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Dr Mark Flear

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Limited, inclusive, and communitarian: in defence of recognising property in the human body

NEIL MADDOX*

Maynooth University

Abstract

While recognising property in the human body would have its uses, there are objections to granting such rights given the unique nature of the body. One objection is that property serves individualistic and not communitarian values and fails to capture the body's relational interdependent nature. I contest this objection as it takes an overly narrow view of property as being 'Blackstonian' in character, eliding the diversity of property institutions that actually exist. Thus, the usefulness of property law in the protection and management of community resources and the manner in which property is often limited by non-property interests that the law is accustomed to protecting have not been accounted for. I contend that property facilitates cooperative human activity and could potentially provide useful tools for the protection of individual and communal rights in the body. I further contend that, where property rights have tentatively been recognised in human biomaterials, they are not strongly exclusive in character and are consistent with property's inclusive and communitarian nature in being limited to prevent public harm and by reference to the non-property interests of other persons and the community.

Keywords: Blackstone; the body; ownership; property; personhood; tissue

1 Introduction

Whether the interests of the person in their body and its parts and products should be protected by the recognition of property rights vesting in the source of these materials (whereby a person may acquire property rights in their own bodily materials), or alternatively, through other non-property legal mechanisms, remains a highly contested area of debate.[1] Leaving aside momentarily the objections to this approach, there are a number of advantages of adopting the property paradigm in order to protect the rights and interests

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1 See the discussion in I Goold, K Greasley, J Herring and L Skene (eds), *Persons, Parts and Property: How Should We Regulate Human Tissue in the 21st Century?* (Hart 2014); R Hardcastle, *Law and the Human Body: Property Rights, Ownership and Control* (Hart 2007); R N Nwabueze, *Biotechnology and the Challenge of Property: Property Rights in Dead Bodies, Body Parts and Genetic Information* (Ashgate 2007); J Wall, *Being and Owning: The Body, Bodily Material and the Law* (Oxford University Press 2015). M Quigley, *Self-Ownership, Property Rights and the Human Body: A Legal and Philosophical Analysis* (Cambridge University Press 2018).

of persons in their body.[2] Of particular usefulness to judges facing novel and difficult questions relating to the control and use of the body and its parts is that property provides remedies in cases where none would otherwise be available.[3] Granting such a strong right as a property right to the source of such materials could provide a valuable tool in protecting the dignity and autonomy of the person by enabling them to control how their bodily products are used and would provide a valuable counterweight to commercial interests that would seek to instrumentalise the body and its parts for private gain, without recourse to or concern for the source of those biomaterials.[4]

Nevertheless, there are concerns with treating the human body as property.[5] There are principled concerns; for example, that property would lead to the commodification of human beings and their parts and this would constitute an affront to human dignity.[6] There are also practical objections, one of which states that allowing the source of human tissue a property right in it would unduly fetter medical research.[7]

There is a broader objection to the use of property which I contest in this article. This asserts that property models are largely underpinned by individualistic values and merely protect exclusion and control. Under this objection, the adoption of a property model to regulate the uses of the body and its parts serves to characterise it as 'bounded and self-contained'. This misrepresents the true nature of the body which is inherently relational.[8] In this article, I contend that this objection to adopting a property model for regulating human biomaterials is rooted in the assumption that property is adequately described by William Blackstone's ownership model (recently rehabilitated as exclusion), ignoring the fact that property is often much more limited and inclusive than that conceived by Blackstone and his successors.

I also examine the recent work of a number of legal pluralists who contend that property should be understood as a mode of organising social relationships, that property owners have not just rights but obligations towards other owners, non-owners and the community as a whole.[9] I show that the recognition of property rights in human biomaterials is developing more in accordance with this view of property. Accordingly, where property rights have been so recognised in human biomaterials, they have been limited by the protection of non-property interests in a way that would be predicted by legal pluralists, but could not be accounted for by those who adhere to accounts of property as an institution being synonymous with full-liberal ownership and exclusively serving individualistic values.

2 As described by L Skene, 'Raising Issues with a Property Law Approach' in Goold et al (n 1) 263–69, 266.

3 For example, in *Yearworth v North Bristol NHS Trust* [2009] EWCA Civ 37, the loss of frozen sperm samples was deemed compensable as damage consequent on property damage by recognising the frozen sperm as property.

4 L Skene, 'Arguments Against People Legally "Owning" their Own Bodies' (2002) 2 Macquarie Law Journal 165.

5 Ibid.

6 J W Harris, *Property and Justice* (Oxford University Press 1996) 351–52.

7 *Moore v Regents of the University of California* (1990) 51 Cal 3d 120, [4a].

8 J Herring, 'Why We Need a Statute Regime to Regulate Bodily Material' in Goold et al (n 1) 215, 216–223.

9 J W Singer, *The Paradoxes of Property* (Yale University Press 2000); H Dagan, *Property: Values and Institutions* (Oxford University Press 2011); G S Alexander, 'Pluralism and Property' (2011) 80 Fordham Law Review 1017.

2 The objection: property serves individualistic values whereas the body is relational

A number of commentators object to property in the body on the basis that it serves the values underpinning autonomy and the market that are atomistic, self-focused and competitive. These principles are at variance with the broader range of values that we should seek to promote when dealing with questions concerning the body, its parts and products. Thus, property rights, it is claimed, would objectify the body as bounded and self-contained when its true nature is in fact relational and interdependent. An understanding of the self as individualised means personhood is then presented by reference to abilities which are self-referential and emphasise independence, and the kinds of ethical values that are said to be advanced by individualised concepts of the self are autonomy, freedom and liberty.[10] Accordingly, there is a presumption that such freedoms should not be interfered with unless sufficient justification can be produced. The role of law becomes primarily to keep others out and leave the person free to carry on activities of their choosing as they wish.[11]

In allowing its owner to be the supreme agenda-setter in respect of a resource, property rights are seen to protect only one set of legal interests: those of control, exclusion and transfer with proceedings rarely being brought on behalf of communal interests.[12] In this view, conceiving of the body as property leads to the attitude that it is a thing controlled by the self with which one can do what one wants. Accordingly, individuals should have control of their bodies and body parts and no one else can have ownership of them.[13] Furthermore, it is the individual who determines the appropriate use of body parts and they should be able to deal with them as they wish.[14]

This line of criticism also asserts that the favouring of individualistic interests inherent in property institutions treats the body as atomised when its true nature is relational. Bodies are 'leaky' in the sense that the meaning and understanding of the self is not easily captured by one concept or approach.[15] This view of the self sees it as having definition and moral value in its relation to others and our relationship with them. In contrast to the role of law in the individualised conception, which seeks to keep people apart, the relational approach sees the purpose of law as enabling good relationships and caring relationships to thrive.[16] This approach does not view the body as a controlled and independent entity. Rather, it emphasises the interconnectedness and interdependence of bodies. This connectedness is to other bodies, such as during pregnancy or through genetics.[17] Human dependence and interdependence are natural parts of the human condition through birth, aging, sickness and the need for companionship.[18] This all means that it is impossible to consider our bodies separate from other bodies. My body

10 J Herring and P-L Chau, 'Relational Bodies' (2013) 21 Journal of Law and Medicine 294, 294.

11 Ibid 295.

12 Herring (n 8) 216. Herring cites Larissa Katz, an exclusion theorist of property, as authority for an owner's agenda-setting powers over their resource: L Katz, 'Exclusion and Exclusivity in Property Law' (2008) 58 University of Toronto Law Journal 275.

13 Herring and Chau (n 10) 295.

14 Ibid.

15 J Herring and P L Chau, 'My Body, Your Body, Our Bodies' (2007) 15 Medical Law Review 34, at 60, quoting Margrit Shildrick, *Leaky Bodies and Boundaries: Feminism, Postmodernism and (Bio) Ethics* (Routledge 1997).

16 Herring and Chau (n 10) 295.

17 Herring and Chau (n 15) 45–49.

18 T Levi, 'The Relational Self and the Right to Give Care' (2006) 28 New Political Science 547, 548.

is not thus 'mine' in a straightforward manner, and the individualistic values of control and exclusion promoted by property can never fully capture it.

The fact that a variety of forms of property may exist does not overcome the objection on this view of property. While obviously not all types of property are unqualified, exclusive and individualistic, these attributes are the 'starting presuppositions' of property.[19] Thus, there is a presumption that absolute and unqualified ownership is the norm. And, while proponents of property point to its technical capacity to encompass exceptions, qualifications and regulations to adapt it to a particular purpose, these must be justified in each case as such limits deviate from the normal conception of what property is. So, property as a legal tool forces us to divert energy into constantly justifying any limits on its absolute nature, as such limits are regarded as aberrant and contrary to what property truly is.[20] This view admits that a reformed and new conception of property could be worked towards that would conceive of property in relational terms.[21] However, the prevailing norms of property are currently unreformed and reflect individualistic and market-driven values.[22] Although the content of property rights is capable of being limited to serve certain values, in such an environment presumptions would favour granting a full suite of property rights in human biomaterials and would thus favour commodification, objectification, exploitation and alienation.[23] In this context, the power of legal discourse to translate and replace complex ways of describing human relations into simple formulas is seen as particularly troublesome if we are to conceive of the body as property. On this legal construct, it is feared that bodies would only be viewed as related to each other as mere market commodities where matters such as pain and desire are articulated as types of property damage and consumer preference and love reduced to only another type of contract.[24]

One does not have to look far into mainstream property theory to find evidence that the property paradigm promotes such values. Blackstone described the right of property as 'that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the rights of any other individual in the universe'.[25] Blackstone thus asserted that property was an *absolute* right vested in the individual by natural law in contrast to the Lockean notion that such rights were dependent on society's recognition that the owner had mixed his labour with the property in some way.[26] Since owners are free to use their property as they wish, we naturally presume that the owner has the fullest amount of powers to use, control, manage and alienate the property, what I will call 'full-liberal ownership'.[27]

Blackstone's 'ownership' model has been modernised by those commentators who reject the 'bundle of rights' picture of property, discussed below, and adopt an exclusion

19 J Nedelsky, 'Property in Potential Life—A Relational Approach to Choosing Legal Categories' (1993) 6 Canadian Journal of Law and Jurisprudence 343, at 353. J Nedelsky, 'Reconceiving Property: Sources, Thoughts and Possibilities' (1989) 1 Yale Journal of Law and Feminism 7.

20 Nedelsky, 'Property in Potential Life' (n 19) 354.

21 Ibid 352–53; R P Petchesky, 'The Body as Property: A Feminist Revision' in F Ginsburg and R Rapp (eds), *Conceiving the New World Order* (University of California Press 1995).

22 Nedelsky, 'Property in Potential Life' (n 19) 353.

23 R Rao, 'Property, Privacy, and the Human Body' (2000) 80 Boston University Law Review 359.

24 A Hyde, *Bodies of Law* (Princeton University Press 1997) 48–49.

25 W Blackstone, *Commentaries on the Laws of England* (Clarendon Press 1765) ii, *2.

26 R P Burns, 'Blackstone's Theory of the "Absolute" Rights of Property' (1985) 54 Cincinnati Law Review 67.

27 M J Radin, *Reinterpreting Property* (University of Chicago Press 1983) 100; For a fuller description of 'full-liberal ownership', see J W Harris, *Property and Justice* (Oxford University Press 2001).

or boundary approach whereby the essence of property is constituted by the power to exclude all others from the object owned.[28] It is not then difficult to regard property as promoting individualistic values whereby, by definition, I may exclude the whole world from the resources over which I have dominion, and I may make such use of them as I like without regard for others. It is precisely because of this conception of property institutions as leading to separation, atomisation and selfishness in the use of resources that the appropriateness of the property paradigm being applied to human bodies is challenged.[29]

3 The limits of absolutist and exclusivist accounts of property

Although undoubtedly influential, the 'ownership' model of property overestimates the extent to which property interests are exclusive and independent of one another and ignores property's relational nature. To characterise property as absolute and exclusive ignores the features of property that facilitate human cooperation and altruism. Indeed, Blackstone accepted that absolute rights may be curtailed by positive law for the blessings of civilised society.[30] And, notwithstanding the natural law basis of these rights, he acknowledged the functional justifications for property rights within this framework.[31] The individual is not protected from all government action, only government action that is arbitrary. Indeed, the government in Blackstone's time exercised extensive powers of regulation.[32] Even in colonial America, where property rights were frequently described in absolutist terms in political rhetoric, these rights were subject to significant regulation and expropriation and property was understood by the colonists as being limited.[33]

While property rights have never been absolute, the rhetoric of absolutism has persisted in political and legal discourse.[34] This creates a difficulty in that this image of property served to obscure the distinctions between different types of property, for example that the family home deserves a significant degree of legal protection does not mean that a developer's commercial property deserves the same level of protection.[35] This 'myth of property' emphasises property rights as providing autonomy in the form of independence and this necessarily limits voluntary obligations to others.[36]

A further weakness of these accounts is that exclusion theorists believe the concept of property concerns only relations between owners and non-owners. They are, as one commentator notes, only concerned with the 'external life' of property.[37] However, the internal life of property, that is the relationships between property stakeholders, is often

28 T Merrill, 'Property and the Right to Exclude' (1998) 77 Nebraska Law Review 730; J Waldron, *The Right to Private Property* (Clarendon Press 1998) 39; T Merrill and H E Smith, 'What Happened to Property in Law and Economics' (2001) 111 Yale Law Journal 257; K Gray, 'Property in Thin Air' (1991) 50 Cambridge Law Journal 252.

29 J Herring and P-L Chau, 'Interconnected, Inhabited and Insecure: Why Bodies Should not Be Property' (2013) 40 Journal of Medical Ethics 39. Herring and Chau (n 15).

30 Burns (n 26) 73.

31 R A Epstein, 'The Disintegration of Intellectual Property? A Classical Liberal Response to a Premature Obituary' (2010) 62 Stanford Law Review 455, 459.

32 J Williams, 'The Rhetoric of Property' (1998) 83 Iowa Law Review 278, 281.

33 D Schulz, 'Political Theory and Legal History: Conflicting Depictions of Property in the American Political Founding' (1993) 37 American Journal of Legal History 464, 465 and 488–89.

34 Williams (n 32) 280–95.

35 Ibid 294.

36 M C Regan, 'Spouses and Strangers: Divorce Obligations and Property Rhetoric' (1994) 82 Georgetown Law Journal 2303, 2339–59.

37 G Alexander, 'Governance Property' (2012) 160 University of Pennsylvania Law Review 1853, 1853–54.

highly significant to property doctrinally.[38] Very significant rules regulate, for example, the rights of communities, neighbours, co-owners and families; providing structure for what are cooperative as opposed to competitive relationships. As Carol Rose has observed, we talk about much more when we talk about property, including such things as:

> Gift
> Trusteeship
> Bequest
> Equal and correlative rights
> Reasonable Use.[39]

Most of these terms are part of the layperson's understanding of property, and we should not allow the mythology of property – exclusiveness, boundedness and selfishness – to obscure the fact that cooperation and attentiveness to others are essential features of any property law regime.[40] This 'mythology of property', based as it is on an understanding of property as an antisocial institution, has been used to assert the inappropriateness of applying the language of property to resolve disputes involving intimate human relations.[41] Nonetheless, while intimate human relationships may be characterised by sharing, nurturing and attentiveness to needs, property and entitlement are inseparable from these features of these relationships.[42] Indeed, property may be implicit in determining 'who gets what' in the most intimate of settings.[43] On even a cursory examination of how property works, it becomes clear that it is fanciful to regard all its forms as controlled, atomised and independent entities. To identify all property in such terms is to mistake rhetoric for reality and cast to the margins a considerable swathe of property law doctrine that is relational, governing rights between owners (nuisance, easements), between owners and non-owners (licences, public accommodations), in intimate settings (family property), as well as doctrine that ensures the management of property for the benefit of others, or indeed its management in the interests of the public as a whole (private and charitable trusts).

4 Alternative accounts of property: limited, inclusive and communitarian

4.1 Property as inclusion

In the view of certain legal pluralists, private law scholars have attempted to provide 'monist' accounts of private law where broad normative accounts suggest that one regulative principle guides the doctrines of complex legal fields. In relation to property, exclusion has been placed at its core by theorists such as Thomas Merrill and Henry Smith and other manifestations of property are pushed to the periphery.[44] Structural pluralists such as Hanoch Dagan note the tendency for distinct institutions to develop in property law, and the rules for each institution are context-specific with differing rules expressing differing normative commitments in different categories of human

38 Ibid 1855.

39 C M Rose, 'Rhetoric and Romance: A Comment on Spouses and Strangers' (1994) 82 Georgetown Law Journal 2409, 2410.

40 Ibid. The development of 'social norms' theory around property rights heavily emphasises cooperative aspects of neighbourhood relations; R C Ellickson, *Order Without Law: How Neighbours Settle Disputes* (Harvard University Press1991).

41 Regan (n 36).

42 Rose (n 39).

43 Ibid.

44 Merrill (n 28); Merrill and Smith (n 28); H Dagan, 'Pluralism and Perfectionism in Private Law' (2012) 112 Columbia Law Review 1409, 1410.

situation.[45] In this account, each property institution, is 'designed to match the specific balance of values suited to the specific social context' (family, business, etc.).[46] Not only does conceptualising property as the right to exclude undermine the importance of the internal life of property, it obscures the fact that inclusion is often an important feature of it.[47] For example, the concept of fair use in copyright law, much of landlord and tenant law and the law of public accommodations involve non-owners' rights of entry that are inherent in property law.[48] On this view of property, while owners have *some* rights to exclude others, other values play a crucial role in shaping property institutions and property can and does serve commitments to personhood, desert, aggregate welfare and social responsibility.[49] The particular configuration of differing entitlements for differing property institutions is not arbitrary or random, but determined by the unique balance of values characterising the property institution. Reshaping property institutions is an on-going process but the ability to repackage rights as envisaged by the Honoré-Hohfeld conception of property allows judges to develop existing property forms while remaining sensitive to social context.[50]

Indeed, the ownership model fails to acknowledge the frequent conflict between the exercise of property rights and non-property rights. Property rights are not the only rights that matter and are certainly not the only rights protected by the legal system.[51] Nor should one assume that property rights will prevail in a conflict with personal rights, and conflicts between different legally protected interests means that regulation and limits on private property are far more pervasive than one might assume.[52] Of particular relevance here is the fact that certain resources may be constitutive of a person's identity resulting in a reconfiguration of property entitlements so that the law vindicates a person's control of their constitutive resources. Margaret Radin supports limiting owners' exclusionary rights in order to protect the personhood interests of others in their property. For example, she espouses residential rent control protection for tenants whose residence is their home and thus constitutive of their person.[53] The commodification of objects constitutive of personhood is of particular concern, and she contends that there are strong arguments for regarding certain objects, such as body parts, sex and children to either be prohibited from sale (market-inalienable) or subject to regulation which limits commodification and protects personhood (limited market-inalienability).[54]

Thus, to be granted property in a valuable resource is not to be granted 'sole and despotic dominion' over it since exclusionary rights will be pockmarked with exceptions depending on the existence of other interests in the resource which the law is accustomed

45 H Dagan, 'Property's Structural Pluralism: On Autonomy, the Rule of Law, and the Role of Blackstonian Ownership' (2014) 3 Brigham-Kanner Property Rights Conference Journal 27.

46 Dagan (n 44) 1411.

47 Dagan (n 45) 29.

48 J W Singer, 'No Right to Exclude: Public Accommodations and Private Property' (1995) 90 Northwestern University Law Review 1283.

49 Dagan (n 45) 29–30.

50 A M Honoré, 'Ownership' in A G Guest (ed), *Oxford Essays in Jurisprudence* (Clarendon Press 1961) 107, 112–14. W N Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 Yale Law Journal 16; Dagan (n 45) 30.

51 J W Singer, *Entitlement: The Paradoxes of Property* (Yale University Press 2000) 7.

52 Ibid.

53 M J Radin, 'Residential Rent Control' (1986) 15 Philosophy and Public Affairs 350.

54 M J Radin, 'Market-inalienability' (1987) 100 Harvard Law Journal 1849.

to protecting.[55] For example, the availability of the trespass remedy has been limited in order to protect such non-property interests as freedom of speech,[56] the welfare of migrant workers,[57] and the right to peacefully picket.[58] A privilege which prevents liability in trespass has been granted by the courts if a defendant has furthered an interest of such societal importance as to be entitled to protection.[59] The abusive exercise of rights can be curtailed in circumstances where the landowner has suffered a mere legal and not actual injury.[60] It is also well established that landowners may not arbitrarily exclude individuals from private land where this land has been opened up to the public at large by the landowner.[61] The common law right to exclude can be said to be substantially qualified by a competing common law right of reasonable access to public places.[62]

The law is clearly accustomed to protecting bodily rights, utilising a diversity of legal doctrines such as privacy, the criminal law and torts. If we accept Dagan's view that property develops distinct institutions with different rules depending on context, there is no reason to doubt that a body-as-property institution would reflect a unique commitment to vindicating the range of values in the body that the law has traditionally protected. Given the unique nature of the body, this property institution would balance the unique interests and values that the individual and the community have in the human body.

4.2 Property serves communitarian values

It is inaccurate to describe property in all its forms as merely serving self-interested and individualistic values, and a further misdescription to assert that property cannot capture the relational aspects of the body: property institutions can and do facilitate cooperative relationships between individuals, and between the individual and the community. Undoubtedly, there are property institutions that are shaped along Blackstonian lines being atomistic and competitive, but in other areas property law does not allow these norms to infiltrate other social spheres and thus property relations mediate some of the most cooperative areas of human interaction.[63] Entitlement sacrifices required by the law, such as restrictions on rights by eminent domain and nuisance, and use sacrifices, so

55 Singer gives the example of public accommodations law which limits the ability of owners of businesses open to the public to exclude persons from their property on an invidious basis such as race: Singer (n 51) 72–75.

56 *Marsh v Alabama* (1946) 326 US 501 (striking down a law against distributing religious literature in a company-owned town without the permission of the landowner).

57 *State v Shack* (1971) 58 NJ 297 (where the conviction of the defendants for trespass for entering onto private lands to aid migrant farmworkers was overturned as being beyond the reach of the trespass statute); cf. *Harrison v Carswell* [1976] 2 SCR 200 (where lawful picketers were convicted of trespass for picketing at a shopping centre).

58 *Amalgamated Food Employees Union Local 590 v Logan Valley Pizza Inc* 308, 88S Ct 1601, 20 L Ed 2d 603, (where the right to picket peacefully in a privately owned shopping centre was upheld); see also *Schwarz-Torrance Investment Corp v Bakery and Confectionary Workers Unio*n, 61 Cal 2d 766, 40 Cal Rptr 233, 394 P 2d 921 (Sup, Ct 1964) 380 US 906, 85 S Ct 888, 13 L Ed 2d 794 (1964).

59 Per Laskin CJ, dissenting, in *Harrison v Carswell* [1976] 2 SCR 200, 209–11.

60 H C Gutteridge, 'Abuse of Rights' (1935) 5 Cambridge Law Journal 22.

61 Singer (n 48); N F Arterburn, 'The Origin and First Test of Public Calling' (1927) 75 University of Pennsylvania Law Review and American Law Register 411.

62 Per Pashman J in *Uston v Resorts International Hotel, Inc* 445 A2d 370, 374 (NJ 1982) (where a casino was held to have no power of exclusion of a casino patron on the basis that he was 'card-counting' as this did not violate any casino rules). See also *Brooks v Chicago Downs Association* 791 F 2d 512 at 519 (1986) and *Marzocca v Ferone* 93 NJ 509, 461 A2d 1133 (1983) which suggest that the courts will be particularly concerned to prevent arbitrary exclusions where the normal workings of the market fail to prevent such excesses.

63 Dagan (n 45) 30.

as to ensure the historic preservation of buildings and environmental protection, are illustrative of the view that private property owners owe duties to the community at large.[64]

Property scholarship concerning the environment is of particular interest to those concerned with questions as to the propertisation of the body, as it has recognised that prevailing theories of property are incompatible with two essential features of environmentalism: the interconnectedness of people and their environment and the importance of the unique characteristics of each object.[65] Rather than rejecting property as a means of achieving environmental goals, they seek for a new metaphor that can better account for human–human relationships, human–object relationships and the importance of the unique characteristics of an object when defining the nature of the rights and interests in it.[66] When all property is regarded as a commodity and seen merely as an instrumental tool to increase value, the environment suffers and a rebalancing of property law is required with the recognition of certain lands as a separate legal category where their undeveloped status can be protected.[67]

The creation of such a separate category in property law would clearly be of interest to those who share the Kantian concern that human beings should never be used solely as a means only to an end, as being human is always an end in itself.[68] Such a theoretical development would merely reflect that there are many categories of things, be they wilderness lands or human ova, that are not appropriately categorised as Blackstonian property, but would benefit from being included in the property system if it could be tailored to protect these unique objects.

Were this otherwise, and if the nature of property were indeed absolute, the state would be unable to adjust property rights to the public good by regulation without the payment of compensation in every case. Effectively, then, the government would only be able to regulate by purchase, effectively rendering regulation of the use of land impossible.[69] In the USA, where attachment to the idea of property as Blackstonian, absolute and fundamental to individual liberty is at its strongest, the lawful exercise of the 'police power' by government may diminish the value of private land without any duty to pay compensation.[70] Where the government effects a 'taking' of property for public use, this is subject to a constitutional requirement that 'just compensation' be paid to the owner. Nonetheless, a considerable range of activities have been held not to be such a

64 G S Alexander, 'The Social-obligation Norm in American Property Law'(2008) 94 Cornell Law Review 745, 773–809.

65 C A Arnold, 'The Reconstitution of Property as a Web of Interests' (2002) 26 Harvard Environmental Law Review 281.

66 Ibid 282.

67 J G Sprankling, 'The Antiwilderness Bias in American Property Law' (1996) University of Chicago Law Review 519, 586. J G Sprankling, 'An Environmental Critique of Adverse Possession' (1994) 79 Cornell Law Review 816.

68 R Johnson and A Cureton, 'Kant's Moral Philosophy' in E N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Fall 2017 edn) <https://plato.stanford.edu/archives/fall2017/entries/kant-moral/>.

69 *Pennsylvania Coal Co v Mahon*, 260 US 393, 413 (1922); *Penn Central Transportation Co v New York City*, 438 US 104, 124 (1978).

70 J L Sax, 'Takings and the Police Power' (1964) 74 Yale Law Journal 36; F I Michelman, 'Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law' (1967) Harvard Law Review 1165.

taking, including zoning ordinances,[71] the abatement of nuisance,[72] conservation,[73] the regulation of business,[74] public navigation rights,[75] and the health and safety of the community.[76] A 'bewildering array of rules' has developed to determine which losses are compensable takings and which are not.[77] If property's nature were truly absolute, a traditional and formal legal test would have yielded consistency and precision in how these cases were decided, but this has not been the case.[78]

Indeed, at every stage of history in the Western world individuals risked having their property taken from them by the state.[79] And A W B Simpson characterises Blackstone's description of property ('So great, moreover, is the regard of the law for private property, that it will not authorize the least violation of it; no not even for the general good of the whole community.')[80] as 'possibly misleading' since there probably existed in Blackstone's time Crown powers to take property without parliamentary approval.[81] Indeed, in English law there is no similar right to compensation for regulatory takings, as is mandated in US constitutional jurisprudence.[82] Furthermore, Article 1 of the European Convention on Human Rights (ECHR) provides that no one shall be deprived of their possessions 'except in the public interest', a seemingly broader range of justifiable expropriations than contemplated in the US Constitution where it is the 'public use' that provides the justification.[83]

5 Property in the body

5. 1 The body and limited ownership rights

Recent debate regarding the appropriate legal category to assign to the body and its parts has focused on whether these materials should be the subject of a property or a statutory regime.[84] In reality, if a property regime were adopted, statutes would be needed to regulate these property rights so the claim for a property regime is not an exclusive one.[85] It is, of course, possible to reject a property approach and rely solely on statutory regulation, but there are disadvantages to this approach. In particular, it is impossible to anticipate all possible legal disputes that will arise when designing a statutory scheme and

71 *Just v Marinette County* 56 Wis 2d 7 (1972) (a zoning ordinance restricting shore-land development to prevent the degradation and deterioration that would result from uncontrolled development).

72 *Gardner v Michigan*, 199 US 325 (1905) (regulation of garbage disposal and control).

73 *Penn Central Transportation Co et al v New York City*, 438 US 104, 124 (1978) (restrictions on development of historic buildings); *Just v Marinette County* (n 71).

74 Such as restrictions upon prostitution: *L'Hote v City of New Orleans*, 177 US (1900); and alcohol *Boston Beer Co v Massachusetts*, 97 US 25 (1878)

75 For example, imposing a navigational servitude on a once private pond that the owners had connected to the bay: *Kaiser Aetna et al v Unites States* 444 US 164 (1979).

76 *Munn v Illinois,* 94 US 113, 146 (1876) (fire regulations).

77 Michelman (n 70).

78 Judge Harlan set down such a test focusing on traditional legal concepts, such as appropriation of property interest, physical invasion and nuisance: *Mugler v Kansas*, 123 US 623 (1887).

79 F A Mann, 'Outlines of a History of Expropriation' (1959) 75 Law Quarterly Review 188.

80 W Blackstone, *Commentaries on the Laws of England* (Clarendon Press 1765) i, 134–40.

81 A W B Simpson, 'Constitutionalizing the Right to Property: The US, England and Europe' (2008) 31 University of Hawai'i Law Review 1, 7.

82 Ibid 14–15; indeed, any analogous right is of much more limited scope: *Colley v Secretary of State for the Environment and Canterbury City Council* (1998) 77 P & CR 190.

83 Simpson (n 81) 19.

84 See Goold et al (n 1).

85 Herring (n 8) 228.

there are dangers that lacunae will be left by any such regulation. As human biomaterials increase in value and advances in technology create new contexts in which such value rises, there is likely to be an increase in the number of and complexity of disputes involving human tissue.[86] The advantage of a broad legal category like property is that it allows legal rules to be expressed at a high level of generality, greatly reducing the administrative costs of amending and interpreting the law. Laws that do not treat a thing as part of a broader class can be described as *sui generis*. Such a specialist regime risks creating regulatory gaps and also imposing high administrative costs upon lawyers and the public.[87] There is also the danger in an area such as biotechnology that a *sui generis* regime might be quickly overtaken by technological change to the extent that the regime is based on assumptions that are no longer valid, creating 'regulatory disconnection': i.e. where the law is still applicable and there is no legal disconnection, but it may not be appropriate to apply it to this new technology creating regulatory disconnection [88]

Proponents of a property regime point to the fact that it would make available pre-existing remedies in novel disputes where there would be none otherwise.[89] As noted, opponents point to the dangers that the body and the person who inhabits it will be devalued by the application of a property regime to human biomaterials, potentially leading to objectification, commodification, fragmentation and expropriation of the body and its parts by the state.[90] Thus, treating the body as property is rejected on the grounds that it will lead to practices that are considered by many to be objectionable, such as the sale of organs, the right to sell oneself into slavery and the right to sell sexual services.[91] Such fears are as a result of the tendency to conflate more limited forms of property with full ownership and to consider all forms of property as equating with roughly the same set of rights.[92]

If, however, we regard property as it is often regarded both judicially and academically,[93] in terms of Antony Honoré's standard incidents of ownership, property is a series of rights (as well as some duties and restrictions), such as the right to possess, the right to use, the right to manage, the right to transmissibility, and the right to derive income from the thing.[94] According to Honoré, for full ownership in a thing to be recognised, one must hold most of these incidents with regard to the object of property. As with games, there is no single characteristic that all types of property share: rather, there is a network of overlapping and criss-crossing similarities.[95] Furthermore, these incidents can be further characterised as being those which allow the owner to control the uses to which the property is put, and those allowing him or her to derive income from

86 I Goold and M Quigley, 'The Case for a Property Approach' in Goold et al (n 1) 246.

87 L B Moses, 'The Problems with Alternatives to Property' in Goold et al (n 1) 197, 200.

88 R Brownsword, *Rights, Regulation and the Technological Revolution* (Oxford University Press 2008); L B Moses, 'How to Think about Law, Regulation and Technology: Problems with "Technology" as a Regulatory Target' (2013) 5(1) Law, Innovation and Technology 1.

89 R N Nwabueze, 'Donated Organs, Property Rights and the Remedial Quagmire' (2008) Medical Law Review 201; *Yearworth v North Bristol NHS Trust* [2009] EWCA Civ 37; *Holdich v Lothian Health Board* [2013] CSOH 197; *Hecht v Superior Court (Kane)* (1993) 16 Cal App 4th 836, 20 Cal Rptr 2d 275.

90 Rao (n 23).

91 M Quigley, 'Property and the Body: Applying Honoré' (2007) 33 Journal of Medical Ethics 631.

92 D C Hubin, 'Human Reproductive Interests: Puzzles at the Periphery of the Property Paradigm' (2012) 29 Social Philosophy and Policy 106, 107.

