Southampton
Law School

UNIVERSITY OF
Southampton

# Southampton Student Law Review

2011 volume 1, issue 1


# Southampton
# Student Law Review

## University of Southampton
## School of Law

Published in the United Kingdom
By the Southampton Student Law Review
School of Law

University of Southampton
SO17 1BJ

In affiliation with the University of Southampton School of Law


The Editors wish to thank Dr. Oren Ben Dor, Dr. Alun Gibbs and Ms Johanna Hjalmarsson.



ISSN 2047 - 1017

This volume should be cited (2011) 1 S.S.L.R.

# Editorial Board 2011

# Academic Advisors

Dr. Oren Ben Dor

Dr. Alun Gibbs

Ms Johanna Hjalmarsson

The editors wish to thank all members of the University of Southampton School of Law who have helped in the creation of this volume

# Table of Contents

## Case Comment



## 2011 Undergraduate Dissertations

# Foreword

It is my very great pleasure to be Head of the Law School at the inauguration of the Southampton Student Law Review. One of only a few other student law reviews in the United Kingdom, this new publication is both managed and written by students associated with the University of Southampton. It is the brainchild of Ross W. Martin, an accelerated LLB student from the United States, and was spearheaded by Harry East, one of our current postgraduate research students, without whom this volume would not exist. Emma Nottingham was instrumental in gathering submissions, especially by running a contest for the best case comment, while Thomas Webber contributed by editing articles. It is intended as a showcase for some of the very best work produced by students in the Law School at the University of Southampton as well as a forum for them to present their ideas outside the confines of pieces of work set for assessment purposes. By encouraging submissions from undergraduate and postgraduate taught students as well as research students, this can only contribute to the research culture of the School. The student law review is something that has a long tradition in the United States, where editors of reviews from the leading law schools can expect their editorial position to assure them of employment as law clerks in the highest courts or in the top firms in the country. I hope that, in time, the Southampton Student Law Review will not only contribute greatly to the education of students reading Law at Southampton by encouraging discussion of some of the most difficult legal issues of our time, but also that it will be read by a wide audience that includes potential employers and will become recognised as a serious publication.

A unique feature of our undergraduate programme, final year students are required to write a 10,000 word dissertation on a subject of their choice, with supervision being provided by an academic member of staff. This element in the degree programme is designed to promote independent research by the students, building upon the foundations of the first two years of the LLB. The initial issues of the Review will include the seven best undergraduate dissertations from 2011, which are testament to the research skills and independence of thought that characterise our graduates.

The task of the student editorial board to keep up the momentum of the first two issues will be an onerous one, but they can be assured of a helping hand from my academic colleagues in the Law School. I wish all those currently involved with the Southampton Student Law Review, and those who will become involved in future years, great success with this new and exciting publication.

Professor Natalie Lee, Barrister
Professor of Tax Law
Head of the Law School, University of Southampton

July 2011

# Exploring the Collective *mea culpa*: Reconciliation Between Nations and Populations

*Josh Boughton*

The 'apology' is an important weapon in any politician's armoury of political rhetoric. In order to cultivate reconciliation, politicians are quick to deliver sincere apologies for wrongs that they, their governments, or their nation have committed. By considering two recent political apologies, this article seeks to explore how apologies can legitimately function on behalf of a nation. David Cameron's apology to the relatives of the victims of 'Bloody Sunday' provides us with an opportunity to revisit the debate that was provoked in 2008 with Kevin Rudd's apology to Australia's 'Stolen Generations'. By considering these apologies, this article explores the way in which collective apologies can be explained and supported. The author submits that all citizens of a nation can legitimately participate in a collective apology through experiencing a sense of national responsibility. The author further submits that this responsibility is founded on privilege: being privileged enough to be able to enjoy the triumphs in your nation's history means that you must also accept the failures. The author concedes that while apologies can be effective in reconciling relationships and ameliorating the present, they must not be overestimated; they cannot exist in a vacuum. Apologies must be accompanied by additional factors in order to function as effective vehicles for reconciliation and justice

## Introduction

Apologies are an integral part of modern social discourse; from the brief 'sorry' that we offer as we brush past another individual to the more sincere 'I am sorry for the way I acted'. Aside from their role as a basic social mechanism, apologies have been used in recent years to embody a much more profound political purpose. Apologies have been employed by numerous politicians to express regret and remorse for wrongs that they, their government, or their nation have committed. For example, Prime Minister Kevin Rudd's apology to Australia's Aboriginal population in relation to the 'Stolen Generations' attracted a great deal of attention from indigenous and non-indigenous Australians alike. More recently, the notion of the apology as a method of reconciliation was brought to the forefront of public attention with David Cameron's apology to the relatives of the victims of 'Bloody Sunday'. This high profile and very public example provides a new opportunity to examine the question of whether apologies issued on behalf of

groups can support the process of reconciliation after mass atrocity and conflict.

This article intends to assess the effectiveness of the 'collective apology' as a mechanism for reconciliation. It will examine the two political apologies mentioned above in order to explore the tenability of the group apology, and to consider whether it can be effective in assisting reconciliation and ameliorating the present. The discussion will consist of four sections. The first section will examine the foundations of the apology as an instrument for reconciliation and justice, in particular the necessary elements of a full apology. The second section will explore the collective apology in relation to Australia. This will include a brief history of the treatment of the Aboriginal people, followed by an explanation of how it is considered that the concept of the 'group apology' can be rationalised and explained. The third section will consider how David Cameron's apology for Bloody Sunday corresponds with the debate that surrounded the apology in Australia. This will include a brief outline of the history of the conflict in Ireland, followed by an examination of Cameron's apology. The final section will examine whether these collective apologies can materially aid the process of reconciliation. It will be argued that apologies can act as sophisticated forms of justice that contribute to the process of reconciliation and in doing so, demonstrate that apologies on behalf of groups can, and indeed do, work. This article will go on to emphasise that while apologies may be greatly welcomed, they must contain certain features and be accompanied by certain commitments in order to be effective.

## The Apology as a Method of Reconciliation

Different nations respond in various ways following periods of mass atrocity. With the culmination of conflicts between the Hutu and Tutsi tribes in 1994, Rwanda pursued prosecutions through its 'Gacaca' courts system. South Africa, on the other hand, created its 'Truth and Reconciliation Commission' to bring reconciliation and closure following the Apartheid regime. Other countries have issued apologies. Martha Minow explains that we should not be rigidly prescriptive when considering responses to mass atrocity for two reasons.[1] Firstly, the variety of circumstances can differ vastly between nations, and the context in which conflicts occur is hugely important. There are many factors that can affect whether a given system works, including religion, culture, historical background and context, and the proportion of the population affected.[2] Secondly, and arguably more importantly, no response is adequate when a child or family member has been killed. Minow explains that the fact that a perpetrator can never reverse the wrongdoing means that the most effective remedy for the situation must be pursued.[3] For many nations, an apology undoubtedly serves as an effective instrument for dealing with past conflicts.

[1] M Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence* (Beacon Press, Boston 1998) 4.
[2] *Ibid.*
[3] *Ibid.,* at 5.

We have noted what the apology means in its colloquial sense, but this needs further clarification in order for us to understand how the apology can serve as a means of transitional and restorative justice. Trudy Govier and Wilhelm Verwoerd distinguish between three types of apology.[4] Firstly, there is an apology as a defence, such as the apology of Socrates. Secondly, there is an apology as an excuse or account, such as when we apologise for being late. Finally, there is the moral apology.[5] A moral apology is one offered with the goal of reconciliation and forgiveness; the apologising person or party expresses regret and remorse for past actions, and encourages the reconstruction of a relationship. Such apologies function by promoting dialogue and in so doing can help to repair relationships. By JL Austin's formulation, in this sense apologies are performative; that is, rather than simply bearing a promise of reconciliation in the future, they are a distinct and definite part of the present.[6] Barkan and Karn recognise that although apologies do not erase or undo events, they can ameliorate the past so that it resonates differently in the present for those who feel either aggrieved by it, or responsible for it.[7]

Nicholas Tavuchis was one of the first writers to consider the nature of the moral apology. Tavuchis recognises that apologies are just speech acts;[8] the wrongful deed can never be undone, and there is no intimation that it should be forgotten. However, in some cases apologies can help to repair rifts between the offender and the offended. In this sense, he explains, their very operation is mysterious:

> I was, and continue to be, struck by certain paradoxical and talismanic qualities of this human faculty. Specifically, if the major task of an apology is to resolve conflicts and somehow restore an antecedent moral order by expunging or eradicating the harmful effects of past actions, then at one level of reality it is doomed to fail. Why is this so? Very simply, because an apology, no matter how sincere or effective, does not and cannot undo what has been done. And yet, in a mysterious way and according to its own logic, this is precisely what it manages to do.[9]

This mystery is present in a number of apologies. Chancellor Willy Brandt's 'Warschauer Kniefall' has generally been hailed as a sincere and successful

[4] T Govier and W Verwoerd, 'The Promise and Pitfalls of Apologies' (2002) 33(1) *Journal of Social Philosophy* 67, at 67.
[5] *Ibid.*
[6] JL Austin, *How to do Things with Words* (Clarendon Press, Harvard 1962) 6.
[7] E Barkan and A Karn (eds.), *Taking Wrongs Seriously: Apologies and Reconciliation* (Stanford University Press, Stanford 2006) 8.
[8] N Tavuchis, *Mea Culpa: A Sociology of Apology and Reconciliation* (Stanford University Press, Stanford 1991) 34.
[9] *Ibid.*, at 5.

apology[10]. On a visit to the Warsaw Ghetto Monument in December 1970 he surprisingly, and supposedly spontaneously, fell to his knees. Nothing was said and no compensation was given, but despite this, his actions were viewed as extremely powerful[11]. Equally mysterious are apologies that fail. Tony Blair's expression of 'deep sorrow' over the slave trade was generally thought to be insincere and inadequate[12], as was George Bush's apology for the Abu Ghraib prisoner abuse scandal[13]. There are of course many apologies that are met with mixed responses. One such apology was issued by Kevin Gover on behalf of America's Bureau of Indian Affairs. Gover held the position of Assistant Secretary for Indian affairs during the Clinton administration and issued an apology in September 2000 for the past harms caused by the Federal Indian policy, which was implemented by the Bureau of Indian Affairs.[14] His apology was criticised for the fact that Gover was himself a Pawnee Indian. The Hoopa Valley Tribal Chairman, Lyle Marshall, was particularly vocal. Marshall emphasised that Assistant Secretary Gover's apology was inadequate because it came from the wrong person: as a Pawnee Indian it was not Gover's place to apologise.[15]

In order to reveal something of the mystery that Tavuchis felt towards apologies, further examination of the moral apology is needed. Ruti Teitel explains that an apology used following a period of atrocity can be viewed as a 'transitional apology'. Teitel contends that this form of apology can serve as an important demonstration of public accountability as a new regime strives to generate legitimacy.[16] Martha Minow recognises that apologies implicit in acts of reparation acknowledge the facts of the harm, accept some degree of responsibility, avow sincere regret, and promise not to repeat the offence.[17] Similarly, Kathleen Gill has set out five factors that will be present in a full moral apology:

> In its fullest version, an apology includes the following elements:
> (1) An acknowledgment that the incident in question did in fact occur;
> (2) An acknowledgment that the incident was inappropriate in some way;
> (3) An acknowledgment of responsibility for the act;

---

[10] Chancellor Gerhard Schroder, 'Presentation Speech - Dedication of Willy Brandt Square in Warsaw', 6 December 2000 < http://www.bundesregierung.de/en/Latest-News/Speeches-,10155.25738/rede/Speech-given-by-Chancellor-Ger.htm> accessed 17 June 2011.
[11] *Ibid*.
[12] BBC News, 'Mixed Response to slave sorrow' 27 November 2006 <http://news.bbc.co.uk/1/hi/6187216.stm> accessed 17 June 2011.
[13] Fox News, 'Bush Apologizes for Iraqi Prisoner Abuse' 7 May 2004 <http://www.foxnews.com/story/0,2933,119156,00.html> accessed 17 June 2011.
[14] R Tsosie, 'The BIA's Apology to Native Americans: An Essay on Collective Memory and Collective Conscience' – in Barkan and Karn (eds.), *Taking Wrongs Seriously: Apologies and Reconciliation* (Stanford University Press, Stanford 2006) 185, at 185.
[15] *Ibid*., at 189.
[16] R Teitel, 'The Transitional Apology' – in Barkan and Karn (eds.), *Taking Wrongs Seriously: Apologies and Reconciliation* (Stanford University Press, Stanford 2006) 101, at 107.
[17] Minow (n 1) 112.

(4) The expression of an attitude of regret and a feeling of remorse; and
(5) The expression of an intention to refrain from similar acts in the future.[18]

In understanding these five elements, the moral apology becomes a little less mysterious and more palpable and comprehensible: responsibility is accepted, remorse is demonstrated and an intention to refrain is confirmed. It is a combination of these ingredients that results in the moral apology being transformed from a collection of words into a performative act. Despite the many proponents of the moral apology and the propensity with which politicians utilise them, many criticise apologies when they are used as mechanisms for reconciliation. Many claim that we cannot judge the acts of people in history against the standards and views of the contemporary world. Others feel that apologies serve as nothing more than political rhetoric and are a substitute for real compensation, and can trigger a dangerous decline into the realm of forgetting and suppressing memories.[19] In order to decide whether our two political apologies withstand these criticisms, we must consider them in more detail and understand the conflicts on which they are based.

## The Collective Apology in Australia

(i) Australia and the 'Stolen Generations'

The Aboriginal people are thought to have been resident in Australia for over 45,000 years. But for most of us, the story of Australia begins with the first fleet, which sailed in Port Jackson eight years after Captain James Cook discovered the Great South Land. The treatment of the Aboriginal population by the Western settlers amounted to genocide on two fronts.[20] The first was the frontier violence in the 19th Century, while the second was the programme for the absorption of the indigenous population, which occurred predominantly in the 20th century.[21]

From the beginning of Australia's colonisation, the Aborigines were treated with aversion and violence by the Westerners. William Lines has documented situations where kangaroos and Aborigines alike were shot as game, and even killed to feed dogs.[22] The view of the Aborigines at this time is epitomised by an observation made by one visitor to New South Wales in the 1840's who declared that the native people were 'not entitled to be looked upon as fellow creatures' [23] (this in fact formed the foundation of Australia as *terra nullius* – land belonging to no one). Towards the end of the nineteenth century the on-going mistreatment of the Aboriginal people led to a feeling that the

[18] KGill, 'The Moral Functions of an Apology' (2000) 31(1) *The Philosophical Forum* 11, at 12.
[19] Barkan and Karn (n 7) 6.
[20] D Moses (ed.), *Genocide and Settler Society: Frontier Violence and Stolen Indigenous Children in Australian History* (Berghahn Books, New York 2005) 16.
[21] *Ibid.*
[22] *Ibid.*
[23] Moses (n 16) 6.

indigenous population needed protection. This inclination led to what is commonly referred to as the Stolen Generations.

The treatment that amounted to the Stolen Generations can be divided into two distinct halves. Before the Second World War, the programme for the protection of the Aborigines was one of 'absorption'.[24] To address the problem of the growing numbers of half-caste children who were growing up in dire conditions, legislation was enacted in various states that gave the 'Protector of Aborigines' (one may rightly conclude, a rather ironic name) extensive powers. In Queensland, for instance, the *Aboriginal Act of* 1897 allowed the protectors to remove, under warrant from the Home Minister, any Aboriginal or half caste adult or child from their family and place them elsewhere in the state. Similar laws were passed in Western Australia; one provision of the 1904 *Aboriginal Act* made the Chief Protector the legal guardian of all Aboriginal children up to the age of 16. Many people, including those behind the Bringing Them Home Community Guide,[25] viewed all Aboriginal removals as part of the programme of absorption. In fact, the 1937 Aboriginal Affairs Conference in Canberra represented a high water mark in the absorption programme.[26] At this conference Auber Octavius Neville (Protector in Western Australia) and Dr Cecil Cook (Neville's counterpart in the Northern Territory), who were both prominent players in the treatment initiatives, spoke about the programme. It was concluded that the Aborigines should be absorbed both culturally and biologically. It was thought that eventually the full bloods would die out, so efforts could be concentrated on the half-castes. The half-caste descendants of full bloods would also have to be absorbed and once this was complete, everybody could, as Neville explained, 'forget that there were ever any Aborigines in Australia'.[27] Therefore, this conference produced a long-term plan for the elimination of the Aboriginal people. As Robert Manne starkly appreciates, this constituted a genocidal intention.[28]

With the conclusion of the Second World War, the programme for the treatment of the Aborigines changed from one of absorption to one of assimilation.[29] Under this programme the removals still continued, but the intention behind them changed. Aboriginal children were taught to recognise their heritage as having a place in their life, but ultimately were brought up to live in Western society. Children were taught not to abandon, but to reinterpret their Aboriginality. The 1961 Propaganda Booklet demonstrated this, indicating a desire for the inhabitants of Australia to live as one people and to strive for collective citizenry.[30] However, whether under pre-war

[24] R McGregor, 'Governance, Not Genocide: Aboriginal Assimilation in the Postwar Era' – in Moses (ed.), *Genocide and Settler Society: Frontier Violence and Stolen Indigenous Children in Australian History* (Berghahn Books, New York 2005) 290, at 290.
[25] Australian Human Rights Commission, 'Bringing Them Home Community Guide' (2007) <http://www.hreoc.gov.au/education/bth/community_guide/index.html> accessed 25 February 2010.
[26] McGregor (n 20) 294.
[27] R Manne, 'Aboriginal Child Removal and the Question of Genocide, 1900-1940' – in Moses (ed.), *Genocide and Settler Society: Frontier Violence and Stolen Indigenous Children in Australian History* (Berghahn Books, New York 2005) 217, at 238.
[28] *Ibid.*
[29] Moses (n 16).
[30] McGregor (n 20), 297.

absorption or post-war assimilation, there is no escaping the findings of the 'Bringing Them Home Community Guide'[31], which confirms that, between 1910 and 1970, between one in ten and one in three indigenous children were forcibly removed from their families.

In the latter half of the 20th Century, the Aboriginal population began to gain the rights that they undoubtedly deserved. Aboriginal people were included in the census for the first time in 1967, and the landmark decision in the second 'Mabo' ruling came in 1992.[32] In this case the Australian High Court built on its decision in the first 'Mabo' ruling five years earlier to recognise the native title of Aborigines at common law. Brennan J analysed the foundations of the Australian colonisation, and rejected the legal fiction of *terra nullius*.[33] This had enormous implications for the recognition of Aboriginal land ownership, since they were finally recognised as inhabitants of their own country – a right that they had not enjoyed for over 200 years. The recognition of Aboriginal rights continued, and remorse about the past remained prominent; nowhere else was this more evident than in Australian politics. Between 1983 and 1996 Australia was governed by the Australian Labour Party, led initially by Bob Hawke and subsequently by Paul Keating. Throughout this period the Conservatives complained about the political correctness of the Labour Party, and their devotion to multiculturalism.[34] The Conservatives argued that the Labour Party's 'black-armband' view of history criminalised the national past.[35] In 1996 a sufficient proportion of the Australian nation agreed and elected a coalition government comprising of the Liberal and National parties. Much to the consternation of the Government, indigenous issues remained pressing. This came to fruition in 1997 with the publishing of the 'Bringing Them Home' Community Guide, which was a result of the national inquiry. The national inquiry was commissioned by the Keating Government before the coalition came to power, and brought additional and unwanted pressure in respect of issues dealing with the Aboriginal people.

The national inquiry uncovered in great detail the child removal practices, revealing to the nation a blemished chapter in their history. With reference to Article 2(e) of the United Nations Convention on Genocide[36], the Community Guide classed the child removals as acts of genocide, as they involved the forcible transfer of children, with the intention of destroying the Aboriginal group. The inquiry included accounts from many victims: those who had been taught to reject their Aboriginality, and kept in appalling and abusive conditions. There were many recommendations issued by the inquiry – most notably were the encouragement of Aboriginal people to re-learn their language and culture, the provision of monetary compensation to victims, the acknowledgement of responsibility and the issuing of an apology. As leader of the coalition Government from 1996 to 2007, John Howard refused to offer an apology for the Stolen Generations. However, following his election as Labour

[31] Australian Human Rights Commission (n 21).
[32] *Mabo v Queensland (No 2)* (1993) 175 CLR 1.
[33] *Ibid.*, at 40.
[34] Moses (n 16) 11.
[35] *Ibid.*
[36] Australian Human Rights Commission (n 21).

Prime Minister in 2007, Kevin Rudd issued an official apology in Parliament to the victims of the Stolen Generations on 13 February 2008.

(ii) Explaining the Collective Apology: Conceptual Issues

This background is important in order to fully understand the group apology in Australia, and the debate that surrounds it. If we recall Kathleen Gill's five constituent parts necessary for a moral apology, we see that the apology issued by Kevin Rudd appears *prima facie* problematic. His speech in Parliament expressed a sincere apology for the harm that was caused, and he pledged to reconcile relationships between all Australians. In doing so, he apologised on behalf of himself as Prime Minister, on behalf of the Government and on behalf of Parliament. Rudd apologised for the laws and policies of successive governments that inflicted profound grief on Aboriginal families: what he termed the "dark chapter" in the history of Australia.[37] In turning a new page in the history of the continent, Rudd committed to close the gap that lies between indigenous and non-indigenous Australians in relation to life expectancy, educational achievement and economic opportunity. From this, we see that some of the constituent parts necessary for Gill's moral apology are undoubtedly present: there is certainly acknowledgement that the incident did in fact occur, as well as acknowledgement that it was inappropriate. But other aspects of Gill's apology are more difficult to identify. Does, and can, Kevin Rudd acknowledge responsibility for these historical acts as well as express regret and remorse for more than just himself? Here, I contend that Rudd's apology does indeed meet all of the factors required for a moral apology as set out by Kathleen Gill and I offer an explanation as to how the apology from Rudd can function collectively on behalf of Australia to the Stolen Generations.

As a key proponent of the anti-apology movement in Australia, John Howard stated that to hold the nation responsible for the Stolen Generations would be to impose on them an unreasonable penalty and injustice.[38] Danielle Celermajer submits that to frame the question of the apology in this way is to approach it from a traditional liberal jurisprudential background.[39] Celermajer explains that on a traditional view of accountability in criminal law, liability can only be assigned to he who commits both the *actus reus*, and has the accompanying *mens rea*. However, in order to fully understand the apology in the case of Australia, Celermajer explains that we need further clarification of the wrong itself. She explains that the entire classification of Aboriginality as anathematic to progress and civilisation, and therefore the whole basis of Aboriginal treatment, was in fact the wrong committed. The child removals, and therefore specific *actus reus* commissions, are just entry points to this debate.[40] In order to explain how present day Australian's can

[37] Australian Parliamentary Archives – Wednesday 13 February 2008 <http://www.aph.gov.au/house/rudd_speech.pdf> accessed 27 August 2010.
[38] D Celermajer, 'The Apology in Australia: Re-covenanting the National Imaginary' – in Barkan and Karn (eds.), *Taking Wrongs Seriously: Apologies and Reconciliation* (Stanford University Press, Stanford 2006) 153, at157.
[39] *Ibid.*, at 158.
[40] *Ibid.*, at 162.

feel responsible for this, Celermajer refers to an article by Robert Manne.[41] In this article, Manne distinguishes between collective guilt and historical shame. Guilt, he argues, is something that can only be experienced by the individual perpetrators. Shame, however, is something that can be felt by present day Australians in relation to acts committed by past generations:

> [G]uilt for wrongs done is always a matter of individual responsibility, any idea of collective guilt genuinely makes no sense. An individual cannot be charged with the crimes of others. He or she cannot experience remorse on someone else's behalf... Talk of sharing in a collective guilt over the dispossession of the Aborigines is one thing; however, talk of sharing in a legacy of historical shame is altogether another.[42]

This distinction is utilised by a number of others, including Rudd in his apology. Farid Abdel-Nour makes a similar argument, explaining that being part of a nation, being a citizen, is to be engrained in the institutions and past achievements of the people.[43] In the same way that the Australian population takes pride in the successes of their nationals, such as the achievements of the celebrated aviator Kingsford Smith, they can also experience shame. The Australian people, as part of a relatively new country, have relied upon the actions of those who founded their nation. Therefore, the citizens of Australia inherit the legacy of their nation: this must include all acts that helped to constitute their State, whether good or bad. The very existence of Australia as a sovereign, post-colonial nation, constituted on British law, rested on the systematic annihilation of Aboriginal rights.[44] Therefore, Australians can feel shame for the actions of those before them.

However, the feeling of historical shame for acts in the past is far removed from feeling personally responsible for them, and for many Australians this distance is indeed too far. Celermajer offers an argument for responsibility based on the fact that it was the whole system of political culture that resulted in the mistreatment of the Aborigines. This political culture can transcend time and space – from the 1937 Aboriginal Affairs Conference to the present day – as Australians continue to legitimise it by electing governments, and adhering to social norms. In developing this explanation, Celermajer relies on the work of the German philosopher Karl Jaspers, who devised the notion of 'political guilt'. Jaspers explains that our responsibility for wrongful acts rests on our relationship with government – we are not responsible for acts done, but we are responsible for who we are as the human dimension of our nation.[45] Celermajer goes on to explain that we can re-conceptualise political culture as a pattern of meanings that organise the full range of institutions, including hard ones like law and soft ones like norms and identity.[46] The

[41] R Manne, 'Race Relations: Forget the Guilt, Remember the Shame' *The Australian* (Sydney 8 July 1996).
[42] *Ibid.*
[43] F Abdel-Nour, 'National Responsibility' (2003) 31(5) *Political Theory* 693, at 694.
[44] Celermajer (n 32) 170.
[45] *Ibid.*, at 165.
[46] *Ibid.*, at 169.

inhabitants of a nation act to continually re-indorse these principles. Therefore, the responsibility for shame lies not in committing the *Actus Reus* of an offence, but from the citizens' continual reinforcement of the cultural and political context that at one stage legitimised the doing:[47]

> The responsibility behind shame does not result from a discrete doing (*actus reus*), but from the people's bearing and perpetuating the cultural and political context that underpinned the doing. [48]

Celermajer explains that if we view political culture in this way we are able to demonstrate how Australians can feel responsible for the actions of people in history, without collapsing the individual into the collective. If we accept this link then it legitimises the apology made by Rudd on behalf of all Australians. However, I find this explanation rather tenuous. It explains why people can be held responsible for acts of a present government, but not one in the distant past. It is more than mildly unfair to impose responsibility on the citizens of a country simply because they abide by the rules of governance in obeying the law and participating in elections. Another problem with this explanation is that it falls prey to one of the often cited criticisms of the political apology, namely, that we cannot judge actions in the past from the standpoint of contemporary society, because knowledge has changed and different actors are involved. With Celermajer's explanation, it is the perpetuating of cultural and political norms by society that founds responsibility. I do not believe that when Australians adhere to the cultural and political norms of contemporary society that they are reinforcing the cultural and political norms that underpinned the Stolen Generations.

Other writers have tried to rationalise how individuals can legitimately experience a sense of national responsibility. Farid Abdel-Nour relies, as Celermajer does, on the work of Karl Jaspers to explain that national responsibility is linked to an acceptance of a nation's past. Abdel-Nour explains that the most intelligible way in which individuals can feel a sense of national responsibility is through an acceptance of their nation's history as forming part of their national identity.[49] Michele Moody-Adams supports this, explaining that to be cultured is a significant part of being human, and therefore we must accept the legacy of the nation that we are fortunate enough to be born into.[50] Another proponent of collective identity is Peter French, who offers an explanation of collective responsibility based on the collective ownership of public memory.[51] He explains that in casting the past into the present, our public memory means that we are a continuation of the projects of our collective past.[52]

I offer an explanation based on an amalgamation of these ideas to explain the collective apology. I do not consider it necessary to explore in great detail

---

[47] *Ibid.*, at 171.
[48] *Ibid.*
[49] Abdel-Nour (n 37) 695.
[50] M Moody-Adams, 'Culture, Responsibility, and Affected Ignorance' (1994) 104(2) *Ethics* 291, at 292
[51] Barkan and Karn (n 7) 194.
[52] *Ibid.*

Celermajer's reconceptualisation of political culture, but, instead, suggest a form of responsibility based on the inheritance of the past, as an individual born into a nation with legacy. In the same way that Manne and Abdel-Nour explain that to enjoy the benefits of historical actors, one must also accept the shame, I contend that Australians can legitimately accept responsibility for the actions that founded their nation. My suggestion is that this acceptance of shameful historical acts is founded on the privilege of accepting past successes; therefore, it is the privilege of being able to enjoy successes of historical actors that means Australian citizens can also accept responsibility for shameful actions.

As citizens of a relatively new post-colonial nation, Australians can inherit their history, but this must include an acceptance of everything that has resulted in the constitution of their state. In support of this notion, we must employ Celermajer's distinction that the responsibility being accepted is not for the specific *Actus Reus* commissions, but for the whole conception of Aboriginality as antagonistic to civilisation. If we view privilege as the chief ingredient for accepting responsibility, then the collective apology becomes a much simpler human and political faculty. With this formulation of the collective apology, not only can political leaders apologise for wrongs that governments have committed, but citizens of a nation can legitimately contribute to the sincerity of an apology. Of course, this explanation as to how the group apology can function is not prescriptive: it is a method of explaining how Australians can accept responsibility, not of how Australians do, or should, feel.

## The Collective Apology In The United Kingdom

### (i) Northern Ireland and 'Bloody Sunday'

In order to understand how the notion of privilege, in explaining the collective apology, correspond with David Cameron's apology for Bloody Sunday, we must identify the conflict that led to it. There are issues and complexities that stray far beyond the focus of this discussion, so what I offer below is a brief summation of the key themes that provide the background to Bloody Sunday.

The conflicts that plagued Northern Ireland for three decades from 1968 are often referred to as 'the Troubles' and are sometimes thought to be a religious conflict. In fact, the tensions arose out of social and political situations, with ethnicity and religion often characterising the opposing parties. For this reason the Troubles are identified, albeit rather tentatively, as an ethnic conflict.[53] With nuances, the Troubles were the culmination of centuries of tension between Unionist and Nationalist groups. The conflicts stemmed from the uncertainty of Ireland's political relationship with the UK and discrimination by Unionist groups. The Unionist community is overwhelmingly comprised of Protestant and/or British settlers who support political union between Great Britain and Ireland. The Nationalist community

[53] N O' Dochartaigh, *From Civil Rights to Armalites: Derry and the Birth of the Irish Troubles* (Cork University Press, Cork 1997) 8.

is comprised of traditionally Irish and/or Roman Catholic individuals who support Irish independence.

From the Norman Conquest in 1171 onwards, Irish nationals were marginalised by British settlers, who strived to control Ireland.[54] From the seventeenth century onward, a system of Plantation placed British settlers in land confiscated from Irish nationals. This gave the so called Protestant Ascendancy significant control over Ireland. Despite the settlers being vastly in the minority, the ownership of this confiscated land allowed them to enjoy social and political supremacy throughout Ireland. Through the control of the Irish Parliament, the Ascendancy enacted the Penal Laws between 1695 and 1727, which stripped the Catholic majority of its rights.[55]

In 1800 the *Union with Ireland Act* was passed and the Irish Parliament was abolished. The Act created the United Kingdom of Great Britain and Ireland, asserting that the two nations were to be 'united into one kingdom'.[56] Under this United Kingdom, agitation grew amongst Nationalist communities for Ireland to be ruled by its own government. The desire for home rule was opposed by the Unionist community and nowhere was this more strongly felt than in Ulster. Ulster industrialised and became the most prosperous province in the country, benefiting from a thriving import and export relationship with mainland Britain.[57] The industries of Ulster derived no income from the generally poorer southern provinces of Ireland, so Union with Britain was viewed as synonymous with prosperity. The issue of home rule continued to escalate and by the time of the Easter Rising in 1916, both the Nationalist and Unionist communities had formed private armies: the Irish Volunteers and the Ulster Volunteer Force respectively. Following the Irish War of Independence, mounted by the original Irish Republican Army (IRA) in 1919, some brand of separation from the UK was inevitable.

This came to fruition with the *Government of Ireland Act* 1920, which brought into force the 'Articles of Agreement for a Treaty Between Great Britain and Ireland' ('the Anglo-Irish Treaty'). This created the Irish Free State and divided the country in two. The division separated the six predominantly Protestant counties in the north (three counties short of the complete Ulster province) from the twenty-six predominantly Catholic counties in the south.[58] The whole of the country was included in the original Irish Free State, but the Northern counties exercised their right to opt out immediately, and as a result they remained part of the UK.

With this history in mind we can now focus our attention on Derry (or Londonderry) itself and consider the years preceding the Troubles and Bloody Sunday. In 1948, the new British Government enacted radical social legislation, which the Unionist Northern Irish Government implemented.[59]

---

[54] J Stevenson, *'We Wrecked the Place: Contemplating an End to the Northern Irish Troubles'* (The Free Press, New York 1996) 7.
[55] *Ibid.*, at 8.
[56] *Union with Ireland Act* 1800, s 1.
[57] Stevenson (n 48) 11.
[58] Stevenson (n 48) 13.
[59] Dochartaigh (n 47) xiv.

Part of this reform was the development of the welfare state. Among other things, the development of the welfare state caused a large expansion of public housing, which exacerbated the already tense relationship between the Nationalist and Unionist communities. Throughout the 1950s and 1960s, the newly established Northern Ireland Housing Trust began construction work on estates in Derry to account for its lack of accommodation. Creggan was one such estate, built in the 1950s, and housed a large number of Catholic families. Bogside was another, and became the epicentre for much violence during the Troubles. By 1961, Derry was 67% Catholic, but still under Unionist rule.[60] The Nationalist majority felt controlled and discriminated against by the Unionist minority, who restricted accommodation and redrew electoral boundaries to ensure Unionist governance. In 1965 the Northern Irish Government further aggravated Nationalists by declining to locate a new university in Derry; Nationalist MPs claimed this was to ensure Unionist control was maintained. As discrimination continued, Nationalist groups formed and participated in civil rights marches throughout late 1968 and early 1969.[61] These were often organised with or by the Northern Ireland Civil Rights Association (NICRA). If the beginning of the Troubles is able to be isolated at all, many agree that the civil rights march of 5 October 1968 marks the commencement of this period.

