinder cases expressed a positive opinion of their experience and provided specific examples of their contributions. Benefits included assisting in bringing offenders to justice, increasing access to justice, contributing to cost savings, assisting in identifying witness needs and informing appropriate interviewing and questioning techniques. Challenges to the use of Registered Intermediaries were due to poor levels of awareness, misinterpretation of the eligibility criteria, overestimating advocates' competence and underestimating the extent of communication difficulties. In 2007, the MoJ began to roll out the scheme nationally. This also involved devolving the cost of the scheme to local police and Crown Prosecution Service (CPS) areas. Awareness of the scheme and of its benefits increased, so did the use of Registered Intermediaries by police forces and CPS areas.

The most important function of the intermediary is to make sure that the vulnerable witness is questioned in a way that is appropriate to their ability to answer: 'quality in terms of completeness, coherence and accuracy', as per the 1999 Act (and the 1999 Order) or 'giving their best evidence' in everyday legal parlance. The statute does not expressly grant the right to the intermediary to intervene during the questioning but from the start, including during the very first intermediary training course, the right to intervene was taught as an essential part of their function. Intermediaries were also taught to recommend 'ground rules' in their reports to court and to request a ground rules hearing (or meeting) with the trial judge and advocates so that best questioning practice could be agreed. They were taught that interventions would normally be based on the agreed ground rules, that is

39 The majority of MoJ Registered Intermediaries are speech and language therapists. However, Registered Intermediaries also come from a wide background of professional roles and occupations including occupational therapy, psychology, mental health nursing, social work and teaching, and bring the skills and experience gained in these roles to their work as Registered Intermediaries.

40 The first and subsequent cohorts of MoJ Registered Intermediaries were trained by the authors at City University London.

41 *Intermediary Procedural Guidance Manual* (Home Office 2005) para 2.3.1.

42 The 2005 manual contains the Code of Ethics (39–40) and Code of Practice (44–42). The Codes have appeared in successive manuals.

43 Though initially described as 'a briefing note for the court': Home Office (n 41) para 3.9.11.

44 J Plotnikoff and R Woolfson, *The Go-Between: Evaluation of Intermediary Pathfinder Projects* (Lexicon 2007).

the Registered Intermediary would intervene if a ground rule was breached. Ground rules hearings have become a requirement in cases involving Registered Intermediaries.[45] Registered Intermediaries now routinely set the agenda for matters to be discussed at a ground rules meeting:[46]

i ground rules recommendations in the report (do's and don'ts for questioning);

ii the Registered Intermediary role and its neutrality;

iii how to address the witness (for instance, by their first name?) and how to address the Registered Intermediary;

iv if communication aids are to be used how that will be done;

v where the Registered Intermediary will sit in the live-link room so that he or she is visible on the TV screen, or if in court where they would sit so that they can see the witness and catch the eye of the judge if necessary;

vi when and where the Registered Intermediary will give the Registered Intermediary oath (in court and then go to the live-link room or from the live-link room?);

vii how the Registered Intermediary will signal to the judge a need to intervene if that becomes necessary (for instance, raising a hand and or interjecting 'Your Honour, could that be rephrased, please?');

viii timing of witness breaks (including how long and how often);

ix any other matters/residual queries.

Experience in England and Wales has shown that ground rules hearings must involve the judge, advocates and Registered Intermediary *for the trial*. If one of these is missing it will not be completely effective. It must be far enough ahead of the witness giving evidence to give the advocates an opportunity to plan questioning according to what was agreed at the ground rules hearing. It is therefore usually better for it to take place one or two days before the witness gives evidence. Detailed advice on conducting such a hearing is now available on line as a toolkit on the website of The Advocate's Gateway.[47] The toolkit explains *inter alia* that this hearing is as much for the advocate as it is for the witness. When ground rules are agreed well enough in advance of the hearing, it allows the advocate properly to plan the questioning and the court to ensure that technical and practical issues are resolved in good time for when the witness gives evidence.

The first author's Registered Intermediary survey in 2009 suggested that Registered Intermediaries were having ground rules hearings in fewer than half their cases.[48] In 2010, after this finding was brought to the attention of the Criminal Procedure Rule Committee, the application form for a direction for special measures was amended. It now includes the words 'Ground rules for questioning must be discussed between the court, the advocates

45 See now Criminal Procedure Rules 2012, r 29.10, and the Application for a Special Measures Direction Form, Part F. See also Criminal Practice Directions [2013] EWCA Crim 1631, part 3E.

46 This list came from the first author's workshop with Registered Intermediaries in March 2012 at one of their twice yearly CPD events. In England and Wales the Application for a Special Measures Direction form, Part F, simply refers to the purpose being 'to establish (a) how questions should be put to help the witness understand them, and (b) how the proposed intermediary will alert the court if the witness has not understood, or needs a break'. Registered Intermediaries have developed their own suggested agenda.

47 <www.theadvocatesgateway.org>.

48 P Cooper, *Tell Me What's Happening: Registered Intermediary Survey 2009* (City University London 2010)

and the intermediary before the witness gives evidence'.[49] Subsequent survey data suggested that the frequency was increasing and they were occurring in approximately three-quarters of Registered Intermediary cases.[50] It should be all. It is then of course vital that the ground rules made by the judge are followed; they were not made to be broken and the advocate's professional duty is to follow rules set by the judge.[51]

The intermediary will intervene if they believe a ground rule has been broken or if there is miscommunication in some other way and the trial judge upholds the intervention or not. The intermediary, if requested, will suggest alternative ways to put the question. Judges are used to ensuring that witnesses are questioned appropriately and it was clear from discussions that the authors had with members of the Northern Irish judiciary that they are understandably proud of their record in this respect. In England as well, of course, as further described below, judges are used to setting their own ground rules where necessary and then enforcing them. They recognise that there can come a time in difficult cases where they feel they can no longer intervene for fear that they will appear to have 'descended into the arena'. This illustrates a key benefit of having an intermediary at court for a vulnerable witness; they can intervene as often as is necessary. The judge decides whether or not to uphold the intervention, and maintains their traditional position of impartial 'umpire'.

Even with ground rules set, advocates do not always follow them and some may even take the attitude that they are made to be broken.[52] One of the most challenging tasks of Registered Intermediaries is to get counsel to adapt their traditional form of cross-examination, and since 2004 there have been numerous incidents of advocates asserting their 'right' to ask leading or tag questions or to put their case in a particular way[53] including on occasion in contravention of previously set ground rules. The tradition of barristers asserting their rights in cross-examination can be traced back to the 1700s.[54] The very recent introduction of ground rules hearings based on intermediary reports represents a significant development; previously, the advocate prepared questions without detailed advice on a witness's communication needs and without the prospect of interventions from a specialist adviser on the witness's communication needs. Questioning a vulnerable witness is now recognised as a specialist skill and judges expect careful preparation and high standards from advocates.[55]

The innovation of the intermediary court report provides the judge with far more information regarding the vulnerable witness than is ordinarily available. The great advantage of the ground rules hearing in an intermediary case is that it is structured and transparent and based on the report. In Northern Ireland, where there is an intermediary this will apply to all witnesses, whether for the Crown or the defence, and to defendants. Advocates who are cross-examining will have had, in advance, a sounder basis for how to phrase their questions, although one cannot exclude the possibility that a fresh communication issue will arise during cross-examination. Adherence to judge-set ground

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49 Criminal Procedure Rules 2012 , r 29.10, and the Application for a Special Measures Direction Form, Part F.

50 Cooper (n 48).

51 See *R v Farooqi and Others* [2013] EWCA Crim 1649: 'By way of emphasis, in the course of any trial, like everyone else, the advocate is ultimately bound to abide by the rulings of the court.' [109].

52 Cooper (n 48).

53 Anecdotal reports from Registered Intermediaries to the authors via email.

54 Hostettler says that barrister William Garrow played a 'pivotal role' in lawyers 'capturing the courtroom' and 'was a pioneer in using cross-examination as a means to comment on the evidence, refute or discredit the prosecution case and aggressively battle for the accused': J Hostettler, *Fighting for Justice: The History and Origins of the Adversarial Trial* (Waterside Press 2006) 15 and 41.

55 P Cooper, 'Witness Competency Hearings: A Test of Competence' (2013) (2) Criminal Bar Quarterly 5.

rules is of such importance that the legal profession regulators should consider making it a professional conduct requirement to follow them.

How the scheme works for prosecution witnesses

The DoJ manual for Registered Intermediaries[56] was developed from the material in the latest MoJ manual which is more detailed, prescriptive and helpful than it was when the MoJ WIS started.[57] A comparison of the respective procedural guidance manuals demonstrates that the procedures are very similar in both jurisdictions.

When a Northern Ireland police officer identifies that the witness might benefit from the assistance of a Registered Intermediary the officer should speak to the Public Prosecution Service (PPS) to discuss the possible involvement of a Registered Intermediary (an 'early special measures meeting' or more likely a discussion over the phone). The police should obtain the necessary consents from the witness so that the Registered Intermediary in due course can look at relevant reports and speak, say, to the teacher, the social workers and doctor who know the witness. The police officer contacts the matching service[58] and submits a request for service form. The ISS (Intermediaries Schemes Secretariat) matches a Registered Intermediary with suitable expertise who is available as required.

The Registered Intermediary conducts an assessment of the witness's communication abilities and needs. There is no set form for this; it depends on the specific witness and his or her abilities and needs. A responsible third party (not a witness in the case) must be present. It is best if this is the officer who will be conducting the ABE interview since it gives them additional insight into the witness's communication needs. The responsible third party is there in case any question subsequently arises over what took place. The Registered Intermediary provides a preliminary report for the police: either oral, if the interview takes place on the same day as the assessment, or in writing, if it takes place subsequently. The report assists the police officer in how to plan the interview, in terms of communication needs of the interviewee the layout of the room, etc. The Registered Intermediary assists during the interview, intervening if necessary to advise the police officer on communication. The Registered Intermediary then writes a report for the court based on their assessment, other information gathered about the witness, and what they learned about the witness's communication needs during the interview. The report is more than a summary of findings. It provides positive advice and examples to those who will question the witness about how most effectively to do it. It is this advice that is central to the formulation of questioning ground rules at court. The intermediary sends their report to the Investigating Officer (IO) and to the PPS for submission by the PPS with their application for a special measures direction.

In accordance with Practice Direction No 5/2011, each participant must ensure that all applications 'are made at the earliest possible opportunity' (2.1(i)) and, at the arraignment, the prosecution's legal representative must be in a position to tell the judge what applications will have to be made for special measures (3.7(a)). It follows that the arraignment would be the appropriate time to apply for the use of an intermediary. In any event, such an application must be heard at the 'earliest possible opportunity' in order to give the witness the maximum amount of time to know how they will be giving evidence in court and to give the other side ample opportunity to consider the contents of the report

56 *The Registered Intermediaries Procedural Guidance Manual (Northern Ireland) V3* (DoJ 2013)

57 For instance, the third edition of the *Intermediary Procedural Guidance Manual* (MoJ 2012) now includes detailed notes on court reports, 32–43.

58 For the Northern Ireland pilot this will be the DoJ Intermediaries Schemes Secretariat, in England and Wales matching is now carried out by the Witness Intermediary Team at the National Crime Agency.

and to plan their cross-examination accordingly. This is fair both to counsel who wants to do the best for the party who is instructing him or her and also for the witness. It is easy to forget that a witness who is asked questions they cannot deal with can become distressed because they realise that they are not helping the court in the way they would like to. The history of cases in England with vulnerable witnesses is littered with aborted trials because the vulnerable witness was too upset to continue. If the application is contested then the Registered Intermediary should attend the hearing in order to explain the report and its conclusions to the court. Obviously, they must be in court when the application is heard.

The Registered Intermediary assists in other ways. They attend the court familiarisation visit to assist with communication. They can advise the Witness Service or Young Witness Service as appropriate on matters relating to the witness's welfare of which the Registered Intermediary (who should not be seen as a witness supporter) may be aware. They can advise on timetabling of the witness's evidence[59] and when and how the witness should watch their ABE interview to refresh their memory. One of the achievements of recent years is the recognition that the jury watches the taped interview as the evidence in chief but that the witness only watches it for memory refreshing. It is therefore *not* necessary for the witness to watch it at the same time as the jury, even though counsel and judges may initially react 'but we always do it this way'. In fact there are sound reasons why not: the witness may become tired or distressed or need breaks, all of which would disrupt the trial schedule. Far more sensible is for the witness to watch at an earlier time (not necessarily at their court familiarisation visit when a good deal of other information needs to be processed) and then for them to begin their cross-examination fresh the morning after the jury has watched the video. This recognition has now found its way into the Judicial College Checklist: Young Witnesses Cases ('consider whether child should watch DVD at a different time from jury') of January 2012.[60]

In practice the ground rules hearing is often on the day the witness is due to give evidence but for the reasons discussed above it is better for it to be at least the day before. It stands to reason that the intermediary must be part of the ground rules hearing, though, in the early days of the scheme in England and Wales, the intermediary was sometimes kept outside court while their report was discussed. This may have been because their role was not well understood and the intermediary was thought of as a witness, which of course they are not.

Immediately prior to the witness giving evidence the Registered Intermediary takes their oath and then assists as the witness gives evidence. They sit alongside the witness in the live-link room so that they are visible on the screen (or stand or sit next to the witness if they are giving evidence in court) in order to monitor communication. They intervene during questioning when appropriate and as often as appropriate in accordance with the ground rules and the recommendations in their report. For Northern Ireland, the MoJ Code of Practice and Code of Ethics for Registered Intermediaries has been replicated.[61] Applications for an intermediary for witnesses and defendants are made under Crown Court Rules,[62] which include provision for the intermediary oath.[63]

Since 2005, at first through a secure online forum known as the 'SmartSite', now via Registered Intermediaries Online (RIO), Registered Intermediaries in England and Wales

59 For example, that the witness would be at their best first thing in the morning and would not be able to give comparably good evidence if it came at the end of several hours' waiting at court.

60 The important thing is that they have the opportunity to refresh their memory from it before they are cross-examined: *Judicial College Bench Checklist: Young Witness Cases* (Judicial College 2012).

61 Email from the DoJ to the authors, 26 April 2012.

62 Crown Court (Amendment) Rules (Northern Ireland) 2013 (2013 No 82).

63 DoJ briefing paper to the Northern Irish Judiciary, November 2012.

have been able to discuss cases and issues amongst themselves and receive information from the MoJ. A study in 2011 analysed what could be learned from these online postings:[64]

- Registered Intermediary tasks have extended beyond the investigative interview and trial. For example, they have assisted at identification procedures and beyond their statutory remit their value has been recognised in family cases and for vulnerable defendants;
- some of the problems emerging at the trial stage, such as a witness's inability to read their written statement, are as a consequence of the police failing to involve a Registered Intermediary at the investigative interview;
- the Registered Intermediary's role is not always understood by some justice system practitioners. The Registered Intermediary is not an expert witness. Their report is not evidence in the case;
- even when there is a ground rules hearing, some advocates find it difficult or seem unwilling to adapt their questioning to ensure it is appropriate to the communication needs of the witness.

The DoJ has provided a similar online forum which should prove to be a rich source of support for its intermediaries.

The route to best evidence

On 12 May 2009, the Lord Chief Justice of Northern Ireland wrote to judges about the way in which young and vulnerable witnesses and victims are dealt with. The main points were:

- they should not attend court on the first day of trial;
- the child should be asked to be in the TV link room at 10.30am on the second day of trial unless the case is being opened on the second day, in which case a timetable needs to be discussed;
- the child should be introduced to the court environs and Crown counsel should consult with the child. Both should happen prior to the hearing and 'well before the date fixed for hearing';
- the judge should ask the court staff to test the equipment prior to the trial starting and on the morning well in advance of the court starting;
- the above should be adopted for other vulnerable witnesses or victims; and
- 'Every effort should be made to bring certainty to the timing of their evidence. That can only assist in the delivery of reliable evidence and the administration of justice.'

In May 2011 *The Experiences of Young Witnesses in Criminal Proceedings in Northern Ireland*[65] was published. The statistics showed that more could be done to improve these experiences. For instance:

- only 48.6 per cent had had a pre-trial visit at all;
- the mean time between reporting the offence and trial was 18.1 months in the crown court; only 42 per cent had their trial happen on the first scheduled date (versus 65 per cent in England); 17 per cent had it rescheduled three or

64 J Plotnikoff and R Woolfson, *Registered Intermediaries in Action: Messages for the CJS from the Witness Intermediary Scheme SmartSite* (Ministry of Justice/NSPCC 2011). At that stage there were 112 active Registered Intermediaries on the national database for the WIS.

65 D Hayes, L Bunting, A Lazenbatt, N Carr and J Duffy, *The Experiences of Young Witnesses in Criminal Proceedings in Northern Ireland* (Queen's University Belfast/NSPCC 2011).

more times; average waiting time at the crown court was 12.7 hours (versus 5.8 hours in England); only 30 per cent completed their evidence on the first day (versus 67 per cent in England); and only 8 per cent began their evidence in the morning of the first day of court attendance;

- only 54 per cent had been kept informed prior to trial about what was happening with the case;
- 62.7 per cent saw the defendant during the course of the trial.

In terms of memory refreshing, of the 13 young witnesses who had given a video interview, seven saw it on the morning of the trial, three in the week before the trial and two were not shown it before the trial started. Complaints about questioning were that they were: repetitive (77.1 per cent); too long or complicated (45.7 per cent); jumped around in time (34.3 per cent); placed unrealistic demands on memory (31.4 per cent); and too fast (11.4 per cent).

Although the majority of young witnesses felt they had been able to tell the court everything they wanted to say and had understood the questions, 42.9 per cent (n=15) reported not understanding some of the questions asked and that many who had difficulties felt unable to tell the judge they had a problem. The report concluded that the use of intermediaries is likely to be 'of particular value to this group as well as young witnesses generally, and should be brought forward as soon as possible'. In the study 62.2 per cent indicated that they would be willing to give evidence in a criminal trial again if asked but 51.4 per cent stated that there was nothing positive about the experience of being a witness.

Areas flagged up for improvement included better pre-trial contact and information-sharing between parents and criminal justice agencies which in turn would lead to implementation where necessary of special measures, more frequent practising with the live link, avoiding delay, re-issuing the Lord Chief Justice's recommendations of 2009, bringing forward 'as soon as possible' the introduction of intermediaries and developing guidance and training initiatives for judges and legal professionals in handling vulnerable witnesses. The introduction of Registered Intermediaries in Northern Ireland could herald a legal culture change in respect of vulnerable witnesses as it did in England and Wales. The roll-out of Registered Intermediaries across all 43 police force areas in England and Wales was shortly followed by landmark case law. Whether this is a coincidence or whether Registered Intermediaries were a catalyst is a moot point; the fact is it has happened. The English Court of Appeal has repeatedly scotched any notions that counsel has free-rein in the cross-examination of a vulnerable witness. Some but not all these cases had intermediary involvement.

The Court of Appeal in England and Wales has begun to consider not only the appropriate questioning for vulnerable witnesses but also how the defendant can have a fair trial if his or her counsel did not put the defence case to the witness in the traditional way. The emerging view is that the questioning should be adapted to the witness, and so long as the jury is not misled and is provided with information about any inconsistencies in the accounts given by the witness, the trial process remains fair. It is not necessary that the 'putting of inconsistencies' forms part of the cross-examination. Whether adopting this approach will require a culture change in Northern Ireland remains to be seen. If so, it is something they have in common with their counterparts in England and Wales.

The watershed case was *R v B*[66] where the complainant/witness was four years old and was giving evidence of sexual abuse which had taken place when she was less than three years old. There was no intermediary and counsel was left to his own devices in phrasing

66 [2010] EWCA Crim 4.

the questions. On appeal counsel submitted that attempts to cross-examine the child were futile; because of her age he was unable effectively to challenge her account and to put the defendant's case to her. In his judgment, the Lord Chief Justice made clear that 'none of the characteristics of childhood, and none of the special measures which apply to the evidence of children carry with them the implicit stigma that children should be deemed in advance to be somehow less reliable than adults'.[67]

The trial process though must cater 'for the needs of child witnesses, as indeed it has increasingly catered for the use of adult witnesses whose evidence in former years would not have been heard, by, for example, the now well understood and valuable use of intermediaries' and:

> it should not be over-problematic for the advocate to formulate short, simple questions which put the essential elements of the defendant's case to the witness, and fully to ventilate before the jury the areas of evidence which bear on the child's credibility. Aspects of evidence which undermine or are believed to undermine the child's credibility must, of course, be revealed to the jury, but it is not necessarily appropriate for them to form the subject matter of detailed cross-examination of the child and the advocate may have to forego much of the kind of contemporary cross-examination which consists of no more than comment on matters which will be before the jury in any event from different sources.

Four months after the judgment in *B*, two ten-year-old boys stood trial at the Old Bailey for the rape of an eight-year-old girl. Again, there was no intermediary either for the complainant or for the defendants. The 'ground rule' was that the girl should only be questioned for 45 minutes in the morning and for 45 minutes plus 15 minutes in the afternoon. The Court of Appeal judgment in *R v W and M*[68] does not say how that ground rule came to be decided. The questioning as set out in the judgment contains tag questions ('S did not pick you up at any time, did he?'); multi-parted questions ('Do you want to think about that one again? No one is going to be cross with you.'); and comment ('Little bit naughty but do not worry. Nothing too terrible.'). The judge wanted to replace assertions with open questions. The submission of no case to answer, like the submissions in the Court of Appeal, was based on answers from the child which 'had been the result of questions in which a proposition had been directly put to the child, usually with an invitation to agree'. The court stated:

> It is particularly important in the case of a child witness to keep a question short, and even more important than it is with an adult witness where it also matters to avoid questions which are rolled up and contain, inadvertently, two or three at once. It is generally recognised that particularly with child witnesses short and untagged questions are best at eliciting the evidence. By untagged we mean questions we [sic] do not contain a statement of the answer which is sought.[69]

One of the most challenging prosecution cases put before a jury was in the case of *R v Watts*,[70] where there were four complainants. Three of them suffered from cerebral palsy. One could not communicate save by shouting, spitting and swearing when distressed. A second could only indicate 'Yes' or 'No' by the movement of her eyes. A third could answer questions by use of a computer device attached to her chair. The fourth suffered a stroke between her ABE interview and the trial and was then incapable of any form of communication. Counsel for the appellant submitted in effect that because of the

67 [2010] EWCA Crim 4 [40].

68 [2010] EWCA Crim 1926.

69 Ibid [30].

70 [2010] EWCA Crim 1824.

unsatisfactory nature of the evidence, the verdicts were unsafe 'even if some logical basis for the verdicts can be discerned'. However, the Court of Appeal found that:

> even in a case of difficulty and complexity such as this, the primacy of the jury in our criminal justice system has to be respected, particularly where matters of reliability and the assessment of witnesses lie at the centre of the case . . . The ordinary principles governing criminal trials require both the judge and the jury to face the realities which can sometimes arise where special measures are put in place, but these arrangements do not alter the principle that the primacy of the jury should be respected.[71]

Two of the witnesses would have given their evidence with the assistance of an intermediary but defence counsel elected not to cross-examine them. More recently, there have been two cases in which the Court of Appeal upheld a trial judge's decision to impose his own rules on the manner of cross-examination of a child. In *R v E*,[72] the complainant was five at the time of the alleged assault. The trial judge told defence counsel that he intended to tell the jury that during the cross-examination of the child the traditional form of cross-examination would not occur and instead would be restricted to asking necessary questions. Defence counsel should not ask questions challenging the girl. During the cross-examination the judge interrupted counsel and told him to ask open questions rather than to make suggestions because it would be difficult to know whether the girl was giving accurate answers or just agreeing with counsel. Counsel then asked ten listed questions. The Court of Appeal concluded that the judge had been right to seek to avoid a situation where counsel confronted the child with assertions; that risked confusion in the mind of the witness and it was difficult to see how the right to a fair trial had been compromised simply because the defendant had not been able to ask, 'S didn't punch you, did he?'. The judgment in *E* still leaves room for debate about which witnesses cross-examination restrictions should be applied to, what the specific restrictions should be and the timing and the content of the advice to the jury in such circumstances.

The Court of Appeal similarly dismissed an appeal in *R v Wills*[73] and endorsed the judge's decision to place limitations on the cross-examination of the child complainant witness. Counsel submitted that although he had adopted the judge's approach, his co-defending counsel adopted a more 'traditional' type of cross-examination, albeit the judge intervened to stop the long questions and inappropriate comment. It was held that, where it is necessary and appropriate to have limitations on the way in which the advocate conducts cross-examination there is a duty on the judge to ensure that those are complied with. The case highlighted that:

> for vulnerable witnesses, the traditional style of cross-examination where comment is made on inconsistencies during cross-examination must be replaced by a system where those inconsistencies can be drawn to the jury at or about the time when the evidence is being given and not in long or complex cases for that comment to have to await the closing speeches at the end of the trial.

Judges are also assisted by the *Crown Court Bench Book* and the new *Judicial College Bench Checklist: Young Witness Cases* ('How defence case is to be put. For younger children, inform jury of evidence believed to undermine credibility, but do not necessarily address in detailed cross-examination.').[74] It is within the knowledge of the authors that trial judges follow the

71 [2010] EWCA Crim 1824 [54].

72 [2011] EWCA Crim 3028.

73 [2011] EWCA Crim 1938.

74 Judicial College (n 60).

example in *Wills* of informing the jury of any inconsistencies of account directly after the child has given their evidence.

MoJ statistics[75] in 2012 revealed that there had been over 5300 requests for a Registered Intermediary since the scheme was first implemented as a pilot project in 2004. Of that number (as at 31 March 2012), 3318 have been made since August 2009. Of the 3318 requests received at 31 March 2012, 3160 (94.95 per cent) were matched, 70 (2.10 per cent) were unmatched,[76] 93 (2.80 per cent) were cancelled and 5 (0.15 per cent) were in progress at the time of the statistics being published (that is they overlap from one month to the next). Despite intermediary involvement in thousands of cases in England and Wales since 2004 there has been only one appeal on the basis that the Registered Intermediary thwarted a fair process. The Court of Appeal in 2013 rejected any challenge to the work done by the Registered Intermediary in that case, however, it criticised the length and style of cross-examination and noted that counsel 'failed sufficiently to adapt their questions in order to take account of [the deaf witness's] difficulties in communication'.[77]

Over the six-month period from September 2012 to February 2013, an average of 122 requests per month were received by the MoJ for the services of a Registered Intermediary. The majority were for prosecution victims, some were for prosecution witnesses, one was for a defence witness.[78] Although the 1999 Act provides for the use of intermediaries for both prosecution and defence witnesses they have scarcely been used for defence witnesses. This may be on account of a low level of awareness about eligibility amongst defence solicitors in England and Wales. There should be greater awareness in Northern Ireland where defence solicitors are far more likely to be aware of the scheme because of its applicability to vulnerable defendants. At the time of writing the ISS has received requests for a Registered Intermediary for both suspects and defendants but not for defence witnesses.[79]

In the case of a defence witness it would be the defence solicitor who would identify the fact that the witness may need assistance from a Registered Intermediary. It is the solicitor who would have to obtain the necessary consents, contact the matching service, act as the responsible third party (or arrange for one) in the assessment and deal with the Registered Intermediary. In terms of assessment, report-writing, ground rules hearing and assistance during evidence, the Registered Intermediary's role is the same as with a prosecution witness.[80]

Defendants

The concern about 'vulnerable witnesses' since 1988 has centred on prosecution witnesses and, in particular, victims of crime. When the then Home Secretary introduced the Bill which became the 1999 Act (and the 1999 Order), he spoke only of victims: 'We must re-establish the system so that proper dignity and respect are given to the victim and to the community.'

75 Vulnerable and Intimidated Witnesses Section, Victims and Witnesses Unit, Justice Policy Group, Ministry of Justice, London, by email to the first author, 24 April 2012.

76 Reasons for a request being unmatched include a combination of factors such as not being able to identify a suitable, available Registered Intermediary prepared to accept the work in the specified geographic area, the request being made at too short notice and incorrect information being submitted by the requestor.

77 In *R v IA and Others* [2013] EWCA Crim 1308 [64].

78 WIS Usage Statistics provide by Jason Connolly (MoJ) by email to the first author, 7 March 2013. A year later the average monthly figure for the corresponding period is just over 200 per month (MoJ email to the authors, March 2014).

79 Information supplied by the DoJ by email to the authors, March 2014.

80 MoJ (n 57) 18, 20.

In 2005, the House of Lords, in *R v Camberwell Green Youth Court*,[81] held that the special measures regime was not incompatible with the Human Rights Act because prosecution witnesses could take advantage of it but defendants could not. However, studies have shown that a substantial number of defendants have conditions which cause them to have limited language ability and communication skills, learning disabilities, and to be acquiescent and suggestible: '16% of people placed in custody meet one or more of the assessment criteria for mental disorder'[82] and 'a consensus figure of 50–60 % of young people who are involved in offending having speech, language and communication needs is emerging'.[83]

A recent report found that 'while the numbers of defendants who might be considered vulnerable is relatively high it was extremely rare to see defendants make an application for, or use any kind of special measure'.[84] Section 47 of the Police and Justice Act 2006 enabled a court to make a direction allowing an accused to give evidence by live link in England. In Northern Ireland, a similar provision is made by Article 21A of the 1999 Order, as inserted by Article 82 of the Criminal Justice (Northern Ireland) Order 2008 (No 1216 (NI 1)), which was subsequently substituted by Article 19 of the Justice Act (Northern Ireland) 2011. The report also noted the imminent arrival of intermediaries and said that the inspectors 'express the clear hope that their use will ultimately extend beyond the courtroom to become commonplace in the investigative setting, as is being planned'.[85] The police will also need training in the use of Registered Intermediaries; findings included that 'special measures are not being identified at the early stages and many [Police] Officers do not have sufficient understanding of special measures to explain these appropriately to victims and witnesses'.[86]

Article 21BA of the 1999 Order, as inserted by Article 12 of the Justice Act (Northern Ireland) 2011, as amended by s 11 of the Criminal Justice Act (Northern Ireland) 2013 (c 7), provides for examination through an intermediary of a vulnerable accused giving testimony. Both Articles 21A and 21BA employ the same criteria:

(i) Where the accused is aged under 18 when the application is made, the condition is that the accused's ability to participate effectively in the proceedings as a witness giving oral evidence in court is compromised by the accused's level of intellectual ability or social functioning

(ii) Where the accused has attained the age of 18 when the application is made, the conditions are that (a) the accused suffers from a mental disorder (within the meaning of the Mental Health (Northern Ireland) Order 1986) or otherwise has a significant impairment of intelligence and social functioning; and (b) the accused is for that reason unable to participate effectively in the proceedings as a witness giving oral evidence in court.

The contrast with the test in Article 4 is obvious: 'ability to participate effectively in the proceedings' as opposed to 'the quality of evidence' 'is likely to be diminished'. The expression 'in order to be able to give their best evidence' does not apply by statute to

81 [2005] UKHL 4.

82 M Maguire, *Not a Marginal Issue: Mental Health and the Criminal Justice System in Northern Ireland* (CJINI 2010).

83 J Gregory and K Bryan, 'Speech and Language Therapy Intervention with a Group of Persistent and Prolific Young Offenders in a Non-custodial Setting with Previously Undiagnosed Speech, Language and Communication Difficulties' (2011) 46(2) International Journal of Language and Communication Disorders 202–15.

84 CJINI, *The Use of Special Measures in the Criminal Justice System in Northern Ireland* (CJINI 2012) para 3.18

85 Ibid 4.13.

86 Ibid para 3.30.

defendants. There is a parallel provision in the Coroners and Justice Act 2009 but it has never been brought into effect.[87] Judges in England and Wales face applications by defence counsel to adapt the court proceedings in order to assist the defendant without any effective statutory guidelines. Where they allow defendants to be assisted by an intermediary, the order is based on the court's inherent jurisdiction to ensure that the defendant has a fair trial, pursuant to Article 6 of the European Convention on Human Rights. The power to do this was noted by Baroness Hale in her speech in the *Camberwell Green Youth Court* case.[88] However, procedures are undocumented, *ad hoc* and funding is a constant source of difficulty.[89]

Northern Ireland's scheme for defendants is leading the way as the first of its kind anywhere. We can look forward to seeing the courts establish best practice when dealing with applications for an intermediary for a defendant. In England and Wales, most cases where the judge has made an order allowing for the use of an intermediary to assist a defendant have included allowing the intermediary to assist throughout the trial. This has been successful in making sure that the defendant has understood the trial process as it went along. It has inevitably put a strain on resources.

The Court of Appeal in *R v Cox*[90] considered a case where a judge had felt that the defendant needed assistance from an intermediary but none could be found. The trial took place regardless, with the trial judge making important adjustments to the trial process in order to accommodate the defendant's needs. It was found that 'when every sensible step taken to identify an available intermediary has been unsuccessful, the next stage is not for the proceedings to be stayed, which in a case like the present would represent a gross unfairness to the complainant, but for the judge to make an informed assessment of whether the absence of an intermediary would make the proposed trial an unfair trial'.[91] Since the Justice Act (NI) 2011 makes no reference to assistance from an intermediary other than when giving evidence, the DoJ scheme will not allow for an application for special measures other than when giving evidence. Of course, that does not prevent the judge from making any adjustments to the trial process to assist the defendant, including the use of an appropriate adult.