93 See *Yearworth v North Bristol NHS Trust* [2009] QB 1.

94 A M Honoré, 'Ownership' in A G Guest (ed), *Oxford Essays in Jurisprudence* (Clarendon Press 1961) 107, 112–14.

95 Honoré makes use of Wittgenstein's concept of family resemblance: Quigley (n 90).

the thing. The existence of certain incidents does not imply the existence of others – e.g. I may have the power to use something but not have the power to sell it. While none of the standard incidents is necessary for ownership to be present, it is certainly possible for all of these incidents to vest in the owner, sometimes referred to as 'full-liberal ownership'.[96] However, there are many forms of property which are more limited as some of the standard incidents are not present; for instance, an owner may have control rights but not income rights.[97] Thus, the fact that I have the right to control a thing (such as my body) does not automatically imply that I have the right to sell it, or any part of it. Indeed, Douglas and Goold maintain that commercialisation and exploitation are not inevitable consequences of recognising property in the body as the law of property does not confer a right to use nor restrict an owner's liberty to use a thing.[98] Thus, in a technical legal sense at least, the concept of property does not inevitably lead towards any of the feared outcomes since any of the standard incidents can be absent from the bundle of rights. Nonetheless, limited forms of property still meet the definition of full-liberal ownership in Honoré's scheme as long as most of these incidents are present, allowing flexibility in how we design property regimes.[99] Recent legal decisions have demonstrated a cautious move towards explicit recognition of some property rights in biomaterials vesting in their source, but this recognition has been of limited property rights and has not included income rights.[100] The transfer of rights may also be restricted so as to protect the non-property interests of the individual and society, and questions as to what parts of myself I may sell or gift, and to whom, are highly contested areas of academic inquiry and no consensus has developed as to what a person may do with their blood,[101] organs,[102] and sperm and ova,[103] both before and after death.[104] Implicit in these debates is that the right to fragment the body can be limited, and the extent of such limitations is where the contest lies.[105] Such limited rights are consistent with a property approach as most commentators who advocate this approach to body parts do not argue for full-liberal ownership by the person of their bodies, i.e. they acknowledge that the 'owner' will not enjoy the fullest set of rights possible on the ownership spectrum. For instance, Quigley contends that having self-ownership consists in having most of the elements of ownership set down by Honoré and given *inter alia* that we have use and control of our

96 J W Harris, 'Who Owns My Body' (1996) Oxford Journal of Legal Studies 55.

97 Professor Harris describes such a limited form of ownership as 'mere property': Harris (n 6) 28, 360–61

98 As, in their view, the right to use is not a property right but a liberty and would exist irrespective of whether or not property rights were recognised in respect of human biomaterials: S Douglas and I Goold, 'Property in Human Biomaterials: A New Methodology (2016) 75(3) Cambridge Law Journal 478, 490–91.

99 Quigley (n 91).

100 *Yearworth v North Bristol NHS Trust* [2010] QB 1; *Holdich v Lothian Health Board* [2013] CSOH 197; *Hecht v Superior Court (Kane)* (n 89).

101 R M Titmuss, *The Gift Relationship: From Human Blood to Social Policy* (Allen & Unwin 1970).

102 A J Cronin and D Price, 'Directed Organ Donation: Is the Donor the Owner?' (2008) 3 Clinical Ethics 127; Nwabueze (89); J S Taylor, *Stakes and Kidneys: Why Markets in Human Body Parts are Morally Imperative* (Routledge 2017).

103 R P Jansen, 'Sperm and Ova as Property' (1985) Journal of Medical Ethics 123; J Wall, 'The Trespasses of Property Law" (2013) Journal of Medical Ethics 1; J A Robertson, 'Egg Freezing and Egg Banking: Empowerment and Alienation in Assisted Reproduction' (2014) Journal of Law and the Biosciences 113.

104 *Hecht v Superior Court* (1993) 16 Cal App 4th 636; T C Voo and S Holm 'Organs as Inheritable Property' (2013) 40 Journal of Medical Ethics 57.

105 Douglas and Goold correctly caution against confusing normative questions as to whether property can or should be recognised in human biomaterials and determining the content of those rights and how they may be transferred: S Douglas and I Goold (n 98).

bodies, we can be said to own them.[106] While J W Harris states that every person ought to be considered the owner of his or her separated body parts, he believes that this right is limited to use and control rights and does not carry transmission powers.[107]

Regarding property as equivalent to the full spectrum of ownership rights has resulted in alarmist assumptions that, for example, endorsing property rights in the body is tantamount to endorsing a right to sell a body part at any time for cash, or rendering valuable body parts subject to eminent domain.[108] A more realistic understanding of the richness and diversity of property rights leads instead to an appreciation of the variety of possible property regimes in human biological materials.[109] Property has always been limited by the interests and rights of others, both owners and non-owners, and it is not fanciful to speculate that a property institution governing the body would be configured in such a way as to serve a plurality of commitments; in particular those non-property interests, identified by commentators such as Dagan, Joseph Singer and Radin, of personhood, aggregate welfare and social responsibility.[110]

In the limited ways in which the law currently recognises property in the body – in relation to human gametes, corpses and transplantable organs – the development of the law lends support to this view that property rights in the body will be limited rights, with a reconfiguration of an owner's rights if they are found to conflict with the rights of non-owners. Where property rights have been recognised or at least argued for in human body parts, their extent has been attenuated by the recognition that a grant of full-liberal ownership would negatively impact upon other interests that the law is accustomed to protecting. The trend where such an interest is identified is thus away from, and not towards, granting full-liberal ownership of body parts given the range of other interests such ownership rights potentially conflict with.

Human gametes are of note here given the variety of sensitive interests they can implicate. This stems from their potential for the creation of human life: i.e. they have genetic information in readily usable form.[111] Furthermore, this potential use can be preserved for many years since the technology now exists to freeze such materials *ex vivo*. There have followed disputes in the courts about who can control and use such materials after the death of the testator, as well as whether the loss or destruction of these samples as a result of breach of duty is compensable.[112] And, while the courts have recognised sperm as property in a number of cases, nowhere has full-liberal ownership been expressly granted to the samples' owner. Indeed, to the extent that frozen sperm samples can be described as property, such rights are severely restricted by detailed statutory regulation.[113] Rights in gametes have been limited in other ways in response to a developing understanding of how granting unlimited rights of disposal in them (i.e. the right to transfer them anonymously) may harm future offspring. Until recently, seeking to know one's genetic origins only concerned a small group of people. With recent advances in artificial reproduction and also the increase in the number of non-traditional families, this group has quickly expanded, as there are many ways a child can be conceived and

106 Quigley (n 91).

107 Describing such a right as 'mere property': Harris (n 6) 360–61.

108 V D Mahoney, 'The Market for Human Tissue' (2001) 86 Virginia Law Review 163, 202.

109 Ibid.

110 Above at 294–96.

111 Jansen (103).

112 *Hecht v Superior Court* (n 104); *Yearworth v North Bristol NHS Trust* (n 100); *Holdich v Lothian Health Board* (n 100).

113 Human Fertilisation and Embryology Act 1990 (UK); *Yearworth v North Bristol NHS Trust* (n 100).

raised in the modern world.[114] In the past, it was presumed that donor-conceived people were best served not knowing the circumstances of their conception.[115] Only recently has this paternalistic approach been superseded and the interest in knowing one's biological parents is now phrased in terms of a 'right to know'. This change of attitude came as a result of personal accounts and small-scale studies that illuminated the views of donor-conceived people.[116] A number of consistent themes were revealed; early telling was better than late telling; where the information about the individual's conception was revealed later in life the donor-conceived person may experience negative feelings about the concealment ('It's not the conception, it's the deception that's the problem.'); donor-conceived persons expressed an interest in knowing their donor personally, as well as in identifying and locating any half-siblings that might exist; finally, lack of information about the donor was a source of deep concern and frustration and of problems with identity for many donor-conceived people.[117] The right to know one's origins is a feature of the broader right to ascertain and preserve one's identity, and human rights law has in recent times been called in aid of these claims. Article 8 of the ECHR protects the right to private and family life, and the right to know one's origins has been held to be included in the privacy guarantee by the European Court of Human Rights (ECtHR).[118] The recent change of attitudes towards the right to know one's origins has been reflected in the case law of the ECtHR. The margin of appreciation was formerly so broad that the court upheld absolute secrecy as to the identity of a parent as permitted in French law.[119] In subsequent cases, however, the margin has narrowed considerably and the court now considers that this right to know one's identity and origins belongs to the inner core of the right to respect for one's private life as guaranteed by Article 8. In cases where this right is concerned, the court will now examine the state's balancing of rights with close scrutiny.[120] In addition to these protections derived from Article 8 of the ECHR, Article 8 of the Convention on the Rights of the Child expressly guarantees identity rights and Articles 17 and 18 of the International Covenant on Civil and Political Rights guarantees the right to privacy and right to birth registration, from which the right to know one's origins can be derived implicitly.[121] This growing legal recognition of the fundamental importance of the right to know one's genetic parents in human rights law has led to numerous jurisdictions prohibiting or curtailing anonymous gamete donation.[122] For instance, the UK, New Zealand, the Australian State of Victoria, British Columbia as well as a number of mainland European countries have banned anonymous

114 S Besson, 'Enforcing the Child's Right to Know Her Origins: Contrasting Approaches under the Convention on the Rights of the Child and the European Convention on Human Rights' (2007) International Journal of Law Policy and the Family 137, 138.

115 R Deech, 'Family Law and Genetics' (1998) 61 Modern Law Review 697.

116 E Blyth, M Crawshaw, L Frith and C Jones, 'Donor-conceived People's Views and Experiences of Their Genetic Origins: A Critical Analysis of the Research Evidence' (2012) 19 Journal of Law and Medicine 769.

117 E Blyth, 'Information on Genetic Origins in Donor-assisted Conception: Is Knowing Who You Are a Human Rights Issue?' (2002) 5 Human Fertility 185, 187.

118 *Odièvre v France*, 42326/98 [2003] ECHR 86 (13 February 2003), [29].

119 Ibid.

120 *Jaggi v Switzerland* 58757/00 [2006] ECHR (13 July 2006), paras [37]–[38].

121 Besson (n 114) 141.

122 L Frith, 'Gamete Donation and Anonymity: The Ethical and Legal Debate' (2001) 16 Human Reproduction 818; I De Melo-Martin, 'The Ethics of Anonymous Gamete Donation: Is There a Right to Know One's Genetic Origins?' (2014) 44 Hastings Centre Report 28; A Ravelingien and G Pennings, 'The Right to Know Your Genetic Parents: From Open-identity Gamete Donation to Routine Paternity Testing' (2013) 13 American Journal of Bioethics 33.

donation of gametes, and donors must now be identifiable to their genetic offspring.[123] If one regards, as many do, sperm and eggs as property, such regulatory requirements represent a restriction on alienation enacted to secure the non-property interests of any future offspring. One may still transfer ownership (by transferring possession and the right to control and use) of the sperm sample to the Assisted Reproductive Technology clinic or donee, but there is a limit on such alienability in that it can no longer be anonymous.

A similar approach is evident in regard to common law quasi-property rights that the next-of-kin have over their relative's dead body.[124] Although at common law, there is traditionally 'no property' in a corpse, the law recognised a sort of quasi-property whereby they may be, indeed are, under a duty to take possession of a corpse for the purposes of burial, and the law would protect against such an interference.[125] Thus, the entitlement to possession of the corpse is severely attenuated by non-property interests: both of the deceased and the wider community.[126] Granting the deceased a proper funeral is in accordance with human dignity, while public health requires the prompt disposal of the remains so as the living are not endangered by the spread of disease.[127]

The ongoing debate over the status of transplantable organs also illustrates the powerful reasons for limiting property rights in them. Organs aren't fully property, as they cannot be sold due to concerns about commodification.[128] While they may be gifted, there are restrictions on this power that echo public accommodations cases where certain facilities, both public and private, must not discriminate on the basis of such matters as race, religion or national origin.[129] Indeed, concerns as to controversial conditions relating to age, race or gender being attached to conditional donations has led to their blanket prohibition in the UK.[130] Once it was clear that a power to attach conditions to donated organs could lead to interference with rights that the law has customarily protected – i.e. discrimination on prohibited grounds – policymakers acted quickly to limit the powers of the donor in gifting their organs.[131]

Thus, it can be seen that property institutions in human tissue are beginning to develop in ways that would be predicted by Dagan rather than Blackstone, being limited in response to potential harms caused to the non-property interests of persons other than the owner.

5.2 The language of property

There is a more nuanced objection to recognising a property regime in the body. This states that in applying the language of property and the market to the body, this rhetoric will have a detrimental effect upon important values and reduce the body to a fungible

123 De Melo-Martin (n 122) 28.

124 W Boulier, 'Sperm, Spleens and Other Valuables: The Need to Recognize Property Rights in Human Body Parts' (1995) 23 Hofstra Law Review 693, 700.

125 Ibid 709–11.

126 H Conway, 'Dead, but not Buried: Bodies, Burial and Family Conflicts' (2003) 23 Legal Studies 423, 426–27.

127 *Re Blagdon Cemetery* [2002] 3 WLR 603; *R v Newcomb* (1898) 2 CCC 255.

128 J L Nelson, 'Trust and Transplants' (2005) 5 American Journal of Bioethics 26, 27.

129 J W Singer, 'We Don't Serve Your Kind Here: Public Accommodation and the Mark of Sodom' (2015) 95 Boston University Law Review 929

130 'Dobson Threatens New Law to Halt Donor "Apartheid"' *The Guardian* (London, 8 July 1999) <www.theguardian.com/uk/1999/jul/08/race.world>; Cronin and Price (n 102).

131 H K Consolo and S J Wigmore, 'Ethical and Legal Issues with Organ Donation and Transplantation' (2017) 35 Surgery (Oxford) 341, 345.

commodity whose only value is its exchange value on the market.[132] This objection is rooted in the fact that language and how we use it has the power to affect perceptions and shape our view as to what is important in life.[133] Donna Dickenson contends that, once the body is viewed as a full-fledged commodity, it will be subject to a multitude of abuses such as the trading and trafficking of organs, the exploitation of sperm and egg donors by unscrupulous fertility clinics (what she terms 'baby shopping'), or the taking of organs, tissue and indeed bones from the dead without the necessary consent of the deceased or their family.[134]

The familiar counterargument to this, as set out above, is that property is often limited and we should not conflate all types of property with Blackstonian property. Nonetheless, the language used by legal regulations will not just be used by lawyers but also medical professionals, philosophers and the public at large. Some commentators contend that, while lawyers may understand that such terminology has a technical meaning, the subtleties and nuances of property institutions will not be clear to others. As language has a power of its own, they fear that the use of property language will serve to objectify and commercialise people.[135] Thus, they are not attuned to the complexity of the relational model of the bundle of sticks, and describing the body as property would influence policymakers and the public to think of the body in terms leading to objectification and commercialisation.[136]

This objection gives too little credit to non-lawyers' intuitions about the differing meanings of property. As Professor Harris notes, we frequently invoke what he describes as 'body-ownership rhetoric' to forcefully assert our right to use our bodies as we wish, but this analogy to property in resources is not meant to be taken literally.[137] Law and social norms recognise something close to full-liberal ownership in resources, but someone invoking body-ownership rhetorically is not committed to claiming the full range of use rights, income rights and transmission powers over their bodies.[138] One does not have to be a lawyer to understand that a reference to 'my body' means something somewhat different than 'my pen' or 'my car', even if the rhetoric of ownership is the same.[139]

Indeed, there is empirical research in relation to organ donation that suggests the language of commodification is far too simple to capture everyday intuitions about the body.[140] Participants demonstrated a plurality of attitudes towards the body; namely, the body as a mechanical object, the body as part of a higher order embodying the self, and the body as a hierarchy of organs constitutive of the self. In the focus groups, the authors noted that the idea of bodily self-determination – i.e. the right of a person to do what

132 M J Radin, *Contested Commodities* (Harvard University Press 1996) 122.

133 Mahoney (n 108) 206.

134 D Dickenson, *Body Shopping: Converting Body Parts to Profit* (Oneworld Publications 2008) 1–14.

135 Goold et al, 'Conclusion' in Goold et al (n 1) 281, 283. Dickenson (n 134) 6–13.

136 Goold et al, 'Conclusion' in Goold et al (n 1) 281, 283.

137 Harris (n 96) 63.

138 Ibid.

139 Ibid 62–65.

140 M Schewda and S Schicktanz, 'The "Spare Parts Person"? Conceptions of the Human Body and their Implications for Public Attitudes toward Organ Donation and Organ Sale' (2009) 4 Philosophy, Ethics and Humanities in Medicine 4; S Schicktanz and M Schweda, "'One Man's Trash is Another Man's Treasure": Exploring Economic and Moral Subtexts of the "Organ Shortage" Problem in Public Views on Organ Donation' (2009) 35(8) Journal of Medical Ethics 473; M Schweda and S Schicktanz, 'Public Ideas and Values Concerning the Commercialization of Organ Donation in Four European Countries' (2009) 68 Social Science and Medicine 1129.

they wished with their body and its parts – was expressed in terms of ownership language. At first blush, this seemed to equate the human body with forms of private property where one has full-liberal ownership, but on closer examination the adoption of the language of ownership did not imply approval of commercialisation, which some viewed as impeding self-determination in corrupting a person's proper will.[141] Thus, the intuitive and absolutist image of property that Thomas Grey suggests the layman holds ('to be able to use as one wishes, to sell it, give it away, leave it idle, or destroy it') does not necessarily hold true for the body.[142] It is also worth noting that many of the abuses that Dickenson fears will be exacerbated by recognising property in the body have occurred throughout history; Burke and Hare would likely have been little troubled that the law recognised 'no property' in the body at the time they were carrying out their crimes.[143]

In addition, it cannot be assumed that the intrinsic value of certain goods will necessarily be diminished by assigning them a value in the market.[144] Markets in goods are not limited to fungible commodities such as shares and negotiable instruments, but also things whose value cannot be fully captured in monetary terms such as artworks, rare musical instruments, and tickets to highly anticipated sporting events. Such items clearly have non-economic value to their owners and experience in exchanging such non-fungible goods suggests that market language would necessarily lead to us forgetting the non-economic value of human tissue and organs.[145] Of course, law has an expressive function and when evaluating a legal rule we may question whether it appropriately values an event, group or practice.[146] If the law inappropriately values something it may tilt social norms in the wrong direction. However, law sometimes has negligible value effect on social norms. Cass Sunstein contends that legal provisions for market exchange of intrinsic goods which are valued for reasons other than use need not affect social valuations of their intrinsic worth.[147] While there is a lack of evidence that human beings cannot comprehend the diverse ways in which the human body and its parts are valued, there are many examples, some set out above, of markets in goods whose value is not limited to their commercial use.[148] In light of the above, the current practice of permitting numerous transfers of property rights and market exchanges to continue, while limiting the application of the language of property and markets to such exchanges, must be called into question as leading to unscrutinised market activity.[149] For example, donations of tissue and organs are often framed in the language of gift, obscuring the fact that no property can vest in the source of such materials. Such altruistic (and thus non-market) discourse also obscures the fact that 'gifted' human tissue is, as a matter of course, exploited and commercialised for private gain by medical researchers, further damaging the relationship of trust between medical professionals and the public.[150]

141 Schewda and Schicktanz, 'Spare Parts Person' (n 140).

142 T C Grey, 'The Disintegration of Property' (1980) Nomos XXII: Property 69.

143 O D Edwards, *Burke and Hare* (3rd edn, Birlinn 2014).

144 C R Sunstein, 'Incommensurability and Valuation in Law' (1994) 92 Michigan Law Review 779, 822.

145 Mahoney (n 108) 207.

146 Sunstein (n 144) 820–24; C R Sunstein, 'On the Expressive Function of Law' (1996) 144 University of Pennsylvania Law Review 2021.

147 Sunstein (n 144) 822.

148 Mahoney (n 108) 207.

149 Ibid 209.

150 J K Mason and G T Laurie, 'Consent or Property? Dealing with the Body and its Parts in the Shadow of Bristol and Alder Hey' (2001) 64 Modern Law Review 710, 723–28.

5.3 Property can protect social and community interests in the body

A further difficulty with regarding property as always synonymous with full-liberal ownership is that this simplification conflates all types of property with private property: i.e. it ignores the types of property that are communal. At times, one would be forgiven for forgetting that private property is but one factor, albeit a major one, in the overall system of resource management. But, even in capitalist economies, many valuable resources are not in private ownership, with other forms of property ranging from open access resources to differing forms of limited commons arrangements such as a pasture shared by villagers or a common area in a condominium, all of which have their own governing rules.[151]

Some commentators contend that human bodily materials should be considered as belonging to the community rather than the individual. For instance, Radhika Rao considers that the dead, and by extension their organs, might constitute communal property. Any individual rights thus granted over the material would be by way of stewardship and would have to be exercised for the benefit of the entire community, something akin to the public trust.[152] Professor Harris contends that genetic information should belong to the entire community,[153] and there are those who argue that indigenous people's genetic heritage should be protected by some form of ownership.[154] One could, of course, opt to protect such communal and public interests in these materials by legal means other than property. Nevertheless, to dismiss property in favour of statutory regulation is to lose the benefit of pre-existing legal tools for protecting and managing communal interests in valuable resources where regulations are not working.

For example, when one considers the ethical difficulties in securing consent to the future use of one's tissue in research, property may provide an answer. It may be difficult, if not impossible, to foresee the types of research that the tissue will be utilised for in the future. The researcher must then decide to seek a fresh consent in every case, an enormously costly and impractical exercise, or, as became the practice, secure a broad and effectively open-ended consent to any future use of the tissue at the time of its donation.[155] The donor's interests in the use of their material is supposed to be protected by this consent, but as the breadth of these consents has increased so too have ethical questions as to how meaningful they really are.[156] There is a further difficulty with this regime. By researchers encouraging donation of such material (and employing the language of gift) and then excluding donors from any meaningful input into what is done with them and the type of research they are used for, public trust in the process is undermined.[157]

151 R C Ellickson, 'Two Cheers for the Bundle-of-Sticks: Three Cheers for Merrill and Smith' (2011) 8 Economics Journal Watch 215, 219–20; L A Fennell, 'Lumpy Property' (2012) 160 University of Pennsylvania Law Review 1955.

152 Rao (n 23) 450.

153 Harris (n 96).

154 D Harry and L A M Kaneche, 'Asserting Tribal Sovereignty over Cultural Property: Moving towards Protection of Genetic Material and Indigenous Knowledge' (2006) 5 Seattle Journal of Social Justice 27.

155 D E Winickoff and R N Winickoff, 'The Charitable Trust as a Model for Genomic Biobanks' (2003) 349 New England Journal of Medicine 1180.

156 B Hofmann, 'Broadening Consent and Diluting Ethics?' (2008) 35 Journal of Medical Ethics 125.

157 G Laurie, *Genetic Privacy: A Challenge to Medico-Legal Norms* (Cambridge University Press 2002) 263; *Washington v Catalona* 437 F Supp 2d (ED Mo 2006).

Until recently, scholarship on the governance of biobanks ignored property and focused on consent, Institutional Review Boards and privacy.[158] Rather than tinkering with the regulatory requirements, one of the most sensible solutions advocates that biobanks be based on a new form of agreement between the medical institution, the researcher and the donor community. These agreements would utilise property law to vindicate the donor community's interests by adopting the charitable trust model.[159] A charitable trust with the public as the ultimate beneficiary fully accords with altruistic expectations when gifting tissue, and the donor group can act in an advisory capacity in the governance of the trust. Under the trust agreement, the donor/settlor formally transfers any property interest in his or her tissue to the trust and appoints a trustee of the property who then has a duty to manage the material for the benefit of an identified beneficiary, which in this case would be the general public.[160] The adoption of a trust model has the potential to encourage donor participation in research governance, as well as encourage research that will benefit the public.[161] For example, UK Biobank has adopted a variation of this model and has been established as a non-profit entity with a charitable purpose: to build a major resource that can support medical research aimed at the prevention, diagnosis and treatment of illness throughout society. Its Board of Directors is obligated under UK charity law to manage the organisation in accordance with this charitable purpose.[162] Although the proper governance arrangements for biobanks is still hotly contested in the literature, the adoption of a charitable model of institutional governance allows for a form of stewardship that honours the charitable intent of the donors, protects against insolvency, promotes research and respects the dignitary interest of donors.[163] Thus, property law can facilitate cooperative engagement between the various stakeholders in human biobanks, allowing their interests to be balanced flexibly with due regard to the interests of the donors, as well as tailoring incentives to ensure the material is used to perform research that will benefit the public at large.

A property regime may also provide solutions in the developing world where there is a growing recognition of the need to protect indigenous peoples from exploitation by the Western biotechnology industry. Native peoples have numerous concerns in relation to medical and genetic research. First, they worry that data from such studies will be used in a way that supports theories that conflict with theories about the origin and identity of the group. Secondly, there is a pervasive belief that bodily substances contain something of the essence of the individual even after removal from the body, and thus there are concerns about the possible mistreatment of such material by researchers.[164] There are also the fears, not unique to tribal peoples, that in a small tribal group the genetic information of one individual may implicate others with the attendant privacy issues and, furthermore, that the material will be exploited for material gain by the researchers

158 D E Winickoff, 'Partnership in UK Biobank: A Third Way for Genomic Property?' (2007) Journal of Law, Medicine and Ethics 440.

159 Winickoff and Winickoff (n 155) 1180–84.

160 Ibid 1183.

161 Ibid.

162 Winickoff (n 158) 443.

163 Ibid 445. A Boggio, 'Charitable Trusts and Human Research Genetic Databases: The Way Forward?' (2005) 1 Genomics, Society and Policy 41; D W Winickoff and L B Neumann, 'Towards a Social Contract for Genomics: Property and the Public in the "Biotrust" Model' (2005) 1 Genomics, Society and Policy 8.

164 R Tsosie, 'Cultural Challenges to Biotechnology: Native American Genetic Resources and the Concept of Cultural Harm' (2007) Journal of Law, Medicine and Ethics 396, 406.

leaving the tribe no right to share in the profits.[165] Legal recognition that a tribe's DNA forms its communal or cultural property could effectively achieve this.[166]

The Human Genome Diversity project seeks to characterise the genetic diversity of the world's peoples. In addition, it is attractive for biotechnology companies to research small, stable and genetically similar populations.[167] There are particular issues – political, legal and social – that these projects raise when the genomes being studied are of indigenous peoples who are subject to economic and social disadvantage and discrimination.[168] The majority of indigenous peoples did not develop a society where goods are individually owned and can be bought and sold without reference to the group.[169] Land is often seen as belonging to the tribe, family or nation and cannot be sold unless the entire group agrees, an attitude that extends to property in human bodily materials such as DNA. While native property systems may include a 'bundle of rights' that attach to land and property, these rights are phrased in terms that indicate the duties and responsibilities that people have in relation to these properties.[170] Alienability is not a central feature of these systems and it may not be possible to alienate many objects of property either within the group or to persons outside it. An individual in an indigenous culture will often not have the right to give or sell a blood sample for genetic testing without the consent of the group, or at all.[171]

Some commentators argue that informed consent procedures must be strengthened to protect vulnerable populations, taking account of their differing cultural traditions and disadvantages vis-à-vis the researchers they are dealing with so as to make the consent meaningful.[172] In addition, both immediate and long-term economic and therapeutic benefits must flow back to the groups participating in these studies.[173] But there is a contradiction here: it is arguable that the imposition of a model of 'informed consent' and 'benefit-sharing', even with the best of intentions, is to impose an individualistic and commodified model of exchange at variance with the culture of indigenous peoples.[174] If it is simply wrong to commodify human materials, benefit-sharing does not change this and is more akin to 'a bribe than justice'.[175] If we are to take the differing traditions of indigenous cultures seriously, there must be a recognition that there is often a strong sense that tribal DNA and biomaterials are subject to the common ownership of the group, and part of its cultural identity.[176] Native title claims cannot be properly

165 As has, of course, already occurred in the West: *Moore v Regents of the University of California*, 793 P 2d 479 (Cal 1990); *Greenberg v Miami Children's Hospital*, 264 F Supp 2d 1064 (SD Fla 2003).

166 D Dickenson, 'Consent, Commodification and Benefit-sharing in Genetic Research' (2004) 4 Developing World Bioethics 110.

167 See the (ultimately unsuccessful) proposal for an arrangement between the Tongan government and an American biotechnology company for access to genetic material from an isolated community: L Skene, '"Sale" of DNA of People of Tonga' (2001) Genetics Law Monitor 7.

168 M Dobson and R Williamson, 'Indigenous Peoples and the Morality of the Human Genome Diversity Project' (1999) 25 Journal of Medical Ethics 204.

169 Ibid 205.

170 Tsosie (n 164) 398.

171 Dobson and Williamson (n 168) 205.

172 Ibid 205.

173 Ibid 204.

174 D L Dickenson and J Ferguson, 'Bioethics, Benefit Sharing and Indigenous Populations' in Tikanga Rangahau Mātauranga Tuku Iho Traditional Knowledge and Research Ethics Conference Proceedings 2004 (2005) 32.

175 Dickenson (n 166) 119.

176 Dobson and Williamson (n 168) 207; Harry and Kaneche (154).

understood or valued unless their very different conceptions of property are understood and accounted for.[177]

Rather than resorting to the 'informed consent' model, based as it is on the Western individualistic idea of personal autonomy, utilising existing property mechanisms, including those related to common and cooperative ownership, would allow the development of legal tools for the protection of vulnerable populations against unauthorised takings of their shared interests in their bodies and genome and as a means to counter its appropriation and commodification by private interest.[178] As tribal property is group-orientated and has aspects of collective and communal ownership, the utilisation of such legal mechanisms is particularly appropriate. In this way, the strong exclusionary protection that is a feature of property rights can be adapted not just to serve the individual but also communities, ethnic groups and societies wishing to protect their shared genetic heritage from private appropriation by third parties, as well as ensuring that any benefits that result from the use of their materials is returned to the group who donated them.[179]

6 Conclusion

That there is an objection to recognising property in the body and its parts when it is assumed that it serves such individualistic values is understandable. Nonetheless, this objection fails to consider property's complexity, its external interactions and internal structure. Nor does it acknowledge that property is often limited by the existence of non-property interests that the law is accustomed to protecting. This may be due in part to the fact that property's communitarian aspects and the extent to which there are social obligations inherent in property institutions have been undertheorised, a trend that is beginning to be reversed.

Property has pre-existing mechanisms for managing and protecting communal interests in valuable resources and could potentially provide a mechanism to protect the interests of individuals and communities in the use and control of their biomaterials. Concerns that a recognition of property in human body parts would lead to full-liberal ownership tend to overstate the danger. Where property rights have been recognised in body parts, they have been limited by reference to other non-property interests, and the trend has been away from and not towards full-liberal ownership. A recognition that property is a complex and multifaceted institution which can develop ownership models that are sensitive to context and the unique nature of the resource over which property rights are claimed strengthens the argument that a 'property approach' could be adopted for the regulation of human biomaterials in the future.

177 Tsosie (n 164) 397.

178 Dickenson (n 166).

179 A A Lemke, J T Wu, C Waudby, Jill Pulley, C P Somkin and S B Trinidad, 'Community Engagement in Biobanking: Experiences from the eMERGE Network' (2010) 6(3) Genomics, Society and Policy 50.

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Pensions on divorce in Ireland: law, practice and a way forward?

KATHRYN O'SULLIVAN

University of Limerick

Abstract

The importance of pensions as a source of family wealth has attracted increased attention during the first decades of the twenty-first century. In particular, ever-greater focus is now being placed in many jurisdictions on how the wealth held in pensions is factored into financial remedies on marital breakdown. Notwithstanding that pension entitlements may also be some of the most valuable assets available for distribution on separation or divorce in Ireland, the Irish approach to pensions and pension adjustment orders on marital breakdown has attracted minimal comment or analysis. This article seeks to address this gap in the literature. It pulls together for the first time findings from various studies to investigate the prevalence of pension adjustment orders, specifically, in Irish divorce practice. Reflecting on these findings and the Supreme Court's recent 2019 judgment in F v M*, it analyses the regime and considers a multifaceted approach to reform.*

Key words: pension; ancillary relief; financial provision; reform

Introduction

The importance of pensions as a source of family wealth has attracted increased attention during the first decades of the twenty-first century. In particular, ever greater focus is now being placed in many jurisdictions on how the wealth held in pensions is factored into financial remedies on marital breakdown with an ever-expanding body of law reform reports, empirical research and academic commentary investigating the issue.[1] In England and Wales, notwithstanding that '[p]ublic understanding and interest in pensions is

1 See Alan Brown, 'Pension Sharing in Scotland: General Principles in the Family Law (Scotland) Act 1985?' *(2018) 40(1) Journal of Social Welfare and Family Law 104; New Zealand Law Commission, Dividing Relationship Property – Time for Change?* (Issues Paper 41-2017, New Zealand Law Commission 2017) 286–89; Fumie Kumagai, 'Late-Life Divorce in Japan Revisited: Effects of the Old-Age Pension Division Scheme' (2014) Family Issues on Marriage, Divorce, and Older Adults in Japan 119; Grania Sheehan, April Chrzanowski and John Dewar, 'Superannuation and Divorce in Australia: An Evaluation of Post-Reform Practice and Settlement Outcomes' (2008) 22(2) International Journal of Law, Policy and the Family 206; British Columbia Law Institute, Pension Division on Marriage Breakdown: A Ten Year Review of Part 6 of the Family Relations Act (Report No 44–2006, BCLI 2006); Ministry of Justice, *Family Law Act Explained (Part 6: Pensions)* <www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/legislation-policy/fla/part6.pdf>. For recent research in England and Wales, see below.

generally weak', particular emphasis has been placed on pension-sharing on divorce with a number of comprehensive reports published on the issue in the past five years.[2]

In Ireland, the Office of the Pensions Ombudsman noted in 2015: 'Frequently, particularly where house property may be in negative equity, the pension entitlements may be one of the most valuable assets available for distribution on separation or divorce.'[3] Yet, despite this, the Irish approach to pensions and pension adjustment orders on marital breakdown has attracted minimal comment or analysis.[4] It is apt, then, that the first reported Supreme Court judgment of 2019, *F v M*, places the Irish approach to financial remedies on marital breakdown (known as 'ancillary relief provision' under Irish law), and pension adjustment orders in particular, under the spotlight.[5]

Part 1 outlines the historical context for the introduction of pension adjustment orders in Ireland and the key provisions contained in s 17 of the Family Law (Divorce) Act 1996. Part 2 then pulls together for the first time findings from various studies to investigate the prevalence of pension adjustment orders in Irish divorce practice. Part 3 summarises the Supreme Court's 2019 judgment in *F v M*, before Part 4 analyses the weaknesses of the regime in light of the decision and the various studies considered. Part 5 concludes by considering a multifaceted approach to reform including the need for legislative intervention, judicial engagement and the development of greater education and support initiatives for practitioners, specialists and judges alike.