Indeed, it was NICRA who organised the march on 30 January 1972 – Bloody Sunday – in response to the internment programme instituted by the British government. This sought to arrest and intern paramilitary members without trial – the main targets being members of the Provisional IRA.[62] When the march took place the number of participants grew from 5,000 to around 10,000 as protestors moved along the planned course from the Creggan Estate to Guildhall Square.[63] British Army barricades were erected to prevent protesters reaching Guildhall Square. The NICRA lorry leading the march respected these barricades and turned onto Rossville Street, where a number of civil rights speeches were to be given. However, large numbers of protesters, many of whom had been permanently ahead of the NICRA lorry, approached the barricades on William Street and Rossville Street with stones and other missiles.[64] Soon after, three companies of the 1st Battalion, the Parachute Regiment were given orders by their Commanding Officer to launch an arrest operation to round up as many protesters as possible. The battalion moved under instruction, but the exact nature of the events that followed has for many years remained unclear. What is known is that 14 Catholic civil rights marchers were killed by members of the Parachute Regiment around Rossville Flats Courtyard and on Rossville Street itself: 13 died on site and one died months later from wounds suffered on site.[65] Six of those killed were only 17 years of age.[66]

---

[60] Ibid., at xvi.
[61] Ibid., at 19.
[62] Ibid., at 283.
[63] *Ibid.*
[64] E McCann and others, *Bloody Sunday in Derry: What Really Happened* (Brandon Book Publishers Ltd, Dingle 1992) 19.
[65] *Ibid.*, at 22.
[66] Lord Widgery, *Bloody Sunday: Lord Widgery's Report | 1972* (Uncovered Editions, TSO Publishing, London 2001) at 72.

The now discredited inquiry conducted by Lord Widgery, concluded that the actions of the Parachute Regiment were justified under Rule 13 of the Yellow Card (allowing soldiers to fire without warning against immediate threats).[67] The report, which was commissioned by Prime Minister Ted Heath, concluded that the soldiers had fired at rioters in response to individuals handling weapons and bombs. Widgery suspected at least six of those killed of providing aggravating fire.[68] He blamed the rioters for the deaths that occurred that day, explaining that if the illegal march had not been organised 'There would have been no deaths in Londonderry on 30th January'.[69]

However, on 15 June 2010 the Saville Inquiry Report was published. Commissioned originally by Tony Blair and entrusted to Lord Saville, the report took 12 years to complete, running to 5,000 pages over its 10 volumes. The 14 victims of Bloody Sunday were completely exonerated by the Saville Report, which concluded that (with one probable exception) none of the fatalities, or the similar number that were injured by gunfire, were armed with firearms or bombs of any description.[70] In fact, none of the victims were doing anything 'that could on any view justify their shooting'.[71] Saville found that IRA gunfire did provide the source of some confusion; however, he concluded that the shots that provoked the Parachute Regiment were in fact British Army gunfire and the events that followed were a result of a loss of control.[72] In addition, Saville reached conclusions regarding the evidence given to the Widgery Inquiry, explaining that a number of soldiers had given false accounts in order to justify their actions.[73]

### (ii) Explaining the Collective Apology for Bloody Sunday

David Cameron's apology was delivered after the Saville Inquiry was published. For the residents of Derry and the families of the victims, the publishing of the report and subsequent apology were long overdue. Copies of the erroneous Widgery report were torn to shreds by relatives of victims who watched the apology from Guildhall Square.[74] Speaking in the House of Commons, David Cameron declared that the events that took place on Bloody Sunday were both 'unjustified and unjustifiable'.[75] The Prime Minister went on to apologise on behalf of the Government, who he explained are ultimately responsible for the conduct of the armed forces, and on behalf of the country.[76] He explained that despite the difficult and dangerous circumstances

---

[67] *Ibid.*, at 87.
[68] *Ibid.*, at 72.
[69] *Ibid.*, at 97.
[70] Lord Saville's Bloody Sunday Inquiry – Full Report <http://www.bloody-sunday-inquiry.org> accessed 26 August 2010 – Vol 1, Chap 1, Para 3.70.
[71] *Ibid.,* Vol 1, Chap 1, Para 3.79.
[72] *Ibid.*
[73] Lord Saville (n 64 ) Vol 9, Chap 173, Para 173.134.
[74] BBC News, 'Bloody Sunday report published' <http://www.bbc.co.uk/news/10320609> accessed 24 August 2010.
[75] Daily Hansard 15 June 2010, Column 739 – <http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm100615/debtext/100615-0004.htm> accessed 28 August 2010.
[76] *Ibid.*, Column 740.

in which the armed forces operate, there was nothing equivocal or ambiguous in Lord Saville's conclusions – the actions of the Parachute Regiment on Bloody Sunday were, quite simply, wrong.[77]

If we recall the features of the moral apology set out by Kathleen Gill then this apology appears to satisfy all of them, with the exception of the commitment to refrain from similar acts in the future. However, this feature of the moral apology is not entirely necessary here since the actions of the Parachute Regiment were clearly mistaken. A commitment to refrain from similar acts in the future is therefore implicit in the apology given and the lack of any explicit formulation of such a commitment does not in any way detract from the effectiveness of the apology. As with Australian Prime Minister Kevin Rudd's apology, the feature that requires some explanation is the acceptance of responsibility.

For a number of reasons, the background to David Cameron's apology was rather different to that seen in Australia. For one, before Rudd's apology many non-indigenous Australians were strongly opposed to any proposals for accepting responsibility for the Stolen Generations. Many supported Prime Minister John Howard who refused to issue an apology. However, no such opposition was evident in the UK following Bloody Sunday. Secondly, the actions being apologised for by David Cameron were committed by the armed forces whom, as he acknowledged, are accountable to the government. As the current Prime Minister, he is ultimately responsible for the conduct of the armed forces. Therefore, if misconduct by the armed forces warrants the issue of an apology then, as Prime Minister, he is undoubtedly in the best position to issue it. This is slightly different from the situation in Australia, since what Kevin Rudd was seeking to apologise for was the treatment of Aboriginal people by individuals outside the sphere of governmental responsibility or accountability. Linked to this is a third difference, which is that the apology for Bloody Sunday was for a single event, rather than a whole sequence of treatment. David Cameron was simply apologising for the actions of the armed forces on a single day, whereas Kevin Rudd apologised for the treatment of the Aboriginal people throughout a generation. The effect of this is that unlike the situation with the Stolen Generations, we do not encounter any difficulty in finding the *actus reus* for the commission of the offence. What Cameron apologised for was a single event; therefore, consideration of this as a legitimate collective apology is directed towards the notion of privilege in founding national responsibility.

In applying this theory of privilege to Cameron's apology, we must remember Manne's distinction between collective guilt and historical shame. As British citizens we cannot feel guilty for what happened in Derry in January 1972, but we can feel shameful. It is this feeling of shame; along with the notion of privilege that gives David Cameron's apology legitimacy with regards to the citizens of the UK. If we, as British citizens, accept with pride the accomplishments of those who have contributed to the success of our country then we must also accept with shame other less favourable actions. If we can accept the brilliance of a courageous Winston Churchill then we must also

[77] Daily Hansard (n 69).

accept Britain's involvement in the abhorrent and degrading Slave Trade. It is the privilege of being able to accept the accomplishments of Churchill that means we can also accept responsibility for the shame that is brought by the Slave Trade. So if we are able to recognise and enjoy the successes of our armed forces in the numerous battles they have fought, then we must also accept the times when their actions have fallen below expected standards. This notion of privilege allows citizens of a nation to experience a sense of national responsibility, and therefore legitimately participate in the issuing of an apology. As with Australia, this explanation as to how British citizens can feel responsible for the actions of the Parachute Regiment does not mean that this is how David Cameron's apology actually functioned, or even how it should. Rather, the experience of national responsibility through privilege is simply an explanation as to how such apologies can be rationalised.

## The Apology And Amelioration of the Present

Prime Minister Kevin Rudd's apology was met with standing ovations and rapturous applause from Australians around the country. Similar scenes of triumph were evident in Derry on the day of David Cameron's apology. Having established how such apologies can function on behalf of nations, governments and individuals, we ought also to consider whether in reality they contribute to the process of reconciliation and the amelioration of the present. I will consider firstly the situation in Australia, then Northern Ireland.

For many Aboriginal Australians, the apology issued by Kevin Rudd was the overdue recognition of years of torment, and for many non-Aboriginal Australians it was a significant way in which they could express their sorrow for the past mistreatment. Returning to Kathleen Gill's formulation of the apology, we see that Kevin Rudd's apology included the first four requirements (incorporating privilege as a method of explaining national responsibility). The final aspect of a full apology is an expression of an intention to refrain from similar acts in the future. This is the deciding factor in many moral apologies, and helps to explain the mystery of the apology that Tavuchis felt. An apology, as Tavuchis notes, is nothing more than a speech act,[78] but it is the commitment to refrain from similar acts in the future that means an apology is more than a collection of words. Understood thus, the apology is a lens through which the harms of the past can be viewed from a perspective that allows all the parties to strive towards a common future.

While they can be powerful, apologies do not solve problems of social division and cultural degradation; we must understand that an apology alone is never enough. In order to function as a complex and effective form of justice, apologies must strive for mutual reconciliation and a common future. Kevin Rudd certainly acknowledged this in his apology, though only time will tell as to whether these goals are ever to be realised. Statistics relating to the Aboriginal population in Australia prior to Rudd's apology show that much has to be overcome before the apology can be viewed as truly successful. A

[78] Tavuchis (n 8).

statistical overview prepared by the Australian Human Rights Commission, collaborating data from the 2001 and 2006 censuses is very revealing.[79] For instance, of Aboriginals over 15 years old, 22% reported their health as fair or poor.[80] Furthermore, the life expectancy of the Aboriginal population between 1996 and 2001 was 59.4 for males and 64.8 for females. On average, this is 17 years less than non-indigenous Australians.[81] Excessive alcohol consumption is also a problem in many indigenous communities. The statistical overview revealed that the proportion of indigenous adults who drank alcohol at chronic high-risk levels increased from 12% in 2001 to 17% in 2004–05.[82]

While the apology in Australia was recognised by many as a cathartic release of social tension, these figures cannot be overlooked. The Aboriginal peoples have indubitably gained the rights that they deserve, but they are still not equal with non-indigenous Australians according to numerous social indicators. The full effectiveness of the apology as a mechanism for reconciliation in Australia will depend on the future treatment of the Aboriginal population, and an improvement in these statistics.

The situation in Northern Ireland provides a largely different background to that seen in Australia. We have already identified that what David Cameron was apologising for was one event. He was not apologising for Britain's forceful control of Ireland in the centuries that followed the Norman Conquest; similarly, he was not apologising for the Plantation system that took land from Irish nationals and gave it to British settlers. Nor was he apologising for the Penal Laws that stripped Irish nationals of their basic rights. What Cameron was apologising for was in fact one mistake, one loss of control, by a department of the British armed forces whilst they struggled to manage a situation of social and political unrest. This apology was certainly met with attentive ears and longing hearts: families who have had the shadow of the Widgery report hanging over them for decades felt vindicated by Cameron's words. No longer would their sons and brothers be viewed as disruptive rioters throwing nail bombs at courageous units of soldiers. Rather, they are now viewed more accurately as innocent civil rights marchers who were caught up in a terrifying and heated confrontation that should never have ended in the way it did. In this sense, David Cameron's apology has served as an effect mechanism for justice. As the Sinn Féin leader Gerry Adams explained to the BBC:

> Today is a wonderful day for Britain and the people of Ireland. Today can also be a wonderful day for people everywhere who want truth, who want peace and who want justice.[83]

---

[79] Australian Human Rights Commission, 'A statistical overview of Aboriginal and Torres Strait Islander peoples in Australia' http://www.hreoc.gov.au/social_justice/sj_report/sjreport08/downloads/appendix2.pdf.
[80] *Ibid.*, at 289.
[81] *Ibid.*
[82] *Ibid.*, at 295.
[83] BBC News, 'Bloody Sunday Report Published' <http://www.bbc.co.uk/news/10320609> accessed 24 August 2010.

However, despite the profound effect that this apology may have had on the families of the victims of Bloody Sunday, this apology has not resolved all of the issues in Northern Ireland that have stemmed from the Troubles. There remain so many questions relating to so many deaths that still remain unanswered. Those deaths will never be publicly acknowledged, let alone apologised for by a British Prime Minister. We were reminded in August 2010 that waves emanating from the Troubles will continue to rumble on in years to come. The Claudy bombing killed nine people in July 1972[84]. Details of the conspiracy to cover up the bombing came to light in August, revealing yet another source of controversy that originated in the Troubles. I raise this not to detract at all from the success of the apology issued by David Cameron, but simply as a reminder that Northern Ireland is a country that has suffered immensely in past decades and this apology addresses just one event. While David Cameron's apology is a welcome step, we must bear in mind that, as with Australia, there are questions that need to be answered and issues that need to be addressed before we can assert that this apology has been truly effective.

# Conclusion

There is no doubting that when issued by an appropriate individual, collective apologies can be extremely effective: the reactions in Australia and Northern Ireland demonstrate this. Despite the differing environments, it is possible to reach a similar conclusion in relation to both apologies; an apology is not the end. Rather, it is the beginning of a long journey towards reconciliation. Throughout this analysis, Kathleen Gill's requirements for a moral apology have provided us with a guide as to what is required for a successful apology. However, we have also recognised that even when these five ingredients are present, an apology itself can never be enough.

Through the course of this discussion we have considered the nature of the apology as a form of restorative justice, transitional justice and reconciliation. In doing so, we have reflected on the treatment of the Aboriginal people throughout Australia's turbulent history, focusing particularly on the programmes of absorption and assimilation. Following this, we considered the nature of the collective apology, and concluded that based on the privilege of accepting the past successes of their nation, Australians can legitimately feel responsible for the wrongs also committed. We then sought to apply this theory to the more recent apology issued in relation to Bloody Sunday. Finally, we explored the fact that apologies must be accompanied by additional factors in order to be fully effective.

Statistics for the next census in Australia will be particularly poignant, as they will demonstrate whether the quality of life has improved for the Aboriginal people in Australia, and whether the gap has begun to close between the indigenous and non-indigenous populations. Since Kevin Rudd's apology was

[84] *Ibid.*

accompanied by a commitment to change, surely it has proved, and will prove, an invaluable part of the reconciliation process in Australia. The apology issued by David Cameron has exonerated the victims of Bloody Sunday, and therefore acts as an extremely valuable part of the justice delivered by the Saville Inquiry.

But apologies must not, and cannot, exist in a vacuum; apologies cannot of themselves solve conflicts that have for decades ravaged nations, communities and families. In fact, it would be insensitive to say that anything can. In the words of Jacques Derrida: 'La justice reste à-venir'.[85] That is to say that justice remains and is yet to come – it is a veneer on the present. Justice is something that is continually strived for, not something we can attain; it is an entity that transcends the now in the mode of 'peut-être' – perhaps.[86] But despite the notion of justice being elusive and arguably unattainable, apologies can, and certainly do, serve as a valuable mechanism for achieving this veneer.

[85] J Derrida, *Acts of Religion* (Routledge, London 2002) at 256
[86] P Gehring, 'Force and "Mystical Foundation" of Law: How Jacques Derrida Addresses Legal Discourse' (2005) 6(1) *German Law Journal* 169, at 162

# Pure Economic Loss in Negligence: Has England got it wrong? Does Australia have it right?

*Marilena Stylianou*

The exclusionary rule regarding recovery for pure economic loss in negligence in England has been the subject of academic debate for a long time. The law of negligence in England has developed in such a way as to protect people in cases of physical harm or damage to property, but it does not generally allow for recovery when the loss is purely economic. There have been instances where such a recovery was possible, but these were mere exceptions to the rule. Australia on the other hand allows recovery when a range of factors indicate that a duty of care should be imposed on the defendant to prevent pure economic loss from being suffered by the plaintiff. This study examines the reasons why such recovery is not possible in England. It involves an account of the recent developments in the law in the light of the decision in *Customs & Excise Commissioners v Barclays Bank plc.*[1] It reaches two conclusions; that the decision per se was correct, but it provides little assistance as to future cases. An examination and comparison of the Australian position then follows, where it can be argued that Australia is in a slightly more advantageous position in this area because its system can more readily adapt and react to change. However, England has managed to reach correct conclusions in its case law by adopting a bright line exclusionary rule. It would be over simplistic to state that one jurisdiction's approach is correct and the other is wrong. The preferred approach lies somewhere in between the positions that the two jurisdictions have adopted.

## Introduction

Pure economic loss is loss that involves no damage to property or physical injury to a person.[2] Fleming has argued that recovery for pure economic loss 'has been and remains the most controversial area of torts'.[3] The issue of recovery for pure economic loss has troubled the judiciaries of many jurisdictions, which have have responded to this problem with different approaches. England has followed a bright line exclusionary

[1] [2006] UKHL 28
[2] Weir, T, *An Introduction to Tort Law*, (2nd edn, OUP, United Kingdom, 2006) 190
[3] Fleming, J.G, *The Law of Torts,* (9th edn, LBC Information Services, Sydney, 1998) 194

rule and refuses to grant recovery when the loss is purely economic. The general rule has its exceptions; the most notable being *Caparo v Dickman*[4] and *Hedley Byrne v Heller*.[5] Australia has taken a middle position, rejected the broad exclusionary rule[6] and viewing each case more open-mindedly.[7]

England has catered to all other categories of loss yet left recovery for pure economic loss in a stagnant state. What follows is an account of the historic development of the law in this area in England, an examination of the *Customs & Excise*[8] case and an account of where this case has left the law.

The similarities between the English and Australian jurisdictions allow a comparison between the development of pure economic loss doctrine. A comparably monumental case to *Customs & Excise*[9] is *Perre v Apand,*[10] not on the facts, but because of the change that the decision instigated. It is important to clarify that Australia has not always allowed recovery for pure economic loss; it had followed England for many years only diverging after the *Caltex*[11] ruling.

From the examination of the relevant case law, it can be argued that it is high time that England reviewed its exclusionary rule since at times it yields unfair results. Conversely, Australia should review it's adjudication process since there is no single route to a satisfactory outcome. Whilst England faces problems regarding the fairness of decisions , Australia faces problems regarding certainty and predictability.

The issue of indeterminacy of liability, the floodgates argument, and the possible exposure of public authorities to endless litigation are but a few reasons for England's exclusionary policy towards pure economic loss. Similar arguments were put forward by Australian courts for refusing to allow recovery for pure economic loss. However, Australian courts took a different route, considering in each case whether a judgment would create indeterminate liability,[12] yet not letting it determine the outcome of the case. Australia has adopted a wide range of factors on which to base a conclusion and thus achieves more balanced decisions.

The *Customs & Excise*[13] case, although decided correctly, gives judges wide discretion regarding liability for economic loss. The *Perre* [14] case leaves Australian law in no better a position. It allows for the consideration of a variety of issues, but does not provide one single legal test, which would

---

[4] [1932] AC 562 (HL)
[5] *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL)
[6] *Bryan v Maloney* (1995) 182 CLR 609 (High Court of Australia)
[7] *Fleming* (n 1)
[8] *Customs & Excise Commissioners v Barclays Bank plc.* [2006] UKHL 28
[9] *Customs & Excise* (n 7)
[10] *Perre v Apand Pty Ltd* (1999) 198 CLR 180 (High Court of Australia)
[11] *Caltex Oil (Australian) Pty Ltd v The Dredge 'Willemstad'* (1976) 136 CLR 529 (High Court of Australia)
[12]Examples would include: *Perre v Apand* (1999) 198 CLR 180 and *Caltex Oil (Australian) Pty Ltd v The Dredge 'Willemstad'* (1976) 136 CLR 529
[13]*Customs & Excise* (n.7)
[14] *Perre v Apand* (n 9)

achieve certainty. Each approach has its downside yet both jurisdictions have managed to produce sound outcomes based on their legal principles and reasoning.

## The Historical Development

Is the non-recovery of unintentionally inflicted pure economic loss an historical accident?

The exclusionary rule applies to economic loss which is caused by negligent behaviour, not intentional wrongdoing.[15] Pure economic loss caused by intentional wrongdoing is recoverable. In any successful claim, the claimant must persuade the court that the defendant owed him a duty to protect him against such a loss.[16] This is not an easy task since the courts are less willing to find that such a duty exists in this type of case compared to those involving damage to property or physical injury.[17]

The case of *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd*[18] is widely cited to support this view,[19] however the law on the issue developed long before *Spartan Steel.*

During the late 16th and early 17th centuries recovery was allowed,[20] and it was not until the 19th century that the prohibition emerged. The reasons underpinning the change have no part to play in the modern world, and the arguments of this period 'have at the moment little appeal'.[21] The prohibition was developed in the 19th and early 20th centuries, notably in the 1875 case of *Cattle v Stockholm Waterworks.*[22] Important cases that followed, including *Simpson & Co. v Thomson*[23] and *Anglo-Algerian Steamship Co. Ltd v The Houlder Line Ltd*,[24] were also approached in the same manner and decided in the same way. Roby Bernstein's[25] much supported observation[26] states that

[15] Bussani, M and Palmer, V,V, 'The Notion of Pure Economic Loss and its Setting' in Bussani, M and Palmer V,V, (ed), *Pure Economic Loss in Europe,* (Cambridge University Press, Cambridge 2003) 9

[16] Murphy, J, *Street on Torts*, (12th edn OUP, United States, 2006) 81

[17] *Anglian Water Services Ltd v Crawshaw Robbins Ltd* [2001] BLR 173 and Stapleton, J. 'Duty of Care: Peripheral Parties and alternative Opportunities for Deterrence' (1995) 111 *Law Quarterly Review* 301

[18] *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd* [1972] QB 27 (CA)

[19] W. V. H. Rogers, *Winfield and Jolowicz on Tort* (15th edn ,Sweet & Maxwell, London, 1998) 134; K. M. Stanton, *The Modern Law Tort (Sweet & Maxwell, London, 1994)* 332, 353-4; M. Furmston (ed.), *The Law of Tort Policies and Trends in Liability for Damage to Property and Economic Loss* (Duckworth, London, 1986)

[20] Gordley, J, *Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment,* 1st ed. (Oxford University Press, United States, 2007) 263

[21] Ibid 263

[22] *Cattle v Stockholm Waterworks Co*. (1875) LR 10 QB 453

[23] *Simpson & Co. v Thomson* [1877] 3 AC 279 (HL)

[24] *Anglo-Algerian Steamship Co. Ltd v The Houlder Line, Ltd* [1908] 1 KB 659

[25] R. Bernstein, *Economic Loss* (2nd edn, 1998) 11

[26] John Frederick Clerk and WHB Lindsell, *The Law of Torts* (Wyatt Paine, ed., 3rd edn, London, 1904) 11 & C. G. Addison's treatise on Torts; Charles Greenstreet Addison, *A treatise on the Law of Wrongs and their Remedies* (8th edn, William E. Gordon and Walter Hussey Griffith, eds., London, 1906) viii

the rationale underlying these cases, forming the bedrock of the current system, was not based on a exclusion of recovery for economic loss, but on the fact that the damage was too remote. Furthermore, if recovery were allowed, the number of potential plaintiffs would multiply.[27]

In another series of cases the courts ruled that the determining factor was the type of harm suffered by the plaintiff rather than remoteness.[28] However, it has been observed that courts' rulings were not clear as to whether the reason for the non-recovery was solely that the loss was purely economic.[29]

Over this lengthy period, there were two instances in which cracks appeared but were plastered over. One is the infamous case of *Donoghue v Stevenson,*[30] in which Lord Atkin developed the neighbour principle recognising that 'one must take reasonable care to avoid acts or commissions which he/she can reasonably foresee would be likely to injure their neighbour'.[31] The other case was *Hedley Byrne v Heller*[32] which reversed the result of *Derry v Peek*.[33] In *Hedley*,[34] the House of Lords recognised that a party may owe another party a duty of care in cases where the former has reasonably relied on the skill, knowledge or ability of the latter and the latter had performed the act negligently.[35] This concept had earlier been rejected in *Candler v Crane Christmas & Co*;[36] here negligent misstatements that resulted in pure economic loss became recoverable.[37] Later however, the courts confined their decisions in the two cases to situations dealing with negligently manufactured goods and negligently provided information. Critically, *Hedley Byrne* has not offered formulae which have stood the test of time.[38] The court used the 'special relationship' notion and the 'relationship akin to contract' in stating its conclusion, both of which offer little guidance as to their reasoning.

Importantly, two more cases have shaped English law in this field; *Smith v Eric Bush*[39] and *Caparo Industries plc v Dickman.*[40] Lord Templeman[41] believed that the relationship between the parties was capable of coming under the scope of Lord Devlin's criterion of being akin to contract.[42] Lord

---

[27] This is the floodgates argument which is examined below
[28] *Elliott Steam Ting Co. Ltd v Shipping Controller* [1922]1 KB 127, 140, *Best v Samuel Fox & Co Ltd* [1952] AC 716 & *Weller & Co v Foot and Mouth Disease Research Institute* [1966] QB 569
[29] P.S. Atiyah, 'Negligence and Economic Loss' *Law Quarterly Review* 83 (1967) 248, 248
[30] *Donoghue v Stevenson* [1932] AC 562 (HL)
[31] Ibid 580
[32] *Hedley Byrne* (n 3)
[33] (1889) LR 14 App Cas 337
[34] *Hedley Byrne* (n 3)
[35] Ibid, 503 (Lord Morris)
[36] *Candler v Crane Christmas & Co* [1951] 2 KB 164
[37] D, Howarth, 'Economic Loss in England: the Search for Coherence' in Eustathios K. Banakas (ed.), *Civil Liability for Pure Economic Loss*, (1994) 16 *United Kingdom Comparative Law Series,* 29
[38] Stanton, K, 'Professional Negligence: Duty of Care Methodology in the Twenty-First Century' (2006) 22(3) *Professional Negligence* 134-150, 134
[39] *Smith v Eric Bush* [1990] 1 AC 831 (HL)
[40] *Caparo v Dickman* (n 2)
[41] Ibid, 846-54
[42] *Hedley Byrne* (n 3) 524-5

Devlin had not suggested that nearness to contract was essential for the imposition of a duty of care. This misconception has been clarified by pointing out that nearness to contract sufficed (but was not essential) for a duty of care to arise.[43] Lord Griffith suggested in *Smith*[44] that a duty arises when the defendant either expressly or implicitly undertakes responsibility to the claimant for advice or information but also where the relationship under consideration is such that it is just for the defendant to be under such a responsibility.[45] This was supported by Lord Millet's opinion in *Al Saudi Banque*[46] case, who suggested that either the one or the other suffices.

Prior to *Caparo,*[47] which provided the current three-stage test used to determine whether a duty of care exists, a two-stage test existed, established by Lord Wilberforce in *Anns v Merton London Borough Council*.[48] The test was used for 23 years until 1990 when the case was overruled by *Murphy v Brentwood*.[49] Between 1964, when *Hedley Byrne* was decided, and the 1990s, when the decision in *Caparo* was delivered, the principles of *Hedley* were extended and used in an avalanche of cases.[50] Lord Oliver in *Caparo* described *Smith v Eric Bush* as the outer limit of the *Hedley Byrne* extension. Both the *Caparo* test and the formulations of Lord Devlin in *Hedley* formed part of the *ratio decidendi* in *Customs & Excise Commissioners v Barclays Bank plc*.[51] The three-stage test in *Caparo* has not gone unnoticed and without criticism. Markesinis suggested that the test marks only the start of the analysis, not the end of it,[52] and it has been described as analytically obscure.[53] Even though the *Caparo* test has stood the test of time, it no longer fits the needs of modern tort law. Tort law requires certainty and predictability and the second part of the test, concerning the proximity between parties, is too vague. The courts have not managed to find an exact definition as to what amounts to a proximate relationship.[54]

Through three decisions of the House of Lords one can observe how far the *Hedley Byrne* principle had been stretched. First, in *Henderson v Merrett*,[55] the court established the possibility of concurrent liability in both tort and contract. Second, in *White v Jones*[56] the daughters of a testator were able to successfully sue the solicitor who failed to act upon the instructions of the testator. Recovery was made possible in this case even though there was no contract between them (the contract was between the testator and the

[43] Steele, J. *Tort Law: Text, Cases and Material,* (1st edn, OUP, United Kingdom, 2007) 371
[44] *Smith* v *Eric* (n 43)
[45] Ibid at 865
[46] *Al Saudi Banque v Clark Pixley* [1989] 3 All ER 361, 367
[47] *Caparo* (n 2)
[48] [1978] AC 728, 753 (HL)
[49] *Murphy v Brentwood District Council* [1990] 2 All ER 908 (HL)
[50] Murphy, J, *Street on Torts*, (12th edn, OUP, United Kingdom, 2006) 84
[51] *Customs & Excise* (n 7)
[52] Deakin, S and Johnston, A and Markesinis, B, *Markesinis and Deakin's Tort Law* (6th edn, OUP, United States, 2008) 131
[53] N. J. Mullany, 'Proximity, Policy and Procrastination' [1992] 9 *Australian Bar Review* 80
[54] The attempts to define a proximate relationship can be identified in *Smith v Eric Bush* [1990] 1 AC 831, *Caparo v Dickman Industries Plc* [1990] 2 AC 605 and in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465. These are only a few examples.
[55] *Henderson v Merrett Syndicates Ltd* [1994] 2 AC 145
[56] [1995] 2 AC 207

solicitor), there was no fiduciary relationship, and the loss was purely economic. This case was followed in *Gorham v British Telecommunications plc*.[57] The third case is *Williams v Natural Life Health Foods Ltd*[58] which established that when a case falls under the scope of the extended *Hedley Byrne* approach, it is unnecessary to investigate whether it is fair, just and reasonable to impose liability.[59] The decision in *Williams* cannot really be reconciled with the reasoning adopted in *White v Jones*.[60] The reason for this difficulty rests on the fact that Lord Steyn in *Williams*[61] ruled that in order for the director to be held liable there had to be a special relationship between the plaintiff and the tortfeasor. Mere existence of a special relationship with the principal could not suffice.[62] What existed in *Jones* was a special relationship with the principal.

The position prior to the *Customs & Excise*[63] case has been that as a general rule recovery for pure economic loss was precluded unless in exceptional cases. It has not been clear however what distinguished some cases from others and why in some cases recovery for pure economic loss was allowed.

## Arguments forwarded for the non-recovery rule?

(i) The Floodgates argument

The most commonly cited argument is the floodgates argument, which is also the most persuasive, and can be sub-divided into three arguments. First, by allowing recovery in this area, an avalanche of lawsuits would appear before courts, overwhelming them and creating indeterminate liability.[64] The courts would not be able to efficiently and effectively deal with this, possibly leading to the denial of justice on the unacceptable grounds of an increased workload.[65] This is certainly not the right way to approach the indeterminacy of liability argument; the role of the courts is to serve justice and whilst efficiency is an important factor in the practical deliverance of justice, it should not become its primary consideration.

Similarly, widespread liability would place potential defendants in a situation which would be wholly disproportionate to the loss they had created: 'where would it lead if everyone could be sued...!'.[66] Loss resulting from personal injury or damage to property can be better handled and would not generally create an excessive number of actions. Cardozo J emphasized this problem by

[57] [2000] 1 WLR 2082
[58] [1998] 1 WLR 830
[59] [1998] 2 All ER 577, 581
[60] [1995] 2 AC 207
[61] *Williams* (n 71)
[62] [1998] 1 WLR 835
[63] *Customs & Excise* (n 7)
[64] Bussani, M and Palmer, V,V, 'The Notion of Pure Economic Loss and its Setting' in Bussani, M and Palmer V,V, (ed), *Pure Economic Loss in Europe,* (Cambridge University Press, Cambridge 2003) 16
[65] Grubb, A, *The Law of Tort* (Butterworths Lexis-Nexis, London, 2000) 528
[66] Rudolf von Jhering: *Jherings Jahrbücher für die Dogmatik des Bürgerlichen Rechts*, vol. 4 (Jena,1861) 12-13

suggesting that there should not be any liability where it would result in liability 'in an indeterminate amount for an indeterminate time to an indeterminate class'.[67] This line of thought was faced with hostility by both Stevens[68] and Stapleton.[69] Stevens suggests this argument cannot withstand scrutiny since not all recoveries would result in an indeterminate number of claimants.[70] Many cases are merely between two companies or individuals and these disputes will not result in an avalanche of claimants. Stapleton asserts that 'neither the volume nor the uncertainty of the number of claimants justifies an exclusionary rule'.[71] The number of claimants cannot be the determinative reason for whether claimants can recover in cases of pure economic loss. Therefore, the solution does not lie in Cardozo's argument in denying recovery. The law needs to develop better methods of approaching economic loss. Denying recovery is not progressive and the exclusionary rule cannot be justified.

The argument's third limb is to claim that recovery for pure economic loss exhibits merely a modern trend towards increasing tort liability,[72] and as with all modern trends, as we are unaware of the potential harm that they might cause, claims must be kept under control.[73]

(ii) The Philosophical Argument

Philosophically, in law human beings are considered more valuable than property, which in turn is considered more valuable than money. Compensation must be made in reference to this ranking.[74] Hence, the primary aim of compensation is for personal injury, then for damage to property and then for pure economic loss. This argument is persuasive in accepting the finite limit of the legal system's ability to protect interests and recognising that granting protection to claimants of pure economic loss would adversely affect the more important categories. However, as with Grubb's earlier criticism,[75] this argument is unacceptable as a justification for the exclusionary rule. A system should function in such a manner to protect all of the interests of its members be they for personal injury or pure economic loss.

(iii) The Historical Accident Argument

[67] *Ultramares Corporation v Touche* (1930) 255 NY 170
[68] Stevens, R, *Torts and Rights,* (1st edn, OUP, Oxford, 2009)
[69] Stapleton, J, 'Duty of Care Factors: a Selection from Judicial Menus' in Cane and Stapleton (eds) *Essays in Celebration of John Fleming* (1998)
[70] *Stevens* (n 80) 20
[71] *Stapleton* (n 81) 59,66,76
[72] Bussani, M and Palmer, V,V, 'The Notion of Pure Economic Loss and its Setting' in Bussani, M and Palmer V,V, (ed), *Pure Economic Loss in Europe,* (Cambridge University Press, Cambridge, 2003) 18
[73] Ibid
[74] *The Aliakmon* [1985] 2 All ER 44, 73 (Lord Goff)
[75] Grubb, A, *The Law of Tort* (Butterworths Lexis-Nexis, London, 2000) 528

Gordley suggests that the non-recovery for pure economic loss is merely an historical accident,[76] a view which was reinforced by Kötz, who believed that the primary purpose of the law in England has always been to provide protection against harm to physical property and personal injuries.[77] That economic loss was left out of historical development for at least two centuries is evidenced by the predominance of recovery for physical injury and personal property.[78] Before *Hedley Byrne,* the question was whether liability should be imposed for negligent misstatements, and not whether there 'could be liability for purely economic loss.'[79] The change emerged in the two cases that followed *Hedley Byrne; Weller & Co v Foot and Mouth Disease Research Institute* and *Spartan Steel and Alloys Ltd v Martin (Contractors) Ltd & Co.*

(iv) Other Arguments

Edelman and Davies[80] believe that the protection of financial interests and insuring against financial losses belongs under contract law rather than tort law. Liability for every type of financial loss would undermine commercial certainty. The issue of incrementalism was also raised in order to explain the unwillingness of the courts to identify a duty of care.[81] This argument suggests that the courts should confine themselves to incremental change within existing categories rather than a sudden expansion of liability.[82] There is a reluctance of the courts to interfere with the principles of negligence in cases where the contract framework behind the economic loss provides a balanced answer that would be disrupted by applying tort principles.[83] Such arguments do not suffice to deny recovery for pure economic loss; rather, they are mere excuses for the unwillingness of the courts to impose liability.