It is also anticipated that intermediaries can assist vulnerable defendants in the police station during their interview under caution.[92] There is no established procedure for this in England and Wales, thus the procedural guidance has been written from a theoretical perspective. The *Northern Ireland Registered Intermediaries Procedural Guidance Manual* suggests that the third party when the Registered Intermediary carries out her assessment should be the defence solicitor.[93] Whether or not the assessment is taking place in a police station, it would be inappropriate for a police officer to be present during the assessment. The vulnerable defendant needs to feel comfortable if disclosing private and possibly highly sensitive information about his communication needs or disabilities. An intermediary

87 S 104 of the Coroners and Justice Act 2009 inserts s 33BA into the 1999 Act which contains this provision for defendant intermediaries in England and Wales.

88 *R v Camberwell Green Youth Court* [2005] UKHL 4 [59].

89 P Cooper and D Wurtzel, 'A Day Late and a Dollar Short: In Search of an Intermediary Scheme for Vulnerable Defendants in England and Wales' (2013) (1) Criminal Law Review 4–22.

90 [2012] EWCA Crim 549.

91 Ibid [30].

92 It is arguable that the legislation does not cover this and only applies to defendants at court when giving testimony. Such an interpretation would create a stark disparity with vulnerable prosecution witnesses who can benefit from an intermediary at the police station not just at court when giving testimony. A narrow interpretation for vulnerable defendants would potentially deprive the police and the defendant of vital assistance at a crucial stage in the investigation.

93 *Registered Intermediaries Procedural Guidance Manual* (n 56) para 1.38.

assessment is not a situation where a defendant is or ought to be under caution. Clearly, a defendant would have to consent to the Registered Intermediary disclosing to the police information about his communication needs. Defence solicitors may need to explain to their clients that the point of intermediary involvement at this stage is to allow the interviewing officer to adapt their questioning and understand the answers, both of which are as much for the benefit of their client as they are for the benefit of the police.

Anything said about the offence itself is another matter. It is the view of the authors, which they conveyed to the delegates they trained on behalf of the DoJ, that anything said by the defendant about the offence should be kept confidential and disclosed to defence solicitors but not to anyone acting on behalf of the Crown.[94] This contrasts with their duty, when assisting a prosecution witness, of disclosing to the IO or the PPS anything said by or about the witness which might potentially undermine their evidence or the prosecution case. In this way intermediaries finds themselves adjusting their duties in accordance with the very different rules regarding disclosure which apply to the Crown and to the defence. When questioning defendants, time is of the essence in a way in which it is not for the prosecution witness on account of the custody time limits. The procedural guidance states: 'If an officer needs to interview a witness/suspect as a matter of urgency, and before a Registered Intermediary is available, then they should record the reasons for this and notify the PPS and defence legal representative, if applicable.'[95]

There is some overlap with the role of the appropriate adult; experience will reveal how the two roles work together. Will the interview suite become overcrowded with the suspect, two interviewers, a Registered Intermediary and the solicitor? If there is an appropriate adult too will there be room and, in any event, which room? Registered Intermediaries have been warned that the ambiance of the typical suspect interview room with bolted down furniture is quite different from an ABE interview suite. What will happen if the intermediary recommends a different environment because it would be more conducive to communication with the vulnerable defendant? The interviewing officers may not be trained in how to interview a vulnerable person. The ABE procedure does not apply to the suspect. The PEACE[96] model of interviewing is meant to be similar in structure to an ABE interview but its purpose is different and the Registered Intermediary may find that suspect interviewers are less experienced in adapting their questioning for vulnerable defendants.

At court, DoJ Registered Intermediaries are available for when the defendant gives testimony. Since defence counsel might only make a firm decision about whether to call the defendant just before the close of the prosecution case it is unclear when the application for special measures should be made for the defendant intermediary. Should it be prior to the trial as a contingency application or should it be left until defence counsel is certain? Will the intermediary be available at short notice to carry out an assessment and act at trial if necessary? Defence counsel is unused to revealing anything about the defendant before the trial begins, on the other hand, if prosecution counsel is suddenly faced with an intermediary report setting out prescriptively how a defendant is to be questioned, they may legitimately ask for time to consider their cross-examination. The project evaluation may establish best practice.

94 *Registered Intermediaries Procedural Guidance Manual* (n 56) 'Principles of RI practice' para 1.15.

95 Ibid para 1.41.

96 This PEACE model is a mnemonic acronym for the sequential phases of the model. For a review of its effectiveness, see D Walsh and R Bull 'What Really is Effective in Interviews with Suspects? A Study Comparing Interviewing Skills against Interviewing Outcomes' (2010) 15 Legal and Criminological Psychology 305–21.

If a judge believes that the defendant needs communication support throughout other parts of the trial so that he or she may participate effectively, the advice from the DoJ is that:

> he may be assisted by a court defendant supporter. Where no other appropriate person is available to perform this role (for example, a family member or carer), the Department has put arrangements in place, for the purpose of the pilot schemes, for Mindwise (who deliver the Appropriate Adult Scheme) to act as a court defendant supporter.[97]

A judge might consider that what a supporter can do is more limited than what an intermediary can, and might even consider ordering an intermediary for the defendant for the whole of the trial. That would have significant resource implications for the scheme as a whole which could not be ignored.

Briefing the Bar and the judiciary

In 2011, Plotnikoff and Woolfson produced a progress report on the experience of young witnesses in the criminal courts.[98] Top of the list of challenges was appropriate questioning at court. There have been regular and repeated calls for specialist training for advocates.[99] On 13 May 1999 at a Childline conference, representatives of the Bar 'acknowledged the need for training for barristers on matters such as the tone and manner of cross-examination'.[100] Twelve years later, in April 2011, the Advocacy Training Council (ATC) published its *Raising the Bar* report.[101] It cited as one of its strongest themes, the 'urgent need to address the significant problems associated with vulnerable people in the Court system'. It accepted that the handling and questioning of vulnerable witnesses, victims and defendants is indeed a specialist skill and should be recognised as such by practitioners, judges, training providers and regulators. Some Bar training has been delivered over the years by the authors, including participative training by the second author. A 'vulnerable witness' module was introduced in 2011 at the highly regarded South Eastern Circuit Advanced Advocacy Course held annually at Keble College but only about 70 barristers a year take part in this. The ATC now supports The Advocate's Gateway project which places online the latest law and guidance to assist judges and advocates in cases with vulnerable witnesses or defendants.[102]

With the advantages of a smaller and more cohesive Bar, training in Northern Ireland should be easier. Perhaps the Northern Ireland Bar will introduce compulsory continuing professional development (CPD) training on the handling of vulnerable witnesses

97 DoJ briefing paper to the NI Judiciary (November 2012).

98 J Plotnikoff and R Woolfson, *Young Witnesses in Criminal Proceedings: A Progress Report on Measuring up?* (Nuffield Foundation/NSPCC 2011).

99 For example, R Flin, R Bull, J Boon and A Knox, 'Child Witnesses in Scottish Criminal Trials' (1993) 2 International Review of Victimology 309–29, 327; M R Kebbell, C Hatton, S D Johnson and C M E O'Kelly, 'People with Learning Disabilities as Witnesses in Court: What Questions Should Lawyers Ask?' (2001) 29 British Journal of Learning Disabilities 98–102; H L Westcott, 'Child Witness Testimony: What Do We Know and Where Are We Going?' (2006) 18(2) Child and Family Law Quarterly 174–90; B O'Mahony, 'The Emerging Role of the Registered Intermediary with the Vulnerable Witness and Offender: Facilitating Communication with the Police and Members of the Judiciary' (2009) 38 British Journal of Learning Disabilities 232–37; A Keane, 'Cross-examination of Vulnerable Witnesses: Towards a Blueprint for Professionalisation' (2010) 16(2) (175) International Journal of Evidence and Proof 181–86; and Youth Justice Working Group, *Rules of Engagement: Changing the Heart of Youth Justice* (CSJ 2012).

100 K McEwan, 'In Defence of Vulnerable Witnesses: The Youth Justice and Criminal Evidence Act 1999' (2000) 4(1) International Journal of Evidence and Proof 1–30, 20.

101 Advocacy Training Council, *Raising the Bar: The Handling of Vulnerable Witnesses, Victims and Defendants in Court* (ATC 2011).

102 See <www.theadvocatesgateway.org> co-founded by the first author, J Plotnikoff and R Woolfson.

(including working with intermediaries), consider the question of 'ticketing' (i.e. accrediting advocates to work with vulnerable witnesses and defendants) and create its own version of The Advocate's Gateway? In any event, training for lawyers is essential. Some has occurred already. For instance, in May 2012 the Criminal Bar Association held an annual conference on Victims and Vulnerable Witnesses in the Criminal Process at Queen's University; the Judicial Studies Board hosted a seminar 'Judges and Intermediaries' in December 2012 which was attended by some 20 Belfast judges and intermediary seminars were delivered to police and prosecutors in April 2013.[103] It is only through participative training that advocates really begin to realise and to practise the specialist skills required to question vulnerable witnesses.

Civil cases

There is ample scope for intermediaries to be used in civil cases.[104] A number of English family court cases have included discussion and sometimes use of an intermediary for a vulnerable witness. In one the judge noted that the absence of a statutory intermediary scheme in family cases led to 'real obstacles'.[105] Notwithstanding, there are Family Justice Council *Guidelines in Relation to Children Giving Evidence in Family Proceedings* encouraging practitioners to consider the use of intermediaries at the 'earliest opportunity'.[106] More recently, in the High Court in England and Wales, a father's appeal against a fact-finding decision was successful on the ground that inadequate special measures were in place when he gave evidence[107] and at the rehearing he was assisted by an intermediary. In another, a highly vulnerable young woman was assisted by an intermediary to give evidence about previous sexual abuse.[108]

A 2011 Northern Ireland Law Commission report[109] recommended the use of special measures[110] in the civil courts for children, or people who are living with mental illness, learning disability or personality disorder or physical disability or disorder, and for witnesses who suffer fear and distress in connection with giving evidence. Children should be automatically entitled to use the live link unless the use of that will not be likely to maximise the quality of their evidence. The Commission, 'encouraged by the use of intermediaries in criminal proceedings in England and Wales', recommends that the use of intermediaries is included as a special measure subject to it being successfully implemented in criminal proceedings in Northern Ireland.[111] Northern Ireland might be the first to introduce a scheme of Registered Intermediaries for the civil courts.

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103 The authors and Northern Ireland Registered Intermediaries spoke at these events.

104 P Cooper, 'Child Witnesses in Family Proceedings: Should Intermediaries be Showing Us the Way?' (2011) 41 (April) Family Law 397–403; A Brammer and P Cooper, 'Still Waiting for a Meeting of Minds: Child Witnesses in the Criminal and Family Justice Systems' (2011) 12 Criminal Law Review 925–941; and P Cooper, 'ABE Interviews, Children's Testimony and Hearing the Voice of the Child in Family Cases: Are We Barking up the Right Tree?' in M Thorpe and W Tyzack (eds), *Dear David: A Memo to the Norgrove Committee from the Dartington Conference* (Jordans 2011) 23–31.

105 *Re X (A Child)* [2011] EWHC 3401 (Fam) [42]

106 Working Party of the Family Justice *Council, Guidelines in Relation to Children Giving Evidence in Family Proceedings* (Family Justice Council 2011) para 14.

107 *Re M (Oral Evidence: Vulnerable Witness)* [2012] EWCA 1905.

108 *Re A (A Child) (Vulnerable Witness: Fact Finding)* [2013] EWHC 2124 (Fam), includes a detailed description of how the vulnerable witness testimony was heard with the assistance of special measures including an intermediary.

109 NILC, *Vulnerable Witnesses in Civil Proceedings* (NILC 10, 2011)

110 The range of special measures would be the same as those used in the criminal courts including the use of intermediaries.

111 NILC (n 109) 62, para 3.52.

Conclusions

If England and Wales are indicative, then the extent to which Northern Ireland's cross-examining culture changes to accommodate the needs of the vulnerable is primarily in the hands of the Registered Intermediaries, trial judges and the Court of Appeal. Northern Ireland's intermediary legislation closely mirrors that which has been in force in England and Wales for almost ten years for prosecution and defence witnesses. Much has been learnt since the first MoJ Registered Intermediaries were recruited. The DoJ Registered Intermediaries have the advantage of the springboard of existing Registered Intermediary training, procedural guidance and research showing the vital importance of ground rules being set and enforced by judges and their wide-ranging role, including assisting with communication during witness familiarisation and memory refreshing. The DoJ has been able to take advantage of MoJ 'learning through doing' resulting in advances in training and guidance for its Registered Intermediaries. The DoJ's Registered Intermediary course and its procedural guidance manual are the most detailed and practical to date. Similarly, following in the footsteps of the MoJ, the DoJ regulates and supports the Northern Ireland Registered Intermediaries. The DoJ is also supporting their attendance at the regular MoJ Registered Intermediary CPD events which promulgate best practice.

The DoJ will deliver an evaluation report in 2015 and one of the most eagerly awaited aspects will be the analysis of the brand new scheme available for vulnerable defendants at the police station and when they give testimony. As at March 2014 only four requests for intermediaries for vulnerable defendants have been made and further awareness raising may be required amongst defence solicitors.[112] If and when an application for a defendant Registered Intermediary is made it will be the first ever under a statutory scheme. Apart from dealing with applications for a Registered Intermediary for vulnerable defendants when giving evidence, judges will no doubt be asked to determine how to ensure the effective participation of the defendant for the rest of the trial. Will judges order that the Registered Intermediary be present for the rest of the trial and, if so, who will fund this? Experience in England and Wales suggests that this may be an issue and there may be challenges to Northern Ireland's defendant scheme on the basis that it does not go far enough to ensure that the vulnerable defendant understands all of the court proceedings (not just if and when he gives oral evidence) in order to effectively participate.

In September 2011 the then Lord Chief Justice of England and Wales commented extra-judicially:

> The use of intermediaries has introduced fresh insights into the criminal justice process. There was some opposition. It was said, for example, that intermediaries would interfere with the process of cross-examination. Others suggested that they were expert witnesses or supporters of the witness. They are not. They are independent and neutral. They are properly registered. Their responsibility is to the court . . . their use is a step which improved the administration of justice and it has done so without a diminution in the entitlement of the defendant to a fair trial.[113]

112 Already this has included conference presentations, distribution of information leaflets and in 2013 there have been two articles about the scheme in *The Writ* (by N Dempster and the second author) and a further is in print (by the first author).

113 'Vulnerable Witnesses in the Administration of Criminal Justice', The Rt Hon The Lord Judge, Lord Chief Justice of England and Wales, 7 September 2012, at the 17th Australian Institute of Judicial Administration Conference.

Time will tell if Northern Ireland's Lord Chief Justice will heap similar praise, either in court or outside it, on the DoJ's Registered Intermediaries. It is more likely to be so if there is participative training for Northern Ireland's police, lawyers and judges and a thoroughly evaluated pilot. The use of intermediaries in Northern Ireland would be immediately more effective if court rules made ground rules hearings mandatory as is now the case in England and Wales. It would be better still for the administration of justice if Northern Ireland's advocates underwent training to be 'ticketed' for vulnerable witness cases and if their regulator made it a requirement of the code of conduct to follow ground rules; neither of these things has happened yet in England and Wales. Going second has already proved to be an advantage, but Northern Ireland could do even more to further capitalise on the lessons from the Registered Intermediary scheme in England and Wales.

NILQ 65(1): 63–79

Wrongful trading: problems and proposals

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1 Introduction

One of the critical elements of a liquidator's remit is to ascertain if there are any assets or funds that belong to the company that can be recovered in order to swell the dividend that will be paid to the unsecured creditors.[1] As part of his or her investigations the liquidator may determine that transactions entered into before the commencement of the winding up can be challenged as transactions which might be adjusted. Examples of these are preference payments[2] and transactions at an undervalue.[3] In the liquidator's investigations he or she may find that the directors have engaged in what the UK's Insolvency Act 1986 (the Act) (Insolvency (Northern Ireland) Order 1989 (the Order)) refers to as 'wrongful trading'. A right to take action against directors for wrongful trading was first introduced in the Act and is found in s 214 and the corresponding article in the Order is art 178 (for the balance of the paper there will be a reference to the relevant article of the Insolvency (Northern Ireland) Order 1989 in brackets). The section provides, in essence, that, unless a director takes every step to minimise the potential loss to creditors, the director is liable for wrongful trading if at some time prior to the commencement of winding up he or she knew or ought to have concluded that there was no reasonable prospect of the company avoiding going into insolvent liquidation. The UK is not alone in providing a liquidator with the right to bring an action against directors, where they have, when their company is in danger of insolvency or is actually insolvent, failed to take special care concerning the trading activity and other actions of their company, and to act in such a way that will minimise losses to company creditors.[4] Many Commonwealth jurisdictions,[5] as well as Ireland,[6] include in their company or insolvency legislation such a provision.

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1 S Wheeler, 'Swelling the Assets for Distribution in Corporate Insolvency' [1993] JBL 256; D Milman and R Parry, 'Challenging Transactional Integrity on Insolvency: An Evaluation of the New Law' (1997) 48 NILQ 24.

2 Insolvency Act 1986, s 239 (Insolvency (Northern Ireland) Order 1989, art 203).

3 Insolvency Act 1986, s 238 (Insolvency (Northern Ireland) Order 1989, art 202).

4 Notably, the United States and Canada, do not, and have never done so.

5 For example, see: New Zealand (Companies Act 1993, s 135); Australia (Corporations Act 2001, s 558G); South Africa (Companies Act 1984, s 424); Singapore (Companies Act 1990, s 339).

6 Companies Act 1963, s 297A.

The aim of this article is to examine the issues that exist in relation to the bringing of actions for wrongful trading in the UK and to determine if the law should be reformed. It is argued that, because of the way that the wrongful trading provision has been drafted and applied by the courts, it does not achieve what was intended when introduced, for it does not provide the liquidator with an effective weapon in recovering funds for the benefit of creditors and it fails to act as a mechanism that will encourage directors to minimise losses to creditors. As a result, the article submits that reforms are needed.

The article is structured as follows. First, it provides some brief background to the wrongful trading provision. Second, it sets out the conditions that must be established if a liquidator is to succeed in an action under s 214. Third, the article identifies areas of difficulty facing liquidators in both bringing actions and establishing the conditions necessary for a successful claim. Fourth, it proposes some reforms to the law. Finally, some concluding remarks are provided.

2 Background

The advent of wrongful trading was due primarily to the perceived inadequacies of the fraudulent trading provision.[7] The report of the Insolvency Law Review Committee, *Insolvency Law and Practice* (the Cork Report)[8] was of the opinion that the fraudulent trading provision[9] possessed significant inadequacies in dealing with irresponsible trading.[10] The Cork Committee was concerned that unsecured creditors were not protected adequately and it took the view that compensation ought to be available to those persons who experience loss due to unreasonable behaviour as well as fraudulent action.[11] It was concerned that the existing fraudulent trading provision had failed in curbing directors who ran up losses when their companies were in deep financial difficulty.[12] Consequently, the Cork Committee recommended that a new provision be introduced to provide civil actions for unreasonable trading where only the civil burden of proof would apply.[13] In the past directors were only liable if they were proved to have intended to defraud creditors. The committee favoured including in legislation a provision which provided that directors who anticipated insolvency and did nothing to prevent it or seek to minimise creditor losses would be personally liable for company liabilities.[14] To achieve this, the committee proposed liability being imposed on directors (and any others taking part in the carrying on of the company's business), if the company incurred liabilities when it was insolvent and without a reasonable prospect of satisfying the debts in full.[15] The directors would be liable if they knew or ought to have known that the trading was wrongful.[16] What the committee envisaged was legislation that acted so as to encourage company directors to satisfy themselves concerning the company's ability to discharge commitments.

7 Now Insolvency Act 1986, s 213 (Insolvency (Northern Ireland) Order 1989, art 177).

8 Insolvency Law Review Committee, *Insolvency Law and Practice* (the Cork Report) (Cmnd 858 HMSO 1982).

9 At the time the provision was s 332 of the Companies Act 1948.

10 Cork Report (n 8) [1776]–[1780].

11 Ibid [1777].

12 Ibid [1776]–[1778].

13 Ibid [1777].

14 A Walters, 'Enforcing Wrongful Trading: Substantive Problems and Practical Incentives' in B A K Rider (ed), *The Corporate Dimension* (Jordans 1998) 146.

15 Cork Report (n 8) [1781].

16 Ibid.

While, in 1984, the government stated in a White Paper, entitled *A Revised Framework for Insolvency Law*[17] that it agreed that there had to be a tighter rein on directors' activities in order to prevent irresponsible trading where insolvent companies were concerned, it declined to take up many of the recommendations of the Cork Report relating to wrongful trading. This attitude continued to prevail when the Insolvency Bill was introduced in late 1984 (later to become the Insolvency Act 1985). The reason that the government gave for this opinion was that the Cork Report's approach imposed too severe a responsibility on directors for their companies' liabilities. The provision that was proposed, and which was first contained in s 15 of the Insolvency Act 1985, and later in s 214 of the Act, provided for a concept that was more limited than that recommended by the Cork Committee and it reflected legislative caution against diluting the law of limited company liability. The provision focused on the making of directors liable for creditor losses when the former failed to take appropriate steps where the avoidance of insolvent liquidation was not a reasonable prospect. Len Sealy records that one reason that was given for the decision not to follow the Cork Report proposal was that it was not envisaged that the conduct covered should be restricted to the incurring of liabilities when insolvent.[18]

The provision was introduced in order to regulate directors in an attempt to prevent them from externalising the cost of their companies' debts and placing all of the risks of further trading on the creditors. For, if a company is heading for insolvent liquidation, the creditors of the company are effectively the ones who have a residual claim (this is the claim of those whose wealth directly rises or falls with changes in the value of the company[19]) over the company's assets,[20] and so the directors should be taking action to minimise the losses of the creditors.

It is generally accepted that directors may well, when their companies are in difficulty, embrace actions which involve more risk,[21] because the shareholders, given the concepts of limited liability and separate legal entity, have little to lose where their company is in financial distress. If the risk-taking pays off, then the shareholders will see their wealth maximised, but if it does not, then they have lost nothing more. As mentioned above, it is the creditors who will bear the cost.

Provisions like s 214 have been controversial.[22] It has been argued that the provision makes directors overly risk averse and it deters people from accepting posts as directors. The Cork Committee was of the view that such a provision strikes a balance between the need to ensure that directors feel that they can engage in entrepreneurial activity, on the one

17 Cmnd 9175.

18 'Personal Liability of Directors and Officers for Debts of Insolvent Corporations: A Jurisdictional Perspective (England)' in J Ziegel (ed), *Current Developments in International and Comparative Corporate Insolvency Law* (Clarendon Press 1994) 491.

19 D Baird, 'The Initiation Problem in Bankruptcy' (1991) 11 International Review of Law and Economics 223, 228–29; S Gilson and M Vetsuypens, 'Credit Control in Financially Distressed Firms: Empirical Evidence' (1994) 72 Washington University Law Quarterly 1005, 1006.

20 S Schwarcz, 'Rethinking a Corporation's Obligations to Creditors' (1996) 17 Cardozo Law Review 647, 668.

21 K Daigle and M Maloney, 'Residual Claims in Bankruptcy : An Agency Theory Explanation' (1994) 37 Journal of Law and Economics 157; B Adler, 'A Re-Examination of Near-Bankruptcy Investment Incentives' (1995) 62 University of Chicago Law Review 575, 590–98; R Barondes, 'Fiduciary Duties of Officers and Directors of Distressed Corporations' (1998) 7 George Mason Law Review 45, 46, 49. See Company Law Review Steering Group, *Modern Company Law for a Competitive Economy: Final Report* vol 1 (DTI 2001) [3.15].

22 For instance, see J Mannolini, 'Creditors' Interest in the Corporate Contract : A Case for the Reform of our Insolvent Trading Provisions' (1996) 6 Australian Journal of Corporate Law 14; D Morrison, 'The Australian Insolvent Trading Prohibition: Why Does It Exist?' (2002) 11 International Insolvency Review 153, 161; A Keay, 'Wrongful Trading and the Liability of Company Directors: A Theoretical Perspective' (2005) 25 Legal Studies 431.

hand, and they do not abuse the privilege of limited liability and face up to the consequences of their action, on the other.[23]

3 Elements of a successful claim

It is not intended to provide a detailed exposition of the elements which a liquidator must establish if he or she is to succeed in wrongful trading proceedings,[24] but it is helpful to lay down what circumstances have to have occurred and/or what needs to be proved to enable sense to be made of the proposed reforms argued for later.

First, the director's company must be in insolvent liquidation.[25] Second, and the main condition, at some time prior to the commencement of winding up the director knew or ought to have concluded that there was no reasonable prospect of the company avoiding going into insolvent liquidation.[26] This condition is then explained in s 214(4). It provides that the facts which a director ought to know or ascertain, the conclusions which he or she ought to reach are those that would be known or ascertained or reached or taken by a reasonably diligent person having both the general knowledge, skill and experience that may reasonably be expected of a person who carries out the same functions as are carried out by the defendant director (an objective requirement), and, in addition, that person has the general knowledge, skill and experience that the defendant director possesses (a subjective requirement). Obviously, liquidators are more likely to rely on the fact that a director ought to have concluded that there was no reasonable prospect of the company avoiding going into insolvent liquidation rather than alleging and proving that the director knew that there was no chance of avoiding liquidation,[27] as it is usually going to be easier to establish.

It is notable that the director will not necessarily be liable if he or she was aware that the company was insolvent at a particular time. The critical issue is whether or not the director knew or ought to have concluded that insolvent liquidation was inevitable.[28] A director might be aware of, say, cash flow insolvency at a particular date, but is fairly optimistic about the future as some debts owed to the company are coming due in the near future and new contracts have been entered into that will benefit the company in due course.

The third element for liability is that the defendant was a director at the time prior to the commencement of winding up when he or she knew or ought to have concluded that there was no reasonable prospect of the company avoiding going into insolvent liquidation.[29] In this context 'director' can include shadow directors,[30] and there is authority for the proposition that liability may extend to *de facto* directors.[31]

23 Cork Report (n 8) [1805].

24 For such a treatment, see, for example, F Oditah, 'Wrongful Trading' [1990] LMCLQ 205; A Keay, *Company Directors' Responsibilities to Creditors* (Routledge-Cavendish 2007) 81–110; A Keay, *McPherson's Law of Company Liquidation* (3rd edn Sweet & Maxwell 2013) 747–65; R Goode, *Principles of Corporate Insolvency Law* (4th edn Sweet & Maxwell 2011) 663–83.

25 S 214(2)(a) (art 178(2)(a)).

26 S 214(2)(b) (art 178(2)(b)).

27 For example, see *Re Continental Assurance* [2001] BPIR 733; [2007] 2 BCLC 287.

28 See, *Re Hawkes Hill Publishing Co Ltd* [2007] BCC 937; [2007] BPIR 1305.

29 S 214(2)(c) (art 178(2)(c)).

30 S 214(7) (art 178(7)).

31 *Re Hydrodan (Corby) Ltd* [1994] BCC 161, 162.

4 Difficulties facing liquidators

Following the enactment of the Act, and for some years after it, academics and practitioners alike saw s 214 as having a bright future in providing much needed protection for creditors.[32] However, as time moved on, optimism waned and subsequently later commentators were more circumspect about the potential, and impact, of the provision. Several negative assessments of the provision over the past ten years, including a concern that few proceedings have been initiated, have been propounded.[33] Consequently, it has led one commentator to conclude that s 214 is little more than a 'paper tiger,'[34] a view reflected in the business community.[35] While the volume of proceedings probably cannot determine the efficacy of s 214, it might well be seen as an element in the aim of deterring wrongful trading, for, as established already, it is generally accepted that directors can be expected, when their companies are in difficulty, to embrace actions which involve more risk.[36] Certainly, there appears to be empirical support, in the form of a survey of disqualified directors,[37] for the contention that the provision has not been used overly. Of those disqualified on the ground of unfitness, the survey concluded that the most common basis for this was trading while insolvent, yet no corresponding proceedings had been brought under s 214 against these directors.[38] More recently, one leading UK law firm has confirmed that successful wrongful trading claims are rare.[39]

There are substantial difficulties that liquidators have to overcome, especially in terms of evidence, in bringing an action. Clearly, establishing a case is frequently not going to be easy and courts are going to require some convincing evidence where the directors have not acted in a patently irresponsible manner.

(A) Establishing blame

The use of the title 'wrongful trading' for s 214 (although it is not mentioned in the text of the section) is not helpful. As Marion Simmons QC has noted,[40] the *Oxford Dictionary* definition of 'wrongful' is 'full of wrong, injustice, or injury; marked . . . by wrong, unfairness or violation of equity'. This definition seems to suggest that there is a need to establish blame, something which does not accord with the wording of the section, and certainly is something which was never envisaged by the Cork Committee.

There are indications in the cases that courts are going to consider issues of blameworthiness in determining liability. In the longest judgment dealing with s 214, *Re Continental Assurance Co of London plc*[41] (*Re Continental Assurance*), Park J[42] made a lot of the fact that the directors were conscientious and that no wrong could be apportioned to them.

32 For instance, see Oditah (n 24) 222; D Prentice, 'Creditors' Interests and Directors' Duties' (1990) 10 OJLS 265, 277.

33 For instance, see Walters (n 14).

34 C Cook, 'Wrongful Trading: Is it a Real Threat to Directors or a Paper Tiger' [1999] Insolvency Lawyer 99, 100.

35 'Wrongful Trading Laws that Directors Ignore' Accountancy Age (29 October 1992) 8.

36 Adler (n 21) 575, 590–98; Daigle and Maloney (n 21). See Company Law Review Steering Group (n 21) [3.15].

37 A Hicks, *Disqualification of Directors: No Hiding Place for the Unfit* (Research Report No 59, Chartered Association of Certified Accountants 1995).

38 D Arsalidou, 'The Impact of Section 214(4) of the Insolvency Act 1986 on Directors' Duties' (2001) 22 Company Lawyer 19, 20. An example appears to be *Official Receiver v Zwirn* [2002] BCC 760.

39 Lawrence Graham, 'Nice Try' Lexology (30 September 2009).

40 M Simmons, 'Wrongful Trading' (2001) 14 Insolvency Intelligence 12.

41 [2001] BPIR 733.

42 Ibid 769–70.

This was notwithstanding the fact that the company had incurred losses so significant that they had eradicated the company's reserves and taken a quarter of the share capital.[43] In his judgment, Park J seemed to be looking for some clear wrongdoing on the part of the directors, and found none. His Lordship said, in considering the fact that the financial figures of the company presented at a board meeting were worrying, that he was of the opinion that the directors were not expecting figures which showed a bad financial situation, and this appears to have been a factor in his Lordship's decision to find in favour of the directors.[44] This was notwithstanding expert evidence from one of the liquidator's witnesses that indicated that the figures suggested a worse financial position.[45]

It is submitted that the courts have often taken the view that unless a director can be said to be irresponsible then he or she should not be held liable. This places an added onus on the liquidator to establish not only that the director knew or ought to have concluded that there was no reasonable prospect that the company would not end up in insolvent liquidation, but that the director(s) acted in a way that was not responsible, such as ignoring advice or the clear signs of the inevitable demise of the company's business. There is nothing in s 214 that suggests that the liquidator is required to prove that a director participated in some kind of irresponsible conduct. In fact, both the Cork Committee and the government were trying to get away from the need to prove some kind of subjective culpability.

Rarely, it would seem, where directors have made an effort to understand the position of their company, and where they decided to continue doing business, will they be held liable.[46] Certainly, it would seem, given the case law, that the courts can take into account how culpable the defendant(s) has been, and Vanessa Finch feels that this has diminished the effect of s 214.[47]

(B) The point of time when liability fixes[48]

It appears to have been generally assumed[49] that a liquidator will need to decide on an exact point of time at which it is alleged the director knew or ought to have concluded that there was no reasonable prospect of the company avoiding going into insolvent liquidation, and plead that point of time. This is probably because s 214(2)(b) states that for a defendant to be liable then 'at some time' before the commencement of the winding up the defendant must have known or ought to have known that insolvent liquidation could not be avoided. It has been suggested that the point from which liability commences is likely to be a crisis point in the life of the company when directors have to acknowledge the inevitable.[50] So reliance has to be placed on a particular date and it has been referred to as 'the moment of truth'.[51] Harry Rajak explains this as the point 'when the reasonably diligent person would have said, "Oh dear (or words to that effect), while yesterday I thought that we could pull

43 See T Bachner, 'Wrongful Trading Before the High Court' [2004] EBOR 195, 198.

44 The judge also took a benign view in *Re Cubelock Ltd* [2001] BCC 523, an application for an order of disqualification against a director on the basis, *inter alia*, that he engaged in wrongful trading.

45 [2001] BPIR 733, 753.

46 *Re Sherborne Associates Ltd* [1995] BCC 40; *Re Continental Assurance* [2001] BPIR 733, [2007] 2 BCLC 287.

47 V Finch, *Corporate Insolvency Law: Perspectives and Principles* (2nd edn CUP 2009) 702.

48 For a detailed discussion of this matter, see A Keay, 'Wrongful Trading and the Point of Liability' (2006) 19 Insolvency Intelligence 132.