1 Pension adjustments orders under the Family Law (Divorce) Act 1996

The emergence of pension adjustment orders in Ireland

In 1992, the Irish government published its *White Paper on Marital Breakdown*.[6] The *White Paper* sought to address various implications of legislating for the introduction of a remedy of divorce.[7] However, as then Minister for Justice Máire Geoghegan-Quinn observed, the paper did not 'gloss over the fact' that there remained a difficulty 'in at least

2 Hilary Woodward (with Mark Sefton), *Pensions on Divorce: An Empirical Study* (Cardiff University 2014) <https://orca-mwe.cf.ac.uk/56702/1/14%2002%2024%20KF%20final.pdf>. Building on the findings of this research, Pension Advisory Group, *A Guide to the Treatment of Pensions on Divorce* (Nuffield Foundation 2019) was recently produced, see <www.nuffieldfoundation.org/pensions-divorce-interdisciplinary-working-group>. See also Joanna Miles and Emma Hitchings, 'Financial Remedy Outcomes on Divorce in England and Wales: Not a "Meal Ticket for Life"' (2018) 31(2) Australian Journal of Family Law 43; Emma Hitchings and Joanna Miles, 'Meal Tickets for Life? The Need for Evidence-Based Evaluation of Financial Remedies Law' (2018) 48 Family Law 993; Emma Hitchings, Joanna Miles and Hilary Woodward, *Assembling the Jigsaw Puzzle: Understanding Financial Settlement on Divorce* (Nuffield Foundation 2013).

3 Office of the Pensions Ombudsman, *Annual Report* (Office of the Pensions Ombudsman 2015) 13 <www.fspo.ie/documents/archives-pensions/Annual%20Report%202015.pdf>. There has been no reference to divorce in any annual report since then. Note, since 2017, the role of Pensions Ombudsman has been subsumed within that of the Financial Services and Pensions Ombudsman.

4 The most comprehensive family law analysis of pensions and pension adjustment orders is Laura Cahill and Sonya Dixon, *Pensions: A Handbook for the Family Law Practitioner* (Bloomsbury 2015). See also Louise Crowley, *Family Law* (Round Hall 2013) 11–101ff. Note, the practice around pensions on marital breakdown was peripherally noted in empirical research, including Roisin O'Shea, *Judicial Separation and Divorce in the Circuit Court* (PhD Thesis, Waterford Institute of Technology 2014); Lucy-Ann Buckley, 'Irish Matrimonial Property Division in Practice: A Case Study' (2007) 21 International Journal of Law, Policy and the Family 48; Carol Coulter, *Family Law in Practice: A Study of Cases in the Circuit Court* (Clarus Press 2009).

5 [2019] IESC 1.

6 Department of Justice, *White Paper on Marital Breakdown: A Review and Proposed Changes* (Stationery Office 1992).

7 Cf the then ban on divorce formerly found in Article 41.3.2 of the Irish Constitution, *Bunreacht na hÉireann*.

one area, namely, loss of pension following divorce'.[8] Although the draft Divorce Bill it presented required a court when making a financial provision order to take account of the value to each of the parties to the marriage of any benefit, including a pension, which by reason of divorce one party would forego, the *White Paper* concluded that 'this might not constitute adequate protection in all cases'.[9]

Reflecting on the experience in England and Wales, the *White Paper* noted that '[n]o means' had yet been discovered 'of dividing occupational pensions on divorce so as to mitigate the potential hardship involved'.[10] While a 'number of solutions' had been canvassed in other 'neighbouring jurisdictions', they too had ultimately been rejected in those jurisdictions as 'unworkable or inappropriate'.[11] On the one hand, it noted that empowering the court to order that an occupational pension should be paid in whole or in part to a divorced spouse could present 'many problems and could, in certain circumstances, cause grave hardship to a second or subsequent spouse'.[12] On the other hand, providing an occupational pension which would accrue to successive wives 'in proportion to the length of each marriage' could give rise to 'complex problems in pension administration'.[13] Although the *White Paper* concluded that the hardship involved in the loss of a prospective occupational pension could be met 'to some extent' by a secured maintenance order[14] or by requiring the maintenance debtor to purchase an annuity for the other spouse to compensate for the loss of pension benefits, it was particularly concerned for those cases where divorced spouses had remained at home to care for the family, were too old to take up employment of a pensionable nature and had acquired no occupational pension rights in their own right.[15] The *White Paper* thus recommended that where grave hardship might result, the court ought to be able to refuse to grant a decree of divorce. Notwithstanding that it was 'rarely invoked . . . and, apparently, even more rarely successful', it noted that such a grounds for refusal applied in England and Wales and would provide an 'important protection' for those who might suffer such hardship.[16]

Although the legislature subsequently adopted the former recommendation (that when making ancillary relief provision the court ought to take account of the value of

8 See Friday, 26 March 1993 Dáil Éireann debate on the White Paper on Marital Breakdown <www.oireachtas.ie/ga/debates/debate/dail/1993-03-26/3/>. Although the *White Paper* was prepared by the Department of Justice, responsibility for the reform of family law was subsequently transferred to the then newly established Department of Equality and Law Reform.

9 Department of Justice (n 6) at [13.5].

10 Ibid at [13.6]. Pension-sharing powers were introduced in England and Wales in 2000, see below for more.

11 Ibid at [13.7].

12 Ibid.

13 Ibid.

14 Which could continue to be paid after the death of the maintenance debtor

15 Department of Justice (n 6) at [13.8]–[13.9]. Alternatively it noted a property adjustment order 'may provide sufficient compensation' for the loss.

16 Ibid at [13.6]. Note this was separate and distinct from a recommendation that 'proper provision' ought to be a pre-condition to a decree of divorce. S 5 of the Matrimonial Causes Act 1973 in England and Wales continues to provide for the refusal of a decree of divorce in five-year separation cases on the grounds of grave hardship to respondent. However, a recent study of defended divorce cases highlighted how little recourse there is to the provision. Observing the 'extremely high bar' s 5 sets, Liz Trinder and Mark Sefton, *No Contest: Defended Divorce in England and Wales* (Nuffield Foundation 2018) 79 note: 'The only area where respondents initially had some limited success with a hardship defence was in relation to the loss of pension rights. However, the introduction of pension-sharing following the Welfare Reform and Pensions Act 1999 has made even that defence extremely unlikely.'

any benefit, including a pension, which by reason of divorce a party would forego),[17] it did not accept the latter recommendation permitting a court to refuse to make a decree of divorce. Rather, drawing on the expertise of the Pensions Board and 'certain key figures in the pensions industry',[18] the legislature chose to empower the Irish courts to redistribute wealth held in pensions directly. Notwithstanding the *White Paper*'s doubts about the viability of such reform, so-called 'pension adjustment orders', considered below, were introduced on judicial separation and divorce through the Family Law Act 1995 and the Family Law (Divorce) Act 1996.[19]

Pension adjustment orders on divorce in Ireland

Part III of the Family Law (Divorce) Act 1996 places considerable discretion in the hands of the judiciary which is enjoined to effect an equitable redistribution of property that 'shall ensure' that, as constitutionally mandated by Article 41.3.2 and as a pre-condition to the award of a decree of divorce, 'proper provision' is made for a dependent spouse and children.[20] Among the orders available to achieve this end, s 17 of the 1996 Act empowers the courts to make pension adjustment orders.[21]

For the purposes of s 17, pensions are divided into two categories: 'retirement benefits' and 'contingent benefits'.[22] Retirement benefits are defined as 'all benefits (other than contingent benefits) payable' under a scheme.[23] Retirement benefits are thus benefits payable post-retirement and usually include a lump-sum payment on retirement and a pension paid to the scheme member, or to the member's spouse and/or dependants, should the member die post-retirement.[24] Contingent benefits are benefits payable on the occurrence of a particular contingency and are generally payable if the member dies while employed and still a member of the scheme.[25] Similar to retirement benefits, contingent benefits include a lump-sum payment and a pension payable to the member's spouse and/or dependants.[26] Pursuant to s 17(3), an application for a pension adjustment order

17 S 20(2)(k) of the Family Law (Divorce) Act 1996, see below.

18 Per the Minister for Equality and Law Reform, Mr Taylor, Thursday 27 June 1996, Dáil Éireann debate on the Family Law (Divorce) Bill, 1996: Second Stage <https://www.oireachtas.ie/en/debates/debate/dail/1996-06-27/3/>. See also Wednesday 23 March 1994 Dáil Éireann debate on the Family Law Bill, 1994: Second Stage (Resumed) <https://www.oireachtas.ie/en/debates/debate/dail/1994-03-23/4/>.

19 The situations in which such orders can be made have since been extended. For civil partners, see s 121 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010. For cohabitants, see s 187 of the 2010 Act. Note also the role of the Pension Schemes (Family Law) Regulations 1997 (SI 107/1997), see Cahill and Dixon (n 4) 77ff.

20 See s 20 of the Family Law (Divorce) Act 1996. Whether this lofty goal is achieved in all cases remains doubtful, however, see Kathryn O'Sullivan, 'Rethinking Ancillary Relief on Divorce in Ireland: The Challenges and Opportunities' (2016) 36(1) Legal Studies 111.

21 Note s 12 of the 1995 Act governs pension adjustment orders on judicial separation and is almost identical to s 17 of the 1996 Act. For ease, reference is only made here to the divorce provisions. As a result of the passing of the referendum on the Thirty-Eighth Amendment to the Constitution in May 2019 the wait period for a divorce is expected to be reduced from four years to two. This will likely reduce the number of judicial separations significantly with spouses likely to proceed directly for a divorce.

22 Although Cahill and Dixon (n 4) 36 note a 'very wide' definition of 'pension scheme' is taken in Irish family law legislation, the issue has nonetheless given rise to some difficulties, see for example *D v D* [2015] IESC 16.

23 S 17(1) of the 1996 Act.

24 See Cahill and Dixon (n 4) 51–55.

25 S 17(1) of the 1996 Act. It may be referred to as a 'death in service' benefit.

26 Cahill and Dixon (n 4) 55–56. Donagh McGowan and Tommy Nielsen, 'Making the Adjustment' (June 2012) Law Society Gazette 42 note there are two types of pension benefit in Ireland: defined benefit (DB) and defined contribution (DC) schemes.

in relation to a contingent benefit, specifically, must be made within one year after the granting of the decree of divorce. By contrast, an application for such an order in respect of a retirement benefit can be made at the time of the granting of the decree of divorce or at any time thereafter during the lifetime of the member spouse.[27]

Where a court determines that a pension adjustment order is warranted, it may make an order stating that a percentage of the whole or part of a benefit ought to be paid directly to the other spouse (or to another person for the benefit of a dependent member of the family) in a process known as 'earmarking'.[28] Alternatively, a spouse in whose favour an order is made may wish to use the 'pension-splitting' provisions of s 17(4), whereby a percentage of a retirement benefit which has been designated for them is valued and is then used to provide a separate pension for that spouse.[29]

To determine the value of the retirement benefits to be earmarked or split, the court has to identify the period of 'reckonable service'.[30] 'Reckonable service' is defined as 'service in relevant employment during membership of any scheme': in effect, the period during which the retirement benefits were earned.[31] In keeping with the general ethos of the legislation not to characterise assets as marital or non-marital, the Act does not require that in determining the period of reckonable service regard be had to the length of time during which the member was simultaneously a member of the pension scheme *and* was married (or in a relationship) with the non-member spouse.[32] Despite this, the period of the marriage is 'usually' the period of 'reckonable service', with cohabitation prior to marriage 'sometimes taken into account'.[33] The court then determines the relevant percentage of the retirement benefits accrued during the relevant period to be allocated to the applicant spouse.[34] Once accruing, the amount payable to the person in whose favour a pension adjustment order based on earmarking, specifically, is made is known as the 'designated benefit'.[35]

In determining whether or not to make a pension adjustment order, and, if so, the percentage of the pension to be earmarked or split, the court must have regard to a

27 See s 17(2) of the 1996 Act.

28 Ibid. See Cahill and Dixon (n 4) 69–70. Note an application must be made for a pension adjustment order as a court cannot make such an order of its own motion. Cahill and Dixon (ibid 52) highlight the 'ambiguity' in s 17(2) which states that an order for retirement benefits can be made 'to either of the following, as the court may determine, that is to say—(a) the other spouse and, in the case of the death of that spouse, his or her personal representative, and (b) such person as may be specified in the order for the benefit of a person who is, and for so long only as he or she remains, a dependent member of the family . . .' (emphasis added).

29 See Cahill and Dixon (n 4) 70–72. Note pension-splitting is only available in relation to retirement benefits.

30 S 17(2)(b)(i) of the 1996 Act.

31 S 17(1) of the 1996 Act.

32 Note, however, that the duration of the marriage is a factor to be considered under s 20(d) of the 1996 Act.

33 Cahill and Dixon (n 4) 37. While this does appear to contradict the wording of s 17(1), it is arguable that, in confining the period of 'reckonable service' to the period when the spouse was a member of the scheme and was married (or cohabiting), the courts are implicitly recognising a partnership- or contribution-based basis for sharing in Irish divorce law. See also the decision in *JCN v RTN* (HC 15 January 1999), discussed in Frank Martin, 'Prohibition to Approval: The Limitations of the "No Clean Break" Divorce Regime in the Republic of Ireland' (2002) 16(2) International Journal of Law, Policy and the Family 223, 241; and *TT v TT* (HC 26 June 2002). Note the relevant period cannot extend beyond the granting of the decree of judicial separation or divorce.

34 See s 17(2)(b)(ii) of the 1996 Act. For contingent benefits, only the percentage to be paid to the non-member must be specified in the pension adjustment order (no period of reckonable service is required): s 17(3).

35 S 17(1) of the 1996 Act. For more, see Cahill and Dixon (n 4) 38, 68–70. This terminology is not used typically where the earmarked benefits to be paid to the non-member spouse are used to create a separate pension using the pension-splitting provisions of s 17(4) of the 1996 Act.

non-exhaustive list of statutory factors enumerated in s 20 of the 1996 Act. These factors include 'the income, earning capacity, property and other financial resources which each of the spouses concerned has or is likely to have in the foreseeable future'[36] as well as 'the value to each of the spouses of any benefit (for example, a benefit under a pension scheme) which by reason of the decree of divorce concerned, that spouse will forfeit the opportunity or possibility of acquiring'.[37] The legislation also, however, makes it clear that a pension adjustment order exists solely as a last resort. Pursuant to s 17(23)(b), the court is required to consider whether 'proper provision, having regard to the circumstances, exists or can be made for the spouse concerned or the dependent member of the family concerned' by virtue of other order of the court, for example, by property adjustment order or financial compensation order.[38] Finally, although s 22 of the 1996 Act permits parties to seek a variation of pension adjustments ordered in relation to a retirement benefit,[39] under s 17(26) the ability to seek such variation may be restricted 'to a specified extent' or excluded entirely by order of the court, commonly known as a 'blocking order'.

2 Pension coverage and pension adjustment orders in Irish divorce practice

Pension coverage in Ireland

According to the Central Statistics Office, in Quarter 3 of 2018, over half (56.3%) of all workers aged between 20 and 69 years had private pension coverage involving occupational pension coverage (from current or previous employments) and/or personal pension coverage.[40] Pension coverage remained lowest among younger[41] and part-time

36 S 20(2)(a) of the 1996 Act.

37 S 20(2)(k) of the 1996 Act. Note, this factor is taken to refer to any widow(er)'s benefits for which the now ex-spouse will no longer be eligible owing to the loss of marital status.

38 In *MP v AP* (2005) IEHC 326 (unreported), O'Higgins J in the High Court quoted from the guidance notes issued by the Pensions Board in relation to s 17(23)(b) which stated: 'The legislation requires the court to consider the question of whether adequate and reasonable financial provision exists or can be made by means of any other orders that are available under the Act, prior to the making of a pension adjustment order.' Consequently, the court held that it 'must consider whether provision can be made by recourse to other orders available, but it is not precluded from making an order under section 17(23)(b) . . . if there is good reason to do so.' Notwithstanding this, s 17(23(b) has been widely interpreted as limiting the ordering of pension adjustments to situations where no alternative orders are suitable. As Lucy-Ann Buckley, 'Irish Matrimonial Property Division in Practice: A Case Study' (2007) 21 International Journal of Law, Policy and the Family 48, 64 highlights, 'the legislation implicitly suggested that the court should consider a pension adjustment order as a last resort'. Crowley (n 4) 633–34 concludes likewise. This approach, which places a clear emphasis on offsetting, appears highly questionable particularly when viewed in light of the challenges involved in offsetting pension wealth highlighted by the Pension Advisory Group (n 2) in England and Wales. See below for more. S 17(23)(a) of the 1996 Act also states that the court 'shall not make a pension adjustment order in favour of a spouse who has remarried'.

39 It is 'widely accepted' that contingent orders may not be varied under the 1996 Act given the wording of s 22(1)(h), see Cahill and Dixon (n 4) 57. However, they expand at 57 and 75–76 on one way this may technically be possible.

40 As regards personal pension coverage, this included those where payments has been deferred for a period of time or were being drawn down by the pension holder. Note, these results were derived from a pensions survey of workers which was included in the Labour Force Survey in Quarter 3 (July–September) of 2018. The survey did not measure pensions provided through the State Social Welfare Scheme. See <www.cso.ie/en/releasesandpublications/er/pens/pensioncoverage2018/>.

41 In Quarter 3 2018, just over four out of every 10 (41.5%) workers aged 25 to 34 years reported having a pension (ibid).

workers.[42] The highest figures were recorded among full-time workers[43] and, in particular, among workers aged 45–54 years where total pension coverage exceeded 70 per cent.[44] Although the 2018 statistics did not elaborate on the difference in coverage between men and women, a strong gendered dimension in Irish private pension coverage has been identified in recent years. The Irish Longitudinal Study on Ageing, *Fifty Plus in Ireland 2011*, found that women in the jurisdiction were significantly less likely to be covered by occupational or private pension schemes.[45] While only 20 per cent of men at work were not covered by an occupational, Personal Retirement Savings Account or private pension scheme, this figure rose to 41 per cent among women.[46] It appears the trend has largely continued. It was recently reported, based on a survey of more than one thousand people by Behaviour & Attitudes on behalf of pension provider Aviva, that 'the number of women with private pensions coverage has remained stubbornly stable at about 37 per cent' over the last five years.[47] While the difference in the average levels of retirement income of men and women may not be as great as originally feared (analysis of data from the 2011 longitudinal study suggested that the average income of male retirees was 58 per cent higher than that of female retirees),[48] it also retains a strong gendered dimension. Recent data from the European Commission's *2018 Report on Equality between Women and Men in the EU* suggests a retired woman living in Ireland receives approximately 30 per cent less retirement income than her male counterpart.[49]

Dealing with pensions: pension adjustments, offsetting and 'nil' orders

In determining how to take account of this wealth held in pension funds in ancillary relief proceedings on divorce, the courts have two main approaches. First, a court may use the detailed machinery of s 17 of the 1996 Act discussed above. However, as the Pensions Authority *Guidance Notes* highlight, this is not the most common approach. Rather, the Authority explains, 'the Court will try to avoid making a pension adjustment order and instead take account of pension benefits by means of one of the other types of order'.[50]

42 Of these, only 36% had private pension coverage (ibid).

43 61.4% of such workers received such protection (ibid).

44 Total pension coverage for this cohort was recorded as 70.9% (ibid). 55–69 year-olds recorded 68.2% coverage.

45 The Irish Longitudinal Study on Ageing, *Fifty Plus in Ireland 2011* 233–34 <https://www.ucd.ie/issda/t4media/0053-01_TILDA_Master_First_Findings_Report_2011.pdf>. See also Kathryn O'Sullivan, 'Ancillary Relief and Private Ordering: The Vulnerability of Financially Weaker Spouses' (2016) 19(1) Irish Journal of Family Law 3–6.

46 The Irish Longitudinal Study on Ageing (n 45). See also National Women's Council of Ireland, *Pensions: What Women Want* (National Women's Council of Ireland 2008).

47 See Dominic Coyle, 'Women Continue to Snub Pensions as a Financial Priority, Study Finds' *Irish Times* (Dublin, 25 February 2019).

48 Sanna Nivakoski and Alan Barrett, Supplementary Pensions and the Income of Ireland's Retirees (TILDA 2012) <https://tilda.tcd.ie/publications/reports/pdf/Report_PensionsIncome.pdf>.

49 See European Commission, Report on Equality between Women and Men (Publications Office of the European Union, 11 February 2019) 24 <https://publications.europa.eu/en/publication-detail/-/publication/950dce57-6222-11e8-ab9c-01aa75ed71a1>. Although this may not create significant issues where spouses are still married, it heightens the importance of fair divorce settlements to ensure adequate retirement income for divorced wives.

50 Pensions Authority, *Pension Provisions of the Family Law Act 1995, Family Law (Divorce) Act 1996 and Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010* (Pensions Authority 2015) 6 <www.pensionsauthority.ie/en/News_Press/News_Press_Archive/Guidance_Notes_on_Pension_Provisions_of_Family_Law_Act_1995_Family_Law_Divorce_Act_1996_And_Civil_Partnership_And_Certain_Rights_And_Obligations_Of_Cohabitants_Act_2010_Nov_2015_.pdf>. Note similar findings were reported in England and Wales, see Hitchings et al (n 2); Woodward (with Sefton) (n 2).

In this manner, and in line with s 17(23)(b), a court may take account of pension benefits by splitting other, non-pension assets, leaving the pension intact with the original member in a process commonly known as 'offsetting'.[51]

Where such offset takes place, member spouses will usually wish to protect their pension against future claims under s 17. However, as a result of a lacuna in the 1996 Act, it is not possible to secure a blocking order under s 17(26) where no pension adjustment order has actually been made. It is equally not possible for a court to make a zero pension adjustment order and order that none of a member's pension benefits be awarded to a non-member spouse. Consequently, as the Pensions Authority explains:

> . . . in practice if such an order [declaring that none of a member's pension benefits be given to a non-member spouse] is sought, the Court will rule that a very small percentage of benefits (e.g. 0.001%) earned over a short period (usually 24 hours) be designated for the non-member spouse/civil partner. This results in a 'nil-order', with designated benefits so small that in practice the trustees do not comply with the order.[52]

The so-called 'blocking' provisions of the Irish legislation may then be used against this 'nil' order to prevent future applications for variation and thus future claims for a pension adjustment order.

In addition to creating undesirable levels of complexity and bureaucracy in the ancillary relief process, the use of nil orders in this way has the effect of potentially skewing quantitative empirical findings or statistics seeking to determine the frequency of substantive pension adjustment orders in Ireland. Notwithstanding this, however, it is interesting to consider the findings of research in the field over the past almost 20 years.

Pensions in Irish divorce practice

In 2002, Lucy-Ann Buckley conducted one of the first significant (albeit small-scale) post-divorce referendum empirical studies of Irish ancillary relief provision. She analysed 89 case file questionnaires completed by 44 family law solicitors on their most recently completed divorce or judicial separation file.[53] In considering the outcomes in consensual cases, she found that wives were 'almost the exclusive beneficiaries of pension adjustment orders', although she also noted that these were 'not particularly common, as in many cases there was no pension to be adjusted'.[54] Where such orders were made, the proportion of the pension benefit transferred was unknown and the possibility that these may have included nil orders was highlighted.[55] In relation to non-consensual cases, she found pension adjustment orders were 'less common' but attributed this to an apparent 'dearth of pensions, at least in divorce cases'.[56] Where presented, she noted the orders again 'mostly favoured the wife'.[57] Reflecting on her findings, she concluded:

> It is hard to comment on the greater prevalence of pension orders in consent cases, particularly as it is unclear how many of the orders were 'nil' orders, made

51 See Aoife Lavan, 'Pension Adjustment Orders: The Dangers of not Seeking Advice' (2016) 29(3) Irish Tax Institute Tax Review 122, 122.

52 Pensions Authority (n 50) 9. See also Cahill and Dixon (n 4) 56, 124.

53 Buckley (n 4). Three-quarters of the questionnaires were completed by private practitioners and just over a quarter by Legal Aid practitioners.

54 Ibid 64.

55 Ibid 64. She added 'it must be remembered that "nil" orders are common'. Pension adjustment orders were less common in legal aid cases.

56 Ibid 66.

57 Ibid 66.

> purely to invoke the 'blocking' provisions of the legislation. It is possible that parties in consensual cases are more inclined to share assets, but equally they may simply be more inclined to view pensions as negotiable assets, to be traded in return for other concessions.[58]

Buckley's study also highlighted regional variations in the approach adopted to pension adjustment orders in both consensual and non-consensual cases[59] and appeared to identify a correlation between the presence of dependent children and the likelihood of a pension transfer, with pension transfers more common in cases not involving dependent children.[60] Finally, (and perhaps related to this latter finding) the study found that pension adjustment orders were 'least common' in medium-length marriages, those between 11 to 20 years.[61]

In 2009, Carol Coulter reported the findings of her empirical research conducted in the Irish Circuit Courts which saw her analyse 459 case files from October 2006 and attend court hearings throughout 2006–2007 in which 239 judicial separation and divorce cases were concluded.[62] Given the high settlement rate noted,[63] the outcomes of all cases, contested and consent, were analysed together.[64] Reflecting on the outcomes recorded in the case files, she reported that '[o]nly a minority' of spouses used the 'sophisticated legislation' applied in Ireland to deal with the division of pensions.[65] She found that, even in those cases, there was 'a significant proportion' who sought only 'nominal pension adjustment orders, preserving their pensions with the agreement of the other spouse'.[66] Where such an approach was adopted, the pension could be 'offset against a greater share of the family home'.[67] Although pension adjustment orders where a portion of the pension or the contingent benefit was allotted to the other spouse arose in 31.5 per cent of cases involving other assets, Coulter nevertheless concluded that there appeared to be a 'reluctance on the part of litigants to exercise their rights under the legislation'.[68] Similar trends were identified in the hearings attended as part of the research. Again, she found that

58 Ibid 66–67.

59 Ibid 67–68. She found 'many types of ancillary property order' including pension adjustment orders 'were most common in cases heard in Cork'. The other centres considered were Dublin and Galway. She noted: 'Of course, much may depend on the resources of the parties, but the differences seemed sufficiently consistent to consider Cork judges likely to be more redistributive than judges in the other two venues'. In terms of consensual cases, 'far more' such cases included pension adjustments in Cork (in comparison to non-consensual cases) while, despite the lower base in Galway, 'far less' included such orders there. Less divergence in approach between consensual and non-consensual cases was evident in Dublin.

60 Ibid 68–69.

61 Ibid 70.

62 Coulter (n 4). See also the associated Courts Service, *Family Law Matters Series* (Courts Service 2007–2009) <http://www.courts.ie/Courts.ie/library3.nsf/(WebFiles)/AF1984DCA46E944A802576AA003BC8BA/$FILE/Family%20Law%20Matters%20Index%20updated%20Jan%202010.pdf>.

63 On the basis of the case files reviewed, she noted 91% of cases were settled, see Coulter (n 4) 59. Although the methodology adopted for court attendance (which prioritised attendance at contested cases) resulted in an under-representation of settlements, as noted at 72, she surmised that a similarly high settlement rate would likely have been present in the general caseload dealt with by the courts.

64 Ibid 24, Coulter noted that cases that were settled and did not require court adjudication 'were filed in court records as the granting of a decree of divorce or judicial separation, many with minimal court orders other than the extinguishing of succession orders . . . but where the terms of the settlement were usually received and made rules of court'.

65 Ibid 65.

66 Ibid. Nominal pension orders were made in 12% of all cases and 25% of cases with other assets.

67 Ibid.

68 Ibid. It was not stated in what percentage of all cases such pension orders were made.

pensions were 'rarely divided' although 'sometimes' orders were made in lieu of a pension adjustment order 'including a disproportionate allocation of interest in the family home'.[69]

In the most recent study undertaken, Roisin O' Shea observed 1087 unique cases between October 2008–February 2012 in the eight Irish Circuit Courts and analysed 40 case files.[70] Seemingly reflecting the changed economic climate, she found pensions were often the 'primary "assets" in the marital pot' as the family home and other properties often had 'little equity or were in negative equity'.[71] In contested cases, she reported 'the approach of the court was to put [pensions] into the marital pot for a division of assets on a 50/50 basis'.[72] Whether this division resulted in the use of pension adjustment orders or saw the value reflected in a larger property adjustment or compensation order was not clear, nor was the adequacy of any arrangements reached.

Finally, it would be remiss not to consider official Courts Service statistics which were available up until to 2012 and which may also provide some insights. According to the Annual Report for 2012, pension adjustment orders were only made in 19 per cent of cases where a divorce was granted, down from 39 per cent in 2011 – a seemingly inexplicable 50 per cent drop.[73] Pension adjustment orders were made in 53 per cent of cases where a judicial separation was granted, however, slightly down from 55 per cent in 2011.[74] While these statistics appear to suggest pension adjustment orders play an important role in ancillary relief provision in Ireland, particularly on judicial separation, it remains unclear how many of these orders represented so-called nil orders or how the value held in pensions was accounted for in the provision made.[75]

3 Pension adjustments in the spotlight: *F v M* [2019] IESC 1

Whatever the lack of clarity as to the frequency of substantive (rather than nil) pension adjustment orders, such orders are coming under increasing scrutiny in the Irish Superior Courts. The most recent addition to the jurisprudence is the 2019 Supreme Court decision of *F v M*.[76]

In January 2013, Abbott J in the High Court granted a divorce to the parties, F and M. Ancillary to this decree, the court made a number of orders regulating the financial

69 Ibid 105. This trend has also been identified in England and Wales, see Pension Advisory Group (n 2) 34.

70 O'Shea (n 4). It appears the outcomes to which the research refers were from a mixture of consent cases (with separation agreements often being made a rule of court) and contested cases where the adjudication of the court was required. The precise proportion of cases requiring adjudication was unclear.

71 Ibid.

72 Ibid 71. Note this observation seems to have related to judicial separation cases.

73 There were 543 pension adjustment orders made on divorce in 2012 and 2892 divorces granted. There were 1183 pension adjustment orders made on divorce in 2011 and 3005 divorces granted. See Courts Service *Annual Report for 2012* (Courts Service, 21 June2012) <http://courts.ie/Courts.ie/library3.nsf/(WebFiles)/87BE463114EF96FF80257BA20033953B/$FILE/Courts%20Service%20Annual%20Report%202012.pdf>.

74 There were 457 pension adjustment orders made on judicial separation in 2012 and 858 judicial separations granted. There were 562 pension adjustment orders made on judicial separation in 2011 and 1029 judicial separations granted. See ibid.

75 It cannot be said definitively why the rate is so much higher on judicial separation than on divorce. One theory may be that parties wish to resolve practical issues such as the ownership of the family home at this initial stage (rather than waiting a further two to three years for a divorce to be finalised) and may in this context be agreeing to 'nil' pension adjustments orders on judicial separation as a form of offset. As noted above, however, this trend is likely to change when the wait period for divorce is shortened.

76 See (n 5).

relationship between the parties.[77] Among these was a pension adjustment order which awarded the respondent wife 80 per cent of the appellant's defined benefit pension fund, a fund which was valued at approximately €800,000.[78] The appellant husband appealed this distribution to the Supreme Court. The shortcomings in the key provisions of s 17 of the 1996 Act governing pension adjustment orders identified above were not the focus of the appeal. Rather, the appeal centred on the fundamental appropriateness or otherwise of the High Court's 80/20 division of the applicant's pension fund in favour of his former spouse which he claimed was 'over generous'.[79]

Significantly, by the time the full appeal was heard in January 2019, various distributions made on foot of interim pension adjustment orders had significantly reduced the overall fund remaining. First, in April 2013, the Supreme Court directed that, notwithstanding the appeal, the respondent wife was immediately to receive 40 per cent of the total value of the fund, half of the 80 per cent share which she was awarded in the High Court.[80] Second, in July 2018, the appellant sought and received access to his 20 per cent share (which now represented 33.33 per cent of the remaining fund).[81] As a result, by the time the judgment in the much delayed full appeal was delivered, only 40 per cent of the original fund remained undistributed, now worth €380,000.