## The proceedings in *Customs & Excise Commissioners v Barclays Bank plc*[84]

The Customs & Excise Commissioners had been seeking VAT payments of £2.3 million and £3.9 million from Brightstar Systems Ltd and Doveblue Ltd respectively. They managed to obtain 'freezing orders' against those companies, which they served against the defendant bank. The purpose of the freezing orders was to prevent the companies from removing funds from their accounts, in order to enable the Commissioners to recover the sums owed. The

[76] J, Gordley, 'The Rules Against Recovery in Negligence for Pure Economic Loss: An Historical Accident' in Bussani, M and Palmer V,V, (ed), *Pure Economic Loss in Europe,* (Cambridge University Press, Cambridge 2003) 46
[77] H. Kötz 'Economic Loss in Tort and Contract' (1994) 58 *Rabels Zeitschrift fur auslandisches und internationales Privatrecht* 428
[78] Bussani M and Palmer, V,V (n 84) 23
[79] Ibbetson, D. J. '*A Historical Introduction to the Law of Obligations*' (1st edn, OUP, United Kingdom, 1999) 194-195
[80] Edelman, J and Davies, J, 'Torts & Equitable Wrongs' in Burrows, *Oxford Principles of English Law: English Private Law* (2nd edn, OUP, Oxford, 2007) 1239
[81] *Sutherland Shire County v Heyman* (1985) 60 ALR 1, [43-44] (Brennan J)
[82] Ibid
[83] Carty, H, *An Analysis of the Economic Torts,* (1st edn, OUP, United Kingdom, 2001) 242
[84] *Customs & Excise* (n 7)

defendant bank, due to an operational error, failed to prevent the companies from withdrawing money from their frozen accounts. The failure was classified as negligent. The Commissioners had initiated separate proceedings against the companies for the recovery of the money owed but did not manage to recover the full sum. They thus brought an action against the defendant bank in order to recover the shortfall on the basis that the bank has breached a duty of care owed to them, viz., to follow the orders and freeze the accounts. They also argued that if Barclays had not breached that duty, the claimants would have recovered all the VAT that they were owed.

Commercial Court[85]

Colman J was the judge at first instance. His arguments were persuasive and his methodology was clear and elegant.[86] He stated that 'assumption of responsibility' was not always a condition necessary to give rise to a duty of care in cases of economic loss. He went on to suggest that the test for establishing whether a duty of care had been assumed was an objective one. To impose a duty of care, it was not a prerequisite that a relationship akin to contract should exist.[87] Such a relationship between the parties was too oblique or indirect in order for such an assumption of responsibility to arise.[88]

When no relationship 'akin to contract' exists, then as per *Hedley* we arrive at a void and the *Caparo* three stage test is then used in order to fill the lacuna. There was no relationship 'akin to contract' in the case before him nor could he infer an assumption of responsibility based on precedent from two earlier authorities.[89] A special feature of conduct was essential according to this line of cases. A special feature of conduct is some behavior that would point towards the voluntary assumption of responsibility by one of the parties, yet no positive act by the defendants that might imply that they had crossed the line and assumed responsibility existed. Without such an act there is no 'proximity' and it would not be 'fair, just, and reasonable' to impose liability. The judge reached a conclusion in line with the later views of the House of Lords.[90] He could not impose liability on the defendant bank.

An assumption of responsibility according to Colman J could either be inferred from the nature of the relationship between the parties,[91] or in the absence thereof, from words, conduct or circumstances[92] that would indicate as such.[93] The only move that the defendants had made was to write a letter acknowledging the receipt of the freezing orders. This was received by the claimants after the withdrawal had been made. Even if this letter had

[85] [2004] EWHC 122 (Comm), [2004] 1 WLR 2027
[86] Mitchell, C, & P, 'Negligence Liability for Pure Economic Loss' (2005) 121 *Law Quarterly Review* 194-200
[87] [2004] EWHC 122, [51] (Colman J)
[88] Ibid
[89] *Connolly-Martin v Davis* [1999] PNLR 826; *Welsh v CC of Merseyside Police* [1993] 1 All ER 692
[90] [2004] 1 WLR 2027, [81] (Colman J)
[91] *Henderson* (n 66)
[92] *Williams* (n 71)
[93] Ibid

amounted to an assumption of responsibility, the assumption came too late accordingly Lord Bingham in the House of Lords attached no importance to the letter.[94]

Court of Appeal[95]

The Court of Appeal reversed the decision of the Commercial Court and found in favour of the Commissioners. Longmore LJ decided the case by applying the threefold test of *Caparo* which requires that the damage must be foreseeable, the relationship between the parties must be one of proximity or neighbourhood, and it must be fair, just and reasonable to impose liability.[96] He believed that the test was satisfied and that the bank should be liable. His unconvincing reasoning led to an assertion that the test had been satisfied and that the bank was liable.[97]

On the issue of 'proximity' between the parties he equated proximity with remoteness.[98] He pointed out that the incremental approach was a separate or a 'third' approach for finding out whether a duty of care was owed, which has been criticized as erroneous.[99] He drew an analogy with the case *Z Ltd v A-Z*,[100] but this was a tenuous link, since the case did not involve negligent misstatement or negligent services offered to a claimant. The case did not suggest that there was an assumption of responsibility, but because earlier in his analysis he had ruled that the various tests 'should' produce the same result, he concluded that an assumption of responsibility should be 'deemed'.[101]

This result was surprising and commentators have argued the decision should be classified *sui generis*.[102] Further criticism of the decision points out that the judge's methodology is bound to create confusion and incoherence in the legal system.[103] Indeed, if the case had only reached the Court of Appeal then there would be widespread confusion since the judges equated proximity with remoteness; these are two completely different criteria to consider when examining whether a particular claimant can recover. However, the potential confusion caused by the Court of Appeal was rectified when the case was heard by the House of Lords.

---

[94] *Customs & Excise* (n 7), [2006] 3 WLR 1, [3] (Lord Bingham)
[95] [2004] EWCA Civ 1555, [2005] 1 WLR 2082
[96] [2005] 1 WLR 2082, 2090, [30] (Longman LJ)
[97] He points out towards one approach at [46] of the case and then rejects this approach in the next sentence. He comments that a duty was imposed when the freezing order was served and then he continues that no such duty exists in *Customs & Excise* case even though the freezing order had been served.
[98] [2005] 1 WLR 2082, 2090, [30] (Longman LJ)
[99] Steele, J. *Tort Law: Text, Cases and Material,* (1st edn, OUP, United Kingdom, 2007) 392
[100] [1982] QB 558
[101] *Steele* (n 116) 393
[102] McBride, N, and Bagshaw, R, *Tort Law,* (3rd edn, Pearson Education Limited, London, 2008) 127
[103] Mitchell, C, & P, 'Negligence Liability for Pure Economic Loss' (2005) 121 *Law Quarterly Review* 194-200

House of Lords:[104] Considerations and Conclusions

The House of Lords rightly restored the decision of Colman J and the bank was not held liable since no duty of care was owed. Lord Bingham, Lord Hoffmann, Lord Rodger, Lord Walker, and Lord Mance all approached the case differently, but the decision was nonetheless unanimous. The court employed three tests in deciding the case: the voluntary assumption of responsibility test, the three-fold *Caparo* test, and the incremental test. The last test was not welcome by Lord Bingham[105] as he believed that it was of 'little value as a test in itself, and...only helpful when used in combination with other tests'.[106]

*(i) Voluntary Assumption of Responsibility*

The first question is whether there has been a voluntary assumption of responsibility. If established, this might suffice to make it unnecessary to consider policy issues. Lord Bingham identified a situation where such duty would be assumed, as a relationship which has 'all the indicia of contract, save consideration'.[107] *Hedley*[108] would be such a case if it had not included the disclaimer. Lord Hoffman[109] and Lord Walker[110] treated the assumption of responsibility as an aspect of proximity. If the way they treated the assumption of responsibility is correct, this creates further problems with their views; the assumption of responsibility becomes part of the three stage test making it necessary to consider policy issues.

The doctrine of reliance goes hand in hand with the voluntary assumption of responsibility. However, it can safely be discarded because of the different meanings that can be attributed to it. Both Stanton[111] and Barker[112] have commented against it, and expressed their concerns about its continuing use as a second limb to the *Hedley Byrne* test.

Analysing the facts of the case, there was no way in which an assumption of responsibility could be established. As Colman J in the Commercial Court suggested, a degree of voluntariness was essential, yet it was absent here.[113] The bank was obliged to abide by the freezing orders since failure to do so could result in the bank being held liable for contempt of court. It has been argued that it would be contradictory for the involuntary receipt of a court

[104] *Customs & Excise* (n 7)
[105] Ibid, [2006] 3 WLR 1,7 [7]
[106] Gee, S, 'The Remedies Carried by a Freezing Injunction' (2006) 122 *Law Quarterly Review* 535-542, 536
[107] *Customs & Excise* (n 122) 4, [4]
[108] *Hedley Byrne* (n3)
[109] Ibid, 14, [33]
[110] Ibid, 25, [73]
[111] Stanton, K, 'Professional Negligence: Duty of Care Methodology in the Twenty-First Century' (2006) 22(3) *Professional Negligence* 134-150,135
[112] Barker, K, 'Unreliable Assumptions in the Modern Law of Negligence' (1993) 109 *Law Quarterly Review* 461
[113] [2004] 1 WLR 2027, [29] (Colman J)

order to establish a voluntary assumption of responsibility.[114] This is a plausible argument; the core aspect of a voluntary assumption of responsibility is the element of voluntariness, and by imposing this principle on an involuntary receipt of a court order the court would undermine the notion on which the principle is based.

*(ii) The Caparo Test and the Scope of the Duty of Care*

Even if no assumption of responsibility could be established, the defendants may still be held liable for owing a duty of care, and hence it is necessary to apply the *Caparo* test. It would therefore be inaccurate to suggest that the various tests arrive at the same result as Longmore LJ claimed in the Court of Appeal.[115] The *Caparo* test encompasses the neighbour principle of *Donoghue v Stevenson*[116] and the two stage test of *Anns v Merton*.[117] The problem with this test is that it does not provide a clear methodology leaving a wide discretion to the judges. The Supreme Court is currently deciding cases in an *ad hoc* manner based on their perception of the best result rather following settled law. This is evidenced by their reasoning in two decisions that antedated *Customs & Excise*:[118] *Arthur JS Hall & Co v Simons*[119] and *D v East Berkshire Community Health NHS Trust*.[120] This judicial creativity has a downside in that it operates at the expense of certainty. Deciding a case upon its own merits provides little assistance as to how future cases are to be decided when considering the doctrine of precedent.

When considering the policy issues involved concerning whether a duty should be imposed, Lord Bingham pointed out that it would be unfair to expose the bank to liability on being notified of an order that it was not given any opportunity to contest.[121] Lord Rodger made a very important comment, viz., that the Commissioners had at no point relied on the defendants to comply with the orders.[122] Huang supports the decision of the House of Lords, since if a duty of care were assumed in this case then any other involuntary third party could in the future be liable for larger sums even for trivial fault.[123] From the standpoint of the courts they had to decide the case bearing in mind the implications of the decision as to future cases. However, Huang is not entirely right to agree with the House of Lords as the Court by doing so might sacrifice fairness. Decisions should not be made on policy considerations and potential floodgates arguments. Judges should decide cases based on the facts in front of them not as to what potential issues might arise.

---

[114] Stiggelbout, M, '"I'm banking on you"- Rethinking Reliance' (2008) *Lloyd's Maritime and Commercial Law Quarterly* 258-264, 259
[115] [2005] 1 WLR 2082, 2088, [25] (Longmore LJ)
[116] *Donoghue v Stevenson* (n 33)
[117] *Anns* (n 52)
[118] *Customs & Excise* (n 7)
[119] [2002] 1 AC 615
[120] [2005] UKHL 23
[121] *Customs & Excise Commissioners v Barclays Bank plc* [2006] 3 WLR 1, 23
[122] [2006] UKHL 28, [2007] 1 AC 181, 212, [81] (Lord Rodger)
[123] Huang. R, 'The House of Lords Concludes that Bank Owes No Duty of Care to the Beneficiary of Freezing Orders: Customs and Excise Commissioners v Barclays Bank plc (2007) 22.3 *Banking & Finance Law Review* 449-457, 452

It would be unfair to impose a duty on any third party (in this case the the bank) when the defendant is under no such duty.[124] The law in the economic loss field involves a mutuality of obligations when imposing liability. This can be in the form of an understanding or conduct that the parties have agreed either expressly or impliedly. There was no such understanding or conduct in the *Customs & Excise*[125] case that could imply that the bank was under an obligation, with the Commissioners remaining under no obligations. Lord Bingham labelled the imposition of such a duty as strange and anomalous. If such a duty were imposed, indeterminate liability on the side of the bank would be created.[126] Supporting this, Lord Mance stressed that the bank's exposure to this type of risk was not necessary to maintain standards of care.[127]

Accordingly, Lord Hoffman accurately suggested that as no duty of care arises out of the freezing orders themselves,[128] they therefore do not provide a claimant with any security. In the case of the insolvency of a defendant, a claimant who has a freezing order is in the same position as any other unsecured creditor.[129] In his judgement he ruled that the law does not impose liability for pure omissions and added that one cannot generate a common law duty of care from an order of the court.[130] The law rightly adopts this position since many people otherwise would be held liable based on an assumption of responsibility attached on the freezing order. Whilst in this case the imposition of a duty would be wrong, the general approach of deciding cases based on the indeterminacy of liability is still erroneous.

## Concluding Remarks

The case has improved our understanding of the tangled relationship between the various tests. The incremental approach was not discussed in isolation because the judges confined themselves by stating that there was no assumption of responsibility, and no duty of care could be established because that would not be analogous to or a logical extension of any previous development of the law.[131] However, the result of the decision means it is upon the courts to work out what kind of remedies should be imposed in cases of carelessness in dealing with freezing orders. There is the 'remedy' of a defendant being held in contempt of the court in case of failure to act in accordance with a freezing order. However, the lack of rules in cases of carelessness is subject to criticism.[132] Certainty rather than judicial creativity is required in these situations and imposing liability would make banks and potential defendants more cautious when dealing with the freezing orders.

---

[124] Capper, D, 'No Tort Liability for Breaching Freezing Orders' (2006) 65(3) *Cambridge Law Journal* 484-486, 485
[125] *Customs & Excise* (n 7)
[126] Ibid at [18]
[127] Ibid at [111]
[128] *Customs & Excise* [2007] 1 AC 181,207, [60] [Lord Hoffman]
[129] Cheyney, E, 'Do Banks Risk Being Left Out in the Cold by Breached Freezing Orders?' (2006) 21(11) *Journal of International Banking Law and Regulation* 672-675, 672
[130] *Customs & Excise Commissioners v Barclays Bank plc* [2006] 3 WLR 1, 39
[131] Ibid, [113] (Lord Bingham)
[132] *Gee* (n 123) 541

There are potential problems with the outcome of the case.[133] Even though the test that the judges had employed yielded the correct result, it did not create a coherent approach to be used by the courts in future. There should therefore be a combined test of the 'voluntary assumption of responsibility' by the defendant and the 'reasonable reliance' by the claimant.[134] This is a progressive and novel idea, as the test that is used by the courts is difficult to comprehend and does not yield coherent results as the following cases show. The complete abandonment of the combined test would be a step forward; a new test including the needs of the commercial world would better suit the situation.

## *Customs & Excise Commissioners v Barclays Bank plc:* the Aftermath

In the cases that follow, *Custom & Excise* was discussed and applied, the Court of Appeal also employed the same reasoning and approach. In *Calvert v William Hill Credit Ltd*[135] it was held that no duty of care was owed to a gambler from a telephone bookmaker who negligently failed to implement an agreement to close the former's account to prevent him from placing telephone bets. The reasoning focused on the issue of indeterminate liability, previously discussed in *Customs & Excise*, since every bookmaker could be held liable for huge amounts of money in analogous situations. It was the correct outcome, however the causation analysis used in the case can be criticised and would have been better if based on the 'judge's unchallenged findings of fact.'[136] The question troubling the judges was whether, had it not been for the failure of William Hill to prevent the Calvert from gambling, he would have lost his money in the same way. This answer can be answered in the affirmative since if Calvert were not gambling with William Hill, , he would certainly gamble elsewhere.

In *MAN Nutzfahrzeuge AG v Freightliner Limited*[137] the issue arose as to whether Ernst & Young owed a duty of care towards Freightliner in the audit of the accounts of ERF, a truck manufacturer. But for the negligence of the auditor the manipulation of the accounts would have been discovered. Following *Customs and Excise*, the Court of Appeal could not impose such a duty on the auditors, since they had not voluntarily accepted such a duty of care beyond the duty of care the auditors owe to the company they audit,[138] and thus the duty could not be extended to the use of the audited accounts created by a dishonest employee.[139]

---

[133] Barker, K, 'Wielding Occam's Razor: Pruning Strategies for Economic Loss' (2006) 26(2) *Oxford Journal of Legal Studies* 289-302
[134] Ibid, 296
[135] [2008] EWCA Civ 1427
[136] Morgan, J, 'Causation and the Compulsive Gambler' *Cambridge Law Journal* (2009) 68(2) 268, 268
[137] [2007] EWCA Civ 910
[138] *MAN Nutzfahrzeuge AG -v Freightliner Limited* [2007] EWCA Civ 910, [2007] BCC 986, 1006, [35] per Chadwick LJ
[139] Ibid, 1012, [56] (Chadwick LJ)

In *HSBC Bank Plc v 5th Avenue Partners Ltd*,[140] the defendant bank was not liable concerning payments made out of the accounts with the bank. The appellants believed that a letter of instruction and a reference letter amounted to false representations negligently prepared by an employee of the bank. In applying *Customs & Excise* and the three-fold *Caparo* test the Court of Appeal held that the bank could not be held vicariously liable.[141] However, Etherton LJ relied on the *Caparo* test without even exploring the elements of the test.[142]

In *Patchett v Swimming Pool & Allied Trades Association Ltd*[143] (SPATA), P appealed against the decision of the lower court that SPATA did not owe a duty of care towards P. SPATA's website included certain representations that P had relied upon. The contractor that P had found from the website was an affiliate member and not a full member of the association therefore could not benefit from the warranty scheme when the contractor became insolvent and did not complete the job. It was necessary according to the judge to look at the information on the website as a whole, which made a reference to an information pack that P should have accessed. The website should not have beed relied upon without further inquiries. Following again the reasoning employed in *Customs & Excise* it would not be fair, just, and reasonable to impose liability in the circumstances.

The case of *Customs & Excise Commissioners* was decided correctly but questions remain as to whether it should be a case that is confined to its own facts. Judicial reliance on reasoning that was at times incoherent allows defendants to escape liability in cases where it should be imposed; SPATA for example should have been held liable. In his dissenting opinion, Smith LJ[144] argues that the website's message, as understood by the reasonable and careful person, was that SPATA was a responsible organisation that could be relied upon and subsequently held accountable or even liable if anything went wrong. Both the decisions in *HSBC* and in *MAN Nutzfahrzeuge AG* were correct and can be characterized as policy decisions because of the indeterminate liability that would come about if they were decided differently. Questions remain regarding *Pachett,* based on the arguments of Smith LJ and also the fact that the decision could not be justified on policy grounds. It remains to be seen how the *Customs & Excise* will be used in future cases.

## The Australian Approach

The theory behind the approach

[140] [2009] EWCA Civ 296, [2009] 1 CLC 503
[141] [2009] 1 CLC 503, 516, [43] (Etherton LJ)
[142] Witting, C, 'So v HSBC Bank Plc: banks, dangerous documents and other people's money' *Law Quarterly Review* (2010) 126 (Jan) 39, 41
[143] [2009] EWCA Civ 717
[144] *Patchett v Swimming Pool & Allied Trades Association Ltd* [2009] EWCA Civ 717, [46-58] (Smith LJ)

In any claim for recovery for pure economic loss the claimant must establish that the defendant owed the claimant a duty of care.[145] Australian courts have previously been reluctant to find for the claimant in cases of pure economic loss; and thus establish that a duty of care situation existed.[146] Similar arguments were forwarded against the recovery of pure economic loss as were were forwarded in English courts to justify the exclusionary rule. The primary fear of the Australian courts was the indeterminacy of liability.[147] The fears were not regarding the large number of people that would bring claims, rather the 'ripple effect' that these would create.[148] The ripple effect is the effect of a single event upon various other situations. This argument manifested in *Perre v Apand*[149] where McHugh J stated that no duty of care would be imposed in cases where people have suffered loss as a result of the ripple effect.[150] Another reason behind the reluctance to impose a duty of care is that the courts felt that the award of damages in such situations belonged to the domain of contract law.[151] Allowing recovery in tort where no such recovery could be made under contract would undermine contract law.[152]

Until 1976 Australian law had followed English Law and applied the general exclusionary rule regarding the recovery for pure economic loss. In that year however, the decision in *Caltex Oil (Australian) Pty Ltd v The Dredge 'Willemstad'*[153] was delivered and from that point onwards Australia followed a very different approach to that of England. The defendant had negligently damaged an oil pipeline which was owned by another company. This pipeline was used in order to convey oil to the oil terminal of Caltex, which was situated on the other side of the bay. As a result of the damage the oil had to be transported by the road route, at Caltex's considerable expense. Although his claim was purely economic the High Court reached a unanimous decision and awarded damages. The 'test' employed by the Court referred to the nature of relationship between the parties. Accordingly from *Caltex* onwards the courts concentrated on the nature of the relationship between the parties involved.[154] The method was opposed most notably by Brennan CJ, who argued that the law should develop incrementally, and by analogy to existing categories.[155]

The main difference between the two jurisdictions is that England imposes liability in cases of negligent statements, but it does not impose liability for

---

[145] Stewart, P, and Stuhmcke, A, *Australian Principles of Tort Law*, (2nd edn, Federation Press, Australia, 2009), 380
[146] *MAN Nutzfahrzeuge AG -v Freightliner Limited* [2007] EWCA Civ 910
[147] The issue of indeterminate liability was examined in the previous chapter.
[148] Stapleton, J. 'Duty of Care and Economic Loss: A wider Agenda' (1991) 107 *The Law Quarterly Review* 249, 260
[149] (1999) 198 CLR 180
[150] Ibid, [112]
[151] Trindade, F and Cane, P and Lunney, M, *The Law of Torts in Australia*, (4th edn, OUP, Australia, 2007) 491
[152] Ibid
[153] (1976) 136 CLR 529
[154] Baron, A, 'The "Mystery" of Negligence and Economic Loss: When is a Duty of Care Owed? (2000) 19 *Australian Bar Review* 167, 168
[155] Ibid, 169

negligent acts,[156] whereas in Australia, both negligent statements and acts result in liability.[157] Australia has catered to negligent misstatements through statute: s.12DA of the Australian Securities and Investments Commission Act 2001 provides a statutory remedy in cases of negligent misstatement. But the area of interest concerns negligent acts that cause pure economic loss.

The decision in *Caltex* was unfortunately not followed in the cases that followed it. In *Johns Period Furniture Pty Ltd v Commonwealth Savings Bank of Australia,*[158] in *Ball v Consolidated Rutile Ltd,*[159] in *Christopher v MV Fiji Gas*[160] and in *Seas Sapfor Forests Pty Ltd v Electricity Trust of SA*[161] the court was unwilling to impose a duty of care and the claimants were thus unsuccessful, the main reason being that the claimants could not prove that they were 'known to the defendants as individuals or as members of an "ascertained class" who would suffer economic loss resulting from the defendant's negligence'.[162]

*Perre v Apand Pty Ltd*[163]

In the approximately twenty-year period between *Caltex* and *Perre v Apand,*[164] some judges adopted the proximity approach to impose a duty, others adopted the incremental approach,[165] whilst others amalgamated them and used something in between.[166] A fourth category of judges tried to develop a completely new approach.[167] The case of *Perre v Apand* was seen as an opportunity to clarify the law. According to Luntz, the notion of proximity started losing ground when Deane J left the courts,[168] a view supported by the fact that two subsequent cases on pure economic loss, *Hill Van Erp*[169] and *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords,*[170] were decided without relying on proximity.

This twelve-year-old decision is still the leading case and should therefore be compared with *Customs & Excise*. Due to the negligence of the defendant, who was a manufacturer of potato crisps and supplier of seeds, the plaintiffs could not sell their crops in Western Australia for five years. The defendant had supplied diseased seeds to the plaintiffs' neighbours. Even though the crops of

---

156 *Stewart, P. and Stuhmcke, A*, (n 172) 385
157 It is not to be thought that every situation of negligent act that results in pure economic loss is remedied. A duty of care is imposed in some situations.
158 (1980) 24 SASR 224
159 [1991] 1 Qd R 524
160 [1993] Aust Torts Reps 181
161 (1996) 187 LSJS 369
162 *Stewart, P, and Stuhmcke, A,* (n 172) 396
163 *Perre v Apand* (n 9)
164 *Perre v Apand* (n 9)
165 Swanton J,' Concurrent Liability in Tort and Contract: the Problem of Defining the Limits', (1996) 10 *Journal of Contract Law* 21, 30
166 *Bryan v Maloney* (1995) 182 CLR 609; *Hill v Van Erp* (1997) 188 CLR 159, 174 (Dawson J)
167 *Pyrenees Shire Council v Day* (1998) 192 CLR 330, 419-29 (Kirby J)
168 Luntz. H, 'Turning Points in the Law of Torts in the Last 30 years' (2003) 15(1) *Insurance Law Journal* 1, 5
169 (1997) 188 CLR 159
170 (1997) 188 CLR 241

the plaintiffs were not infected, Western Australian regulations prohibited crop imports grown within 20 km radius from the outbreak of the disease.

Before reaching the High Court, the claims had previously been dismissed, and the claimants had appealed to the Full Court of the Federal Court of Australia with no success.[171] However, the High Court reversed the decisions of the lower courts and found in favour of the plaintiffs, finding the defendant under a duty of care towards them. Each of the judges delivered separate judgements, but agreed on some issues. A common feature of all judgments is that they all referred to and approved of the *Caltex* case. Five out of the seven justices ruled that all of the plaintiffs could recover for pure economic loss.[172] McHugh J would not have allowed recovery by the potato processors.[173] Hayne J would have allowed one grower and one processor to recover, since the processor was the only person selling directly to Western Australia.[174] Critically, Feldthusen pointed out that the treatment of economic loss in the case was too exhaustive, while the consideration of the main issue was too sparse.[175] Feldthusen is correct, for the judges had not provided a clear cut answer to the question of when and whether economic loss should be recoverable.

Guadron J in *Perre* argued that a duty of care should be imposed when the defendant knew or ought to have known that his acts or omissions may cause 'the loss or impairment of legal rights possessed, enjoyed or exercised by another, whether as an individual or a member of a class, and that the latter person [would be] in no position to protect his interests'.[176] By employing the guidance given by Guadron J, Barclays Bank would have been held liable since it ought to have known that an'operational error would result in the Customs & Excise Commissioners[177] suffering economic loss and that they were not in a position so as to protect themselves.

McHugh J based his outcome on the issue of the vulnerability of the Perres and the fact that they were an ascertainable class of people,[178] also commenting that imposing a duty would not unreasonably interfere with Apand's commercial autonomy. Gummow J chose the 'salient features'[179] approach introduced by Stephen J in *Caltex Oil*.[180] Kirby J argued that the correct way to approach a duty of care issue was the three-stage test as employed in *Caparo*. However, in contrast to Feldthusen's criticism of the judges for their differences, one can praise them for their similarities. A common feature of all the judgments was that they identified the need to avoid

---

[171] (1997) 80 FCR 19
[172] Feldthusen, B, 'Pure Economic Loss in the High Court of Australia: Re-inventing the Square Wheel?' 8 (2000) *Torts Law Review* 33-52, 33
[173] (1999) 73 ALJR 1190, 1216
[174] Ibid, 1256-1259
[175] Feldthusen, B, 'Pure Economic Loss in the High Court of Australia: Re-inventing the Square Wheel?' 8 (2000) *Torts Law Review* 33-52, 35
[176] Ibid, 202
[177] *Customs & Excise* (n 7)
[178] *Perre v Apand* (n 9) 204
[179] Ibid, 254
[180] *Caltex Oil* (1976) 136 CLR 529, 576-7

imposing a duty of care where it would result in indeterminate liability and also to avoid unreasonable restraint on the autonomy of the defendants.

*Bow Valley Husky*[181] demonstrated that it is possible to draw a common line of argument and adopt a methodology that governs all cases and includes concepts such as proximity and forseeability while at the same time accepting that there are different categories of economic loss that can be suffered and different factors and considerations that should apply.[182] Bonollo suggested that as a result of *Perre v Apand*[183] the judges consider vulnerability rather than dependency,[184] which is supported by subsequent case law.[185]

## *Perre v Apand*: the Aftermath

Shortly after *Perre* the issue was raised again in *Wilkins v Dovuro Propriety Ltd.*[186] The defendant was a merchant who knew that his seeds were contaminated by the seeds of weeds yet had left local seed merchants to resell them without warning the farmers in the area. When this was discovered the farmers had to take expensive weed-eradication measures. The plaintiffs were able to recover based on the economic loss that they suffered. The Federal Court of Australia took into consideration the fact that the loss was reasonably foreseeable, as was the ascertainability of the class of persons that were claiming recovery and the vulnerability of those persons.[187]

In the later decision in *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd*[188]the courts recognised that there was a need to limit the class of claimants. An explosion in the Esso gas plant resulted in supplies being cut off for two weeks. The claims were against Esso since the explosion resulted in financial losses for various groups. The principles established in *Caltex* and *Perre* were applied, but in this case Gillard J refused to impose a duty of care since this would create 'an indeterminate amount *[sic]* of claimants for an indeterminate amount of money'.[189]

In *Valleyfield Pty Ltd v Primac Ltd*[190] the defendant had designed an irrigation system for the plaintiff's farm which did not operate effectively. The plaintiff sought recovery for pure economic loss. It was asked whether the defendant owed a duty of care to the plaintiff. The plaintiff was able to recover. In deciding the case the judges relied on the *Perre*[191] principles, considering the issue of reliance, the fact that the defendant had the

---

[181] **Bow Valley Husky** *(Bermuda) Ltd v Saint John Shipbuilding Ltd* [1997] 3 SCR 1210
[182] Dietrich, J, 'Liability in Negligence for Pure Economic Loss: The Latest Chapter (Perre v Apand Pty Ltd)' (2000) 7 *James Cook University Law Review* 74, 94
[183] (1999) 198 CLR 180
[184] Bonollo, F, 'Seeds, Weeds and Unlawful Means: Negligent Infliction of Economic Loss and Interference with Trade and Business' (2005) 31 *Monash University Law Review* 322, 406
[185] The judgement of Merkel J in *Johnson Tiles No. 4* [2000] FCA 1837
[186] (1999-2000) 169 ALR 276
[187] Ibid, 302-11
[188] [2003] VSC 27
[189] *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* (No. 4) [2004] VSC 466, 56
[190] [2003] QCA 339
[191] *Perre v Apand* (n 9)

knowledge and expertise to advise the plaintiff, and the fact that the defendant knew that the plaintiff would suffer economic loss if proper care was not taken.[192] In *Bryan v Maloney*[193] McHugh J set out the five elements to consider when imposing a duty a care: 'reasonable forseeability of loss, indeterminacy of liability, autonomy of the individual, vulnerability of the plaintiff to the risk, knowledge by the defendant of the risk and the magnitude.'[194]

In *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*[195] it was held that a duty of care may not arise in a situation where the plaintiff was not 'vulnerable'. Because of that conclusion it is arguable whether the *Customs & Excise* case would have been decided differently in Australia. The exact definition of vulnerability remains unclear and the ratio offers little assistance.

As far as the issue of reliance is concerned, Trindade, Lunney, and Cane have suggested that general reliance is established when a party is dependent on another to exercise 'some power or to use some skill or knowledge'[196] in such a way so as to protect and therefore refrain from causing economic loss to the other. It was firstly devised by Mason J in *Sunderland Shire Council v Heyman*.[197] The reliance must have been reasonable.[198] If this is the definition for reliance and when it is successfully pleaded it results in establishing a duty of care, then under this approach the *Customs & Excise* case would have been decided differently in Australia. The Customs & Excise Authority reasonably relied upon Barclays Bank to use its power and implement the freezing orders in order to refrain from causing economic loss to the former.

## The Contrast Between Jurisdictions

After a period of turmoil the law in both England and Australia has apparently settled.[199] In England the courts are deciding cases based on three concepts: an incremental approach;[200] an approach based on the notions of 'assumption of responsibility' and 'reasonable reliance' by the defendant and the claimant respectively;[201] and lastly based on the three stage test dealing with the 'foreseeability of harm', the issue of proximity and whether is it fair, just and reasonable to impose liability.[202] The courts employ their customary attitude towards cases where purely economic loss has been suffered and do not allow recovery unless there are any special circumstances that necessitate the

[192] Ibid, [151-158] (Mackenzie J)
[193] Bryan v Maloney [1995] HCA 17
[194] Ibid, [74]
[195] (2004) 216 CLR 515
[196] Trindade, F and Cane, P and Lunney, M, *The Law of Torts in Australia*, (4th edn, OUP, Australia, 2007) 498
[197] (1985) 157 CLR 424
[198] *Ta Ho Ma Pty Ltd v Allen* (1999) 47 NSWLR 1
[199] Barker, K, "Economic Loss and the Duty of Care: A Study in the Exercise of Legal Justification" (2008) *University of Queensland Law Research Series* 1, 1
[200] *Caparo* (n 2)
[201] This approach has been affirmed in the House of Lords case of: *Customs & Excise Commissioners v Barclays Bank Plc* [2006] UKHL 28
[202] The 'Caparo' test employed in *Caparo Industries v Dickman* [1990] UKHL 2

imposition of a duty of care. Such instances as has been seen are rare. The most notable example where a duty of care was imposed is *Hedley Byrne v Heller*.