49 For instance, see Simmons (n 40) 12, 13.

50 T Cooke and A Hicks, 'Wrongful Trading: Predicting Insolvency' [1993] JBL 338, 339.

51 H Boschma and L Lennarts, 'Wrongful Trading in a Comparative Perspective' in J Wouters and H Schneider (eds), *Current Issues of Cross-Border Establishment of Companies in the European Union* (Maklu 1995) 205.

through, today I see that that is highly unlikely".'[52] But while these observations are helpful, there are likely to be many situations where it will be difficult for the liquidator to settle on the exact point when wrongful trading commenced.[53]

The liquidator is hampered by the fact that some cases, notably *Re Sherborne Associates Ltd*[54] and *Re Continental Assurance*,[55] have held that a liquidator is not entitled, where the case presented is not made out in relation to the dates pleaded in the claim, to argue for wrongful trading in respect of other dates once the evidence has been heard, or to invite the court to select a date subsequent to that which had been pleaded. But there are other cases that suggest a more liberal approach might be adopted.[56] Quite recently, the courts in *Roberts v Frohlich*[57] and *Re Kudos Business Solutions Ltd*[58] did not express any concern with the liquidators in fact nominating dates in the alternative. Furthermore, it seems that dates can be estimates. For instance, in *Roberts v Frohlich* the case pleaded was that the wrongful trading occurred 'around 1 July 2004 (or alternatively on or around 1 September 2004)'.[59] In this case the judge found that wrongful trading had occurred by 14 September and allowed the liquidator's claim. Even in *Re Sherborne Associates Ltd* the judge appeared to offer some hope to liquidators when he said that he would not wish his decision:

> to be cited hereafter as authority for the proposition that in all cases under s 214 the liquidator must always specify his starting date, and must lose the whole case if he cannot satisfy the Court that his case is made out by reference to that particular date. Cases vary in detail and complexity.[60]

As a consequence, a fair degree of uncertainty exists in relation to this matter. And while there might be a chance that a judge will be willing to give some leeway to a liquidator, the liquidator cannot be certain that that in fact will be the case. The risks are that the courts either may be inclined to give directors the benefit of the doubt and not to adopt too early a time from which liability should run,[61] or hold that because the liquidator could not prove that at the time pleaded in the claim the defendants were engaging in wrongful trading, they are not liable.

(C) Funding

Andrew Hicks, writing in 1993, following a survey he conducted amongst insolvency practitioners and solicitors, said that the greatest inhibition to wrongful trading proceedings was the cost of investigating and then pursuing the action.[62] This issue remains an important one for liquidators. A solicitor, Peter Fidler, said in 2001 that anecdotal evidence suggested that a minimum of £50,000 was needed to run a wrongful trading case, even where the claim was relatively small.[63] Ensuring that the liquidator has sufficient funds behind him or her is critical, for cases can take a long time to be heard. For instance, the

52 H Rajak, 'Wrongful Trading' (1989) NLJ 1458, 1459.

53 Finch (n 47) 700.

54 [1995] BCC 40, 42.

55 [2001] BPIR 733, 766–67. Also, see 899.

56 For instance, see *Official Receiver v Doshi* [2001] 2 BCLC 235; *Rubin v Gunner* [2004] EWHC 316 (Ch), [2004] BCC 684, [2004] 2 BCLC 110.

57 [2011] EWHC 257 (Ch), [2011] 2 BCLC 635 [6].

58 [2011] EWHC 1436 (Ch) [3], [131].

59 [2011] EWHC 257 (Ch), [2011] 2 BCLC 635 [6].

60 [2001] BPIR 733, 899.

61 Cooke and Hicks (n 50).

62 A Hicks, 'Wrongful Trading: Has It Been a Failure?' (1993) 8 Insolvency Law and Practice 134, 134.

63 P Fidler, 'Wrongful Trading after Continental Assurance' (2001) 17 Insolvency Law and Practice 212, 212.

trial in *Re Continental Assurance* lasted for 72 days, three times as long as the period that had been estimated.[64]

Obviously, any liquidator has to be concerned about the costs and expenses of litigation. First, he or she has to ensure that the funds of the company are not needlessly wasted, thereby reducing the dividend payable to creditors. Second, liquidators will want to ensure that they are not liable to pay for litigation out of their own pocket. The latter is particularly relevant to s 214 actions because, as the action has to be brought by the liquidator personally in his or her own name, the liquidator will be personally liable for any costs incurred.[65]

Liquidators are helped to some extent by the fact that r 4.218(3)(ii) of the Insolvency Rules 1986 (and r 4.218(1)(a) before it[66]) provides that expenses or costs which are properly chargeable or incurred by the official receiver or the liquidator in preserving, realising or getting in any of the assets of the company or otherwise relating to the conduct of any legal proceedings which he or she has power to bring or defend whether in their own name or the name of the company, are payable out of company funds before any other sums (save for expenses incurred by a provisional liquidator). Whether this is the case as far as an adverse costs order made in wrongful trading proceedings against the liquidator or the company, is not clear, and that does, obviously, present some concern for a liquidator.[67] Any expenses or costs awarded to a successful litigant against the company in liquidation or its liquidator were at common law to be paid in priority to the general expenses and costs of the liquidation and any subsequent priority claims, such as preferential creditor claims.[68] The difficulty for liquidators is that adverse costs are not *prima facie* within r 4.218(3)(ii) and it was held by the House of Lords that if any expense claim is not covered by r 4.218 then it cannot be deducted under that provision.[69]

It might be thought that if a liquidator has a particularly strong case, he or she should not be so worried about funding because a significant part of the liquidator's costs will usually have to be paid by the defendant. But, of course, all sorts of problems might ensue. The defendant might prevaricate in making payment, and the liquidator, therefore, may have to bear the cost until payment is forthcoming, if at all. Further, a defendant might disappear or might be impecunious and so the liquidator may recover little or nothing in terms of costs. A further issue is that the liquidator's legal advisers will want the payment of their fees during the course of the litigation, so there has to be money available to the liquidator.

So, funding can be an issue that presents difficulties for liquidators. This is particularly so in all cases except where there is a significant amount of assets of value in the company's estate. Often, a liquidator will have to consider finding some way of financing the action, or at least safeguarding his or her own financial position. Realistically, funding will need to be sought from creditors or even outside sources. While a liquidator might be able to obtain funding through fighting funds or indemnities from creditors,[70] these are not favoured so

64 [2001] BPIR 733, 765.

65 *Van den Hurk v Martens & Co Ltd* [1920] 1 KB 850; *Re Wilson Lovatt & Sons Ltd* [1977] 1 All ER 274; *Re MC Bacon Ltd (No2)* [1990] BCLC 607.

66 R 23 of Insolvency (Amendment) (No 2) Rules 2002 (SI 2002/2712). It was amended in 2008.

67 For a discussion of this point, see S Gleghorn, 'Re MT Realisations Ltd; Recovering Costs from an Insolvent Company' (2004) 20 Insolvency Law and Practice 105. Also, see R Gregorian and R Butler, 'Liquidators' Litigation Expenses, Funding Arrangements and the Amendment to Rule 4.218' (2004) 20 Insolvency Law and Practice 151.

68 *Re London Metallurgical Company* [1895] 1 Ch 758; *Re MT Realisations Ltd* [2003] EWHC 2895 (Ch), [2004] 1 BCLC 119; *Re Toshoku Finance (UK) plc* [2002] BCC 110.

69 *Re Toshoku Finance (UK) plc* [2002] BCC 110.

70 For a discussion of this, see A Keay, 'Pursuing the Resolution of the Funding Problem in Insolvency Litigation' [2002] Insolvency Lawyer 90.

much nowadays. There is little incentive for creditors to provide indemnities when any fruits obtained from the action will be divided amongst all creditors.[71] If one creditor provides the funding then all of the other creditors will be free-riding on the former's risk and efforts.

More frequently liquidators are entering into arrangements with companies which specialise in funding actions, in exchange for either an assignment of the action or a portion of any successful claim. The problem for liquidators is that in securing funding in the manner just suggested, they are engaging in maintenance and/or champerty. The former is the assistance or encouragement of proceedings by someone who has neither an interest in the proceedings nor any motive recognised by the law as justifying interference in the proceedings. The latter is a form of maintenance[72] in that assistance or encouragement of proceedings is provided in exchange for a promise to provide a share of the proceeds of the action. While these doctrines may be archaic,[73] they are still relevant in several areas, such as in the assignment of causes of action. There is a well-established exception to the application of these doctrines available to a trustee in bankruptcy (and liquidators and administrators) who is able lawfully to assign any of the bare causes of action of the bankrupt (being property of the bankrupt) that have vested in the trustee on the basis that the trustee is to receive a share of any proceeds of ensuing litigation.[74] This exception (referred to here as 'the insolvency exception' as it applies to other regimes besides bankruptcy, such as liquidation[75]) is based on the idea that the legislature has granted to the liquidator the power to realise the assets of the company, and the transfer of actions to an insurer in return for the financing of it has been treated as a sale in *Grovewood Holdings plc v James Capel & Co Ltd*.[76]

Liquidators have power to sell the company's property,[77] and this includes causes of action. Notwithstanding this, according to *Re Oasis Merchandising Services Ltd*,[78] it is not possible for a liquidator to assign a cause of action under s 214 to an insurer in exchange for a promise to pay the liquidator a part of the fruits of the claim.[79] This is because actions commenced under provisions like s 214 are granted to the liquidator personally and not to the company; an action under s 214 is only given to the liquidator and involves the recovery of moneys to which the company never had any right.[80] The courts are most concerned that there is no interference in the action by a third party, and that there is no loss of control of the action by the liquidator.

It is also highly debatable whether a liquidator could agree to assign only part of the fruits of a wrongful trading action to an insurer, thereby retaining control over the proceedings. This is because it was held by Lightman J in *Grovewood Holdings plc v James Capel & Co Ltd* that a share of the proceeds of an action could not be assigned without being regarded as champertous. Unlike a bare cause of action, which can be assigned, as it comes

71 Contrast this with the position in Australia, under s 564 of the Corporations Act 2001. For further discussion, see Keay (n 70).

72 Referred to as 'aggravated maintenance': *Guy v Churchill* (1888) 40 Ch D 481, 489.

73 See the comments of Oliver LJ in *Trendtex Trading v Credit Suisse* [1980] QB 629, 674.

74 *Seear v Lawson* (1880) 15 Ch D 426; *Re Park Gate Waggon Works Co* (1881) 17 Ch D 234 (CA); *Ramsey v Hartley* [1977] 1 WLR 686; *Stein v Blake* [1996] 2 AC 243; *Norglen Ltd v Reeds Rains Prudential* [1998] 1 All ER 218.

75 Causes of action are company property which can be dealt with by liquidators under Schedule 4, para 6 to the Act (Schedule 2, para 6 of the Order).

76 [1995] BCC 760, 764.

77 See ss 165 and 167 and para 6 of Schedule 4 (arts 140 and 142 and Schedule 2, para 6 of the Order).

78 [1995] BCC 911.

79 Ibid 919.

80 Ibid 918.

within the insolvency exception (to the rules on champerty), a portion of the fruits of an action does not constitute property for these purposes and cannot be assigned without breaching the rules against champerty.[81]

Another method of funding actions is to instruct solicitors who are willing to operate under a conditional fee arrangement (CFA). However, that only means that if liquidators are not successful their own lawyers do not get paid. If, as usually occurs, costs go to the victor, the liquidator will be faced with having to pay the costs of the other party. In the past if a liquidator were successful then he or she could claim against the other party a success fee that applied under the CFA, but since the introduction of the so-called 'Jackson reforms'[82] success fees will not be able to be claimed against the other party. This change does not apply to Insolvency proceedings[83] until after April 2015.[84]

A final option is for the liquidator to obtain after-the-event insurance (ATE). This is much easier to secure than third-party funding and it will cover the legal costs of the other side (in case of losing the proceedings and the court making the usual order against the loser), disbursements and a portion of the liquidator's own legal costs.[85] But as with creditors agreeing to cover costs, it does not generate any cash flow, and so a liquidator has to ask his or her solicitors to wait for payment until the insurer pays out.[86]

5 Reform measures[87]

The previous section of the article explained some of the difficulties that a liquidator is confronted with when considering taking legal proceedings under s 214. While the requirements for succeeding in a claim should cause liquidators to engage in careful consideration of their case, and a weighing up of the basis of the action, it is submitted that hitherto liquidators, on the whole, have decided not to take action not necessarily because they have a weak case, but because of other issues. Also, the provision has come under increasing attack from academics and practitioners alike.[88] It is contended that, while the intention behind s 214 is commendable, the law needs to be modified. It is submitted that some major changes to the law could provide a more effective right of action.

(A) Prohibiting the incurring of debt

The first proposal is to amend s 214(2)(b) so that, rather than having to establish that the director/defendant knew or ought to have concluded that there was no reasonable prospect of the company avoiding going into insolvent liquidation, the liquidator has to establish that the director incurred debts or liabilities at a time when he or she knew or ought to have known that the company was unable to pay its debts as they fell due. So, if directors know

81 [1995] BCC 911; *Grovewood Holdings* [1995] BCC 760.

82 These were recommendations made by Lord Justice Jackson after his inquiry into legal costs. See *Review of Civil Litigation Costs: Final Report* (December 2009) and accessible at <www.judiciary.gov.uk/NR/rdonlyres/8EB9F3F3-9C4A-4139-8A93-56F09672EB6A/0/jacksonfinalreport140110.pdf> accessed 16 July 2013.

83 A claim by a liquidator does constitute insolvency proceedings for this purpose. See, 'insolvency related-proceedings' in Civil Procedure Rules, r 48.2(2)(a).

84 Legal Aid, Sentencing and Punishment of Offenders Act 2012, c 10.

85 K Crinson and S Morphet, 'Funding for Actions Brought by Insolvency Officeholders' (2011) 24 Insolvency Intelligence 108, 111.

86 Ibid.

87 Some of the following points draw on Keay, *Company Directors* (n 24).

88 For example, see L Doyle, 'Ten Years of Wrongful Trading' (1996) 18 IL and P 10; P Godfrey and S Nield, 'The wrongful trading provisions – all bark and no bite?' (1995) 11 I L&P 139; Walters (n 14); Simmons (n 40); Fidler (n 63); A Keay, *McPherson's Law* (n 24) 747–65.

or ought to know that their company is unable to pay its debts when they have fallen due, they should stop incurring more debt. If this is likely to mean that the business cannot continue, they should consider placing their company into administration or liquidation.

This proposal is similar to what was proposed by the Cork Committee.[89] The proposal is made on the basis that the main requirement that has to be established by the liquidator, namely that at some time prior to the commencement of winding up the defendant director knew or ought to have concluded that there was no reasonable prospect of the company avoiding going into insolvent liquidation, is fraught with problems. First, I have already considered the fact that it is arguable that the liquidator must plead an exact point of time from which wrongful trading commenced. This is often an onerous requirement. Second, the phrase 'reasonable prospect' is elusive.[90] According to the court in *Re Kudos Business Solutions Ltd*,[91] whether directors had a reasonable prospect depends on rational expectations of what the future might hold.[92] In determining whether there was no reasonable prospect of a company avoiding insolvent liquidation, courts may take into account a broad range of factors which may be presented to them through evidence, including pressure from creditors owed debts, the withdrawal of support from banks, the loss of contracts, the fact that fresh contracts cannot be obtained, the failure to pay the revenue,[93] and the loss of a major supplier.[94] But it is difficult for directors in many situations, leaving aside those cases where their company is clearly hopelessly insolvent and cannot possibly recover, or the slide into insolvency appears to be inexorable, to gaze into the future and determine whether insolvent liquidation is the fate of the company.[95]

It is argued that directors should be able to ascertain whether their company is in effect cash-flow insolvent; they will know or can easily discover that their company is not able to pay its way. While an inability to pay debts as they fall due is not a precisely defined expression,[96] although arguably it is a little more so since the decision of Briggs J in *Re Cheyne Finance plc*,[97] but it is certainly more certain than considering whether a director ought to have known that the company was not going to be able to avoid insolvent liquidation (a future occurrence). For the most part directors should be able to detect insolvency before they could be expected to conclude that there was no reasonable prospect of the company avoiding insolvent liquidation.[98] It is easier for a director, and perhaps fairer, to ascertain whether his or her company is solvent or not than to be expected to look into a crystal ball and determine whether the company will recover and avoid insolvent liquidation. Directors would only be liable, on the above proposal, if they knew or ought to have known that the company is insolvent when they incur further debts. As a consequence, if directors could not have reasonably known that their company was unable to pay its debts then they would not be liable.

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89 Cork Report (n 8) [1783].

90 Oditah (n 24) 208; J Payne and D Prentice, 'Civil Liability of Directors for Company Debts under English Law' in I Ramsay (ed), *Company Directors' Liability for Insolvent Trading* (CCH and University of Melbourne 2001) 206.

91 [2011] EWHC 1436 (Ch).

92 Ibid [61].

93 S Griffin, *Personal Liability and Disqualification of Company Directors* (Hart Publishing 1999) 66.

94 *Re DKG Contractors Ltd* [1990] BCC 903.

95 See M Mumford and A Katz, *Making Creditor Protection Effective* (ICAEW 2010) 52, who consider some of the accounting problems that exist with this element of the section.

96 A Keay and P Walton, *Insolvency Law: Corporate and Personal* (3rd edn Jordans 2012) 16–21.

97 [2007] EWHC 2402 (Ch), [2008] 1 BCLC 741, [2008] BCC 182.

98 But note the criticism of the Australian criteria of insolvency in Morrison (n 22) 166–69.

The Australians have employed this approach for some time,[99] and found it to be workable and appropriate, even though there has been, admittedly, some concern over the meaning of 'incurring a debt' and the timing of this occurrence.[100] Nevertheless 'Australian law in effect is definite as to when liability will arise; it is expected that directors will take heed of this potential liability in their conduct.'[101]

Some might say that what is proposed is unfair on non-executive directors as they will not always be aware of a company's exact financial position. There are three things to be noted in this respect. First, it is clear from the case law that the vast majority of problems with wrongful trading are to be found in small private companies where it is rare to have non-executive directors in the classic sense. All of the directors are more often than not the shareholders and managers of the company. Second, courts have, more and more over the past 20 years, emphasised the fact that all directors need to be aware of a company's financial position. No longer can directors plead passivity or ignorance as a defence. They must keep themselves informed concerning the affairs of the company.[102] The recent Australian case of *ASIC v Healey*[103] has made it clear that directors must keep apprised of a company's financial position. Third, even with the amendment being suggested, directors can still extricate themselves from liability if they can establish that they did not know and ought not to have known about the company's inability to pay its debts. For instance, a director might prove that he or she made inquiries or did what was reasonable, but the executive directors kept from him or her the information that would indicate the insolvency of the company.

An argument against the introduction of this requirement is likely to be that companies go in and out of insolvency all of the time, so can one ever say that the present insolvency being experienced is likely to be terminal? It is undoubtedly true that many companies do go in and out of insolvency. So, if actions were permitted, would the proposed change be unfair on directors? Under the proposal we are only going to see action being taken against those companies that became insolvent and then ended up in liquidation. If a company was insolvent, but then traded out of that position, it would not be subject to liquidation and no action under s 214 would eventuate. But if the company did end up in insolvent liquidation that indicates that the company was in significant difficulties and not just experiencing some temporary cash-flow problems.

It might be said that the use of this test might mean that more companies prematurely enter administration, as directors would be fearful of breaching s 214 and they would use administration as a safe haven. If this were to occur this is not a major problem as administration would provide a moratorium against claims and would offer a chance for the company to look for ways to get itself back on its feet, under the professional guidance of an independent insolvency practitioner. This seems to accord with the government's desire to foster realistic corporate rescue.[104]

99 The present provisions are ss 588G–Z of the Corporations Act 2001. For a discussion of them, see, R Austin, H Ford and I M Ramsay, *Company Directors: Principles of Law and Corporate Governance* (LexisNexis 2005) 412–20; M Murray and J Harris, *Keay's Insolvency Law* (7th edn Law Book Co 2010) 473–79.

100 See J Mosley, 'Insolvent Trading: What is a Debt and When is One Incurred?' (1996) 4 Insolvency Law Journal 156; Austin et al (n 99).

101 A Keay and M Murray, 'Making Company Directors Liable: A Comparative Analysis of Wrongful Trading in the United Kingdom and Insolvent Trading in Australia' (2005) 14 International Insolvency Review 27, 37.

102 *Re Westmid Packing Services Ltd (No 3)* [1998] 2 All ER 124, [1998] BCC 836, 842, [1998] 2 BCLC 646, 653. A similar view was taken in the disqualification case of *Re Galeforce Pleating Co Ltd* [1999] 2 BCLC 704.

103 [2011] FCA 717.

104 See, Review Group, *A Review of Company Rescue and Business Reconstruction Mechanisms* (Insolvency Service May 2000) [17]; *Productivity and Enterprise: A World Class Competition Regime* Cm 5233 (HMSO 2001) [5.10].

It is submitted that the approach being advocated here would address the overriding concern that the Cork Committee and the government had 30 years ago, namely that a company could slide into insolvent liquidation and prejudice the creditors. The only negative elements, if administration occurred and was not strictly necessary, would be the incurring of extra costs and a possible effect on the company's reputation. Now while the running up of any unnecessary cost and harm to reputation is not optimal, it is submitted that it is preferable to companies continuing to trade, incurring more and more debts, and prejudicing creditors and others, such as customers, in the long run. It has been suggested that:

> Intuitively, one would say that creditors would rather see their dividend reduced in a small way in relation to a few companies who did not need to go into administration if they were to see their losses because of wrongful trading reduced significantly.[105]

In any event, having insolvency as the trigger point for directors to do something to arrest the problems of the company rather that what is provided for presently in s 214, could give the directors more time to turn around the company, because it might be said that under the present section the directors might have concluded that their company could not have avoided insolvent liquidation before the company actually becomes insolvent.[106]

One of the ideas behind this reform proposal is, as the Cork Committee advocated,[107] if the directors at any time consider the company to be insolvent, they should take immediate steps for the company to be placed in administration (or liquidation). This is not altogether radical or overly severe, as it is something that is akin to what is required in some jurisdictions, such as France, Belgium and Germany. Given the fact that administration may now be commenced extra-judicially, and without a lot of formality and cost, this approach has attractions. It is certainly the approach taken in Australia, where voluntary administration has been embraced frequently, and is posited as the reason for a reasonably low number of reported insolvent trading cases.[108]

If this proposal were initiated it would be preferable to change the heading of the section to 'insolvent trading' in place of 'wrongful trading' as that would eliminate any connotation of blameworthiness or moral wrong that might emanate from the idea of 'wrongful' and it would enable the focus to be on the catalyst for the operation of the provision, namely insolvency.

If this alternative element for liability were introduced, the defence currently found in s 214(3), which is not very precise in any event, and widely criticised, would need to be replaced with a new defence, namely the director had reasonable grounds to expect the company was solvent when a debt was incurred, or the director took all reasonable steps (contrast with s 214(3) and the reference to 'every step') to prevent the incurring of the debt or at the time of the incurring of the debt the director had reasonable grounds for not being involved in the management of the company, or the director had reasonable grounds to believe that any debt incurred would be able to be repaid.[109]

105 Keay, *Company Directors* (n 24) 144.

106 This is something acknowledged by Paul Davies ('Directors' creditor-regarding duties in respect of trading decisions taken in the vicinity of insolvency' [2006] EBOR 302, 319).

107 Cork Report (n 8) [1786].

108 A Herzberg, 'Why Are There So Few Insolvent Trading Cases?' (1998) 6 Insolvency Law Journal 77.

109 Parts of this defence are similar to that in the Australian legislation (Corporations Act 2001, s 588H).

(B) Extending the scope of permissible claimants

At the moment s 214 only permits proceedings to be initiated by a liquidator. It is submitted that this is too narrow. In other common law jurisdictions various persons and bodies are able to initiate actions in relation to their equivalent of wrongful trading. It is contended that two other persons should be entitled to bring proceedings.

(i) Administrators

It is submitted that administrators should be empowered to commence proceedings.[110] This will reflect the fact that administration has become very popular and frequently invoked, and it has been favoured by government policy. Also, it is being used in place of liquidation in some cases, namely where there is no possibility of the company being rescued. The administrator essentially winds up the company, and may seek court approval to distribute to the unsecured creditors.[111]

The Cork Report[112] actually advocated that administrators and administrative receivers as well as liquidators be given the right to take proceedings, and it is not clear why this recommendation was not taken up. In Ireland, examiners, who fulfil a similar role to administrators in the UK, are given the right to bring proceedings. Also, it is somewhat strange that administrators in the UK are given the power to bring proceedings under the adjustment provisions, for example, for a preference, and they are not able to do so with respect to wrongful trading.

Keeping administrators from bringing proceedings has three possible drawbacks. First, if an administrator believes that directors of the company have been engaged in wrongful trading, he or she has to recommend that the company move from administration to liquidation. This is time-consuming and adds costs. Second, any creditor who is concerned that wrongful trading has occurred or is occurring might push for liquidation rather than administration so as to obtain a share of an award made under s 214. Yet, conceivably, if an administrator could take proceedings the company could be placed in administration, take action against the directors and the company might still be rescued. Third, a company could go from administration to dissolution without any consideration being given to a possible action against the directors for a breach of s 214.[113] Admittedly, allowing administrators to initiate wrongful trading actions might be said to discourage some directors from embracing administration.[114] Yet today the appointment of an administrator can be done quickly and if they do so the directors can gain assurance that they will not be liable for any future trading in which the company might engage. Also, it is unlikely that many directors would be moved to refrain from appointing an administrator because of fear of wrongful trading having occurred. Most directors will not have contemplated it.

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110 This issue has been recently raised in a discussion paper of the Department of Business Innovation and Skills, *Transparency and Trust* (Discussion Paper July 2013) para 11.6 and accessible at <www.gov.uk/government/uploads/system/uploads/attachment_data/file/212079/bis-13-959-transparency-and-trust-enhancing-the-transparency-of-uk-company-ownership-and-increaing-trust-in-uk-business.pdf> accessed 16 July 2013.

111 Para 65 of Schedule B1 of the Act.

112 Cork Report (n 8) [1791], [1792].

113 Para 84 of Schedule B1 of the Act.

114 See Davies (n 106) 323–24.

(ii) The Secretary of State

For a couple of reasons, it is submitted that it would be preferable if s 214 also permitted the Secretary of State for Business, Innovation and Skills to be able to instigate proceedings. First, we have noted already that one of the major difficulties facing liquidators is obtaining the necessary funding to bring proceedings. Whilst the government is obviously not able to expend large amounts, it could determine, in a number of situations, to bring proceedings where a liquidator might not be able to do so, or to do so might place him or her in a potentially embarrassing situation. Where the Secretary of State does take action he or she is likely to have more resources, in terms of investigation, at his or her disposal than a private liquidator. Second, the Secretary of State could take proceedings where the liquidator cannot be persuaded by creditors to initiate proceedings.

Third, the introduction of such a change would allow the Secretary of State to obtain a declaration in relation to wrongful trading and then seek a disqualification order all in the one action. It is arguable whether the Secretary of State could in fact pursue disqualification proceedings against a director under s 6 of the Company Directors' Disqualification Act 1985 (CDDA) (unfitness) on the basis that he or she has engaged in wrongful trading where no declaration is made that the director has actually so engaged. In fact Richard Schulte has submitted that the Secretary of State cannot do so.[115] In *Official Receiver v Doshi*[116] it was held that an application under s 214 may be consolidated with disqualification proceedings, but the application under s 214, in that case, had been commenced by the liquidator of the director's company.

If the Secretary of State were entitled to bring proceedings then s 7(2) of the CDDA would need to be amended, for at the moment it requires a disqualification action to be commenced within two years of the commencement of a company entering insolvency and that might be too soon for a wrongful action to be initiated. This change has been recently mooted in a Department of Business Innovation and Skills Discussion Paper, *Transparency and Trust*.[117]

In both Ireland and Australia, a government agency is entitled to initiate equivalent proceedings against directors. In Ireland action may be taken by the Director of Corporate Enforcement,[118] and in Australia action is able to be initiated by the Australian Securities and Investment Commission.[119]

Why should the Secretary of State be involved in an action that is taken for the benefit of creditors? After all is said and done, an award against directors in favour of the company can be seen as a private matter. The main thrust of s 214 is to compensate creditors of companies in insolvent liquidation, but it also plays a public role. If a person is guilty of wrongful trading there is no criminal sanction to be imposed. But the fact that wrongful trading does not lead to criminal liability should not be seen as an indication that s 214 is

115 R Schulte, 'Enforcing Wrongful Trading as a Standard of Conduct for Directors and a Remedy for Creditors: The Special Case of Corporate Insolvency' (1999) 20 Company Lawyer 80, 82. Compare A Mithani (ed), *Mithani: Director Disqualification* (Lexis) Div IV, Chap 1A [5].

116 [2001] 2 BCLC 235.

117 July 2013 at para 59 and 60 (at p 18) and accessible at <www.gov.uk/government/uploads/system/uploads/attachment_data/file/212079/bis-13-959-transparency-and-trust-enhancing-the-transparency-of-uk-company-ownership-and-increaing-trust-in-uk-business.pdf> accessed 16 July 2013.

118 Company Law Enforcement Act 2001.

119 Australian Securities and Investments Commission Act 2001.

without a public role to play. The public element in s 214 proceedings was adverted to by Robert Walker J in *Re Oasis Merchandising Services Ltd*.[120]

It is not in the public interest to permit directors to get away scot free when they have engaged in wrongful trading, because it is likely to have wide-ranging consequences, such as the creditors of the company not being able to pay their creditors and so on, thereby causing a chain reaction of insolvency.[121] A second reason is that the section involves an attempt to prescribe a minimum standard of conduct of directors in managing the affairs of companies. Third, the public is interested in companies being managed properly for a number of reasons, such as to instil confidence in the market, provide protection for stakeholders, enhance commercial morality. The public has legitimate expectations that those involved in managing companies will act properly and if they do not then they should be penalised.[122] Finally, the provision is linked to disqualification of directors, for if wrongful trading is found to have occurred, the court is at liberty, of its own volition, to disqualify the director from being involved in the management of companies for a period of up to 15 years.[123]

(C) Funding

Funding of actions was identified earlier as a real difficulty facing liquidators. A way of alleviating this concern would be to establish a central fund, administered by the Insolvency Service, on which liquidators could draw, if they could establish a good case. This was a process that was used in Australia in relation to bankruptcies for many years and appeared to work well, particularly where bankruptcy trustees did not have sufficient funds to institute recovery proceedings or seek the examination of the bankrupt and others. Such a fund could be financed by government or, given the stringencies of public financing today, a levy on companies in general, with repayment to the fund if a liquidator were successful in the proceedings issued.

Another possible approach is to give the courts discretion to give to any creditor who funds an action a prescribed amount out of the award pursuant to the s 214 proceedings, before the creditors are paid out, as well as any costs that they have expended, in order to give them an advantage and to reward them for the risk that has been adopted.[124]

(D) Corporate rescue

Besides opening up the use of s 214 more, it is possible that the changes proposed here could contribute to a greater amount of corporate rescue. Rescue is often impossible for companies because the seeking of professional advice and/or the taking of action such as appointing an administrator does not occur early enough. The fact is that the earlier that a company realises its predicament, the more likely it is that it can be saved and rehabilitated. It is acknowledged that the directors of small private companies often commence the business carried on by the company and are sentimentally attached to their firms, often having sunk their life savings into them as well as a lot of effort. As a result they are often

120 [1995] BCC 911, 918.

121 See the Australian case of *Woodgate v Davis* (2002) 42 ACSR 286, 294, where Barrett J of the Supreme Court of New South Wales discussed the fact that the Australian equivalent served a social purpose.

122 See *Commonwealth Bank of Australia v Friedrich* (1991) 5 ACSR 115, 126.

123 Company Directors Disqualification Act 1986, s 10(2)). For an example, see *Re Brian D Pierson (Contractors) Ltd* [1999] BCC 26, 55.

124 This is discussed in detail in Keay (n 70).

ready to try anything to keep their enterprise going.[125] But directors might be ready to embrace administration earlier than they have hitherto because of fear of being liable for wrongful trading. In Australia it has been found that the existence of a provision similar to what is proposed here has led to directors placing their companies into voluntary administration[126] at a point where rescue might be a possibility.[127]

6 Conclusion

It would seem that wrongful trading has not made a great impact in its 25-years-plus existence. Arguably, it is easier for liquidators to make out cases under the adjustment provisions, such as preferences (especially against connected persons) and transactions at an undervalue, than under s 214. One reason for this, and it is a critical one, is that 'wrongful trading rarely occurs in a vacuum but usually in a context of other managerial shortcomings'.[128] It has been submitted here that the present state of affairs is not palatable. In this regard, the article has identified some of the problems that liquidators encounter when considering a wrongful trading action, and that might well account for the low number of proceedings, and the perception that the wrongful trading provision has not been successful. These involve: the difficulty in establishing the critical element in wrongful trading, namely that the director knew or ought to have concluded that there was no reasonable prospect of the company avoiding going into insolvent liquidation; emphasis in some cases on the need for directors to be regarded as blameworthy in some way rather than just being regarded as someone who knew or ought to have concluded that there was no reasonable prospect of the company avoiding going into insolvent liquidation; a problem in obtaining funding; concerns as to what elements of s 214 actually mean; and what liquidators must establish.