Justice MacMenamin delivered the Supreme Court's judgment. Reflecting on the High Court's distribution – and no doubt echoing the sentiments of the applicant husband – MacMenamin J admitted it was 'not entirely clear why Abbott J. arrived at the apportionment of 80% of the pension fund to the wife and 20% to the husband'.[82] Although he noted that the duty of the Supreme Court, in general, 'is to seek to identify whether the High Court judge erred in principle in making the award', the court was nonetheless obliged to consider the parties' circumstances such as they exist at the time of the hearing.[83] While the position of both parties had worsened since 2013, the Supreme Court found that the respondent [wife]'s situation had 'deteriorated more'.[84] Particular attention was placed on her accommodation needs: 'While seeking to be fair to both sides, the more weighty factor identified, that is living accommodation, requires the Court to lean more towards the respondent than the appellant.'[85] MacMenamin J for the

77 *F v M* (HC, 25 January 2013). Although the couple had separated since 2000, they only secured a decree of divorce in January 2013. For an overview of the history of the marriage and earlier litigation, see [2011] IEHC 559. Note, separate to the pension, it appears that following the order for judicial separation in 2002, the husband retained the right to live in the family home while the wife received a €250,000 lump sum and maintenance. The home and the pension appear to have been the most significant assets. Given the amount of litigation (much of which was unreported) and the many amendments made to various orders, however, it is not possible to describe or comment on the overall financial provision made in the case.

78 As estimated in *F v M* (n 5) at [18].

79 Ibid at [5].

80 *F v M* (SC, 19 April 2013). In April 2013, the appellant had applied to the Supreme Court for a stay on the High Court order. The Supreme Court refused the stay and ordered that the respondent wife immediately receive half of her award as noted. However, pursuant to s 17(20) of the 1996 Act, the court did order that the trustees of the fund were not to disperse any of the remaining entitlements of the appellant (60%) in the fund pending further order of the court. Note, the respondent wife encashed her 40% of the fund towards the end of 2014 as noted at *F v M* (n 5) at [10].

81 This order was made by Irvine J in the Court of Appeal.

82 *F v M* (n 5) at [30].

83 Ibid at [34] the court noted it felt 'one cannot ignore the realities as they appear as of now'.

84 Ibid at [33]. By the time of the 2019 appeal, the wife was living abroad in the home of a friend and wished to return to Ireland. Note also that the couple had two children who, it was explained at [14], 'are now adults and are successfully making their way in the world'. However, somewhat confusingly, it was later remarked at [32] in relation to the husband that it was 'to his credit that he is taking care of one child'.

85 Ibid at [34]. Note accommodation needs are a factor listed in s 20(2)(j) of the 1996 Act.

Supreme Court thus directed that the respondent wife receive 75 per cent of the balance of the fund with the appellant receiving the remaining 25 per cent.[86] The end result therefore was that the wife received 70%, rather than 80%, of the pension.

4 Shortcomings of the Irish approach identified

It is clear from the case law and the various research studies analysed above that there are numerous difficulties with the way in which wealth held in pensions is addressed on divorce in Ireland.

First, at a fundamental level, *F v M* vividly exemplifies the shortcomings, not only of the approach adopted to pension adjustment orders, but also the wider shortcomings of the highly discretionary equitable redistribution regime applied on marital breakdown in Ireland. In the absence of accurate data on the overall financial provision ordered between the parties since 2002, as well as information on their precise financial position when such orders were made, it is not possible to comment on the overall fairness of the orders made in either the 2013 or 2019 litigation. In this context, the uncertainty and lack of consistency inherent in the regime comes to the fore. Despite not explicitly saying so, it would appear the Supreme Court felt the High Court's 80/20 division of the applicant husband's pension fund in favour of the respondent wife was indeed 'over generous' – if not exceedingly so. Although, on one hand, the Supreme Court acknowledged that the respondent wife's situation had deteriorated more than the applicant husband's since 2013 with the court inclined to 'lean more towards the respondent', in allowing the appeal, the court significantly reduced the provision made for her[87] – a fact which received little attention in the judgment or the associated media commentary.[88] Viewed in percentage terms, a 10 per cent redistribution may not appear overly worthy of comment. However, when considered from the perspective of the applicant husband, this redistribution had a significant positive impact. In awarding him a 25 per cent share in the undistributed portion of the pension fund, his overall share of the entire pension effectively jumped by 50 per cent from 20 per cent to 30 per cent.[89] At the time of the hearing, this increase saw the applicant benefit from a redistribution back to him approximately equivalent to an additional €95,000.[90]

Notwithstanding that an ancillary relief system founded on equitable redistribution will invariably sacrifice consistency in the pursuit of fairness in an individual case, where there is such a difference in opinion as to what the fairest outcome would be (and with such significant practical implications for the parties concerned),[91] serious questions have

86 Ibid. The court noted: 'While seeking to be fair to both sides, the more weighty factor identified, that is living accommodation, requires the Court to lean more towards the respondent than the appellant.' At [32]– [33], the court noted: 'The simple fact is that the appellant is fortunate in that lifetime accommodation is available to him. He has a source of income, albeit an attenuated one . . . By contrast, the respondent has no home.' Note, how precisely the pension adjustment order was going to resolve the respondent wife's accommodation needs was not elucidated on by the court. Moreover, the tax implications should she wish to convert it into cash were not referenced in the judgment.

87 See below. While the wife was due to receive €380,000, this was reduced to €285,000 by the Supreme Court.

88 The decision received considerable media attention. See, for example, Mary Carolan, 'Judge Hopes Couple's Costly 16 Year Legal battle "Will Now End"' *Irish Times* (Dublin, 22 January 2019).

89 Despite initially arguing that he ought to be awarded 100% of the remaining balance of the fund, in oral submissions, the appellant asserted that the court should grant him 30% of the 40% of the fund which remained to be apportioned, see [25]. In upholding the appeal, the court ultimately awarded him 25%.

90 This figure is reached having regard to [19] and tallies with values advanced in the Court of Appeal in 2018 as noted at [10].

91 Bearing in mind the court seemed to adopt a more generous approach to the spouse given her deteriorating financial circumstances.

to be raised as to the overall appropriateness of the regime.[92] Without meaningful parameters on the exercise of judicial discretion in relation to pension adjustments and ancillary relief provision generally, and in the absence, as a bare minimum, of a clear judicial explanation of what is being awarded and why,[93] an unacceptable level of inconsistency in outcomes is inevitable with knock-on effects. Whether seeking a pension adjustment order or hoping to reconfigure the overall provision made to take account of the wealth held in a pension, the absence of a starting point (such as a presumption of equal sharing) or other meaningful guiding principles makes it extremely difficult to predict the outcome of any litigation.[94] This ambiguity over such a valuable asset invariably promotes disputes.[95]

While not addressed in *F v M* or the empirical studies considered, questions may be asked as to how, in the first instance, pensions are approached, categorised and (in particular) valued in Ireland.[96] Although reported judgments rarely elaborate on how a pension valuation has been reached, it is possible that in many cases, whether contested or consent, regard is simply had to the cash equivalent value notwithstanding the shortcomings that have been identified with the over-reliance on this approach.[97] Irrespective of whether earmarking, pension-splitting or offsetting is preferred, the need to have an accurate, appropriate and transparent valuation of all pension assets remains central and the lack of clarity in this regard further exacerbates the ambiguity inherent in the Irish regime.

As well as encouraging disputes, the uncertainty of the law and lack of transparency in relation to valuations can also have a particularly negative impact on financially weaker spouses seeking to reach a settlement regarding pension-sharing – especially in a system tilted towards offsetting as the preferred treatment of pensions. As alluded to in Part 2, women appear especially vulnerable in this regard.[98] The absence of a 'shadow of the

92 Rosemary Horgan, 'Editorial: A Decade of Divorce in Ireland' (2007) 10(1) Irish Journal of Family Law 1 notes: '*the variation of treatment of pensions very much depends on judicial discretion*' (emphasis added).

93 While undoubtedly complicated, it is to be regretted that the 2019 judgment in *F v M* did not relate the full factual background and explain the pension adjustment order by reference to the rest of the settlement.

94 The only principle which can be said to exist is that 'proper provision' must be made. However, no further explanation as to what this might involve is set out in legislation. For a discussion of ancillary relief provision in Ireland, see O'Sullivan (n 20). Note, in England and Wales, pensions in 'need-based' and 'sharing' cases may be addressed differently, see Pension Advisory Group (n 2) Part 4.

95 In *F v M* (n 5) at [2], MacMenamin J said: 'It is an unfortunate fact that the subsequent lengthy hearings in this case, go back at least to the year 2002, have absorbed hundreds of thousands of Euro, which could have been used by the parties had the issues between them been resolved.'

96 See Pension Advisory Group (n 2) Parts 3 and 5. The valuation issue in particular appears heightened in Ireland in light of s 17(4) and section 17(23)(b). For more on the Irish approach to valuing pension assets, see Cahill and Dixon (n 4) 58–60. See also *MD v ND* [2015] IESC 16.

97 Pension Advisory Group (n 2) 20 and 21; Parts 6 and 7. It is suggested this possibility is increased in Ireland given the confusion noted among practitioners and specialists alike, see below for more.

98 While there appears to be a lack of data on the precise position of divorced retired women in Ireland, Áine Ní Léime and Nata Duvvury, *Country Report: Ireland* (Lives Working Paper 2019) 10 note on the basis of their research that: 'Older women who are divorced, widowed or single are less likely to be financially well off in retirement than are married women.' <https://lives-nccr.ch/sites/default/files/pdf/publication/lives_wp_77.2_daisie_ireland_format_ah.pdf>.

Nata Duvvury, Áine Ní Léime and Aoife Callan, *Older Women Workers' Access to Pensions: Vulnerabilities, Perspectives and Strategies* (NUI Galway 2012) at 3.2.3. <https://aran.library.nuigalway.ie/xmlui/bitstream/handle/10379/3205/Older_Women_Workers_report_Aine.pdf?sequence=1> also highlighted 'the extent to which many women are unprepared for the possible effects of loss of income, increased costs and potential loss of share in pension after divorce.' For more, see Nata Duvvury, Áine Ní Léime and Aoife Callan, 'Erosion of Pension Rights: Experiences of Older Women in Ireland' (2018) 5(3) European Journal of Cultural and Political Sociology 266.

law' under which settlements in respect of pension-sharing can be negotiated ensures that the vulnerability of such spouses is heightened. In this context, vulnerable spouses appear especially reliant on judicial protection, as evidenced in research findings. Roisin O'Shea reported a consent divorce case where a wife who had no pension agreed to a nil pension adjustment order, preserving her husband's 'substantial pension' for his benefit, in circumstances where the primary provision for her appeared to be that she would receive a 50 per cent share of the net proceeds from the sale of the family home. Having reviewed the settlement reached, the court refused to rule on the terms. It held that 'proper provision' was not made and stated that the wife should have some entitlement to the pension in light of the length of the marriage.[99] Whether such judicial protection will always be available, however, remains doubtful.[100]

Furthermore, a common finding across the various studies considered (which is corroborated by practitioners and referenced indirectly in *F v M*) is the high level of confusion and wariness with which pension adjustment orders, in particular, are associated. O'Shea reported: 'Where any question arose around pension adjustment orders, most of the judges deferred to counsel or sought clarification from counsel.'[101] However, practitioners themselves appear equally fearful. Based on her research, Coulter suggested that pension adjustment orders were seen as 'overly complex by practitioners'.[102] Seemingly confirming this view, the Law Society's Pensions Law Sub-Committee noted that it was 'generally recognised' that pensions adjustment orders were 'notoriously complex to draft and implement effectively'.[103] Seeking to ameliorate the situation somewhat, it published a Template Pension Adjustment Order in January 2012.[104] Notwithstanding the production of this template however, Laura Cahill and Sonya Dixon, authors of the leading family law practitioner guide on pensions, report that practitioners still tend to 'avoid dealing with pensions if possible'.[105] They note that errors have 'the potential to have disastrous consequences' with these errors potentially not spotted for years.[106]

In light of the value of the asset, practitioners are therefore wary of engaging with pensions and exposing themselves to liability for a professional negligence claim.[107] However, while they may feel the safer option is to seek to offset the value of the pension against other assets, the protection this provides may be illusory. As recently reported in

99 O'Shea (n 4) 84–85.

100 See O'Sullivan (n 20) 116–17.

101 O'Shea (n 4) 68. Note the case reported at 68 where, on making two pension adjustment orders, the court asked counsel if the orders were 'compatible'. It might have been anticipated that judicial expertise in relation to pension adjustment orders would improve in light of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010. It dictates that pension adjustment orders are to be considered before any property adjustment orders. However, the legislation appears to have generated relatively little case law.

102 Coulter (n 4) 105.

103 *Template Pension Adjustment Order Explanatory Memorandum* (Law Society of Ireland, 16 April 2019) <www.lawsociety.ie/globalassets/documents/committees/employment/pensions/pensionadjustmentorder.doc>.

104 Ibid. It noted: 'This template PAO is aimed at guiding members who are applying for such orders in Family Law matters. The template in primarily drafted from the perspective of a Defined Benefit Scheme and "nil pension adjustment order", but would require more comprehensive revisions if applied in respect of a Defined Contribution Scheme.'

105 Cahill and Dixon (n 4) 131.

106 Although recourse may be had to pensions specialists, they too appear cautious. Donagh McGowan and Tommy Nielsen (n 26) 42 note: 'Pension adjustment orders often cause difficulties for family law practitioners, but they are also a complex area for pension specialists.'

107 Ibid.

England and Wales, '[w]here there have been claims of negligence made against family lawyers in the field of pensions, it has overwhelmingly been in cases where offsetting has been the chosen remedy, not pension sharing'.[108] Specifically, it appears 'disadvantageous offsetting decisions' have been a 'significant source' of negligence actions.[109] Although the issue has not attracted attention in Ireland to date, the potential for such negligence claims to be pursued in the jurisdiction appears tacit, particularly in light of the ambiguity surrounding valuations.

Finally, the complexity of the legislation and of pension funds themselves is particularly problematic for lay litigants. Legal representation and recourse to experts seems almost a prerequisite in seeking a pension adjustment order, yet the costs associated with such representation or expert input can be significant. Reflecting on the enormous costs allegedly charged by a pension trustee for his court appearance in *K v M*,[110] MacMenamin J noted 'whatever sympathy one might feel in relation to these costs . . . the position is that neither this Court, nor the High Court, would have been in a position to make the pension adjustment orders in the absence of information from them'.[111] The challenges faced by lay litigants seeking access to pension adjustment orders was also highlighted in O'Shea's study.[112]

5 Where to next? Possible avenues for reform

Based on the foregoing, it is clear a multifaceted approach needs to be taken to address the issues endemic in pension-sharing on divorce in Ireland. At a fundamental level, the difficulties highlighted in *F v M* speak to the weaknesses associated with the adoption of an unpredictable, highly discretionary, ancillary relief regime. The uncertainty created by the regime has knock-on effects in terms of promoting litigation and, where such litigation is not pursued (perhaps, particularly, due to financial constraints), can contribute to increasing the vulnerability of financially weaker spouses to potentially disadvantageous settlements. To address these shortcomings, and as part of a wider reform of the Irish approach to ancillary relief provision,[113] it is clear that a more predictable approach needs to be adopted to identify the designated benefit – the share of the pension that is being redistributed to the non-member. Although organisations

108 Pension Advisory Group (n 2) 35.

109 Ibid 37.

110 The appellant alleged that one representative of the trustees who attended the Supreme Court for one day in earlier litigation charged €15,790 for their services. It is unclear whether the fees were associated with a trustee's appearance in relation to earlier litigation where the appellant husband tried to prevent them 'unnecessarily' making a transfer of 50% of the funds (see [35]–[36]) or whether they related to the trustee's presence 'assisting the courts as to how monies could be released from the fund for the purposes of making a pension adjustment order' (see [5]). It is also unclear as to why a paper report was not sufficient.

111 *F v M* (n 5) at [36]. In England and Wales, Woodward (with Sefton) (n 2) noted 'pension orders are hard to achieve fairly or at all without legal and/or expert advice. Even family lawyers and judges benefit from expert help on pensions except in the simplest of cases.' However, see recommendations in Pension Advisory Group (n 2) 10 and Part 6 for so-called 'pensions on divorce experts' (PODEs) who can act as Single Joint Experts (SJEs) instructed by both parties.

112 See, for example, O'Shea (n 4) 207 and 279. This issue has also received increased attention in England and Wales, see Hitchings et al (n 2) 127.

113 Note various proposals for reform which seek to bring greater certainty and predictability to ancillary relief provision, particularly property division, have been presented in Ireland. O'Sullivan (n 20) presented a detailed proposal for reform, adopting a rules-based discretion approach. Louise Crowley, 'Irish Divorce Law in a Social Policy Vacuum – From the Unspoken to the Unknown' (2011) 33(3) Journal of Social Welfare and Family Law 227 advocated for the judicial development of clear principles. Lucy-Ann Buckley 'Matrimonial Property and Irish Law: A Case for Community' (2002) 53 Northern Ireland Law Quarterly 39 argues for the adoption of a community of property approach.

such as the National Women's Council of Ireland have advocated for compulsory pension-splitting, presumably on a 50/50 basis,[114] a more nuanced approach, ensuring some discretion remains in the hands of the judiciary, may be preferable and more politically palatable. Pursuant to the Family Law Act 2011 in British Columbia, for example, the legislation applies a presumption that parties share the pension benefits accrued during the marriage, with the benefits not arising until the parties retire.[115] This presumption can be rebutted where it would give rise to 'serious unfairness'. A similar approach could be adopted in Ireland.[116] Once the reckonable period is established, the presumptive equal share could then be used for earmarking, pension-splitting or valued to facilitate a reconfiguration of the overall package agreed if so desired.[117] Such reform – if combined with a more transparent and reflective approach to the valuation of pension assets in the first instance – would not only promote greater consistency and certainty but would also ensure that settlements could take place under the shadow of the law and alleviate some of the vulnerability suffered by financially weaker spouses.

However, while we await such reform we can continue to make progress. First, the influential role that the Irish courts can have in addressing some of the difficulties highlighted, in particular the lack of certainty, ought to be reiterated. Having identified similar issues in England and Wales, Woodward noted the need for greater 'guidance and clarification from case law' on issues of frequent dispute as well as 'some basic guidelines' on, for example, the valuation of offsets.[118] She recommended that there ought to be 'a standard requirement to spell out the reasoning and objectives behind any proposed order, to include the basis of any pension share, whether a pension offset is proposed and if so how it has been calculated, and what the overall net effects are'.[119] Acknowledging that '[t]his might add a little time to each case', she nevertheless felt it 'would help concentrate minds and result in greater understanding, clarification and longer term benefits for parties, practitioners and judges'.[120] The need to encourage such judicial engagement would appear equally important in Ireland and could certainly play an important role in addressing many of the weaknesses identified.

Second, although the then Pensions Ombudsman Paul Kenny noted in 2007 that the relevant sections of the Acts were 'drafted in a reasonably straightforward way',[121] various technical weaknesses of the legislation have been highlighted, in particular by Cahill and Dixon, and have certainly added to the perceived complexity of the regime.[122] These could be remedied with minimal tweaking, simplifying the scheme and eliminating

114 The National Women's Council of Ireland (n 46) 57 notes: 'An alternative approach to achieve gender pension equity is to statutorily require pension splitting. With increased levels of divorce and remarriage it has become necessary to have a fair way of rectifying inequality in pension provision between both partners in a marriage. In Germany, Netherlands and Switzerland it is mandatory to split equally the pensions of both spouses.'

115 This largely replicates the former approach applied under Part 6 of the Family Relations Act 1996, see British Columbia Law Institute (n 1). It was concluded that overall the pension division provisions of the 1996 Act worked well and as a result were carried into the 2011 Act with no major amendments. See also the Ministry of Justice (n 1).

116 For more, see O'Sullivan (n 20).

117 Cahill and Dixon (n 4) 72 note that calculating the transfer amount in a 'defined contribution scheme is reasonably straightforward'. Although they also note that with a defined benefit scheme calculating the transfer amount is 'more complicated', it is possible. For more on valuation issues, see above.

118 Woodward (with Sefton) (n 2) 191.

119 Ibid.

120 Ibid.

121 Paul Kenny, 'Pensions? No Need to Panic' (2007) 1(2) Family Law Matters 43, 43.

122 Cahill and Dixon (n 4) ch 8.

perceived flaws. The difficulties associated with the failure to include provision for pension blocking orders where no pension adjustment is ordered, as discussed above, must be addressed.[123] Calls have been made for reform to address the fact that, at present, contingent benefit pension adjustment orders cannot be varied or discharged.[124] The 12-month limitation period for seeking a pension adjustment order in respect of contingent benefits has also been criticised as an 'arbitrary rule' and could easily be remedied.[125]

Third, it would appear that greater effort needs to be made to educate and support practitioners and divorcing couples alike in dealing with pensions as part of the ancillary relief process. As former Ombudsman Kenny explained over a decade ago:

> . . . when it comes to drafting and actually implementing PAOs, the provisions of Murphy's Law seem to apply with greater force than those of either of the [Family Law Acts]. I find this mysterious and distressing: mysterious, because it shouldn't be that difficult; distressing, because the results of error can be catastrophic for the intended beneficiary. I believe that some difficulties arise just because the word 'pension' is involved, a word that seems to generate panic in otherwise sane and sober individuals.[126]

Although some support has been provided in the interim, for example by the Law Society of Ireland through the publication of its sample pension adjustment order, more is required.[127] Indeed, the perception of practitioners as to difficulty of dealing with pensions on divorce is not unique to Irish practice. High levels of confusion were also recently reported in England and Wales. Given the scope of her research study, Woodward linked this confusion to poorer outcomes.[128] As a result, she too emphasised the importance of education initiatives:

> The findings imply that if there is to be any improvement in the outcome of cases involving pensions, more public education on pensions is required, more training for the divorce lawyers, including on their qualifying courses, and some compulsory pensions training with options for more specialised training for the judiciary.[129]

As well as focusing on developing the competence and confidence of practitioners in drafting effective pension adjustment orders, such education initiatives could also play an important role in better ensuring full disclosure in relation to pensions. Kenny noted that although, when asked about pension entitlements, scheme trustees must provide this information in line with the Guidelines under the Pensions Act 1990, '[s]ometimes the information furnished is inaccurate or incomplete'.[130] As a result the importance for

123 As Horgan (n 92) notes: 'It should surely be possible to attain a pension blocking order preventing future pension adjustment without having to give 0.01 per cent of the pension over 24 hours to the non-pension member. Other technical nightmares no doubt await unsuspecting practitioners on the pensions area when these orders fall to be implemented by the pension trustees.' Kenny (n 121) 45 also noted this is 'a clumsy device, which increases the scope for error'. For different practical solutions, see Cahill and Dixon (n 4) 124.

124 Cahill and Dixon (n 4) 125–26. They note at 128 that such orders can be varied for qualified cohabitants under the 2010 Act.

125 Ibid 125.

126 Kenny (n 121) 43. He provided numerous examples of bad practice in drafting pension adjustment orders.

127 Cahill and Dixon (n 4) also provide sample orders, see ch 9. British Columbia Law Institute provides accessible information for practitioners and lay people alike, see <http://www.bcli.org/wordpress/wp-content/uploads/2017/03/March-2017-Questions-and-Answers-on-Pension-Division-Final.pdf.>

128 Woodward (with Sefton) (n 2) 6.

129 Ibid 191.

130 Kenny (n 121) 45.

practitioners 'to be familiar with all the relevant disclosure requirements to ensure all the relevant information is provided in advance of the case' has been reiterated.[131]

In this context, the 2019 publication in England and Wales of *A Guide to the Treatment of Pensions on Divorce* presents an interesting template for Ireland.[132] It aims to help practitioners, financial experts and judges to understand the issues in relation to pensions, draw attention to pitfalls and provide a 'good practice guide for legal practitioners and experts involved in these cases'.[133] Notwithstanding its non-binding nature, the production of such a report for Ireland could certainly go some way towards achieving greater consistency in how the wealth held in pensions on divorce is addressed and the basic understanding necessary for that to occur.

Admittedly, these proposals will not represent a silver bullet and will not cure all the ills associated with the redistribution of wealth held in pensions on divorce. They will not, for example, address the many challenges faced by lay litigants. Whether the obstacles for this latter category of stakeholders can ever be eradicated in the context of ever more complex pension funds remains doubtful. However, these proposals would go some way, at a practical level, in addressing many of the main issues highlighted by reducing the uncertainty inherent in the regime, streamlining the legislative framework and inching Irish ancillary relief provision towards better practice.

Conclusion

The Department of Justice and the Pensions Board undertook a review of the pensions provisions of the Family Law Acts in 2001.[134] Yet, despite this, no report was made publicly available following the review and no reform ever came to fruition. To the contrary, many of the weaknesses of the 1995 and 1996 Acts were repeated in the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 with even more confusion and complexity added.[135] Although it was reported in 2015 that the Department of Justice had indicated that there were 'continued plans' to amend family law legislation in respect of pensions,[136] these too have failed to materialise.

While the shortcomings of the law in this area undoubtedly affect all parties involved, it remains an unfortunate reality that these effects often retain a gendered dimension. As Joanna Miles and Emma Hitchings recently explained albeit in relation to England and Wales:

> . . . many women are still less able than most men to deal alone with the economic shock of divorce: a combination of socio-economic factors and the division of functions within many marriages often leaves wives with lower earning capacity, lower capital resources and lower pension . . . savings than their husbands . . .[137]

The research conducted in Ireland to date appears to indicate a similar reality on this side of the Irish Sea. In this context, any weaknesses in the law or practice which affect such valuable assets must be addressed.

131 Cahill and Dixon (n 4) 130. See also O'Shea (n 4) 198. Hitchings et al (n 2) 99 note challenges with disclosure in relation to pensions in England and Wales. Woodward (with Sefton) (n 2) 191 recommended '[i]mproved standards for financial disclosure'.

132 Pension Advisory Group (n 2).

133 Ibid 10.

134 Geoffrey Shannon, Hilary Walpole and Eleanor Kiely, *Maintenance, Pensions and Taxation in Family Law Proceedings* (Roundhall 2001).

135 Cahill and Dixon (n 4) 127.

136 Ibid 123.

137 Miles and Hitchings (n 2) 43–44.

Although it has been pointed out that 'it is clearly intended that [pension adjustment orders] should not merely be granted as a matter of course in every case'[138] – and notwithstanding that, to quote former Pensions Ombudsman Kenny, some family law practitioners and judges 'regard pension adjustment orders as the bane of their lives'[139] – such orders are an important tool available in ensuring 'proper provision' on marital breakdown under Irish law. Indeed, even where (or, perhaps, particularly where) pension adjustment orders are *not* sought or granted, it is of the utmost importance that there is clarity as to how pensions are valued, how the value held in such assets is accounted for in any provision made and how any offset has been reached.

There are various weaknesses which beset the Irish approach to ancillary relief provision on relationship breakdown.[140] To date, however, the challenges pertaining to pensions and pension adjustment orders have attracted little academic or public attention. It is to be hoped that, going forward, greater consideration will be afforded to these assets and that the legislature, judiciary and professional bodies are alive to their own role in ensuring best practice in the redistribution of wealth held in pensions on divorce in Ireland.

138 Cahill and Dixon (n 4) 125.

139 Kenny (n 121) 45. He added these sentiments were also 'shared by pension managers, trustees and scheme administrators'.

140 See O'Sullivan (n 20); Crowley (n 113); Buckley (n 113).

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Moving on from a judicial preference for mediation to embed appropriate dispute resolution

MASOOD AHMED

*University of Leicester**

Abstract

This paper critically considers judicial approaches to and promotion of mediation within the English civil justice system. It argues that the overzealous judicial emphasis on mediation in the ADR jurisprudence has restricted the wider concepts of ADR and 'dispute resolution' which in turn has created what the author terms 'judicial mediation bias'. The paper critically explores these issues through an analysis of the ADR jurisprudence, with a focus on key Court of Appeal ADR authorities, and successive civil justice reforms. The paper makes proposals for reform, including the potential use of stages one and two of Lord Justice Briggs' online court to promote a greater application of a variety of ADR procedures, in particular, judicial early neutral evaluation and collaborative dispute resolution.

Key words: civil justice system; dispute resolution; alternative dispute resolution; mediation; online court; litigants in person; reform

Introduction

Over the past quarter of a century, mediation has grown to become an integral part of the civil justice fabric of many common law and civil law jurisdictions.[1] It is consistently promoted by policymakers[2] and the courts for its economic and practical virtues as compared with costly and lengthy court adjudication.[3] Some members of the senior judiciary in England and Wales have gone to great lengths to emphasise the growing importance of mediation within the civil justice system. Indeed, Mr Justice Lightman controversially referred to alternative dispute resolution (ADR), with specific reference to

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1 Examples of common law jurisdictions which have an established history of mediation and mandatory forms of mediation include Australia, Canada and the USA. Singapore recently enacted the Singapore Mediation Act 2017 and the Republic of Ireland recently passed the Mediation Act 2017. Italy, France and China are examples of civil law jurisdictions with an established history of mediation. See S Ali, *Court Mediation Reform: Efficiency, Confidence and Perceptions of Justice* (Edward Elgar 2018).

2 In the family context, mediation has been formally introduced by s 10(1) of the Children and Families Act 2014.

3 For example, see the comments of Lord Justice Jackson praising mediation as an important cost-saving mechanism in his *Review of Civil Litigation Costs: Final Report* (TSO 14 January 2010) ch 36, 355.

mediation, as being 'at the heart of today's civil justice system.'[4] More recently, the Civil Justice Council ADR Working Group explained that mediation 'is the principal process for us to consider, operating in the direct shadow of the civil courts. Almost all of the Court decisions about ADR have been about mediation.'[5] Finally, mediation has found favour on the regional and international levels with the EU Mediation Directive[6] and the recently proposed Convention on the Enforcement of Mediation Settlements.[7]

As government austerity policies[8] continue to have a stranglehold on public expenditure on the justice system,[9] the judiciary has embraced mediation as the most preferred ADR process in diverting cases away from the over-burdened and under-resourced civil courts.[10] This strong judicial preference for and promotion of mediation has been consistently reflected in the evolving ADR jurisprudence,[11] extrajudicial statements[12] and successive civil justice reforms. Mediation featured prominently in Sir Rupert Jackson's *Review of Civil Litigation Costs* and was praised for its role in controlling litigation costs for the parties and the courts.[13] More recently, mediation was a major focus of Lord Justice Briggs' (as he then was) recent *Civil Courts Structure Review* (CCSR)[14] in which he proposed the introduction of an online court,[15] now called the Online Civil Money Claims (OCMC),[16] for the resolution of low-value money claims, with an enhanced focus on settlement.[17]

4 *Hurst v Leeming* [2002] CP Rep 59. The combined effect of delay, expense and complexity – the enemies of justice – have severely restricted access to justice. See the comments in Lord Justice Briggs, *Civil Courts Structure Review: Interim Report* (Judiciary of England and Wales 2015) (CCSR *Interim Report*); Lord Justice Briggs, *Civil Courts Structure Review: Final Report* (Judiciary of England and Wales 2016) (CCSR *Final Report*).

5 *ADR and Civil Justice: CJC ADR Working Group Final Report* (CJC ADR Working Group November 2018) <www.judiciary.uk/wp-content/uploads/2018/12/CJC-ADRWG-Report-FINAL-Dec-2018.pdf>.

6 Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters. Although recognising the efforts of Member States in implementing the Directive, the European Parliament in its 2017 Report on the Mediation Directive recommended, inter alia, the need for greater publicity and education of mediation within Member States as well as the need for greater quality control of mediators. It also welcomed the introduction of mediation in family disputes.

7 This is to be called the Singapore Mediation Convention. See <www.singaporeconvention.org>. For a critical review of the proposals, see M Ahmed, 'Reflections on the UNCITRAL Convention on the Enforcement of Mediation Settlement Agreements and Model Law' (2019) 2 (May) Lloyd's Maritime and Commercial Law Quarterly 259–69.

8 See 'Ministry of Justice's Settlement at the Spending Review 2015' (Press Release 25 November 2015) <www.gov.uk/government/news/ministry-of-justices-settlement-at-the-spending-review-2015>.

9 For example, from 2010–11 to 2015–16 there has been a 34% cut in spending by the Ministry of Justice. See *The Crisis in the Justice System in England and Wales: The Bach Commission on Access to Justice Interim Report* (Fabian Society November 2016).

10 *CJC ADR Working Group Interim Report* (n 5).

11 Recent pro-mediation cases include *Garritt-Critchley v Ronnan* [2014] EWHC 1774 (Ch) and *Thakkar v Patel* [2017] EWCA Civ 117, although see *Gore v Naheed* [2017] EWCA Civ 369 in which Patten LJ appeared to adopt a divergent approach to the earlier decision in *Thakkar*.

12 Lord Neuberger, 'A View from on High' (Civil Mediation Conference 2015).

13 Jackson (n 3) ch 36.

14 CCSR *Interim Report* and CCSR *Final Report* (n 4).

15 The official name of the online court is the Online Civil Money Claims.

16 The OCMC is currently subject to a pilot. The rules governing the pilot are set out in CPR 51R.

17 For a collection of essays critically discussing various aspects of the proposed online system, see P Cortes, 'The Online Court: Filling the Gaps of the Civil Justice System?' (2017) 36(1) Civil Justice Quarterly109; M Ahmed, 'A Critical View of Stage 1 of the Online Court' (2017) 36(1) Civil Justice Quarterly 12; and J Sorabji 'The Online Solutions Court – a Multi-door Courthouse for the 21st century' (2017) 36(1) Civil Justice Quarterly 86.