The courts in Australia have also settled their own approach. The current approach can be described as 'multi-factoral'[203] as confirmed in the numerous cases post-*Perre.*[204] The 'multi-factoral' approach that is used includes a variety of ideas such as foreseeability of harm, the vulnerability of the claimant, and the knowledge by the defendant that he has created a risk by his conduct or omission.[205] That the vulnerability of the individual is taken into account is an important step forward, and if considered in England may have led to a different result in *Customs & Excise*. The Commissioners were vulnerable since there was nothing else that they could do but rely upon the bank for ensuring that the freezing orders were applied.

The English approach can be criticised as abstract as it leaves a wide margin of discretion to the judges. The Australian approach rejects categorisation in the sense that when a case does not belong to an existing category this is not determinative of the result of the case.[206] The existing categories are negligent misrepresentation, relational economic loss, and public authority liability for pure economic loss, negligent performance of a service and negligent supply of shoddy goods or structures.[207] It is only used in situations where a case falls outside a space where liability rules are clearly settled.[208] If the case does not belong to one of these categories the next step is to ask whether the loss suffered was reasonably foreseeable. If this is answered in the affirmative then the case is interpreted in the light of existing cases,[209] questions of indeterminacy of liability follow and whether the imposition of a duty of care in the particular situation would be an unreasonable burden to the autonomy of the individual. The approach in England is not terribly removed from this approach. The courts in England respect the existing categories and are seeking to develop the law incrementally and in accordance with existing categories.

The English courts have difficulties in applying the Occam's Razor[210] principle. Under this principle the courts should favor the simplest of two or more competing theories unless that principle is known to be wrong. This results in inconsistency and incoherence between similar cases that should have yielded the same result, as seen in a variety of cases, including *Bank of Credit and Commerce International Overseas Ltd (In Liquidation) v Price*

---

[203] *Barker, K*, (n 239) 1
[204] An example would include *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* [2004] HCA 16
[205] *Perre v Apand* (n 9), [105] (McHugh J)
[206] Witting, 'The three Stage Test Abandoned in Australia- or Not' (2002) 118 LQR 214, 218
[207] *Perre v Apand* [1999] HCA 3, [93-95] (McHugh J)
[208] Ibid, 94
[209] Legg, M, 'Negligent Acts and Pure Economic Loss in the High Court' (2000) 12(1) *Insurance Law Journal* 101, 105
[210] Russel, *History of Western Philosophy*, (2nd edn, London, 1961), 462-463; Barker, 'Wielding Occam's Razor: Pruning Strategies for Economic Loss (2006) 26 OJLS 289

*Waterhouse (No. 2),*[211] *Dean v Allin & Watts*[212] and *Customs & Excise Commissioners v Barclays Bank.*[213]

# Conclusion

Feldthusen, in an article criticising the *Perre* case, concludes that the 'relatively firm exclusionary rule' that has been adopted in England achieves a higher degree of certainty with the least amount of judicial expenditure.[214] His argument is incorrect. English law currently achieves certainty but it is questionable whether it achieves fair outcomes. The decision in *Perre* achieved a fair outcome and it gives a detailed account of the issues that concerned the judges who, despite the fact that they did not agree at all times, have enhanced our understanding as to how the duty of care is imposed.

In his criticism of *Perre,* Dietrich believes an opportunity to clarify the law has been thrown to the wind.[215] This has indeed been a missed opportunity to clarify the law, as each of the judges delivered a separate judgment and addressed different issues. The judges did not reach a conclusion as to a single test that could be used in the future in deciding whether a duty should be imposed. Mendelson does not directly criticise the case, merely commenting that the courts have not yet settled on a single coherent test, yet the various factors that they take into consideration are resemble each other and are featured in all recent cases.[216] These factors are: whether the individual can be ascertained from a class, to what extent the defendant had control in terms of knowledge, and the vulnerability of the plaintiff as well as policy considerations. However, these are mere guidelines and the adoption of a single test would clarify the situation. The guidelines could have been the beginning of a move towards a single test, yet eleven years have passed since the decision was delivered and no single test has been adopted.

It is also argued that searching for a single theory for approaching economic loss is fruitless because the problem *per se* is 'multiform rather than unitary in character'.[217]As so many years have passed and the courts have not managed to reach a single test, the most pragmatic course is to follow the guidelines given in *Perre v Apand.* Commonwealth jurisdictions have employed a more subtle approach towards economic loss which is preferable;[218] Australia has

[211] [1998] PNLR 564, [1998] B.C.C. 617,634, [7.19a] per Sir Brian Neill
[212] [2001] EWCA Civ 758, [33]
[213] *Customs & Excise* [2006] 3 WLR 1, 16 and 28 [40] and [83] (Lord Hoffman) and (Lord Mance)
[214] Feldthusen, B, 'Pure Economic Loss in the High Court of Australia: Re-inventing the Square Wheel?' 8 (2000) *Torts Law Review* 33-52, 52
[215] Dietrich, J, 'Liability in Negligence for Pure Economic Loss: The Latest Chapter (Perre v Apand Pty Ltd)' (2000) 7 *James Cook University Law Review* 74, 89
[216] Mendelson, D, *The New Law of Torts,* 1st ed. (Oxford University Press, Australia, 2007), 472
[217] Schwartz, G. T. 'Economic Loss in American Tort Law: The examples of J'Aire and of Products Liability', (1986) 23 *San Diego Law Review* 37, 38
[218] Stapleton, J, 'Comparative Economic Loss: Lessons from Case-Law-Focused 'Middle Theory' (2002) 50 *University of California at Los Angeles Law Review* 531-583, 552

achieved some kind of balance between the protection of the plaintiff on the one hand and not imposing an unreasonable duty of care upon the defendant on the other.

The law in this area has been unstable and in a state of flux,[219] as evidenced by the unsettled application in both England and Australia, understandable given the complex nature of the law in this area.[220] The examination of the laws of both countries cannot be concluded by saying that England got it wrong and Australia got it right. Such a conclusion is simplistic and does not reflect the reality of the issue. A coherent approach would be a method that would lie somewhere between the approaches of both different jurisdictions.

The search for a coherent approach must continue since both countries have both succeeded and failed to some degree. They have both managed to deliver sound judgments even though no single test is followed. However, they failed in the sense that English courts must change their approach in deciding cases on policy issues and on the indeterminacy of liability, whereas Australian courts should devise a test so that future decisions become more coherent. The best approach is one that does not leave the judges with a wide margin of discretion, that is governed by a single test in determining whether a defendant should be liable in economic loss cases, and that achieves fairness, certainty, and predictability, the very aim of tort law. When lawyers cannot advise their clients as to the outcome of the case this diminishes the effectiveness of the whole legal system.[221] The preferred approach will combine the admirable adherence to precedent of the English courts with the flexibility of the Australian courts and it will be governed by a single test which should determine whether liability should be imposed upon the individual. Even though this is a complex area of law a single test that would include the considerations and reservations of the judges and commentators will add much needed clarification to the situation helping both the English and the Australian jurisdictions to overcome the hurdles that the current system has created.

[219] Cane, P, 'The Blight of Economic Loss: Is there Life after *Perre v Apand*?' (2000) 8(3) *Torts Law Journal* 246, 246

[220] Schwartz, G. T. 'Economic Loss in American Tort Law: The examples of J'Aire and of Products Liability', (1986) 23 *San Diego Law Review* 37, 38

[221] Luntz., H, Hambly, Burnsk, Dietrich, J., & Foster, N D '*Torts: Cases and Commentary*' (6th edn, Chatswood NSW: Butterworths, 2009)

# Compensation Culture: A Storm in a Coffee Cup

*Harriet Ann Williams*

The existence of a compensation culture in the United Kingdom (UK) is a controversial and widely debated topic. Whilst some commentators argue that the 'compensation culture' is a reality, others believe it is merely a perception fuelled by a frenzied media and a succession of changes that have been made over the last ten years. These changes include those made to the system of claiming compensation, such as the introduction of conditional fee agreements and growth in claims management companies, as well as a range of more general alterations made to society as a whole, such as the global economic downturn. These changes have collectively affirmed and amplified the public perception of a compensation culture in the UK. The Compensation Act 2006 is briefly examined, in order to discuss its effects on the public's misconception. In respect of this paper, its main significance is that Parliament felt it necessary to legislate on the matter. Furthermore, the introduction of the Act may have even been a stimulant to the view that there is a compensation culture in the UK in recent years.

Finally, the current situation is summarised and the issue of whether or not there is a need to alter the public perception is considered. It is submitted by this paper that the current perception that there is a compensation culture in the UK should be altered in accordance with the reality of the situation. Potential methods of redress are proposed and discussed in order to suggest possible approaches to this problem in the future.

## Introduction

'Reality doesn't bite, rather our perception of reality bites.'
- Anthony J. D'Angelo.

Contrary to popular belief, no compensation culture exists in the United Kingdom, but a strong public perception of the prevalence of this culture does exist. This paper is a result of changes that have been made to the process of claiming compensation and to more general social changes, over the last ten years.

'Compensation culture' has been described as 'an amorphous term'[1]. Although, there is no widely accepted definition, the term 'compensation culture' is generally used to connote a society in which there is a propensity for anyone who has suffered a personal injury to seek punitive damages through litigation from someone connected to the injury, whether or not anyone was actually at fault.[2] Due to the plethora of interpretations, this paper construes the term 'to suggest that we are much more likely to claim than in the past'[3] rather than 'using short-term trends to defeat the notion of a compensation culture'[4] The fact that this culture concerns accidents where the connection between the defendant and claimant, or accident and cause, is merely tenuous means that the term is mainly construed in a pejorative way[5] and this tendency towards more fraudulent and spurious claims[6] also adds to this definition of a compensation culture.

There have been many changes over the last ten years including the growth and decline of claims management companies,[7] the increased profile of conditional fee agreements (CFAs),[8] a worldwide recession, and various technological advancements.[9] These changes have been radical in altering both the way in which claims can be made and the publics' perception of claiming. Therefore, they have had effects on genuine claimants who have a legitimate, worthwhile claim and society as a whole. In this respect, the term "society" is very inclusive, defining the totality of social relationships among humans with mutual interests, shared institutions, and a common culture.[10] As a result, the period of 2000-2010 is an ideal focal point to analyse and prove the declaration that a compensation culture exists only in the mind of the public.

Actuaries have described a compensation culture as 'the desire of individuals to sue somebody, having suffered as a result of something which could have been avoided if the sued body had done their job properly.'[11] The implicit criticism in this quotation evidences the negative manner in which the culture of claiming compensation is viewed by many people. To challenge the statement and to conclude that this desire only exists as a public

---

[1] Morris, A, 'Spiralling or Stabilising? The Compensation Culture and Our propensity to Claim Damages for Personal Injury' (2007) 70(3) *MLR* 349-378, 350

[2] This stance on the interpretation of the term "compensation culture" will be used for the purposes of this paper.

[3] Ibid.

[4] See N1 above p363.

[5] See Chapter 5 for discussion of if this is justified or not.

[6] See Chapter 3, Part III.

[7] Growth: Money Advice Trust, *Office of Fair Trading Financial Services Strategy Consultation Paper,* http://www.moneyadvicetrust.org/images/MAT_response_to_OFT_Financial_Services_Strategy_consultation_paper_(2).pdf, accessed 16 February 2010, Page 5, and decline: General Insurance Communications Committee of the UK Actuarial Profession, *The Cost Of Compensation Culture*, (October 2002) Page 26.

[8] General Insurance Communications Committee of the UK Actuarial Profession, *The Cost Of Compensation Culture*, (October 2002) Para. 3.4.

[9] See Chapter 3 for further discussion.

[10] http://www.thefreedictionary.com/society, accessed 16 February 2010.

[11] See N8 above Para. 2.1.

misconception, focus shall be upon the existence of a compensation culture in general and, more specifically, in relation to personal injury claims made against local authorities. This further illustrates the inclusive nature of the term "society", in this context, as the existence of a compensation culture could be detrimental to all of society; the public could suffer if their local authorities are forced to spend time and resources,[12] on insurance claims rather then use their taxpayer funds [13] or for maintenance of their infrastructure.

Commentaries on the existence of the compensation culture are extremely biased. For example CompensationCulture[14] campaigns for safety in the areas of construction and child safety, consequently promoting claiming compensation in the event of an accident.[15] In order not to discourage people from pursuing a claim, this group implies that no compensation culture exists in the UK.[16] Lobbying groups,[17] media sources[18] and websites,[19] such as CompensationCulture,[20] exist to persuade others of their opinion and political agenda, however, these sources are still be very useful to illustrate the variety of opinions and perceptions on the matter.

Compensation is often seen as a new legal and cultural phenomenon but 'in so far as the law of tort is ruptured by incoherence, it is an incoherence that goes back as far as Aristotle.'[21,22] The English legal framework that relates to compensation consists of a number of statutory duties and the law of negligence. Intentional torts such as trespass and battery can also lead to

[12] For example, staffing and administration funds.
[13] Channel 4 TV Documentary, 'Cutting Edge: Scams, Claims and Compensation Games', Century Films (25 February 2010, 9pm) – examples of how tax payer's money is spent on Claims Investigators and experts in order to defend cases.
[14] See: www.compensationculture.co.uk, accessed 20 November 2009 – founded by John Rowlinson, the Managing Director of PtS, a property construction company – www.pts.co.uk, accessed 13 January 2010.
[15] Groups such as this on the internet are influential as the internet is often a widely used source of information for many members of the public – McRoberts, B, *The Digital Influence Index Study: Understanding the Role of the Internet in the Lives of Consumers in the UK, Germany and France*, (Fleishman Hillard) http://www.slideshare.net/marketingfacts/digital-influence-index, accessed 16 February 2010.
[16] 'Is the "compensation culture" a fabrication?' – http://www.compensationculture.co.uk/Is-the-compensation-culture-a-fabrication.html, accessed 20 November 2009.
[17] For example, The Lobby Group, http://www.lobbygroup.org/2009/08/09/condensed-manifesto-rev-0-0/, accessed 16 February 2010 and The Litigious Society, http://www.lobbywatch.org/lm_intro.html, accessed 16 February 2010.
[18] Including, The Times, The Sun, The Daily Mail, The Telegraph, The Independent, The Guardian, local newspapers such as The Liverpool Echo, Times Online – www.timesonline.co.uk, accessed 16 February 2010, television reports and BBC News Online – www.news.bbc.co.uk, accessed 16 February 2010.
[19] For example, www.compensationculture.co.uk, accessed 20 November 2009, www.injurylawyers4U.co.uk, accessed 20 January 2010, www.ClaimSquad.com, accessed 19 December 2009 and www.AccidentAdviceHelpline.net, accessed 18 December 2009.
[20] www.compensationculture.co.uk, accessed 20 November 2009.
[21] Ibbetson, D.J, 'Historical Reflections on the Compensation Culture' (2005) 1 *Journal of Law* 100, http://thejournaloflaw.org/documents/0001_007.doc, accessed 3 February 2010, Page 9.
[22] Illustrated by the early cases of *Langridge v Levy* [1835-42] All ER Rep 586 and *Cavalier v Pope* [1906] AC 428.

compensation for injuries,[23] but these are not of an accidental nature. The law of negligence is based on the proposal that citizens owe each other a duty of care; shown by proximity, foreseeability and fault.[24] Lord Atkin established the universal application of the duty of care in *Donoghue v Stevenson*,[25] even if there are no contractual liabilities, a duty of care and the obligations that come with that duty can be conferred upon any man to his neighbour.[26]

The duty was refined by Lord Wilberforce in *Anns v Merton London Borough Council*,[27] which introduced a two-stage test to establish negligence.[28] First, could the accident or injury have been foreseen by the party accused of a breach? Second, were there were any factors that might mitigate that duty? Currently a three stage test is used as established in *Caparo Industries plc v Dickman*.[29] A party can only be considered negligent when it is 'just, fair and reasonable'.[30] The legal definitions of negligence have adjusted as the case law has tested the boundaries of situations in which duties of care are owed. In the opinion of some,[31][32] it is the many changes in the framework and processing methods, combined with the current ease by which claims can be brought that have 'helped fuel the growing range of claims that are brought.'[33] However, whether a compensation culture 'truly exists is still a controversial topic.'[34]

Many of the accidents that occur in the UK happen in public places, giving rise to numerous claims against local authorities. The focus on local authority claims is further narrowed to focus on slip and trip claims made against them under the Highways Act 1980 s.41, obliging public authorities to maintain their highways. The recent legal ruling in *Goodes v East Sussex County Council*[35] offers some respite to local authorities in relation to these types of claims. The House of Lords established that the s.41 duty, does not extend to removing or preventing the formation of snow and ice.[36] However, s.111 of the Railways and Transport Safety Act 2003 amends s.41[37] and plugs the gap left by *Goodes v East Sussex County Council*, by placing a duty upon the highway

---

[23] Steele, J, *Tort Law: Text, Cases and Materials*, (OUP: Oxford, 2007) Page 96.
[24] Established in *Caparo Industries plc v Dickman* [1990] 2 AC 605 and discussed in Steele, J, *Tort Law: Text, Cases and Materials*, (OUP: Oxford, 2007) Page 156.
[25] *Donoghue v Stevenson* [1932] AC 562.
[26] Ibid, 578-83, per Lord Atkin. As affirmed in *Heaven v Pender* 11 QBD 503, 509, per Brett MR and *Le Lievre v Gould* [1893] 1 QB 491, 497 & 504, per A.L. Smith LJ.
[27] *Anns v Merton London Borough Council* [1978] AC 728.
[28] Ibid, 751-2, per Lord Wilberforce.
*Caparo Industries plc v Dickman* [1990] 2 AC 605.
[30] Ibid, 617-618, per Lord Bridge of Harwich.
[31] Greene, D, 'A Matter of Perception' (2008) 158 *NLJ* 885, 885.
[32] Anna Rowland of the Law Society (Q54) Presenting Oral evidence to the Committee – House of Commons Select Committee on Constitutional Affairs, *Compensation Culture* (Third Report, Session 2005-06, HC 754-I) Page 6. Oliphant, K, *Evidence submitted by Ken Oliphant, Cardiff Law School* in House of Commons Select Committee on Constitutional Affairs, *Compensation Culture*, (Third Report, Session 2005-06, HC 754-II) Ev 122.
[33] General Insurance Communications Committee of the UK Actuarial Profession, *The Cost Of Compensation Culture*, (October 2002) Para. 3.1 – See Chapter 3 for further discussion.
[34] 'Is the "compensation culture" a fabrication?' – http://www.compensationculture.co.uk/Is-the-compensation-culture-a-fabrication.html, accessed 20 November 2009.
[35] *Goodes v East Sussex County Council* [2000] 3 All ER 603.
[36] Ibid, 605, per Lord Slynn of Hadley.
[37] Highways Act 1980.

authority to ensure 'so far as is reasonably practicable, that safe passage along a highway is not endangered by snow and ice.'[38] Due to the recent unprecedented levels of snow and ice, the Law Society is expecting an increase in this type of slip and trip claim.[39]

It is essential that, the 'proper defendant'[40] is determined as some highways are not under the responsibility of a local authority, it may be possible for injured parties to sue under s.2 of the Occupiers' Liability Act 1957 or for negligence. However, as illustrated by *Robbins v Jones*,[41] owners are not automatically liable for accidents occurring on their land:

> 'an occupier was held not to be liable to a pedestrian who died as a result of a pavement giving way due to the number of people who had walked on the pavement over the years. This was because the way over his land had been dedicated to the public and the owner had not deliberately created the defect.'[42]

Furthermore, claims under the Occupiers' Liability Act 1957 are often unsuccessful;[43] as Williams humorously quotes, 'you may choose to sue the occupier of the land by relying upon Woodie Gurthrie's words, 'This land is your land'. But if you do, beware. He is likely to answer the issue of who is liable with Bob Dylan's refrain, 'It ain't me babe'.[44]

The prominence of media attention into this area is only one justification for an investigation into compensation.[45] The current economic climate is another; the recession has exacerbated the amount of people in financial need[46] presenting compensation as an alluring means to garner funds.[47] Furthermore, seven years have passed since the 2004 publication of the Better

---

[38] Railways and Transport Safety Act 2003, s.111.
[39] Law Society, *Don't slip up on your snow-related personal injury claim says Law Society* – http://www.lawsocietymedia.org.uk/site.php?s=1&content=35&press_release_id=1234&mt=34, accessed 13 January 2010.
[40] Williams, A, 'Tripping Claims' (2003) 153 *NLJ* 1385-1386, 1385.
[41] *Robbins v Jones* (1863) 15 CB (NS) 221, more recently applied by the House of Lords in *Southwark London Borough Council v Mills; Baxter v Camden London Borough Council (No2)* [2001] 1 AC 1 and the Court of Appeal in *McNeny v London Borough of Lambeth* [1989] 19 EG 77.
[42] Williams, A, 'Tripping Claims' (2003) 153 *NLJ* 1385-1386, 1386.
[43] As the Occupiers' Liability Act 1957 is fraught with difficulties, as shown by *Gautret v Egerton* (1867) LR 2 CP 37, *Robbins v Jones* (1863) 15 CB (NS) 221 and *McGeown v Northern Ireland Housing Asoc* [1994] 3 WLR 187.
[44] Williams, A, 'Tripping Claims' (2003) 153 *NLJ* 1385-1386, 1386.
[45] See media reports and coverage such as: Channel 4 TV Documentary, 'Cutting Edge: Scams, Claims and Compensation Games', Century Films (25 February 2010, 9pm); Laville, S & Gregory, S.J, 'How a puppy, a paving slab and a passing cyslist made a bad break worth thousands', The Guardian, (London, 23 October 2004); Wilson, G, 'Cottonwool kids', The Sun (London, 27 May 2009) and 'Carrot slip pays girl £200', The Sun (London, 4 December 2008).
[46] Mr David Cameron (Witney) (Con), *Budget Resolutions and Economic Situation*, (LNUK, 22 April 2009: Issue 168, Column 251-254).
[47] See the Knowsley Metropolitan Borough Council example in Chapter 2, Part III for evidence that hard financial times correlate to an increase in compensation claims. See Chapter 3, Part II (iii) for further discussion of the impact of the recession on claims in the UK.

Regulation Task Force (BRTF) report on the compensation culture[48]. The BRTF is 'an independent advisory group established in 1997, which reports directly to the Cabinet office' [49] and they reported that the so-called compensation culture is an 'urban myth.'[50] Whether this assertion is true has been complicated by the introduction of the Compensation Act 2006.

## The Debate over the Existence of a Compensation Culture

Commentators such as Morris, Robins and Williams have debated the existence of a compensation culture[51] yet, in 2005, the House of Commons Constitutional Affairs Committee created a new session to investigate whether this compensation culture truly exists.[52] The third report of this session is particularly illustrative, unequivocally stating that such a culture does not exist[53] and its existence is not a possibility in the near future.[54]

This report followed a publication by the BRTF, which concluded that there is not a compensation culture, but that action was required to counter the popular perception that there is.[55] Evidence from the Compensation Recovery Unit (CRU) supports this view, between 2000 and 2005 the number of personal injury claims fell with the Department for Constitutional Affairs suggesting there had been a 5% reduction in accident claims during that period.'[56] Since 1990, the CRU, a section of the Department for Work and Pensions,[57] 'has administered a scheme which enables the state to recover from tort damages any social security benefit paid as a result of a relevant accident or disease.'[58] The CRU holds the most comprehensive and reliable data on the number of current personal injury claims as 'all compensators must provide prompt notification to CRU of any claim for personal injury made against them.'[59] Already, it could be said that no compensation culture exists in the UK but the numerous select committees,[60] independent advisory groups, [61] academic commentators [62] and even Governments have felt it

[48] Better Regulation Task Force (BRTF), *Better Routes to Redress* (May 2004).
[49] Ettinger, C, 'Exploding an Urban Myth' (2004) 154 *NLJ* 873, 873.
[50] See N48 above Page 3.
[51] Morris, A, 'Spiralling or Stabilising? The Compensation Culture and Our Propensity to Claim Damages for Personal Injury' (2007) 70 (3) *MLR* 349-378, Robins, J, 'Small Injury Claims: Say it with Flowers' (2005) *LS Gaz* 27 Jan, 22-23 and Williams, K, 'State of fear: Britain's "Compensation Culture" Reviewed' (2005) *Legal Studies* 499-514.
[52] House of Commons Select Committee on Constitutional Affairs, *Compensation Culture*, (Third Report, Session 2005-06, HC 754-I).
[53] Ibid, Page 34, Para. 111.
[54] Ibid, Pages 35-38.
[55] Better Regulation Task Force (BRTF), *Better Routes to Redress* (May 2004) Page 11.
[56] House of Commons Select Committee on Constitutional Affairs, *Compensation Culture* (Third Report, Session 2005-06, HC 754-I) Page 13, Para 32.
[57] http://www.dwp.gov.uk/other-specialists/compensation-recovery-unit/, accessed 18 February 2010.
[58] Lewis, R, Morris, A, & Oliphant, K, 'Tort Personal Injury Claims Statistics: Is There a Compensation Culture in the United Kingdom?' (2006), http://ssrn.com/abstract=892981, accessed 18 February 2010, Page 3.
[59] Ibid.
[60] Such as the House of Commons Select Committee on Constitutional Affairs.
[61] Such as the Better Regulation Task Force (BRTF).

necessary to discuss the existence of a compensation culture, indicating that its existence is open to debate. Yet, this culture is a product of perception rather than reality.[63]

Conversely, some people are of the opinion that a compensation culture is very much in existence.[64] Many UK Actuaries claim that a 'compensation culture is developing in the UK,'[65] whilst 'research by MORI Financial Services[66] indicates that 72% of the population would consider making a claim if someone else were at fault.'[67] Holbrook believes that it is the reality that underpins the perception that needs to be changed,[68] claiming that the compensation culture is a reality and that there is a very heightened perception of it.

'[S]tatistics may not show it, but there is undoubtedly a perception of compensation culture.'[69] Even if this perception is misguided, whether or not there is a claims culture is a substantiated question. This belief has a basis, but the foundation is not the truth. A primary cause for the public's misconception of the process is the media because 'often the most outlandish cases that are brought are dismissed. But their headlines live on, create a myth and the myth is acted upon.'[70]

The media and politicians have created a 'storm in a coffee cup.'[71] The perception of a compensation phenomenon arises from shock stories, involving the injured party receiving large amounts of money in compensation.[72] For this reason, 'personal injury litigation attracts most attention from the media,'[73] creating not only the belief of a claims culture but also inciting potential claimants to act. This has a cyclical effect, as a potential rise in claimants could increase litigation, further amplifying the perception that there is a compensation culture.

---

[62] Such as Annette Morris, Ken Oliphant, Richard Lewis, Professor David Ibbetson and Kevin Williams.
[63] Better Regulation Task Force (BRTF), *Better Routes to Redress* (May 2004) Page 11.
[64] Such as Jon Holbrook: Holbrook, J, 'The Sliding Snail' (2007) 157 *NLJ* 168-169 and John Rowlinson – www.compensationculture.co.uk, accessed 20 November 2009.
[65] General Insurance Communications Committee of the UK Actuarial Profession, *The Cost Of Compensation Culture*, (October 2002) Para. 2.1.
[66] Carried out in November 2000 and quoted by Datamonitor plc, *UK Personal Injury Litigation 2001: Surviving and Thriving in the Compensation Culture*, (2001), in General Insurance Communications Committee of the UK Actuarial Profession, *The Cost of Compensation Culture,* (October 2002) Page 64.
[67] Datamonitor plc, *UK Personal Injury Litigation 2001: Surviving and Thriving in the Compensation Culture*, (2001), in General Insurance Communications Committee of the UK Actuarial Profession, *The Cost of Compensation Culture,* (October 2002) Page 64.
[68] Holbrook, J, 'The Sliding Snail' (2007) 157 *NLJ* 168-169, 169.
[69] Parker, A, 'Changing the claims culture' (2006) 156 *NLJ* 702, 702.
[70] Blair, T, *Speech on Compensation Culture given at University College London on 26 May 2005* – http://www.number10.gov.uk/Page7562, accessed 20 November 2009.
[71] Better Regulation Task Force (BRTF), *Better Routes to Redress* (May 2004) Page 13.
[72] Haltom, W, & McCann, M, 'Distorting the Law: Politics, media and the Litigation Crisis' (University of Chicago Press: Chicago, London, 2004) Page 149.
[73] See N71 above Page 7.

The Constitutional Affairs Committee opines that the actual number of claims is now falling but, despite this, the media and public perceptions of the compensation culture have remained.[74] In 2005, Tony Blair said 'whatever the actual state of the so-called compensation culture, the perception of it and the effects of that perception are real. In England, in 2003, there were between 7 and 10 million pupil visits on school trips. Sadly, there was one fatality. But only one.'[75] As a result of the public perception created by the media coverage of the few accidents that do occur,[76] there are now far less educational trips for children,[77] evidencing how the belief in a claims culture has a negative effect on both society as a whole and, more specifically on genuine claimants.[78]

## US Comparison

In the United States the compensation culture is far more prominent as illustrated by the comparison of tort costs.[79] The BRTF says that 'statistics show that tort costs in the UK in 2000 were 0.6 per cent of GDP, compared with 1.9 per cent of GDP in the US.'[80] In the US, Stella Liebeck sued McDonald's after spilling her coffee and suffering third degree burns, subsequently receiving $160,000 compensatory damages and $480,000 punitive damages.[81] When such events are reported in the UK it insinuates that the same level of award is possible.[82]

The US media report extreme cases in a way that shocks the public and implies that all compensation cases are of this nature. '[T]he McDonald's "coffee spill case" is often cited, even though the damages were later reduced significantly'[83] when the parties settled in a private out-of-court agreement, illustrating the tendency for a frenzied media to present the facts to suit their agenda. A similar case in the UK, *Bogle & Ors v McDonald's Restaurants*

---

[74] House of Commons Select Committee on Constitutional Affairs, *Compensation Culture* (Third Report, Session 2005-06, HC 754-I) Page 15, Para 39.
[75] Blair, T, *Speech on Compensation Culture given at University College London on 26 May 2005* – http://www.number10gov.uk/Page7562, accessed 20 November 2009.
[76] Chrisafis, A, 'Pupil dies on school trip to Normandy', The Guardian (London, 5 July 2003).
[77] Malleson, K, *The Legal System*, 3rd Edition (Oxford University Press: Oxford, 2007) Page 81.
[78] These effects will be further discussed in Chapter 5 of this paper.
[79] Better Regulation Task Force (BRTF), *Better Routes to Redress* (May 2004) Page 15.
[80] Ibid.
[81] *Liebeck v McDonald's Restaurants, P.T.S., Inc.,* No. D-202 CV-93-02419, 1995 WL 360309 (Bernalillo County, N.M. Dist. Ct. August 18, 1994) US
[82] Better Regulation Task Force (BRTF), *Better Routes to Redress* (May 2004) Page 13 – see Ford, R, 'UK tops league of state-paid compensation at £10bn a year' Times Online (London, 17 December 2002) http://www.timesonline.co.uk/tol/news/uk/article802898.ece?print=yes&randnum=1151003209000, accessed 21 February 2010 and Gerlin, A, 'McDonald's counts the cost of hot, hot coffee: Big Mac's "naïve" defence crumbles in face of scalded customer's wrath', The Independent (London, 4 September 1994). http://www.independent.co.uk/news/world/mcdonalds-counts-the-cost-of-hot-hot-coffee-big-macs-naive-defence-crumbles-in-face-of-scalded-customers-wrath-1446536.html, accessed 21 February 2010.
[83] Ryan, P.S, 'Revising the United States Application of Punitive Damages: Separating Myth from Reality' (2003-2004) 10 *ILSA J. Int'l & Comp. L.* 69-92, 70.

*Ltd*,[84] was unsuccessful on the ground that McDonald's could not have avoided injury by serving cooler coffee as the public want to be able to drink coffee served hot.[85] There are few differences between the two cases,[86] but the defendant in *Bogle*[87] received no damages at all, proving that the UK is different to the US.

Concerns grow that the US compensation culture is 'spreading to other regions', including the UK.[88] 'A Tillinghast report cited by Datamonitor estimated that the US civil liability system cost 2.3% of GDP in 1995, compared to 0.8% in the UK. Datamonitor believes that the current state of the UK market is equivalent to that in the USA in 1987. On this basis, UK insurers would be paying £6.7 billion per annum by 2005, a 72% increase from £3.9 billion in 2000.'[89] Furthermore, the Lloyd's 360 report[90] suggested that new types of claims may be imported from the US, 'such as shareholder claims arising from competition law.'[91] With new types of claims being encouraged there is even more risk of the UK's compensation culture increasing, in the public's perception if not in reality.

Yet, the BRTF are of the opinion that tort costs in the UK are significantly lower than in the US, and, 'the UK also compares favourably with a number of other countries'.[92] Japan, Germany and Italy all had higher international tort costs as a percentage of GDP than the UK in 2000,[93] supporting the opinion that there is no compensation culture in the UK when compared to other jurisdictions.

## Evidence: Statistics and Judicial Opinion

Inconsistent statistics from diverse sources are used in order to achieve the results any individual organisation desires to further their aim. McIlwaine has said that 'no evidence is ever tendered to back'[94] the compensation culture, so in his opinion it is a 'fundamental non-entity.'[95] However, 'the Lloyds report rather pooh-poohs this'[96] by suggesting that 'the actual number of cases that

---

[84] *Bogle & Ors v McDonald's Restaurants Ltd* [2002] EWHC 490
[85] Ibid, [33], per Field J
[86] *Liebeck v McDonald's Restaurants, P.T.S., Inc.,* No. D-202 CV-93-02419, 1995 WL 360309 (Bernalillo County, N.M. Dist. Ct. August 18, 1994) US and *Bogle & Ors v McDonald's Restaurants Ltd* [2002] EWHC 490.
[87] *Bogle & Ors v McDonald's Restaurants Ltd* [2002] EWHC 490.
[88] Greene, D, 'A Matter of Perception' (2008) 158 *NLJ* 885, 885.
[89] General Insurance Communications Committee of the UK Actuarial Profession, *The Cost of Compensation Culture,* (October 2002) Page 65.
[90] Lloyd's, 360 – *Driving the Debate on Emerging Risk: Directors in the Dock – Is Business Facing a Liability Crisis?* (Society of Lloyd's, 2008).
[91] Greene, D, 'A Matter of Perception' (2008) 158 *NLJ* 885, 885.
[92] Better Regulation Task Force (BRTF), *Better Routes to Redress* (May 2004) Page 15.
[93] US Tort Costs 2000, *Trends and Findings on the Costs of the US Tort System* (Tillinghast – Towers Perrin, February 2002) – Japan: 0.8%, Germany: 1.3%, Italy: 1.7% and UK: 0.6%.
[94] McIlwaine, L, 'Tort Reform and the Compensation Culture' (2004) *JPIL* 239-249, 243.
[95] Ibid.
[96] Greene, D, 'A Matter of Perception' (2008) 158 *NLJ* 885, 885.

reach court is just the tip of an expanding iceberg.'[97] These conflicting opinions illustrate a further component that must be considered when examining the statistics as many claims that are made against local authorities, and indeed other defendants, 'are settled out of court.'[98] Many commentators, including Greene, have argued that, despite the fact that pre-action protocols are designed to reduce the number of claims being issued[99] and 'the culture in litigation has definitely changed over the past 10 years, with parties encouraged by their lawyers to achieve a settlement without going to court';[100] if there were a 'burgeoning claim culture, we would see some passage through the statistics to an increase in claims issued, but there isn't.'[101] However, the absence of the claims that are settled out of court, from the relevant statistics, is generally thought to be imperative in that the statistics consequently do not show the full picture.