The article proposed some reforms that might improve the usefulness of s 214 in fulfilling what its introduction was intended to achieve, as well as contributing to an increase in the incidence of corporate rescue. It was advocated that: s 214 should be changed so that directors are required not to incur further liabilities when they know or ought to conclude that their company is insolvent; administrators and the Secretary of State for Business Innovation and Skills should be permitted to initiate proceedings against directors; and some state funding should be available to liquidators and administrators where it is appropriate.

125 R Mokal, 'An Agency Cost Analysis of the Wrongful Trading Provisions: Redistribution, Perverse Incentives and the Creditors' Bargain' (2000) 59 CLJ 335, 353–54.

126 For a discussion of this in comparison with the UK regime of administration, see A Keay, 'A Comparative Analysis of the Administration Regimes in Australia and the United Kingdom' in P Omar (ed), *International Insolvency Law: Themes and Perspectives* (Ashgate 2008) 105.

127 Herzberg (n 108).

128 D Milman, 'Improper Trading: Can it be Effectively Regulated?' (2004) 4 Company Law Newsletter 3.

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An intermediate standard of proof in serious civil cases in England and Wales

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Introduction

For over half a century, judges have spoken in imprecise terms of a standard of proof in civil cases involving serious allegations or bearing a serious consequence (serious civil cases), a standard higher than the 'balance of probabilities' (see *Bater v Bater*). Judges have continued to explain and define the standard of proof in serious civil cases across pages and pages of their judgments and continue to adopt various approaches since the early twentieth century. The vagueness of these explanations is far from coherent. The true scope of the case law on the civil standard in serious civil cases remains confusing and subsequent case law has not settled into a clear path, despite precedent established in the House of Lords in *Re B* and *Re D*. In the interests of greater certainty and consistency, this paper seeks to offer a better approach – a third standard of proof, a standard lying between the ordinary civil standard of balance of probabilities and the higher criminal standard of beyond reasonable doubt.[1] This 'third-standard' approach would be open-textured, but it would be stabilised by identifying a range of clear cases to which it could be applied. New serious civil cases could be embraced by the third standard if, and only if, a suitably strong analogical argument could be devised. This approach would set in motion a process of incremental development and would, thus, by nature be a source of some uncertainty. However, it would be clearer than the law as it now stands and mark a significant advance over the imprecision that has prevailed for too long.

This paper will first address how the courts approach a typical civil case and a serious civil case. In a typical civil case (e.g. a commercial or negligence action), the balance of probabilities standard is applied. This is because society has a minimal concern with the outcome of such private suits, and monetary redress is typically in the ultimate interest of the claimant. Parties in a civil case share the risk of error equally.[2] This means that as long

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1 *R v Hepworth* [1955] 2 QB 600 *per* Lord Goddard CJ: 'One would be on safe ground if one said in a criminal case to a jury: "You must be satisfied beyond reasonable doubt". One could also say – "You, the jury, must be completely satisfied" – or, better still – "You must feel sure of the prisoner's guilt".'

2 One function of legal process is to minimise the risk of erroneous decisions.

as the balance of probabilities is met, the typical case is decided in favour of the party that tilts the scale to a degree of more than 0.5 or 50 per cent.[3] Similarly, the term 'balance of probabilities' is defined as to 'think it more probable than not that an event had occurred.'[4] This implies that, if the probabilities of occurrence and non-occurrence are equal, the event is then deemed to have not occurred.

Serious civil cases are quite different and take many forms. They may involve a criminal accusation; for example, an allegation of arson in an action on insurance policy,[5] or that of murder in a probate proceeding.[6] Such accusations may lead to the removal of a child from the family home on grounds of abuse,[7] or result in issues affecting liberty and livelihood, such as the deportation of a person back to his/her country of origin,[8] or declining to recommend the release of a prisoner.[9] More often than not, serious civil cases go beyond financial loss. Such cases seem to indicate that the degree or cogency of the evidence required by the individual case depends very much on the nature of the serious allegation and its consequence, if proved true in the civil court. Whether the nature or consequence of the case is serious, in this paper both are referred to as serious civil cases. The general approach when confronted with a serious civil case is for the judge to apply an approach implying some 'deviation' from the normal balance of probabilities. In *Issais*,[10] for example, the court stated that a civil case concerned with an allegation of arson cannot be considered to require the same standard of proof as a commercial action or one related to negligence. Lord Atkin relied on several authorities[11] and stated that 'if the commission of a crime is directly in issue in any proceeding, criminal or civil, it must be proved beyond reasonable doubt'.[12] This raises the need for a separate standard.

Thus, the question is what course, away from the normal approach, should be taken in serious civil cases? The answer is that the deviation is typically a further step taken by the judge to ensure that the evidence produced by the party alleging a serious issue is cogent and commensurate to the seriousness of the allegation and/or its consequence.[13] The confusion in this further step stems from the 'remodelling' of the balance of probabilities standard to extend its application to serious civil cases, as well as the fact that the choice of

3 Lord Denning in *Miller v Minister of Pensions* [1947] 2 All ER 372, 373–74, gave one of the clearest explanations of what amounts to the civil standard of proof. For the sake of convenience, a mathematical quantification is used to explain the operation of a typical civil case: to win a civil case, the claimant need only prove probability to a degree of more than 0.5: C M A McCauliff, 'Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?' (1982) 35 Vanderbilt Law Review 1293–335. See also Mike Redmayne in 'Standards of Proof in Civil Litigation' (1990) 62(2) MLR 167–74. He defends the 0.5 rule adequately from the perspectives of expected utility of verdict, minimising expected errors, and treatment of symmetry for both the claimant and the defendant in a civil case. Moreover, the word 'balance' is indicative of equi-probability between the claimant and the defendant, and some may argue this to be a weakness. See David Hamer, 'Probabilistic Standards of Proof, their Complements and the Errors that are Expected to Flow from Them' (2004) 1(1) UNELJ 71.

4 Denning LG in *Miller v Minister of Pensions* (n 3).

5 *Issais v Marine Insurance Co Ltd* [1923] 15 LI L Rep 186.

6 *Re Dellow's Will Trusts* [1964] 1 WLR 451.

7 *Re B* [2009] 1 AC 11.

8 *Al-Khawaja v Secretary of State for the Home Office* [1984] AC 74.

9 *Re D* [2008] 1 WLR 1499.

10 *Issais* (n 5) 192.

11 John Pitt Taylor and G Pitt-Lewis, *A Treatise on the Law of Evidence as Administered in England and Ireland: With Illustrations from Scotch, Indian, American and Other Legal Systems* (9th edn Sweet & Maxwell 1895); and James F Stephen, *A Digest of the Law of Evidence* (MacMillan & Co 1876).

12 *Issais* (n 5) 192.

13 Various serious civil cases have applied this approach and a more in-depth discussion can be found in section 1 below.

language used lacks clarity. Unfortunately, the exact nature of this further step and what it entails is not always clear, as various approaches and interpretations have been applied by judges in the past.

Two notable approaches have emerged from this deviation: the 'flexible' and the 'prior probability' approaches that have been consistently applied since the 1950s (these will be discussed in detail in section 1 below). This remodelling of the civil standard to apply in serious civil cases is a departure from the traditional understanding of the civil standard of proof. It is argued in this paper that, by incorporating an additional step in serious civil cases, when the same is not required in a typical civil case, a different standard is effectively being applied. It is also argued in this paper that, when such words are used (i.e. cogent evidence commensurate with the gravity of the allegation) and further careful scrutiny of the evidence is presented in serious civil cases, the purpose is not merely to *prove* with a balance of probabilities that the event has taken place, but to *persuade* the fact-finder that the event has actually taken place (persuade mandates something more than mere probabilistic proof of the occurrence or existence of the fact). The language used by judges in the cases discussed in section 1 below demonstrates this purpose.

It is argued that, to achieve this purpose, the standard ought to be a higher standard of the balance of probabilities and distinct from the civil standard (i.e. at least 51 per cent). Judges cannot expect cogent evidence and *at the same time* state that the standard is the civil standard of probabilities. This approach breaches the principle of non-contradiction by asserting 'P' and 'Not-P' simultaneously (which is logically unsustainable). A case for a higher standard of proof is, thus, made and better known as the intermediate standard of proof, which can be seen in America (see section 3).[14]

The definitions of both the standard of proof and the civil standard of balance of probabilities become essential to this discussion. Standard of proof is defined as 'the *degree* [emphasis added] of cogency or persuasiveness required of the evidence adduced by a party, in order to discharge a burden of proof borne by the said party'.[15] The definition explicitly states that it is the degree of cogency or weight of the evidence that determines whether the standard has been met. If this is the case, then it is difficult to rationalise how mandating more cogent evidence would not affect the degree of proof.

Standards of proof are placed based on this determination – the more serious the case, the higher the standard of proof; the less serious the case, a lower standard is applied. Thus, when a case involves serious issues, how does the standard of proof protect against errors? Typically, the standard of proof applicable is determined by the extent to which the finding affects the party whose allegation has been proved true. This ought to create an awareness that the finding that the allegation is true would mean the finding would affect the party the allegation is made against.[16] Similarly, the level at which a standard is set is a key determinant of the type of error that may occur. The appreciation that the expected number of errors in a serious civil case increases as a result of the fact-finding process based on the seriousness of the allegation made and the consequence of the allegation, affects the standard of proof: a similar appreciation is that the expected number of errors

14 See Denning LJ, *Miller v Minister of Pensions* (n 3). See also, Rosemary Pattenden, 'The Risk of Non-persuasion in Civil Trials: The Case Against a Floating Standard of Proof' (1988) (7) CJQ 220 –33, which states that either terminology is confusing, in that 'probabilities' means both parties are in equilibrium, when this is not the case. The latter, on the other hand, seems to suggest the cogency, rather than the quality, of the evidence.

15 *Miller v Minister of Pensions* (n 3).

16 Redmayne (n 3) 169 suggests that the choice of the appropriate standard comes from the 'expected consequences of our fact-finding decisions'. He stated that the reason the criminal standard is much higher is due to the awareness of the possible consequence in the event the defendant is found guilty.

in a typical civil case is lower than in serious civil cases, hence the standard is the lower standard of balance of probabilities. The closer that a fact-finder is able to get to certainty, the greater the opportunity of avoiding error. And this is argued to be the underlying reason for the various approaches and interpretations in serious civil cases (see discussion in section 1 below) – the need to achieve greater certainty in these cases. If this is the case, then a higher standard ought to be imposed as opposed to the balance of probabilities. The use of an intermediate standard would serve to protect the party accused of a serious allegation against any mistakes made by the fact-finder against the cost of potential errors made in the adjudication of that particular case.

In section 1, the hierarchy of serious civil cases in the UK is described, explaining how the adoption of varying approaches of the civil standard of balance of probabilities in these cases is unsatisfactory. This paper then provides an explanation of why the different language used causes incoherence and indicates a different (and often higher) standard of proof compared to the balance of probabilities standard. In section 2, an explanation is provided as to why the intermediate standard of proof ought to be used in serious civil cases, drawing similarities to certain 'special civil cases'. The use of such a standard is considered in America in section 3. This paper then explores, in section 4, the reluctance of the judges to adopt an intermediate standard of proof and reasons underlying their reluctance, and section 5 outlines possible reform in serious civil cases.

1 Serious civil cases in England and Wales

(A) The early cases

In early cases, attempts were made to address the presence of a serious allegation in a civil case by applying the criminal standard of proof. This is evident, in particular, in divorce proceedings based on grounds of adultery[17] and cruelty,[18] prior to the Divorce Reform Act 1969. The criminal standard of proof was also applied in legitimacy[19] and professional misconduct cases.[20] The primary reason as to why the criminal standard had been applied in the cases above is the seriousness of the allegation and its consequences. Some judges have gone on to say that the distinction between the criminal and civil standard is 'largely illusory'.[21] However, none of these cases has suggested the intermediate standard of proof approach as applied in America.[22] As it appears, the controversy on the appropriate

17 Various *dicta* are found in *Ginesi v Ginesi* [1948] P 179; *Bastable v Bastable and Sanders* [1968] 1 WLR 1684. At the time, adultery was regarded as a quasi-criminal offence by the ecclesiastical courts.

18 *Bater v Bater* [1951] P 35; *Davis v Davis* [1950] P 125. The criminal standard was, perhaps, more readily understandable prior to the Divorce Reform Act 1969, since the grounds for divorce were at that time still depicted as matters of proving fault.

19 See *Preston-Jones v Preston-Jones* [1951] AC 39. In *Serio v Serio* [1983] 4 FLR 756, the Court of Appeal did not apply s 26 of the Divorce Reform Act 1969 when it came to rebutting the presumption of legitimacy and stated that the standard could not just be the civil standard, but rather a higher standard.

20 *Re A Solicitor* [1992] QB 69.

21 See Lord Bingham in his *dictum* in *B v Chief Constable of Avon and Somerset Constabulary* [2001] 1 WLR 340, 353–54 [31]; Lord Scarman in *Al-Khawaja* (n 8) 113–14 stated that the degree of probability must be such that the court is satisfied; Lord Goddard in *R v Hepworth and Fearnley* [1955] 2 QB 600, 603, where he stated that he was unable to understand the difference between the criminal and civil standards of proof. Compare this to *Re W (Minors)* [1994] 1 FLR 419, 426, where Balcombe J stated that the trial judge should have applied the higher standard of proof, instead of the basic civil standard of proof (on appeal, however, the Court of Appeal emphasised that the standard is the balance of probabilities). Similarly, Lord Bingham CJ in the Court of Appeal in *R (McCann) v Crown Court at Manchester* [2003] 1 AC 787 commented that the heightened civil standard and the criminal standard are virtually indistinguishable.

22 For the explanation of the term 'clear and convincing' evidence, see Charles T McCormick, *McCormick on Evidence* (5th edn West Publishing 1999) ch 36, 340. A more detailed discussion is found in section 3 below.

standard of proof that ought to apply in serious civil cases emerged even before *Bater v Bater* or *Hornal v Neuberger Products Ltd*[23] were decided.

Alongside the early cases, an alternative strand emerged, including that seen in *Bater v Bater*[24] and *Hornal v Neuberger Products Ltd*.[25] For example, Denning LJ in *Bater v Bater* propounded a floating standard of proof in serious civil cases, which depended largely on the subject matter of the allegation. Although the standard introduced is variable (i.e. flexible), it is not as high as the criminal standard:[26]

> Many great judges have said that, in proportion as the crime is enormous, so ought the proof to be clear. The case may be proved by a preponderance of probability, but there may be degrees of probability within that standard.[27]

The standard propounded in *Bater v Bater* is indeterminate and there is an absence of meaning. This is overstated as a criticism, since the relevant standard is known to exceed 0.5. It could, perhaps, be lower than the criminal standard; this is, however, vague. It might be said with more justification that the *Bater* approach exhibits a lack of clear meaning, which means that the *Bater* approach opens up a field of interpretative possibility. This field occupies the space between the civil standard and the (not precisely expressed) criminal standard. Similar ambiguity is observed in *Hornal v Neuberger*[28] and *Re Dellow's Will Trusts*[29] below.

In *Hornal v Neuberger*, Lord Morris, *obiter* (together with Lord Hobson) said that 'the very elements of gravity become a part of the whole range of circumstances which have to be weighed in the scale when deciding as to the balance of probabilities'.[30] After citing Lord Morris in *Hornal*, Ungoed-Thomas J in *Re Dellow's Will Trusts*, where the issue was whether a wife feloniously had killed her husband, upheld that: 'The more serious the allegation the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it.'[31] The court saw this as a serious issue based on the facts that if the case is proved, the wife will be branded a murderer.[32]

(B) The law today: from *Re H* to *Re B* and *Re D*

The law as it stands today can be derived from Lord Nicholls' statement in *Re H* (see below) that mandating stronger evidence in serious civil cases does not affect the standard of balance of probabilities:[33]

> the court will have in mind as a factor, *to whatever extent is appropriate in the particular case* [emphasis added], that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the

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23 [1956] 3 All ER 970.

24 [1950] 2 All ER 458; approved in *Blyth v Blyth* [1966] AC 643 and endorsed in *Al-Khawaja* (n 8).

25 *Hornal v Neuberger* [1957] 1 QB 247.

26 Redmayne referred to the approach in *Bater* as the flexible standard, whereby the standard of proof varies according to the seriousness of the issues (n 3) 181–84.

27 *Bater* (n 18) 459.

28 *Hornal v Neuberger* (n 25).

29 See *Re Dellow's Will Trusts* (n 6).

30 *Hornal v Neuberger* (n 25) 978.

31 *Re Dellow's Will Trusts* (n 6) 455; see also *Redmayne* (n 3) 184–87 who refers to this as the 'prior probability' approach.

32 The same reasoning was found in the Australian case of *Helton v Allen* [1940] 63 CLR 691 (HC).

33 Lord Nicholls in *Re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563, 586. This passage by Lord Hoffmann, in *Re B* (n 7) 6, reiterates Lord Nicholls' view in *Re H*.

> court concludes that the allegation is established on the balance of probabilities.[34]

Lord Hoffmann in *Re B* focused on the words italicised above in Lord Nicholls' passage in *Re H* and stated that *Re H* did not lay down any rule of law, but merely states that when there is a serious allegation, one needs to use common sense and not law to determine if the occurrence of a fact in issue had been proved on a balance of probabilities.[35] Lord Hoffmann went further to explain how the inherent probabilities test operates by providing the example of a child alleging sexual abuse by a parent, and how it is common sense to start with the assumption that most parents do not abuse their children, but that this assumption may be dispelled by adducing compelling evidence of the relationship between the parent and the child. He also stated that:

> it would be absurd to suggest that the tribunal must in all cases assume that serious conduct is unlikely to have occurred. In many cases, the other evidence will show that it was all too likely. The fact that the child was assaulted by one of the two people, that it would make no sense to start one's reasoning by saying that assaulting children is a serious matter and therefore neither of them is likely to have done so.[36]

It is submitted that Lord Hoffmann's explanation of how the balance of probabilities test works in the example given above is indeed incomprehensible. Fact-finders do take notice of the seriousness of the allegation and the consequence of the allegation as a whole before it is proven in court, and this is often taken into consideration against the evidence presented in court when deciding if the occurrence of a fact in issue has taken place or not. Typically, the issue of likelihood and unlikelihood of the fact is something the party bringing the action must prove in court. So, in the example provided by Lord Hoffmann above, the party bringing the action would need to bring compelling evidence to prove the allegation of sexual abuse has been made; and, often, the party bringing the action already has in mind who the perpetrator is and will present the case with that perpetrator in mind. Following Lord Hoffmann's explanation above, his Lordship seems to be dissecting the facts and showing how the initial stage of proving sexual abuse places a greater responsibility on the part of the party bringing the action to prove that sexual abuse had indeed taken place. What if the identity of the perpetrator is in issue? For example, what if the mother had various partners during the time the child was abused? Would there not be a need for compelling evidence to identify the perpetrator and not just establish that the event did in fact occur?

Lord Hoffmann in *Re B* further stated that the inherent probabilities and the gravity of the allegation are not related.[37] It is argued in this paper that the very use of the inherent probabilities approach to certain cases that are deemed serious can only mean that the seriousness of the case (or the gravity of the allegation) warrants careful consideration on the evidence received in court. When this is the case, it is difficult to comprehend Lord Hoffmann's perception that inherent probabilities and the gravity of the allegation are not related.

A more recent case, *Re D*, involved the decision of the Life Sentence Review Commissioners in Northern Ireland not to direct release from prison (on licence) of D,

34 *Re H* (n 33) 586 approves *Hornal v Neuberger* (n 25) and *Re Dellow's WT* (n 6). Consistently with Lord Hoffmann, Baroness Hale in the same case held that neither the seriousness of the allegation nor the consequences affect the standard of proof, therefore inherent probability should be considered, where relevant, in deciding where the truth lies.

35 *Re B* (n 7) 21.

36 Ibid.

37 Ibid.

who was serving a life sentence for murder, on the basis of protecting the public from D and confining him to further sentence despite completing the 'tariff' part of his sentence.[38] Lord Carswell in *Re D*,[39] expounded that, in some contexts, the courts need to look at the facts 'more critically or anxiously' and apply *good sense* before the civil standard is satisfied, in particular in cases that involve a serious allegation or bear a serious outcome.[40] This approach is the 'anxious scrutiny' test. This test, explained in *Re D*, suggests that judges apply caution when weighing evidence in a serious civil case.[41] However, in *Re D*, Lord Carswell stated that this did not imply that the case required a different standard or an especially cogent standard of evidence,[42] suggesting that the balance of probabilities should still be the guiding factor in making the ruling. The issue of using good sense or 'common sense' further contributes to the uncertainty in this area, as Lord Carswell's statement dictates the need for caution in serious civil cases and not a separate, and thus higher, standard of proof.[43] However, choosing common sense over clear guidance is less than ideal.[44] If judges consistently emphasise the need for common sense when applying the prior probability approach, then the rationale underlying the need to reiterate this approach repeatedly should be questioned.

(C) Problem with the language used by judges

Based on the language used in cases ranging from *Bater v Bater* to *Re H*, the judges are seeking cogent evidence to prove the facts alleged in the individual serious civil cases. *Re B*, a case involving allocation of parental responsibility for children, decided that the criteria found in s 31(2) of the Children Act 1989 (i.e. whether or not the child in question is suffering, or is likely to suffer, significant harm) require the application of a standard of proof based upon the balance of probabilities.[45] Baroness Hale in *Re B*, consistently with *Re H*, opined that in childcare cases, in particular, special care is needed with regard to the seriousness of the purported crime and a decision cannot be based on '*unsubstantiated suspicions*'.[46] This expression by Baroness Hale is unclear. Does it mean that unlike typical civil cases, serious civil cases warrant a careful deliberation on whether the standard of proof is achieved? It is argued in this paper that no case, whether a serious or a typical civil case, should be or indeed is based on unsubstantiated suspicions. On the other hand,

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38 *Re D* (n 9).

39 Ibid 1508–09. Lord Carswell stated that the panel should 'devote the necessary critical attention to the evidence adduced in support of such a serious charge'. His Lordship goes on to say that the evidence 'was clear and cogent and pointed very strongly to the conclusion reached by the panel'.

40 *Re D* (n 9) 1509.

41 Ibid.

42 Ibid.

43 Consistent with *Re H*, Lord Hoffmann in *Re B* said that: 'There is only one rule of law, namely that the occurrence of the fact in question must be proved to have been more probable than not. Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities.' Lord Hoffmann, also agreeing with Baroness Hale on how common sense is used in care-order applications, said that: 'If a child alleges sexual abuse by a parent, it is common sense to start with the assumption that most parents do not abuse their children. But this assumption may be swiftly dispelled by other compelling evidence of the relationship between parent and child or parent and other children.': (n 7) 21. Also see Lord Carswell in *Re D* (n 9) 1509, who refers to the use of 'good sense' in deciding the gravity of the allegation.

44 Peter Mirfield, 'How Many Standards of Proof Are There?' (2009) LQR 31–38. On page 35, Mirfield stated that *Re B* had left 'evidential logic, allied with common sense, in charge of the field'.

45 The House of Lords in *Re B* (n 7) also affirmed *Re U (A Child)* [2004] EWCA Civ 567 that the same balance of probabilities standard applied to the welfare considerations found in s 1 of 1989 Act.

46 *Re B* (n 7) 30.

'*unsubstantiated suspicions*'[47] could also indicate the standard of proof to be a much lower standard from that of balance of probabilities. Hence, the choice of language has created confusion about the standard applied in serious civil cases.

Lord Carswell in *Re D* went on to state that the civil standard is 'finite and unvarying',[48] suggesting that situations that make such *heightened* examination necessary may include the inherent unlikelihood of the occurrence taking place, the seriousness of the allegation to be proved, or, in some cases, the consequences which could follow from acceptance of proof of the relevant fact.[49] Although Lord Carswell asserted that he was not putting forward a new test, or a new requirement, the problem lies with the wording and the corresponding approaches used in the case.[50] These have the potential to mislead when interpreting what is truly required to prove a serious civil case. For instance, the Court of Appeal in *Re D* expressed that the case at hand required 'more cogent evidence than would be conventionally required' and a 'more compelling quality of evidence'.[51]

Lord Carswell in *Re D* further referred to and endorsed Richards LJ in *R(N) v Mental Health Review Board (Northern Region)*,[52] where Richards LJ stated that the civil standard of proof is *flexible* in its approach to the 'strength and quality of the evidence' required for an allegation to be proved on the balance of probabilities, and the degree of probabilities is not affected by this.[53] Incidentally, this is the same approach applied by Denning LJ in *Bater v Bater* indicating the standard to be a higher standard than the balance of probabilities.[54]

The language used in the cases discussed above requires judges to be meticulous with the evidence presented in court and to exercise caution when faced with a serious civil case. Further examples of the confusing nature of the language used in various cases are: 'the need for cogent evidence'; or that 'the standard must be commensurate with the gravity of the allegation'; or that 'the more serious the event, the less likely that the event took place'; or that the evidence mandates 'anxious scrutiny' – all seem to suggest a different standard than that of the ordinary civil standard of proof that is applied to a typical civil case.[55] In *Re H*, Lord Lloyd warned judges of the dangers of the repeated use of such words and the potential for them to harden into a formula.[56] For this reason, Lord Lloyd (disagreeing with Lord Nicholls in *Re H*) refused to add any comment explaining the civil standard of balance of probabilities in his judgment in *Re H*.

In *Re B*, Lord Hoffmann agreed with Lord Steyn in *McCann*[57] and attempted to clarify the approach in serious civil cases by refusing to use 'colourful' language to elucidate the applicable standard and to only consider the inherent probability test where it is relevant.[58]

47 Ibid 30.

48 His Lordship affirms *R v Mental Health Review Board* [2006] QB 468, *Re D* (n 9) 1509.

49 Ibid.

50 Ibid 1507–08.

51 Ibid.

52 *Mental Health Review Board* (n 48).

53 *Re D* (n 9) 1509, referred to *Mental Health Review* (n 48) [62].

54 *Bater v Bate*r (n 18). See also, Redmayne (n 3) 175–76.

55 Lawrence M Sloan, in 'Judicial Decisions and Linguistic Analysis: Is There a Linguist in the Court?' (1995) 73 Washington ULQ 1069, 1076, attributes that language interpreted by judges is often not how linguists would have interpreted the language. He speaks of the tension between definitional and prototypical views of word meaning in judicial setting. Sloan also states that, in hard cases, the 'ordinary meaning' of the word cannot be used to interpret the word(s) and a decision must be made on the kind of analysis the court should use.

56 *Re H* (n 33) 577–78.

57 Lord Steyn, in *R (McCann) v Crown Court at Manchester* (n 21) 812, stated that clarity of the standard that applies is important.

58 *Re B* (n 7) 35.

His Lordship accepted that the process of elucidating the applicable standard has the potential to cause confusion.[59]

(D) Too much explaining of the standard of proof in serious civil cases sends a signal that the standard is not the normal balance of probabilities

Despite Lord Hoffmann's attempts to demystify the applicable standard in serious civil cases in *Re B*, his Lordship still proceeded to echo the inherent probability test found in *Re H*. This does not, unfortunately, provide a convincing explanation that the standard in serious civil cases is that of the normal balance of probabilities, as the need to remind fact-finders of the additional step (approach) in serious civil cases that needs to be undertaken is not often extended to typical civil cases. In this sense, there seems to be an element of fear or anxiousness when judges are faced with serious civil cases, while this is not the case with typical civil cases.[60]

This means that the more serious the accusation, the less it is believed and thus the greater the need for the evidence to convince the judge. The choice of the appropriate standard of proof is determined by the appreciation or awareness of the expected consequences of our fact-finding decisions.[61] It is argued in this paper that, for the judge to be convinced that the evidence produced by the party to prove the allegation is true, then the cogency (or 'weight') of the evidence becomes significant. For this reason, in serious civil cases, the seriousness of what is alleged or its consequence has a correlation with the weight of the evidence received in court and this in turn affects the degree of belief about whether or not the event had taken place.

This is not to say that there is a way of quantifying the evidence tendered in court to prove a case, but that the effect the evidence has on the belief of the fact-finder before a decision is made is critical. Still, the inherently more-likely-than-others approach established by Lord Nicholls in *Re H* has the effect of applying to all types of civil cases ranging from a typical civil case to a serious civil case. This 'catchall' application propounded by Lord Nicholls reflects an easy approach to dealing with all types of civil cases without actually taking into account the fact that seriousness of cases is subjective and varied. It is argued in this paper that the approach in *Re H* (i.e. the inherently more-likely-than-not test) is fundamentally flawed due to what happens when a serious case has facts that are rare and unique. Lord Nicholls suggests that the more serious the allegation, the less likely it is that the event occurred and, hence, the stronger the evidence should be. This means stronger evidence is required to satisfy a civil tribunal that the 'rare' allegation had indeed taken place. Although Lord Nicholls did recognise that some things are inherently more likely than others,[62] it is difficult to understand how a serious civil case can be decided on a standard of balance of probabilities. The need for stronger evidence means that the weight of the evidence tendered in court must be very persuasive (or convincing) – persuasive enough (or convincing enough) to move the fact-finder to decide that the fact had occurred or existed.

59 *Re B* (n 7) 35.

60 For example, in insurance fraud cases, insurers avoid pleading fraud as the explanations and approaches used by judges indicate a different standard from the balance of probabilities standard: see, Johanna Hjalmarsson, 'The Standard of Proof in Civil Cases: An Insurance Fraud Perspective' (2013) IJE and P 47–73.

61 Redmayne (n 3) 169.

62 *Re H* (n 33) 586.

(E) Confusion on standard of proof in serious civil cases leading to appeals

A further problem with these confusing approaches is that they have led to appeals to the higher courts. For example, in *Re D*, the Court of Appeal applied the flexible standard, and this was the main subject of appeal to the House of Lords. Although appeal courts rarely interfere with the findings of the trial judges, it is important for the parties and their lawyers to be aware of the relevant standard of proof that is applied to manage the case in the most effective manner.[63] Confusing language describing the standard of proof in serious civil cases, such as that used by the Court of Appeal in *Re D* requiring 'more cogent evidence than would be conventionally required' and a 'more compelling quality of evidence' can, and (it is submitted) should, be avoided, and a more concise intermediate standard of proof applied for serious civil cases, as demonstrated in America.[64]

Similarly, in the recent case of *Re S-B Children (Care Proceedings: Standard of Proof)*, the trial judge applied the standard which was not akin to the balance of probabilities in a childcare/placement proceeding and, during the fact-finding hearing, stated that there was a 60 per cent likelihood that the father had caused the injuries and 40 per cent chance of the mother having done so.[65] The trial judge also proceeded to say: 'The allegations in this case are very serious . . . When I apply the appropriate standard of proof, it has to be based on evidence of reliability and cogency equivalent to the gravity of the allegations.'[66] Further, in *R (McCann) v Crown Court at Manchester*, Lord Steyn cited a passage in *Re H*[67] as authority that a higher standard should be applied in serious civil cases. These cases, in which the party appealed on the grounds of the application of the incorrect standard, demonstrate that the law in this area is still not clear and is indeed muddled by difficult language.

All the cases discussed in this section reinforce the rationale in *Re H* (with the exception of *Bater*) that the requirement for cogent evidence or careful scrutiny in fact does not affect the degree of probability. Thus, the balance of probabilities standard still applies in serious civil cases. But it is argued here that the requirement for cogent evidence and careful scrutiny in fact *does* affect the standard of proof.[68] The analysis of the cases illustrates a policy decision by the courts and Parliament underlying certain civil cases (quite apart from special and hybrid civil cases) where a higher standard and a criminal standard have been applied.

2 'Special' civil cases and hybrid cases justify the incorporation of an intermediate standard of proof

Established 'special' civil cases that apply a standard higher than the balance of probabilities include actions of rectification that require the evidence to be 'strong and irrefragable';[69] professional misconduct cases[70] where intention to change domiciles must be 'clearly and unequivocally proved';[71] standards in determining paternity that are said to be higher than

63 Pattenden (n 14) 233.

64 *Re D* (n 9).

65 *Re S-B Children (Care Proceedings: Standard of Proof)* [2010] AC 678.

66 Ibid.

67 *Re H* (n 33) 586.

68 C R Williams, 'Burdens and Standards in Civil Litigation' (2003) 25 Sydney Law Review 165–88, 185.

69 *Re Snowden, Smith v Spourage* [1979] 2 All ER 172, 177; *Earl v Hector Whaling* [1961] 1 Lloyd's Rep 459 (CA). See, also, R Cross and C Tapper, *Cross on Evidence* (6th edn Butterworths 1985) 149.

70 *Rowland v Boyle* [2003] EWHC 78 (Ch).