It has, therefore, become increasingly noticeable that strong judicial promotion of mediation has elevated it as the pre-eminent ADR procedure in the resolution of civil disputes. This is understandable given the well-known virtues of mediation over litigation. A successful mediation – a mediation which has resulted in a settlement between the parties – saves the parties from incurring substantial and unpredictable litigation costs and preserves the courts' finite resources. It provides the parties with a voluntary, non-adjudicative process and empowers them to craft a solution for their disputes which works for them, something which the court process cannot provide.[18]

Although there can be no dispute concerning the rationale for strong judicial preference for mediation, this has created 'judicial mediation bias'. Judicial mediation bias entails the overzealous judicial focus on mediation as the most preferred ADR option, without sufficient consideration of other ADR procedures which have been neglected and underused. Judicial mediation bias has had an adverse impact on the development of ADR – both as regards the use of other forms of ADR, and in relation to building the skills for and availability of these alternatives. From a jurisprudential perspective, the case law reflects the development of a narrow and distorted concept of ADR which simply equates ADR to mediation. This distorted understanding of the concept of ADR has been partly reinforced by the judiciary's tendency to refer to ADR as simply amounting to mediation, rather than distinguishing between the various ADR procedures and thereby promoting a wider appreciation of the concept and nature of these procedures. This is particularly concerning in respect of Court of Appeal authorities because of that court's responsibilities in monitoring, developing and reforming civil procedure.

To remedy these shortcomings, this paper will argue for a judicial cultural shift and significant procedural changes, so that ADR is promoted and used in its widest sense. It will be argued that stage two of the OCMC, which is currently under construction and which will incorporate an opt-out mediation stage, provides the greatest potential to remedy the ills caused by judicial mediation bias so that, as the jurisdiction of the OCMC expands in the future beyond small value money claims, a range of ADR procedures, including early neutral evaluation (ENE) and collaborative dispute resolution (CDR), are embedded and used. In particular, the recent Court of Appeal decision *Lomax v Lomax*,[19] which held that the courts could, as part of their case management powers,[20] compel parties to engage with judicial ENE, provides a new impetus for a judicial culture shift and greater integration of ADR within the civil justice system.[21] It will also be argued that the recent Courts and Tribunals (Judiciary and Functions of Staff) Act 2018, which provides the flexibility for judges to be deployed across a range of cases, provides impetus to incorporate and encourage judicial-ENE at stage two of the OCMC.

It should be noted from the outset that the paper is only concerned with certain non-adjudicative ADR procedures: those procedures which assist the parties in reaching a settlement but allow the parties to withdraw from the process before a binding settlement

18 S Blake, J Browne and S Sime, *A Practical Approach to Alternative Dispute Resolution* (3rd edn, Oxford University Press 2014); and S Blake, J Brown and S Sime, *The Jackson ADR Handbook* (2nd edn, Oxford University Press 2016).

19 *Lomax v Lomax* [2019] EWCA Civ 1467.

20 Civil Procedure Rule 3.1(2)(m).

21 CPR 3.1(2)(m) provides that the court may 'take any other step or make any other order for the purpose of managing the case and furthering the overriding objective, including hearing an Early Neutral Evaluation with the aim of helping the parties settle the case'. See the comments of HHJ Birss (as he then was) explaining that ENE forms part of the courts' case management powers in *Fayus Inc v Flying Trade Group plc* [2012] EWPCC 43. In *Frey v Labrouche* [2012] EWCA Civ 881 at [41] Lord Neuberger made it clear that judges are permitted to express preliminary views as to points at issue.

agreement is concluded. It is not concerned with adjudicative forms of ADR: that is those forms of ADR procedures which the parties have voluntarily chosen and where a third party reaches a binding decision. In this regard, arbitration and the compulsory adjudication scheme for (non-dwelling) construction disputes[22] and other forms of adjudicative ADR are not considered.[23] Ombudsman services, which can result in a binding decision, are also not considered. Further, this paper does not engage with the well-trodden ground concerning the impact mediation may have on the development of the law;[24] the types of 'justice' that mediation offers to the parties;[25] whether mediation should be made compulsory;[26] the potential dangers of imbalances of power between the parties during the mediation process;[27] the confidential nature of mediation;[28] nor whether mediators should be regulated.[29]

Part one of the paper will analyse the concept of ADR, the wider notion of 'dispute resolution' and various non-adjudicative ADR procedures including ENE and CDR. Part two will discuss the promotion of mediation by successive English civil justice reforms. Part three will review ADR jurisprudence and critically analyse the emergence of judicial mediation bias and its consequences. Finally, part four will offer proposals for reforms.

1 A variety of ADR procedures and a wider concept

To understand the dominant position which mediation currently occupies within the civil justice system and how it has been promoted by the senior judiciary, it is important to appreciate what is meant by ADR (conceptually and procedurally) and what is meant by the wider notion of 'dispute resolution'. A discussion of these concepts will help to illustrate the existence of a narrow description of ADR and dispute resolution and the consequential emergence of judicial mediation bias; and the need for reform.

1.1 ADR procedures and the wider concept of 'dispute resolution'

There is no universally agreed definition of 'alternative dispute resolution' but, in its most simple terms, ADR refers to the resolution of disputes (for the purposes of this paper, civil disputes) through procedures other than the formal court process.[30] ADR has been varyingly described by the senior judiciary as, on the one hand, being at the 'heart of our civil justice system'[31] and, on the other, as being 'supplementary' or as running 'in parallel'

22 Housing Grants, Construction and Regeneration Act 1996; Scheme for Construction Contracts (England and Wales) Regulations 1998, SI 1998/649.

23 The Professional Negigence Adjudication Scheme para 6(i) of the Professional Negligence Pre-action Protocol.

24 O Fiss, 'Against Settlement' (1984) 93 Yale Law Journal 90; H Genn, 'What Is Civil Justice For? Reform, ADR, and Access to Justice' (2013) 24(1) Yale Journal of Law and the Humanities 397.

25 Fiss (n 24); Genn (n 24).

26 D Girolamo, 'Rhetoric and Civil Justice: A Commentary on the Promotion of Mediation without Conviction in England and Wales' (2016) 35(2) Civil Justice Quarterly 162.

27 O Gazal-Ayal and R Perry, 'Imbalances of Power in ADR: The Impact of Representation and Dispute Resolution Method on Case Outcomes' (2014) 39 Law and Social Inquiry 791.

28 B Clarke and A Agapiou, 'The Practical Significance of Confidentiality in Mediation' (2017) 37(1) Civil Justice Quarterly 74.

29 Mike Whitehouse, 'Regulating Civil Mediation in England and Wales: Towards a "Win-win" Outcome' (2017) 2(1) Mediation Theory and Practice; Mike Whitehouse, 'Mediation and the Art of Regulation' (2017) 2(1) Mediation Theory and Practice 69–83.

30 The CEDR defines ADR as: 'A body of dispute resolution techniques which avoid the inflexibility of litigation and arbitration, and focus instead on enabling the parties to achieve a better or similar result, with the minimum of direct and indirect cost."

31 *Hurst* (n 4).

to judicial determination.[32] Despite these varying judicial opinions on the role played by ADR, it is clear that there has been a consistent acceptance among the senior judiciary that court adjudication is no longer the primary means by which all disputes should be resolved. This acceptance of a paradigm shift in dispute resolution is consistent with Lord Woolf's revolutionary reforms[33] which ushered in a new philosophy that the civil justice system should primarily be concerned with the settlement of disputes.

As acceptance of ADR has grown, some among the senior judiciary have adopted a cautious approach in embracing ADR and have made powerful arguments in making clear that ADR is 'supplementary' to court adjudication. Lord Neuberger has consistently explained that the courts, not private forms of dispute resolution, fulfil the function of the state in the administration of equity and law. Although arbitration and other forms of ADR can secure justice for individuals, 'they do so because they exist within the framework of law and enforcement by formal adjudication. Without formal adjudication they would be mere epiphenomena.'[34] Similarly, Lord Briggs has stated that court adjudication 'remains an essential guarantor of the rule of law'.[35]

A further issue which requires attention is the concept of 'dispute resolution'. Although ADR refers to those *procedures* that are separate to the court process, the concept of 'dispute resolution' is wider. It refers to *all* procedures available in the resolution of disputes – litigation and ADR. This wider concept of dispute resolution is echoed in the late Professor Frank Sander's seminal lecture at the Pound Conference in 1976 where he famously spoke of his vision of the court being a 'dispute resolution centre', later coined the 'multi-door courthouse' in which it adopts a pro-active and facilitative approach in 'screening' and allocating disputes to an appropriate dispute resolution process.[36] Sanders' vision reflected the idea that court adjudication was not the only means through which disputes could be resolved – they could and should be resolved through a *variety* of appropriate dispute resolution procedures.

The wider concept of 'dispute resolution' was not easily transferred into the English civil justice system. The Woolf and Jackson Reforms adopted a compartmentalised approach to the concept of the resolution of civil disputes as being either through litigation or ADR, with a focus on mediation as the preferred ADR procedure. The wider concept that dispute resolution encompassed all procedures which may resolve disputes remained absent from the English civil justice landscape until Briggs LJ's *Chancery Modernisation Review* in 2013.[37] Briggs LJ was the first to advocate the need for a judicial culture shift in the management of disputes so that cases are managed to 'a resolution' which would include ADR procedures as well as litigation. Briggs LJ's call for a culture shift in the judicial management of disputes was also prevalent in his CCSR.[38] However, this wider application of the concept of ADR and dispute resolution is inherently absent from the jurisprudence. As will be demonstrated, ADR is perceived as simply meaning

32 Neuberger (n 12).

33 The Rt Hon Lord Woolf, *Access to Justice Interim Report* (Lord Chancellor's Department 1995) ch 2, para 7(a) (*Interim Report*) and the Rt Hon Lord Woolf, *Access to Justice Final Report* (Lord Chancellor's Department 1996) (*Final Report*).

34 Lord Neuberger MR, 'Equity, ADR, Arbitration and the Law: Different Dimensions of Justice' (Fourth Keating Lecture, Lincoln's Inn, 19 May 2009).

35 CCSR *Interim Report* (n 4).

36 See F Sander, 'Varieties of Dispute Processing' (1976) 70 Federal Rules Decisions 111–34; F Sander, 'The Multi-door Courthouse' (1976) 3 Barrister 18.

37 Lord Justice Briggs, *Chancery Modernisation Review: Final Report* (Judiciary of England and Wales December 2013) para 5.

38 CCSR *Interim Report* (n 4) para 2.22.

mediation and 'dispute resolution' as either litigation or mediation. This is particularly evident from the extrajudicial comments of Sir Gavin Lightman, who controversially spoke of ADR, with a focus on mediation, as being 'at the heart of today's civil justice system'.[39] In his speech 'The Civil Justice System and the Legal Profession – The Challenges Ahead',[40] Sir Gavin argued that '*a mediation culture is vital* today where the alternative is financially crippling and socially disruptive'.[41] In another speech he spoke of the benefits of mediation affording 'a palliative' to those, particularly litigants in person (LiPs), who could not afford the cost and risk of litigation. Mediation provided 'the chance of the *approximation* to justice'.[42]

With respect, Sir Gavin's call for a 'mediation culture' being 'vital' is not convincing. Although it is accepted that mediation has its economic and practical virtues, to call for a culture change which focuses only on mediation undermines the broader need to promote a culture of settlement through a variety of ADR procedures. It fundamentally creates two streams in the resolution of disputes within the civil justice system: litigation or mediation. This is not consistent with the wider notions of ADR and dispute resolution – but is consistent with the 'tunnel vision' of ADR that is evident from the jurisprudence.

Further, although it is true that litigation is costly for ordinary citizens, they should not be channelled into resolving their disputes exclusively through mediation. The focus should continue on increasing access to justice and that can be achieved by educating parties about dispute resolution and guiding parties to the most appropriate dispute resolution procedure. This issue will be explored further when reflecting on the CCSR and the OCMC.

1.2 ADR – A VARIETY OF PROCEDURES

1.2.1 Mediation; conciliation; negotiation

ADR also encompasses a variety of alternative procedures. The common forms of ADR procedures referred to in the CPR include mediation and conciliation; negotiation or settlement meetings;[43] and ENE.[44] Although procedures other than mediation are mentioned in the CPR and in the pre-action protocols, reference to mediation remains dominant in the case law and reforms while other procedures, such as ENE, are severely underused and ignored. CDR, common in North America for family matters and now increasingly used in divorce matters in England, will also be considered.

Negotiation is a non-adjudicative, confidential and flexible ADR process which can be conducted by the parties and/or by their respective lawyers. It is the most common form of dispute resolution[45] and allows the parties to retain complete control of the outcome. Mediation has similar features to negotiation but, unlike negotiation, it involves a third-party neutral – the mediator – who seeks to facilitate what is essentially a negotiation

39 *Hurst* (n 4).

40 G Lightman, 'The Civil Justice System and Legal Profession – The Challenges Ahead' (2003) 22 Civil Justice Quarterly 235.

41 Emphasis added.

42 G Lightman, 'Mediation: An Approximation to Justice' (Speech, SJ Berwin Mediation Summer Drinks Reception 28 June 2007) <www.cedr.com/articles/?item=Mediation-an-approximation-to-justice-a-speech-by-The-Honourable-Mr-Justice-Lightman>.

43 Sometimes referred to as 'without prejudice meetings'.

44 For a detailed coverage of these and other adjudicative ADR procedures, see Blake et al, *A Practical Approach* (n 18).

45 Blake et al, *Jackson ADR Handbook* (n 18) para 216.

process to resolve a dispute. The parties retain control of the process and are only bound by the final settlement agreement. Conciliation is similar to mediation and involves, like mediation, a neutral third-party conciliator who will either facilitate a compromise or may actively make settlement proposals. Often, due to its similarities to mediation, conciliation is, as is evident from the CCSR, interchangeably referred to as mediation and vice versa.[46]

1.2.2 Early neutral evaluation and collaborative dispute resolution

ENE is a written assessment of the issues in dispute conducted by an independent third party (who may be a judge) who is an expert in the field. The written assessment provides the parties with an indication of the likely strengths and weaknesses of their arguments, which may then assist in an early resolution of the matter. ENE can be provided by organisations or individual specialists (private ENE) or by the courts (judicial-ENE).[47]

Briggs LJ endorsed ENE as a 'valuable tool' for encouraging settlement in a range of Chancery cases.[49] Further, in *Seals v Williams*[50] Norris J in the Chancery Division described as 'commendable' the parties' legal representatives' proposed use of ENE to the court. Confirming that judges could provide ENE, Norris J outlined the advantages of ENE over mediation in the following terms:

> The advantage of such a process over mediation itself is that a judge will evaluate the respective parties' cases in a direct way and may well provide an authoritative (albeit provisional) view of the legal issues at the heart of the case and an experienced evaluation of the strength of the evidence available to deploy in addressing those legal issues. The process is particularly useful where the parties have very differing views of the prospect of success and perhaps an inadequate understanding of the risks of litigation itself.[51]

The Civil Procedure Rule Committee amended[52] Civil Procedure Rule (CPR) 3.1(2)(m) to make express reference to an ENE hearing. CPR r.3.1(2)(m) provides that the court may, as part of its general case management powers:

> Take any other step or make any other order for the purpose of managing the case and furthering the overriding objective, *including hearing an Early Neutral Evaluation with the aim of helping the parties settle the case*.[53]

Despite judicial praise of ENE, Briggs LJ in his CCSR voiced concern that it was being offered 'on an infrequent ad hoc basis by various courts'.[54] This has also been noted by the Civil Justice Council ADR Working Party, which recently conducted a review of the

46 CCSR *Interim Report* (n 4).

47 For example, the Centre for Effective Dispute Resolution (CEDR) provides private ENE services. Other private organisations providing ENE services include the Academy of Experts, the ADR Group, the City Disputes Panel, the Chartered Institute of Arbitrators, the London Court of International Arbitration and the Royal Institute of Chartered Surveyors.

49 Briggs (n 37).

50 [2015] EWHC 1829 (Ch). See also *Fayus Inc v Flying Trade Group plc* [2012] EWPCC 43.

51 Ibid.

52 This was incorporated into CPR 3.1(2)(m) by the Civil Procedure (Amendment No 4) Rules 2015 and came into effect on 1 October 2015.

53 Emphasis added.

54 CCSR *Interim Report* (n 4) para 2.91, where Briggs LJ noted: 'the District Judges who undertake both Family and Chancery case management outside London have successfully introduced a measure of early neutral evaluation into Chancery litigation about family property (such as TOLATA and Inheritance Act claims) by cross-application of their experience in conducting financial dispute resolution hearings in family cases'.

provision of ADR within the civil justice system, when it noted: 'ENE seems to have been rarely used indeed. The number of private ENEs of which the Working Group are aware is vanishingly small.'[55] This is surprising given the benefits ENE offers, especially where the parties are so entrenched in their positions that a mediator cannot dislodge them and move them towards a settlement. The ENE process also has the advantage of providing 'authority' to the evaluation of the parties' positions and, as noted above, has the ability either to move the parties to a settlement or, at the very least, narrow the issues which may assist case management or settlement at a later stage in the litigation. This could be a particularly useful aid to LiPs, many of whom face court proceedings with little understanding of legal process and no training in forming legal arguments. It may, however, be argued that ENE is potentially more expensive and time-consuming as compared with mediation because it requires the parties to make appropriate disclosure of information and documents without which the process would be futile. Certainly, there is force in this argument. Although disclosure is a cornerstone of English civil procedure, it can be a time-consuming and expensive exercise,[56] and yet without appropriate disclosure the evaluator would be unable to provide his or her opinion on the merits of the parties' respective positions. But this is equally true of mediation, expert determination and construction adjudication: these ADR procedures rely on the disclosure of documents for the process to work effectively. Further, litigating parties are obliged to engage with the pre-action protocols before issuing court proceedings and those protocols oblige the parties to make early disclosure of documents. Thus, disclosure of documents during the pre-action stage (including the detailed letters of claim and reply setting out the parties' arguments) can be used during the ENE process thereby reducing the time and cost of further disclosure exercise.

Finally, mention should be made of CDR which has had little attention in the English scholarly ADR literature.[57] CDR has its origins in North America and is slowly being used in family divorce matters in England. CDR requires the parties and their lawyers to commit to working toward resolution without going to court.[58] The commitment allows any of the parties to withdraw from the process before an agreement is reached. The parties then use methods which are intentionally focused on settlement by design. The parties and lawyers accomplish this through a series of collaborative meetings, in which all the substantive negotiations take place. The meetings address at least five key tasks, each building on the previous one: discussion and agreement upon the rules of the collaborative process used; voluntary and open sharing and exchange of all relevant information; identifying interests and goals of the parties; developing options for resolution, using neutral experts when appropriate; and determining the terms of the resolution and reducing them to a settlement agreement.

Collaborative processes are confidential and allow the parties and their lawyers to concentrate their efforts on satisfying their interests as well as those of the other party.

55 *CJC ADR Working Group Interim Report* (n 5) para 3.9.

56 In May 2016, the then Chancellor of the High Court, Sir Terence Etherton, established a Working Group in response to widespread concerns regarding the excessive scale and costs of disclosure. A Working Party, led by Lady Justice Gloster, published its report in 2019 in which it made a number of recommendations which are subject to a pilot scheme which is currently underway in the Business and Property Courts of England and Wales. See <www.judiciary.uk/announcements/disclosure-proposed-pilot-scheme-for-the-business-and-property-courts>.

57 The basic elements of CDR are described on the webpages of some family law firms.

58 See J Lande, 'The Revolution in Family Law Dispute Resolution' (2012) 24 Journal of the American Academy of Matrimonial Lawyers 411; J Lande, 'Principles for Policymaking about Collaborative Law and Other ADR Processes' (2007) 22(3) Ohio State Journal on Dispute Resolution 619.

The lawyers actively work with their clients, advise them, advocate on their behalf and help to facilitate the process of resolution. Due to its flexible nature and its focus on resolving disputes in both parties' interests, CDR is popular in the USA in family matters and is being used in divorce matters in England. While the process can appear costly, it may, however, save costs overall, and there is clearly scope for CDR to extend beyond family disputes and cover high-value civil disputes which may require expert input and involve complex legal and factual issues. The commitment element is a distinguishing and significant feature as compared with other, more conventional, ADR procedures such as settlement meetings, which are used in engineering and construction disputes: the commitment is given by both parties to resolve and not to litigate and this has the effect of focusing the minds of the parties from the outset on working with each other to reach a solution to which all the parties have contributed. This active involvement in the process provides the parties with a greater sense of empowerment over both the process and final outcome and can lead to higher levels of satisfaction.

There is also recent empirical data from dispute resolution stakeholders (including corporates and individuals) that demonstrate strong support for more collaborative forms of dispute resolution. The Global Pound Conference Series[59] collated empirical data from over 4000 respondents across the spectrum of dispute resolution stakeholders, at 28 conferences across 24 countries worldwide. One of the major themes that emerged from the data was that respondents expected greater collaboration from legal advisors (whether in-house general counsel or external panel lawyers) in dispute resolution as opposed to adversarial processes. This trend is evidence of the emergence of a 'second dispute resolution culture shift': the first was a shift from litigation to a wider understanding of dispute resolution which encompassed ADR. The second dispute resolution culture shift is one away from adversarial types of ADR procedures (principally arbitration) to those which are collaborative and focus on the opposing parties working together constructively to resolve disputes.

As will be explored in part four, ENE and CDR should not only be embraced and promoted by the judiciary, but should be embedded within stage two of the OCMC.

2 Dispute resolution, ADR and mediation in civil justice reforms

This part considers how successive civil justice reforms have approached the concepts of dispute resolution, ADR and the promotion of mediation. A review of recent reforms demonstrates a wider judicial appreciation and understanding of a range of ADR procedures and, with Briggs LJ's *Chancery Modernisation Review* and CCSR, the emergence of a judicial understanding of dispute resolution which corresponds with that advocated by Sander. That understanding is also strongly echoed in Briggs LJ's CCSR. However, as ADR has gradually become embedded within the civil justice system since the Woolf Reforms, later ADR jurisprudence reflects a strong judicial bias towards mediation as the default ADR option to litigation.

2.1 The Reforms – Woolf, Jackson and Briggs

Through his revolutionary reforms, Lord Woolf[60] gave formal effect to his philosophy that the aim of the civil justice system should be the settlement of disputes rather than engagement with the expensive and complex adversarial court process. He achieved this

59 The Global Pound Conference Series 2016–17: Shaping the Future of Dispute Resolution and Improving Access to Justice <www.imimediation.org/2015/10/19/global-pound-conference-launch-shaping-the-future-of-dispute-resolution-improving-access-to-justice/>.

60 Woolf, *Interim Report* (n 29) ch 2, para 7(a).

by formally incorporating ADR within the CPR and making it part of the court's duty to further the overriding objective.[61] That duty includes the court's obligation to encourage the parties to use ADR procedures and to help by facilitating the use of such procedures. The ADR obligation is also incorporated within the system of pre-action protocols,[62] a framework governing parties' behaviours before proceedings can be issued, which encourages early disclosure of documents and aims to promote early settlement. It should be noted that the majority of pre-action protocols list a number of ADR procedures which the parties may choose to engage with. Those procedures include: negotiation, mediation, arbitration, early neutral evaluation and the ombudsman systems.[63]

In his *Review of Civil Litigation Costs Final Report*, Jackson LJ dedicated a whole chapter to ADR and the beneficial role mediation plays in reducing disproportionate costs. Jackson LJ explained that ADR was 'under-used' and 'Its potential benefits are not as widely known as they should be.' It was noted that mediation and joint settlement meetings (a form of negotiation) were 'highly efficacious means of achieving a satisfactory resolution of many disputes, including personal injury claims'.[64] Although his Lordship's primary focus was on mediation, he also gave attention to the practical and economic virtues of joint settlement meetings (especially when discussing the Pre-action Protocol for Construction and Engineering Disputes) and, to a limited extent, ENE.

It was Briggs LJ who advocated a wider notion of ADR and one which echoed the vision of Professor Sander's multi-door courthouse. In his *Chancery Modernisation Review*, Briggs LJ argued that, rather than simply managing cases to trial, the courts should take a more active approach in the encouragement, facilitation and management of dispute resolution in the widest sense, including ADR as part of that process. Briggs LJ's philosophy is to be welcomed because it gives effect to the wider notion of dispute resolution that encompasses all means of resolving disputes and provides the way forward to promote and encourage the greater use of the various ADR procedures available to the courts and the parties.

2.2 The Online Civil Money Claims

Briggs LJ's dispute resolution philosophy features prominently in his radical proposal for an online court for the resolution of low-value money claims. The proposals for an online court and the wider reform proposals made by Briggs LJ were to finally remedy 'The single, most pervasive and intractable weakness of our civil justice courts' which is 'that they simply do not provide reasonable access to justice for any but the most wealthy individuals.'[65]

The Civil Justice Council Online Dispute Resolution Advisory Group suggested a three-tier online court for low-value claims, with an enhanced focus on online dispute

61 CPR 1 sets out the overriding objective which is the central pillar of the CPR. Rule 1 states: '(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost.' Dealing with cases 'justly and at proportionate cost' is detailed in CPR 1(2) which states '(2) Dealing with a case justly and at proportionate cost includes, so far as is practicable – (a) ensuring that the parties are on an equal footing; (b) saving expense; (c) dealing with the case in ways which are proportionate – (i) to the amount of money involved; (ii) to the importance of the case; (iii) to the complexity of the issues; and (iv) to the financial position of each party; (d) ensuring that it is dealt with expeditiously and fairly; (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and (f) enforcing compliance with rules, practice directions and orders.'

62 There are currently 16 pre-action protocols. For a complete list, see <www.justice.gov.uk/courts/procedure-rules/civil/protocol>.

63 See, for example, the General Pre-action Protocol, para 10.

64 Jackson (n 3) ch 36, 355.

65 CCSR *Interim Report* (n 4) para 51.

resolution (ODR). Briggs LJ proposed the introduction of a three-stage online court which would, he explained, form 'part of the mainstream civil justice system, rather than a tribunal or a structure for arbitration or ADR'.[66]

Briggs LJ explained the three-stage structure of his online court as follows:

> … stage 1 will consist of a mainly automated process by which litigants are assisted in identifying their case (or defence) online in terms sufficiently well ordered to be suitable to be understood by their opponents and resolved by the court, and required to upload (i.e. place online) the documents and other evidence which the court will need for the purpose of resolution. Stage two will involve a mix of conciliation and case management, mainly by a Case Officer, conducted partly online, partly by telephone, but probably not face-to-face. Stage 3 will consist of determination by judges, in practice DJs or DDJs, either on the documents, on the telephone, by video or at face-to-face hearings, but with no default assumption that there must be a traditional trial.[67]

In his *Interim Report*, Briggs LJ spoke more generally of the need to make stage two 'conciliation' a 'culturally normal' part of the civil court process, but appeared to focus his attention on the small claims mediation procedure which currently exists.[68] However, in his *Final Report*, Briggs LJ appeared to abandon his initial recommendations that the ADR procedure at stage two should be mediation. Rather, he modified his position to reflect a wider approach to and understanding of both dispute resolution and ADR procedures when he explained that stage two would make conciliation a culturally normal part of the civil court process and that ODR, judicial-ENE or private mediation may form part of that stage. Briggs LJ also explained that the court officer at stage two would be tasked with working with the parties to ascertain the most appropriate ADR method to resolve the dispute.[69]

By forming an integral part of the existing civil justice architecture, Briggs LJ's online court closely resembles Sander's multi-door courthouse. It seeks to create a fully functional dispute resolution forum which incorporates a variety of ADR procedures within the litigation process. In this regard, it goes further than the Woolf Reforms, which were instrumental in providing a formal role for ADR within the civil justice system. Briggs LJ's proposed online court and, in particular stage two, follows the Woolf Reforms in providing ADR with a formal and integrated function within the procedural architecture, but goes further in providing ADR with an enhanced status. This is underlined by the proposed pro-active role the court officer will play in working with the parties to consider ADR and choose the most appropriate procedure. Briggs LJ's vision also reflects a wider understanding of the concept of 'dispute resolution' which embraces ADR as well as formal court adjudication.

Despite the comprehensive approaches taken by the civil justice reforms, there has been a failure within the civil justice system to give effect to the wider notions of 'dispute resolution' and ADR procedures. This is particularly evident from the initial findings of the Civil Justice Council ADR Working Party which identified an ADR deficit within the civil justice system and that there has been a failure to effect a culture change both within the judiciary and the wider public.[70] One element of this ADR deficit, the present writer contends, is the failure of the senior judiciary to advocate, promote and encourage the

66 Ibid ch 6.

67 Ibid para 76.

68 Ibid para 6.13.

69 CCSR *Final Report* (n 4) paras 6.112–113 and 7.22.

70 *CJC ADR Working Group Interim Report* (n 5).

use of a variety of ADR procedures, including ENE, through the jurisprudence. This is in contrast to the wider ADR and dispute resolution approach advocated by successive civil justice reforms. It is to the ADR jurisprudence to which we now turn our attention.

3 ADR jurisprudence and judicial mediation bias

This part reflects on and critically considers ADR jurisprudence, primarily from the Court of Appeal, and illustrates how the notion of judicial mediation bias has developed as a consequence of judicial focus and (over)emphasis on mediation as the pre-eminent and default ADR procedure to litigation. While some of these cases involved one of the parties proposing mediation, and therefore the court's focus was on mediation, it will be argued that this should not prevent or restrict the court's reference to the wider notion of dispute resolution. Neither should it prevent the court, especially the Court of Appeal which is responsible for the reform and development of civil procedure, from providing otherwise valuable judicial comments and guidance on the possible relevance of the wider ADR procedures available to the parties. Finally, it should not follow that, because a particular case is concerned with mediation, the Court of Appeal should demonstrate overzealous judicial preference for mediation, since it is this which has resulted in judicial mediation bias with mediation perceived as the preferred ADR default to litigation.

The general ADR approach of the Woolf Reforms and the relevant provisions within the CPR reflect the fundamental principle of party autonomy in allowing the parties themselves to choose the most appropriate ADR process.[71] The 'party choice' approach is also reflected through the early ADR jurisprudence following the implementation of the Woolf Reforms. In *Dyson v Leeds City Council*,[72] an early ADR decision of the Court of Appeal, Lord Woolf MR lamented the disproportionate costs the parties had incurred during the litigation. Without preference for a particular type of ADR procedure, his Lordship commented on the suitability of the matter for resolution through ADR when he said '*we should encourage the parties to use an alternative dispute resolution procedure* to bring this unhappy matter to the conclusion it now deserves sooner than later'.[73] Lord Woolf MR's ADR message to the Court of Appeal and lower courts is that the courts should adopt a more proactive ADR stance by engaging in an ADR dialogue with the parties, encouraging the use of ADR and possibly recommending an appropriate ADR procedure. What it does not do is provide courts with the discretion to unilaterally recommend and impose a particular ADR procedure onto the parties, which would restrict party autonomy. Thus, it is similar to the functions which the court officer is likely to play at stage two of Briggs LJ's online court – a function which will see the parties engaging in a positive and proactive ADR dialogue.

In *Cowl v Plymouth City Council*,[74] another early ADR Court of Appeal authority, Lord Woolf MR called for the use of the court's new case management powers pursuant to the CPR, to encourage the parties to engage in settlement discussions 'with the minimum involvement of the courts'. His Lordship made clear that the courts could require the parties to provide an explanation as to the steps taken to try to settle the matter:

> To achieve this objective the court may have to hold, on its own initiative, an inter parties hearing at which the parties can explain *what steps they have taken to resolve the dispute* without the involvement of the courts. In particular the parties should

71 For example, CPR 1, the pre-action protocols and CPR 26.

72 [2000] CP Rep 42.

73 Ibid (emphasis added).

74 [2001] EWCA Civ 1935.

> be asked why *a complaints procedure or some other form of alternative dispute resolution* has not been used or adapted to resolve or reduce the issues which are in dispute.[75]

Lord Woolf MR in both *Dyson* and *Cowl* encouraged the parties to engage in ADR procedures without indicating a preference for any one type of procedure. In *Cowl* he refers to a complaints procedure and 'some other form of alternative dispute resolution', and in *Dyson* he speaks more generally of 'settlement discussions', which may assist the parties in the resolution of their dispute.