However, a view can be assembled through the use of evidence gathered from a variety of sources, including local authority statistics, official publications and case law. The local authority segment of the general claims culture is wide enough to represent the whole of the culture in the UK, whilst still allowing examination of whether a compensation culture truly exists in reality without having to analyse every type of claim. This would be an unrealistic aim, as claims are made in a variety of scenarios; against employees, as a result of sport, as a result of crime and as a result of damage or theft of personal property.

Missing from the debate about the existence of the compensation culture is statistical rigour in weighing the evidence in support of one position or the other. There has been substantial disagreement over the alleged emergence of the compensation culture, but a paucity of hard evidence. This paper aims to establish evidence to clarify the debate.

Statistics from Essex County Council (ECC), in relation to personal injury claims made against them between 2001 and 2008, will be used to portray all local authorities in the UK.[102] Although it may not be fair to attribute these statistics to all local authorities, it is not possible to gather statistics from all of them.[103] Statistics from other sources, however, will be used in order to add as much relevance and insight as possible.

The statistics for each year, as seen in Appendix 1, represent the number of claims made in that year, rather than the year of cause of action, thus the three year time limit on bringing personal injury claims, under s.11 of the Limitation Act 1980,[104] does not affect the validity of the more recent statistics. This is

---

[97] Lloyd's, 360 – *Driving the Debate on Emerging Risk: Directors in the Dock – Is Business Facing a Liability Crisis?* (Society of Lloyd's, 2008) Page 13.
[98] Better Regulation Task Force (BRTF), *Better Routes to Redress* (May 2004) Page 11.
[99] Civil Procedures Rules – Pre-Action Protocol for Personal Injury Claims, Para 1.2.
[100] Greene, D, 'A Matter of Perception' (2008) 158 *NLJ* 885, 885.
[101] Ibid.
[102] See Appendix 1.
[103] Further attempts to gain more statistics were made through Freedom of Information Act 2000 requests to the following sources: Hampshire County Council, the Ministry of Justice, Datamonitor, Beachcroft LLP, ALARM, APIL, the National Statistics Office and Euroinfo.
[104] See s.33 of the Limitation Act 1980 for exceptions.

vital for this paper, as it is concerned with the amount of claims made in a year, as this indicates whether a compensation culture exists; not the amount of accidents that occur, as this does not indicate a propensity to claim. For the purpose of these statistics and this paper, "claims received" includes all cases where a formal letter of claim is received from the claimant or the claimant's solicitor.[105]

The statistics show that the total numbers of claims received by ECC are consistent between 1 January 2001 and 31 December 2008. In 2001, 1705 claims were received, and in 2008 there were 1821 claims, [106] this inconsistency immediately implies that there is no compensation culture. Additionally, the average payments per claim show that either fewer claimants have received damages or claimants are receiving, on average, fewer damages than in previous years, as the average awarded per claim has reduced. On average, in 2008, only £286.50 was awarded per claim, compared to an average of £920.17 per claim in 2001.[107] In relation to slip and trip claims specifically, £1901.17 was awarded on average per claim in 2001 and only £511.94 in 2008.[108]

Furthermore, some cases take a long time to be settled after the claim is issued, meaning that the total damages paid in that year may reflect the outcome of previous claims made rather than the specific claims made in that year. However, these statistics are merely being used to illustrate the overall trend of compensation claims, so this is not an issue, as the trend still shows that the number of claims received and the amounts paid in damages are fairly constant. This consistency further proves that no compensation culture exists; it is realistic to have a steady amount of genuine claims being received and effectively dealt with. Peaks or declines in the amount of claims and damages would indicate an issue with the propensity to claim, but these statistics clearly do not indicate a problem.[109]

Furthermore, most local authorities have a high success rate with pre-litigation denial, the rate at which they avoid liability for the claim from the outset. In Essex this rate was about 81% in 2008/09, and the national average is approximately a 60% successful denial rate before litigation.[110] Despite the possibility that the public could attempt undue claims, local authorities only allow certain claims to reach litigation. The ECC statistics indicate a steady number of successful claims, which are duly granted compensation, not a steep increase which would indicate the growth of the claims culture.

However, some local authorities have inordinate amount of claims against them at any time.[111] Knowsley Council, Liverpool, shows how a compensation culture could very easily develop, but also how it can be avoided. Between

[105] See Civil Procedures Rules – Pre-Action Protocol for Personal Injury Claims, Para 3.1-3.9 for rules and Part A for example.
[106] See Appendix 1.
[107] Ibid.
[108] Ibid.
[109] As with Knowsley Metropolitan Borough Council, see Appendix 2.
[110] Personal correspondence with Chris Dyton, LA Team Manager, Essex Legal Services.
[111] For example, see Knowsley Metropolitan Borough Council – Appendix 2.

2001/02 and 2003/04 there was an explosion of claims made against Knowsley Metropolitan Borough Council.[112] Claims peaked in 2002/03, with 1911 claims received and this trend continued in 2003/04, with 1356 claims received. The figures are similar for the amount of highways injury claims by Knowsley Council, which reached 1391 in 2002/2003.[113]

Poverty in Knowsley may explain this increase.[114] It is commonly thought that, claims for slips and trips on local authority land accelerated at this time because individuals were encouraged to make similar claims, having observed the success of others.[115] An isolated compensation culture was developing in Knowsley. Consequently, council funds were stretched to the limit and infrastructure suffered as the funds allocated to them were withdrawn in order to cover the staffing and administration costs involved in dealing with claims.[116]

Knowsley Council took a proactive solution; Councillor Norman Keats said: 'at Knowsley we have made a conscious decision to make sure we are not regarded as a "soft touch" for fraudsters...we thoroughly investigate every application for compensation, and, while we recognise our responsibility to compensate genuine claimants, we are not prepared to pay out for false or invented claims.'[117] Knowsley Council used 'rigorous detailed checks, including the compilation of claimant and witness profiles, coupled with a robust defence'[118] and 'an enhanced inspection and repair regime'[119] of the highways, to reduce the number of claims made against them to an all-time low.

Knowsley Council also found judges awarded damages too frequently.[120] The only way to alter their predicament was to change judicial opinion; to do this Knowsley Council took most of the claims made against them to court, using

---

[112] Khaleeli, H, 'Crackdown on bogus claims; £3m saved in compensation', The Liverpool Echo (Liverpool, 18 May 2005).
[113] See Appendix 2.
[114] 'Knowsley is the UK's most deprived region', Kirkby Times News, (Kirkby, 30 April 2004) http://www.kirkbytimes.co.uk/news_items/2004_news/no_1_deprived_borough.html, accessed 22 February 2010.
[115] 'Fraudulent insurance claims a growing issue for councils', Local Government Chronicle (London, 30 June 2005).
[116] Steve Jackson, the National Fraud Controller for insurance-based financial advisors Zurich Municipal, cited in: Zurich Municipal and ALARM, *Fraud in the public services: How to prevent, detect and investigate fraudulent claims*, http://web.anglia.ac.uk/anet/staff/sec_clerk/Documents/Insurance/ins_PDF%20Forms/Ins_fraud.pdf, accessed 10 January 2010, Page 14.
[117] Councillor Norman Keats, Cabinet Member for Finance and Information Society Technologies, cited in: Zurich Municipal and ALARM, *Fraud in the public services: How to prevent, detect and investigate fraudulent claims*, http://web.anglia.ac.uk/anet/staff/sec_clerk/Documents/Insurance/ins_PDF%20Forms/Ins_fraud.pdf, accessed 10 January 2010, Page 8.
[118] Zurich Municipal and ALARM, *Fraud in the public services: How to prevent, detect and investigate fraudulent claims*, http://web.anglia.ac.uk/anet/staff/sec_clerk/Documents/Insurance/ins_PDF%20Forms/Ins_fraud.pdf, accessed 10 January 2010, Page 8.
[119] Ibid.
[120] Reid, K, 'The Home Secretary and Improved Accountability of the Police?' (2005) 69(3) *JoCL* 232-255, 249.

the courtroom to ensure that the claims were genuine.[121] They also prosecuted those they suspected of fraud in order to deter deceitful claimants. This tactic was risky and not necessarily an economically sound approach, but it was successful and stopped the propensity of the people of Knowsley to claim compensation from their council.[122]

In 2004/05 the Council managed to decrease the number of claims from 1109 in the previous year to 403 highways injury claims, with a further decrease in the following years.[123] In 2008/09, only 255 claims were received by Knowsley Council and only 171 highways injury claims.[124] In 2009/10, the figures reduced further to 254 claims received in total and 165 highways injury claims.[125] A decrease of 1657 fewer claims made in 2009/10 compared to 2002/03.

Despite the fact that 'Liverpool is the compensation capital of the UK',[126] this example is a microcosm of society as a whole, as the whole country is experiencing similar issues.[127] Therefore, it would be possible for all councils to reduce their spending on compensation claims by encouraging the judiciary not to award damages so readily. The judiciary's role is vital and, as long as they do their job effectively, there should be no claims culture; only deserved claimants would receive damages. Recent case law, including *Tomlinson v Congleton Borough Council*,[128] *Simonds v Isle of Wight*[129] and *Martin v Peterborough City Council*[130] has established an important legal precedent 'which should make people understand that they need to be responsible for their own actions and should anticipate risk,'[131] indicating that the judiciary are reacting to the increased of the perception of the compensation culture in order to keep it at bay in reality.[132]

In summary, it appears that there is definitely a commonly held view that there is a compensation culture, but contrary to popular belief claims are 'not spiralling out of control.'[133] There should be a steady number of claims, indicating that genuine claimants are being appropriately compensated, and this does appear to be the case from the statistics gathered.[134]

---

[121] Morris, A, 'Spiralling or Stabilising? The Compensation Culture and Our Propensity to Claim Damages for Personal Injury' (2007) 70 (3) *MLR* 349-378, 372.
[122] Ibid, 372 (see footnote130).
[123] See Appendix 2.
[124] Ibid.
[125] See Appendix 2.
[126] Paul Thornley, commentator, cited in: Channel 4 TV Documentary, 'Cutting Edge: Scams, Claims and Compensation Games', Century Films (25 February 2010, 9pm).
[127] Such as the recession, see Chapter 3, Part III and all above debate over the existence of the compensation culture, to illustrate that similar issues exist.
[128] *Tomlinson v Congleton Borough Council* [2002] EWCA Civ 309, [2004] 1 AC 46.
[129] *Simonds v Isle of Wight* [2004] ELR 59.
[130] *Martin v Peterborough City Council* [2003] EWHC 2925.
[131] Better Regulation Task Force (BRTF), *Better Routes to Redress* (May 2004) Pages 18-19.
[132] See also the Court of Appeal's distaste for "compensation culture claims" in *Harris v Perry and another* [2008] All ER (D) 415.
[133] Morris, A, 'Spiralling or Stabilising? The Compensation Culture and Our Propensity to Claim Damages for Personal Injury' (2007) 70 (3) *MLR* 349-378, 350.
[134] See Appendix 1 and also: Morris, A, 'Spiralling or Stabilising? The Compensation Culture and Our Propensity to Claim Damages for Personal Injury' (2007) 70 (3) *MLR* 349-378, 350.

## Causes of the Misperception

Media

The media are a primary source for the view that there is a compensation culture in the UK and that this culture has a negative effect on society, with headlines such as 'the culture that is crippling Britain'[135] creating this perception. A recent television programme[136] documenting the 'compensation culture' gives the illusion that financially rewarding claims can be made for the most minor injury.[137] This further adds to the negative public perception that there is a compensation culture in the UK and may also encourage people to make more claims in the future.[138]

Changes in the Last Ten Years

*i) Conditional Fee Agreements and After-The-Event Insurance*

Since 1995, solicitors have entered into CFAs with potential claimants, colloquially known as "no-win, no-fee" deals. Further, since 2000, in the event of a successful claim, it has been possible to recover the litigation costs.[139] The claimant can also take out after-the-event (ATE) insurance, insuring them against the defendant's legal costs if their claim is unsuccessful.[140] These changes were made in order 'to widen access to justice'[141] and have contributed to the public perception of a compensation culture.

The Courts and Legal Services Act 1990 introduced CFAs by making provision for agreements in which it was explicit that part or all of the legal representative's fees were payable only in the event of success.[142] CFAs allow solicitors and barristers to take a case on the understanding that, if the case is lost, they will not charge their client for the work they have done, or they will charge at a lower rate. Claims companies use this method to persuade potential clients to make a claim with them. However, if successful, the solicitor can charge the unsuccessful party a success fee in addition to their

[135] Daily Mail, 21 February 2004, cited in: Better Regulation Task Force (BRTF), *Better Routes to Redress* (May 2004) Page 5.
[136] Channel 4 TV Documentary, 'Cutting Edge: Scams, Claims and Compensation Games', Century Films (25 February 2010, 9pm).
[137] See examples from: Channel 4 TV Documentary, 'Cutting Edge: Scams, Claims and Compensation Games', Century Films (25 February 2010, 9pm), such as Glen Capelli who stubbed his toe and received £2250 in damages from his school.
[138] Dowling, T, 'Cutting Edge: Scams, Claims and Compensation Games', The Guardian (London, 26 February 2010).
[139] Access to Justice Act 1999.
[140] Morris, A, 'Spiralling or Stabilising? The Compensation Culture and Our Propensity to Claim Damages for Personal Injury' (2007) 70 (3) *MLR* 349-378, 362.
[141] General Insurance Communications Committee of the UK Actuarial Profession, *The Cost Of Compensation Culture*, (October 2002) Para 3.3.
[142] Courts and Legal Services Act 1990, s.58.

normal fee, to compensate for the risk of not being paid.[143] Success fees are limited to 100 per cent of the normal fees,[144] but most lawyers impose a much smaller charge,[145] with some types of cases having fixed success fees.[146] Success fees cover the solicitor for costs accrued in other unsuccessful cases as well. The introduction, growth and publicising of CFAs is another factor driving the perception a compensation culture.[147]

Prior to the changes under the Access to Justice Act 1999, success fees were payable by the client. Now, s.31 allows rules of court to limit or regulate the indemnity principle, which provides that the receiving party cannot recover more costs from the paying party than they would be liable to pay their own solicitors. The Access to Justice Act 1999, s.31 was commenced on 2 June 2003, along with amendments to the Civil Procedure Rules,[148] the CFA Regulations[149] and the Collective CFA (CCFA) Regulations.[150] The combined effect of these changes provides for the abrogation of the indemnity principle in respect of a defined type of CFA. Now, legal representatives can lawfully guarantee a client all their damages and contract to be remunerated by reasonable costs which can be recovered from the unsuccessful party.[151] This radical change to the process is often viewed by some as incentivising potential claimants, because of the potential to profit with very little risk.[152] This is beneficial to most genuine claimants, but may have encouraged fraudulent claimants.[153] Furthermore, despite the lack of risk, making a claim under a CFA can be less financially beneficial than dealing with the claims process individually, and since the introduction of CFAs the numbers of claims has not exponentially risen.[154]

The CCFA Regulations[155] 'enable bulk legal service providers to enter into one CFA with a large group of claimants, rather than a series of individual CFAs. This makes collective legal action much more accessible by, for example, trade unions, who can collectively launch legal action without incurring any legal costs and with no reduction in the damages their members might receive.'[156] This, again, has widened the access to personal injury claims. However, as the evidence shows that no increase of claims due to the CCFA Regulations has

---

143 Ibid, s.58(2).
144 Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report*, (TSO, December 2009) Page 20.
145 Ibid, Pages 25-26.
146 Ibid, Pages 113-114.
147 House of Commons Select Committee on Constitutional Affairs, *Compensation Culture* (Third Report, Session 2005-06, HC 754-I) Page 7, Para. 8.
148 Civil Procedure Rules 1998 (SI 1998/3132).
149 Conditional Fee Agreement Regulations 2000 (SI 2000/692).
150 Collective Conditional Fee Agreement Regulations 2000 (SI 2000/2988).
151 The claimant still has to pay for the insurance premium though.
152 Morris, A, 'Spiralling or Stabilising? The Compensation Culture and Our Propensity to Claim Damages for Personal Injury' (2007) 70 (3) *MLR* 349-378, 355.
153 Some cases are viewed as too risky to take on a CFA, but most genuine claimants are benefited.
154 Due to the fact that a success fee is normally added to the normal fees if a claims management company and CFA are used.
155 Which came into effect on 30 November 2000.
156 General Insurance Communications Committee of the UK Actuarial Profession, *The Cost Of Compensation Culture*, (October 2002) Para. 3.2.

actually occurred. Again, their introduction has led people to believe because organisations have more avenues to enter a claim by, that there has been an increase in claims. Additionally, 'the introduction of ATE insurance produced considerable controversy...with some having costs that led to the customer being disappointed with the amount they received'.[157] The apparent flaws in the current insurance system enable claims management companies to advertise CFAs and ATE insurance in a way that makes them appear to be risk free and have a very high success rate,[158] impacting on the public perception of the claims industry.

Despite the efforts of claims management companies to allure potential claimants with CFAs and ATE insurance, the statistics show this has not been successful. Evidence from the CRU demonstrates 'that there has not been an upward trend of recorded accident claims since CFAs were introduced',[159] thus it seems that 'conditional fee agreements [themselves] have not directly caused the perception of a compensation culture.'[160] Rather, it is the increased profile of CFAs, resulting from excessive and misleading advertising by claims managements companies, leading to the suggestion that 'the effect of the move to conditional fee agreements has been to fuel the compensation culture.'[161]

*ii) Claims Management Companies*

Hence, claims management companies themselves are a cause for the claims culture misconception. Since legislating for CFAs, these firms 'have become considerably more ubiquitous.'[162] Compensation was never intended to primarily profit claims companies; they make large profits by arranging the entire process of claiming compensation on behalf of the claimant, via their own in-house lawyers, or with third-party solicitors who pay commission on allocated cases. Biased advertising by some companies[163] creates the impression of a compensation culture through publicising opportunities to claim.[164] However, the coupling of easy access to representation, with low risk and financial reward has not led to a sharp increase.

'Claims farmers',[165] such as The Accident Group and Claims Direct, have damaged the industry's reputation.[166] The collapse of these two companies

---

[157] Datamonitor plc, *UK Personal Injury Litigation 2003*, (2003).
[158] For example: http://www.national-accident-helpline.co.uk/no-win-no-fee.html, accessed 18 December 2009 and http://www.claims4free.co.uk/, accessed 23 February 2010.
[159] House of Commons Select Committee on Constitutional Affairs, *Compensation Culture* (Third Report, Session 2005-06, HC 754-I) Page 13, Para 32.
[160] Ibid Page 9, Para 17.
[161] Oliphant, K, *Evidence submitted by Ken Oliphant, Cardiff Law School* in House of Commons Select Committee on Constitutional Affairs, *Compensation Culture*, (Third Report, Session 2005-06, HC 754-II) Ev 122.
[162] 'Should I use a "Claims Management" Firm?' – http://www.compensationculture.co.uk/Should-I-use-a-claims-management-firm.html, accessed 20 November 2009.
[163] For examples see: http://www.claims4free.co.uk/, accessed 23 February 2010, http://www.national-accident-helpline.co.uk/no-win-no-fee.html, accessed 18 December 2009, www.injurylawyers4U.co.uk, accessed 20 January 2010 and www.AccidentAdviceHelpline.net, accessed 18 December 2009.
[164] See Chapter 2, Part I and Chapter 3, Part I.
[165] See below for explanation.

alone was 'responsible for the decline in advertising expenditure of the key players in this market falling from £34.8m in 2001 to £6.5m in 2002,'[167] demonstrating the weight firms place on the effectiveness of advertising their services. It follows, therefore, that the belief of the existence of a compensation culture is largely based on the advertisement of claims management companies.[168]

These claims farmers or 'ambulance-chasing lawyers' [169] are generally characterised by their dire reputation, the poor quality of their work and their dubious sales tactics.[170] Claims Direct was labelled 'Shames Direct'[171] after entering receivership. They controlled 4.0% of the personal injury litigation market, second only to The Accident Group who also went into receivership, constituting a huge blow to the industry and to the reputation of personal injury litigation.[172]

Lord Justice Jackson has recently published his final report reviewing civil litigation costs.[173] This report may prove to be very influential as 'the Master of the Rolls has made it clear that the Senior Judiciary are right behind this review and will do what they can to ensure that the final recommendations are implemented sooner rather than later.'[174] Among other proposals, the report recommends fixed costs for road traffic accidents and the introduction of contingency fees,[175] helping make litigation more affordable for genuine claimants, but perhaps, discouraging solicitors from taking on personal injury claims. Contingency fees, commonly used in the US, can be defined as 'a lawyer's fee calculated as a percentage of monies recovered, with no fee payable if the client loses.'[176] If contingency fees were to be introduced, their simplicity may encourage more solicitors to do personal injury work and encourage genuine claimants to instigate proceedings.

---

[166] See: O'Hara, M, 'Collapse adds insult to injury', The Guardian, (London, 20 July 2002) and Griffiths, K, 'Claims Direct to make "ethical" comeback', The Independent, (London, 2 July 2004).
[167] Datamonitor plc, *UK Personal Injury Litigation 2003*, (2003).
[168] Bamber, L, 'Compensation Culture' (2005) 3 *Tolley's Health and Safety at Work (Journal)* 26-28, 27.
[169] Brogan, B, 'Jack Straw reveals: Why I want to change the law: The Justice Secretary opens up on greedy lawyers, privacy, human rights and responsibilities', Daily Mail (London, 8 December 2008).
[170] 'Should I use a "Claims Management" Firm?' – http://www.compensationculture.co.uk/Should-I-use-a-claims-management-firm.html, accessed 20 November 2009.
[171] Walsh, C, 'Ware-Lane aims to bury "Shames Direct" label', The Guardian (London, 2 September 2001).
[172] General Insurance Communications Committee of the UK Actuarial Profession, *The Cost Of Compensation Culture*, (October 2002) Para. 3.4.
[173] Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report*, (TSO, December 2009).
[174] Parker, A, *The Jackson Review – the new bestseller?* (Beachcroft LLP) http://www.beachcroft.co.uk/article.aspx?id_Content=1246, accessed 23 February 2010.
[175] Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report*, (TSO, December 2009) Page 464.
[176] Ibid, Glossary, Page viii.

The report also deals with the key issue of the defendant's costs if the claimant loses the case by recommending resolution through 'qualified one way costs shifting'[177] for 'certain categories of litigation in which it is presently common for ATE insurance to be taken out.'[178] This means that 'the claimant will not be required to pay the defendant's costs if the claim is unsuccessful, but the defendant will be required to pay the claimant's costs if it is successful',[179] reducing the allure of claiming to fraudulent claimants. The media coverage of this report further evidences the public's fear of a compensation culture;[180] if the judiciary and the Government feel it necessary to conduct extensive reports then it can lead to the belief that there is a problem with the current system of litigation, which is not the case.

*iii) Removal of Legal Aid*

The Access to Justice Act 1999 allowed for the removal of legal aid for most personal injury cases,[181] as it was felt that 'the State ought not to have a routine role in funding legal disputes between private parties which could be funded by other means,'[182] namely CFAs.[183] When this source of aid was removed, there was an explosion of the popularity of claims management companies who reopened 'the possibility of getting redress.'[184] A 2002 survey estimated 'that about 60,000 cases per month'[185] were being taken on by claims management companies. The huge amount of claims that these companies dealt with and the manner in which they conducted the work, meant that the service claimants received significantly suffered and the reputation of the industry was further tarnished.[186] Claims farmers are often only concerned in making a profit, have no interest in individual claimants and are often quite a geographical distance from the claimant.[187] Often it is not a solicitor handling the claim but a claims handler.[188] This is another reason

[177] Ibid, Para. 2.6.
[178] Ibid.
[179] Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report*, (TSO, December 2009) Para. 2.6.
[180] See: BBC News, 'No win, no fee reforms "could save millions"' – http://news.bbc.co.uk/1/hi/uk/8459897.stm, accessed 18 January 2010 and Gibb, F, 'End to spiralling costs urged in landmark civil justice reforms', Times Online (London, 15 January 2010) http://business.timesonline.co.uk/tol/business/law/article6988844.ece#cid=OTC-RSS&attr=989864, accessed 21 January 2010.
[181] Access to Justice Act 1999, Schedule 2 s.1(a).
[182] Department for Constitutional Affairs, *A Fairer Deal for Legal Aid,* (CM 6591, July 2005) Page 33, Para 6.15.
[183] Ibid, Page 16, Para 2.31.
[184] Oral evidence to the Committee by Anna Rowland of the Law Society (Q54) – House of Commons Select Committee on Constitutional Affairs, *Compensation Culture* (Third Report, Session 2005-06, HC 754-I) Page 6, Para 7.
[185] General Insurance Communications Committee of the UK Actuarial Profession, *The Cost Of Compensation Culture*, (October 2002) Para. 3.4.
[186] Morris, A, 'Spiralling or Stabilising? The Compensation Culture and Our Propensity to Claim Damages for Personal Injury' (2007) 70 (3) *MLR* 349-378, 354 and see: Griffiths, K, 'Claims Direct to make "ethical" comeback', The Independent, (London, 2 July 2004).
[187] Illustrated by the need for the Ministry of Justice, *Claims Management Services Regulation: Conduct of Authorised Persons Rules 2007*, (MoJ, 9 May 2007).
[188] Baksi, C, 'News: Website targets claims handlers' (2009) 24 *LS Gaz* 18 Jun, 2(1).

why the reputation of claims companies has declined in the last ten years,[189] and also why the public are of the opinion that claiming compensation has negative connotations.[190]

## The Recession and Increase in Fraudulent Claims

It has been assumed that 'an economic downturn is bound to see an increase in disputes',[191] but this is not the case. True, the recession has led to an increase in fraudulent claims;[192] *Ul-Haq & Others v Shah*[193] illustrates a scam which has become profligate during the recession.[194] In this case, there was a genuine road traffic accident, but three claimants alleged whiplash injures when there was only one passenger. People consider it to be more acceptable to make a fraudulent insurance claim now than before the recession.[195] This is a serious problem for both the insurance industry and society, as it encourages illegal activity and forces up the cost of mandatory insurance premiums. The nature of fraudulent claims means that they are often reported in the media adding to the misinformation.[196]

## Other Causes

Other causes of the perception that there is a compensation phenomenon include the many advances that have been made in the worlds of science, technology and medicine.[197] Society is now far more aware of the links between cause and effect, meaning that those suffering with a personal injury

---

[189] Lord Falconer of Thoroton, *Speech by Lord Chancellor and Secretary of State for Constitutional Affairs, Lord Falconer of Thoroton at the Association of Personal Injury Lawyers Conference – Reform in the Legal Profession*, (DCA, 20 April 2007).

[190] Dornstein, K, *Accidentally on Purpose: The Making of a Personal Injury Underworld in America* (St. Martin's Griffin: New York, 1996) Page 239.

[191] Greene, D, 'A Matter of Perception' (2008) 158 *NLJ* 885, 885.

[192] Koster, O & Bates, D, 'Recession sends fraudulent insurance claims soaring by 17 per cent', Mail Online, (London, 17 April 2009) http://www.dailymail.co.uk/news/article-1170726/Recession-sends-fraudulent-insurance-claims-soaring-17-cent.html, accessed 24 February 2010.

[193] *Ul-Haq & Others v Shah* [2009] EWCA Civ 542.

[194] See cases reported in the media such as: Tozer, J, 'Caught on camera: The wedding party who claimed they were hurt in a car accident dancing at reception', Mail Online (London, 11 July 2009) http://www.dailymail.co.uk/news/article-1198897/Groom-parents-jailed-fraudulent-compensation-claim-accident-way-wedding.html, accessed 22 February 2010 – fraudulent claims include phantom passenger cases and phantom soft tissue cases of real passengers.

[195] Survey carried out by YouGov Plc on behalf of RSA. Total sample size was1,986 adults. Fieldwork was taken 16th–19th January 2009. The survey was carried out online. The figures have been weighted and are representative of all GB adults (aged 18+) – http://www.rsagroup.com/rsa/pages/media/ukpressreleases?type=press&view=true&ref=489, accessed 18 January 2010.

[196] See for example: Driscoll, M, 'Judge Risk – it dares you to live on the edge', Sunday Times (London, 15 August 2004), Gill, K, 'Rising Tide of Claims . . . ', The Express (London, 27 November 2003), Laville, S, 'Riding schools head for fall as compensation claims jump', The Guardian (London, 15 May 2004) and Samson, P, 'What can I claim for my asthmatic budgie?', The Mirror (London, 10 July 2003).

[197] Better Regulation Task Force (BRTF), *Better Routes to Redress* (May 2004) Page 11.

are more aware that they can make a claim against the person with liability,[198] 'In the health arena, for example in areas such as passive smoking...this has led to a large increase in claims.'[199] Furthermore, scientific advances have contributed to the growth in the types of claim that are made, 'For example, claims for psychological damage were almost unheard of only a decade ago'.[200] Victims now can sue defendants for a larger range of personal injuries, such as post-traumatic stress disorder.[201] Additionally, the Human Rights Act 1998 has provided 'a number of new avenues for individuals to claim against companies or public bodies. For example, the Act specifies that an individual should enjoy "respect for family life", so noisy aircraft flying overhead, or disruptive road works, could be challenged.'[202] Although not personal injury claims, the Act further evidences the significant number of new types of claims which create an impression of proliferation in claims.

Finally, it has also been suggested that 'there was very significant *under*-claiming in the past,'[203] perhaps leading to the belief that there is a compensation problem now, when actually the current level of litigation compensates only genuine claimants who previously had no access to claim. The indisputable existence of the misconception that there is a compensation culture has no one cause, but a number of issues have collectively amplified this view.

## Effects of the Compensation Act 2006

The Compensation Act 2006 was introduced as a result of the rapid increase in claims management companies.[204] Its main function is to regulate the claims management industry[205] and 'thereby reduce the false impression amongst the public and the corporate world that a compensation culture is flourishing in the UK.'[206] That Parliament found it necessary to enact such legislation shows an attempt to remedy the negative consequences of the changes in the previous decade. All claims management companies must now be registered with the Government and the terms of their registration require an agreement to abide by a set of rules designed to protect consumers from exploitative business practices.[207] Of most concern to the consumer is the

[198] See Chapter 1 on the importance of the "proper defendant".
[199] Better Regulation Task Force (BRTF), *Better Routes to Redress* (May 2004) Page 11 – for statistical evidence see: Institute of Actuaries, *UK Asbestos – The Definitive Guide*, (November 2004).
[200] General Insurance Communications Committee of the UK Actuarial Profession, *The Cost Of Compensation Culture*, (October 2002) Para. 3.1.
[201] For example see: *Page v Smith* [1996] AC 155.
[202] General Insurance Communications Committee of the UK Actuarial Profession, *The Cost Of Compensation Culture*, (October 2002) Para. 6.5.
[203] Oliphant, K, *Evidence submitted by Ken Oliphant, Cardiff Law School* in House of Commons Select Committee on Constitutional Affairs, *Compensation Culture*, (Third Report, Session 2005-06, HC 754-II) Ev 122.
[204] Baroness Ashton, *Written Ministerial Statement – House of Lords*, (DCA, 2005).
[205] Ibid.
[206] 'The Compensation Act' – http://www.compensationculture.co.uk/the-compensation-act.html, accessed 20 November 2009.
[207]Compensation Act 2006, s.4, s.5(4).

prohibition of "hard sell" tactics by these companies, for example, for representatives of claims management companies to visit accident victims in hospital with a view to encouraging them to make a claim through their organisation.[208] This practice was deemed to be inappropriate as it targeted individuals when they were particularly vulnerable. The Act also goes some way to preventing claims against individuals who had been involved in desirable activities at the time of the incident in question.[209] The aim of these provisions is to ensure that those who find themselves in situations where they feel obliged to act, or in which they are professionally required to do so, are not fearful of any legal consequences. This, in turn, should help to tackle the perception of a compensation culture by ensuring that it is statutorily impossible to make unreasonable claims.

In light of the recent evidence it appears that the Act may have had a positive effect on the claims culture; since 2006 the total that Local Authorities have paid out in compensation has declined.[210] The important decisions in the appeal cases of *Harris v Perry and another*[211] and *Trustees of the Portsmouth Youth Activities Committee (A Charity) v Poppleton*[212] illustrate the Act's effectiveness. Judges are less willing to find defendants liable and to award damages for personal injuries now, as a result of s.1 which states that 'desirable activities' should not be discouraged.[213] On the other hand, the Act has been criticised for having had no noticeable effect, 'it remains to be seen if the courts will use the Compensation Act'[214] to rise to the challenge of changing the perception of a compensation culture.

The full effect of the Compensation Act is not yet known, but so far it seems to be reducing the levels of damages in compensation claims, thereby having a positive effect on the perception of a compensation culture.[215] In respect of this paper, the Act's main significance is that Parliament felt it necessary to legislate on the matter. This is a strong indication a prevalent impression exists of a compensation culture in the UK and its introduction may have even been a stimulant to this view in recent years.

# Conclusion

There is not a compensation culture in the UK at the current time, but there is an evident and ever increasing perception contrary to reality. The changes of the last ten years, including those made to the process of claiming

---

[208] Following the Secretary of State's Code of Practice under the Compensation Act 2006, s.5(4) – see: Department for Constitutional Affairs, *Claims Management Regulation – Baseline Study*, (DCA, 23 April 2007).
[209] Compensation Act 2006, s.1.
[210] See Appendixes 1 and 2.
[211] *Harris v Perry and another* [2008] All ER (D) 415.
[212] *Trustees of the Portsmouth Youth Activities Committee (A Charity) v Poppleton* [2008] EWCA Civ 646.
[213] Compensation Act 2006, s.1.
[214] Holbrook, J, 'The Sliding Snail' (2007) 157 *NLJ* 168-169, 169.
[215] See above and General Insurance Communications Committee of the UK Actuarial Profession, *The Cost Of Compensation Culture: Briefing Note*, (2002) Page 2.

compensation and the effects of the Compensation Act 2006, have had both beneficial and detrimental effects to genuine claimants and society in general. Genuine claimants have suffered from the increase in fraudulent claims and the decline in service quality and the negative social impacts on society include a decline in insurance market competition.