71 *Moorhouse v Lord* [1863] 10 HL Cas 272, 286.

the civil standards but lower than the criminal standard;[72] the presumption that a marriage ceremony is valid, which requires evidence in rebuttal that is 'strong, distinct and satisfactory'[73] or 'evidence which satisfied beyond reasonable doubt that there was no valid marriage';[74] and the approval of medical treatment for an incompetent mentally ill patient, in which the proposed treatment must be 'convincingly shown' as medically necessary.[75] In rectification cases and whether a secret trust exists, for example, ordinarily the standard of proof is balance of probabilities, however, where fraud is alleged, a higher standard of proof is required.[76] Similarly, in enforcement actions under the Competition Act 1998, the Competition Appeal Tribunal (CAT) recognised that the Office of Fair Trading (OFT) has to discharge its burden of proof by adducing 'strong and compelling evidence' to prove that infringement had taken place and, given the seriousness of the allegations, the OFT will be required to exercise 'any reasonable doubt' in favour of the company being investigated.[77] Further, the tribunal should not be anything less than sure that the decision was soundly based.[78] Despite the CAT recognising *Re H* and the civil standard, the CAT itself recognised that the test it was applying was tantamount to that of a criminal case.[79] In *JJB*, the CAT stated that the evidence to prove infringement of the Act must be correspondingly more 'cogent'.[80] It is observed from these cases involving infringement of the Competition Act that the CAT is trying very hard to reconcile and 'fit in' with *Re H*'s interpretation of the civil standard. This is, in particular, quite astounding as numerous times in the judgments in *Napp* and *JJB* the tribunal observes the gravity of the infringement and the corresponding need for evidence. In *Yeganeh v Zurich*,[81] the Court of Appeal appeared to apply a higher standard of proof (by looking for a reasonable doubt synonymous to the criminal standard) and found the allegation of arson unproven and decided that the trial court had failed to direct itself to the seriousness of the allegation (arson). The court did not designate any standard of proof, nor did it discuss any of the precedent found in section 1 of this article.

Given this wide range of the examples, it is evident that there will be a wide disparity of treatment in civil cases. The type of standard used depends on the facts of the individual cases. In these examples, it is difficult to understand why serious civil cases (especially those discussed in section 1) do not merit the same treatment. At the same time, it is difficult to comprehend why, in these cases, the courts have accepted a separate treatment of the standard from that adopted in serious civil cases. Although the courts have not labelled this as a separate standard from the civil standard, there is a *tacit agreement* that the standard in these cases is higher than the civil standard of balance of probabilities based on the nature of the cases.

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72 *W v K* [1988] Fam Law 64. See also *Serio v Serio* (n 19) above, the Court of Appeal held that the standard on the issue of paternity is slightly higher than the balance of probabilities.

73 *Piers v Piers* [1849] 2 HL Cas 331, 389.

74 *Mahadervan v Mahadervan* [1964] P 233, 246.

75 *R (N) v Dr M* [2003] 1 WLR 562 (CA).

76 *Re Snowden* (n 69).

77 *Napp Pharmaceutical Holdings Limited v DGFT* [2002] CAT 1 [100]; *Genzyme Limited v OFT* [2004] CAT 4 [148]. See also *JJB Sports plc v OFT and Allsports Limited v OFT* [2004] CAT 17 [164].

78 *Napp* (n 77) [108].

79 Ibid [108].

80 *JJB* (n 77) [201].

81 *Yeganeh v Zurich* [2011] EWCA Civ 398. This case involved a claim made by Yeganeh of his household insurance policy in respect of the loss and damage to his property and its contents caused by a fire at the property. Zurich avoided the policy on the grounds both that the appellant had started the fire deliberately and also that he had knowingly made a false claim for the loss of items of his clothing.

It is also difficult to understand why the same reasons used to reject the use of an intermediate standard in cases discussed in section 1 are not shared in these special cases. Common to these special cases is the fact that a definition of the higher standard of proof is typically lacking; instead, the mere statement that the standard is higher than the civil standard but lower than the criminal standard is made. In addition, the justification for a different standard for these special cases against the cases discussed in section 4 is not strong, especially in cases where the livelihood of the person alleged in the accusation is in question. A good example of the further development of this disparity of treatment is the implementation of hybrid cases.

The hybrid case is another category of civil case in which a different standard is applied – a criminal standard. Although a civil case is initiated in the civil court, applying Civil Procedure Rules (CPR) due to the consequence of the allegation could affect the livelihood of the defendant, so the standard is the criminal standard beyond reasonable doubt. A person who fails in establishing their defence in a civil case could be penalised and their movement restrained, clearly affecting their rights given by Article 8 of the European Convention on Human Rights, and resulting in moral stigma attached to the person through, for example, the loss of reputation, liberty and/or livelihood. Examples of such cases include: antisocial behaviour orders as found in s 1(1)(a) of the Crime and Disorder Act 1998;[82] applications involving sex offenders pursuant to s 2 of the Crime and Disorder Act 1998;[83] football banning orders pursuant to the Football Disorder Act 2000;[84] and contempt proceedings.[85]

Al-Khawaja,[86] which dealt with detention pending deportation of persons alleged to be illegal immigrants, affords another illustration. In this case, if the allegation was found to be true on a balance of probabilities, the immigrant could be ordered to be deported. Such a deportation order can obviously be detrimental to the immigrant's liberty and livelihood. The decision of the House of Lords and the applicable standard of proof was unclear. The House of Lords seemed to apply the civil standard of balance of probabilities on the defendants to prove that they entered into the country legally and imposed a higher standard on the government to prove that the immigrants had entered into the country unlawfully.[87] Further, Lord Scarman's expression that the facts justifying detention must be proved 'to the satisfaction of the court' seemed to connote a higher standard of proof.[88] Conversely, in *Secretary of State for the Home Department v Rehman*, a case concerning deportation on the grounds of alleged links to terrorism, where the House of Lords ruled that while any specific facts on which the Secretary of State relied should be proved on the ordinary civil balance of probability, no particular standard of proof was appropriate to the formation of his executive judgment or assessment as to whether it was conducive to the public good that a person should be deported, which was simply a matter of a reasonable and proportionate judgment on the material before him.[89] The concern is that, despite the fact that both *Khawaja* and *Rehman* are cases dealing with deportation, in practice, the courts treat them differently from each other – a higher standard of proof is mandated in the

82 *R (McCann)* (n 21).

83 *B v Chief Constable of Avon and Somerset Constabulary* [2001] 1 WLR 340.

84 *Gough v Chief Constable of the Derbyshire Constabulary* [2002] QB 1213 (HC).

85 *Re Bramblevale Ltd* [1970] Ch 128.

86 *Al-Khawaja* (n 8).

87 Ibid 777, 784, 791, 794.

88 Ibid 784; the standard of proof imposed on the government was higher than that which the applicants had to satisfy, *per* Lord Fraser, 772 (HL). See also Pattenden (n 14) 222.

89 *Secretary for State for the Home Department v Rehman* [2003] 1 AC 153: cf *Al-Khawaja* (n 8).

former, whilst the latter does not require a particular standard (even that of balance of probabilities), irrespective of the seriousness of the consequence.[90]

There are various other cases where, for policy reasons, judges must carefully scrutinise the evidence presented in court; for example, in asylum and immigration cases or other matters affecting human rights (as seen above), including judicial review applications. This is consistent with the justification for applying an intermediate standard in serious civil cases in America. It is suggested that these cases could benefit from an intermediate standard, as opposed to the balance of probabilities standard. Once more, it is argued that the approach that the courts currently use is laden with confusing language that produces incoherence.

3 Intermediate standard of proof in USA

A third standard of proof is accepted in the USA – namely that of clear and convincing evidence (much more likely than not) – as an intermediate standard of proof between the balance of probabilities and beyond reasonable doubt. This standard is aimed at addressing the inconsistencies produced by using the traditional balance of probabilities standard.[91] The higher standard was also introduced to address issues that involve 'fundamental constitutional rights' when the individual 'interests at stake' are both particularly important and more substantial than 'mere loss of money'.[92] The standard is reflected on the degree of confidence American society thinks the fact-finder should have in the correctness of the factual conclusions for a particular type of adjudication. This is why the highest proof – beyond a reasonable doubt – is required in criminal cases. The standard is defined as that measure or degree of proof that will produce in the mind of the juror a firm belief or conviction as to the truth of the allegations sought to be established.[93] (This is argued in this paper to be the standard in serious civil cases in England and Wales as seen in section 1.) This is also argued to be less problematic in England and Wales, as jury members are only found in a minority of civil cases.[94]

In the US, the court would apply a three-part test to determine the imposition of the intermediate standard on a particular case:[95]

(i) The private interests affected by the judicial proceeding – if the individual 'may be "condemned to suffer grievous loss"' by the action of the state, and if 'the loss threatened by the particular proceeding is sufficiently grave to warrant more than average certainty on the part of the fact finder [because of] both the nature of the private interest threatened and the permanency of the threatened loss'. [96] A party will have to demonstrate that a deprivation of a fundamental right is at stake and, further, a deprivation of a private interest can be final and irrevocable.

(ii) The risk of error created by the state's chosen procedure or that the judicial process has a high risk of erroneous fact-finding, and

90 See *Woodby v Immigration and Naturalisation Service* 385 US 276 (1966), the Supreme Court took into account similar considerations of deporting a person from the country, similar to *Al-Khawaja* (n 8). However, unlike, *Al-Khawaja*, the US Supreme Court applied a fixed intermediate standard of proof.

91 McCormick (n 22) 441–45.

92 Justice Bill Valance, 'The Clear and Convincing Evidence Standard in Texas: A Critique' (1996) 48 Baylor Law Review 391.

93 14th Amendment to the US Constitution.

94 *Addington v Texas* 441 US 418 (1979). See also *Re Winship* 897 US 358, 370, 90 S Ct 1068, 1076, 25 L Ed 2d 368 (1970).

95 *Mathews v Eldridge* 424 US 319, 335 (1976).

96 *Santosky v Kramer* 455 US, 758 (1982).

(iii) The court will evaluate the countervailing governmental interest that would be served by the use of a lower preponderance of the evidence standard. Unless, the use of the lower standard is so strong as to be compelling, the intermediate standard will not be required.[97]

The Supreme Court in deciding whether to impose the intermediate standard would also look at the practice of the states and the common law tradition and their underlying values in certain sets of facts.[98] The intermediate standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.[99] The standard of proof (at a minimum) reflects the value society places on individual liberty.[100] The function of legal process is to minimise the risk of erroneous decision.[101] Burger CJ in the US Supreme Court case of *Addington v Texas* stated that the intermediate standard is typically used in civil cases involving allegations of fraud or deception and other 'quasi-criminal wrongdoing'.[102] The case of *Addington* concerned the involuntary commitment of an individual for an indefinite period to a state mental hospital; the US Supreme Court had to consider what standard of proof was required by the 14th Amendment to the US Constitution based on these facts.[103] It was decided that the intermediate standard of proof applied, as the individual's liberty was potentially affected by him being committed indefinitely, and is compared against the state's interests in providing care for the individual and in protecting the community from the dangerous tendencies of some who are mentally ill; thus, due process requires the state to justify confinement.[104] This approach has been commonly applied in cases involving denaturalisation,[105] termination of parental rights,[106] deportation,[107] paternity determining,[108] defamation[109] and civil commitment to a mental hospital.[110] Still, the range of cases varies from state to state, each of which has its own policies.[111] The standard is also applied in the following cases: fraud; undue influence; existence or contents of a lost deed or will, parol gift or agreement to bequeath by will; mistake sufficient to reform an instrument; parol or constructive trust; oral contract as a basis for specific performance; anticipatory use of an invention; and whether a deed absolute is a mortgage.[112]

The standard is typically set to 67–75 per cent probability, higher than the civil standard of balance of probabilities, mathematically quantified at 50 per cent+1 in a typical civil

97 *Santosky v Kramer* (n 96) 745. See, *Cruzan v Director, Missouri Department of Health* 110 S Ct 2841 (1990), where an intermediate standard was imposed in a case for an unconscious person to withdraw life-sustaining treatment and the court observed that the state applied this standard to protect the individual's interests and, subsequently, against unwarranted state action.

98 *Michael H v Gerald D* 491 US 110 (1989).

99 *Addington v Texas* (n 94).

100 *Tippett v Maryland* 436 F 2d 1158, 1166.

101 See *Mathews v Eldridge* 424 US 319, 335, 96 S Ct 893, 903.

102 441 US 418 (1979).

103 14th Amendment to the US Constitution.

104 *Addington v Texas* (n 94).

105 *Nishikawa v Dulles* 356 US 129 (1958).

106 *Santosky v Kramer* (n 96) 745.

107 *Woodby v Immigration and Naturalisation Service* 385 US 276 (1966).

108 *Brown v Edwards Transfer Co* 764 SW 2d 220 (Tex1988).

109 *Casso v Brand* 776 SW 2d 551, 552–53 (Tex 1989).

110 *Addington v Texas* (n 94).

111 McCormick (n 22) 516.

112 John Henry Wigmore, *Evidence in Trials at Common Law* (3rd edn Little, Brown 1940) 329.

case.[113] The US Supreme Court in *Addington* accepted the difficulty of quantifying exactly how much evidence is required in serious civil cases when the intermediate standard is applied; however, it saw the third standard as also having an important communicative function.[114] It reminded fact-finders that, owing to the seriousness of what is alleged or what is at stake, the need for careful deliberation becomes necessary. This means the risks of error in decision-making are not to be distributed more or less equally between the parties, which is the function performed by the normal balance of probabilities. Similarly, the third standard reminds the fact-finder that the error in decision-making is not as high as the criminal standard, as it does not involve punishing the offender.

This is a much clearer approach than the current approach used by the English courts. Applying probability judgments in mathematical terms (as seen above) can be very useful in trying to minimise the risk of errors (and to improve human processes, i.e. fact-finding considerations) in serious civil cases based on the reasoning given by Burger CJ in *Addington* above. In addition, explaining to the jury the standard being the highest standard in civil cases will demonstrate the significance of the interests at stake and is probably easier to explain to a jury than a floating standard or asking for more 'cogent evidence' or applying the 'anxious scrutiny' test[115] (see below in section 5).

4 The reluctance of the judiciary to adopt an intermediate standard of proof

The primary justification to explain the judges' reluctance in England and Wales perhaps stems from the dangers of imposing a higher standard of proof in a civil case.[116] This is evident in care proceedings, of which *Re B* is an excellent example, whereby a care order application was filed on the basis of a reported sexual abuse of a child by a step-parent. *Re B* affirms the decision in *Re H* that the standard of proof in respect of the threshold criteria in s 31(2) of the Children Act 1989 is the balance of probabilities. The same standard was said to apply in the welfare considerations provision of s 1 of the same Act, affirming *Re U*.[117]

Although Baroness Hale accepted that some civil cases do require the criminal standard of proof and gave examples, including *Bater v Bater*, she did not hold that care proceedings required this higher standard. She asserted that the primary intention is always to protect the child from harm, rather than to deter or punish the person against whom the allegation is made.[118] The rationale is that, if a higher standard is adopted, then it may be difficult for the allegation to be made out by the local authorities.

Despite the facts that the law values a family home and envisages avoiding unjustified interventions in the family home, as evident in the threshold in s 31 of the Children Act 1989,[119] and a child wrongly removed may be damaged for life,[120] a higher standard of proof could effectively reduce the likelihood of an application being granted for the child to be removed from the home. As a result, the child may suffer significant harm by

113 McCormick (n 22). See also *United States v Fatico* 458 F Supp 388 (EDNY) (1978).

114 McCormick (n 22).

115 D Hagman and M MacArthur, 'Evidence: The Validity of Multiple Standards of Proof' (1959) Wisconsin Law Review 525, 538–40.

116 Baroness Hale's response, in *Re B* (n 7) 22, that the law in this area had been authoritatively determined compelled her to observe that 'it is time for us to loosen its grip and give it its quietus' is an example of this reluctance.

117 *Re U (A Child)* [2004] EWCA Civ 567.

118 *Re B* (n 7) 22 [69].

119 See also Article 8 of the European Convention of Human Rights or Human Rights Act 1998.

120 See *R v C* [2007] EWCA Crim 2551.

remaining in the same household with the abusive or neglecting parent.[121] Lord Lloyd stated that the standard should remain the civil standard. Lord Lloyd based his views mainly on the threshold criteria stating that, if it was a higher standard, then the court will not be able to go on and consider the checklist in s 1(3) of the Children Act 1989, however grave the anticipated injury is to the child.[122] This view is perhaps justified, as there is less risk to the parent than to the child when the balance of probabilities remains the civil standard rather than a higher standard of proof; after all, in family law, the child's interest is of paramount consideration addressing the welfare principle in s 1 and the threshold criteria found in s 31(2) of the Children Act of 1989.[123]

The cases of Baby P,[124] Chelsea Brown[125] and Anna Climbié[126] provide effective evidence to support the contention that the standard should remain at the balance of probabilities.[127] They illustrate the threat of resulting death of children who suffer abuse at home. Baroness Hale referred to Dame Elizabeth Butler-Sloss in her judgment in *R v Cannings* when her Ladyship stated that there was no good reason in addressing issues relating to a crime, and that preventive measures should be taken to restrain defendants for the benefit of the community, and for that of child protection and child welfare.[128] It is argued in this paper that Parliament's intention is clear, following the threshold criteria and the welfare principle, that the child's interests are paramount and the legitimate concerns of the state must be upheld. It is also argued in this paper that a third standard of proof is not appropriate in child protection or child welfare matters due to the strong cultural features of protecting children from harm found in England and Wales.

For that reason, it is argued in this paper that the decision made in *Re B* is correct based on the facts presented therein. Although this decision not to include child protection matters in the list of cases when the intermediate standard of proof applies, as is done in America, the final decision lies on the individual state and its concerns with specific crimes.

The second possible justification for the reluctance in introducing an intermediate standard of proof would be the risk of causing confusion and uncertainty, not only to the members of the judiciary, but also to lawyers advising their clients. For example, Lord Nicholls in *Re H* rejected the use of a third standard of proof:

> The only alternative which suggests itself is that the standard should be commensurate with the gravity of the allegation and the seriousness of the consequences. A formula to this effect has its attraction. But I doubt whether in practice it would add much to the present test in civil cases, and it would risk causing confusion and uncertainty.[129]

121 John R Spencer, 'Evidence in Child Abuse Cases: Too High a Price for Too High a Standard?' (1994) 6 JCL 160.

122 *Re H* (n 33) 577.

123 Children Act 1989, s 1(1).

124 *R v B* [2010] EWCA Crim 4. See also <www.bbc.co.uk/news/education-11621391> accessed 15 September 2012.

125 <http://news.bbc.co.uk/2/hi/uk_news/1206019.stm> accessed 15 September, 2012.

126 *R (On the Application of Shoesmith) v Ofsted* [2011] PTSR D13. See also <http://news.bbc.co.uk/2/hi/uk_news/1114298.stm> accessed 15 September 2012.

127 In March 2011, the NSPCC stated that approximately 46,700 children were known to be at risk of child abuse at the time, see <www.nspcc.org.uk/Inform/research/statistics/prevalence_and_incidence_of_child_abuse_and_neglect_wda48740.html> accessed 15 September 2012. After Baby P's death, the number of care orders applied for reached a record high: see <www.guardian.co.uk/society/2011/sep/08/baby-p-effect-child-protection> accessed 9 September 2012. This policy reasoning could explain the reluctance in applying a higher standard to serious civil cases.

128 *R v Canning* [2004] 1 WLR 2607.

129 *Re H* (n 33) 587.

It is argued that this matter has not been effectively investigated, for whilst 'special' civil cases and hybrid cases are recognised as requiring a higher standard, the same is not extended to other serious civil cases discussed in section 1. The reluctance to do so may relate to the difficulty of identifying the type of cases that should be included in this category, combined with the difficulty of justifying one particular fact or case over another.[130]

As argued in this paper, the current position of serious civil cases could be stabilised by identifying a range of clear cases to which an intermediate standard of proof could be applied. This approach would set in motion a process of incremental development. However, it would be clearer than the law as it now stands and mark a significant advance over the confusion and uncertainty that has prevailed for too long.

5 A proposal for reform

It is suggested that Parliament should set up a CPR Committee in consultation with members of the judiciary with the task of considering which of the serious civil cases mandate an intermediate standard, as was done in hybrid cases (see in section 2 above). It may be that similar cases identified in America can also be identified here, which might warrant an intermediate standard of proof. Particular importance is drawn from the three-stage test utilised in America in deciding if a particular set of facts warrant a higher standard of proof based on the interests at stake against that of the state (see section 3). Some might argue that the American approach of an intermediate standard is pegged to the American Constitution; this does not mean a similar approach cannot be applied in England and Wales. A process of incrementally developing the list must be kept under review.

The reason why it is proposed that only a selection of serious civil cases be considered is because there are certain cases – in particular, child protection proceedings – when a higher standard may subject the child to further harm, as discussed in section 4.[131] The list should also contain cases that would affect the liberty and livelihood of the party in the civil action. These would include deportation cases,[132] civil commitment to a mental hospital, declining to recommend the release of a prisoner, or, in other words, any case that has the consequence of influencing the loss of the liberty of an individual.[133] From the suggestion above, this is not to say that the list contains only cases that carry a serious consequence, but the list must be open to include any serious civil case that might also carry a serious allegation. An example of this is when fraud and criminal accusations affect the livelihood and liberty of an individual in the community.

In America, the formulation for jury instructions which a judge might give on the appropriate standard of proof varies from state to state. A clear specimen direction should be issued for judges in England and Wales when explaining the intermediate standard of proof to the parties in the proceedings. It is suggested in this paper that the following could

130 See Pattenden (n 14) 232, who states that a third standard of proof is the best solution to serious civil cases. See also Lord Nicholls, in *Re H* (n 29) 587, expressing the difficulty in identifying what the standard is and when it applies. See also Ian Dennis, *The Law of Evidence* (4th edn Sweet & Maxwell2008) 398, where Dennis stated that the argument for not incorporating a third standard was not entirely persuasive. He also added that the rejection of a third standard was 'over-hasty'.

131 See Lord Nicholls in *Re H* (n 33) 587; Lord Lloyd, *Re H* (n 33) 577; Baroness Hale in *Re B* (n 7); Dame Butler-Sloss in *R v Canning* (n 128). Similarly, Articles 2 and 3 of the European Court of Human Rights that the child has the right to life and not to be subjected to torture, inhuman and degrading treatment.

132 *Al-Khawaja* (n 8).

133 *Rehman* (n 89).

be applied in English courts (a combination of the definition applied in Federal courts and in Kansas and Colorado):[134]

> proof which is stronger than a balance of probabilities and which is clear in the sense that it is certain, plain to the understanding, unambiguous, and convincing in the sense that it is so persuasive as to cause you to believe it . . . This standard is the highest civil standard, sitting between the balance of probabilities and the criminal standard of beyond reasonable doubt – higher than the balance of probabilities, but lower than the criminal standard. [*Mathematical quantifications to follow.*]

In addition to the above definition, to avoid any uncertainty or confusion when applying a third standard of proof, it may be necessary to quantify to the parties in the civil proceedings the different standards of proof – i.e. the civil standard, the intermediate standard and the criminal standard. Kagehiro conducted a study on the understanding of fact-finders when they are provided with a legal definition and a quantified definition to determine whether the applicable standard in any given case achieves the law's professed goal of appropriately distributing the risk of erroneous decision-making.[135] Based on the research, Kagehiro argues that a relationship between the standard of proof and risk of erroneous decision-making be demonstrated and this may be done in a comparative context. The study also indicates that quantification of standard of proof merely makes explicit what is implicit in the original legal definition and concludes that quantified definitions could function as yardsticks against which the legal definition is measured.[136] This will clarify the need to meet the intended standard and the evidence required to establish the necessary facts according to the relevant standards, as compared to merely providing legal (unquantified) definitions.[137] The judge would decide if the intermediate standard has been met in a particular case. The judge can direct jury members to both the criminal and civil standards and explain to them how the intermediate standard sits in between both these standards. Again, in very limited and exceptional circumstances does a jury sit in civil cases in England and Wales, a factor which should encourage Parliament to include an intermediate standard in serious civil cases.[138] Further to the suggested legal direction above, the judge could include a quantified direction to assist in the decision-making and to avoid risk of erroneous decisions. The suggested mathematical quantification for this standard is set to 67–75 per cent probability.[139]

134 See, also, *Mason v Texaco Inc* 741 F Supp, 1510.

135 D K Kagehiro and W C Stanton, 'Legal vs. Quantified Definitions of Standards of Proof' (1985) 9 Law and Human Behaviour 159–78, 171–76.

136 If there is an assumption of calculated risk in the guilt determination process expressed in a quantified definition, it is because the assumption of risk is present in the original legal definition, see, John Kaplan, 'Decision Theory and the Factfinding Process' (1968) 20 Stanford Law Review, 1065–92.

137 Kagehiro and Stanton (n 135) 161.

138 Heydon's argument in J Heydon, *Evidence Cases and Materials* (2nd edn Butterworth 1984) 36, that the adoption of a third standard of proof would make jury direction even harder than it is at present with two. Rosemary Pattenden, see (n 14) 229, counter-argues Heydon's comment stating that a third standard of proof is easier to explain to a jury than a floating standard which requires a higher quantum of proof for serious civil cases. See, also, a similar argument put forward by D Hagman and M MacArthur (n 115) 538–40.

139 Jeremy Bentham in *Rationale of Evidence*, Book I, ch 6, advocated applying a numerical scale for defining the third standard of proof due to the incapacity of ordinary language to define the degree of probabilities and the probative force: *The Works of Jeremy Bentham*, John Bowring (ed) (London 1838–1843, reprinted New York 1962) vol 6, *An Introductory View of the Rationale of Evidence; Rationale of Judicial Evidence, specially applied to English Practice*, Books I–IV.

Moreover, although there can never be absolute certainty in the decision-making process, it would be easier if judges were aware of the complexity of the case before them, including best evidence, and conscious of the ramifications of the case before deciding on whether the allegation is true or not. This could be achieved at the case management stage.

Conclusion

Judges have applied various approaches in explaining what the standard of proof actually is in serious civil cases which have contributed to incoherence in the law. This incoherence is due to the choice of language used to describe the standard of proof in serious civil cases. This language seems to suggest a different standard from the civil standard of the normal balance of probabilities. Language applied in each of the cases discussed in section 1 above seems to suggest a standard different from the normal balance of probabilities. The requirement for more cogent evidence and caution in serious civil cases establishes a different standard altogether from the normal balance of probabilities standard applied in civil cases. An intermediate standard is suggested as a possible solution. This is especially relevant given that, in other 'special' civil cases and hybrid cases, a higher standard of proof than the civil standard is required. It is difficult to appreciate why there is a disparity in treatment between these cases and serious civil cases. The courts have remained reluctant to permit and apply an intermediate standard, even though it is evident that the incoherence of the law justifies some changes. The judiciary may have good reasons for its reluctance in permitting a higher standard of proof in cases dealing with, for instance, children faced with harm from an abusive or neglecting parent, since setting a standard too high could result in more harm to the child than when the standard is lower. This does not mean that we should be deterred from considering other cases in the list when an intermediate standard is applied. Childcare cases will be an exception.

As in America, a list of cases can be identified by Parliament through the auspices of a commission when the intermediate standard is applied, especially since this has already been done in 'special' civil cases. It is accepted that the judicial system cannot always mandate absolute accuracy in its findings of the evidence presented. However, the need to reflect coherence and minimal error far outweighs the need to apply the civil standard of balance of probabilities found in England and Wales. The current non-exhaustive list should be reviewed once every two years. Whether or not an intermediate standard is introduced, as seen in America, a proper procedure to address the standard of proof in serious civil cases in a consistent and coherent manner is needed to clarify the law of evidence. Judges should become more conscious of the ramifications of the arguments that they make concerning the interpretation of language, and should move to accept that we are better off with a third standard of proof in serious cases, rather than leaving it to the good sense and better judgment of an individual judge. The criminal standard, for instance, is well understood now, despite the difficulty the courts faced in explaining what a reasonable doubt is.[140]

In conclusion, the advantages of applying an intermediate standard in serious civil cases may be summarised as follows:

i it would potentially remove the confusion and incoherence that the current system presents, mainly addressing the choice of language used in describing the standard of proof;

ii it would ensure that parties initiating appeals on grounds that the trial judge had applied the wrong approach might be avoided;

140 *R v Ching* [1976] 63 Cr App R 7, 9; *R v Gray* [1974] 58 Cr App R 117.

iii most civil cases in England and Wales do not have jury members presiding over them, hence any technical difficulty or legal jargon used by the judges in explaining the proceedings concerning the relevant standard of proof in serious civil cases may present less of a challenge;

iv the 'special' cases listed in section 2 are proof of the inconsistent use of the civil standard of proof, and perhaps including them in the same list as a selected few serious civil cases, when an intermediate standard of proof is used, would ensure more consistency in the civil justice system.

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Hillsborough: legal culpability in the aftermath of the findings of the Independent Panel

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Introduction

Twenty-five years ago the worst stadium disaster in British sporting history took place.[1] On 15 April 1989, Nottingham Forest Football Club (FC) played Liverpool FC in the Football Association (FA) Cup semi-final. The match was held at the neutral ground of Hillsborough in Sheffield, the home of Sheffield Wednesday FC. Tragically, 96 fans lost their lives in a major crush, an incident which has since been attributed, in the main, to incompetent policing.[2]

In the immediate aftermath, inaccurate press reporting, fuelled by misleading information provided by South Yorkshire Police (SYP) and a local Sheffield MP in an attempt to divert blame, sought to impose responsibility for the disaster on the Liverpool FC fans. It was alleged that many supporters had arrived at the ground late, intoxicated and without a ticket. An exit gate, it was claimed, was forced open, which led directly to the crush.[3] These accusations were vehemently denied by the families of the victims and the people of Liverpool and it has since been established that the actual blame for the events that took place on that day lies firmly elsewhere.[4] In 1990 the Taylor Report criticised SYP's handling of the match,[5] confirming that the actual cause of the crush was not the actions of the fans, but the decision by the senior police officer in charge on the day, Chief Superintendent Dukenfield, to open an exit gate and his subsequent failure to order the closure of the entrance to the tunnel which directly serviced pens three and four, where the

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1 For detailed analysis of the build-up, the disaster itself and the aftermath, see P Scraton, *Hillsborough: The Truth* (Mainstream Publishing 2009).

2 Tony Bland was the 96th and final victim of the Hillsborough disaster. Artificial nutrition and hydration treatment was withdrawn as a result of him being diagnosed in a permanent and irreversible vegetative state. One patient, Andrew Devine, was initially diagnosed as being in a coma, but he subsequently demonstrated signs of awareness and a limited ability to communicate. For a full list of the victims see <http://hillsborough.independent.gov.uk/memorial.html>.

3 House of Commons, *Report of the Hillsborough Independent Panel* (HC 581 September 2012) paras 2.12.2–3.

4 Ibid para 1.124.

5 The Home Office, *Final Report of the Taylor Inquiry into the Hillsborough Stadium Disaster 1989* (Cm 962 January 1990).

crush then developed.[6] Despite various out-of-court settlements being made between SYP and the victims' families, and in more recent times numerous apologies, SYP has never formally admitted liability for its behaviour and the families of the victims have remained unsuccessful in a range of legal actions which sought to hold it accountable.[7]

The recent report of the Hillsborough Independent Panel,[8] whose remit was to develop public understanding of the tragedy based on thorough examination of a range of documents which have now become public,[9] has exposed crucial new evidence about Hillsborough, illuminating the precise extent of SYP's failings and its subsequent cover-up. The findings also shed new light on the circumstances surrounding the disaster and what happened immediately afterwards and, as a result, the spotlight has intensified not only on SYP, but also on the Coroner, the emergency services, the English FA, Eastwood and Partners (a firm of safety engineers employed by Sheffield Wednesday FC), Sheffield City Council and Sheffield Wednesday FC itself.[10] Amid this new evidence, there have been strong calls for criminal charges to be brought against those who were to blame for causing the disaster[11] and against those who were involved in what has been described as 'one of the biggest cover-ups in British history'.[12]

It is against this backdrop that this piece aims to explore the potential legal culpability of the various parties involved in Hillsborough, with a particular emphasis on the criminality of the conduct from both a historical and future perspective. The article begins by investigating the concept of collective blame. It discusses how the civil law of negligence is more suited to remedying behaviour of this kind and highlights the possible benefits which could have been gained from pursuing the initial civil law actions. It then examines the transition from civil liability to criminal liability for gross negligence manslaughter, identifying who potentially could be charged with this offence and the related problems. The narrative then moves to a discussion of 'systemic' fault and illustrates the limitations of the criminal law at the time of Hillsborough, and also of the criminal law at present. The paper finally concludes by suggesting where the most appropriate and realistic chance of success may lie in terms of any future criminal prosecutions.

6 See House of Commons (n 3) para 1.124.

7 House of Commons (n 3) para 2.7.24. In criminal law, see *Addlington v Dukenfield and Murray*, Leeds Crown Court, 6 June 2000 [Unreported]. In tort law, see *White v Chief Constable of South Yorkshire* [1999] 2 AC 455; *Alcock v Chief Constable of South Yorkshire* [1992] 1 AC 310.

8 See House of Commons (n 3).

9 The Independent Panel's full terms of reference can be found in Appendix 1 of the Final Report. See House of Commons (n 3).