Early signs of strong judicial preference for mediation began to emerge in the leading case of *Dunnett v Railtrack Ltd*[76] in which the Court of Appeal exercised, for the first time, its powers under the CPR to deprive the successful defendant of its costs for behaving unreasonably in refusing to consider the claimant's proposal to seek settlement through mediation. In *Dunnett*, the claimant brought an appeal concerning the death of her horses, for which she blamed the defendant rail company for failing to maintain gates from which the horses had escaped onto the railway and died. Schiemann LJ, granting permission to appeal, advised the claimant to engage with 'alternative dispute resolution' to resolve the matter. However, the defendant dismissed the claimant's proposal to explore settlement through ADR. Although the claimant lost the appeal, the Court of Appeal denied the successful defendant its costs because of its failure to consider the claimant's ADR proposal. Brooke LJ, a strong supporter and advocate of mediation, gave the seminal judgment on the issue of costs and ADR, stating that this was:

> . . . a case in which, at any rate before the trial, a real effort should have been made by way of alternative dispute resolution to see if the matter could be satisfactorily *resolved by an experienced mediator*, without the parties having to incur the no doubt heavy legal costs of contesting the matter at trial.[77]

Brooke LJ held that the overriding objective placed a positive duty on the parties to consider ADR in the resolution of disputes. He dismissed the defendant's justification for dismissing ADR on the grounds that it believed the claimant wanted money by way of settlement, which it was unwilling to pay. Brooke LJ set out the practical and economic benefits of mediation and of deploying the skills of a mediator in resolving disputes where emotions were clearly running high. A warning was sent to the profession in the following terms:

> It is to be hoped that any publicity given to this part of the judgment of the court will draw the attention of lawyers to their duties to further the overriding objective in the way that is set out in CPR Pt 1 and to the possibility that, if they turn down out of hand the chance of alternative dispute resolution when suggested by the court, as happened on this occasion, they may have to face uncomfortable costs consequence.[78]

Brook LJ's judgment is the first in which the Court of Appeal did not hesitate to use its new powers under the CPR to penalise a party in costs for failing to discharge its ADR obligations. The judgment is particularly significant because it is the first decision which penalises a successful party in costs and thereby departs from the long-established costs principle that the loser should pay the winner's costs.

An interesting feature of the decision, which has not received scholarly attention thus far, is the use of ADR language in the *Dunnett* judgment. Like Lord Woolf in *Dyson* and

75 Ibid (emphasis added).

76 [2002] EWCA Civ 3030.

77 Ibid [10] (emphasis added).

78 Ibid [15].

Cowl, Brooke LJ begins by using the term ADR in its general sense and as related to the parties' duties under the CPR with reference to specific aspects of the overriding objective. However, when discussing the missed opportunity of not engaging with ADR, Brooke LJ, within the same sentence, shifts his focus onto mediation and the skills that 'an experienced mediator' could bring in successfully resolving the dispute where emotions were clearly running high. Although the remainder of the judgment uses the term ADR, the majority of it remains focused on mediation. Brooke LJ's judgment can be justifiably criticised for a number of reasons. First, it inappropriately conflates ADR and mediation. Secondly, the judgment assumes that mediation would have been the most appropriate ADR procedure and would have resulted in a successful resolution of the dispute. Clearly, there is no harm in judicial recommendation of an ADR procedure – in some cases this may be particularly welcome for parties who do not understand the nature and process of ADR. Indeed, Lord Woolf in *Dyson* spoke of the need for the courts to make recommendations. However, the judgment in *Dunnett* goes beyond judicial recommendation, both in the strength of language used and the focus of the judgment on the nature and virtues of mediation and the role of the mediator. The Court of Appeal could have taken the opportunity to discuss the various ADR options available within the civil justice process, which may equally have been appropriate for the resolution of the parties' dispute. Brooke LJ observed that the emotions of the parties were running high and therefore a mediator would have been best placed to deal with the matter to resolution. However, an equally effective ADR procedure, especially where the emotions of the parties are creating an impenetrable barrier to communication and constructive engagement, is ENE, especially judicial-ENE which provides the parties with an objective expert option on the merits of their positions which may be more acceptable to them than mediation.

Mediation came into even sharper focus in the leading Court of Appeal authority of *Halsey v Milton Keynes General NHS Trust*.[79] The effect of the *Halsey* decision has been to radically enhance the status of mediation as the default ADR procedure for civil disputes. One of the main areas of controversy in Halsey has been Dyson LJ's *obiter* comments regarding compulsory mediation. While noting the general benefits of mediation, Dyson LJ dismissed the call for the courts to compel parties to engage with mediation. He argued, *obiter*, that to do so would breach the fundamental rights of litigating parties to access the courts. In support of this position, the Court of Appeal relied on the European Court of Justice (ECJ) case of *Deweer v Belgium*.[80] In that case, the claimant agreed to pay an amount in settlement of a fine to state authorities and thereby waived his right to refer the dispute to a tribunal. The ECJ held that the claimant's waiver had not amounted to a violation of his right to a fair trial. However, the Court in *Halsey* incorrectly assumed that *Deweer* applied to mediation, which permits the parties to revert to the courts for judicial determination if a matter cannot be settled. Judicial reliance on *Deweer* demonstrates that the Court of Appeal was confused between the nature of mediation, which is non-adjudicative, and arbitration, which is an adjudicative process that binds the

79 [2004] 1 WLR 3002.

80 (1980) 2 EHRR 439, para 49. See further the leading case of *Alassini v Telecom Italia SpA (joined cases C-317–320/08)* [2010] 3 CMLR 17 ECJ in which the Advocate General Kokott held that a form of compulsory mediation for telecommunications disputes in Italy pursued legitimate objectives in the general interest in the quicker and less expensive resolution of disputes. Advocate General Kokott also held that the measure of requiring parties to engage in settlement discussions before commencing court proceedings was proportionate because no less restrictive alternative existed to the implementation of a mandatory procedure since the introduction of an out-of-court settlement procedure, which is merely optional, is not as efficient a means of achieving those objectives. See also the recent case of *Menini Banco Popolare Sopcieta Cooperativa* (C-75/16).

parties to the decision of the arbitrator. Lord Dyson MR appeared to categorise mediation as an adjudicative process, which has the effect of restricting the parties' rights to access the courts. Despite this confusion about the nature of mediation, it continued to be regarded as the default alternative to litigation.

The case of *Burchell v Bullard*[81] concerned a small building dispute. In that case, the Court of Appeal found the defendant builder to have behaved unreasonably in rejecting the claimant's invitation to mediate the dispute. Giving the leading judgment of the court, Ward LJ strongly endorsed mediation as an effective alternative to court adjudication when he explained:

> Halsey has made plain not only the high rate of a successful outcome being achieved by mediation but also *its established importance as a track to a just result running parallel with that of the court system*. Both have a proper part to play in the administration of justice. *The court has given its stamp of approval to mediation* and it is now the legal profession which must become fully aware of and acknowledge its value.[82]

Ward LJ's choice of words is particularly interesting. He refers to the significance of mediation 'running parallel' with the court process, which underscores judicial preference for mediation as the pre-eminent default alternative to litigation – it is perceived as the (only) alternative to litigation and thus creates a two-stream approach to dispute resolution: litigation and mediation. Indeed, this is further reinforced when Ward LJ speaks of the courts giving their 'stamp of approval' which the profession must fully understand and appreciate.

Although mediation's benefits may be obvious, it is not, contrary to the message which Ward LJ's judgment appears to portray, the principal or only ADR method, nor the most appropriate procedure for all civil disputes. Indeed, *Burchell* could have been more suited to ENE than mediation. ENE, especially judicial-ENE, would have provided the parties with an objective appraisal of the merits of the case earlier on in the dispute and therefore assisted the parties in moving from their entrenched positions towards settlement. A further point to note from *Burchell*, and similar Court of Appeal authorities such as *Dunnett*, is that the stern message given by the judiciary is for the profession to 'understand' mediation. That message in itself has the effect of forcing lawyers to focus their attentions on mediation rather than considering ADR procedures which may be more appropriate.

A similar mediation-focused decision was given by the Court of Appeal in *Rolf v De Guerin*,[83] which, like *Burchell*, also concerned a small building dispute. The claimant made various invitations to the defendant builder to enter settlement discussions and, later, mediation, which the defendant rejected. Rix LJ found that the defendant's refusal to mediate was unreasonable, and, as a consequence, the court was entitled to exercise its discretion and make an order as to costs. Rix LJ also observed that small building disputes were appropriate for mediation. Despite acknowledging that mediation may not have produced a solution on the particular facts of *Rolf*, Rix LJ was nonetheless of the opinion that it was suitable for mediation:

> It is possible of course that settlement discussions, or even mediation, would not have produced a solution; or would have produced one satisfactory enough to the parties to have enabled them to reach agreement . . . Nevertheless, in my judgment,

81 [2005] EWCA Civ 358.

82 Ibid [43].

83 [2011] EWCA Civ 78. See E Suter, 'Building towards Compulsory Mediation' (2011) 77 Arbitration 375.

> the facts of this case disclose that negotiation and/or mediation would have had reasonable prospects of success. The spurned offers to enter into settlement negotiations or mediation were unreasonable and ought to bear materially on the outcome of the court's discretion, particularly in this class of case.[84]

Rolf, like *Burchell* and similar cases involving small building disputes in which the Court of Appeal stressed that mediation was highly suitable, appeared to 'carve out' this type of dispute for resolution through mediation. What is surprising, however, is that the Court of Appeal consistently neglects ENE, which would have been equally suited, if not better suited, to the resolution of such small building disputes. A judge conducting ENE would be more effective in providing the parties with an assessment of their arguments. Judicial-ENE would be highly effective in cases where emotions may be running high, as in *Rolf* where the defendant was determined to expose the claimant's husband's behaviour to a court, which, he believed, would not be possible in mediation. These Court of Appeal authorities appear to have missed an opportunity to encourage and promote ENE.

In *Wright v Michael Wright (Supplies) Ltd*[85] Ward LJ gave the leading judgment regarding a dispute where both parties were LiPs. Referring to the difficulties which LiPs may cause to the court process and to judicial case management, Ward LJ made explicit reference to two tracks of dispute resolution when he said that 'it is not possible to shift intransigent parties off the trial track onto the parallel track of mediation. Both tracks are intended to meet the modern day demands of civil justice.'[86] Ward LJ's words echo those of Sir Gavin Lightman who spoke of mediation being a palliative form of justice to those who could not afford court adjudication. They also reflect senior judicial understanding that the civil justice system consists of litigation and, as an ADR default, mediation, which parties should consider.

The Court of Appeal in *PGF v OMFS*,[87] the leading case on ADR since the *Halsey* decision, took a slightly more nuanced approach, principally because the leading judgment was given by Briggs LJ. In *PGF*, the claimants made various invitations to the defendants to engage in mediation. The defendants decided to simply ignore the claimant's invitations and were subsequently successful in the litigation. One of the key issues upon which the claimant successfully appealed was costs. The claimant contended that the defendants' conduct in ignoring the claimants' invitations to ADR amounted to unreasonable refusal to engage with ADR and should, therefore, be penalised in costs. The Court of Appeal agreed. Briggs LJ held that a party's silence in the face of an invitation to ADR would, as a general rule, be regarded as unreasonable behaviour which would result in an adverse costs order being made. This was regardless of whether there may have been justifiable grounds to reject the invitation. Briggs LJ's judgment is heavily focused on mediation, discussing the success rates of mediation using figures from the CEDR and the Court of Appeal Mediation Scheme and the general nature and virtues of a settlement through mediation. As argued above, although the facts of some of the ADR authorities specifically dealt with mediation, including *PGF*, Briggs LJ's judgment adopts a more balanced approach to the notion of ADR and the need for positive engagement with invitations to ADR. Briggs LJ spoke of the need for the parties themselves, without necessarily the court's assistance, to consider suitable ADR procedures and engage with ADR in trying to settle their disputes, which was also required in the interest of the proportionate use of limited court resources. As well as strong policy reasons for the

84 *Rolf* (n 83) [48].

85 [2013] EWCA Civ 234.

86 Ibid [2].

87 [2013] EWCA Civ 1288.

parties to engage with an invitation to ADR, there were also strong practical reasons, including opening up discussions between the parties on the most appropriate ADR procedure for the dispute. In this regard, Briggs LJ referred to the possibility of judicial-ENE as a potential ADR procedure which may be appropriate, in which case there is an expectation that the parties would discuss and try to resolve these issues. A positive engagement with ADR would also serve the policy of proportionality including the parties choosing a different type of ADR procedure. In the penultimate paragraph of his judgment, Briggs LJ warned of the folly of ignoring ADR when he said:

> . . . this case sends out an important message to civil litigants, requiring them to engage with a serious invitation to participate in ADR, even if they have reasons which might justify a refusal, *or the undertaking of some other form of ADR*, or ADR at some other time in the litigation. To allow the present appeal would, as it seems to me, blunt that message. The court's task in encouraging the more proportionate conduct of civil litigation is so important in current economic circumstances that it is appropriate to emphasise that message by a sanction which, even if a little more vigorous than I would have preferred, none the less operates pour encourager les autres.[88]

Briggs LJ's reference to 'the undertaking of some other form of ADR' reflects the wider understanding and appreciation of ADR as a term which embraces a variety of procedures, not just mediation. Even though the facts of the case concerned the claimant's invitation to mediation, the judgment embraces ADR in its widest possible sense. This is consistent both with Briggs LJ's comments in his *Chancery Modernisation Review* and his CCSR, and it is this judicial understanding that must prevail in order to avoid the continued development of the two-stream civil justice process which Ward LJ alluded to in *Wright*.

Judicial ENE was recently given strong judicial support in the recent Court of Appeal decision of *Lomax*.[89] The issue in *Lomax* was whether, as part of its case management powers under CPR 3.1(2)(m), the court could compel the defendant to engage with judicial ENE. At first instance, Parker J held that she could not order an ENE in circumstances where one of the parties did not consent for such an order to be made. A close analysis of the relevant court rules, including the language of CPR 1.4(1)(e), the rule dealing with the alternative dispute resolution aspect of the overriding objective, were directed at facilitation rather than compulsion and therefore the courts did not possess the power to compel parties to ENE. However, that conclusion did not detract from Parker J's view that this was a case 'which cries, indeed screams out, for a robust judge-led process to focus on the legal and factual issues . . . and perhaps even craft a proposed solution for the parties to consider'.[90]

Giving the judgment of the Court of Appeal, Moylan LJ noted that, because the wording of CPR r.3.1(2(m) did not contain an express requirement for party consent before an ENE could be ordered, the issue was whether such a limitation could be implied into the rule. Moylan LJ held that if the intention had been to require the parties' consent, then it would have been easy to make this clear within the rule and the absence of express words requiring party consent was 'a powerful indication that consent is not required'.[91] It followed that there was no reason to imply into CPR r.3.1(2)(m) any limitation on the courts' power to order an ENE hearing. Such an interpretation 'would

88 Ibid [56].

89 *Lomax* (n 19).

90 Ibid [123].

91 Ibid [30].

be inconsistent with elements of the overriding objective, in particular the saving of expense and allotting to cases an appropriate share of the court's resources, and would, therefore, be contrary to rule 1.2(b)'.[92] Did ordering an ENE prevent the parties from having their dispute determined by the courts? Moylan LJ answered in the negative. His Lordship explained that, in the event that the matter could not be settled as a result of the parties engaging with an ENE this 'did not, in any material way, obstruct a party's access to the court'.[93] At most, an ENE was an additional step in the court process and therefore was 'not in any sense an "unacceptable constraint" on the parties' rights to access the courts'.[94] Court-ordered ENE was, in Moylan LJ's view, 'a step in the process which can assist with the fair and sensible resolution of cases'.[95] In fact, an ENE in which a judge provides his or her neutral evaluation of the merits of the parties' respective positions had the positive effect of focusing the parties' minds on the issues and on settlement which would save both the parties and the courts time and cost.

The decision in *Lomax* is significant for a number of reasons. The Court of Appeal adopted the correct approach on the contentious issue of whether compelling non-consenting parties to ENE undermines or restricts the parties' rights to access the courts. ENE, like mediation, is not a hindrance to the parties' rights to access the courts because the parties are at liberty to choose not to be bound by the expert's evaluation and to revert to the court process for judicial determination of their dispute. It is a procedure which, as Moylan LJ helpfully explained, assists the parties to obtain a judge's opinion on the merits of the parties' respective positions and to focus their minds on settlement; the parties are not bound by that opinion unless they choose to be. Also, the wording of CPR r.3.1(2)(m) is deliberately widely drafted with the intention of providing the courts with the necessary discretion to manage disputes effectively in order to further the overriding objective. Ordering ENE in appropriate cases is an important part of those judicial functions. To accept the argument that party consent should be implied into CPR r.3.1(2)(m) would be to place an unnecessary fetter on the court's case management powers and undermine the overriding objective of dealing with cases justly and at proportionate cost. It would also beg the question of which other aspects of the court's case management powers were subject to party consent given the complete absence of any explicit reference to consent in CPR r.3.1. The decision, therefore, is consistent with the central aims of the overriding objective and, more significantly, upholds and gives effect to the principle of proportionality.[96] Accordingly, the courts should consider the effect decisions in individual cases have on the civil justice system as a whole. A commitment to the principle of proportionality reduces the possibility of achieving substantive justice as it requires a compromise between the resources made available to

92 Ibid [32].

93 Ibid [26].

94 Ibid [26].

95 Ibid [27].

96 For a detailed analysis of the overriding objective and the principle of proportionality, see John Sorabji, 'The Road to New Street Station: Fact, Fiction and the Overriding Objective' [2012] European Business Law Review 77; and John Sorabji, 'Prospects for Proportionality: Jackson Implementation' (2013) 32 Criminal Justice Quarterly 213. Lord Clarke MR explained the importance of the principle of proportionality when he said: 'Our civil justice system has always been committed to ensuring justice is achieved economically, efficiently, in a timely fashion, and through the application of equality of arms. There was nothing novel there. You need simply look to the previous civil justice reform reports to see that. No, the significant difference between the Woolf reforms and what had gone before was the commitment to the proportionality principle.'; A Clarke, 'Proportionate Costs from Woolf to Jackson' (The Law Society 2009) (unpublished) at [8].

each claim and securing a substantively just decision in individual claims.[97] In this respect, judicial ENE provides a unique opportunity to the parties because the issues are dealt with in an authoritative manner whilst also upholding the principle of proportionality.

Finally, although the decision in *Lomax* was only concerned with judicial ENE as part of the court's case management powers, it also demonstrates a judicial shift away from a narrow perception and application of ADR as simply equating to mediation and dispute resolution as merely equating to a two-stream process of mediation and litigation. Parker J at first instance was willing to critically consider the nature of mediation and ENE and to identify the procedure which was most suited to the circumstances of the case rather than simply focusing and recommending mediation. Parker J noted that: 'Mediation (even by a legally trained mediator, if one should be found to assist where the issues were specialised) is unlikely to approach the issues in an authoritative way, as Norris J said in *Seals*.' In his judgment, Moylan LJ also discussed in detail the nature of ENE and its practical and economic virtues for the courts and the parties. Thus, both decisions reflect a wider understanding and appreciation of what is meant by dispute resolution and the judicial activities related to ADR. The classic perception of the role of a judge is limited to formal adjudication. In reality, however, the promotion of settlement is also a mainstream judicial activity,[98] and perhaps even more so than formal adjudication considering the fact that a vast majority of claims issued in the civil courts are undisputed.[99] This melding of ADR techniques with the traditional exclusively adjudicative role of the courts has been conceptualised as judicial dispute resolution by scholars.[100] The claimant's choice of ENE as opposed to simply opting for mediation caused Parker J to engage with a wider consideration of dispute resolution, including engaging in a critical comparison between ENE and mediation. Therefore, the decision in *Lomax* provides fertile ground for a future judicial culture shift towards a wider understanding of ADR and dispute resolution.

4 Solutions and conclusion

It has been shown that the increasingly strong focus and promotion of mediation by the judiciary, through decided cases, has created judicial mediation bias and that this, in turn, has distorted and narrowed the concepts of ADR and dispute resolution so that there exist two dominant dispute resolution streams: litigation and mediation. There is evidence from the jurisprudence that mediation is used synonymously with ADR. Aside from Briggs LJ's judgment in *PGF*, there also appears to be a lack of attention to and promotion of other forms of ADR, which may provide better outcomes for the parties. Although *Lomax* is a positive step forward, the overwhelming ADR jurisprudence is focused on the promotion of mediation.

Given the actual and potential adverse consequences of judicial mediation bias, there is a need for a culture change in the manner in which the judiciary approaches and promotes ADR within the jurisprudence. This is particularly significant because the judiciary must not only dispense substantive justice but must also ensure that procedural justice is achieved when applying the overriding objective – this in turn contributes to the

97 John Sorabji, *English Civil Justice after the Woolf and Jackson Reforms: A Critical Analysis* (Cambridge University Press 2014) 168–89.

98 Michael Alberstein, 'Judicial Conflict Resolution (JCR): A New Jurisprudence for an Emerging Judicial Practice' (2015) 16 Cardozo Journal of Conflict Resolution 885.

99 Lord Justice Briggs, *Civil Court Structure Review: Final Report* (TSO 2016) para 6.109.

100 For a thorough analysis of this subject see Tania Sourdin and Archie Zariski (eds), *The Multi-Tasking Judge: Comparative Judicial Dispute Resolution* (Thomson Reuters 2013).

development of procedural jurisprudence. The Court of Appeal, in particular, is responsible for overseeing the development of civil procedure and for providing valuable judicial leadership. That leadership should ensure that subsequent ADR authorities reflect a wider and more consistent notion of ADR. In this regard, a simple solution is to call on the judiciary to alter its approach to and understanding of the notion of dispute resolution and ADR and to embrace, encourage and promote a variety of ADR procedures. This may be done through greater focus on educating and training the judiciary, though the Judicial College,[101] on all aspects of ADR and encouraging it to adopt a more pragmatic approach, similar to Sander's 'screening' of disputes. Parties would be encouraged to consider a range of options and the courts could actively engage in a wider 'ADR conversation' with them. Several powers supporting this approach exist in the CPR, including the overriding objective, the court's case management powers, the ability for the court to stay proceedings in favour of settlement,[102] and the powers to make ADR orders.[103] Here, leadership from the Court of Appeal through decided ADR cases is vital in effecting a culture change so that the wider notion of dispute resolution and ADR is used as a norm.

What *practical solutions* could bring about a clearer, more consistent and wider understanding of ADR within the civil justice system? What changes, beyond simply calling for a culture change, can be made, to avoid entrenching an 'ADR tunnel vision'?

In addition to training judges on the wider concept of dispute resolution and the nature and variety of ADR procedures, the Judicial College would be the most effective forum to train and develop the skills of judges to actually conduct certain ADR procedures, in particular, judicial-ENE. The power of the courts to undertake an ENE was recognised and confirmed by Norris J in *Seals* and was, more recently, strongly endorsed by Parker J in *Lomax v Lomax*.[104] The courts should be brave and embrace their case management powers in ordering parties to judicial ENE. The Judicial College should focus on delivering a structured training programme that focuses on developing the essential skills that judges would need to not only recommend ENE to the parties but to also conduct an ENE.

Structural changes are required within the court process to change culture for both the judges and the parties. Structural changes help to reinforce cultural and conceptual changes: for example, Lord Woolf's philosophy of settlement was a fundamental culture shift in the resolution of disputes and was given force through the CPR. Thus, any culture shift away from judicial mediation bias to a wider application of ADR requires important structural changes. The OCMC (with its potential to expand its jurisdiction to cover higher-value and more complex disputes) provides the greatest opportunity to introduce those changes, which must take place both at stage one and two of the OCMC.

The OCMC is under construction and is being rolled out in stages. Stage one is currently operational and is subject to a pilot which allows LiPs and lawyers to upload a claim and defence.[105] It is currently an automated system and provides very little information to prospective litigants on ADR options. It simply states that the prospective

101 The Lord Chief Justice is responsible for arrangements for training the courts' judiciary in England and Wales under the Constitutional Reform Act 2005. The Senior President of Tribunals has an equivalent responsibility in relation to judges and members of the tribunals within the scope of the Tribunals, Courts and Enforcement Act 2007. These responsibilities are exercised through the Judicial College.

102 CPR 26.

103 *Admiralty and Commercial Courts Guide* (10th edn, HM Courts and Tribunals Service 2017).

104 [2019] EWHC 1267 (Fam).

105 CPR Practice Direction 51R and CPR PD 51S.

claimants should consider resolving their disputes by speaking to the other side (i.e. using negotiation) or suggests that the parties may consider using mediation. However, as it currently stands, stage one is wholly inadequate in educating and signposting parties to a wider variety of ADR procedures, or explaining the nature of those procedures and how they may be appropriate for certain types of disputes. If parties are to be better educated and informed of the concept of ADR and are to actively consider and engage with ADR, there must be a greater emphasis on the range of ADR procedures (through an explanation of each type) and signposting to other dispute resolution channels, such as the Ombudsman service, which may be more appropriate and effective in the resolution of different disputes. Stage one would also provide an effective opportunity to introduce CDR and educate parties about its nature and virtues. Clearly, CDR would be more appropriate for the future and as the OCMC's jurisdiction expands to encompass higher-value and more complex disputes.

Aside from achieving early settlement, the strength of an enhanced ADR education and signposting approach at stage one is that if the matter cannot be settled then the parties will proceed to stage two with a deeper and more informed understanding of the nature of ADR. It also means that the parties are in a better position to engage in an 'ADR conversation' with each other and with the court officer when considering and deciding on the most appropriate ADR procedure.

Stage two must effectively integrate a variety of ADR procedures and not simply focus on mediation. Although Briggs LJ's vision of stage two of the OCMC is to have a greater emphasis on ADR, this must become a reality and not simply reinforce mediation as the only ADR procedure.

The current proposal is for stage two of the OCMC to include opt-out mediation for cases up to £300: that is, the dispute will automatically be referred to mediation unless one or both of the parties elect not to have their dispute referred to mediation.[106] Although the integration of ADR within the process is to be welcomed, the current proposals to focus simply on mediation as the only ADR procedure at stage two of the OCMC has the obvious danger of reinforcing mediation bias and preserving, rather than transforming and widening, the narrow understanding of dispute resolution. It is this stage, together with the changes to stage one in signposting and educating the parties, that has the greatest potential to promote a wider understanding and application of ADR and dispute resolution. As the jurisdiction of the OCMC expands to higher-value and more complex disputes, stage two should also expand by integrating a wider variety of ADR procedures, in particular ENE, and the courts should continue to exercise their cost powers to penalise parties for unreasonably refusing to engage with the process. As recently illustrated in the case of *Thakkar v Patel*,[107] the courts are willing to exercise their costs powers to penalise parties for failing in their ADR duty. As Jackson LJ made clear in *Thakkar*:

> The message which this court sent out in PGF II was that to remain silent *in the face of an offer to mediate* is, absent exceptional circumstances, unreasonable conduct meriting a costs sanction, even in cases where mediation is unlikely to succeed. *The message which the court sends out in this case is that in a case where bilateral*

106 D Phillips, Programme Director HM Courts and Tribunal Service, 'Courts, Tribunals and Regional Tier' (HM Courts and Tribunal Service Event, 11 Match 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785324/Civil_reform_event_11_March_2019.pdf>.

107 *Thakkar* (n 11) (emphasis added).

> *negotiations fail but mediation is obviously appropriate, it behoves both parties to get on with it.*[108]

This proposal also envisages that judges (not court officers) will actively participate at stage two only to conduct ENE for the parties. If the matter cannot be settled following judicial-ENE, then the matter will proceed to stage three for judicial determination, with a different judge. Two types of disputes, small construction disputes and boundary disputes, can be taken as examples of disputes which may be more appropriate for ENE at stage two rather than mediation. These types of cases would be appropriate for ENE because the issues in dispute will require a degree of expert knowledge of the subject matter (e.g. measuring and determining boundaries and understanding technical construction terminology).

A review of the ADR jurisprudence reveals that the Court of Appeal has, whether intentionally or not, 'carved out' boundary and small construction disputes (i.e. those falling outside the compulsory adjudication scheme)[109] as being appropriate for settlement through mediation. Indeed, Ward LJ in *Burchell* and Rix LJ in *Rolf* made clear their views that small construction disputes were suitable for mediation.

As for boundary disputes, Elias LJ in *Oliver v Symons*[110] lamented that the matter before him 'was crying out for mediation, even assuming that it could not have been settled more informally than that. It ought never to have come near a court, and with a modicum of good will on both sides, it would not have done so.'[111] In *Faidi v Elliott Corporation*[112] the Court of Appeal strongly endorsed the use of mediation in resolving neighbour disputes when Jackson LJ said this was: 'precisely the sort of outcome which a skilled mediator could achieve, but which the court will not impose'. In the same case, Ward LJ expressed his enthusiasm for mediation in the following manner: 'I wish enthusiastically to associate myself with the observations of my Lords on the desirability of mediation in neighbourhood disputes.'[113] Further, in *Bramwell and Others v Robinson*,[114] a right-of-way dispute, the parties did attempt mediation a number of times but could not reach a settlement. Despite this, HHJ Brehrens insisted that mediation would still have been preferred because 'as with many such disputes it would have been far better if it could have been resolved amicably or with the assistance of an experienced mediator'.[115]

Jackson LJ has also expressed his strong preference for the use of mediation for boundary disputes. In his *Final Report* he stated: 'Domestic boundary disputes and similar property disputes between neighbours are particularly well suited to mediation. Judicial encouragement in this regard at an early stage is highly beneficial for the parties.'[116]

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108 Ibid [30].

109 Housing Grants, Construction and Regeneration Act 1996, Part II.

110 [2012] EWCA Civ 267.

111 Ibid [1]. See also the comments of Ward LJ in ibid [53]: 'All disputes between neighbours arouse deep passions and entrenched positions are taken as the parties stand upon their rights seemingly blissfully unaware or unconcerned that they are committing themselves to unremitting litigation which will leave them bruised by the experience and very much the poorer, win or lose.'

112 [2012] EWCA Civ 287.

113 Ibid [30]. Another neighbour dispute was *Bradley v Heslin* [2014] EWHC 3267 (Ch) in which Norris J said the 'entrenchment of positions' was a regrettable characteristic of neighbour disputes and mediation was more likely to produce an 'outcome satisfactory to both parties'.

114 [2016] EWHC B26 (Ch).

115 Ibid [1].

116 Jackson (n 3) para 4.12.

But why should these types of disputes be taken as being most suitable for mediation? It is accepted that mediation has its practical and economic virtues and may provide the parties in neighbour and small construction disputes with a solution – there is no argument there. There is, however, an argument against judicial promotion of mediation as the default ADR procedure for the resolution of those types of disputes, without proper consideration and promotion of other ADR procedures which may provide better outcomes and higher levels of settlement. Those disputes would benefit greatly from judicial-ENE or CDR. Given that these types of disputes typically involve individuals who are emotionally involved in the particulars of the dispute, the parties often take very entrenched positions. Judicial-ENE would provide an expert option on the merits of the arguments, which the parties may feel confident in accepting, either to settle the matter or at least narrow the issues.

As the jurisdiction of the OCMC expands to encompass higher-value and more complex disputes, information on the nature of CDR should be incorporated during stage one so that the parties are educated, informed and signposted as regards CDR. This proposal could follow the Mediation Information and Assessment Meeting (MIAM)[117] model in family disputes.[118] Separating couples are obliged to attend a MIAM before making certain kinds of applications to the family courts to obtain a court order. The aim of MIAMs is to provide the parties with information about mediation and for them to consider whether their differences could be resolved through mediation. Drawing inspiration from MIAMs, parties to civil disputes could be signposted to information on the nature of CDR and how it operates, as well as providers of CDR services.

Although judicial-ENE may be effective, the thorny issue of the lack of resources remains. The Ministry of Justice is not protected from austerity policies and the civil justice system continues to see its budget cut. However, investment in the training and development of judicial-ENE is an investment worth making because it will result in the more efficient management and settlement of disputes. By developing a wider approach to dispute resolution and ADR procedures, especially judicial-ENE which requires active judicial participation, judges will be better equipped to manage and dispose of a variety of disputes. This would assist in the current aims of the Ministry of Justice in modernising the courts and the judiciary. This potential benefit will reinforce some of the principal aims of the recent Court and Tribunals (Judiciary and Functions of Staff) Act 2018.

The Act was introduced to allow judges to work more flexibly by being deployed across a range of cases and to provide for the undertaking of some judicial functions by HM Courts and Tribunal Service staff. The Act contains three substantive sections and one schedule. Section 1 changes existing legislation to remove restrictions on how judges can be deployed, enabling judges to hear a wider scope of cases. Section 2 makes minor changes to the law concerning some judicial titles, and section 3 and schedule 1 provide for court and tribunal staff to carry out some judicial functions and to provide legal advice to judges. By delegating some judicial functions to court staff, section 3 and schedule 1 can provide judges with greater opportunities and scope to be trained to conduct ENE and other forms of ADR at stage two of the OCMC. This would allow judges to develop a wider understanding and appreciation of ADR and

117 Introduced by s 10 (1) of the Children and Families Act 2014.

118 For an assessment of MIAMs, see A Moore and S Brookes, 'MIAMs: A Worthy Idea, Failing in Delivery' (2018) 1 Private Client Business 32–39. For an explanation of how MIAMs work in practice, see J Edwards, 'Closer Collaboration between the Judicial and Mediation Communities: Part 1: Mediation/MIAMs – How They Work in Practice' (2016) 46 (September) Family Law 1168–71.

thus diminish the existence of judicial mediation bias. It will also encourage judges to broaden their skills so that they are not only aware of ADR procedures but are also actively providing judicial-ENE and exposing themselves and the parties to its potential benefits.