The Need to Alter the Perception

The BRTF feel that it is necessary to reform the current process of claiming because 'those with grievances need a system of redress that provides them with effective remedies; whilst those without should be kept out of the system.'[216] Genuine claimants suffer from the perceived compensation culture because of the decline in quality of the service of the insurance industry.[217] Furthermore, genuine claimants may be dissuaded from making a claim by the fact that they do not want to be tarred with the same brush as those making fraudulent claims or find the process too distasteful due to the poor reputation of the industry.[218] Affecting the wider society is the loss of in meaning of the tort of negligence: 'if negligence becomes merely a means of compensating somebody who has been harmed, then the tort loses its meaning...individual claimants may benefit from this approach but society loses out.'[219] Further, socially, the effects of fraudulent claims could mean less progress and innovative business, because the faulty perception 'has led to a lack of productivity as companies are spending more time on minimising risk than they are on creating profitable working conditions.'[220]

The creation of the 'have-a-go society'[221] in the last decade has not only increased the amount of fraudulent claims, but has also created a 'health-and-safety monster.'[222] This culture has quashed many desirable activities because of the fear liability. Not only does this attitude eradicate 'the joie-de-vivre'[223] from society, but it also encourages individualism and greed, which could lead to unemployment levels rising.[224] The media reports that the perception of a compensation culture exists 'in the minds of jobsworths, lazybones and buck-passers, not in the law,'[225] potentially leading to 'the rich tapestry of life getting dumbed down and reduced to bland, humourless interactions.'[226]

---

[216] Better Regulation Task Force (BRTF), *Better Routes to Redress* (May 2004) Page 7.
[217] As discussed previously: see Chapter 3, Part II.
[218] Morris, A, 'Spiralling or Stabilising? The Compensation Culture and Our Propensity to Claim Damages for Personal Injury' (2007) 70 (3) *MLR* 349-378, 351 and see Chapter 3, Parts II and III.
[219] Holbrook, J, 'The Sliding Snail' (2007) 157 *NLJ* 168-169, 169.
[220] Better Regulation Task Force (BRTF), *Better Routes to Redress* (May 2004) Page 3; 'Is the 'compensation culture' a fabrication?' – http://www.compensationculture.co.uk/Is-the-compensation-culture-a-fabrication.html, accessed 20 November 2009.
[221] See N216 above, Page 6.
[222] Turner, J, 'What snow told us about modern Britain', The Times (London, 16 January 2010).
[223] *Tomlinson v Congleton BC* [2004] 1 AC 46, [100], per Lord Scott.
[224] Morris, A, 'Spiralling or Stabilising? The Compensation Culture and Our Propensity to Claim Damages for Personal Injury' (2007) 70 (3) *MLR* 349-378, 351.
[225] See N222 above
[226] Thomas, G, 'Article for The Actuary' www.guythomas.org.uk/compensation/betterroutes.php - accessed 20 November 2009.

Tracy Brown 'sees rising litigation as an erosion of trust between people,'[227] another unwanted negative effect on society.

As a result of the current view, a primary difficulty, is the fact that 'many services are being scaled back or closed altogether because of the risk of claims and time taken up by already over-stretched staff in defending these claims. This has taken the form of reduced access to swimming pools, closure of children's play areas in public parks, and so on.'[228] Amateur sports and school trips are now impossible due to the fear associated with the 'blame culture,' 'we cannot even enjoy a child's sports day these days as someone might sue the school.'[229] Additionally, insurance premiums could increase 'to a point where it may be uneconomical for certain activities to continue'[230] if the fear of a compensation culture continues. '[T]he ultimate problem is the cost of claims, and if some trades/occupations are suffering crippling financial burden because of claims against them'[231] then industry, and in turn society as a whole, will suffer.

> 'Of course there are two sides to every argument. Whilst an increasing propensity to claim has led to higher costs to society and some detrimental changes in various walks of life, there have of course been many beneficial effects.'[232]

Insurance companies and law firms have benefited financially from the increase in compensation claims. Also, genuine claimants have benefited from the simplicity offered by some reputable claims management firms. Socially, 'there are some who would argue that the shift in emphasis towards an individual's right to compensation has forced big businesses and public authorities to behave more responsibly.'[233] Moreover, the more stringent view of health and safety rules is seen by many as a positive step towards a safer society: Lord Falconer is one who believes that 'it is vital compensation claims continue to play their part in improving health and safety.'[234]

---

[227] Tracy Brown, a risk analyst and regular commentator and critic on litigation matters, cited in: Hodder & Stoughton, Institute of Ideas: E. Lee, J. Peysner, T. Brown, I. Walker, D. Lloyd, 'Compensation Crazy: Do we blame and claim too much?' (2002) from General Insurance Communications Committee of the UK Actuarial Profession, *The Cost of Compensation Culture*, (October 2002) Page 59.

[228] General Insurance Communications Committee of the UK Actuarial Profession, *The Cost Of Compensation Culture*, (October 2002) Para. 4.4.

[229] Jim Yeulet, Claims Officer for Lambeth Borough Council, cited in: Channel 4 TV Documentary, 'Cutting Edge: Scams, Claims and Compensation Games', Century Films (25 February 2010, 9pm).

[230] General Insurance Communications Committee of the UK Actuarial Profession, *The Cost Of Compensation Culture*, (October 2002) Para. 4.4.

[231] Ibid, Para. 5.2 – supported by North, I.H, 'Asbestos victims to lobby bankrupt company', The Independent (London, 11 February 2002).

[232] See N230 above Para. 4.5.

[233] Ibid.

[234] Rt Hon Lord Falconer of Thoroton, the Lord Chancellor, *Risk and Redress: Preventing a compensation culture*, (November 2005) cited in: House of Commons Select Committee on Constitutional Affairs, *Compensation Culture* (Third Report, Session 2005-06, HC 754-I) Page 14, Para 37.

Finally, the compensation culture, or at least the perception of it, is needed to control companies that breach health and safety rules because the criminal law is ineffective in this regard. The Corporate Manslaughter and Corporate Homicide Act 2007 is 'unlikely to apply to large companies for many years'[235] as it contains strict retrospective clauses that mean not only must the event have taken place after 6 April 2008, but all the evidence supporting the allegation must also have taken place after that date.[236] Additionally, the Health and Safety at Work Act 1974 has had little effect in providing compensation for injury.[237]

Changing the Perception

First, the media coverage of the area must reflect reality. 'It would be helpful if those in positions of influence could resist talking about the "compensation culture" [as] doing so only perpetuates the problem.'[238] 'This would include making sure that statistics were not reported out of context or inaccurately, and would be linked to a drive to ensure that claims management companies and other legal professionals gave a true representation of the law regarding compensation in all of their advertising.'[239]

Second, people ought to be encouraged to take responsibility for their own actions. 'It is not, and never should be, the policy of the law to require the protection of the foolhardy or reckless few to deprive, or interfere with, the enjoyment by the remainder of society of the liberties and amenities to which they are rightly entitled'.[240] 'Essentially a swing is a swing and does present an inherent and obvious risk. If a parent lets their child use a swing, they might get hurt.'[241] It is important that a 'safety culture'[242] is encouraged also, for example through better risk management by public bodies and enforcing 'better procedures to avoid the claims in the first place,'[243] but this should not be allowed to manifest itself as a blame culture.

Thirdly, alternative dispute resolution (ADR) should be encouraged in place of expensive and confrontational litigation, rehabilitation, conciliation, arbitration and mediation are preferable alternatives. 'It was suggested that this would help in two ways: firstly, the courts would not be clogged up with unnecessary claims; and secondly, cases in which the complainant's primary

---

[235] http://www.corporateaccountability.org/press_releases/2008/apr02newman.htm, 2 April 2008, accessed 23 December 2009.
[236] Corporate Manslaughter and Corporate Homicide Act 2007, s.27.
[237] Vogel, L, 'A critical look at the health and safety at work strategy 2007-2012', (November 2007) *HESA Newsletter* No.3.
[238] Better Regulation Task Force (BRTF), *Better Routes to Redress* (May 2004) Page 17.
[239] 'Government's Responses to the Compensation Culture' – http://www.compensationculture.co.uk/government-responses-to-the-compensation-culture.html, accessed 20 November 2009.
[240] *Tomlinson v Congleton BC* [2004] 1 AC 46, [96], per Lord Hobhouse.
[241] Better Regulation Task Force (BRTF), *Better Routes to Redress* (May 2004) Page 19 – in relation to *Simonds v Isle of Wight* [2004] ELR 5.
[242] Ettinger, C, 'APIL Fights Back at Compensation Critics' (2004) 154 *NLJ* 756, 756.
[243] General Insurance Communications Committee of the UK Actuarial Profession, *The Cost of Compensation Culture,* (October 2002) Para. 5.2.

aim is an apology and a change in policy, rather than financial redress, will be dealt with more efficaciously.'[244] Ombudsmen are an ideal way to encourage ADR as they 'provide a valuable dispute resolution service that is less adversarial than the court service.'[245] It is also vital that the judiciary change their view on the claims process and take more care in their decisions. Recently the Law Commission have published a Consultation Paper [246] containing new proposals for the alteration of the litigation process against public bodies,[247] suggesting that courts should have discretion to stop litigants disproportionately targeting 'public bodies as co-defendants'[248] just because they are 'seen (however unrealistically) as having big pockets.'[249] Also, some sort of aggravated fault[250] would be required 'before a public body would be obliged to reach into its purse.'[251] If these proposals are legislated, it would be harder to succeed in a claim against a public body, thus less spurious and fraudulent claims would be made and the perception of a compensation culture would be reduced. These amendments to the current system could potentially change the faulty perception that there is a compensation culture, and change the public attitude towards making a claim. The Law Commission's proposals should be enforced in order to both discourage fraudulent claims and instigate the other changes.

[244] 'Government's Responses to the Compensation Culture' – www.compensationculture.co.uk, accessed 20 November 2009.
[245] Thomas, G, "Article for The Actuary", www.guythomas.org.uk/compensation/betterroutes.php – accessed 20 November 2009.
[246] The Law Commission, *Administrative Redress: Public Bodies and the Citizen – A Consultation Paper*, (July 2008).
[247] Ibid, Part 4.
[248] Ibid, Para. 4.66.
[249] Fowles, M, 'Tennis with the net down?' (2009) *PILJ* 23-24, 23.
[250] The Law Commission, *Administrative Redress: Public Bodies and the Citizen – A Consultation Paper*, (July 2008) Para. 4.95.
[251] Fowles, M, 'Tennis with the net down?' (2009) *PILJ* 23-24, 24.

## Appendix 1

## Statistics from Essex County Council

| Year | Total No of Claims | Total Paid | Total No of Slip/Trip Claims | Total Paid for Slip/Trip Claims |
|---|---|---|---|---|
| 2001 | 1705 | £1,568,886.27 | 245 | £465,785.55 |
| 2002 | 996 | £1,445,826.33 | 222 | £340,468.40 |
| 2003 | 1042 | £1,957,866.48 | 248 | £477,426.11 |
| 2004 | 1158 | £1,950,402.55 | 256 | £662,978.66 |
| 2005 | 1122 | £2,057,914.83 | 315 | £651,576.76 |
| 2006 | 1420 | £1,528,677.81 | 482 | £854,912.72 |
| 2007 | 1813 | £1,459,511.19 | 510 | £842,461.91 |
| 2008 | 1821 | £521,719.52 | 483 | £247,267.22 |

## Appendix 2

## Statistics from Knowsley Metropolitan Borough Council

| | Number of claims received (exc schools) | Total paid in damages | Total highways injury claims received | Total damages paid for highways injury claims |
|---|---|---|---|---|
| | | | | |
| 2001/02 | 1499 | £ 790,607.49 | 900 | £ 486,605.72 |
| 2002/03 | 1911 | £ 859,712.47 | 1391 | £ 685,452.96 |
| 2003/04 | 1356 | £ 1,323,221.71 | 1109 | £ 886,975.78 |
| 2004/05 | 566 | £ 1,045,488.25 | 403 | £ 854,421.61 |
| 2005/06 | 264 | £ 542,908.19 | 167 | £ 384,982.02 |
| 2006/07 | 355 | £ 384,254.73 | 225 | £ 249,215.59 |
| 2007/08 | 224 | £ 288,158.56 | 151 | £ 237,916.65 |
| 2008/09 | 255 | £ 230,028.84 | 171 | £ 138,463.51 |
| 2009/10 | 254 | £ 191,412.83 | 165 | £ 136,398.51 |

# Birks and the Absence of Basis Approach

*Clive Bow*

The theoretical basis of the law of unjust enrichment can be traced back many centuries, though the most significant developments have only occurred in the last fifty years. Professor Peter Birks has played a pivotal role in the development of the law of unjust enrichment, advocating its importance alongside the other private law obligations - contract and tort. But as with any evolving area of law, establishing a united view on most basic principles can be difficult. A furore was generated by the publication of the second edition of *Unjust Enrichment*,[1] in which Birks presented his final thesis, conflicting with his previous position, in an attempt to rationalise the law.[2] The most revolutionary changes to Birks's scheme relate to the classificatory structure, the movement towards a civilian approach, and the redundant requirement for the claimant's loss to correspond to the defendant's gain. The new classificatory scheme had been previously discussed in an earlier piece by Birks, *Misnomer*,[3] and therefore will not add any weight to a discussion of the revolutionary nature of *Unjust Enrichment*. To facilitate a deep analysis I only intend to address what Birks regards as 'question three': what constitutes an unjust enrichment? The new scheme reflects the contrasting approaches in common law and civilian jurisdictions, and Birks's attempts to resolve the current inadequacies of English law by relying on their respective merits. To conclude, I intend to assess the correctness of Birks' new approach, and whether it has been accepted by English law.

## Introduction

To appreciate the significance of Birks's new scheme, one should first consider how English law traditionally determined whether an enrichment was unjust. The common law followed an approach that was idealistic in its simplicity, adopting terminology that could be easily understood. The court had to identify a positive reason why the recipient of an item was not 'intended to have it'[4] by identifying whether any such intent of

[1] Birks, *Unjust Enrichment* (. Oxford: Clarendon Press 2005)
[2] Birks, *An Introduction to the Law of Restitution* (Oxford University Press 1985)
[3] Birks, 'Misomer' in Cornish, Nolan, O'Sullivan and Virgo Restitution, *Past, Present & Future: Essays in Honour of Gareth Jones* (Oxford Hart Publishing 1998) 1
[4] *Kelly v Solari* (1841) 152 ER 24, 27.

the transferor had been impaired. The common law established an extensive list of recognised unjust factors, including mistake, illegitimate pressure, undue influence, and personal handicaps. However, there were situations the law had not anticipated where restitution was clearly necessary, hence the court later recognised claims where the claimant was able to provide a specific reason why policy militated in favour of restitution.[5] The recognition of policy factors disrupted the continuity of the law of unjust enrichment, and the unsatisfactory state of the law was openly criticised by Lord Diplock.[6] Birks disliked the collection of particular unjust enrichment laws, describing them as being 'an untidy heap, like tort,' adding that policy factors did no more than confess the miscellany.'[7]

The untidy state of the law was clearly problematic, and the development of the common law approach reached a defining moment during the swaps cases litigation. A swap agreement involves a theoretical sum of money and two parties who are willing to take financial risks based on their prediction of future interest rates. One party promises to pay the other a fixed rate of interest of this sum of money to the other, whilst the other party provides the reciprocal arrangement, but with the level of interest determined by a formula. The House of Lords decided that swap agreements involving local authorities were void because they were beyond their money management powers.[8] Therefore anybody who had engaged in a swap agreement with a local authority was granted an opportunity to recover the value of their transfer. The question posed to the court was under what circumstances recovery should be permitted.

Within the case authority there were two types of swap agreements to consider: closed agreements, agreements that had been concluded; and interrupted agreements, contracts that were still in progress. Hobhouse J decided that there was no relevant difference between the two types of case, and that they should both be decided on the grounds of absence of consideration.[9] A subsequent Court of Appeal decision supported this position with respect to closed swap agreement.[10] Due to the non-contractual use of the term consideration, Birks suggests that the term can be used synonymously with basis.[11] However, the House of Lords infamously removed the bar to restitutionary claims on the basis of a mistake of law, and recognised this as constituting another ground for restitution in closed swap cases.[12] Birks described the dual analysis recognised in English law as being 'unsound',[13] because the two approaches could not coexist. A reason for the incompatibility was that unlike the unjust factor approach, the absence-of-basis approach was not affected by policy considerations.[14] Birks disagreed with the reliance on a

[5] Birks (n 1) 106.
[6] *Orakpo v Manson Investments* [1978] AC 95, 104.
[7] Birks (n 1) 107.
[8] *Hazell v Hammersmith & Fulham BC* [1992] 2 AC 1, 43.
[9] *Kleinwort Benson Ltd v Sandwell BC* [1994] 4 All ER 890, 929.
[10] *Guinness Mahon & Co Ltd v Kensington & Chelsea Royal London Borough Council* [1999] QB 215, 236.
[11] Birks (n 1) 117.
[12] *Kleinwort Benson Ltd v Lincoln CC* [1999] 2 AC 349, 389.
[13] Birks (n 1) 112.
[14] Ibid 114.

mistake of law in this type of case, with judicial support located in *Hazell v Hammersmith & Fulham BC*.[15] On a theoretical level, Birks disagreed that a mistake even existed. On the basis that the two approaches could not coexist, and the inherent flaws with mistakes of law constituting an unjust factor, Birks concluded the English courts had adopted the absence-of-basis approach.[16]

## No Basis Approach

Birks appreciated that the unjust factor approach was simple to understand[17], though stressed that a reformulated approach to the law was necessary. Birks considered how civilian jurisdictions, in particular Germany, identified whether an enrichment was unjust. The German Civil Code states:[18]

> A person who through an act performed by another... acquires something at the expense of that other person without legal ground, is bound to render restitution.

This approach strives to find a reason why the transfer should be considered valid, and to formulate a new approach Birks referred to the exact passage which had originally been used to represent the judicial acceptance of the unjust factor approach. Birks's new scheme is founded on the extract 'not entitled', not the previously relevant 'nor intended to have it'.[19] Academics have questioned the rationality behind this conclusion, stating that this fundamental change in direction is not clear from the decision in *Kelly v Solari*, and that Parke B had probably not envisaged the extent to which this extract of judgment would be relied on.[20] Birks was unfazed by the subtlety of the reference to the new approach, stating that 'the ambiguity almost slips unnoticed.'[21]

Birks' new approach has been structured so as to resemble a pyramid. The recognised unjust factors remain influential and are located at the base of the pyramid; placed above is the absence of basis; at the top is the conclusion that the enrichment is unjust. The burden of proof is reversed and now rests with the claimant. Evidence of the transferor's deficient intent will be influential when determining whether the transfer had a valid basis;[22] however, the absence-of-basis stage looks beyond mere reasons of invalidity. The removal of policy-militated factors led to concerns that this would open the floodgate to restitutionary claims, but Birks allayed these fears by stating that policy still served a role in the area of defences. Identifying whether an enrichment was

[15] *Hazell v Hammersmith & Fulham BC* (n 8) 36.
[16] Birks (n 1) 112-113.
[17] Ibid 115.
[18] Section 812(1) German Civil Code (BGB)
[19] *Kelly v Solari* (1841) 152 ER 24, 27.
[20] Burrows, 'Absence of Basis: The New Birksian Scheme' Burrows and Lord Rodgers (eds) Mapping the Law: *Essays in Memory of Peter Birks* (OUP 2006) 38
[21] Birks (n 1) 102.
[22] Ibid 116.

unjust only serves to establish prima facie liability.[23] This approach can be considered superior to the German approach in a number of respects:[24]

(i) It is not exclusively objective or subjective

A purely objective approach is under-inclusive because it cannot accommodate certain situations, such as when an individual transfers money, subject to his doubts as to whether he is under an obligation, and it is later revealed that no such obligation existed because the demands for payment were ultra vires. A purely objective approach would allow a restitutionary claim, but this should not be the case because the transferor had taken a risk.[25] However, a subjective approach also has limitations, for example by denying restitution to a transferor for the purpose of aversion, under the correct impression that he is not under an obligation to pay.[26] Birks' approach does not suffer from the inadequate coverage of the German scheme, because it embraces both subjective and objective elements.[27]

(ii) It adopts a simpler notion of basis

Under German law the requirement of a basis is satisfied by anything that justifies the retention of the enrichment in law, extending to natural obligations. For Birks, all void contracts may potentially instigate a restitutionary claim.[28] Other recognised obligations are addressed at the defence stage, for example the defence of stultification; no basis exists if statute states there is no contract.[29] This is beneficial because there is no need to categorise void contracts; this conforms neatly to the current common law approach.

(iii) Improved unity

The German approach has no difficulty dealing with transfer cases, but outside this category difficulties are encountered when applying the absence-of-basis approach. This problem does not exist in Birks's new scheme, which, he proclaims, achieves tighter unification.[30] An analysis of this confident boast forms the focal point of the next area of discussion.

---

[23] Ibid 263.
[24] Baloch, 'The unjust enrichment pyramid' [2007] LQR 636, 639-645.
[25] Scott, 'Restitution of Extra-Contractual Transfers: Limits of the Absence of Legal Ground Analysis' [2006] RLR 93, 100.
[26] Ibid 102.
[27] Baloch (n 24) 641.
[28] Birks (n 1) 131-135.
[29] Ibid 257.
[30] Birks (n 1) 108.

## Application of Birks's New Approach

The greatest achievement of Birks' new approach is that it can be applied with 'surgical simplicity' – this cannot be said of the current common law approach.[31] He divides the analysis of the application of his new approach into three separate sections: obligatory enrichments, voluntary enrichments and non-participatory enrichments.[32]

(i)Obligatory enrichments

Transfers of enrichments that have been made subject to an obligation have been met by a common law response described as a 'superfluous struggle to identify an unjust factor.'[33] A prime example is the tenuous reliance on policy motivations to bring forth a successful restitutionary claim, demonstrated in *Woolwich Equitable Building Society v IRC*.[34] There is no such uncertainty under the absence-of-basis approach, where the only consideration is whether the transfer is subject to a valid obligation.[35] If the transferor is under no obligation, for example in *Kelly v Solari*,[36] the recipient will not be entitled to retain the item unless a valid defence can be relied upon. Similar to the swaps litigation, in particular *Kleinwort Benson*, identifying the absence of an obligation to pay is much more desirable than encountering technical complexities regarding a mistake of law.

Where the party seeking restitution wants to rely on his deficient intent,[37] the existence of a valid obligation will deny a restitutionary claim.[38] This rigid obstacle to restitutionary claims was considered to generate harsh decisions and so law and equity began to recognise claims depending on the degree of foundational mistake. However the scale of mistake was not clearly defined and so the outcome of cases was difficult to predict.[39] Another prevalent problem was that similar cases were being decided on the ground of unjust factors.[40] Birks pinpoints the exception to the general rule in *Bell v Lever Brothers* to be the problem, which is not an issue in his absence-of-basis approach because these exceptions form part of the rule.[41]

---

[31] Ibid 129.
[32] Ibid 160 – The categories serve no other function other than to demonstrate the universal application of the no basis approach.
[33] Ibid 133.
[34] *Woolwich Equitable Building Society v IRC* [1993] 1 AC 70.
[35] Birks (n 1) 104.
[36] *Kelly v Solari* (n 19). The case was decided on the ground of a mistaken payment, though the judgment was for a new trial.
[37] Except in circumstances where the party's autonomy was reduced by some severe personal handicap.
[38] *Evident in: Bell v Lever Brothers Ltd* [1932] AC 161, 210.
[39] *Contrast: Solle v Butcher* [1950] 1 KB 671, with: Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd, The Great Preace [2002] EWCA Civ 1407.
[40] *Deutsche Morgan Grenfell Group plc v IRC* [2003] 4 All ER 645.
[41] Birks (n 1) 139.

If the obligation of the transfer fails after the enrichment has been transferred, the success of a restitutionary claim depends on whether an analogy can be drawn with one of the conflicting common law authorities. Chandler v Webster is authority for the proposition that if there was effective consideration at the time of contract formation, an aggrieved party cannot later rely on the failure of basis unless the contract was rescinded ab initio.[42] However in Fibrosa it was decided a contract that had been frustrated could generate a right to restitution, because this constituted a 'total failure of consideration'.[43] Birks's pyramid could consistently address both decisions. In cases analogous to Fibrosa, Birks's pyramid would consider this to constitute a failure of reciprocation, invalidating the obligation, meaning there was no explanatory basis for the transfer.[44]

A critical area of Birks's analysis is how it addresses a situation in which a benefit is conferred under an avoided or a terminable contract. Burrows had anticipated that Birks's thesis would state the act of avoiding or terminating a contract as constituting an absence of basis, instigating a restitutionary claim.[45] It would be logical to view either of these events as capable of destroying the obligation for which a transfer had been made. Instead Birks considers the right to terminate the contract as providing the trigger for the restitutionary claim, the basis falling away retrospectively.[46] A contract being unenforceable, on the other hand, will not in itself constitute an absence of basis.[47] It has been argued that if this area of Birks' thesis is to succeed, the distinction between void and unenforceable contracts needs to be more clearly defined.[48] The current approach will not be viewed favourably by somebody who is in a position to terminate a contract, as he will not necessarily know whether it will lead to a restitutionary remedy, or the contract being rescinded *ab initio*. This is an obvious weakness in Birks' scheme, and there appears to be no logical reason why Burrows' observation had not been followed.

(i)Voluntary enrichments

For the purpose of analysing voluntary enrichments, the analysis of transfers has been separated into the following categories: contracts, trust and gifts.[49] In the context of contracts that may come about, the common law approach involves a complex assessment of the relationship between the parties and past events. So if a builder was informed that his performance will lead to a contract, and due to an unusual history it is common knowledge that payment was never expected, the restitutionary claim will not succeed and the courts

[42] *Chandler v Webster* [1904] 1 KB 493, 501.
[43] *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour* [1943] AC 32, 60-61.
[44] Birks (n 1) 142.
[45] Burrows (n 20) 40.
[46] Meier, 'No Basis: A Comparative View' Burrows and Lord Rodgers (eds) Mapping the Law: Essays in Memory of Peter Birks OUP (2006) 349.
[47] Birks (n 1) 126.
[48] Dannemann, 'Unjust Enrichment as Absence of Basis, Burrows and Lord Rodgers' (eds) Mapping the Law: *Essays in Memory of Peter Birks* OUP (OUP 2006) 376.
[49] Birks (n 1) 152 - The category of transfer bears little technical significance; other situations may give rise to restitution.

will construe the transfer as a gift.[50] Birks' approach requires making the distinction between risk-takers and non-risk-takers, which can be difficult, but it is a vast improvement on having to differentiate between present and future facts.[51] Whereas if the transfer was made to conclude the contract, and this did not eventuate, the court will have to decide whether the claimant had made a misprediction[52] or a mistake[53] - a fine factual distinction. Following Birks' no basis approach, *Dextra* would be decided differently - a cause of action should have been allowed because there was no intended basis of transfer.

Trusts are generally regarded as constituting a voluntary transfer; however, there are exceptions to this rule, particularly within the realms of the resulting trust. *Vandervell v IRC* provides authority for the proposition that the beneficial interest must vest with somebody, and it should lie with the donor if not stated.[54] The presumption is in favour of a trust, and the onus of rebuttal rests with the recipient. In practice there does not appear to be a presumption operating at all, and the courts are just concerned with identifying which party has the strongest evidence in support of their interest.[55] Furthermore, the existence of any such presumption has been criticised for being unreal.[56] Birks agreed, stating that this presumption can not only be rebutted by contradictory evidence, but also by evidence that the transferor had not contemplated the failure of the trust.[57] Lord Millett stated that amidst the uncertainty of the intention of the settlor, the courts will presume that he had not intended to pass the beneficial interest to the recipient.[58] For Birks it seemed more rational to avoid these 'fictitious manifestations of intent'[59] and recognise that the beneficial interest returns to the donor by operation of the reversal of an unjust enrichment.[60]

Gifts, with *animus donandi*, have a recognised basis for enrichment.[61] Consequently, anything that impairs the intent of the transferor may be sufficient to invalidate the transfer, for example undue influence.[62] A transfer may be invalidated long after the donee receives the enrichment, if the donor's intent is qualified.[63] Bargains are substantially different from gifts in that the risk of disappointment lies with the contracting party, and so a restitutionary remedy will not be available because the parties got what they bargained for.[64]

---

[50] *Rowe v Vale of White Horse DC* [2003] 1 Lloyd's Rep 418, 422.
[51] Meier (n 46) 353.
[52] *Dextra Bank & Trust Co Ltd v Bank of Jamaica* [2002] 1 All ER (Comm) 193, 202-203.
[53] *R E Jones Ltd v Waring & Gillow Ltd* [1926] AC 670, 693-694.
[54] *Vandervell v IRC* [1967] 2 A.C. 291, 308.
[55] Example: *Hodgson v Marks* [1971] Ch 892.
[56] *Westdeutsche Landesbank Girozentrale v Islington BC* [1996] AC 669, 703,707-8.
[57] *Re Gillingham Bus Disaster Fund* [1958] Ch 300, 310.
[58] *Air Jamaica Ltd v Charlton* [1999] 1 W.L.R. 1399, 1412.
[59] Supported by Swadling: Swadling, 'Explaining Resulting Trusts' [2008] LQR 72, 95.
[60] Birks (n 1) 152.
[61] Ibid 148.
[62] *Allcard v Skinner* [2002] EWCA Civ 885.
[63] *Hussey v Palmer* [1972] 1 WLR 1286.
[64] Birks (n 1) 149.

(ii)Non-Participatory enrichments

Enrichment may occur without one of the parties actively being involved – the transfer clearly lacks a valid basis. The common law previously had difficulties recognising that no fault or wrong was required; there was uncertainty as to whether ignorance constituted an unjust factor.[65] To prevent injustice, defences are available, for example good faith. In equity the position appears to be different, because fault is a necessary requirement.[66] Birks' approach does not consider fault because there is no reason for the transfer to be considered valid. The requirement of fault was criticised for attempting to 'disapply the law of unjust enrichment in favour of the law of wrongs,'[67] a view that has received the support from both Lord Millett[68] and Lord Nicholls.[69]

Birks diverts his attention to situations involving 'by-benefits' – where an individual performs an activity for his own personal benefit, but also indirectly enriches another. No restitution should be awarded, and the unjust factor approach achieves this conclusion simply by failing to recognise an unjust factor. Whilst one would expect the no basis approach to favour a restitutionary response, this is not the case and such transfers should not be regarded as being anything more than a 'grudging gift'.[70] Birks states that 'if the principal activity is freely intended...the incidents of that activity are also intended, however little they may be wanted.'[71] This reflects the overly broad conceptual understanding of the term gift, for on this understanding they can be transferred unconsciously to an endless number of people. Whilst this justification is not technically an exception to the new scheme,[72] the advantage of shielding against endless claims has been at the expense of introducing an unwelcome inconsistency.

## Reception to Birks' New Approach

Much of the discussion thus far has concerned the respective merits and flaws of Birks' new scheme, therefore satisfying the area of discussion regarding whether this new approach should be followed. Turning to the question whether the courts actually do follow his scheme, one would have to consider subsequent case law authority. Since the publication of Unjust Enrichment, the courts have appeared far from willing to openly accept Birks' absence-of-basis approach. The House of Lords was given the opportunity to clarify its position in *Deutsche Morgan Grenfell v IRC*. Lord Hoffman echoed the opinion of the majority of the Lords, deciding that the circumstances of the case were not an appropriate opportunity to consider such fundamental

[65] *Lipkin Gorman v Karpnale* [1991] 2 A.C. 548, 559-560.
[66] Re Montagu's Settlement Trusts [1987] Ch 264, 284.
[67] Birks (n 1) 157.
[68] *Twinsectra Ltd v Yardley* [2002] A.C. 164, 200-201.
[69] Lord Nicholls of Birkenhead, 'Knowing Receipt: The need for a New Landmark' in WR Cornish, R Nolan, J O'Sullivan, and G Virgo (eds), *Restitution, Past, Present and Future: Essays in Honour of Gareth Jones, Hart* (Oxford OUP 1998) 231.
[70] Birks (n 1) 159.
[71] 158.
[72] Baloch (n 24) 653.

principles of unjust enrichment, and in doing so declined to discuss the matter any further.[73] A more forthcoming response by the Lords was perhaps not possible due to the pressure being exerted on the courts by academics.[74] Despite this, Lord Walker took the opportunity to express an affectionate tribute to the achievements of Birks. Rather than discarding the relevance of Birks's thesis, Lord Walker acknowledged the rapid development of case law in recent times, and that there had not been much opportunity to pursue the ideas of Birks. For those in favour of a civilian-style approach being incorporated into English law, the following passage will be warmly received:[75]

> I would be glad to see the law developing on those lines. The recognition of 'no basis' as a single unifying principle would preserve what Lord Hope refers to as the purity of the principle on which unjust enrichment is founded, without in any way removing (as this case illustrates) the need for careful analysis of the content of particular "unjust factors" such as mistake.

Without any more authoritative judicial support, Birks strongest support is still Guinness Mahon – a Court of Appeal decision. Kleinwort Benson was decided on the ground of a mistake of law, and agreeing with the justification behind this decision serves as a decisive factor as to whether one approves of Birks' new scheme.[76] Amidst all of the subsequent House of Lords decisions, his thesis is anchored in shallow foundations.

Virgo, who is not an admirer of the absence-of-basis approach, considered this to be a negative development because there will always be a need to refer to established grounds of restitution to determine whether there was a basis for payment.[77] His opinion is strengthened when considered in conjunction with Stevens' observation on the relationship between what constitutes an unjust factor and the available defences. Stevens notes that under the current position, certain unjust factors compliment certain defences; for example change of position operates where there has been a mistake. He accepts that such relationships will be lost under the absence-of-basis approach.[78]

As for further outstanding points made by the academic world, Burrows remains highly critical of the absence-of-basis approach because it does not address the complicated issues faced by the unjust factor approach. He accuses the pyramid of obfuscating details such as mistake or duress, and, in doing so, not actually assisting the court in determining whether restitution should be awarded.[79] Instead these complications are transferred to the defence stage, which is equally problematic. However, like all academics,

---

[73] *Deutsche Morgan Grenfell v IRC* [2006] UKHL 49, paragraphs 21-22.
[74] Ibid 155.
[75] Ibid 150-158.
[76] Cf Burrows, *The Law of Restitution* (OUP 2nd.ed. 2002) 156.
[77] Virgo, 'Deutsche Morgan Grenfell: restitution for payments: back to basics' (2007) BTR 27, 30.
[78] Stevens, 'The New Birksian Approach to Unjust Enrichment' (2004) RLR 270, 271.
[79] Burrows (n 20) 46-47.