10 See N Morris, 'New Inquest to be Held into the Deaths of 96 Liverpool Fans Killed in the Hillsborough Disaster' *The Independent* (London, 16 October 2012) <www.independent.co.uk/news/uk/home-news/new-inquest-to-be-held-into-the-deaths-of-96-liverpool-fans-killed-in-the-hillsborough-disaster-8213378.html?origin=internalSearch> accessed 13 November 2012.

11 J Cusick, 'Manslaughter Charges Could be Brought over Hillsborough Tragedy' *The Independent* (London, 13 October 2012) <www.independent.co.uk/news/uk/crime/manslaughter-charges-could-be-brought-over-hillsborough-tragedy-8209055.html?origin=internalSearch> accessed 13 November 2012.

12 See M Beckford, 'Hillsborough: Prosecutions Likely over "The Biggest Cover-Up in History"' *The Telegraph* (London, 12 September 2012) <www.telegraph.co.uk/sport/football/teams/liverpool/9539424/Hillsborough-prosecutions-likely-over-the-biggest-cover-up-in-history.html> accessed 13 November 2012.

Pinpointing the blame

The difficulty with any large-scale disaster is that there is very rarely one isolated mistake which can be said to be the sole cause of it.[13] More often than not, as was the case on the day of Hillsborough, circumstances conspire to create an environment where the potential for tragedy is heightened, and a chain of cumulative errors then triggers events which can very quickly spiral out of control.

In the investigations which inevitably follow, it will often become clear that some errors were graver than others, but it still may not be factually possible to say that any one individual has sole responsibility for causing the disaster.[14] The problem then for any inquiry, legal or other, is ascertaining precisely who did what and identifying which errors are more culpable than others and deserving of civil, criminal or professional sanction. The natural inclination for any of the parties involved will be to blame each other in an attempt to protect themselves. This is exactly what happened after Hillsborough and is one of the principal reasons why it became so difficult for the numerous investigations that followed to elicit the truth.[15] Despite attempts to divert blame to the Liverpool fans, SYP has since been held primarily responsible for the disaster.[16] That being said, it is worth remembering that no matter how incompetent its officers were on the day, and no matter how abhorrent its subsequent lies were in the cover-up, SYP was not alone in error. The English FA knew that Hillsborough was a venue which had experienced crush problems before, a fact evidenced by its previous removal from the list of potential designated semi-final venues.[17] When the question was raised as to whether or not it ought to be reinstated as a semi-final venue, the FA ought to have approached this with an increased sense of alertness. If nothing else it ought to have taken steps to ensure that the ground had received its safety certificate, something which Hillsborough did not have at the time of the disaster.[18] If the FA had fulfilled its role properly, the tragedy would never have happened, at least not at that ground and on that day. Similarly, Sheffield Wednesday FC itself was partially at fault for failing to ensure that its ground adhered to safety regulations which were designed to protect fans from harm at the time, and so too was Eastwood and Partners, the firm of safety engineers which was engaged to make alterations to the Lepping's Lane End as a result of the earlier concerns about crushing. Finally, Sheffield City Council, which was under a statutory duty to issue the ground with a safety certificate in conjunction with the club and the safety engineers, had a legal responsibility that it failed to discharge.[19] After the disaster occurred, there were also other parties, such as the South Yorkshire Ambulance Service, the South Yorkshire Fire Service and the Sheffield hospitals, whose conduct came under scrutiny. However, whilst the findings of the Independent Panel do consider the emergency response immediately after the incident, it is clear that if any fault can indeed be attributed to these parties, it is not of the same magnitude and thus any argument for a legal

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13 This is evident from the range of disasters which took place in the late 1980s. These include, amongst others, the capsizing of the *Herald of Free Enterprise*, the rail crash at Clapham Junction, the *Piper Alpha* oil rig explosion and the sinking of the *Marchioness* pleasure boat on the River Thames. See I M Gault and R J McGrane, 'Corporate Manslaughter in Major Disasters' (1991) 2 International Company and Commercial Law Review 166.

14 This has been a perennial problem in the evolution of tort and criminal law in the context of causation. See, amongst others, *McGhee v National Coal Board* [1973] 1 WLR 1; F*airchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22, [2003] 1 AC 32.

15 See House of Commons (n 3) para 1.148.

16 Ibid paras 2.12.6–9.

17 Ibid para 1.54.

18 Ibid para 2.1.82.

19 See Safety of Sports Ground Act 1975, s 1(1)(a)(b). See also House of Commons (n 3) para 1.141.

case against them is less compelling. As such, this article limits its analysis to those key parties at fault before and during the disaster.

The initial civil actions: importance overlooked?

Civil law is primarily concerned with the relationship between two parties and their legal responsibilities to each other; the principal aim of civil negligence is to provide compensatory redress for the careless conduct of one party which owes a legal duty of care to the other.[20] Numerous actions in negligence were pursued quickly after Hillsborough.[21] It was clear that various agencies were at fault and that there was the distinct possibility of recovering damages against all of them. When faced with multiple tortfeasors, the claimant, in a civil action for negligence, has the advantage of choosing which defendant to sue; the defendants can be sued individually and/or together and it is then open to a particular named defendant to commence third-party proceedings against another unnamed defendant seeking a proportionate contribution to any compensatory award made.[22] Thus, cases were initially brought against SYP, Sheffield Wednesday FC, Eastwood and Partners and Sheffield City Council for the fatalities and the physical injuries and/or psychological distress which the claimants endured as a result of being in the pens. One notable exception from this list of defendants was the FA. The FA was subject to minimal legal scrutiny and exposure for its failings in regard to Hillsborough, but for a number of reasons it would have been useful for it to be named as a defendant in the early civil proceedings. First, it would have sensitised governing bodies from that point on to the fact that across a range of different sports they may face civil liability for failing to monitor, review and implement effective safety procedures. Second, it would have served to clarify the law. The existence of a sports governing body's duty of care has now been recognised in English law,[23] but it was not until fairly recently and the legal basis for imposing the duty, and its precise parameters, are ill-defined.

Certain duties as and between those actually involved in sporting events have been confirmed by the courts,[24] but the law is much less clear in respect of the duty of care between sports governing bodies and spectators. Whilst one could argue that the requirements of proximity and foresight of harm are present between, say, the FA and spectators who attend one of its organised events,[25] it has been countered, albeit it in a slightly different context, that to impose a duty in this way would create a duty to an indeterminate class of individual.[26] First instance case law seems to indicate that the former view would prevail,[27] but there is another moot point. In the existing cases, assumption of responsibility seems to have played a big part in the confirmation of a duty of a governing

20 Negligence is only actionable on proof of damage. Causation is a further requirement of negligence which demands that the breach (careless conduct) has caused or materially contributed to the damage.

21 See House of Commons (n 3) para 1.146.

22 See for discussion, S Deakin et al., *Markesinis and Deakin's Tort Law* (7th edn OUP 2013) 880–87.

23 See *Watson v British Boxing Board of Control Ltd* [2001] QB 1134.

24 For the duty owed by participants to other participants, see *Condon v Basi* [1985] 1 WLR 866; *Caldwell v Maguire* [2001] EWCA Civ 1054, [2002] PIQR P6. For participants and spectators, see *Wooldridge v Sumner* [1963] 2 QB 43. For referees and participants, see *Vowles v Evans* [2003] EWCA Civ 318, [2003] 1 WLR 1607.

25 The tripartite test for establishing a legal duty of care is found in the case of *Caparo Industries v Dickman* [1990] 2 AC 605. The three requirements are proximity, reasonable foresight and that it must be fair, just and reasonable to impose a duty.

26 See the submissions made by counsel for the second defendant in *Wattleworth v Goodwood Road Racing Co Ltd and Others* [2004] EWHC 140 (QB), [2004] PIQR P25 [116].

27 See the comments of Davis J in ibid [122].

body.[28] Assumption of responsibility is not a prerequisite to establishing a duty, but it is one component of the bigger question of whether it is fair, just and reasonable to impose one.[29] It would have been less of an issue in respect of the more direct parties, but in terms of a more distant defendant, such as the FA, it would have been difficult to ascertain whether in fact it did assume any responsibility for the safety of fans back at the time of Hillsborough. It did not do so explicitly,[30] but an assumption of responsibility does not have to be express and can be inferred through conduct or certain other working arrangements.[31] Nonetheless, it is still not overtly clear whether such an assumption could have been inferred from the then working practices of the FA.[32] If it was decided that the FA did not assume any responsibility, it would have been interesting to see what effect, if any, this would have had on the duty question. Nowadays, for instance, a specific statutory body is responsible for overseeing stadium and spectator safety and presumably it would now be easier to identify that body as assuming responsibility for the care and safety of fans.[33] Thus, if a similar case was litigated today and if it was deemed appropriate to pursue an action against a more distant defendant, would it be fair to hold the FA liable for an obligation that does not fall directly within its remit? The omission of the FA in the civil actions was probably more to do with pragmatic reasons than anything else. There were clearly more direct parties with better financial backing, but it would have been beneficial to see how the courts would have dealt with this question in the early 1990s, particularly given that the existence of a duty of care has significant importance outside the civil law and within the context of criminal gross negligence manslaughter.[34]

The subtleties of the original civil actions are now only matters of academic interest because eventually the cases were settled out of court.[35] Agreements were made between SYP and the bereaved and injured; and also between SYP and the 'other' defendants

28 *Watson* (n 23) and *Wattleworth* (n 26) were decided on this basis.

29 See *Selwood v Durham County Council* [2012] EWCA Civ 979, [2012] PIQR P20 [53].

30 There is nothing in the FA's documentation, either now or at the time of Hillsborough, to suggest that it assumes explicit responsibility for the safety of spectators at football grounds. The most recent version of the FA's Memorandum of Association, amended in 2007, states, under cl 3(7), that one of its objectives is to 'promote, provide for, regulate and manage in all or any of the required details or arrangements, including any arrangements for the benefit of associations clubs, football competitions, contests and matches, international or otherwise, and in England or elsewhere, and to do or provide for all or any such matters and things as may be considered necessary for or ancillary to the comfort, conduct, conveyance, convenience or benefit of players *and of the public, or of any other persons concerned or engaged in such competitions, contests or matches*' (my emphasis added). Whilst the last line suggests the FA may acknowledge some responsibility to the public, it does not go as far as to mention clearly the words health and safety. See <www.thefa.com/football-rules-governance/more/rules-of-the-association>.

31 See *Selwood* (n 29) [52].

32 The immediate question when seeking to impose a duty of care on the FA would be: 'A duty to do what exactly?' This could be couched as a duty to take reasonable care in the organising and supervision of its competitions, which ought to encompass health and safety. By its own admission it has some, albeit loosely defined, responsibility to the general public in this regard (see n 30). However, once a decision is made by one of its committees, if the working practice of that committee is not to get involved in the logistics of health and safety and to leave this to the owners of the particular ground in question and/or the police and city councils, it would be difficult to infer any assumption of responsibility.

33 From early on it has always been clear that the safety of sports grounds and spectators is not a matter purely for the FA. In 1976 the Home Office issued *The Guide to Safety at Sports Grounds* (The Green Guide). It is now in its fifth edition, last published in 2008. There is now also a statutory body that is responsible for overseeing stadium safety. See the Sports Ground Safety Authority (SGSA) website: <www.safetyatsportsgrounds.org.uk/about/history.php>.

34 See House of Commons (n 3) para 2.7.6 for the exact dates of the commencement of the civil litigation.

35 See ibid ch 7: 'Civil Litigation: Conclusion – What is Added to Public Understanding' for information relating to the amount paid out in the settlements.

(Sheffield Wednesday FC and Eastwood and Partners) in respect of third-party proceedings to determine the proportionate amount of costs that each should pay in respect of the out-of-court settlements.[36] Despite indications to the contrary, there has never been any formal admission of liability from any of the parties to the settlements.[37] The fact that the cases were settled before they ever reached court was, for a variety of reasons, unfortunate. With the benefit of hindsight this is easy to say and, with a lucrative offer having been made, settlement was financially the sensible move for the families.[38] In view of the findings of the Taylor Report, the families probably felt that justice and accountability would be achieved by other legal means and that accepting compensation would have little or no bearing on this.[39] Nonetheless, civil negligence is not just about compensation. It has a prescriptive power; it is not only a method of holding defendants to account for unreasonably careless behaviour, but is also a means of regulating future conduct.[40] Had the cases been heard in open court, and had the defendants been liable, there would have at least been a feeling back then that someone had been held legally accountable for the errors that took place. The defendants may well have tried to blame each other for what went wrong, but the standard of care is lower in civil law than in criminal and so it would have been easier, although by no means straightforward, for the claimants to prove, on the balance of probabilities, that each of the defendants was in breach of its duty.[41] Crucially, however, in the course of jostling over the question of liability, important evidence would have been heard which may have exposed the serious shortcomings of SYP's version of events at a much earlier stage and which also could have been useful in pursuing lines of criminal prosecution further down the line.[42] Knowing what we know now, there is probably a feeling of regret that the civil cases were settled when they were, but the harsh reality is that when things did not turn out as expected in the other multiple investigations, recourse to the criminal law was always going to prove difficult.

From civil to criminal: gross negligence manslaughter

From a criminal perspective, the Director of Public Prosecutions (DPP) decided not to instigate any criminal proceedings against those who were to blame for Hillsborough.[43] Of

36 House of Commons (n 3) ch 7. Sheffield City Council was not included in the original third-party proceedings. However, it was pursued separately at a later date and eventually did contribute to the overall pay-out.

37 In *Alcock*, (n 7) 392, Lord Keith stated that the 'Chief Constable of South Yorkshire has admitted liability in negligence in respect of the deaths and physical injuries'. This was technically incorrect.

38 One of the major difficulties with civil litigation of this type is the major imbalance of power between the parties. SYP had the financial resources to fight the claim if it had wanted, and the other named defendants were in a better financial position than many of the claimants.

39 One of the key problems in achieving accountability for Hillsborough was that there were multiple investigations and inquires which all overlapped and which all served different purposes. After the publication of the Taylor Report, the families probably thought that the inquest would return a verdict of unlawful killing and that criminal prosecutions would naturally follow. See House of Commons (n 3) ch 6.

40 For discussion see W V H Rogers, *Winfield and Jolowicz Tort* (18th edn Thomson Sweet & Maxwell 2010) ch 1. See also M Lee, 'Tort Law and Personal Injury Law in the Regulatory State' (2011) 3 Journal of Personal Injury Law 137.

41 The general standard of care required in ordinary negligence is to take reasonable care in all the circumstances: *Blyth v Birmingham Waterworks Co* (1856) 156 ER 1047. This same standard applies under the Occupiers Liability Act 1957, s 2(2). In the context of professional negligence, the standard required is to act in accordance with a reasonable, responsible and respectable body of expert opinion with that field: *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582; *Bolitho v City and Hackney Health Authority* [1998] AC 232.

42 See discussion below of the offence of perjury and contempt (n 107).

43 See House of Commons (n 3) para 2.6.252. For discussion of the various other inquiries and investigations, see ibid paras 1.214–40.

the offences available, gross negligence manslaughter was the most appropriate and serious charge that could have been brought.[44] Prosecuting this offence is notoriously difficult. The scope of the crime is poorly defined and it arguably remains too closely aligned to civil negligence, insofar as it is difficult to explain the standard of conduct that is required to make the transition from one to the other.[45]

When disaster occurs, individuals within organisations are sometimes singled out to conceal bigger systemic failings and, in the absence of any legal sanction being brought against the organisation, those who have been directly affected by the incident in question will often find solace in being able to blame one person. Sometimes this may be inappropriate,[46] but equally, on occasion, it may be justified, especially where the individual error seems so gross that it is deserving of criminal sanction. The problem lies, as it did for the families in Hillsborough, in identifying an appropriate individual whose error was of that magnitude.

Sheffield Wednesday FC's civil liability would have been by virtue of the Occupier's Liability Act 1957,[47] but attempting to identify one individual within that organisation whose negligence was such that it warranted criminal sanction would have been difficult for any prosecutor.[48] Framing a case against Sheffield City Council would have been even more challenging. Civilly, whilst it was clearly under a statutory duty to issue the ground with a safety certificate by virtue the Safety of Sports Ground Act 1975, this statute explicitly precludes any civil action for breach of its terms.[49] Thus, what has been termed an action for breach of a statutory duty *simpliciter* would have been out of the question, meaning that any other claim would have had to be pursued under the ordinary common law principles of negligence.[50] Assuming a duty of care was held to exist between the City Council and those who attended the ground,[51] the sloppiness inherent in its systems for checking and issuing safety certificates undoubtedly would have led to success in any civil claim, but the organisational structure of the council would have made it nigh on impossible to identify any one single decision-maker who owed a legal duty and whose error was so grave that

44 The origins of gross negligence manslaughter can be traced back to the early case of *R v Bateman* (1927) 19 Cr App Rep 8. However, as a result of the House of Lords' decision in *R v Seymour* [1983] 2 AC 493, there was some confusion about the applicability of the offence between the years 1983 and 1994. Depending on the precise timings of any prosecutions, it is possible, although by no means certain, that charges could have been pursued under the heading of reckless manslaughter, as per *Seymour*. In 1994, The House of Lords in *R v Adomako* [1995] 1 AC 171 held that there was no offence of manslaughter by recklessness and that the correct offence was gross negligence manslaughter. Despite this confusion, it is highly unlikely that the courts would have disregarded gross negligence manslaughter altogether in appropriate circumstances (see *R v Goodfellow* (1986) 83 Cr App Rep 23). It is clear that, in respect of Hillsborough, the legal opinion at the time was that any criminal prosecutions should have been pursued under the heading of gross negligence manslaughter. See Hillsborough Independent Panel: Disclosed Material, 'A Copy of Joint Opinion of Gareth Williams QC and Peter Birts dated 6 August 1990', Unique Document ID: AGO000003030001, para 63. As such, this article proceeds on this basis that this would have been the appropriate charge at the time, and certainly would be now moving forward.

45 For an interesting critique in a medical context, see M Brazier and A Alghrani, 'Fatal Medical Malpractice and Criminal Liability' (2009) 25 Journal of Professional Negligence 51.

46 For example, when the *Herald of Free Enterprise* capsized, there was an attempt to blame the entire disaster on the ship's bosun. He was not without error, but it was certainly inappropriate to make him the scapegoat in order to disguise a wider range of failings within the company.

47 Occupiers Liability Act 1957, s 2 (1), imposes on occupiers the 'same' common law duty of care to all their visitors.

48 See discussion of 'systemic fault' below.

49 Safety of Sports Ground Act 1975, s 13(a).

50 See M Jones, T*extbook on Torts* (8th edn OUP 2005) 447.

51 This is not an absolute certainty, but in the circumstances would seem highly likely.

instigating criminal proceedings would have been appropriate. The case against Eastwood and Partners would have been easier to argue in the sense that the firm was a much smaller concern and so 'individual' error would have been more readily identifiable. Nonetheless, even though individuals within the firm did receive criticism about how they performed their professional duties, it is debateable whether or not their conduct would have amounted to criminal negligence because the stadium safety guidelines at the time were open to a range of possible interpretations.[52]

After being overlooked in the civil proceedings, personnel within the FA were almost certain to be ignored in any criminal investigation. In the context of a charge for gross negligence manslaughter, a lot would hinge on whether in fact a legal duty was said to exist between an individual at the FA and the victims.[53] Even if it did, which is open to debate, problems would again reside in identification of *the* appropriate individual. The FA was aware of problems with Hillsborough, both from past experiences of games held there and also from written correspondence from fans warning it of the dangers.[54] Naturally, the organisation denied all knowledge of this,[55] which, in turn, would have rendered the task of isolating the negligent conduct of one individual who knew about the risk and who blatantly ignored it, a complex exercise. Prosecution would have been dependant on the ability to demonstrate that a sufficiently senior person within the FA owed a legal duty, was aware of a risk of death, and whose negligence was so gross in the circumstances that it could be said to amount to a crime. With the threshold being so high, one can understand why prosecutors were hesitant to explore this particular avenue.

On an individual basis, then, the most likely avenue for success would have been to bring criminal charges for gross negligence manslaughter against officers within SYP, which is what the families did in a private prosecution.[56] Whilst civil action against SYP as an organisation would not have been uncomplicated, success would have been more likely than not given the circumstances.[57] The only realistic candidates for individual criminal prosecutions though were Chief Superintendent Dukenfield and Superintendent Murray, match-day commander and second-in-command respectively, both of whom were situated in the police control box at the time of the crush. Having identified the relevant parties who were under a legal duty, the next step would have been to isolate the error that was likely to lead to a successful prosecution. It was not open to prosecutors to consider the range of failings that quite blatantly contributed to the nightmare situation that those two officers found themselves in on the day, for those were systemic errors which had taken place beforehand. Thus, the investigation would have had to look specifically at what those two did, and the decisions they took. It was evident that they did not delay kick-off and perhaps they should have done, but it is unclear whether this would have prevented the disaster from happening the way it did.[58] They also took the decision to open exit gate C. Ignoring the lie that Dukenfield subsequently told about the fans forcing the gate open, would this decision alone have been sufficient to convince a jury to convict? Considering the surrounding circumstances, it is

52 See House of Commons (n 3) paras 2.140–82: 'The Green Guide: A Matter of Interpretation?'.

53 See nn 23–33.

54 See House of Commons (n 3) paras 2.1.107–9.

55 Ibid.

56 *Addlington v Dukenfield and Murray*, Leeds Crown Court, 6 June 2000 [Unreported].

57 See n 41 for discussion of establishing breach.

58 In 1987 the semi-final kick-off at Hillsborough was delayed by 15 minutes. See House of Commons (n 3) para 2.1.96. However, even if the kick-off had been delayed in 1989, it is unclear to what extent it would have averted the disaster. The HSE calculated that had gate C not been opened it would have taken until 3.40pm to admit all 10,100 spectators with tickets for the Lepping's Lane terrace, 40 minutes after the scheduled kick-off. See House of Commons (n 3) para 2.6.104.

highly unlikely. If that gate had not been opened there would have been fatalities outside the ground and, faced with this situation, it is not unreasonable to suggest that most people in Dukenfield's position would have done the same in the genuine belief that they were acting to save lives. This certainly does not lend itself to conduct which equates to gross negligence. This left one critical error, an error which must then have been viewed in isolation; opening exit gate C, *without giving a thought to whether or not the tunnel leading to pens 3 and 4 should then have been closed off*. It was this error which was central to the private prosecution.

The leading case on gross negligence manslaughter is the House of Lords' decision in *R v Adomako*.[59] This involved a charge against an anaesthetist for causing the death of a patient when he failed to notice that the patient's air tube had become disconnected. Lord Mustill delivered the leading judgment stating that 'the essence of the matter which is supremely a jury question is whether having regard to the risk of death involved, the conduct of the defendant was so bad in all the circumstances as to amount in their judgment to a criminal act or omission'.[60] This does not provide a great deal of assistance and the test has been criticised as being circular in nature; it essentially asks a jury to convict of a crime if they think a crime has been committed.[61] Accordingly, a judge will have to elaborate on this when giving a direction in a particular case. In the private prosecution, Hooper J posed four questions to the jury: first, 'are you sure, that by having regard to all the circumstances, it was foreseeable by a reasonable match commander that allowing a large number of spectators to enter the stadium through exit gate C without closing the tunnel would create an obvious and serious risk of death to the spectators in pens 3 and 4?' If 'yes', they were to move to question two; if 'no', the verdicts should be 'not guilty'. Second, could a 'reasonable match commander have taken effective steps . . . to close off the tunnel thus preventing the deaths?' If 'yes', they were to move to question three; if 'no', the verdicts should be 'not guilty'. Third, was the jury 'sure that the failure to take such steps was neglect?' If 'yes', it was on to question four; if 'no', the verdicts should be 'not guilty'. Fourth, was the 'failure to take those steps . . . so bad in all the circumstances as to amount to a very serious criminal offence?' If 'yes', the verdicts should be 'guilty'; if 'no', they should be 'not guilty'.[62] In respect of the first question, the officers on trial would no doubt have claimed that the obvious and serious risk of death was unforeseeable, but the test is objective and, when viewed through the prism of reasonableness, that defence was unlikely to be accepted. If questions two and three were also answered in the affirmative, the main obstacle would still have been question four. It is possible that the test Hooper J posed could have been phrased in a slightly different way, and also that his comments about why a jury may not think it appropriate to convict a police officer of such a felony could have been tempered,[63] but that does not escape the fact that the final question is central to establishing criminality.[64]

Two factors would have weighed against conviction. First, things would have had to be considered as they were in 1989 and not as we know them to be now.[65] Second, the 'circumstances' element of the question opens up a wide range of considerations which may

59 *R v Adomako* [1995] 1 AC 171.

60 Ibid 187.

61 Ibid 183.

62 See House of Commons (n 3) para 1.264.

63 See ibid 1.270–2.

64 See ibid para 1.265. A judge will naturally vary his or her direction to the jury based on the particulars of a given case. In the conjoined appeals of *Adomako*, *Prentice* and *Holloway*, the test for gross negligence manslaughter was articulated in slightly different terms to that presented by Hooper J in the private prosecution against Dukenfield and Murray. See *R v Adomako and Others* [1994] QB 302, 323.

65 See House of Commons (n 3) para 1.270.

convince a jury to be more sympathetic. Despite the fact that Dukenfield and Murray were trained professionals, some jurors may have fallen into the trap of considering what they themselves would have done, and how they would have acted, had it been them in the control box on that day. If a judge, in summing up, stresses the importance of considering 'surrounding circumstances', which Hooper J did, the chances of this happening are increased. The fact that this was an unforeseen disaster which struck out of the blue, and that decisions had to be taken quickly in an emergency situation, may have been issues which heavily influenced jurors' reasoning.[66] It is conjecture, but the lack of guidance may also have caused some of the jurors to reach their decision by directing their minds to the wrong question. The need to avert a life-threatening crisis outside would no doubt have formed an integral part of their reasoning and to that end any question relating to the criminality of opening exit gate C alone would probably have been answered in the negative. However, the jury was not concerned with that question; its attention should have been on the decision not to close off the tunnel. In answering this, if the jury was genuinely convinced that Dukenfield honestly believed it was the responsibility of the club stewards to control the flow of fans through the tunnel, or that his officers would have acted on their own initiative to close off the tunnel, as he has always maintained, could his error have been legitimately classified as being so gross so as to warrant a crime?[67] Dukenfield did not give evidence in the private prosecution, but it was claimed by Murray that it simply never occurred to him (Murray) to close off the tunnel at the time.[68] If there was a blatant lack of foresight of an obvious risk on the part of Dukenfield and Murray then they had a case to answer, but if it did not cross their mind due to an honest belief that others would have acted on their own initiative and already closed off the tunnel, that is slightly different. Given his position as match-day commander, Dukenfield should have been more diligent in checking what his officers inside the stadium had done, and he was certainly careless in not doing so, but the question as to the criminality of his conduct to this day remains borderline and the answer depends largely on who is asked. When juries are faced with difficult questions and indecision strikes, more often than not defendants will escape conviction. Murray was acquitted; the jury could not reach a decision on Dukenfield and a retrial was refused.

The double jeopardy rule has now been relaxed in English law.[69] In light of the new evidence which has been uncovered by the Independent Panel, and against a background of calls for new individual prosecutions for gross negligence manslaughter, if a jury was asked once again to decide on the question of whether certain conduct was so bad in the circumstances to amount to a crime, would anything be different? The panel's findings are not likely to change anything in regard to the criminal liability of individuals previously involved in Sheffield Wednesday FC, Eastwood and Partners and Sheffield City Council. Consequently, Dukenfield's error will continue to take centre stage in any future individual prosecution. Given that SYP's cover-up played a big part in the findings, it is possible that any jury would now be sceptical of Dukenfield's purported 'honest' beliefs about who had responsibility for managing the tunnel. This is particularly pertinent amid evidence that the tunnel had been closed off at the semi-final the year before in 1988 in order to avoid a similar crush. Both Dukenfield and his predecessor, Chief Superintendent Brian Mole, who

66 House of Commons (n 3) paras 1.269 and 1.271.

67 See ibid paras 2.3.69, 2.3.82 and 1.87.

68 See ibid para 1.263.

69 The double jeopardy rule prevents a defendant from being prosecuted for the same crime twice following a legitimate acquittal or conviction. It is now possible, in certain circumstances where new and compelling evidence has come to light, to retry a defendant for certain crimes. See Criminal Justice Act 2003, Part 10. Given recent developments, it seems clear that the findings of the Independent Panel amount to 'new and compelling' evidence.

was the match-day commander in 1988, denied that they had any knowledge of this, but the findings of the Independent Panel suggest that, even if they were specifically unaware of the tunnel closure in 1988, they admitted awareness of the practice of occasionally closing the tunnel to prevent crushing in the pens.[70] Given that this was known to Dukenfield and that he failed to ensure that it had been implemented effectively, it surely amplifies the scale of his error. Even so, in assessing the likelihood of a guilty verdict, at best it can be said that the final outcome would be unpredictable; at worst the chances of success slim. For this reason, pursuing a prosecution for causing death against one individual is perhaps not the most appropriate course of action, but that is not to suggest that bringing serious criminal charges for causing death against SYP as an organisation is inappropriate. Here the emphasis switches from individual to organisational fault and it becomes evident very quickly that a criticism of English criminal law, both past and present, is that it has only limited means of dealing with the type of systemic failings which truly caused Hillsborough.

The law then and the law now: criminal recognition of 'systemic fault'

At the time of the Hillsborough disaster, there was a distinct lack of criminal offences aimed at organisational fault. Offences existed for some time under the Health and Safety at Work Act 1974, but prosecutions were seldom brought against organisations such as the police.[71] A further problem is that any conviction under this legislation was often perceived to be more symbolic than punitive.[72] The other possibility was common law corporate manslaughter. The origins of this offence had already started to take shape before Hillsborough,[73] but its actual recognition as a crime was not confirmed by the courts until just after, in a case which concerned another catastrophic disaster, the sinking of the *Herald of Free Enterprise*.[74] From this point on though, the offence existed, at least notionally.

In order to prosecute, the organisation in question first had to have corporate status. This immediately removed SYP from the purview of the offence because, at the time, a police force was 'devoid of any legal status as a corporate body'.[75] In actual fact, prior to 2007, the police force could not be prosecuted for the common law offence of involuntary manslaughter, leading Griffin and Moran to suggest that this 'represented an obvious injustice to the relatives of a victim killed by police neglect'.[76] The various other parties did not enjoy the same immunity. Eastwood and Partners, whilst giving the impression of a partnership, was actually a registered company.[77] Similarly, whilst it seems to have gone generally unnoticed, the FA had the status of a private limited company[78] and, as a statutory

70 See House of Commons (n 3) Part 2: 'What is Added to Public Understanding?'; ch 3: 'Custom, Practice, Roles, Responsibilities' and 'Conclusion: What is Added to Public Understanding?'.

71 See S Griffin and J Moran, 'Accountability for Deaths Attributable to the Gross Negligent Act or Omission of a Police Force: The Impact of the Corporate Manslaughter and Corporate Homicide Act 2007' (2010) 74 Journal of Criminal Law 358, 368.

72 Ibid 361.

73 *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153.

74 *R v P&O European Ferries (Dover) Ltd* (1991) 93 Cr App R 72.

75 See Griffin and Moran (n 71) 368.

76 Ibid 361.

77 A search of Companies House indicates that Eastwood and Partners (Consulting Engineers) Limited is a private limited company, incorporated on 23 July 1984, company number 01835021: see <www.companieshouse.gov.uk/index.shtml>. In the correspondence which forms part of the Independent Panel's evidence, the company is listed as an unlimited company. Either way, it is clear that it had incorporated status.

78 A search of Companies House indicates that the Football Association Limited is a private limited company, incorporated on 23 June 1903, company number 00077797.

company, so too did Sheffield City Council.[79] Sheffield Wednesday FC was also a registered company and so equally fell within the reaches of the offence.[80] Having established that at least some of the key fault-bearers could theoretically have been charged, what other obstacles stood in the way of a successful prosecution?

The second and integral component of the offence was satisfying what was known as the 'identification doctrine'.[81] This left prosecutors having to identify the senior directing mind and will of the company; in reality this meant it had to be possible to locate, within the corporate structure, one individual who was of such seniority that their guilty mind could be imputed to that of the company. Thus, even though the offence was ostensibly aimed at organisations, conviction still hinged on being able to identify the necessary mental state of an individual. This had the perverse effect of penalising smaller companies, where it was easier to identify a senior directing mind, and benefitting larger corporations, where the diffuse nature of their management structure often made it impossible to identify one person of sufficient seniority who was culpable.