The concept and practice of dispute resolution has evolved from court-based judicial determination as the only means of resolving civil claims to a wider concept which encompasses alternatives to the court process, including ENE and CDR. However, as this paper has revealed, the overzealous judicial emphasis on mediation has undermined and distorted dispute resolution and ADR so that a two-system process exists within the civil justice process: litigation and mediation. This situation is wholly unsatisfactory for disputing parties who ultimately bear the cost of engaging with the civil court process. Therefore, it is only through a judicial culture shift and procedural changes, including grasping the opportunities provided by the OCMC, that a wider understanding and application of dispute resolution and ADR can be restored and preserved.

NOTES AND COMMENTARIES

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Three aspects of litigation funding

DAVID CAPPER

Queen's University Belfast

Abstract

This comment reviews three decisions of the Supreme Court of Ireland from the last three years which concern different aspects of litigation funding. Persona Digital Telephony Ltd v Minister for Public Enterprise *is about the direct provision of financial support for litigation, something which the Supreme Court invalidated as contravening the ancient principles of maintenance and champerty. In S*PV Osus v HSBC Institutional Trust Services *the Supreme Court unsurprisingly struck down an assignment of a right to litigate as also savouring of maintenance and champerty. Finally in* Moorview Development Ltd v First Active plc *the Supreme Court considered when a third party supporting litigation in circumstances not covered by* Persona Digital *might be required to pay the costs of the defendant should the litigation supported be lost.* Persona Digital *is a decision of mainly Irish significance, but the other decisions have implications for the wider common law in relation to two matters. The first is whether the difference between financing a claim and buying it is more than a matter of form. The second is the appropriate approach of courts wherever situated to making a non-commercial funder of civil litigation liable to pay the costs of an opposing litigant.*

Introduction

Modern civil (including family) litigation is well known to be formidably expensive. In addition to professional representation, a litigant has to find the means to pay for expert witness reports and other disbursements. Of course, if the litigation is successful, most if not all of these costs may be recovered from the other party, assuming the latter has the means to pay. But, if the litigation is unsuccessful, they must be borne by the litigant personally save to the extent that professional representatives are prepared to forego their fees.[1] For an unsuccessful litigant, however, this may only be half the battle. The 'loser pays' costs rule that is usually followed in England and Wales, Ireland and Northern Ireland exposes a losing litigant to the extremely heavy burden of meeting the successful party's costs. It is this, much more than having to fund one's own costs, that represents the real obstacle to accessing justice in the civil courts. But the defendant's access to justice must also be taken into account. To be sued in the civil courts requires any defendant to consider,

1 This is what is known in Ireland as 'no foal, no fee' and is the way that most road-traffic accident claims are funded in that jurisdiction. Professional representatives do not charge their clients any fees in the event that the case is unsuccessful. This means that cases tend only to be pursued if legal representatives believe the claim is strong.

first, whether they have any viable defence to the claim and, secondly, whether they can recover their costs in the event that their 'innocence' is established. A defendant sued by an impecunious litigant may end up having to pay a considerable sum to their professional representatives even though the court has decreed that the unsuccessful claimant is required to reimburse them for it. The wisdom of taking out legal expenses insurance is easy to see in this context, but it does not altogether remove the unfairness of giving claimants a free 'punt' on recovering compensation.

The scale of the access to justice problem, at least from the perspective of claimants, was placed in context by Lady Hale, President of the UK Supreme Court, in a recent contribution she made to the BBC's *Radio 4 Appeal*.[2] In appealing for a legal charity to assist persons undertaking legal proceedings in the civil and family courts, Lady Hale spoke of the impact of the savage cuts in civil legal aid in England and Wales during this last decade. The number of people granted legal aid has declined by 80 per cent over the last eight years, and the number of litigants in person has risen sharply. It is well known that Northern Ireland has experienced a similar problem and that judges are concerned about the rise in the number of litigants in person. A scan of the list of published judgments from the Irish High Court reveals a depressing number of cases where one of the parties self-represented. Many of these were cases with no viable defence where lending institutions sought to recover huge sums loaned to borrowers during the property boom of the previous decade. Lawyers were not prepared to undertake the defence of persons who could not pay their fees and legal aid was unavailable. If legal aid had been available, one suspects that a great many of these cases would have settled because advice would have been rendered to the effect that there was no answer to the claim.

It is in the above context that three major decisions of the Supreme Court of Ireland dealing with three different aspects of litigation funding fall to be considered. Litigation funding is where a third party provides financial support to a litigant to enable the bringing of civil proceedings. The first of these cases, *Persona Digital Telephony v Minister for Public Enterprise*,[3] concerned the direct financing of a claim for damages by a third party in exchange for a share of any damages recovered. The second, *SPV Osus Ltd v HSBC Institutional Trust Services (Ireland) Ltd*,[4] addressed the question of whether a litigant could assign for payment a claim for damages to a third party. For a litigant concerned about liability for costs this could be a means to obtain something for the claim while transferring the costs problem to the third party. These two cases address ways in which a claimant might obtain access to justice. The third, *Moorview Development Ltd v First Active plc*,[5] addressed the question of the defendant's access to justice by considering whether a third party who supports unsuccessful litigation can be required to pay the costs of the successful opponent.

It may be obvious already that these cases are far removed in important respects from those that Lady Hale was speaking of. The cases above were all complex high-value commercial claims. In some commercial cases there may be something approximating to equality of arms between the parties, but in many the sheer size of the claim and the complexity of the litigation will mean that even a relatively prosperous business would be unable to bring the case and would risk potential liability to pay opponent's costs without financial support. That financial support is unlikely to be available unless the claim is very large, as funders are generally uninterested in supporting claims that do not offer

2 See *Irish Legal News* (29 July 2019).

3 [2017] IESC 27.

4 [2018] IESC 44.

5 [2018] IESC 33.

generous returns on the investment.[6] Small value claims may only attract litigation funding where they can be aggregated into a group action.[7] However, parties who would never have been entitled to legal aid even in its heyday have access to justice rights too.

Third-party funding

In *Persona Digital*[8] the claim was for damages (including exemplary damages) for misfeasance in public office, breach of statutory duty, breach of contract, breach of constitutional rights, and breach of rights under EU law; together with a declaration that the European Communities (Mobiles and Personal Communications) Regulations 1996 contravened EU law. In a previous judgment he had delivered in this litigation relating to the defendants' unsuccessful application to strike the case out for want of prosecution, Clarke J remarked that if the factual allegations made by the plaintiffs could be proved they would amount to some of the most serious factual findings made by a court in Ireland since the foundation of the state.[9] The litigation was horrendously complicated and there seemed no earthly way that the plaintiffs could go on with it without financial support. Financial support in the form of an undertaking to meet both the plaintiffs' costs of preparing and presenting the case as well as their potential liability for the defendants' costs should the litigation fail was obtained from Harbour Fund III, a leading provider of third-party litigation funding in England. The Supreme Court decided by a 4:1 majority that the third party's provision of financial support for the plaintiff's claim in return for a substantial cut in any damages recovered was barred by the ancient common law principles of maintenance and champerty.[10] Maintenance means providing support for litigation in which one does not have a legitimate interest. Champerty is maintenance in consideration of a share in any recovery obtained in the litigation. Maintenance and champerty ceased to be crimes and torts in England and Wales by section 14 of the Criminal Law Act 1967 and in Northern Ireland by section 17 of the Criminal Justice (Miscellaneous Provisions) Act (Northern Ireland) 1968, although in both of these jurisdictions the rule of public policy making a transaction vitiated by maintenance or champerty void was preserved. In Ireland the Statute Law Revision Act 2007 preserves both criminal and tortious liability for maintenance and champerty.

The attitude of the Supreme Court to the funding arrangements in this case appears to be significantly out of line with the approach to maintenance and champerty adopted by most other common law jurisdictions.[11] Since the early 1990s the courts in England

6 C Hodges, J Peysner and A Nurse, *Litigation Funding: Status and Issues Research Report* (Centre for Socio-Legal Studies, Oxford, University of Lincoln Law School 2012) 7, noting that third-party litigation funders tended not to be interested in claims below £1million.

7 Ibid 49.

8 [2017] IESC 27.

9 *Comcast International Holdings Inc v Minister for Public Enterprise* [2012] IESC 50, referred to at [2017] IESC 27, 2.1.

10 For more detailed commentary on this case, see M Baldock, 'Persona (non?) Grata: *Persona Digital Telephony v Minister for Public Enterprise* [2017] IESC 27' (2018) 37 Civil Justice Quarterly 186; D Capper, 'Third Party Litigation Funding in Ireland: Time for Change?' (2018) 37 Civil Justice Quarterly 193; D Capper, 'Supreme Court Rejects Litigation Funding' (2018) 41 Dublin University Law Journal 197.

11 R Mulheron, 'England's Unique Approach to the Self-regulation of Third Party Funding: A Critical Analysis of Recent Developments' (2014) 73 Cambridge Law Journal 570, at 573, where it is pointed out that the courts of England and Wales, Jersey, Canada, Australia, New Zealand, Bermuda and South Africa have accepted third-party litigation funding. The position in the USA varies significantly from state to state; see N Dietsch, 'Litigation Financing in the US, the UK, and Australia: How the Industry has Evolved in Three Countries' (2011) 38 Northern Kentucky Law Review 687.

have markedly relaxed their approach to litigation support arrangements.[12] English courts ask whether the particular funding arrangements entered into involve any real risk that the funder will take over the management of the litigation so that it effectively becomes the claimant, and the defendant is consequently faced with litigation brought against it by a party with whom it has no actual dispute. The reluctance of the Irish courts to adopt a similar approach appears to be due to a combination of three factors, with the third being the most significant.

First, reliance has been placed on the fact that maintenance and champerty remain as crimes and torts in Ireland. This is not particularly convincing because the issue must surely be whether litigation funding constitutes maintenance or champerty, not whether it could be the subject of criminal or civil proceedings if it were. Secondly, it is argued that decisions from other jurisdictions are of limited weight because the courts in Ireland have built up a substantial body of precedent hostile to anything that resembles maintenance and champerty. This is also unconvincing because the body of precedent mainly falls into two categories of case that provide only limited support for the current approach. One category consists of first instance decisions from the last decade that are hostile to third-party funding; none of these were binding on the Supreme Court. The other concerned two decisions, one High Court[13] and the other Supreme Court,[14] where the courts declared invalid heir-locator contingency fee contracts. In these cases an heir-locator discovered the identity of heirs entitled to inherit shares in the estates of persons who had died intestate, one in England and the other in the USA. The heir-locator approached the heirs, entering into contracts with them under which he would use his best endeavours to recover the heirs' entitlement for them, being paid a very large fraction of their entitlement in the event of success and nothing in the event of failure. The contingency was entirely bogus as the heir-locator was in possession of proof of the heirs' entitlement and had the identity of the deceased been revealed the heirs could have recovered their shares in the estate for a small fraction of the price they paid the heir-locator. These cases had basically nothing to do with any litigation being maintained and were instances of maintenance and champerty being used as tools to strike down contracts courts understandably found objectionable. In *McElroy v Flynn* an alternative ground for the decision was that the heir-locator falsely answered an heir's question as to the identity of the deceased. But misrepresentation may not always assist an heir challenging the contract because a person presented with the opportunity to acquire an unexpected benefit may not ask any questions that can be answered falsely.

The true reason why the Irish courts have such a deep suspicion of third-party litigation funding is because of its perceived inherent tendency to be litigation brought by a third party against the defendant. Irish courts continue to insist that any supporter of another's litigation must have a legitimate interest in that litigation. That interest must pre-exist the making of arrangements for the support of litigation, and it must be clear that the maintainer is supporting the litigation to protect that interest. Financial profit absent a pre-existing interest does not constitute a legitimate interest even if there is no evidence to suggest that the third party will take over the litigation or otherwise engage in any abuse of process. In large measure the approach of the Irish courts represents a

12 See *Giles v Thompson* [1994] 1 AC 142 (HL); *R (on the application of Factortame Ltd) v Secretary of State for Transport, Local Government and the Regions (No 8)* [2002] EWCA Civ 932, [2003] QB 381 (CA); *Hamilton v Al Fayed (No 2)* [2002] EWCA Civ 665, [2003] QB 1175 (CA); *Arkin v Borchard Lines Ltd* [2005] EWCA Civ 655, [2005] 2 Lloyd's Rep 187 (CA); *London and Regional (St George's Court Ltd) v Ministry of Defence* [2008] EWHC 526 (TCC).

13 *McElroy v Flynn* [1991] ILRM 294.

14 *Fraser v Buckle* [1996] 2 ILRM 34.

preference for a bright-line rule that says anything that smacks in any way of third-party involvement in another's litigation, as opposed to the pursuit of one's own pre-existing legal interests, is automatically void. If third-party litigation funding were to be embraced the Irish courts seem to fear that they would be required to engage in much case-by-case adjudication as to whether there was a real risk of improper interference with the administration of justice. The access to justice issue was not in any sense denied, but it was felt that any reform of this area of the law would require a detailed legislative regulatory scheme.[15] However, in his concurring judgment Clarke J made clear his position that if the legislature did not act then the courts may be forced to develop the common law,[16] and the dissenting judgment of McKechnie J would have involved an effective staying of proceedings to give the legislature time to act.

One of the dangers with third-party litigation funding that the Irish courts may be concerned about is the problem referred to above of exposing defendants to the risk of irrecoverable costs should they prevail in litigation with a claimant unable to meet a costs order. This issue will be returned to below, but for now it should be stated that in England the general practice is to require a litigation funder to meet a successful defendant's costs at least up to the level of the financial support provided.[17] For this to work satisfactorily funders need to be financially sound, transparent and ethically grounded organisations. A satisfactory regulatory system should really be in place. Although the approach of the Irish courts to litigation funding is out of line with most other common law jurisdictions, their preference for statutory regulation of this area is not exclusive. Even in England and Wales, a jurisdiction very much in the vanguard of relaxing the law on maintenance and champerty, there is a fairly detailed voluntary Code of Practice issued by the Association of Litigation Funders operating in this field. However, concern should be expressed over Professor Mulheron's revelation that in 2014 only seven out of 16 recognised funders in England had actually subscribed to the code.[18] A salutary tale about a non-subscribing litigation funder is provided by the debacle of *Excalibur Ventures LLC v Texas Keystone Inc*[19] where the Court of Appeal ordered the funder to pay the defendant's costs on an indemnity basis. In Singapore, section 5B of the Civil Law (Amendment) Act 2017 allows the Minister to make regulations exempting third-party litigation funding arrangements from maintenance and champerty in designated proceedings. In Hong Kong, the Department of Justice issued a Code of Practice for Third Party Funding of Arbitration effective from 1 February 2019. The Law Reform Commission of Ireland published an Issues Paper concerned with the administration of justice in 2016,[20] Issue 6 of which was concerned with 'Maintenance and Champerty' and asked directly whether third-party litigation funding should be introduced in Ireland. There may yet be legislative development, but this subject does not appear in the Commission's fifth programme of law reform. It is to be hoped that Ireland will embrace litigation funding, but the case for regulation of providers is also strong.

15 [2017] IESC 27, judgment of Denham CJ.

16 Ibid 4.1–4.4.

17 *Arkin v Borchard Lines Ltd* [2005] EWCA Civ 655. This is the so-called *Arkin* cap.

18 Mulheron (n 11) 578.

19 [2017] 1 WLR 2221 (CA); D Capper, 'Litigation Funder's Liability for Costs' (2017) 36 Civil Justice Quarterly 287.

20 Law Reform Commission, Contempt of Court and Other Offences and Torts Involving the Administration of Justice (LRC IP 10–2016).

Assignment of rights to litigate

The facts of *SPV Osus*[21] are very complex, but for present purposes may be distilled as follows. Optimal Strategic US Equity Ltd (SUS) was a company entitled to make claims in the bankruptcy of the Bernard Madoff Ponzi scheme. Claims fell into two broad categories, secured and unsecured. Owing to the substantial time that investors in SUS would likely have to wait before receiving 'money in hand' from the Madoff bankruptcy SUS set up a special purpose vehicle (SPV Osus) and assigned the bankruptcy claims to it. This enabled investors in SUS to obtain liquid money for their bankruptcy claims by swapping shares in SUS for shares in SPV Osus. A majority of SUS investors did this and then traded their shares in SPV Osus to distressed debt hedge funds. SPV Osus issued proceedings in Ireland against the defendants, the Irish based custodian and administrator to SUS, claiming an entitlement to the net asset value of the investments of SUS. At all three levels of the court system in Ireland – High Court, Court of Appeal and Supreme Court – the defendants succeeded in blocking SPV Osus' claim on the ground that the assignment of the bankruptcy claims to SPV Osus was tainted by maintenance and champerty.

In the context of litigation funding the assignment of a claim often achieves substantially the same purpose as obtaining litigation support from a third party. The bottom line in each instance is that a party with a claim wants to get some money for it. Pursuing the claim involves taking legal proceedings, and often there is a risk of losing the case when it comes to court. The claimant could obtain litigation funding from a third party to cover the costs of preparing and presenting the case and indemnifying it against liability to pay the other party's costs if the claim fails. This will be in consideration of a share in any damages recovered. But this does not guarantee that the claimant will get any money, so assigning the claim to a third party for a sum reflecting, inter alia, the risk that the claim will fail, may be an attractive alternative. The third party takes over the running of the case, incurs all the costs of preparing and presenting it, and assumes all the risks involved if it fails. The claimant gets a 'bird in the hand' in exchange for selling to the third party the chance to recover more for the claim than it paid the claimant.

As the Supreme Court struck down third-party funding arrangements because of the potential risk that a third party with no legitimate interest *might* effectively take over the running of the case, it probably comes as no great surprise that it also struck down an assignment where the third party *would* take over the case. However, it should not be thought that the Supreme Court held that there is a complete ban on the assignment of a right to litigate. Neither should it be thought that in jurisdictions more relaxed about litigation funding that all assignments of rights to litigate are accepted. Third-party funding and the assignment of rights to litigate are similar in many ways but not identical. In both England and Ireland the key questions concern when the third-party assignee has a legitimate interest in the right being assigned and what is objectionable about the particular assignment. There is probably greater willingness in England to accept assignments than in Ireland and greater reluctance in Ireland to undertake case-by-case adjudications.

O'Donnell J's judgment for the Supreme Court provides a near comprehensive analysis of decided cases from England and other common law jurisdictions on this issue. At the outset of the analysis which will be conducted in this article, it is important to state that judicial acceptance of rights to litigate occurred before acceptance of third-party funding. A right to litigate is a chose in action and can generally be assigned, in England

21 [2018] IESC 44.

under section 136 of the Law of Property Act 1925, in Northern Ireland under section 87 of the Judicature Act (NI) 1978, and in Ireland under section 28(6) of the Supreme Court of Judicature Act (Ireland) 1877. Under all of these provisions, themselves generally declaratory of the common law, any right to sue which enforces a property right may be assigned. Anyone who owns any intangible right in property which cannot be protected without taking legal proceedings may assign the right to take those proceedings as part of the assignment of the property right. The property right could not be assigned otherwise. For present purposes the assignable property right that has most significance is a debt. On the face of things, the assignment in *SPV Osus* was the assignment of a debt, so one's first impression may well be that the courts should have allowed the claim by SPV Osus to proceed. The reason why they did not has to do with the still extant common law ban on the assignment of *a bare cause of action*. As the name indicates, a bare cause of action, or bare right to litigate, has no connection to a property right. A debt is a property right, but a right to sue for a monetary sum that does not constitute a property right is non-assignable.

This means that the validity of an assignment essentially depends on whether what is assigned is a debt or a bare right to litigate. This is not always an easy question to answer as a comparison of two cases makes clear. In *Camdex International Ltd v Bank of Zambia*[22] the assignor of a very large bank deposit assigned it to the plaintiff which sought summary judgment against the defendant bank. The defendant disputed the debt, but the Court of Appeal held that this made no difference to its assignability. Hobhouse LJ pointed out that the valuable commercial practice of selling a large quantity of uncollected debts to a factor in order to raise cash could not be carried out if the assignment of debts could be prevented by putting up a flimsy defence. By way of contrast, consider the earlier decision of Megaw J in *Laurent v Sale*.[23] The defendant finance house wrote to the assignors in July 1953 confirming that it had irrevocable instructions to pay certain fixed sums against shipments of copper wire. Nothing much happened until June 1956 when the assignors executed certain documents purporting to assign the sums said to be due from the defendants to the plaintiff assignees. By these documents the plaintiffs agreed to hand over to the assignors 25 per cent of any sums recovered from the defendants. In June 1959 the plaintiffs' solicitors drew the defendants' attention to the assignment and requested settlement of the claims otherwise legal proceedings would be instituted. Nothing was paid and on 1 July 1959, two days before expiry of the limitation period, the plaintiffs took out a specially indorsed writ seeking payment. The defendants contested the claim and also argued that the assignment was champertous. On a preliminary issue the judge upheld the defence of champerty. What took this case out of the inoffensive category of 'debt' and made it champertous was that the assignment was made in the clear knowledge that the debt was disputed, and the modest portion of 25 per cent of any recovery made also indicated that the parties to the assignment were engaging in speculative litigation trafficking. While there seems to be no reason for dissatisfaction with either decision, one is not left with a perfectly clear picture of when an assignment of a monetary claim is a debt and when it is a bare right to litigate.

Differentiating between the assignment of a debt and a bare right to litigate ultimately depends on whether the transaction involves trafficking in litigation. No attempt to define trafficking will be made here. As between assignor and assignee a speculative claim would indicate trafficking. In the absence of anything speculative between these parties the prospect of further on-trading by the assignee to another party and possibly beyond the

22 [1998] QB 22 (CA).

23 [1963] 1 WLR 829 (QBD).

latter would also indicate trafficking. It was this that undid the assignment of the claim under a letter of credit in *Trendtex Trading Corporation v Credit Suisse*.[24] The assignee financed the acquisition of a large consignment of cement to be sold by the assignor to an English company in Nigeria, the latter paying the assignor by letter of credit issued by the Central Bank of Nigeria. The assignor's claim under the letter of credit was assigned to the assignee but then sold on to a fourth party for a considerably larger amount. The original assignment actually contemplated that this would happen. Had the only parties involved been the assignor and assignee there would have been no concern about litigation trafficking. The assignee had no real prospects of being paid for the cement it enabled the assignor to acquire unless the letter of credit resulted in funds. Assigning the letter of credit claim for whatever it was considered to be worth is an unproblematic business judgment that cannot really be challenged. But the onward sale of this claim for a higher sum treats it like a saleable commodity. It is this that the Irish Supreme Court was hostile to and the prospect that SPV Osus' claims being traded onwards by distressed debt hedge funds effectively killed the assignments there. As O'Donnell J expressed it: 'It would be foolish not to recognise that the practice of law is a business, but the administration of justice is not.'[25]

Trendtex raises another issue about assigning rights to litigate – the significance of the assignee having a pre-existing interest in the assignor's claim. There was no pre-existing interest in *Camdex International* and the assignment survived. Neither was there in *Laurent v Sale*, but that does not seem to have been a key factor in holding the assignment to be champertous. There was in *Trendtex*, but that did not save the assignment. So a pre-existing interest is not a requirement for a valid assignment. The true test is whether the assignment involves trafficking in litigation. However, there is no doubt that the presence of a pre-existing interest on the part of the assignee helps in cleansing the claim from the taint of litigation trafficking, and its absence may be an indicator of improper trafficking. Take the decision in *Simpson v Norfolk and Norwich University Hospital NHS Trust*[26] as an example. The assignor issued medical negligence proceedings against the defendant hospital, alleging that he had contracted MRSA as a result of the defendants' negligent failure to exercise proper infection control. He subsequently assigned this claim to the assignee, whose late husband had contracted the same condition in the same hospital while he was being treated for the cancer from which he died. The assignee had earlier instituted negligence proceedings against the hospital alleging that her husband's last days had been rendered more uncomfortable than they should have been because of the MRSA. These proceedings had been settled without admission of liability, but the assignee seems to have felt a measure of regret that she had not publicly exposed the defendants' failings, so she took an assignment of the assignor's claim for £1 and amended its value from £5000 to £15,000. By its very nature, a claim for damages for personal injury is not a debt, and this alone may be sufficient to explain why it was treated as champertous. But a reading of the judgment of Moore-Bick LJ discloses a very real concern about allowing rights to litigate to be bought up by persons pursuing personal public interest campaigns. However genuine and sincere the assignee was, this was not her claim and it would have been an abuse of the civil justice system to allow her to buy it up for a nominal sum and put the defendants to the expense of defending it when their dispute was with another person. In *SPV Osus*[27] O'Donnell J pointed out that defendants

24 [1982] AC 679 (HL).

25 [2018] IESC 44, at [15].

26 [2011] EWCA Civ 1149, [2012] QB 640.

27 [2018] IESC 44, [93].

in civil cases that have been assigned often require the assignor's co-operation in providing discovery and otherwise presenting their defence. This does not justify a complete ban on assignments of the right to litigate, but it should be borne in mind in considering whether assignment is justifiable in any particular case.

Trafficking in litigation can occur between assignor and assignee when the claim crosses the somewhat shadowy line between debt and bare right to litigate. Where there is contemplated further assignment of the claim to fourth and other parties, then it seems that the assignment will likely be declared unenforceable on the ground of maintenance and champerty. There appears to be no English decision where any possibility of onward sale has been permitted, so the prospects for the assignment in *SPV Osus* were not particularly good. However, it is difficult not to view that decision without some measure of regret. There is a well-established international market in distressed debt, these claims were acknowledged to be tradable in the USA, and Ireland is itself a sophisticated market in financial securities. It was suggested to the court that assignments like these should only be void if (a) they were entered into for an improper purpose, and (b) they posed an identifiable and real risk to the administration of justice. The Supreme Court's rejection of this argument is consistent with its reluctance to engage in case-by-case adjudication and its preference for statutory frameworks. The latter may provide a sound regulatory system for this area in terms of fitness to engage in this type of activity, although it may be doubted whether it could provide bright-line rules for distinguishing legitimate from illegitimate transactions.

Third-party costs orders

Where a third party supports unsuccessful litigation it may be required to pay the costs or part of the costs incurred by the successful defendant. The access to justice issue in this context is the defendant's access to justice. If a defendant is sued by a wealthy individual or a company with abundant assets, the defendant is in a better position to decide whether to contest the litigation based purely on an assessment of the merits. But, if the claimant has little in the way of resources itself, the defendant's decision becomes more difficult. A successful defence will probably result in the court awarding costs to the defendant, but if the claimant lacks the means to pay those costs, the defendant will have to decide whether contesting the litigation makes economic sense. Indeed, if the defendant's resources are less than plentiful, it may even be the case that competent legal representation is beyond its reach where there is limited prospect of recovering costs from the claimant.

In England and Wales the award of costs in proceedings in the High Court and Court of Appeal is in the general discretion of the court under section 51 of the Senior Courts Act 1981, and an equivalent provision applies in Northern Ireland under section 59 of the Judicature Act (Northern Ireland) 1978. A third-party costs order, making a third party who supports litigation pay the costs of another party, was first recognised in the decision of the House of Lords in *Aiden Shipping Co Ltd v Interbulk Ltd*,[28] and a considerable body of case law on this matter has built up since then. It might be thought that this issue is of little relevance in Ireland because the courts have set their face firmly against third-party litigation funding from professional funders. But the issue can still arise in Ireland where a controller and/or a major shareholder in a company funds litigation the company is involved in and also perhaps where a third party supports litigation for more altruistic reasons. An example of the latter can be found in *Hamilton v*

28 [1986] AC 965.

Al Fayed (No 2),[29] where Neil Hamilton's financial backers were not required to pay Mohammed Al Fayed's costs in his successful libel action against Mr Hamilton. This case raised issues of maintenance rather than champerty. The litigation was supported but not for a share of the spoils. The Court of Appeal decided that Mr Hamilton's political supporters had a sufficient interest in this litigation to free their financial support from the taint of maintenance and also to make a third-party costs order inappropriate. In factual scenarios like this the court would have jurisdiction to make a third-party costs order if the third party's support constituted maintenance, and even if it did not but where there is no maintenance a third-party costs order is unlikely.

The Supreme Court has decided in *Moorview Development Ltd v First Active plc*[30] that the superior courts in Ireland have the power to make a third-party costs order. This is both under Order 15, rule 13 of the Rules of the Superior Courts, concerned with joining a third party as a party to the action, and section 53 of the Supreme Court of Judicature (Ireland) Act 1877, the latter being a similarly worded provision to section 51 of the Senior Courts Act 1981 and section 59 of the Judicature Act (Northern Ireland) 1978. As the question of when it may be appropriate to make a third-party costs order was approached in the same way under each of these provisions, it is not proposed to say anything specific about the former.

In *Moorview v First Active* the essential facts were that Moorview sued First Active for a wide range of reliefs arising out of a property development project which collapsed and consigned Moorview into insolvency. Mr Brian Cunningham, the principal shareholder in Moorview, funded the litigation which alleged that First Active was responsible for the collapse of the development project and Moorview's insolvency. First Active prevailed in the litigation and, since Moorview was insolvent and could not pay costs, First Active sought a third-party costs order against Mr Cunningham personally. The thrust of First Active's argument was that Mr Cunningham had funded the litigation primarily for his own benefit. If Moorview had prevailed, as principal shareholder Mr Cunningham would have reaped the benefit of any relief obtained, and if Moorview lost he could escape any liability for costs by sheltering behind the company's separate legal personality. The Supreme Court affirmed the decision of Clarke J that Mr Cunningham should be required to pay First Active's costs.

In reaching the conclusion that the courts had power to make third-party costs orders under section 53, the Supreme Court[31] noted that the Irish provision did not contain the words 'by whom' that appear in the relevant UK legislation. However, this was considered to make no substantive difference, since legislation in other common law jurisdictions such as Australia and New Zealand also omitted those words and third-party costs orders had been recognised.[32]

Mr Cunningham argued that third-party costs orders were inappropriate in cases brought by insolvent companies for two main reasons. First, there existed adequate protection for the defendant through the security for costs provision. In rejecting this argument McKechnie J agreed with Clarke J that the existence of the security for costs provision cannot be a jurisdictional bar to a third-party costs order. Security for costs are sought at an earlier stage of proceedings when the company's argument may be that security should not be required because the reason the company is in a parlous financial

29 [2003] QB 1175 (CA).

30 [2018] IESC 33.

31 *Moorview v First Active* (n 5) Judgment delivered by McKechnie J.

32 Ibid [53].

condition is due to the actions of the defendant. But by the conclusion of the legal proceedings it may appear that there is little substance in these allegations.[33] Although not a jurisdictional bar, however, the availability of security for costs is a factor going to the exercise of the court's discretion. Ordinarily, security for costs should be sought and a failure to seek security without explanation is liable to lead to a dismissal of the application for costs. This is particularly so where proceedings are brought on behalf of the insolvent company's creditors by the liquidator. The latter should not be subject to a penalty for pursuing its important public interest function.[34] If security is obtained, that does not preclude the making of a third-party costs order because, inter alia, that security may prove insufficient to meet the defendant's costs.[35] These arguments are convincing as also is the rejection of Mr Cunningham's second argument against third-party costs orders in this context. This argument was that it was an illegitimate piercing of the corporate veil. Where a controller of a company brings proceedings for his or her own benefit the defendant is exposed to the serious injustice of an irrecoverable costs order if the case is lost, while if the case is won the controller would get to keep the damages.[36] That said, third-party costs orders remain an exceptional remedy not to be granted as a matter of course.

In determining whether a third-party costs order was appropriate in this case, the first question addressed was whether bad faith on the part of the funder was required. The Supreme Court was clear that this may be significant but is not a requirement. Where someone with a direct financial interest in the outcome of the litigation, such as a receiver or manager appointed by a secured creditor, a substantial unsecured creditor or substantial shareholder, effectively pursues litigation at no risk to themselves, this is a powerful factor in favour of a third-party costs order whether or not there is any bad faith.[37]

As to the appropriate factors to take into account, the Supreme Court endorsed the approach taken by Clarke J. He laid stress on three questions:

1 the extent to which it might be reasonable to think that a company could meet an order for costs if the litigation failed;

2 the degree to which the non-party would benefit from the litigation if successful;

3 any factors touching whether the proceedings were pursued reasonably or in a reasonable fashion.[38]

Applying these factors to the case here it was clear that the company was hopelessly insolvent and that Mr Cunningham was the person who would benefit if the proceedings had succeeded. As for the way the proceedings were pursued, Moorview had amended the way it put its case on several occasions, yet First Active had succeeded in getting the case dismissed as disclosing not even a *prima facie* case.[39] So lacking in merit was Moorview's case and so unreasonable was the way it was pursued that there was no basis for making

33 Ibid [62]–[63].

34 Ibid [64], citing *Metalloy Supplies Ltd v MA (UK) Ltd* [1997] 1 WLR 1613.

35 *Moorview v First Active* (n 5) [65], citing *Petromec Inc v Petroleo Brasileiro SA Petrobras* [2006] EWCA Civ 1038.

36 *Moorview v First Active* (n 5) [69]–[77].

37 *Moorview v First Active* (n 5) [87]–[91], citing *Carborundum Abrasives Ltd v Bank of New Zealand (No 2)* [1992] 3 NZLR 757 (Tomkins J).

38 *Moorview v First Active* (n 5) [92]–[98].