Burrows can appreciate the merits of Birks' pyramid, and submits that he would prefer to see it being used 'as an alternative line of reasoning...as a cross-check in difficult or novel cases.'[80] Perhaps the pressure exerted on the courts to consider the absence-of-basis approach will accelerate the inevitable change in judicial approach to overcome the inherent problems with the unjust factor approach.[81]

# Conclusions

The current common law approach to identifying whether an enrichment is unjust is unsatisfactory, and the criticisms raised by the academic world provide a positive pressure on the courts to reconsider this area of law. Instead of developing the unjust factor approach, Birks has started afresh and formulated a viable alternative solution. Whilst introducing civilian principles into a common law jurisdiction is likely to be met by reactions of uncertainty, the absence-of-basis pyramid that he proposes has been sculpted in such a fashion to make the two approaches compatible. Furthermore, he has transposed the German approach without its associated problems.

Whilst the absence-of-basis approach is praised for its surgical simplicity, overcoming the problems previously experienced under the common law, and applicability to a broad range of situations, the approach is not entirely problem-free. The main problems can be summarised as follows:

1) The justification for allowing restitution for terminable or voidable contracts does not seem to conform to what is expected from Birks's thesis. As an unenforceable contract will not in itself constitute a cause of action, the distinction between the two types of claim needs to be clearer.

2) The justification for preventing restitutionary claims for by-benefits is controversial, better resolved under the old scheme, and introduces an unwelcome inconsistency.

3) The language and terminology was simpler under the common law scheme, which had the advantage of being understandable by non-specialists. Whilst this is not of paramount concern for the courts, in light of the disadvantage to the public, the wisdom of altering the approach is suspect.

4) Whilst the absence-of-basis approach does not accommodate policy factors, it has been accused of deferring the problems addressed by the unjust factor approach to the defence stage.

[80] Ibid 48.
[81] Dannemann (n 48) 377.

> 5) It will abolish the established relationships between what constitutes an unjust enrichment and the available defences, for example mistake and change of position.

If English law were to undergo a transition from an unjust factor approach to an absence-of-basis approach, one would expect a clear and unambiguous acknowledgement of this development from the House of Lords. This did not happen in *Kleinwort Benson*, and the inference Birks made that they had, on the basis of the incompatibility between the two approaches, was premature. This view was reaffirmed in *Deutsche Morgan Grenfell*, where the House of Lords were clearly unwilling to clarify their position on this principle of unjust enrichment, because of the pressure exerted on them by academics.

As for the future, Lord Walker views the Birksian pyramid favourably, and his standpoint is crucial considering that he is a member of the new Supreme Court. An alternative approach for the future would be to use the absence-of-basis approach as a cross-check. As the outcome of most cases will be the same under both approaches, embracing the new principles when considering peripheral cases will be beneficial, without requiring a major upheaval of the common law. *Unjust Enrichment* provides an excellent starting point for discussion on how the law of unjust enrichment should progress,[82] and it is essential that Birks's ideas are developed.

[82] Krebs, 'The New Birksian Approach to Unjust Enrichment' (2004) RLR 263, 276.

# Out with the Old, in with the New? Comparing the 1992 US Horizontal Merger Guidelines with the 2010 US Horizontal Merger Guidelines

*Alison Knight*[1]

In 2010, new merger guidelines were adopted by the US antitrust agencies on the assessment of mergers between competitors under competition law. This paper critically compares such horizontal guidelines with their 1992 predecessor to analyse the extent to which there is continuity between the two. It is argued that their approaches are not mutually exclusive. Rather, the new guidelines can be viewed as retaining the spirit of the old; both are revolutionary and controversial of their day in endorsing (albeit to different extents) a place for modern economic learning and techniques in legal assessment. The 2010 guidelines, however, go further in making transparent the acceptance of merger-analytical practices focused on competitive effects that have been employed by the antitrust agencies over the last two decades. Although the full impact of the 2010 guidelines is yet to be realised, this paper concludes that pivotal to their acceptance is the attitude of the US judiciary who have so far shown reluctance to import explicitly and whole-heartedly the language and evidence of economics into the realm of law.

## Introduction

In August 2010, the US Department of Justice and the Federal Trade Commission – together responsible for US antitrust law enforcement ('the Agencies') - released new horizontal merger guidelines ('the 2010-Guidelines').[2] They outline their principal analytical framework and practices regarding competitor-merger review, notably under the Clayton Act.[3] This reissue is the first for nearly 20 years, replacing the version issued in 1992 partially amended in 1997 (the '1992-Guidelines')[4] heralded as *'the blueprint'*

[1] Formerly Legal Adviser/Principal Case Officer of Mergers at the UK Office of Fair Trading.
[2] US Department of Justice & Federal Trade Commission, *Horizontal Merger Guidelines* (2010).
[3] The Clayton Act (1914), section 7 prohibits acquisitions from the effects of which *'may be substantially to lessen competition, or to tend to create a monopoly'* regarding commerce in the US.
[4] U.S. Department of Justice & Federal Trade Commission, *Horizontal Merger Guidelines* (1992, revised 1997).

for merger analysis architecture.[5] They were similarly designed to articulate the assessment techniques, and the main evidence types, used to determine whether a post-merger substantial lessening of competition ('SLC') is likely. Both Guidelines were thus intended to clarify US merger enforcement policy.[6]

Despite these broad similarities, the 2010-Guidelines alter the landscape for evaluating mergers in several important ways. Their pervasive theme is competitive effects and, consequently, much greater emphasis is placed on the types of information the Agencies use in their determination. This focus is coupled with a more flexible attitude to the process of merger review generally, whereby the shackles to traditional methodology are loosened. There is de-emphasis on the importance of market-structural benchmarks, together with recognition of the inherent limitations of certain analytical tools. Furthermore, the number of evidentiary and theoretical routes for pursuing cases against horizontal mergers has widened with a particular spotlight on the degree to which merging parties are particularly close rivals.

To evaluate the full impact of the changes introduced by the 2010-Guidelines, they should be understood in historical context. They reflect various elements of economic learning in its progression over the last 50 years. It will be seen that many of the approaches in the 1992-Guidelines are still contained in the 2010-Guidelines. Therefore, it is contended that the modifications are largely *evolutionary* (with retention and extension of much of the same theory) rather than *revolutionary* (radically different), albeit with key changes in emphasis.

Indeed, the Agencies have acknowledged the evolution of merger review and its methodologies. In the press release accompanying its issue, it is stated that the 2010-Guidelines *'are not intended to represent a change in the direction of merger review policy'* but *'take into account the legal and economic developments since the 1992-Guidelines were issued'*.[7] Shapiro describes it as *'the ongoing trend in merger enforcement from hedgehog to fox that has continued since 1992'*.[8][9]

---

[5] Antitrust Modernization Commission, *Report and Recommendations* (2007) 55.

[6] Being statements of agency enforcement policy, neither is technically binding on the courts, although the 2010-Guidelines suggest that they may assist the courts.

[7] Federal Trade Commission Press Release, *Federal Trade Commission and U.S. Department of Justice Issue Revised Horizontal Merger Guidelines* (19 August 2010).

[8] Carl Shapiro, 'The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in 40 Years', 77 *Antitrust Law Journal* (September 2010) 2, 8. The hedgehog stands for knowledge of one big idea, compared to the fox knowing many things and embracing multiple models.

[9] Illustrative of this transition, in 2006 the Agencies issued a Commentary on the 1992-Guidelines (U.S. Department of Justice & Federal Trade Commission, *Commentary on the Horizontal Merger Guidelines* (2006) ('the Commentary') to increase clarity and transparency regarding the reasoning behind their enforcement processes. This is a useful document to shed greater light on the methodologies the Agencies use in merger investigations and to help draw comparisons between the Guidelines. What is unclear is the extent to which the Commentary, finding complementarity between the essence of the 1992-Guidelines and the subject matter later codified in the 2010-Guidelines, was written with the mindset of merger enforcement as practised in the last decade (rather than in the 90's). This comment springs from the fact that over the last few years the antitrust community has acknowledged a growing divergence between the analytical framework laid out in the 1992-

The 2010-Guidelines bridge the gap formally between past statements and present day custom. In this sense, they are not new; rather, they attempt to increase transparency on the practices the Agencies currently employ already.[10]

This paper first compares the structure of the Guidelines, as illustrative of differences in approach. It then critically reviews some important analytical elements broken down into: competitive effects; analytical tools and evidence; market definition, market shares and concentration levels; theories of harm; and other factors that can be argued in justification of an otherwise problematic merger. It concludes that what the 2010-Guidelines gain in flexibility, they may be accused of losing by way of legal certainty. Moreover, their break in emphasis regarding certain traditional methodologies in the 1992-Guidelines may ultimately put them squarely at loggerheads with the courts in the future.

## Structure and Approach

Neither Guidelines intend to detail how the Agencies would evaluate every set of circumstances that a merger may present. They both acknowledge that the standards they describe should not apply mechanistically.[11] Notwithstanding, the 1992 Horizontal Merger Guidelines' framework is structured around a five-step analytical process followed by the Agencies for determining whether a merger is likely to harm competition. These parts are: market definition; measurement/concentration; potential adverse competitive effects; entry analysis; efficiencies; and (if relevant) failing firm/division. This organisational structure has become deeply embedded in mainstream merger analysis.

Thus the 1992-Guidelines have been accused of advocating a formulaic approach when reviewing mergers. Whether this was intended or not,[12] the 2010-Guidelines eliminate expressly the five-step structure. They attribute the Agencies with more analytical flexibility in the review process through integrated evaluation, with a choice of methodologies (rather than a 'tick-box', sequential exercise of step-by-step progression).

---

Guidelines and the practices of the Agencies. It is contended that there is likely to be a degree of interpretation with hindsight in the Commentary. For that reason, by way of caution, the 1992-Guidelines are approached in this paper without the modern gloss overlaid by the Commentary.

[10] Christine A Varney, Assistant Attorney General of the Antitrust Division, U.S. Department of Justice, 'An Update on the Review of the Merger Guidelines' (Remarks as Prepared for the Horizontal Merger Guidelines Review Project's Final Workshop, 26 January 2010).

[11] 1992-Guidelines, p.1 and 2010-Guidelines, p.1.

[12] See, for example, p.2 of the Commentary suggesting that the ordering of the 1992-Guidelines methodology *'is not itself analytically significant'*.

## Adverse Competitive Effects, Analytical Tools and Evidence

The core, substantive purpose behind both Guidelines is enabling recognition of whether a merger between rivals is likely to create a SLC and should be prohibited because of its ability significantly to create, enhance or facilitate the exercise of market power (ultimately resulting in consumer harm).[13] However, it is the 2010-Guidelines which gives central prominence to the scrutiny of competitive effects (the consequence of market power) as the primary focus of merger analysis. Commissioner Rosch, for example, praises their consideration of *'competitive effects first'* as *'ultimately merger analysis must rest on the competitive effects of a transaction'*.[14]

In determining competitive effects, merger review is necessarily linked to determination of facts on the basis of which predictions about future probabilities can be made. By comparison with the 1992-Guidelines, far greater guidance is given in the 2010-Guidelines as to how this can be achieved. Section 2 of the 2010-Guidelines, for example, describes a range of analytical techniques, evidence categories and sources available to the Agencies in their review process.[15] The 1992-Guidelines, by contrast, largely relegate discussion of a merger's competitive impact to its section 2, after market definition, measurement and concentration.

A few points are striking here. First, while the Agencies can evaluate a range of empirical evidence, there is more focus now than in the 1992-Guidelines on economic analyses/evidence in corroboration. The 2010-Guidelines also suggest that the Agencies will base their SLC determination on the totality of information in their possession and disavow having to consider every type of evidence in every case, with no one item taking absolute precedence over another. [16] Moreover, the 2010-Guidelines' reference to head-to-head competition between the merging parties is a repetitive theme in contrast with the 1992-Guidelines.

## Market Definition, Market Shares and Concentration Levels

The 1992-Guidelines' approach to analysis and evidence is most clearly distinguished with respect to market definition, shares and concentrations.

---

[13] 1992-Guidelines, p.2 and 2010-Guidelines, p.2. Both define market power, although notably the 1992-Guidelines focus on its manifestation regarding pricing levels only, whereas the 2010-Guidelines also refer to non-price manifestations.

[14] J. Thomas Rosch, Commissioner of the Federal Trade Commission, *Statement on the Release of the 2010 Horizontal Merger Guidelines* (19 August 2010) 1.

[15] The five types of direct and indirect evidence that the Agencies now normally find most informative in predicting the likely competitive effects of mergers are highlighted in section 2.1 (albeit admitted to be non-exhaustive): actual effects of consummated mergers; direct comparisons based on experience (so-called 'natural experiments'); market shares and concentration; substantial head-to-head competition; and one of the merging parties being a disruptive competitor (See 2010-Guidelines, section 2.1).

[16] 2010-Guidelines, p. 2.

i) Market Definition

Product and geographic market definition is the first step of the 1992 analysis (section 1), only after which the methodology formally turns to likely adverse competitive effects. The 2010-Guidelines, in contrast, while still holding market definition to be important, deemphasise its status (relegated to section 4). It is just one factor amongst many in the integrated effects-analysis approach.

In particular, under the 2010-Guidelines market definition should not be seen as separate from effects analysis (with both capable of informing the other).[17] However, the two are not mutually inclusive (indistinguishable in practice). For example, it may be possible to have a broad market definition and a SLC because the merging parties supply particularly close substitutes. The articulation under the 2010-Guidelines that the Agencies will *'normally'*[18] (impliedly not always) define a relevant market is a significant departure from the traditional 1992-Guidelines methodology. Commissioner Rosch describes it as a *'monumental contribution'*, correcting a *'misimpression'* that market verification and shares are *'gating items, without which competitive effects cannot be considered'*.[19]

Motivation for this change arguably stems from past disproportionate attention placed on market definition and its inferential function, in distortion of its original objective. Under the 2010-Guidelines, market definition is not conceived as an end in itself, a prerequisite starting point or, indeed, a necessary component to effects analysis.[20] Rather its usefulness lies in its ability to illuminate the potential competitive impact of mergers[21] - standing alongside other analytical tools available to the Agencies - although with greater emphasis placed on direct types of potential competitive effects-evidence where they are available and reliable.[22]

This is not to deny the important role that the Agencies attribute to market definition. The 2010-Guidelines state, upfront, in section 4 that its particular significance lies in identifying a competitive arena: the line of commerce and geographical section in which competitive may occur; and, market participants together with shares and concentration levels.[23] Similarly, in determining market definition, both Guidelines retain the economically-

[17] See the 2010-Guidelines, p. 7. The following example is given: *'evidence that a reduction in the number of significant rivals offering a group of products causes prices for those products to rise significantly can itself establish that those products are a relevant market. Such evidence also may more directly predict the competitive effects of a merger, reducing the role of inferences from market definition and market shares.'*

[18] See the 2010-Guidelines, p.7.

[19] Rosch (n 14) 1.

[20] Although this will frequently be the case as a means to evaluate the competitive alternatives that are available to customers of the merging parties.

[21] 2010-Guidelines, p.7.

[22] 2010-Guidelines, p.10 and p.12 (*'The ultimate goal of market definition is to help determine whether the merger may substantially lessen competition'*).

[23] Ibid.

formulated hypothetical monopolist test ('HMT').[24] Its primary role in both Guidelines is to check that antitrust markets are not defined too narrowly. However, the 2010-Guidelines go further (section 4.1.1) in updating the Agencies' approach to HMT.

For example, the HMT is applied differently when evaluating possible candidate markets. The 2010-Guidelines state that the Agencies may apply the HMT to define relevant markets by using an assumed price increase for only one product of one of the merging firms.[25] Market definition has traditionally assumed price increases for all directly competing products of the merging firms. [26] Furthermore, the 2010-Guidelines introduce a complementary method to assist in determining whether the boundaries of a candidate market are correct – so-called 'critical loss analysis'. This calculates the quantity of sales that a merging business would have to lose post-SSNIP to break-even on profitability. [27] The results are compared with the totality of customer-substitution evidence for consistency.[28]

These and other revisions reflect the fact that market definition, and the HMT as part of its expression, are imperfect tools. The 2010-Guidelines explain this fallacy regarding the perception of *'precise metes and bounds'* of market definition:

> 'Customers often confront a range of possible substitutes for the products of the merging firms. Some substitutes may be closer, and others more distant, either geographically or in terms of product attributes and perceptions...defining a market to include some substitutes and exclude others is inevitably a simplification that cannot capture the full variation in the extent to which different products compete against each other'.[29]

Therefore, the 'market' is a conceptual framework which should not determine mechanistically the outcome of the Agencies' analysis of the competitive effects of the merger. In assessing whether a merger gives rise to SLC, the 2010-Guidelines acknowledge in a novel and fuller way that the Agencies may take into account constraints outside the relevant market, segmentation within the relevant market (such as where customer discrimination is possible), as well as any other ways in which certain competitive constraints are more important than others.

---

[24] The HMT defines a market by finding the smallest set of products where a hypothetical monopolist controlling such products could profitably impose a small but significant and non-transitory increase in price ('SSNIP').
[25] 2010-Guidelines, p.9.
[26] 1992-Guidelines, p.6.
[27] 2010-Guidelines, p.12 (section 4.1.3).
[28] Ibid.
[29] 2010-Guidelines, p.7. This notion is only nodded to in section 1.52 (p.17) of the 1992-Guidelines.

ii) Market Shares and Concentration Levels

Just as any myth perpetuated by the 1992-Guidelines that market definition is definitive for predicting competitive effects from a merger has been debunked, in the same way the 2010-Guidelines (section 5) approach the evaluation of shares and concentrations. They are similarly optional with their roles firmly subordinated to illuminating competitive effects in conjunction with other evidence. Much less weight is placed on them now as a result.[30]

This highlights another significant difference between the Guidelines. The 1992-Guidelines created safe-harbours below which merging parties could suppose their transaction safe from a SLC-presumption. The 2010-Guidelines amend this position. For example, one such threshold applied in the 1992-Guidelines where the combined share of the merging parties was less than 35% in the relevant market(s).[31] This is now removed. Another example is the 2010-Guidelines' approach to the Herfindah-Hirschman Index ('HHI'), a mathematical formula used by the Agencies to measure market concentration espoused in the 1992-Guidelines. [32] While retaining this concept as a frequently useful indicator of likely potential competitive impact,[33] the 2010-Guidelines increase HHI thresholds over which mergers are considered to warrant further scrutiny at second-phase investigation lessening their rigidity.[34]

No merger resulting in an incremental HHI increase of less than 100 points will now be of concern (previously more than 50 was a starting-point for concern). The 'unconcentrated' market threshold (unlikely to raise concerns) has risen to below 1500 from below 1000, the 'moderately concentrated market' threshold (potentially raising significant concerns) has risen to between 1500-2500 from between 1000-1800, and the 'highly concentrated market' threshold (also potentially raising significant concerns) has risen to above 2500 from above 1800.[35]

More generally, these amendments reflect the fact that merger control policy has moved increasingly away from a reliance on structural presumptions. Recent economic theory adopts a more dynamic theory of competitiveness. In this light, structural-screening diagnostics (such as the overall market HHI level) retain a role in continuing to act as first-cut red-flags as to possible

[30] 2010-Guidelines, p.15. This is also a reflection of the fact that neither can be calculated until after market definition has taken place; therefore, uncertainty about the role of one reflects uncertainty about the role of these others.
[31] 1992-Guidelines, pp.24-25. This relates to unilateral theories of harm where the merging parties have differentiated products (and a significant share of customers for one merging parties' product regard the other merging parties' product as their second choice) or undifferentiated products.
[32] Market concentration is described as *'a function of the number of firms in a market and their respective market shares'* (1992-Guidelines, p.15).
[33] 2010-Guidelines, p.18 (section 5.3).
[34] 2010-Guidelines, p.19 (section 5.3). Compare 1992-Guidelines p.16 (section 1.51).
[35] Ibid.

concerns requiring deeper inquiry,[36] but they are certainly not decisive in the making of enforcement decisions and there are no longer any rigid safe-harbours. For example, there is explicit recognition in the 2010-Guidelines that significant increases in concentration can be overturned by persuasive evidence.[37] Similarly, an SLC is not dependant on structural evidence. By contrast, the 1992-Guidelines's preoccupation with the first part of its linear checklist in some part reflected historical fixation with trends towards market concentration as a primary antitrust evil in the 20th century.[38]

## Theories of Harm

Merger investigations are framed by the formulation of theories of harm to competition that may result from transactions and exploration of evidence to support/reject those theories. Although the Guidelines approach the framework of analysis differently, they both identify the same, two broad analytical theories of harm for horizontal mergers. These require that the Agencies ask whether the merger will result in a SLC either by enabling the merged firm *unilaterally* to exercise market power and/or by increasing the risk of *collusive* interaction among rival businesses permitting the exercise of market power in concert.

### i) Unilateral Effects

Unilateral effects analysis – whether a SLC is likely to occur simply by eliminating competition between the merging parties irrespective of coordination - has ascended in importance with the 2010-Guidelines. This reflects a development in economic thinking since 1992. Taking a step back, the 1992-Guidelines themselves introduced a major step in antitrust by introducing the notion of unilateral effects.[39] Hence, section 2.21 of the 1992-Guidelines deals with unilateral effects in differentiated product markets and how the Agencies assess the impact of mergers on pricing competition in this respect. However, it does so in a fairly perfunctory fashion.[40] The 2010-

[36] It is a broadly-stated, economic truism that mergers resulting in a firm gaining control of a large part of a relevant market are often associated with the likelihood of a resultant SLC (particularly where the market is already highly concentrated). Furthermore, more weight is applied on HHI measures in coordinated effects cases.

[37] 2010-Guidelines, p. 3 (*'Mergers that cause a significant increase in concentration and result in highly concentrated markets are presumed to be likely to enhance market power, but this presumption can be rebutted by persuasive evidence showing that the merger is unlikely to enhance market power'*).

[38] For example, see Joseph Farrell and Carl Shapiro, *Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition* (February 2010) 2.

[39] Notably, however, the consideration of unilateral effects (section 2.2) comes after coordinated effects (section 2.1) in the 1992-Guidelines. In the 2010-Guidelines, the sequencing is reversed.

[40] 1992-Guidelines, p.23. (*'A merger between firms selling differentiated products may diminish competition by enabling the merged firm to profit by unilaterally raising the price of one or both products above the premerger level...The price rise will be greater the closer substitutes are the products of the merging firms, i.e. the more the buyers of one product consider the other product to be their next choice.'*) .

Guidelines, while retaining the basic 1992 economic theory, extrapolate on this framework with analytical specifics. In so doing, attention is shifted away from market structure features in preference for direct competition evidence between the merging parties. They also describe a variety of different scenarios and dimensions of competition where unilateral effects analysis can be relevant.[41]

Section 6.1 of the 2010-Guidelines deals with unilateral pricing effects for differentiated products, centred on the extent to which customers of products sold by one business deem products by the other merging party to be their next choice. Diagnosis includes through estimation of diversion ratios[42], margins (the difference between price and a measure of cost) and also the inference of the value of diverted sales between the merging parties' products.[43] The Agencies in addition now rely on a range of other evidence such as business documents, customer surveys, together with sophisticated merger simulations where sufficient data is available.[44] This is a far cry from the methodology of the 1992-Guidelines and its dependence on market presumptions and qualitative evidence.[45]

The 2010-Guidelines also consider the possibility of a SLC arising via unilateral effects in the case of bargaining and auction situations (section 6.2) and for homogenous goods (section 6.3). The latter is broadly modelled on the 1992-Guidelines (section 2.22), but without reference to its 35% safe-harbour market share threshold. Section 6.4 of the 2010-Guidelines on unilateral effects relating to innovation and product variety is entirely new. This is an express acknowledgement that the Agencies will consider the impact of mergers on competition other than price in tandem with pricing effects, especially with respect to reduced incentives for long-term innovation, again reflecting a development in economic learning.[46] By contrast, the 1992-Guidelines while acknowledging that non-price manifestations of market power can exist[47] focus almost exclusively on pricing effects of horizontal merger theories of harm (suggesting that little attention used to be paid to how a transaction affected non-price factors such as possible reductions in service quality).

---

[41] 2010-Guidelines, p.20.

[42] The diversion ratio is the percentage of unit sales lost by one product when its price increases, diverted to a second product. *'If the price of Brand A were to rise, what fraction of the customers leaving Brand A would switch to Brand B?'* See Carl Shapiro, *Mergers with Differentiated Products, Antitrust* (Spring 1996) 23.

[43] In heavily relying on these indicative economic concepts, the Agencies try to determine whether and to what degree a merged entity may be incentivised to raise its price in respect of one of its products because a sufficient number of buyers will switch to its other product permitting it to recapture lost revenues/profits. This methodology is often labelled the 'upward pricing pressure' test.

[44] Such evidence often overlaps with the types of evidence relevant to the HMT, again illustrating how merger analysis is holistic.

[45] Indeed, the 2010-Guidelines state at p.21 that diagnosing unilateral effects (as with merger simulation models) need not rely on market definition, the calculation of market shares or concentration.

[46] Some have even criticised the 2010-Guideline for not going far enough in describing an approach for analysing non-price considerations (leaving '*the misimpression that non-price factors are far less significant than price factors*'). See Rosch (n 13) 3.

[47] 1992-Guidelines, p.2 (section 0.1).

ii) Coordinated Effects

The coordinated effects section of the 1992-Guidelines (2.1) organises the analysis into three criteria of ability, all of which needed to be satisfied before there would likely be an increased post-merger danger of tacit coordinated effects: to reach a collusive agreement; to monitor competitor conduct with respect to coordinated activities and detect deviations; and to punish any competitors who deviate.[48]

The analysis of coordinated effects found in the 2010-Guidelines is similar to that of the 1992-Guidelines, insofar as they both focus on examination of market conditions conducive to coordinated interaction and relevant evidence. Both Guidelines also share a concern about the loss of a market maverick.[49] However, the 2010-Guidelines provide an updated section (7) articulating in more detail the types of competition problem created through coordinated effects and other factors relevant to their determination. This encompasses a more flexible approach to the concept of coordinated conduct, with the Agencies now clarifying that they are more likely to challenge a merger only if an additional three conditions are all met.[50]

## Other Comparisons

The remaining assortment of comparison and contrast between the Guidelines with regards to other factors is mixed. The treatment of some subjects are mostly unchanged. For example, there is no relaxation of the 1992 failing firm/division defence by the 2010-Guidelines, with similar analyses.[51] This is also true with regard to the basic assessment of potential 'monopsonist' (dominant buyer) concerns, although the later version expands on how such market power is manifested.[52]

The section on efficiencies in the 2010-Guidelines (section 10) is also not significantly altered from the 1992-Guidelines (section 4). In both cases, efficiencies (capable of benefiting consumers and counteracting a SLC) are only validated if they are merger-specific and 'cognizable' (that is, verified).[53] Thus efficiencies remain relevant only where the merger's likely adverse impact is small and, even then, the onus of demonstration on merging parties remains high. The 2010-Guidelines differ, for example, in making clear that claims substantiated by comparable past experiences are most likely to be

[48] 1992-Guidelines, p.18 (section 2.1).
[49] 1992-Guidelines, p. 21; compare 2010-Guidelines, p. 25.
[50] An appreciable increase to concentration would result in a moderately or highly concentrated market; signs of vulnerability to coordinated conduct are visible; and it is credible to believe that this vulnerability would be enhanced post-merger. See 2010-Guidelines, p.25 (section 7.1).
[51] 1992-Guidelines, pp.33-34 (section 5); compare 2010-Guidelines p.32 (section 11).
[52] 1992-Guidelines p.3; compare 2010-Guidelines p.32 (section 12).
[53] 1992-Guidelines p.30; compare 2010-Guidelines p.30.

accepted by the Agencies and there is explicit recognition of potential efficiencies other than on price.[54]

One area where the 2010-Guidelines change the 1992-Guidelines more significantly is entry. There are notable differences with the 2010-Guidelines introducing more flexibility and having a highly evidential trend to its analysis. With respect to determining which firms currently not producing in competition with the merging parties should properly be considered market participants in response to a SSNIP, the 2010-Guidelines drop the standard of being able to enter within one year.[55]

For later entry to be adequate to mitigate SLC concerns, the 1992-Guidelines state that it must be *'timely, likely, and sufficient'*.[56] The 2010-Guidelines retain this three-step rule but with some modifications arguably giving the Agencies more lee-way to exercise judgement on the strength of the entry argument in any particular case:

- The two-year standard for timeliness introduced in the 1992-Guidelines [57] is deleted in the 2010-Guidelines, instead referring to entry rapidity (sufficient to make profitable potential anti-competitive effects after it takes effect or to ensure that customers do not suffer substantial detriment despite any harm occurring prior to entry).[58]
- With regards to likelihood of entry, the 2010-Guidelines delete reference to the *'minimum variable scale'* criterion as found in the 1992-Guidelines.[59]
- The 2010-Guidelines state that the Agencies will look to evidence as a reliable indicator of entry sufficiency, including by a single firm on a par with the extent and strength of one of the merging parties.

The 2010-Guidelines give particular weight to observed evidence. An absence of prior entry on a successful basis or the inference of valuable intangible assets, for example, tends to suggest that entry would be slow or difficult. By contrast with the 1992-Guidelines[60], their successor also raises the possibility of identifying potential entrants (if they have essential assets or powerful motivations to enter not shared by others).[61]

---

[54] 2010-Guidelines p.31.
[55] 1992-Guidelines, p.11 (section 1.3). They were previously labeled '*uncommitted entrants*'. In the 2010-Guidelines, these are called *'rapid entrants'* (firms that *'would very likely provide rapid supply responses with direct competitive impact in the event of a SSNIP'*, p.15). However, there is no specific guidance as to the length of time required for such a supply-side response although some examples are provided (2010-Guidelines, p.16).
[56] 1992-Guidelines, p.25. The 1992-Guidelines refer to this as *'committed entry'*.
[57] 1992-Guidelines, p. 27.
[58] 2010-Guidelines, p.29.
[59] Minimum viable scale is *'the smallest average annual level of sales that the committed entrant must persistently achieve for profitability at pre-merger prices'*, 1992-Guidelines, p.28 (section 3.3).
[60] 1992-Guidelines, p. 27.
[61] 2010-Guidelines, p.28.

Finally, in other areas the 2010-Guidelines introduce totally new analysis. For example, the 2010-Guidelines include a discussion of powerful buyers who may exercise countervailing power to merging parties lessening the likelihood of a SLC (section 8), for example through sponsored entry or vertical integration.[62] The 2010-Guidelines also discuss acquisitions of minority interests involving competing businesses as potentially raising SLC concerns, even if the loss of competition post-merger is not total.[63]

# Conclusion

While the 2010-Guidelines formally address any misconceptions about the role of traditional analytical tools, the spirit of merger control in the 1992-Guidelines is left intact as a foundation. While the process of review reads differently, what underlies both is concern about anti-competitive effects (ultimately manifestations of market power). In this way, the Guidelines are supportive of each other and expound many of the same tried and trusted methods. Conversely, they should not be seen as necessarily mutually exclusive or inextricably leading to contradictory outcomes in their application (two points on an opposite scale forcing an 'either/or' choice of position). For the majority of transactions reviewed by the Agencies, markets will still be defined, shares and concentration determined, unilateral or coordinated effects assessed, entry analysed and any efficiencies considered.

The 1992-Guidelines were radical of their own day compared with a previous antitrust obsession with curtailing concentration trends (illustrated 50 years ago when there were examples of mergers being prohibited by the courts by virtue of relatively small market share increments). However the 2010-Guidelines represent a new wave of modern learning, reflecting the significant developments in economic theories and tools to predict competitive harm since 1992, resulting in a flexible and integrated approach to analysing competitive effects. To this extent, they go beyond the mere clarification of concepts in the 1992-Guidelines that may not have been expressed as clearly or as fully as they could have been. This is a reflection of practices by the Agencies as they have existed for a number of years already - unfettered to the use of one metric or style of assessment over another in carrying out their review - able to prioritise and deduce, not just infer.

While it is clear that merger review is now predicated firmly on an economic bedrock, it can be argued that this fact together with the 2010-Guidelines' eschewal of bright-line tests will make it more difficult for business to predict enforcement strategy by the Agencies. One of the perceived strengths of the 1992-Guidelines was its rule-driven approach. Discarding simple, benchmark safe-harbours militates against legal certainty.[64] On the other hand, the

[62] However, the existence of powerful buyer does not (in itself) lead the Agencies to presume an absence of adverse competitive effects. See 2010-Guidelines, p. 27.
[63] 2010-Guidelines, pp.33-34 (section 13).
[64] *'...the HMGs have eliminated many of the clear - although somewhat arbitrary - benchmarks that existed in the 1992 HMGs....The elimination of these benchmarks tends to*

assessment of each case with more due regard to its particular circumstances may occasionally benefit merging parties (for example, those trying to clear a deal where the structural evidence suggests prima facie concerns but investigation into more dynamic aspects of competition might indicate otherwise, such as in high-technology or novel markets).

A final point relates to the approach of the judiciary to the 2010-Guidelines. The US courts in hearing merger challenges have relied heavily on the 1992-Guidelines and their structured stance. However, whether they would ever be willing to embrace whole-heartedly the 2010-Guidelines' highly-economic approach, and/or the view that evidence of anti-competitive effects can do away with a need to define a market taking into account its inconsistency with case law, remains highly contentious. If not and if substantial criticism ensues, there is a risk that the 2010-Guidelines may ultimately find themselves going the same way as the Single-Firm Conduct Report issued by the Department of Justice in 2008, formally withdrawn in 2009.

*work against providing clear and useful predictability'* (James Langenfeld, '2010 Horizontal Merger Guidelines: Changes in Policy, Transparency, & Predictability', *CPI Antitrust Journal* (October 2010)). It can be argued that this results in increased evidential burdens on merging parties both in compiling a notification and assisting the Agencies during their investigations, particularly in relation to presenting credible defences.

# A False Hope?: A Critical Evaluation of the Difference made by the Human Rights Act to those who Rent Homes

*Victoria Ferguson*

Scholars believed that the Human Rights Act 1998 would compel the courts to address the much derided injustices of housing law and therefore lead to much stronger rights and protection for tenants. This article, through an examination of case law, evaluates whether the Act has had any impact at all for the different categories of tenants and on the three stages of housing law: acquiring a home, rights of succession and rights of repossession. Although the recent decision of the Supreme Court in *Manchester County Council v Pinnock* finally accepted the European jurisprudence, this development will only lead to a variation for a very small proportion of tenants, namely those in local authority housing who were previously liable to have non-merit-based proceedings brought against them. The article will conclude that the only other difference is that homosexual tenants now have the same rights as their heterosexual counterparts have, and therefore it is clear that the Human Rights Act has not had anywhere near the sweeping effect that was predicted for housing law.