It would have been unheard of at the time to charge a city council with corporate manslaughter and the fragmented management structures and convoluted decision-making processes of local government, untypical of a commercial company, would have severely hindered any chance of success.[82] Sheffield Wednesday FC, on the other hand, was a more traditional company. It was not a huge multinational affair and was therefore likely to have had a more discernible corporate management structure, but that does not mean that this structure would have been straightforward, nor incapable of manipulation. The club would have most likely claimed that health and safety decision-making was delegated further down the chain of command. If the owner, chair and/or board of directors could legitimately claim they had no real knowledge of the inadequacies of the stadium's health and safety measures, nor any sole responsibility for implementing and checking them, any hope of securing a conviction would have been slim. Eastwood and Partners was more typical of the type of company that could have fallen victim to the identification doctrine. It was a smaller concern than many of the other entities involved and thus it would have been less taxing to identify the senior directing mind and will of the company. Even so, the only successful prosecution for corporate manslaughter under the common law was against a much smaller company than Eastwood and Partners and, if an individual charge of gross negligence manslaughter was deemed inappropriate, there would have been little hope of securing a conviction against the company.[83] In terms of the FA, problems would have existed in regard to its senior personnel and the precise role each had in the decision-making process of venue selection. Would it have been possible to identify any one person of sufficient

79 Local Government Act 1972, s 2(3).

80 A search of Companies House indicated that Sheffield Wednesday plc was a public limited company at the time of Hillsborough, incorporated on 08 June 1899, company number 00062478. This company was dissolved on 26 July 2011. This is at odds with other sources which provide evidence about the history of the club. In their recent book it was said by Brodie and Dickinson that 'in the summer of 1893 the club became a limited company, issuing fifty £5 shares'. They then proceed to suggest that in 1899: 'Wednesday were turned into limited liability company (LLC) and a share issue was announced, which it was hoped would raise £5,000.' See J Brodie and J Dickinson, *Sheffield Wednesday: The Complete Record* (DB Publishing 2011) 14 and 16. Interestingly, a new company, Sheffield Wednesday Football Club Ltd, which is still active, was incorporated just after Hillsborough, on 08 June 1990, company number 02509978. This could have been done with the purpose of avoiding significant liabilities if the club had been ordered to pay compensation.

81 This test was developed in *Tesco v Nattrass* (n 73).

82 There was the possibility of charging Sheffield City Council with the offence of culpable misfeasance. This charge could have equally been brought against the FA.

83 See *R v Kite and OLL* [1994] Unreported. For the appeal against the individual jail sentence imposed on the company director, see *R v Kite (Peter Bayliss)* [1996] 2 Cr App R (S) 295.

seniority, whose directing mind and will could have been attributed to the organisation in order to secure a conviction? The FA did have a prominent figure in the public eye who was readily identifiable as the senior official at its helm, the then chief executive, Graham Kelly. He almost certainly would have had a key role in many of the association's decisions, but he was not the only person involved. In fact it is difficult to ascertain the precise extent of any one individual's input into the ultimate decision to select Hillsborough as the semi-final venue, and whether this was done with an awareness of the health and safety concerns which had previously been raised about the ground and the subsequent ignoring of them.[84] The pragmatic difficulties associated with identification and subsequent proof were definite barriers to a possible prosecution for common law corporate manslaughter against the FA.

The collapse of the prosecution against P&O Ferries for the Zeebrugge Ferry Disaster took place in early June 1990;[85] soon after that the DPP decided not to bring criminal charges against any individual or corporations for their respective roles in the Hillsborough disaster.[86] The failure of the earlier case may well have had a bearing on this decision. Yet, in hindsight, it may have been more appropriate to use the Hillsborough errors as test cases in the development of common law corporate manslaughter.

The Corporate Manslaughter and Corporate Homicide Act 2007 came into force on 26 July 2007. This statutory offence replaces the common law offence of corporate manslaughter and provides a different basis for attributing criminal liability to organisations which focuses on collective fault. An organisation is guilty of an offence if the way in which its activities are managed or organised causes a person's death and amounts to a gross breach of a relevant duty of care. Immediately, the offence is more suited to holding organisations to account for systemic failings from top to bottom. Greater emphasis is placed on the role of senior personnel because an organisation will only be guilty of the offence if the way in which its activities are managed and organised by its senior management is a substantial element of the gross breach of the duty of care.[87] The offence would cast the net much wider insofar as the considerations which could be taken into account when prosecuting companies such as Sheffield Wednesday FC, Eastwood and Partners and the FA.[88] The meaning of 'gross' breach is defined as conduct which falls far below what can reasonably be expected of the organisation in the circumstances.[89] Juries are allowed to consider a range of factors when determining this question, but are specifically directed that they must take into account whether the organisation breached any health and safety legislation and, if so, how serious this was and how much of a risk it posed.[90] What would have been highly relevant to the Hillsborough cases is that juries may also now specifically weigh up the extent to which the evidence shows that there were attitudes, policies, systems or accepted practices within the organisation that were likely to have encouraged the failure to adhere to health and safety legislation, or to have produced a tolerance of it.[91] The legislation therefore elaborates on the term 'gross breach' which may prove more helpful to juries in assessing the conduct

84 See House of Commons (n 3) paras 2.3.16–20.

85 See n 74.

86 See House of Commons (n 3) para 1.160.

87 Corporate Manslaughter and Corporate Homicide Act 2007, s 1(3).

88 Sheffield City Council would fall outside the scope of the offence by virtue of the Corporate Manslaughter and Corporate Homicide Act 2007, s 3(3).

89 Ibid s 1 (4)(b).

90 Ibid s 8(2)(a) and (b).

91 Ibid s 8(3)(a). Under s 8(3)(b) the jury may also have regard to any health and safety guidance that relates to the breach. This would have allowed for such things as the guidance contained in Green Guide (n 33) to be considered.

in question. The Act also eliminates the need to identify a scapegoat as the definition of senior management is far-reaching and would include the range of personnel involved in the various decision-making processes of organisations, such as those who contributed to the catalogue of errors at Hillsborough.[92] There were, however, a number of sticking points with the legislation, the main one being how this offence would apply to public authorities. After a stormy passage through Parliament, the final version of the Act extended the offence, in a restricted way, to the police.

At a cursory glance, the impression is that this would have been a particularly useful tool for holding the police criminally accountable for their actions at Hillsborough had it existed at the time. Instead of having to concentrate on solitary errors of particular individuals, the remit of the criminal investigation could have been extended to allow wider management decisions to be analysed. For a long time we have known that Dukenfield and Murray were not the only members of SYP who acted in error, it was simply they who were in the direct firing line because of their presence and inactions on the day. There were grave errors both before and after from higher up within SYP which were serious contributing factors to the disaster. Any legal inquiry under the Corporate Manslaughter and Corporate Homicide Act could have considered such things as the thought process behind the ticket allocation, who took the decision to replace the experienced match-day commander Chief Superintendent Brian Mole with the inexperienced Dukenfield just three weeks before the game and why,[93] who had responsibility for checking that there had been an effective transition between the two officers, and who was in charge of ensuring that effective channels of communication remained open between all officers before, during and after the game.[94]

On closer inspection, however, the Act would have changed very little. In terms of its applicability to the police, the offence is limited. The duties owed by the police are confined to a duty owed to its employees, a duty owed as occupiers of premises and a duty owed to a person, such as a prisoner, for whose safety the police are responsible.[95] Other than that, the relevant duty of care does not extend to things done in the exercise of an exclusively public function and so 'operational decisions' taken by the police fall outside the scope of the offence.[96] To this end, even if the Act had been in existence as the time, the legal accountability of SYP for the deaths at Hillsborough would remain unchanged, meaning they would still have to be dealt with under the other limited mechanisms available to prosecutors. The rationale for restricting the offence was based on a defensive practice argument. Widening the offence could result in police becoming risk averse in the discharge of their duties and cause them to prefer 'inaction over decisive intervention'.[97] As with all defensive practice-type arguments, the claim is unsubstantiated and open to interpretational ambiguities. It is certainly regrettable that the offence does not impose liability for the death

92 'Senior management' is defined as persons who, in relation to an organisation, play significant roles in (i) the making of decisions about how the whole or a substantial part of its activities are to be managed or organised, or (ii) the actual managing or organising of the whole or a substantial part of those activities: Corporate Manslaughter and Corporate Homicide Act 2007, s 1(4)(c).

93 For an interesting account, see Scraton (n 1) 18–20.

94 There was evidence that a crushing incident had occurred in the 1988 semi-final at Hillsborough. Disaster was averted here by closing off the tunnel. Equally, there was evidence that the police, in 1988, checked the tickets of the fans on their way to the ground thereby staggering their arrival to the turnstyles. Mole denied this happened, but it now seems clear it did. This information should have been passed on to Dukenfield, but it was not. See House of Commons (n 3) Part 2: 'What is Added to Public Understanding?'; ch 3: 'Custom, Practice, Roles, Responsibilities' and 'Conclusion: What is Added to Public Understanding?'.

95 Corporate Manslaughter and Corporate Homicide Act 2007, s 2(1)(a)(b)(d). See also s 2(2)(a)–(d).

96 Ibid s 5(3).

97 HL Deb 5 February 2007, col 564; see also HC Deb 5 June 2007, col 147.

of members of the public born out of gross negligence on the part of the police, for if it did important questions concerning systemic failure and the role of senior management in contributing to that failure could be considered, questions which the law has always overlooked and which very often need to be examined.

Before the enactment of the Corporate Manslaughter and Corporate Homicide Act 2007, English law was unequipped to deal with instances of death caused by systemic fault in organisations. This must be a bitter pill to swallow for the families of the Hillsborough victims and other such disasters. The new law does not apply retrospectively but, even if it did, it is severely limited in scope, capturing only some types of organisational behaviour and omitting to include in its reach certain activities performed by important public bodies such as the police. A further salient point is that it has long been recognised that a criminal offence aimed at an organisation does not bring with it the same sense of justice as those which are aimed at individuals. Under the statutory offence there is no individual liability.[98] Moreover, an organisation cannot face a jail sentence. The only sanction available is a fine, and there is now the possibility of an adverse publicity order against the entity convicted.[99] For bereaved relatives, these sanctions may not go far enough. Thus, in regard to Hillsborough, it is worth considering the other potential avenues for criminal responsibility.

Where the prosecutions should lie

There are a number of criminal offences which are available to ensure that there is some form of accountability for Hillsborough. Whilst some of these may be perceived as not having the same status as the serious homicide-type offences, they could still have an important role in the quest for justice and their value should not go unnoticed.

The possibility of prosecution has always existed under the Health and Safety at Work Act 1974. The most likely ground for prosecution would be under s 3(1) of the Act, which places a duty on employers to conduct their undertaking in a way as to ensure, so far as is reasonably practicable, that persons not in their employment who may be affected thereby are not exposed to risks to their health and safety. This could conceivably apply to any one of the entities involved in the Hillsborough errors. Section 2(1) of the Act, which places a duty on employers to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all their employees, could equally apply to some of the organisations involved, particularly SYP and Sheffield Wednesday FC, whose employees were at work on the day of the game and who were exposed to danger and consequential harm as a result.[100] A breach of this offence is a crime punishable by a range of sanctions, encompassing both custodial sentences and fines.[101] It is unclear why the Health and Safety Executive (HSE) decided not to prosecute the various parties for breaching this legislation because, at the time, this was the only real criminal offence that had any chance of success.[102] That being said, knowing what we now know, there are other offences which could be pursued.

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98 Corporate Manslaughter and Corporate Homicide Act 2007, s 18.

99 Ibid s 10.

100 In terms of applicability to the police, see Health and Safety at Work Act 1974, s 51A inserted by Police (Health and Safety) Act 1997, s 1.

101 Health and Safety at Work Act 1974, Schedule 3A inserted by Health and Safety (Offences) Act 2008, ss 1(2), 3(2), Schedule 1.

102 A section of the Independent Panel's findings is devoted to the HSE report. However, it is not explained why no prosecutions were brought. See House of Commons (n 3) paras 2.6.96–109.

The most appropriate criminal charge against SYP, and against any other party involved in the cover-up, would be perverting the course of justice.[103] This is a common law offence which is committed where an accused does an act or series of acts which has or have a tendency to pervert, and which is or are intended to pervert, the course of public justice.[104] The offence, triable on indictment, carries a maximum sentence of life imprisonment and/or a fine.[105] However, no sentence above ten years has been passed in the last century for the commission of this offence.[106] Whilst it covers a wide range of activities, it is usually reserved for more serious cases where there has been a fundamental interference with the administration of justice. Certainly, the conduct of SYP in terms of giving false information, altering witness statements, lying and concealing certain key facts would satisfy the requirements of the offence. The course of justice must have been in existence at the time of the acts, which it was in respect of Hillsborough as the misleading information was submitted to the Taylor Inquiry. Thus, if charges were to be brought for this crime there would be a chance of conviction.

Perjury could also be an option.[107] Under s 1(1) of the Perjury Act 1911 an offence is committed if a lawfully sworn witness or interpreter in judicial proceedings wilfully makes a false statement which he or she knows to be false or does not believe to be true, and which is material in the proceedings. The potential penalty for this offence is imprisonment for a maximum of seven years and/or a fine.[108] On the face of it, if it could be proved that Dukenfield and Murray lied under oath in the course of the criminal proceedings then they could be charged with this crime. However, whilst we know that Dukenfield lied initially in respect of exit gate C being forced open by fans, by the time of the private prosecution this lie had already been exposed and it is more likely that, whilst both officers remained vague in their evidence, they did not explicitly lie about anything else.[109] In respect of the others involved in the doctoring of evidence submitted to the Taylor Inquiry, the charge of perjury may be inappropriate. At the time of Hillsborough, evidence submitted to a public inquiry was not given under oath.[110] This is not the case now,[111] but as it was then it would technically render the charge redundant. If, however, it could be ascertained that false statements were made under oath in the Coroner's court, the possibility of a charge remains. Interestingly enough, this is where the benefits of pursuing the initial civil litigation become apparent. Although prosecutions are rare in a civil context, perjury is punishable as a criminal offence whether it was committed in criminal or civil proceedings. The lack of criminal proceedings against the many different wrongdoers in the Hillsborough affair

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103 For discussion, see S S M Edwards, 'Perjury and Perverting the Course of Justice Considered' (2003) Criminal Law Review 525.

104 The offence is sometimes termed 'attempting' to pervert the course of justice. The word 'attempting' should be removed as the offence is committed when acts tending and intended to pervert a course of justice are done. Here the offence is charged contrary to the common law and not under the Criminal Attempts Act 1981.

105 See the CPS website. 'Public Justice Offences – Incorporating the Charging Standard'. <www.cps.gov.uk/legal/p_to_r/public_justice_offences_incorporating_the_charging_standard/#a03>.

106 See Edwards (n 103) 527.

107 For an interesting discussion, see K Soothill et al, 'Perjury and False Statements: A Criminal Profile of Persons Convicted 1979–2001' (2004) Criminal Law Review 926.

108 See CPS (n 105).

109 The witness statements and transcripts of oral evidence (including cross-examinations) of both Dukenfield and Murray, which formed part of the evidence of the Taylor Inquiry, can be downloaded from the Hillsborough Independent Panel's website. It is clear that they remained vague and non-committal in respect of their evidence.

110 See Scraton (n 1) 121.

111 Inquiries Act 2005, s 17(2).

automatically limits the scope of perjury. Yet, if civil cases had been pursued, and had it been possible to identify false statements made under oath, an offence would have been committed.[112] The reality is that perjury and perverting the course of justice are closely aligned. Where there is a single isolated incident, the most appropriate charge will normally be perjury, but if the perjury is part of a much wider series of acts committed by individuals, as would seem to be the case in Hillsborough, then perverting the course of justice will be the more likely charge. There are also other possibilities, such as the offence of misconduct in a public office,[113] which may be considered, and also non-legal avenues of accountability, such as an investigation by the Independent Police Complaints Commission, which is currently underway.[114]

In theory, then, there remain a number of options available, albeit the majority of which have only become possible because of the altering of evidence after the event rather than the actual conduct which caused the disaster itself. Nonetheless, many would argue that the actual cover-up is the most despicable aspect of the Hillsborough saga which is most deserving of punishment. The likelihood of success is still hard to gauge though, with most of the uncertainty resting on pragmatic questions about what can be proved and against whom. Disentangling what happened all those years ago will take considerable time and effort. Recollections of who altered statements and on whose advice will be sketchy. Moreover, pinpointing who actually changed the statements will be problematic. Presumably, most of the lower-level officers in SYP at that time will insist that their statements were genuine and altered after the event without their knowledge or approval, and then those who actually altered evidence will blame the advice provided by SYP's legal team. In turn, the legal advisers will undoubtedly claim that they were only offering advice. The upshot will be that any investigator will have to tread carefully for otherwise they may become lost in circular arguments. The extent to which SYP and its legal team were entitled to remove statements of opinion rather than fact will also come under scrutiny. If it becomes apparent that the majority of the redacted statements do not conceal much other than personal views and recollections of officers then there may be some difficulty in proving that the alterations would have adversely affected the public inquiry, the Coroner's inquest and the DPP's initial criminal investigation. This must not have been perceived to be too much of a problem though as a new criminal investigation has recently been announced by the Home Secretary, Theresa May, which will focus not only on SYP but also on the FA.[115] It will be a lengthy process and no doubt subject to political machinations, but this move will be welcomed by the families of the victims and it is hoped that they will finally see some form of accountability for the actions and aftermath of the Hillsborough tragedy.

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112 It is incredibly difficult to prosecute someone for committing perjury in a civil hearing. Witnesses are likely to claim that they gave evidence to the best of their knowledge and that, whilst any recollections may have been vague and perhaps inaccurate, they were not blatant lies. However, theoretically it is possible to prosecute as the offence applies to any lawfully sworn witness who gives a false statement in a judicial proceeding: Perjury Act 1911, s 1(1) and (2).

113 Dukenfield was actually charged (and acquitted) with this in the private prosecution. Cases are rarely successful against the police. There is also the equivalent tort of misfeasance in public office. See J Murphy, 'Misfeasance in Public Office: A Tort Law Misfit' (2012) 32 Oxford Journal of Legal Studies 51.

114 See V Dodd, 'Hillsborough Investigation: IPCC Granted Powers to Force Police to Testify' *The Guardian* (London, 22 November 2012) <www.guardian.co.uk/politics/2012/nov/22/hillsborough-investigation-ipcc-powers-police> accessed 26 November 2012. For information on the range of new investigations and inquiries, see: <http://hillsboroughinquests.independent.gov.uk/about-the-inquests/>.

115 See D Conn, 'Hillsborough: More New Hope for Families Scarred by a Long Struggle' *The Guardian* (London, 12 September 2013). <www.theguardian.com/football/2013/sep/12/hillsborough-new-hope-families-struggle> accessed 17 December 2013. For information on the range of new investigations and inquiries, see: <http://hillsboroughinquests.independent.gov.uk/about-the-inquests/>.

Conclusions

The findings of the Hillsborough Independent Panel should not be understated. Without doubt they have exposed facts which were previously unknown. Notwithstanding this, 'developing public understanding' of the disaster does not necessarily alter anything in terms of certain criminal offences which we know are now being pursued once again. This piece has argued that any future attempt to prosecute individuals for gross negligence manslaughter would be highly unlikely to result in convictions. Indeed, whilst it is a difficult question to address, particularly in view of the pain and suffering that the families have endured throughout the years, would anything really be gained by singling out individuals and exposing them, potentially, to convictions for the most serious of criminal offences which have caused death? All but one of the key senior figures formerly of SYP and directly involved in Hillsborough are now deceased[116] and, even if Dukenfield was convicted, it is highly unlikely that he would face a jail sentence.[117] Focusing on the actions of one person, no matter how negligent those actions may seem, simply disguises the bigger problem, the problem of systemic failings and the inadequacies of the English criminal law as having no effective means to deal with it. Some may suggest that the law has now caught up in the form of the Corporate Manslaughter and Corporate Homicide Act, but it is too little too late.[118] The law was slow to reach the statute books and its limited scope and applicability render it a blunt tool in the battle against police negligence which has caused death to members of the public. However, given that a significant portion of the report's findings focus on the alteration of evidence by SYP, it has been argued here that the sense of justice yearned for by the families can be better achieved elsewhere by charging those involved in the cover-up with the range of criminal offences which are designed to combat behaviour of this type.

Although beyond the scope of this paper, in a wider sense questions still remain about how the disaster was dealt with afterwards. The Coroner limited his inquiry to an incredibly narrow time-frame, imposing a cut-off point of 3.15pm. Thus, any evidence concerning events which took place after that time was deemed inadmissible. This was always disputable. It was not necessary for the Coroner to impose that cut-off and it is now clear that he ignored what has since turned out to be crucial information. Confirmation that a significant number of victims could, *potentially*, have been saved is some of the most shocking evidence to come from the Independent Panel's Report.[119] The avenues for

116 The then Chief Constable of SYP, Peter Wright, died in 2011; Superintendent Murray died in 2006. After his retirement from the police force, Chief Superintendent Brian Mole worked as a security adviser to the University of Sheffield. In a recent publication, Sheffield University paid tribute to two recently deceased colleagues, Brian Mole (who died on 12 April 2010) and Roger Marshall who worked in Portering Services (who died on the 27 March 2010). Whether or not this is the same Superintendent Roger Marshall, who was on duty outside the ground at Hillsborough, is unknown. See University of Sheffield, Accommodation and Campus (ACS) Newsletter Issue 11 (2010) 3. Dukenfield is the only survivor who played a key role on the day.

117 In the private prosecution, Hooper J controversially stated, whilst committing Dukenfield and Murray for trial, that even if they were convicted, they would not face a custodial sentence. See House of Commons (n 3) para 1.258.

118 For discussion, see J Gobert, 'The Corporate Manslaughter and Corporate Homicide Act 2007: Thirteen Years in the Making but was it Worth the Wait?' (2008) 71 Modern Law Review 413.

119 See House of Commons (n 3), 'Report Summary', ch 5, bullet point 63. There was clear evidence from the post mortem reports that 28 of those who died did not have traumatic asphyxia with obstruction of the blood circulation, and asphyxia may have taken significantly longer to be fatal than the 3.15pm cut off. There was separate evidence that in 31 the heart and lungs had continued to function after the crush, and in 16 of these this was for a prolonged period. (These numbers cannot be added to the 28 as some featured in both groups.)

holding the Coroner accountable are incredibly limited,[120] yet as a result of his decision, a sizeable time-frame within the chain of events of Hillsborough was left uninvestigated. If the remit of the inquest had been extended, it may have exposed further shortcomings of the police, the emergency services and perhaps even the Sheffield hospitals. Thankfully, the verdict of accidental death returned by the initial Coroner's inquest has recently been quashed by the High Court and we await the outcome of a new inquest in which a jury will deliver a verdict.[121] In all probability the fresh inquest will uncover further evidence of systemic fault, rather than exposing the negligent actions of any one individual, but it is hoped that it will yield a new verdict of unlawful killing, which will be a powerful statement in the history of the Hillsborough affair. What is evident is that deficiencies in all the historical investigations feed into bigger questions about the whole 'system' of British justice and accountability, a system which has failed the families of the victims over the years and which, in many ways, is left severely wanting.[122]

120 In a legal sense, any challenge would be limited to a judicial review action, which the families of the victims tried and failed. See *R v HM Coroner for South Yorkshire, ex p Stringer* (1994) 158 JP 453. Outside formal legal action, it is now possible to lodge a complaint with the Office for Judicial Complaints.

121 See above n 115. For information on the range of new investigations and inquiries, see: <http://hillsboroughinquests.independent.gov.uk/about-the-inquests/>.

122 See P Scraton et al., *No Last Rights: The Denial of Justice and the Promotion of Myth in the Aftermath of the Hillsborough Disaster* (Centre for Studies in Crime and Social Justice/Liverpool City Council 1995).

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Lessons from Shakespeare's tiger mothers: parental and political authority in *Coriolanus* and *Merchant of Venice*

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1 Introduction: Amy Chua and William Shakespeare

Yale Law Professor Amy Chua's memoire *Battle Hymn of the Tiger Mother*[1] created a media sensation.[2] The book struck a powerful chord as hundreds clamoured to register either horror or approval of Chua's confessing to and advocating for a model of mothering that mixes in equal measure asceticism, relentless demands for public achievement, and love (albeit conditional). Many saw Chua's tract as little more than a self-serving apology for child abuse. Others viewed her sometimes astonishingly honest exposé as a refreshing antidote to the cult of self-esteem that predominates the theory and practice of childrearing at the beginning of the twenty-first century.[3]

But for both the outraged and the inspired, the reason Chua's book resonated so deeply was that it raised, with high drama, timeless questions about the limits and legitimacy of parental authority and the value of children's obedience over self-assertion and rebellion. In

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1 Amy Chua, *Battle Hymn of the Tiger Mother* (Penguin 2011).

2 See e.g. Janet Maslin, 'But Will It All Make "Tiger Mom" Happy?' *New York Times* (New York, 19 January 2011) <www.nytimes.com/2011/01/20/books/20book.html?_r=2>; Kate Zernike, 'Retreat of the "Tiger Mother"' *New York Times* (New York, 14 January 2011) <www.nytimes.com/2011/01/16/fashion/16Cultural.html?ref=books>; Judith Warner, 'No More Mrs. Nice Mom' *New York Times* (New York, 11 January 2011) <www.nytimes.com/2011/01/16/magazine/16fob-wwln-t.html?ref=books>; Sheryl Sandberg, 'Tough-Love Mother' *Time Magazine* (New York, 21 April 2011) <www.time.com/time/specials/packages/article/0,28804,2066367_2066369_2066449,00.html>; Joanne Moorhead, 'The Tiger Children Fight Back Against Amy Chua' *The Guardian* (London, 9 December 2011) <www.guardian.co.uk/commentisfree/2011/dec/09/tiger-children-fight-back>; Anne Kingston, 'Amy Chua on High-stakes Parenting' *Maclean's* (Toronto, 13 January 2011) <www2.macleans.ca/2011/01/13/amy-chua-on-high-stakes-parenting/>; Rebecca Dube, 'The "Tiger Mothers and Harsh Parenting', *MSNBC* (10 January 2011) <http://moms.today.msnbc.msn.com/_news/2011/01/10/5806202-the-tiger-mother-and-harsh-parenting>; Elizabeth Kolbert, 'America's Top Parent: What's behind the "Tiger Mother" Craze?' *New Yorker* (New York, 31 January 2011) <www.newyorker.com/arts/critics/books/2011/01/31/110131crbo_books_kolbert>; 'The Tiger Mother Responds to Readers' *Wall Street Journal* (New York, 13 January 2011) <http://blogs.wsj.com/ideas-market/2011/01/13/the-tiger-mother-responds-to-readers/>; Kevin Dolak, 'Strict, Controversial Parenting Style Leads to Death Threats for "Tiger Mother" Amy Chua' *ABC News* (17 January 2011) <http://abcnews.go.com/US/tiger-mother-amy-chua-death-threats-parenting-essay/story?id=12628830#.Twst5BxE4zA>.

3 For an analysis of the cult of self-esteem see Lori Gottlieb, 'How to Land Your Kid in Therapy' (2011) (July/August) *Atlantic Magazine* <www.theatlantic.com/magazine/archive/2011/07/how-to-land-your-kid-in-therapy/8555/#.T0liS1nz7mc.mailto>.

a society addicted to freedom, or at least to choice, Chua's unabashed arrogation of absolute power and limitless authority over her children read as tyrannical and prompted searching questions about when parents can legitimately claim to know best and to demand unquestioning obedience from their children. Yet, in a society also addicted to celebrity, Chua's success in propelling her daughter Sophia to Carnegie Hall read as enviable and prompted equally searching questions about when hard treatment of a child can be justified by the hope of future glory.

Though Chua credits Chinese culture and the legacy of her own Chinese immigrant parents with the inspiration and model for tiger-mothering, she sees the archetype of the Chinese mother as having application far beyond the Chinese-American community.[4] Chua promotes the role as being available to men and women of all ethnicities. A Chinese mother may be 'Korean, Indian, Jamaican, Irish [or] Ghanaian'.[5]

Though she draws the portrait of the Chinese mother as inclusive across gender and ethnicity, what Chua is slower to acknowledge is the timeless nature of the trope of pushy parent who uses a combination of tough love, deprivation and demand to raise super-kids. Had she looked to literature, Chua would have found some instructive portrayals of such parents. Moreover, literature would have been a valuable source for gaining insight into some of the distortions and pathologies to which such childrearing tactics have long been subject.

Shakespeare, as always, is a goldmine. In many of his portrayals of the parent–child relationship Shakespeare explores the extent of the parent's legitimate authority over the child as well as the legitimacy of parents' attempts to control and mould their children in the service of family ambition. What one finds in Shakespeare is, for the most part, a catalogue of failures of tiger-mothering. In many of his portrayals of the parent who is ambitious for his or her child's success, Shakespeare focuses on the various pathologies to which such a parent–child relation is subject.

Old Hamlet, for example, can be read as a failed tiger mother.[6] He demands that young Hamlet achieve as an avenger and attempts to substitute his own agenda of payback for Hamlet's authentic desires and inclinations. King Lear is likewise unsuccessful in his attempts to exert controlling authority over his daughters and to command their love and care for him in his old age.[7] Constance of *King John* is relentless in her ambition to have her son Arthur crowned king, and her single-minded push for his coronation puts in motion events that lead to his death.[8]

Perhaps Henry IV comes closest to being a successful tiger mother to Prince Hal even though he fails at first in his struggles to dominate Hal's wild spirit and to direct him towards the ambitions of excellence that he cherishes for him.[9] A typical tiger mother, Henry IV tries in myriad ways to manipulate Hal into obedience. He is consumed with envy over Henry Percy's success in raising the young Hotspur, and holds up Hotspur as the son he wishes he had in order to shame prince Hal. But Hal is all rebellion – at least until it really counts. In the end it is perhaps despite Henry IV's tiger-mothering rather than because of it that Hal comes into his own, *on his own*, as Henry V, a greater king by far than was his father.

4 Chua (n 1) 4.

5 Ibid.

6 William Shakespeare, *Hamlet* (OUP 2009).

7 William Shakespeare, *King Lear* (Penguin 1998).

8 William Shakespeare, *King John* (OUP 1989) (Queen Elinor: 'have I not ever said/ How that ambitious Constance would not cease/ Till she had kindled France and all the world,/ Upon the right and party of her son?' (I.i.31–34).

9 William Shakespeare, *Henry IV*, Part I (OUP 2008).

Though these are all fascinating explorations of parental authority and vicarious ambition, we have chosen here to focus on two contrasting portrayals of the parent–child relationship. First, we will examine the relationship between Volumnia and her son Coriolanus in *Coriolanus*, one of Shakespeare's lesser-known tragedies recently brought to renewed attention with Ralph Fiennes' powerful film version;[10] and that between Shylock and his daughter Jessica in, what is perhaps an equally tragic play, *The Merchant of Venice*.[11] *Coriolanus* and *The Merchant of Venice* depict distinct, and indeed polarised, failures of the tiger-mother model. With Coriolanus the model fails because his tortured internalisation of his mother's command overbears his independent judgment and sense of self to his own disastrous ruin. With Jessica the model also fails but in the opposite way. Jessica's refusal to internalise her father's aspirations for her, her total rejection of his outsider vision of her future and her worth lead her to 'go public' with her rebellion in a way that leads to the disastrous ruin of Shylock himself.[12]

2 'Thy valiantness was mine': Volumnia and Coriolanus

In the opening lines of Shakespeare's *Coriolanus* we learn that Caius Marcius (later Coriolanus) is a superhuman warrior, that he is proud, disdains the people, and that they in turn suspect that love of country is not what has motivated his triumphs:

> *First citizen:*
> I say unto you, what he hath done famously, he did
> it to that end: though soft-conscienced men can be
> content to say it was for his country he did it to
> please his mother and to be partly proud; which he
> is, even till the altitude of his virtue.[13]

We are thus aware even before we meet Coriolanus that he is in the thrall of a tiger mother. The ensuing scenes reveal a textbook relationship between seemingly successful tiger mother and her ultra-accomplished child. He holds himself to superhuman standards of excellence and she is the push and motivation behind his success.

(A) Volumnia as tiger mother

In what follows we will describe core aspects of the tiger-mother model as Chua articulates it and show both how Volumnia typifies those attributes in her relationship with Coriolanus and how the model is subject to degeneration and distortion as Coriolanus is destroyed by his inability to break free from his mother's control.

10 Director Ralph Fiennes sets the play in the Balkans in the 1990s. He plays the title role, with a spectacular performance also given by Vanessa Redgrave as Volumnia. See Anthony Lane, 'Ralph Fiennes' *Coriolanus*, Review' *New Yorker* (New York, 23 January 2012); Peter Bradshaw, 'Coriolanus Review' *The Guardian* (London, 19 January 2012.

11 William Shakespeare, *Coriolanus* (OUP 2008); William Shakespeare, *The Merchant of Venice* (OUP 1993). See William Ian Miller, *Eye for an Eye* (CUP 2006). Miller states that *The Merchant of Venice* invokes in him emotions that are closer to those he feels when reading *King Lear* than a comedy (71). See also Madelon Sprengnether, 'Annihilating Intimacy in *Coriolanus*' in David Wheeler (ed), *Coriolanus: Critical Essays* (Garland 1995), in which the author discusses the threat that Volumnia poses to Coriolanus' identity, and that this is a condition that he 'both desires and fears' (188).

12 See Chua (n 1) 172 where she discusses the crisis that ensued when her younger daughter Lulu 'went public' with her rebellion.

13 *Coriolanus* (n 11) I.i.33–7, 160.