39 Ibid [99]–[106].

any kind of nuanced costs order, where the third party might bear some of the defendant's costs on some issues but not on others.[40]

The last issue considered in relation to the appropriateness of the costs order in this case was one of some importance so should be considered separately. This is whether the defendant gives reasonable notice to the funder that it intends to seek a third-party costs order. To be able to do this, the defendant would need to know that a third party stood behind the claimant and the identity of that party. In England there is authority that, if a defendant wishes to make an application that a third-party funder posts security for any third-party costs order that the defendant may subsequently seek, the defendant may seek disclosure of the identity of the funder.[41] In New Zealand the Supreme Court held in *Waterhouse v Contractors Bonding Ltd*[42] that the identity of a litigation funder should be disclosed as a matter of course at the commencement of the litigation. The Federal Court of Australia requires the existence and details (redacted in certain circumstances) of third-party funding arrangements to be disclosed before the initial case management conference.[43] All this is principally in the context of professional for-profit third-party funding where the identity of the funder is less likely to be known or suspected. There may not be much of a problem here where the funder is a controller or major shareholder in a company and the jurisdiction does not allow for profit-driven litigation support. Returning to the question of notice, the Supreme Court did not consider giving notice of an intention to seek a third-party costs order to be a jurisdictional requirement but did consider that it would normally be a matter to take into account in deciding whether that order should be made in a particular case. Notice should be given as soon as an intended applicant would be in a position, if called upon to do so, to demonstrate reasonable grounds for making such an application. In this case the letter giving formal notice of the defendant's intention to seek a third-party costs order was given two months before the trial was due to begin. Although most of the costs in this case had still to be incurred at this stage, there would still have been a very significant sum thrown away if the claimant's funder were to withdraw support in the face of a probable application for a third-party costs order. Despite the relative lateness of the formal notice, a third-party costs order was still made, two other considerations supporting this being that this was the first case recognising the power of the Irish courts to make such orders and the giving of informal notice of a likely application to make Mr Cunningham liable for costs before most costs had been incurred. A partial costs order could also be made allowing for recovery of only those costs incurred after the third party was on notice.[44]

In concluding his discussion of third-party costs orders in the context of controllers of corporate claimants, McKechnie J warned that the above was not an exhaustive list of factors to be taken into account in applications for third-party costs orders, that some factors would be of little significance in some cases, and that there are no rigid rules applying to the question.[45]

40 Ibid [107]–[110].

41 *Reeves v Sprecher* [2007] EWHC 3226 (Ch), [2009] 1 Costs LR 1; *Merchantbridge & Co Ltd v Safron General Partner I Ltd* [2011] EWHC 1524 (Comm), [2012] 2 BCLC 291.

42 [2013] NZSC 89.

43 *Coffs Harbour City Council v Australian and New Zealand Banking Group Ltd* [2016] FCA 306.

44 [2018] IESC 33, [111]–[121].

45 Ibid [122]–[128].

Finally, there was a brief observation that, in the case of 'pure funders' like Neil Hamilton's supporters in *Hamilton v Al Fayed (No 2)*,[46] the UK jurisprudence that third-party costs orders would seldom be granted against them 'seems a reasonable rule'.[47] What is significant about that is its apparent acknowledgment that non-commercial third-party funding of litigation may not be considered objectionable in Ireland. If it be the case that third-party costs orders are not likely to be made in these cases it probably also follows that they would seldom be made in cases where a public body funds litigation on behalf of an impecunious person. An example of this is the *Ashers Bakery*[48] case where the Equality Commission in Northern Ireland funded Gareth Lee's ultimately unsuccessful discrimination case against a bakery which refused to decorate a cake with the slogan 'Support Gay Marriage'. This potentially put the bakery in the position where it would have had to decide whether to defend this litigation from its own resources in the knowledge that it was unlikely to recover its costs if it won, or settle out of court on the grounds that the costs were prohibitive. In the end, the Christian Institute funded Ashers' defence and both parties agreed to bear their own costs. That there is no guarantee of the defendant in a case like this receiving financial support from its own 'white knight' draws attention to the important responsibility public bodies bear when they are considering providing litigation support.

Conclusion

Litigation funding in Ireland is not exactly on the move. Profit-motivated litigation funding has been rejected, and the assignment of a right to litigate will likely suffer a similar fate unless it is a near unanswerable debt claim that will not be onward traded by the assignee to someone else. Although the approach to third-party funding rests upon a very conservative and somewhat misconceived notion of maintenance and champerty, the concerns about regulating a third-party funding profession have a measure of legitimacy. *SPV Osus* is an instructive case in that it demonstrates how the assignment of claims presents different issues from third-party funding of claims. The difference between the two is not purely a matter of form. *Moorview* is another deceptively valuable decision because it provides useful guidance on the operation of third-party costs orders where the funder is a controller or major shareholder in an insolvent company. The issues discussed in this article are thus mainly, but not exclusively, jurisdiction-specific.

46 [2003] QB 1175.

47 [2018] IESC 33, [127].

48 *Lee v McArthur* [2018] UKSC 49.

NILQ 70(3): 371–375

Vedanta Resources plc and Another v Lungowe and Others

SAMANTHA HOPKINS

Queen's University Belfast

As globalisation has expanded in recent years, a number of novel issues have arisen on the international stage regarding the relations and interaction between legal regimes – both from the perspective of states (in contexts such as human trafficking), and from that of multinational corporations. One such issue in this latter context concerns liability of parent companies for actions or omissions of their (overseas) subsidiaries or branches – especially considering the lack of transparency surrounding such relationships, and the very public face presented by a multinational. Given the potential for a claim to be brought in either of the two jurisdictions concerned, a number of cases have sought to bring some clarity to this decision.

Vedanta Resources plc and Another v Lungowe and Others[1] is the latest in a line of cases in the UK courts concerning liability of parent companies for actions of foreign-domiciled subsidiaries. *AAA v Unilever plc*[2] and *Okpabi and Others v Royal Dutch Shell plc and Another*[3] discussed, and were dismissed largely because of, lack of 'sufficient proximity' between the parent company and subsidiary to prompt a duty of care. As discussed below, this was one question of law on which the claimants succeeded in *Vedanta*: a common law duty of care was found. The implications of *Vedanta* for *Okpabi* upon its upcoming appeal (and similar future cases) in extending the applicability of a duty of care (in certain circumstances) to stakeholders *other* than employees or consumers are wide-ranging. Given the less than optimistic outcome for victims in both *AAA* and (to date) *Okpabi* from a business and human rights perspective, it is hoped that *Vedanta* can contribute to a more victim-centred approach.

Background and facts

The case is a procedural one, in which Vedanta (the 'anchor defendant', based in the UK) and its self-regarded subsidiary company[4] Konkola Copper Mines plc (KCM, the 'foreign defendant', based in Zambia) jointly raise a jurisdiction challenge to the claim of 1826 Zambian citizens against both companies. The *material* claim runs to the effect that KCM

1 [2019] UKSC 20.

2 [2018] EWCA Civ 1532.

3 [2018] EWCA Civ 191.

4 While the Zambian government has a significant minority stake in KCM, Vedanta has stated publicly that KCM is to be regarded as fully owned by Vedanta.

has 'repeated[ly] discharge[d] . . . toxic matter'[5] into local watercourses over 15 years, affecting both drinking water and irrigation, and consequently the health of the claimants – this is not at issue in the present case. Rather, the issue concerns whether the UK courts are the appropriate jurisdiction in which to determine whether Vedanta can be considered liable for the actions of KCM.

In bringing the case against both companies in the UK courts, the claimants have the continued possibility of succeeding against the parent, should the subsidiary become insolvent (or, as has occurred in this instance, come under state control prior to proposed liquidation).[6] Against Vedanta, Article 4.1 of the Recast Brussels Regulation is relied upon by the claimants: 'persons domiciled in a member state shall . . . be sued in the courts of that member state'[7] – thus allowing for potential recourse to UK rather than Zambian courts. Against KCM the claimants rely upon the 'necessary or proper party gateway'[8] by which proceedings may be served outside of the jurisdiction concerned[9] (para 3.1, Civil Procedure Rules Practice Direction 6B). The jurisdiction challenge was heard first in the High Court[10] and dismissed, largely due to lack of access to justice on the part of the claimants,[11] before being appealed to the Court of Appeal in 2017 and dismissed for much the same reasons.[12]

Four main issues of law were raised by the appellants at the Supreme Court and discussed in the judgment: 'abuse of EU law', 'real issue as against Vedanta', 'proper place' and 'substantial justice'. The court was unanimous in its findings on all four points, finding in the first and second no error of law on the part of the High Court judge, resolving the third in favour of the appellants, and the fourth against the appellants. The overall decision found that, as the UK courts were considered not to be the 'proper place' for the claim, the appeal might have been allowed, save for the issue of substantial justice, which saw the appeal dismissed and the jurisdictional choice of the UK upheld.

Issues of law

Prior to substantive examination of the legal issues, the court clarified that, as a matter of proportionality, it was considered prudent not to conduct a 'mini-trial' on such questions as jurisdiction challenges,[13] meaning that the over 8000 documents submitted by the appellants were regarded as excessive. This is due to the primary role of the Supreme Court being to arbitrate matters of law, rather than those of fact.[14]

The first issue, alleged 'abuse of EU law' in the claimants' reliance on Article 4 of the Recast Brussels Regulation, will be omitted for the present circumstances, since no new reading of law was raised: the Supreme Court upheld three instances of precedent (both at national and EU level) in rejecting this claim, as well as the decision of the judge.

5 *Vedanta* (n 1) para 1.

6 Chris Mfula and Barbara Lewis, 'Explainer: Zambia's Moves on Vedanta, KCM Alarm Mining Industry' (*Reuters*, 31 May 2019) <https://uk.reuters.com/article/us-zambia-mining-vedanta-kcm-explainer/explainer-zambias-moves-on-vedanta-kcm-alarm-mining-industry-idUKKCN1T11JT/>.

7 Regulation (EU) 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.

8 Ibid para 4.

9 That is, outside of Zambia.

10 [2016] EWHC 975 (TCC).

11 Which was again raised at the Supreme Court and is thus discussed below.

12 [2018] 1 WLR 3575.

13 *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1, para 95.

14 *Vedanta* (n 1) para 12.

The second issue concerned the appellants' assertion that no real triable issue against Vedanta exists, based on 'the claimants' pleaded case and supporting evidence'[15] – only against KCM as the perpetrators of the acts. Here the issue of law concerned whether Vedanta owes, due to its involvement in the workings of its subsidiary KCM, either a common law duty of care or statutory liability under Zambian legislation. The appellants claimed that such a finding 'would involve a novel and controversial extension of the boundaries of the tort of negligence'.[16]

While it is true that there is no *immediate* duty of care owed by a parent company to stakeholders of a subsidiary[17] – and moreover that 'there is nothing special or conclusive about the bare parent/subsidiary relationship'[18] – there are certain instances when such a duty may be owed (as in both *Chandler* and the present case). Indeed, 'a parent company will *only* be found to be subject to a duty of care in relation to an activity of its subsidiary if *ordinary, general principles of the law of tort* regarding the imposition of a duty of care on the part of the parent . . . are satisfied in the particular case' (emphasis added).[19] This was affirmed by the Supreme Court, which found that no 'novel extension' of the tort was required, and thus that no more rigour was required in its identification than was in fact utilised by the judge.[20] The issue of *statutory* liability was considered irrelevant, given the existence of a non-novel category of common law duty of care.[21]

The third issue dealt with the question of whether UK courts are 'the proper place in which to bring the claim';[22] the appellants submitting that the phrase 'the claim' (as against KCM) differed from 'the case as a whole' – i.e. that the former ought to be read narrowly.[23] This was the only finding on which the Supreme Court differed substantially (though notably while still disagreeing with the appellants' narrow reading of the CPR) from the previous rulings, which had both found in favour of the claimants on this point.

As a matter of fact it would appear, and indeed the Supreme Court found, that a claim by Zambian claimants concerning acts and effects in Zambia by a Zambian company, with a majority of Zambian witnesses, ought to be heard in Zambia rather than in England. While the judge also found this at a preliminary stage, the avoidance of an irreconcilable judgment (i.e. due to KCM potentially being sued in Zambia and Vedanta in England) was decisive in his ruling that England was the 'proper place' – as it was in *OJSC VTB Bank v Parline Ltd*,[24] which was cited as precedent.

Here the Supreme Court found justifiable issue, as the avoidance of duplicated or irreconcilable judgments is not a requirement of Article 4's stipulation that an EU domiciliary ought to be sued in its state of domicile. Indeed, it is merely *one factor* which a claimant must consider when making a choice concerning jurisdiction: weighing the risk of irreconcilable judgments against the desire to bring proceedings in a single state (thereby avoiding that risk). In essence, the Supreme Court found that the 'irreconcilable judgments' doctrine has been overstated in its importance, both in *OJSC VTB Bank* and

15 Ibid para 17.
16 Ibid para 46.
17 *Chandler v Cape plc* [2012] 1 WLR 3111.
18 *Vedanta* (n 1) para 54.
19 *AAA* (n 2) para 36.
20 *Vedanta* (n 1) para 60.
21 Ibid para 65.
22 CPR 6.37(3) para 66.
23 *Vedanta* (n 1) para 73.
24 [2013] EWHC 3538 (Comm).

consequently by the judge,[25] prompting a fresh examination of the factors concerned and the resultant finding that the 'proper place' was in fact Zambia and not England.

The fourth and final issue concerned the attainment of substantial justice, the appellants arguing that the judge's definition of 'substantial' had been too narrow. The judge found that both the absence of 'sufficiently substantial and suitably experienced legal teams to enable litigation of this size and complexity' and issues surrounding legal funding in Zambian courts would, from a factual perspective, preclude the claimants' access to substantial justice were the case heard in the foreign jurisdiction.[26] This complies with the rule that in 'exceptional cases', 'non-availability of substantial justice' may be found where financial issues exist in a foreign jurisdiction.[27] In supporting this decision, two similar Zambian cases were cited, both of which failed to achieve justice for the majority of claimants due to monetary issues.[28]

Conclusions

There are two main points which might be taken from this judgment, which has considerable impact on the way in which multinational corporations are perceived as legal entities. The first is the finding that a parent company *can* possess, *in correct circumstances*, a common law duty of care towards stakeholders of a subsidiary – the first such in any superior court globally.[29] This thus goes some way towards fulfilling the UK's obligations as a state party to the International Covenant on Economic, Social and Cultural Rights (ICESCR),[30] in which states parties are 'require[d] . . . to establish . . . parent company or group liability regimes'.[31] The existence of such a duty of care (that is, an ordinary and not a novel one requiring an extension of the stages set out in *Caparo Industries plc v Dickman)*[32] establishes a straightforward reading of liability where the parent company has itself accepted that liability in writing.

This leads to the second point, namely the significant weight afforded by the court to Vedanta's written documents in determining that duty of care towards stakeholders. This provides conclusive evidence in the decades-long debate in the business and human rights field regarding the purpose of corporate social reporting.[33] In light of this judgment, it would seem that, at least to some degree, this purpose is to clarify responsibility for corporate actions. It necessarily follows that such reporting cannot

25 *Vedanta* (n 1) para 77.

26 Ibid para 89.

27 Ibid para 93.

28 *Nyasulu v Konkola Copper Mines plc* [2015] ZMSC 33; *Shamilimo v Nitrogen Chemicals of Zambia Ltd* (2007/HP/0725).

29 Robert McCorquodale, 'Parent Companies Can Have a Duty of Care for Environmental and Human Rights' (*Cambridge Core Blog*, 11 April 2019) <http://coreblog.cambridge.org/2019/04/11/parent-companies-can-have-a-duty-of-care-for-environmental-and-human-rights-impacts-vedanta-v-lungowe/>.

30 Ibid.

31 UN Committee on Economic, Social and Cultural Rights, 'General Comment 24 on State obligations under the ICESCR in the context of business activities' (2017) UN Doc E/C12/GC/24, para 44.

32 [1990] 2 AC 605.

33 Massimo Contrafatto, 'The Institutionalization of Social and Environmental Reporting' (2014) 39(6) Accounting, Organizations and Society 414, 415; Shuili Du and Edward Vieira, 'Striving for Legitimacy through Corporate Social Responsibility' (2012) 110(4) Journal of Business Ethics 413, 414; Reggy Hooghiemstra, 'Corporate Communication and Impression Management' (2000) 27 Journal of Business Ethics 54, 55.

solely serve the function of 'window-dressing'[34] if it may be relied upon in court due to the actions of a subsidiary.

This may further have the effect of prompting companies, especially multinationals and those with necessarily close relations to subsidiaries, to exercise more care in their audits of subsidiary companies in order to avoid potential liability for subsidiaries' negligence. Equally, however, the possibility exists that this decision might prompt a *withdrawal* of responsibility by parent companies; Vedanta did not possess a 100 per cent holding in KCM, but rather *held itself out* as being, for all intents and purposes, the parent company of the latter. It would be a simple matter indeed for a company to make no strong reference to a subsidiary one way or another.

Despite the admitted importance of these two points, it is worthwhile noting that the *overall* judgment severely limits the likelihood that a similar case will in future be decided in a similar manner: as was noted in the judgment, Zambia is one of the poorest countries in the world, and so long as there remains no means of quantifying 'non-attainment of substantial justice for reasons of funding', *Vedanta* may be very readily distinguished. It is thus likely that the 'substantial justice' issue will have to be more comprehensively addressed in future cases (such as the anticipated appeal of *Okpabi*), in order to avoid summary judgments concerning jurisdiction reaching the Supreme Court as a matter of course.

34 David Crowther, 'Corporate Social Reporting: Genuine Action or Window-Dressing?' in David Crowther and Lez Rayman-Bacchus (eds), *Perspectives on Corporate Social Responsibility* (Ashgate 2004).

NILQ 70(3): 377–382

Getting past the judge in cases of loss of control: *R v Goodwin*

JOHN E STANNARD

Queen's University Belfast

Despite having been under challenge for more than a quarter of a century, the conventional content of the traditional criminal law course continues to present its oddities. Recent statistics for England and Wales reveal that in the year up to September 2018 there were over half a million convictions for road traffic offences and over 70,000 convictions for theft.[1] In contrast, there were only 342 people even indicted for homicide in a similar period.[2] Yet road traffic offences do not tend to figure at all in the traditional criminal law course, while theft gets a week or a fortnight at most.[3] Homicide, in contrast, will often be dealt with over a number of weeks, with great attention being given to the details of murder and the different varieties of manslaughter. In particular, the defence of provocation and its successor, loss of control, have always featured prominently in this respect, despite the fact that few such cases come before the courts[4] and that prospective criminal lawyers are unlikely to encounter the defence in practice.[5]

That said, there are good reasons for the continuing academic interest in provocation and loss of control. In particular, the defence raises a number of important theoretical issues, most notably the relationship between justification and excuse,[6] the problem of gender bias[7] and the proper response of the law to emotion.[8] That said, the case of *Goodwin*,[9] which we are about to discuss, centres on a different issue altogether, namely the law of evidence and the functions of judge and jury in a case where loss of control

1 *Criminal Justice Statistics Quarterly Update December 2018* <www.gov.uk/government/statistics/criminal-justice-system-statistics-quarterly-december-2018>.

2 Office of National Statistics, *Homicide in England and Wales* (7 February 2019) <www.ons.gov.uk> (figures for year ended March 2018).

3 This sort of criticism is not new: see Peter Alldridge, 'What's Wrong with the Traditional Criminal Law Course?' (1990) 10 Legal Studies 38.

4 Going back to the statistics cited above (n 2), the 342 indictments for homicide resulted in 161 convictions for murder and a mere 91 for manslaughter of any variety.

5 This is especially so in Northern Ireland, where a mere 27 homicides were recorded by the police in the year leading up to July 2018 – see PSNI Recorded Crime Statistics, July 2019, Table 1 <https://psni.police.uk>.

6 See, for instance, Joshua Dressler, 'Provocation: Partial Justification or Partial Excuse?' (1988) 51 Modern Law Review 467.

7 See, for instance, Kate Fitz-Gibbon, *Homicide, Law Reform, Gender and the Provocation Defence* (Springer 2014).

8 See, for instance, Victoria Nourse, 'Passion's Progress: Modern Law Reform and the Provocation Defense' (1996) Yale Law Journal 106.

9 *Goodwin (Anthony Gerard)* [2018] EWCA Crim 2287; [2018] 4 WLR 165.

is raised. In order to understand the case, it is necessary for us to explore its legal and historical context.

Evidential and probative burdens

As a general rule, an accused person tried on indictment (D) who wishes to rely on one of the standard criminal law defences has two evidential hurdles to surmount; in effect, D must 'get past' both the judge and the jury.[10] In relation to the judge, D has the so-called 'evidential burden' or 'burden of production';[11] the judge must decide whether there is sufficient evidence in the case to suggest that the defence might apply. If there is, the defence has to be put to the jury; if not, not. In cases where there is enough evidence to satisfy the evidential burden, then the jury should allow the defence unless convinced beyond reasonable doubt that it is not made out on the facts; this is known as the 'probative burden' and lies on the prosecution. Though there are some exceptions to this, most notably in relation to insanity and diminished responsibility, this general rule holds good for the majority of defences. In effect, the role of the judge is to act as gatekeeper, his or her task being to filter out any defences for which, as they say, no proper foundation has been laid.

The evidential burden in cases of provocation

However, prior to 2009 there was a qualified exception to this in relation to the old defence of provocation. The elements of this required not only that D was provoked to lose his or her self-control (the so-called subjective element), but also that a 'reasonable man' would have acted in the same way (the objective element).[12] However, the judge's role in relation to this was considerably restricted by virtue of section 3 of the Homicide Act 1957 in England and Wales, the corresponding provision for Northern Ireland being section 7 of the Criminal Justice Act (NI) 1966. These both read as follows:

> Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man.

The effect of this was to provide that, if there was any evidence that D had been provoked to lose his or her self-control, the defence had to be left to the jury.[13] In effect, the judge's role as gatekeeper was confined to the subjective element; the defence could not be withdrawn from the jury even in cases where it could not be suggested that any reasonable person could possibly have acted as the defendant did.[14]

As is well known, this was considered one of the least satisfactory aspects of the defence. Taken together with the requirement of a 'sudden and temporary' loss of self-control,[15] the lack of judicial control in relation to the objective requirement led to the

10 Paul Roberts and Adrian Zuckerman, *Criminal Evidence* (2nd edn, Oxford University Press 2010) 229–31.

11 Roberts and Zuckerman (n 10) 228.

12 *Duffy* [1949] 1 All ER 932 (Devlin J); *Lee Chun-Chuen v R* [1963] AC 220 at 231 (Lord Devlin).

13 Nor was there any requirement that the defence be raised by D; see Sean Doran, 'Alternative Defences: The Invisible Burden on the Trial Judge' [1991] Criminal Law Review 878.

14 As in *Johnson* [1989] 1 WLR 740 (self-induced provocation); *Doughty* (1986) 83 Cr App R 319 (crying baby).

15 *Duffy* (n 12).

apparent[16] paradox whereby the defence might be denied to an abused woman who killed her partner,[17] but had to be left to the jury in relation to a father who killed his crying baby.[18]

Loss of control

This paradox, together with other defects in the defence,[19] led to section 54 of the Coroners and Justice Act 2009, the effect of which was to abolish the old common law defence and replace it with the new defence of loss of control, as set out in section 54(1):

> Where a person ('D') kills or is a party to the killing of another ('V'), D is not to be convicted of murder if—
>
> (a) D's acts and omissions in doing or being a party to the killing resulted from D's loss of self-control,
>
> (b) the loss of self-control had a qualifying trigger, and
>
> (c) a person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D.

Like provocation, this has both a subjective and an objective element, the obvious difference being that, whereas previously anything 'done' or 'said' could amount to provocation, there now had to be a 'qualifying trigger', namely either a fear of serious violence on D's part or something said or done which constituted circumstances of an 'extremely grave character' and caused D to have 'a justifiable sense of being seriously wronged'.[20] However, the key question for our purposes is to what extent the Act altered the evidential position as set out in the Homicide Act 1957 and in the Criminal Justice Act (NI) 1966. Is the judge's role as gatekeeper still restricted, or is it now easier for the defence to be withdrawn from the jury in hopeless cases? This is what the case of *Goodwin* is all about.

The facts of *Goodwin*

The facts of the case were depressingly commonplace; D had killed the victim (V) with a hammer in the course of a drunken quarrel.[21] D's main defence was self-defence, on the basis that V had attacked him with the hammer without warning, and that in fear of his life he (D) had grabbed hold of the hammer and struck V.[22] However, D's counsel also requested that the judge direct the jury to consider loss of control.[23] This, however, the judge refused to do, saying that, though there was sufficient evidence to raise an issue with respect to loss of self-control on D's part, there was no evidence either that the loss of self-control had a qualifying trigger, or that a person with a normal degree of tolerance and self-restraint would have acted in the same way.[24] An appeal was then lodged by D.

16 'Apparent', because the issues were not the same. Allowing the defence to go to the jury, as in *Doughty* (n 14), did not imply that it had any chance of success.

17 *Thornton* (1993) 96 Cr App R 112; *Ahluwahlia* (1993) 96 Cr App R 133.

18 *Doughty* (n 14).

19 Ministry of Justice, *Murder, Manslaughter, and Infanticide: Proposals for Reform of the Law* (Consultation Paper CP19/08, 2008).

20 Coroners and Justice Act 2009, s 55(2) and (4).

21 *Goodwin* (n 8) paras 3–11.

22 Ibid para 12.

23 Ibid para 20.

24 Ibid paras 24–28.

The law in *Goodwin*

As we have seen, the judge's ruling would not have been allowable under the old law, under which, if there was sufficient evidence to raise the issue that D had been provoked to lose self-control, the objective test was to be left to the jury to decide.[25] But was the position any different under the Coroners and Justice Act 2009? The Court of Appeal held that it most certainly was, and that the judge now had to consider all three elements of the defence in deciding whether to leave the case to the jury.

The judgment of the court was delivered by Davis LJ, who began by setting out the relevant statutory framework.[26] The key provisions here are set out in section 54 of the 2009 Act and read as follows:

> (5) On a charge of murder, if sufficient evidence is adduced to raise an issue with respect to the defence under subsection (1), the jury must assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not.
>
> (6) For the purposes of subsection (5), sufficient evidence is adduced to raise an issue with respect to the defence if evidence is adduced on which, in the opinion of the trial judge, a jury, properly directed, could reasonably conclude that the defence might apply.

Having discussed the facts of the case and the submissions of the parties, Davis LJ proceeded to set out a list of 11 factors which he said, albeit not exhaustive, should be borne in mind in cases of this sort.[27] Central to our discussion are the eighth, ninth and tenth of these, which are as follows:

> (8) The statutory defence of loss of control is significantly differently [*sic*] from and more restrictive than the previous defence of provocation which it has entirely superseded.
>
> (9) Perhaps in consequence of all the foregoing, 'a much more vigorous evaluation' on the part of the trial judge is called for than might have been the case under the previous law of provocation.
>
> (10) The statutory components of the defence are to be appraised sequentially and separately.

Davis LJ went on to say that there was no room under the new law for what might be called a 'defensive' summing-up, in which the judge would simply leave the defence to the jury to avoid generating a possible ground of appeal.[28] This would go completely against the scheme and wording of the statute. A trial judge should not clutter up a jury's deliberations by inviting them to consider issues which do not arise on the evidence. Turning to the case in hand, the conclusion of the court was that the evidence of loss of control by D was scanty to say the least,[29] and that, while there might have been sufficient evidence to go to the jury on the second issue (the qualifying trigger),[30] there was nothing to indicate that a person of D's sex and age, with a normal degree of tolerance and self-

25 Homicide Act 1957, s 3, above.

26 *Goodwin* (n 8) para 2.

27 Ibid para 33; see *Gurpinar* [2015] EWCA Crim 178; *Jovan* [2017] EWCA Crim 1359.

28 *Goodwin* (n 8) para 35.

29 Ibid, paras 41–42. Particular emphasis here was placed on the fact that D himself had not raised the issue, which seems to indicate that 'invisible burden' cases of the sort discussed above (n 13) will be less common in the future: see commentary by Laird at [2019] Criminal Law Review 348.

30 *Goodwin* (n 8) paras 44–45.

restraint and in the circumstances of D, might have reacted in the same or in a similar way to D.[31] On this basis the appeal was dismissed and D's conviction for murder upheld.[32]

The effect of *Goodwin*

On the basis of this, there is no doubt that getting past the judge in cases of loss of control will be much harder than it was in cases of provocation. However, what is of interest for our purposes is the nature of the exercise required of the judge in cases of this sort. What precisely is it that the judge now has to decide?

The basic answer is, of course, given by section 54(4) and (5); the judge must decide whether 'sufficient evidence has been adduced to raise an issue', and this means asking whether evidence has been adduced on which, in his or her opinion, 'a jury, properly directed, could reasonably conclude that the defence might apply'. Now that the judge has to consider all three elements of the loss of control defence in this connection, how do these words apply in relation to each element?

The first element, a loss of self-control, presents no problems; what we have here is a pure issue of fact well within the traditional province of a jury. All that the judge has to consider here is whether there is any evidence in the case on which the jury could properly find that such a loss of self-control had taken place. Indeed, the situation here is more or less the same as it was under the old law, the only difference being that the loss of control need not be 'sudden'.[33]

The second element, the qualifying trigger, is more difficult. As far as the first possibility is concerned, namely a fear of serious violence on the part of D, this once again is a straightforward issue of fact. But what about the second possibility? As we have seen, this involves 'something said or done (or both) which constituted circumstances of an extremely grave character and caused D to have a justifiable sense of being seriously wronged'.[34] Obviously, whether something was 'said or done' and whether D had a 'sense of being seriously wronged' are simple issues of fact, but whether the circumstances were of an 'extremely grave' character and whether D's sense of being seriously wronged was 'justifiable' are matters which call for some degree of evaluation by the jury.[35] Of course, this is not an uncommon situation in the context of a criminal trial; rather, as Roberts and Zuckerman point out, it is a 'standard juridical technique'.[36] However, what is of interest in the present context is where the judge's role as gatekeeper fits into all this. In the words of section 54(5), what sort of evidence would be sufficient to raise an issue as to whether the circumstances were sufficiently 'grave', or whether the sense of being seriously wronged was sufficiently 'justifiable'? Is it simply a matter of the judge second-guessing what the jury might think, or is the judge expected to make his or her own evaluation in relation to the matter?

Similar questions arise in relation to the third element, namely whether a person of D's sex and age, with a normal degree of tolerance and self-restraint, and in the circumstances of D, might have reacted in the same or in a similar way to D. Does this involve a normative evaluation by the judge, or is it simply a matter of second-guessing

31 Ibid paras 46–47.

32 Ibid para 49.

33 Coroners and Justice Act 2009, s 54(2).

34 Ibid s 55(4).

35 Of course, this may itself involve some degree of fact-finding, most notably in relation to the context of the provoking words or deeds.

36 Roberts and Zuckerman (n 10) 133–36.

the jury? If the former, we are left with the same problem as we had in relation to the second qualifying trigger. If the latter, we again have to ask what evidence would be sufficient to raise the issue? The obvious answer would be to get a psychologist to testify as to how a normal person in D's situation might react. However, the Court of Appeal made it clear in relation to the old defence of provocation that such evidence was inadmissible,[37] and there is no reason to think that the 2009 Act has made any difference in relation to this.

The significance of *Goodwin*

In conclusion, it will be interesting to see how the principles set out by the Court of Appeal in *Goodwin* play out in practice. The question is by no means a purely academic one; whereas in the past many judges may have preferred to play safe and leave doubtful provocation defences to the jury, this is now something expressly discouraged, as *Goodwin* itself shows.[38] Nor is the problem confined to provocation and loss of control alone. As Roberts and Zuckerman point out, the orthodox approach in the law of evidence relies very heavily on the traditional distinction between questions of fact, which are for the jury, and questions of law, which are for the judge.[39] Furthermore, fact-finding is seen as a mere process of historical inquiry, in which questions of normative judgment have no place.[40] However, they go on to insist that this is an oversimplification; in their words, "'fact-finding" in criminal trials is a function of conceptual classification and normative evaluation *as well as* being a process of discovering the truth about historical events'.[41] Unfortunately, as *Goodwin* shows, the traditional mechanism of the criminal trial, including its allocation of functions between judge and jury by means of the rules regarding the burden and standard of proof, is ill-adapted to this insight. Until that mechanism can be adapted to take account of the realities of jury adjudication, it will never be possible to make complete sense of the law in this area.

37 *Turner* [1975] QB 834; R M Colman and R D Mackay, 'Legal Issues Surrounding the Admissibility of Expert Psychological and Psychiatric Testimony' <www2.le.ac.uk/departments/npb/people/amc/articles-pdfs/legaissu.pdf>.

38 *Goodwin* (n 8) para 35; and above (n 27).

39 Roberts and Zuckerman (n 10) 129–30.

40 Ibid 130. This is most obvious in relation to concepts such as dishonesty in theft and gross negligence in manslaughter, both of which call for normative evaluation on the part of the jury: see *Feely* [1973] QB 530 and *Adomako* [1995] 1 AC 171. However, these are not isolated instances; for instance, deciding whether someone has been reckless involves asking whether it was unreasonable for them to take the risk they took having regard to the circumstances: *G* [2004] 1 AC 1034 – and there are many other examples besides.

41 Roberts and Zuckerman (n 10) 135 (emphasis in original). Referring to the writings of Quine and others, they add that 'positivist fantasies of a realm of pristine facts hermetically sealed off against the corrupting influence of evaluation have been debunked many times'.