(i) No pain, no gain

As a tiger mother, Volumnia takes pride, and even pleasure, in the pain and suffering her son endures to achieve military victories for Rome. Volumnia articulates her cheerful attitude toward the prospect of her son's being injured in battle as she reproaches her daughter-in-law who fears for Coriolanus' safety:

> Away, you fool! [blood] more becomes a man
> Than gilt his trophy: the breasts of Hecuba,
> When she did suckle Hector, look'd not lovelier
> Than Hector's forehead when it spit forth blood
> At Grecian sword, contemning.[14]

Volumnia thrills with pride when she learns that her son has been victorious against the Volsces and has singlehandedly taken the city of Corioli. But she delights even more in the news of her son's wounds and conceives of them as stepping-stones to further public glory.

> O, he is wounded; I thank the gods for't.[15]

And in answer to the question of where her son has been wounded, Volumnia, mindful of the instrumental value of the wounds in promoting his career, enthusiastically replies:

> I' the shoulder and i' the left arm there will be
> large cicatrices to show the people, when he shall
> stand for his place.[16]

Of course, few tiger mothers (at least few in present day North America) can match Volumnia's exaggerated pose here, casting the very body and even life of her son as purely instrumental to achievement. But the perverse pleasure in the child's suffering is clearly in evidence in Chua's self-description. For example, Chua tells of discovering her daughter Sophia's teeth marks on the keys of their piano. The image of the child silently struggling against the demand to practise beyond her own endurance, the teeth marks as evidence of an inward-turning rebellion of a child pushed past her capacity elicits powerful pathos in the reader. Yet Chua's reaction holds fast to a vicarious ethic of 'no pain, no gain' for her daughter. Chua seems to see the teeth marks as badges of honour, as battle scars that are instrumental to her daughter's further achievement.[17]

For Chua, as for Volumnia, equanimity about the child's suffering is justified on 'whatever does not kill [them] makes [them] stronger' reasoning.[18] Chua insists that the tiger-mother model in its extreme demands on the child signals to the child confidence in the child's strength. She writes: 'Western parents are concerned about their children's psyches. Chinese parents aren't. They assume strength not fragility, and as a result they behave differently.'[19] Likewise, Volumnia sees her presumption of invincibility as empowering for her son. By sending him into danger as a young child she signals to her son early on her belief that he is capable of triumphing over extreme adversity.

14 *Coriolanus* (n 11) I.iii.40–4, 180–1.

15 Ibid II.i.118, 212.

16 Ibid II.i.143–45, 213.

17 See Chua (n 11) 58–59. Chua is enigmatic in her discussion of the teeth marks. She seems to suggest that she knows that Sophia is not really enjoying playing the piano because she tells the story of the teeth marks in response to a comment that Sophia seems to enjoy playing piano.

18 Friedrich Nietzsche, *Twilight of the Idols*, Duncan Large (trans) (OUP 1998) 8th maxim.

19 Chua (n 1) 52.

(ii) Insatiability

Another textbook trait of the tiger mother that Chua and Volumnia share is the unwillingness or perhaps even the inability to be satisfied with any of their children's achievements. Nothing is ever enough. Each success, though imperative prior to its attainment, is discounted as soon as it is won and upon attainment is immediately reread as a call to higher glory. Chua's pride at Sophia's playing the piano in Carnegie Hall at the age of 14 is soon succeeded by the observation that her daughter only played in the smaller venue. Chua writes: 'I couldn't help notice that the Weill Recital Hall, where Sophia played – while quite charming with its belle époque arches and symmetrical proportions – was a relatively small venue, located on the third floor of Carnegie Hall.'[20] Of course, Chua sets her sights on the main hall for her daughter. Likewise, her younger daughter Lulu's success in impressing her famous violin teacher is discounted immediately and serves only as pressure for her to perform better the next day and as a demand that she continue to practise even after a full day of playing the violin.[21]

Volumnia's joy at her son's victorious return from battle with the Volsces, his being renamed Coriolanus in recognition of his having taken the city of Corioli singlehandedly, even his numerous wounds 'each marking the grave of an enemy' is only momentary and is very soon displaced by the demand that he become consul of Rome. Volumnia says:

> I have lived
> To see inherited my very wishes
> And the buildings of my fancy: only
> There's one thing wanting, which I doubt not but
> Our Rome will cast upon thee.[22]

That line: 'Only there's one thing wanting' epitomises the tiger mother. For her, there is always more that can be done. And Shakespeare masterfully shows how that maternal insatiability creates the most potentially destructive tensions between the tiger mother and her super-kid. It is here that Coriolanus first attempts to assert his will in opposition to Volumnia as he replies:

> Know, good mother,
> I had rather be their servant in my way,
> Than sway with them in theirs.[23]

Throughout the play the people's tribunes warn of the threat that Coriolanus poses to the democratic rights of the people. They suspect that if he gains the consulship he will trample the people's rights and set himself up as a tyrant. For the most part, we dismiss the argument as mere political opportunism on the part of the tribunes. Coriolanus does not even want to be consul let alone a tyrant. But what about his mother? The insatiability of Volumnia's ambition for her son combined with Coriolanus' compulsion to satisfy her demands makes the tribunes' cautions about tyranny more credible.

(iii) Mother knows best

Coriolanus' understanding of his self-interest is continually pitted against his mother's judgment about what is best for him. As a true tiger mother Volumnia believes that she has

20 Chua (n 1) 140–41.

21 Ibid 143.

22 *Coriolanus* (n 11) II.i.194–98, 217.

23 Ibid II.i.198–99, 217.

exclusive access to decisions about what is good for her son. As Chua puts it: 'Chinese parents believe they know what is best for their children and therefore override all of their children's own desires and preferences.'[24] Against his own wishes to remain a purely military man, Coriolanus accedes to his mother's desire that he become consul. The senate readily agrees to his appointment, but the people must ratify the decision. The ancient custom is for the candidate to put on the 'gown of humility', show his wounds and ask for the people's 'voices'.[25] But Coriolanus, half-hearted in his desire for the position and imbued with his mother's elitism and contempt for the common people, is stiff and insolent in his campaign. Though they initially vote to confirm his office, soon the people renege on their decision and withdraw their confirmation.

Volumnia's supreme confidence in her own superior understanding of Coriolanus' best interests is reiterated as she continues to push him to secure the position of consul even as the politics of attaining it become more intractable. The people's hostility to Coriolanus escalates and some begin to call for his execution. Volumnia demands that he return again to humble himself to the people and win their support.[26] He is shocked that his mother would want him to pander to the masses. But Volumnia wants the consulship and far from approving of her son's stubborn adherence to their shared elitist principles she denounces him for his failure of political strategy. She says:

> You might have been enough the man you are,
> With striving less to be so; lesser had been
> The thwartings of your dispositions, if
> You had not show'd them how ye were disposed
> Ere they lack'd power to cross you.[27]

Coriolanus is stunned by the betrayal. But for Volumnia the game of ridiculing the lower classes stops when winning their support is necessary for advancement. Coriolanus is very aware of the threat that obeying or giving in to his mother poses to his best interests as he sees them. He says:

> I will not do't,
> Lest I surcease to honour mine own truth
> And by my body's action teach my mind
> A most inherent baseness.[28]

In Volumnia's response: 'At thy choice, then' she dares her son to defy her and in so doing secures his obedience.[29] She wagers that his statement 'I will not do't' is an attempt to persuade her to accept his understanding of his best interests and to endow his independent choices with the force of her authority. But Volumnia does not believe either that he is right or even that his estimation of his best interests matters. Like Chua, she feels justified in

24 Chua (n 1) 53.

25 *Coriolanus* (n 11) II.iii.151, 239.

26 A moment of tremendous pathos comes when Coriolanus is confused by the disharmony between his mother's desires and his own. He says: 'I muse my mother/ Does not approve me further, who was wont/ To call them woollen vassals, things created/ To buy and sell with groats' (III.ii.7–10, 266). Coriolanus understands the relation between himself and his mother as one of absolute loyalty bound by shared commitment to superiority. Their mutual disdain for the plebeians is a source of their love for each other. Sharing in contempt for the common people is what Coriolanus and his mother do most happily together.

27 *Coriolanus* (n 11) III.ii.19–23, 267.

28 Ibid III.ii.122–24, 274.

29 Ibid III.ii.125, 274.

overriding all her child's preferences. She is supremely confident that seeking what is best for him does not entail respecting or supporting his autonomy. Because Volumnia is sure that she is right, nothing matters more than securing her son's obedience. His autonomy, his right to be wrong or his right simply to decide on his own has no independent value for her.

Volumnia pushing Coriolanus to win the favour of the people is, in an exaggerated way, similar to Chua pushing her daughter Lulu to play 'Hebrew Melody' on the violin at Lulu's Bat Mitzvah. Coriolanus and Lulu's reasons for not wanting to do the thing make more sense than their mothers' reasons for wanting them to. In both cases the mother is blindly relentless against all reason and prevails. For Chua the victory seems to validate the madness of her insistence. Chua's sense of triumph is made possible because Lulu pulls off the performance in the end. Coriolanus, by contrast, submits to Volumnia's will but fails in his performance. Volumnia blames her son and not herself for the failure. But both mothers skirt the question of whether it was right to stop at nothing to impose their version of the good on their child.

(iv) Guilty indebtedness

Volumnia does not rest her claim to authority solely on this sense of superior knowing. She goes on to buttress this argument for her authority with an argument of indebtedness. Again we see the same sentiment articulated by Chua: 'Chinese parents believe that their kids owe them everything . . .Chinese children must spend their lives repaying their parents by obeying them and making them proud.'[30] Condemning Coriolanus' stubbornness and unwillingness to play to the masses to gain power, Volumnia shames her son, saying:

> Thy valiantness was mine, thou suck'dst it from me.[31]

Here we see inexpiable indebtedness as a further argument for the mother's absolute authority over the child. The child acquires good qualities by consuming the mother's. Yet, rather than divesting the mother of her own strength, the transfer allows her to retain control over the child. Evoking the image of the breast, Volumnia claims credit for and property in her son's achievements by virtue of her having transfused her own strength and courage to him. She feeds him and in turn has her desires fed by the glory that his actions produce. Volumnia sustains the rhetoric of reciprocity throughout the play, relentlessly grounding her claim to authority over him in the logic of debt.

Coriolanus, internalising this view of his indebtedness to his mother, relents again agreeing to return to the people against his own desire.[32]

> Pray, be content:
>
> Mother, I am going to the market-place;
>
> Chide me no more.[33]

(v) Vicariousness

A final attribute of the tiger mother that Chua and Volumnia share is that they live vicariously through their children. They consume their children's accomplishments and crave glory for their children as glory for themselves. This aspect of tiger-mothering is one that Chua vehemently denies. She writes:

30 Chua (n 1) 53.

31 *Coriolanus* (n 11) III.ii.131, 274.

32 Early on in the play we see that Coriolanus credits his mother with his accomplishments, further reflecting his sense of indebtedness to her. When he returns from victory over the Volsces he says to her: 'O, You have, I know, petition'd all the gods For my prosperity!' and kneels to his mother (II.i.165-167, 215).

33 *Coriolanus* (n 11) III.ii.132–34, 274.

> Here's a question I often get: 'But Amy, let me ask you this. Who are you doing all this pushing for – your daughters' – and here always the cocked head, the knowing tone – 'or *yourself*?' I find this a very Western question to ask (because in Chinese thinking, the child is the extension of the self). But that doesn't mean it's not an important one.
>
> My answer, I'm pretty sure, is that everything I do is unequivocally 100% for my daughters. My main evidence is that so much of what I do with Sophia and Lulu is miserable, exhausting and not remotely fun for me.[34]

Chua's claim that her own misery in pushing her children proves her selflessness is obviously flawed. That a tiger mother is willing to endure hardship to make her child perform is no proof that the performance is not primarily for the mother. Indeed, the logic contradicts one of Chua's implicit principles – that nothing is enjoyable unless it is difficult.

Volumnia's desire to live through her son is evident throughout *Coriolanus*. Shakespeare points to our anxiety around this vicariousness in a speech by the patrician Menenius. After the people have overturned Coriolanus' election and the tribunes are calling for his death, Menenius tries to reason with the people on Coriolanus' behalf arguing:

> Now the good gods forbid
> That our renowned Rome, whose gratitude
> Towards her deserved children is enroll'd
> In Jove's own book, like an unnatural dam
> Should now eat up her own![35]

Menenius' argument is persuasive against the tribune's impulse to strike down Coriolanus. But the image of the mother devouring her deserving child resonates less with our anxiety about Coriolanus' figurative mother Rome than with his real mother Volumnia's propensity to consume him. The mother sacrifices her child on the altar of her own vicarious pleasure. The play depicts the extremes of vicariousness in the parent–child relationship. Volumnia lives off and through Coriolanus' accomplishments and our anxiety about her manipulating him to feed her own ambition and desire is heightened by the imagery of cannibalism in the play.[36]

(B) Volumnia's failure and Coriolanus' ruin: democracy and self-rule

In *Coriolanus*, Shakespeare depicts one pathological outcome of the tiger-mother model. What we see most graphically in the play is the tiger mother producing an adult child who is incapable of self-rule. Coriolanus has internalised his mother's authority over him. He believes himself to be guiltily indebted to her not just for life, but for the impetus to all his achievements.

The relation between Coriolanus and his mother can be understood in terms of Ronald Dworkin's distinction between personal preferences (desires one has for oneself for what one wants to have and do) and external preferences (desires one has about what others should have and do).[37] Coriolanus' deliberations for his own action are dominated by his mother's external preferences (her desires for what he should do). Her aspirations for him

34 Chua (n 1) 148.

35 *Coriolanus* (n 11) III.i.292–96, 263.

36 Later, after Coriolanus is banished, Volumnia refuses Meninius' invitation to dinner stating: 'Anger's my meat; I sup upon myself/ And so shall starve with feeding' (IV.ii.53–54, 291). With her usual narcissism, Volumnia casts herself as both the eater and eaten. Yet, it is Coriolanus not Volumnia who appears now fallen in stature, emaciated as he has renounced more and more of himself and abdicated self-command over to his mother's ends.

37 Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1987) 234. See also Brian Barry, *Political Argument* (Routledge & Kegan Paul Ltd 1965) for a distinction between 'privately and publically oriented judgements and wants' (12–13).

trump his own desires. He cannot value his own personal preferences (his own estimation of what he should have and do) with the same commitment as he values her external preferences for him. This valuation of her desires over his own is what compels Coriolanus always to continue to extend his consent to her authority over him.

After Coriolanus is banished by the people for yet another failed attempt to gain their favour, he leaves the city and joins with his former arch-enemy the general of the Volsces, Tullus Aufidius.[38] The two plan an attack on Rome together. But when they arrive to carry out their plan, Coriolanus again faces his mother. It is here that Volumnia's manipulation of her son reaches its highest pitch. She begins by reminding him of what he knows has always been her greatest desire – that he should be extolled in reputation in Rome. Volumnia has always seen her son's life as at bottom only instrumental to his 'good report' and he knows it.[39] Thus he is weakened in his resolve by her argument:

> if thou conquer Rome, the benefit
> Which thou shalt thereby reap is such a name,
> Whose repetition will be dogg'd with curses[40]

Further, in trying to persuade him not to go against Rome she kneels to him:

> with no softer cushion than the flint,
> I kneel before thee; and unproperly
> Show duty, as mistaken all this while
> Between the child and parent.[41]

She shames him by humbling herself to him making him feel the unnatural reversal of the hierarchy between mother and child. She trusts that his discomfort at seeing her humiliated before him will be intolerable to him; that he will be compelled to end her debasement by acceding to her demands. The tactic is dependent upon his internalisation of her claim that he is bound to elevate and obey her. She strikes a posture of self-humiliation only as another means of dominating him.[42]

The play's most obvious themes are about the competing claims of democracy and aristocracy as systems of government. As William Hazlitt wrote:

> Any one who studies [*Coriolanus*] may save himself the trouble of reading Burke's Reflections, or Paine's Rights of Man, or the Debates in both Houses of Parliament since the French Revolution or our own. The arguments for and against aristocracy or democracy, on the privileges of the few and the claims of the many, on liberty and slavery, power and the abuse of it, peace and war, are here very ably handled, with the spirit of a poet and the acuteness of a philosopher.[43]

Hazlitt concludes, however, that Shakespeare tentatively comes down on the side of arbitrary power engaging us in the poetic majesty of Coriolanus' solitary power. Yet, read from the vantage point of the relationship between Volumnia and Coriolanus, the play's

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38 Coriolanus (n 11) IV.v.66–102, 299–301.

39 When Virgilia recoils at Volumnia's enthusiasm at sending her son into the dangers of war and asks: 'But had he died in the business, madam; how then?' Volumnia replies: 'Then his good report should have been my son, I therein would have found issue' (I.iii.19–21, 179).

40 *Coriolanus* (n 11) V.iii.143–45, 340–41.

41 Ibid V.iii.53–56, 335.

42 Volumnia's use of self-abnegation as the ultimate means of extracting obedience from her son comes when she threatens suicide unless he turns back from his campaign against Rome.

43 William Hazlitt, *A View of the English Stage: Dramatic Essays* (Anderson and Chase 1818) 124.

ideas about the relation between democracy and aristocracy are more complex. The relation between Volumnia and Coriolanus raises the question of how authority structures within the family are replicated in the political sphere. Hazlitt sees Coriolanus as the beacon of aristocracy in the play, such that when we favour Coriolanus over the plebeians we favour aristocracy. However, looked at from another angle, Coriolanus himself demonstrates that those who are habituated to authoritarian control are unable to break free from domination and effectively exercise the kind of responsible free will necessary to a functioning democracy. Thus, within the character of Coriolanus we see a mirror of the critique of democracy contained in the play.

In so far as the play is critical of democracy, it is the fickleness of the people, their propensity to change their minds and their vulnerability to being manipulated by others that mars democratic rule and makes it seem short-sighted and ineffective. When Coriolanus discovers that the people have reneged on their earlier decision to elect him consul he storms: 'Have I had children's voices?'[44] Later we see a caricature of the people as children fluctuating between opposite political opinions depending on the immediate stimulus. When they hear that Coriolanus is returning from exile to go against Rome they attempt to disclaim responsibility for their actions: 'though we willingly consented to his banishment, yet it was against our will'.[45] The line suggests a lack of comprehension of the very idea of consent and seems to denote an oxymoron. Consent, as an expression of the will, cannot be against the will.

However, though the line elicits contempt for the plebeians its seemingly empty conceptual distinction actually describes perfectly the failure of autonomy to which Coriolanus himself is subject. At every turn he consents to his mother's authority over him, yet the course of action he chooses as a result of her manipulation is never in harmony with his independent intentions. He is manipulated by her demands and aspirations to forsake his own desires and substitute her wishes for his independent agency. He consents, yet it is against his will.

The play shows that, like the plebeians, Coriolanus is not capable of self-government. He can't validate his own internal preferences as reasons for action. He does not know himself well enough to be able to formulate and act on his own evaluation of his situation. He is not capable of projecting his will into the future because he does not know when he will be undercut by his mother's desires. Shakespeare's ideas about the tension between democracy and aristocracy perhaps go beyond even the considerable sophistication that Hazlitt attributed to him in understanding the nuances of the relative merits of democracy and aristocracy. *Coriolanus* comments on the even more complex issue of the perils of transition from aristocracy to democracy in a society where people are unaccustomed to self-rule.[46]

Throughout Chua's book, she expresses scepticism about the value of democracy and autonomy. Indeed, Chua often describes such values as aspects of Western culture that stand in the way of the success of the Chinese model of parenting. Chua reveals on a number of occasions her sense that the antidemocratic and authoritarian values of Chinese culture better support the practice of tiger-mothering. While Chua has equanimity about the damaging effect the tiger-mother model can have on democratic values and the development of the capacity for self-rule, Shakespeare depicts that possibility as deeply troubling.

44 *Coriolanus* (n 11) III.i.32, 247.

45 Ibid IV.vi.153, 316.

46 See Amy Chua, *World on Fire: How Exporting Free Market Democracy Breeds Ethnic Hatred and Global Instability* (Anchor Books 2003) for the author's views on the risks of importing democracy into societies historically ruled by dictatorship.

Coriolanus' final failure to honour his own judgment and muster the strength necessary for self-rule leads to his death. He capitulates to his mother's plea that he spare Rome. He attempts to 'frame convenient peace' between Rome and the Volsces, asking Aufidius to go along with his change of heart. Though Aufidius gives an outward show of agreement, he is planning Coriolanus' death. Contemptuously calling him a 'boy of tears', Aufidius orders his men to kill Coriolanus.[47] Thus, Coriolanus dies to the echo of insult; the naming of his infantalisation and the rejection of his claim not just to the heroic, but to manhood itself.

3 The 'fast bind, fast find' fallacy: Shylock and Jessica

(A) Shylock, minority parents and the protection from 'Western' influence

While *Coriolanus* depicts one exaggerated and pathological form of the tiger mother, *The Merchant of Venice* depicts an altogether different failure of the model. Shylock is a single parent whose vision of the good for his daughter is fundamentally at odds with the dominant and profoundly licentious culture that surrounds him. Like Chua, he is attempting to discipline his daughter in opposition to ubiquitous permissive influences. For Chua much of the work of Chinese mothering involves filtering out 'Western' influences and prohibiting Western pastimes that hinder her daughters' success, as well as her ability to parent them the Chinese way. Like Chua, Shylock believes that prohibiting fun with the kids next door is in the ultimate best interests of his daughter. As a Jew, Shylock is an outsider. And as a Jew he does not desire assimilation for himself or his family. He has contempt for the 'endless luxury' and indulgence of the Christians of Venice and he strives to shelter his daughter from those influences and to inculcate in her the values of pious Jewish life characterised by obedience and temperance.[48]

Just as Chua prohibits sleepovers, playdates, the school play, TV and computer games, so Shylock attempts to shut out the carnival atmosphere of Venice in order to protect Jessica from its immorality and decadence. On the ill-fated night that Shylock leaves Jessica alone while he goes to dinner with the Christians he says to her:

> Hear you me, Jessica:
> Lock up my doors; and when you hear the drum
> And the vile squealing of the wry-neck'd fife,
> Clamber not you up to the casements then,
> Nor thrust your head into the public street
> To gaze on Christian fools with varnish'd faces,
> But stop my house's ears, I mean my casements:
> Let not the sound of shallow foppery enter
> My sober house.[49]

Again, Shylock's brand of tiger-mothering focuses on deprivation. Not only does he not want Jessica to participate in the frivolity of the Christian neighbours, he does not even want her watching it through the window – perhaps the sixteenth-century equivalent of TV. But Shylock's motives are sincere and perhaps more complex than Chua's. Not only does he reject the prodigal lifestyle of the Christians as morally inferior to pious Jewish life, he also fears the threat that Christian culture poses to his daughter. He knows that he and his daughter live in a Jew-hating world and he believes that Jessica is at risk of being exploited

47 *Coriolanus* (n 11) V.vi.103, 355.

48 Miller (n 11) 73.

49 *Merchant* (n 11) II.v.28–36, 143–44.

and hurt by unscrupulous Christian predators. Shylock is not aiming to make Jessica into a virtuoso. He just wants her to be a virtuous Jewish woman and his depriving her of entertainment and fun is aimed at trying to protect her from desiring the decadent life of the Christians and from incurring the serious risks to her well-being that he fears the Christians might pose for her. While Chua raises her daughters the Chinese way and keeps them from becoming too Western, Shylock does not have the same success.[50] He is unable to prevent Jessica from being swayed by the play's equivalent of a Western influence.[51]

Unlike Coriolanus, who values his mother's judgment about himself more than his own, Jessica does not internalise her father's view of her best interests. Further, unlike Coriolanus, Jessica does not feel indebted to her parent for the care he has given her. She sees her father as merely an obstacle to achieving her own goal of assimilation and acceptance among the Christians. And she sees his money as a means of attaining that goal. Jessica rebels against her father's imposition of austerity in their household. Speaking to their servant, Launcelot Gobbo, who has decided to leave Shylock's employ to go to work for the profligate Bassanio (and, of course, to be paid with money borrowed from Shylock), Jessica begins by saying: 'I am sorry thou wilt leave my father so.'[52] We soon realise, however, that it is not the humiliation of her father at having his servant quit him for a man who is her father's creditor, but rather her own loss that concerns her:

> Our house is hell, and thou, a merry devil,
>
> Didst rob it of some taste of tediousness.[53]

The depth of Jessica's hatred of her father's vision of what is good for her goes beyond mere resentment. Jessica profoundly rejects her whole upbringing, her Jewishness, her father and her culture. She says:

> Alack, what heinous sin is it in me
>
> To be ashamed to be my father's child!
>
> But though I am a daughter to his blood,
>
> I am not to his manners. O Lorenzo,
>
> If thou keep promise, I shall end this strife,
>
> Become a Christian and thy loving wife.[54]

She condemns herself for being ashamed of her father but forgives herself because of the profound difference she sees between herself and him.[55] Daughter to Shylock's Jewish blood only, Jessica hopes her Christian manners will secure a saviour for her in the form of a Christian husband. But belying the naivety and vulnerability Shylock attributes to her, Jessica does not trust to her own charms to land Lorenzo. She knows she is stigmatised as a Jew and sets about making up for it; sweetening the deal by stealing her father's money. Jessica orchestrates her escape, making sure Lorenzo knows that she will be well-provisioned with riches stolen from her father.[56] Shylock knows nothing of his daughter's rebellion and is unaware of her complete rejection of his authority. As he unknowingly takes his final leave of her he says:

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50 Chua (n 1) 5.

51 Ibid.

52 *Merchant* (n 11) II.iii.1, 139.

53 Ibid II.iii.2–3, 139.

54 Ibid II.iii.16–21, 139.

55 See Miller (n 11) 78, where he describes the theme of *Merchant* as not allowing like to produce like.

56 Lorenzo reports the contents of her letter to him: 'She hath directed/ How I shall take her from her father's house,/ What gold and jewels she is furnish'd with,/ What page's suit she hath in readiness' (II.iv.29–32, 141).

Well, Jessica, go in;
Perhaps I will return immediately:
Do as I bid you; shut doors after you:
Fast bind, fast find;
A proverb never stale in thrifty mind.[57]

Shylock speaks to his daughter as the static authority figure bidding her to shut herself up. Yet, ironically, the adage he closes with, spoken perhaps more to himself than to her, expresses a misplaced faith in an axiom that one can secure control over one's possessions and even one's children by locking them up. 'Fast bind, fast find', as though if you nail your possessions (including your children) down, they will be there when next you want them. Though he attempts to bind Jessica to their Jewish household and values, he walks out the door not knowing how profoundly he has failed in that attempt and that he has lost her forever.

(B) Shylock's failure and his own ruin

Shylock fails to secure his daughter's consent to his authority because he omits key elements of the tiger-parent model. In the tiger-mother model consent is fixed through a powerful combination of three emotional factors. First the tiger parent engages in intense and intimate emotional manipulation of the child to get the child to internalise a sense of his or her obligation to obey the parent. This emotional manipulation is grounded in the rhetoric of the child's best interests, their guilty indebtedness and the parent's divine right. Second, the tiger parent seduces the child to a grandiose vision of his or her potential. Public glory is held out as the reward for obedience. And, third, the tiger parent's own vital attachment to vicarious pleasure in the child's achievements, their capacity and desire to live through the child, sets up a further emotional pull for the child in which the child comes to see the parent's experience and desire as of a higher order and therefore as carrying greater weight in their decision-making than their own.

Shylock misses the mark on all three accounts. First, Shylock is unaware that he needs Jessica's participation to create a structure of authority over her and, thus, he misjudges its foundation. Unlike Volumnia and Chua, he does not theorise his parental authority in an emotionally engaged way with his child. Shylock and Jessica do not fight and therefore they are not intimate. He does not know enough about her to perceive the need to manipulate her into accepting his authority, and she in turn gives him no opportunity to learn about her. Shylock assumes that telling her that she is bound to obey will be sufficient to secure her obedience. He underestimates the significance of her vulnerability, assuming that it translates into a dependence on him that will motivate her to accept his authority. But he does not engage with her in a way that would lead her to internalise a sense that as her father's debtor she owes him obedience.

Unlike Volumnia, Shylock does not dramatise himself as having given much to his child. And though, as a Jew alone in a hostile world trying to protect his daughter, he may have sacrificed far more for Jessica than Volumnia ever did for Coriolanus, he does not perceive the need to cast himself in that light such that his selflessness will become an emotional reality for her.

Of course, Jessica ultimately becomes a most guilty debtor of Shylock; robbing him, deserting him and eventually becoming the beneficiary of all his property. And her capacity for such total rebellion is nurtured by a dominant culture ruled by the principle that the

57 *Merchant* (n 11) II.v.50–54, 144.

Jew should never, no matter the evidence, be acknowledged as a legitimate creditor. Jessica can refuse her father the authority of a creditor because she lives in a world eager to back her up and to reread any violation of Shylock as justice and fair comeuppance. The ultimate tragedy of Shylock lies in his naïveté on this count. He miscalculates in all his relationships: with Jessica, Antonio and the law itself, because he does not realise that the obligations of indebtedness do not exist where he is acting as creditor.[58] Perhaps no amount of emotional manipulation could have secured Jessica against the pull of the dominant culture's disbelief in the possibility of moral debt to Shylock. But the pathos of Shylock lies in his misplaced certainty that his status as his daughter's creditor would be enough to secure his authority over her.

Shylock's second mistake in applying the tiger-parent model is in his failure to engage Jessica's ego and ambition by selling her a seductive vision of herself. Like the dominant culture that surrounds her, Jessica values money, luxury and celebrity. She idolises the fair Portia's fame, wealth and beauty.[59] But Shylock offers her no vision of the future except one of virtuous Jewish womanhood, which probably includes marriage to another pariah Jew. This reveals a key difference between Shylock as an outsider father and Chua's notion of the tiger mother. For Shylock, protecting his daughter from the influence of the dominant culture is a good in itself. He means to keep her away from it for good. For Chua, however, protecting the child from Western influence is instrumental to achieving fame and fortune on Western culture's terms. The point of the deprivation is to produce a child who can beat the Westerner kids at their own game. The tiger-mother model exploits a contradiction – Western culture loves money, fame and power – but it loves luxury, ease and self-satisfaction even more. Denying all the temptations of ease, the tiger mother gives her outsider child the rigorous training necessary to trounce the insiders in the race for glory. Despite her austerity she gives her minority child a dream of entering the dominant culture, not as a devalued other but as a star. One can hardly imagine a more potent motivation for the child to acquiesce in the authority of the parent. Shylock, by contrast, deprives his daughter of the indulgences of the dominant culture while offering nothing but a vision of continued isolation in a minority culture that values piety and religious observance over luxury and pleasure.

The final omission in Shylock's application of the tiger-mother model is the absence of any vicariousness in the relationship. Shylock does not live through Jessica; he gives no indication that the fulfilment of his wishes for her will bring him joy. Thus, unlike Coriolanus, Jessica is not motivated by the pleasure of giving her father vicarious satisfaction in fulfilling his ambitions for her. Coriolanus, dominated by the powerful and clear desires of his mother, is unable to validate and sometimes even to know his own desires. Coriolanus gives his mother's desires more weight than his own, because his own uncertain desires always lose against the absolute and obsessive certainty of Volumnia's wishes for him. But here again, Shylock misses the mark. By not giving Jessica the pleasure of pleasing him he misses out on another potential hold on her psyche that he might have used to secure her consent and prevent her rebellion.

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58 Jessica seems to be aware, however, that her own Jewishness and perhaps her status as a woman do combine to erase her status as creditor to Lorenzo.

59 See the following exchange between Lorenzo and Jessica – Lorenzo: 'How dost thou like the Lord Bassanio's wife?'; Jessica: 'Past all expressing. It is very meet/ The Lord Bassanio live an upright life;/ For, having such a blessing in his lady,/ He finds the joys of heaven here on earth;/ And if on earth he do not mean it, then/ In reason he should never come to heaven/ Why, if two gods should play some heavenly match/ And on the wager lay two earthly women,/ And Portia one, there must be something else/ Pawn'd with the other, for the poor rude world/ Hath not her fellow' (III.v.67–77, 186–87).

4 Conclusion

There is a strain of self-irony in Chua that is largely ignored in the commentary and discussion of her ideas. Her frequent descriptions of her husband Jed's ridicule of her provide not just comic but real relief from her relentless drilling. She doesn't hesitate to drop in a self-deprecating line, poking fun, for example, at her intellectual ambitions for her Samoyed dogs. In the end, Chua admits some reservations about her model of mothering. She recognises that, by trying to completely control her younger and more rebellious younger daughter Lulu, she risked complete alienation from her.[60] Ultimately, Chua concedes that losing her daughter would be worse than losing absolute control over her daughter. Though that call would be obvious and immediate for most parents, we still credit Chua with a moral breakthrough for getting there.

At the end of the book Chua considers a compromise: 'The Chinese way until the child is eighteen, to develop confidence and the value of excellence, the Western way after that. Every individual has to find their own path.'[61] What Shakespeare's depiction of Coriolanus shows is that going from submission to tyrannical authority as a child to effective self-rule in adulthood may be impossible. Children habituated to valuing their parent's external preferences over their own internal ones may not have the capacity to know let alone honour their own truth. Likewise, *Merchant of Venice* shows us that, unless the tiger parent successfully seduces the child with dreams of glory, the child may refuse to participate at all in the construction of the parent's authority. The plays depict the potential pathologies of the tiger-mothering model and serve as cautionary tales.

60 Chua (n 1) 212.

61 Ibid 225–26.