## Introduction

When the Human Rights Act 1998 came into force on October 2, 2000 it was believed by many academics and practitioners that the domestic application of the European Convention on Human Rights would bring significant changes to housing law[1], particularly to landlord and tenant related litigation. It was hoped that it would address perceived injustices such as the rule in *Greenwich LBC v McGrady*[2], whereby a joint tenant may unilaterally end the joint tenancy - thus leaving the other a *de jure* trespasser, and the discrimination between heterosexual and homosexual cohabitants in cases of succession. However, it soon became

[1] Loveland, „Much Ado About Not Very Much After All? The (latest) last word on the relevance of the ECHR, article 8 to possession proceedings" (2006) JPL, at [1457]
[2] *Greenwich LBC v McGrady* [1983] 46 P. & C.R. 223

apparent through domestic case law that the Human Rights Act was not to have the extensive impact which had been anticipated.[3]

This paper will evaluate the extent to which the Human Rights Act has affected those who rent their homes, focusing upon three key areas: acquiring a home, rights of succession, and rights of repossession. It will also discuss whether the English and Welsh courts have given as much effect to the legislation as was intended, or whether they, 'Canute-like, continue to resist the European tide'[4] in choosing to adopt a narrower reading or defer to Parliament principle?

## Does the Human Rights Act 1998 give a right to be provided with a home?

Prior to the Human Rights Act (HRA), the European Court of Human Rights (ECtHR) jurisprudence was already very clear on this point. As far back as 1956, Strasbourg held that there was only a right to private home life, and not an automatic right to a home itself.[5] This was followed by the ruling in *Burton v UK*[6] that Article 8 cannot be interpreted in such a way as to extend a positive obligation to provide alternative accommodation of an applicant's choosing. In *Marzari v Italy*[7] it was held that, having been evicted from his rented home for rent arrears, there was no right under the Convention to either remain in that property or be provided with another. Finally, in 2001, *Chapman v UK* reaffirmed that 'Article 8 does not...give a right to be provided with a home',[8] echoing the decision given by the House of Lords on the case in relation to the HRA. Therefore, the HRA has made no difference to those who rent their homes as far as their right to be provided with a home to rent is concerned, as the position is the same as it was before the enactment – there is no right.

## Does the Human Rights Act 1998 give a right to succession of a rented home?

As mentioned in the introduction, many practitioners believed that the incorporation of the European Convention on Human Rights (ECHR) into domestic legislation by means of the HRA would help combat the injustices many felt were present in housing law. One such area was succession to a tenancy. It was thought that through the application of Article 14, the restrictive categories of who could qualify would be widened.

Many felt a particular injustice in the fact that homosexual couples did not have the same rights as heterosexual couples. In *Harrogate BC v Simpson,*[9] it was held that the surviving member of a cohabiting lesbian couple could not succeed as a secure tenant under s.30 of the Housing Act 1980 as it required them to be either spouses, which was not possible, or a member of the original

[3] Loveland, „A tale of two trespassers: reconsidering the impact of the Human Rights Act on rights of residence in rented housing: Part 1" (2009) *European Human Rights Law Review*, at [148]
[4] Madge, „La Lutta Continua?" (2009) *Journal of Housing Law* 12(3), at [46]
[5] *X v Germany* (1956) 1 Yearbook 202
[6] (1996) 22 EHRR CD 135
[7] (1999) 28 EHRR CD175 (ECtHR)
[8] (2001) 10 BHRC 48, at [99]
[9] [1986] 2 FLR 91; (1985) 17 HLR 205

tenant's family, which included a couple 'living together as husband and wife'[10]. It was held, however, that this was 'not apt to include a homosexual relationship. The essential characteristic of living together as husband and wife...is that there should be a man and a woman and that they should be living together in the same household'[11] Therefore, she was not entitled to succeed the tenancy.

This harsh ruling had been tempered to some degree prior to the enactment of the HRA in the form of *Fitzpatrick v Sterling Housing Association Ltd.*[12] The case involved very similar circumstances, except that the tenants were homosexual men and the tenancy was protected. It was held that although the remaining partner could not qualify under s2(2) of Schedule 1 of the Rent Act 1977, despite the fact that the wording had been widened from *spouse* to include those 'living with the original tenant as his or her wife or husband', as this could not include a homosexual relationship as the wording was gender-specific, he could qualify as a member of the original tenant's *family* under s.3(1) as family was no longer seen as only incorporating consanguinity and affinity.

Although this was a welcome step forward, it still meant that homosexual couples were being discriminated against compared to married and unmarried heterosexual couples, both seen as spouses. Under the provisions, a member of the original tenant's family could only succeed to the tenancy as an assured tenant and therefore, had no further right to succession, whilst spouses succeeded to a secured tenancy with the right to further succession. It was hoped that this discrimination would no longer be allowed under the HRA.

*Mendoza v Ghaidan*[13] was another case involving the possibility of one partner in a homosexual cohabiting couple succeeding the secure tenancy of the other. Although it was heard in the House of Lords, the reasoning for the decision is better elucidated in the affirmed Court of Appeal case upon which the foregoing analysis will be based[14].

The case involved the interpretation of the Rent Act 1977 Sch.1 para.2, which according to *Fitzpatrick v Sterling Housing Association Ltd* could not apply to cohabiting homosexual couples, in light of the HRA. Mr Mendoza argued that it was discrimination on grounds of sex within the meaning of Article 14, to allow the surviving partner of cohabiting heterosexuals to qualify for a secure tenancy and, therefore, continuing succession rights, whilst the homosexual equivalent qualified only for an assured tenancy, which had lower security of tenure and no future succession rights.

The court found that both in *Fitzgerald* and in the present case that 'it is inescapable on his findings of primary fact that, save for the relationship being between two persons of the same sex, they were living together in the way that

[10] Housing Act 1980, s.50(3)(b)
[11] n. 9 above, at [210], per Ewbank J
[12] [2001] AC 27
[13] [2004] UKHL 30; [2004] 3 WLR 113; [2004] 3 All ER 411
[14] [2002] EWCA Civ 1533; [2003] Ch. 380; [2003] 2 W.L.R. 478; [2002] 4 All E.R. 1162

spouses live together.'[15] The court also decided that Schedule 1 of the Act must be construed in a way which was compatible with Convention rights, even when the litigation was between two private parties as,

> 'Although Convention rights are, in their origin and meaning, only exigible against the state ... [Article 14] imposes on the state not merely a duty to refrain from certain conduct in relation to its citizens, but also a positive obligation to "secure" to those citizens the enjoyment of Convention rights without discrimination. Accordingly, in construing ... [Schedule 1] in the context of Article 14 [the Court had] ... to ask whether that legislative act, construed in domestic law as it was in *Fitzpatrick*, does indeed secure to citizens the relevant freedom from discrimination.'[16]

In order to ascertain the application and reach of Article 14 the court employed the test laid down in *Michalak v Wandsworth LBC*[17]:

1) Do the facts fall within the ambit of one or more of the substantive Convention provisions?

2) If so, was there different treatment as respects that right between the complainant on the one hand and other persons put forward for comparison ("the chosen comparators") on the other?

3) Were the chosen comparators in an analogous situation to the complainant's situation?

4) If so, did the difference have an objective and reasonable justification: in other words, did it pursue a legitimate aim and did the differential treatment bear a reasonable relationship of proportionality to the aim sought to be achieved?

Sections two and three were answered in the affirmative; a heterosexual surviving partner in an analogous situation would not be in the same position as Mr Mendoza. Therefore, the court now had to ascertain the answers to questions 1 and 4.

The court found that Article 8 was engaged as the situation affected 'his interest in his home, since he would after the death of his partner have a less secure position in the demised premises than he would have had if the partnership had been a heterosexual one'[18] The court also found that it was unnecessary that Article 8 be breached for Article 14 to be engaged as the latter was applicable 'whenever "the subject-matter of the disadvantage constitutes one of the modalities of the exercise of a right guaranteed," or the measures complained of are "linked to the exercise of a right guaranteed."'[19]

---

[15] Ibid, at [3], per Buxton LJ
[16] Ibid, at [5]
[17] [2002] EWCA Civ 271; [2002] H.L.R. 39 at [20]
[18] n.15 above, at [10]
[19] *Petrovic v Austria* (2001) 33 E.H.R.R. 14, cited by Buxton L.J. at [9] of *Mendoza*

The final hurdle was to answer whether there was an objective justification for the difference in treatment. The Court rejected the proposition that it was a matter of discretion for Parliament and should therefore not be involved. It stated that it was not enough to simply assert that it was within the ambit of discretion as this did not establish that it was positively justified. Additionally, although in areas of social and economic policy, Parliament is given a wide discretion, the Court felt that this discretion was greatly fettered where the case involved questions 'of high constitutional importance or are of a kind where the courts are especially well placed to assess the need for protection'[20] such as in the present case which involved discrimination of a minority group to a much greater degree than it involved actual housing policy.

The court also rejected the argument that a distinction between heterosexual and homosexual couples was justified on grounds of the policy behind Schedule 1, promoting the interests of landlords; flexibility in the housing market; and the protection of the family. The interests and flexibility of landlords had been curtailed far more by the amendment of para.2(2) of the Rent Act 1977 and the Court felt that if that were the policy behind the difference in treatment, then it's aims were not being met by depriving the survivors of homosexual relationships of statutory but not of assured tenancies. As far as the protection of the family point was concerned, the court could not see that this was at all aided by refusing to allow homosexuals the same succession rights and it was doubted that this was the reason for the distinction. [21] *Fitzgerald* had already found monogamous homosexual relationships could be seen as equating to 'family' in para.3 of the same schedule.

Having answered all four questions, the Court felt that they must[22], if possible, read the Schedule in a manner so that it was compatible with the convention rights of Mr Mendoza. This was done by reading 'as his or her wife or husband' to mean 'as *if they were* his or her wife or husband'. As Alastair Redpath-Stevens mentions, this actually makes more sense than the original wording as a couple cannot live together *as husband and wife* unless they are actually married.[23] It also went far enough whilst keeping the floodgates firmly shut on relationships which were purely platonic.

This ruling meant that for homosexual cohabitants, the Human Rights Act did make a big difference to the way they rented their homes as they now had the same rights to succession of secure and assured tenancies as heterosexual couples.

However, despite *Mendoza v Ghaidan* being heralded as a 'landmark victory for gay rights'[24] perhaps it is not to be seen 'ultimately as a victory for human

[20] Buxton L.J. at [19] of *Mendoza*, citing Lord Hope of Craighead in *R. v DPP Ex p. Kebilene* [2000] 2 A.C. 326 at [381C-D]
[21] Ibid, per Keene LJ, at [42]
[22] as per s.3 of the HRA 1998
[23] „Succession rights: Part1: The Court of Appeal"s ruling in *Mendoza*" [2003] Journal of Housing Law 1, 27
[24] BBC News, November 5, 2002, as quoted from Redpath-Stevens, „Succession rights Part 2: The Court of Appeal's ruling in Mendoza" [2003] Journal oh Housing Law 3, at [44]

rights'[25] considering the case of *Sheffield CC v Wall*[26]in which the HRA did little to help the appellant. It was held that a foster child was not a member of the family for the purposes of the Housing Act 1985, s.113 as the word *child* had to be limited to the closed categories stipulated in s.113(2). It was held that neither Article 8 nor 14 could assist him as the exclusion of foster children from the legislation was objectively justified and was compatible with the appellant's Convention rights. Perhaps in light of this it can be said that generally 'the HRA has done little to improve people's housing rights. *Mendoza* is a welcome exception.'[27]

## Does the Human Rights Act give protection against repossession of a rented home?

After the enactment of the HRA there were high hopes by many in the legal profession that it would radically change repossession litigation, especially in regard to an Article 8 challenge. Jan Luba QC wrote in 2000 that 'the whole procedure for claiming and obtaining possession may need revision.'[28] It would, however, appear that both the courts and Parliament felt differently about the need for a large-scale overhaul of possession procedures.

It is important to analyse how the case law has developed in order to appreciate to what extent the 1998 Act, and in particular Article 8, has affected tenants' rights when faced with repossession. The differing views of the court in Strasbourg and those of the domestic courts in the last decade have been described as 'judicial ping-pong'[29] with the European Court repeatedly stating that the European Convention has a much wider application than being just a 'code of individual civil and political rights'[30]. As shall be seen, it is only with recent developments that the HRA has really made any substantial difference to those who rent their homes in regard to possession proceedings.

*Harrow LBC v Qazi*[31]

Mr and Mrs Qazi rented a house from Harrow LBC as joint tenants. When the marriage broke down Mrs Qazi moved out and Mr Qazi remained in the house with his new wife and their child. Unbeknownst to Mr Qazi, his ex-wife validly terminated the tenancy with a notice to quit served on the council. This left Mr Qazi as a *de jure* trespasser under the rule in *Hammersmith v Monk*[32], which had affirmed the rule in *Greenwich LBC v McGrady*[33], and, therefore, he had no right to remain.

[25] Redpath-Stevens, „Succession rights Part 2: The Court of Appeal's ruling in Mendoza" [2003] Journal oh Housing Law 3, at [44]
[26] [2010] EWCA Civ 922
[27] n. 24 above, at [27]
[28] Luba J, "Housing Law and the Human Rights Act" *Legal Action* September 2000, at [27]
[29] n. 4 above, at [43]
[30] Baroness Hale stated that „[t]he Convention began life as a code of individual civil and political rights, not a code of social and economic rights" in *Kay v Lambeth LBC* [2006] UKHL 10; [2006] 2 A.C. 465 at [192]
[31] [2003] UKHL 43; [2003] 3 WLR 792
[32] *Hammersmith and Fulham LBC v Monk* [1992] 1 A.C. 478; [1990] 3 W.L.R. 1144
[33] n. 2 above.

The House of Lords found with a 3-to-2 majority that Article 8 did not assist Mr Qazi. It held that an unqualified right to possession in law was not susceptible to an Article 8 challenge; it did not need to be justified nor be proportionate. They disagreed that ECHR was ever intended to be used in situations such as this. Lord Scott was particularly forceful on this matter stating, 'The intention of these instruments was to enshrine fundamental rights and freedoms. It was not the intention to engage in social engineering in the housing field.'[34] He further stated that even if Article 8 was engaged in situations such as that which was before him, the domestic law which was already in place was satisfactory to settle any merits issues raised by Article 8(2).[35] Lord Hope agreed, adding 'that the Strasbourg jurisprudence has shown that contractual and proprietary rights to possession cannot be defeated by a defence based on Article 8.'[36]

Both Lord Bingham and Lord Steyn dissented from this ratio. Lord Steyn was particularly derisive:

> It would be surprising if the views of the majority on the interpretation and application of Art 8...withstood European scrutiny. It is contrary to a purposive interpretation of Art 8 read against the structure of the Convention. It is inconsistent with the general thrust of the decisions of the European Court of Human Rights, and of the commission... [I]t empties Art 8(1) of any or virtually any meaningful content...The decision of today does not fit into the new landscape created by the 1998 Act.[37]

The European Court however refused an appeal to them so *Qazi* remained authority that Article 8 was irrelevant to possession proceedings as long as the domestic law governing them had been followed as it is *ipso facto* Article 8 compliant.

*Connors v UK*[38]

The case involved a gypsy [sic] family who had been granted a licence by Leeds County Council to park their caravan on the council managed site in accordance with the Caravan Sites Act 1968. This Act provided a summary ground for possession when the council served a valid notice to quit on the licensee, which required a four week notice period. After this period the licensees would become trespassers. As long as the notice was validly served the court had no discretion to do anything but grant possession.

Although Article 14 was also argued, the decision of the ECHR was based upon Article 8. It looked at the situation from the viewpoint of the Connors' circumstances, not by looking at housing and social policy. The court found

[34] n. 8 above at [1024]
[35] Ibid, at [149]
[36] Ibid, at [84]
[37] Ibid, at [152]
[38] *Connors v United Kingdom (2004) 40 E.H.R.R. 189 ECtHR*

that, due to the summary nature of the possession proceedings under the 1968 Act and therefore the lack of opportunity for a merits review by an independent tribunal, it could not be justified or seen to be proportionate and hence was not compliant with Article 8.[39] As eviction was such a serious interference with the rights enshrined by Article 8, domestic law should always allow for a judicial evaluation of the necessity of that action. This ratio stands in sharp contrast with that of *Qazi* the year before and, due to the reason on which it was decided, strongly indicates that it is not restricted solely to cases involving gypsies, but to all evictions.

*Kay v Lambeth LBC; Leeds CC v Price*[40]

Although the facts of the two cases were quiet different, they were heard together as both appellants had possession proceedings started against them by local authorities as they had no domestic right to remain, Kay having been a licensee and Price having trespassed onto a local authority site.

The House of Lords felt that the view in *Qazi* needed very little adjustment in the light of *Connors v UK* as it was seen to be limited to cases of gypsies.[41] It would only be in similar 'exceedingly rare cases'[42] that the domestic law would not conform to the Convention. This gave rise to what is known as the 'gateway (a)' and 'gateway (b)' routes of challenge. The former was limited to a defence based on the incompatibility of a piece of legislation or common law rule with Article 8. Gateway (b) could be raised as a defence where the appellant believed the public authority landlord had acted unlawfully in repossessing their home. The defence would be limited to *Wednesbury* irrationality and personal circumstances could not be taken into account.

Despite the difference in name, the 'gateways' appeared to offer no more protection to tenants than what was already available by means of traditional judicial review.

*McCann v UK*[43]

*McCann* involved similar facts to that of *Qazi* except that the notice to quit by the ex-wife was not procured voluntarily, but instead the local authority asked for it without explaining the consequences for Mr McCann. Mr McCann complained that his subsequent eviction and the manner in which the notice to quit was obtained, unjustly interfered with the rights afforded to him under Article 8. He had failed in the domestic course and been unsuccessful in seeking a judicial review of the actions of the local authority.

However, the European Court found that the relevant domestic law was not compliant with Article 8. It stated that it was 'unable to accept the Government's argument that the reasoning in Connors was to be confined only to cases involving the eviction of gypsies or cases where the applicant

[39] *Connors v United Kingdom* (2004) 40 E.H.R.R. 189 ECtHR, at [95]
[40] [2006] UKHL 10
[41] Ibid, at [54] per Lord Nicholls
[42] Ibid.
[43] (2008) 47 E.H.R.R. 40; [2008] H.L.R. 40

sought to challenge the law itself rather than its application in his particular case. The loss of one's home is a most extreme form of interference with the right to respect for the home. Any person at risk of an interference of this magnitude should in principle be able to have the proportionality of the measure determined by an independent tribunal in the light of the relevant principles under Art.8 of the Convention, notwithstanding that, under domestic law, his right of occupation has come to an end.'[44]

They continued:

> 'As in Connors, the 'procedural safeguards' required by art.8 for the assessment of the proportionality of the interference were not met by the possibility for the applicant to apply for judicial review and to obtain a scrutiny by the courts of the lawfulness and reasonableness of the local authority's decisions. Judicial review procedure is not well-adapted for the resolution of sensitive factual questions which are better left to the County Court responsible for ordering possession. In the present case, the judicial review proceedings, like the possession proceedings, did not provide any opportunity for an independent tribunal to examine whether the applicant's loss of his home was proportionate under Art 8§2 to the legitimate aims pursued.'[45]

Clearly, the European Court is stating that an orthodox *Wednesbury* irrationality review would not always be enough to satisfy Article 8 as it did not allow the court to assess the necessity of the eviction through reference to McCann's personal circumstances. Therefore the 'gateway (b)' route per *Kay* would often not be rigorous enough either. They were also very discontent with the use of the rule in *Hammersmith v Monk* to bypass the security of tenure and availability to have his personal circumstances taken into account under the Housing Act 1985.

The case is substantially different in its facts from *Connors*, yet the Court has stated the same decision in both – therefore, they clearly believe there is a general problem with English and Welsh law regarding non-merit based repossessions, not one confined just to the eviction of gypsies.

*Doherty v Birmingham CC*[46]

The facts in *Doherty* are essentially the same as in *Connors*, except that the local authority required possession so that it could start major redevelopment of the site. Mr Doherty put forward an argument based on *Connors* in that there was no opportunity under domestic law for the proportionality of his eviction to be assessed by a court.

[44] Ibid, at [50]
[45] Ibid, at [53]
[46] [2007] H.L.R. 32

The ratio by the House of Lords is hard to precisely pin down as in the course of the judgment, despite agreeing that the gateway formula 'requires further explanation... [t]o some extent...it needs to be modified,'[47] the judges appear to come to several different conclusions as to what this means in practice. Lord Hope is particularly confusing, stating at different points that the review grounds for gateway (b) should be restricted to *Wednesbury* unreasonableness; should be wider than that test; should incorporate personal circumstances; should only goes as far as whether the decision was 'arbitrary, unreasonable or disproportionate.'[48]. He is unwilling, even in the light of the ECtHR judgment in *McCann*, to admit that he misinterpreted Article 8 in *Kay*, instead choosing to state that it is the ECtHR that has misunderstood English housing law.[49]

Nevertheless, the overall ratio appears to be that gateway (b) is wider than first stated in *Kay* as all of the traditional grounds for judicial review are available, and in exceptional circumstances the court may take personal circumstances into account. Interestingly, the court would have issued a declaration of incompatibility if the Caravan Sites Act 1968 had not been amended by the Housing Regeneration Act 2008, which is yet to be brought into force.

*Kay v UK*[50]

When the case of *Kay* finally made its way to the ECtHR, the court once again stressed the necessity for a merit-based repossession process in order for it to be Article 8 compliant. It held that there had been a breach in *Kay,* but approved the formula of gateway (b) in *Doherty*. This clearly shows that traditional judicial review, which is essentially the formula for the *Kay* version of gateway (b), is not compatible with Art. 8 simply because it does not have the personal circumstances requirement that the widening in *Doherty* allowed.

*Manchester CC v Pinnock*[51]

The facts of the case were that a local authority had obtained a demotion order in respect of Mr Pinnock's tenancy due to serious allegations in regard to his partner and children. It then claimed possession due to further anti-social behaviour. Mr Pinnock appealed the possession order, which was made under the Housing Act 1996, s.143D stating that his Article 8 rights would be violated.

The Supreme Court gave a single judgment, which finally accepted the Strasbourg jurisprudence requiring that in order for Article 8 to be complied with, anyone who faces repossession of their home by a local authority is, in principle, entitled to have the proportionality of the eviction ascertained by an independent tribunal, notwithstanding a domestic right to the property has been extinguished.[52] This would include an assessment of the applicant's

[47] [2008] UKHL 57, at [36]
[48] Ibid, at [52]
[49] Ibid , at [20]
[50] (ECtHR) App No 37341/06
[51] [2010] UKSC 45; [2010] 3 W.L.R 1441
[52] Ibid, at [45]

personal circumstances as traditional judicial review was not enough to fulfil the requirements under Article 8(2).

## Has the HRA made any difference to those who rent their homes in regard to possession procedures?

As can be seen from the above narrative, until last year the HRA really had made very little difference to tenants' rights when faced with repossession due to the courts' very narrow reading of Article 8. However, following *Pinnock* some tenants will find themselves in a better position that they would be if it were not for the Act.

Tenants with secure or assured tenancies who face repossession on discretionary grounds will be in the same position as they were prior to the 1998 Act as the 'reasonableness' test which forms part of the legal framework for possession on these grounds already conforms with the requirement under Article 8(2) to allow a court to assess the 'necessity' of the eviction, by giving regard to personal circumstances.

Assured shorthold tenants will also find themselves in the same situation as they did prior to the Act, although for differing reasons to above. It is felt that the framework satisfies the necessity requirement under Art. 8(2) for reasons of economic and social policy, and the court felt this was an area of great deference to Parliament.[53]

Introductory tenants are also in no better position as it was held that the statutory scheme under sections 127 and 128 of the Housing Act 1996 are compliant with both Articles 6 and 8 as the review procedure of the scheme in conjunction with the availability of judicial review and the ability of the county court to adjourn possession proceedings to allow the latter to occur provides adequate protection for the tenant.[54] However, 'It should be the norm for the council to spell out in affidavits [sic] before the county court judge how the procedure was operated in the individual case dealing with the degree of independence of the tribunal from the persons who took the original decision, the way the hearing was conducted and the reason for taking the decision to continue with the proceedings. In that the way the judge will have the information on which he can take an informed view as to whether the matter should be adjourned to allow for an application to be made for judicial review.'[55]

However, the Human Rights Act does now have the potential to make a difference to repossession proceedings against tenants who previously would have non-merit-based proceedings brought against them. This would include repossession on mandatory grounds for secure and assured tenancies, demoted tenancies and contractual tenancies. Following *Pinnock*, there now

[53] *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EXCA Civ 595; ; [2002] Q.B. 48 at [69]
[54] *R. v Bracknell Forest D.C. and the Secretary of State for the Environment ex parte Johns and McLellan* [2001] EWCA Civ 1510; [2002] 1 All ER 899
[55] Ibid, at [103] per Waller LJ

must be the availability of a merits-based procedure in order to ascertain the proportionality of the eviction or demotion, in accordance with Article 8(2).

There is a caveat, however. As *Pinnock* stated, the repossession will ordinarily be proportionate, with the main exception being for vulnerable tenants.[56] Additionally, the Supreme Court in *Pinnock* was keen to emphasise that the case involved a local authority landlord, and while the judgment would apply equally to other social landlords that qualified as public landlords under the HRA,[57] it was not intended to have any bearing on possession proceedings by a private landlord.[58] These two points considerable reduce the number of tenants who are going to find themselves in a more secure place due to the HRA. The only possible silver-lining is that the net has been cast a little wider when it comes to which organisations are deemed to be public authorities.[59] It depends on the degree, but if the body is largely publically funded, has had many local authority tenants transferred to it, is closely linked to the local authority and provides a public function it is likely to be found to be a public body for the purposes of the HRA[60] and therefore would be affected by the ruling in *Pinnock*.

# Conclusion

Considering that the banner under which the Human Rights Act 1998 was enacted was *Bringing Rights Home*, it is rather ironic that the Act has actually brought very few additional rights to the law regarding the home. The Act has not lived up to the hype which surrounded it prior to October 2, 2000. It was believed that it would finally enable all the injustices that occurred in housing law to be dealt with by English courts in the same way that would occur in front of the European Court, without substantial delay. However, obvious from the repossession case law detailed above, the English courts did not intend to interpret what had started life as the European Convention on Human Rights in the same way as the European Court of Human Rights. It consistently gave a narrow interpretation, restricting tenants' rights and keeping them as close to what they had been before the enactment as possible, even when this meant patently ignoring repeated disagreement from Strasbourg. It had taken ten years of repetition from the European Court for the Supreme Court (and the House of Lords as it was) to accept that they were not interpreting the convention in the spirit in which it was meant. Even now, the HRA will only come to the aid of very few people, in the few cracks which have been opened.[61] There is still no right to housing, there is still injustice regarding succession of tenancies, and there is still very little tenants can do to prevent their homes from being repossessed. All in all, the Human Rights Act 1998 has made little difference to those who rent their homes.

[56] n. 49 above, at [64]
[57] n. 45 above, at [3]
[58] Ibid, at [4]
[59] n. 49 above
[60] *R (Weaver) v London & Quadrant Housing Trust* [2009] EWCA Civ 587
[61] As opposed to the comment by Bright, „Article 8 again in the House of Lords: *Kay v Lambeth LBC; Leeds CC v Price*" (2006) Conv, at [308]

# Straight through Certainty and Out the Other Side: Section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 and Proprietary Estoppel

*Charlotte Groom*

In the quest for certainty in the disposition and transferral of interests in land, Section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 utilises formality at the expense of a wider sense of just and equitable ownership. Preoccupation with the ambiguity equitable doctrine brought to the former legislative framework prompted the ruthless exorcize of what many consider one of equity's most effective mitigating devices; one most suited to application in this area where equity's intervention remains sought after to soften the sharp edges of the ruthless formalities of the common law. The question remains whether Proprietary Estoppel is still able to answer such calls despite its deliberate exclusion from the Act of 89.

## Introduction

Prior to its publication, Section 2 of the Law of Property (Miscellaneous Provisions) Act 1989[1] sent waves of anticipation through the legal community[2]. Having replaced Section 40 of the Law of Property Act 1925,[3] its central philosophy of formalisation represented an entirely new approach to the sale and transferral of legal and equitable interests in land.[4] Many welcomed the development as a long needed departure from the uncertainties created under conflicting interpretation of the old legislation.[5] Despite its notorious uncertainty, some bemoaned the loss of the doctrine of part performance and questioned how equity would find its way into mitigating the potential harshness of the new legislation.[6]

---

[1] Law of Property (Miscellaneous Provisions) Act 1989 s 2 (henceforth "section 2")
[2] Coughlan, Bentley 'Informal dealings with land after section 2' [1990] 10 LS 325
[3] s 40 Law of Property Act 1925
[4] Law Commission *Formalities for contracts for sale etc. of land* (Law Com Working Paper No 92, 1985), Law Commission 'Formalities for contracts for sale etc. of land' (Law Com No 164 1987)
[5] Annand, 'The Law of Property (Miscellaneous Provisions) Act 1989' [1989] 105(Oct) LQR 553-560
[6] Gerwyn Griffiths, 'Part performance - still trying to replace the irreplaceable?' [2002] 3 Conv 216-236

Section 2 is clearly an attempt to provide certainty in respect of contracts for the sale of land. In referring to the Law Commission's publications,[7] along with subsequent case law,[8] it is this objective which stands most prominent. Such formality was intended to simplify the law, with the aim of ensuring parties receive legal advice prior to contracting, while also allowing the courts to discern exactly the terms of the agreement before them.[9] It has been recognised that the general uniqueness of land justifies the need for such stringency.[10]

This rigid certainty was, however, tempered by an awareness that such strict formality may result in injustice for those without access to legal advice.[11] The assertion that it is perfectly rational to refuse effect to an unwritten contract and yet enforce some interests in land which have been promised orally appears, on the face of it, to be perfectly valid. Despite the enthusiastic abolition of the doctrine of part performance, the Commission recognised there remained possible circumstances where injustice would arise due to inability to plead the doctrine.[12] The very people the legislation had been designed to protect, those accidently contracting away their rights in land, are those most likely to fall foul of the Act's sharp edges.[13] As Bedlam LJ noted in his speech in *Yaxley v Gotts*, Parliament would not intend a statute to act as a vehicle for equitable fraud; in order to deal with such possibilities equitable remedies should be on hand to tackle unconscionable conduct where it arises.[14]

However, one must consider whether refusing effect to a contract not in writing, yet enforcing some interests in land promised orally, is at odds with the very rationale underpinning the legislation. Can such intervention with Section 2, and so Parliament's goals and intentions, be adequately justified? The courts have responded positively to this query, on the condition that the enforcement is through means expressly recognised by the legislature as legitimate tools for the task.[15] In limiting themselves so, the judiciary have promoted great uncertainty in the application of equitable remedies in the context of Section2. The uncertain state of the current means available to enforce some interests in land promised orally may be at odds with the rationale behind the legislation.[16]

---

[7] Ibid n.4
[8] *Yaxley v Gotts* [2000] Ch. 162 CA (Civ Div), *Kinane v Mackie-Conteh* [2005] EWCA Civ 45
[9] Ibid n.4
[10] Ibid n.4
[11] Ibid n.2, *Ibid* n.4, Gerwyn Griffiths, 'Tighter or looser? Formalities for contracts for the sale of land' [1987] 5 Conv.
[12] Ibid n.4
[13] Editor, 'Editor's notebook (March/April)' [2009] 2 Conv 85-89
[14] *Yaxley v Gotts* [2000] Ch 162 CA (Civ Div) 190
[15] Ibid, 181-2, 190, *Kinane v Mackie-Conteh* [2005] EWCA Civ 45, 31 -33, *Yeoman's Row Management Ltd v Cobbe* [2008] UKHL 55, 29
[16] Etherton, 'Constructive trusts and proprietary estoppel: the search for clarity and principle' [2009] 2 Conv. 104 -126

## The Uncertain Status of Proprietary Estoppel

The judiciary have displayed continued preoccupation with the potential application of proprietary estoppel in such situations. The apparent uncertainty represented by the doctrine stems from a lack of certainty regarding its status as a possible equitable device in the face of Section 2.[17] Despite the Law Commission's endorsement of proprietary estoppel as the ideal equitable device to employ alongside Section 2,[18] Parliament failed to include it in the Act. In response, rather than attempting to justify proprietary estoppel's function independently of Section 2, the judiciary have continually, if hesitantly, restated its supposed conflict with the policy underlying the legislation, focusing upon its omission from the final section, and so its potential to challenge the certainty required in such contexts.[19]

First skirted around in the case of *Yaxley*,[20] proprietary estoppel was not expressly declared to be directly at odds with the legislation until the decision of Lord Scott in *Yeoman's Row Management Ltd v Cobbe*.[21] His Lordship restated the recurring mantra in a far more decisive manner than had previously been ventured: '... proprietary estoppel cannot be prayed in aid in order to render enforceable an agreement that statute has declared to be void ... Equity can surely not contradict the statute.'[22] Such sentiments echo the passage in *Halsbury's Laws of England*[23] that caused the Court of Appeal so much deliberation in both *Yaxley*[24] and *Kinane v Mackie-Conteh*.[25][26] Broken down, this leads to thorough consideration of the nature of the enactment in question, the purpose of the provision and the social policy behind it.[27]

In definitively ruling out proprietary estoppel from such situations, critics feared that Lord Scott had 'shot the wrong beast'.[28] In attempting to use only the tools Parliament had expressly granted them, the judiciary had attempted to beach the equitable void with the ill-suited constructive trust.[29] The supposed rationality of our premise is undermined by the uncertainty the Section 2 constructive trust now represents.

---

[17] McFarlane, 'Proprietary estoppel and failed contractual negotiations' [2005] 6 Conv 501-523, Thompson, 'Oral agreements for the sale of land' [2000] 3 Conv 245 -254, Lord Neuberger, 'The stuffing of Minerva's owl? Taxonomy and taxidermy in equity' [2009] 68(3) CLJ 537-549
[18] Ibid n.4
[19] Ibid n.15
[20] Ibid n.14
[21] [2008] UKHL 55
[22] Ibid, 29
[23] 4th reissue (1992) Vol. 16. 962
[24] Ibid n.14
[25] *Kinane v Mackie-Conteh* [2005] EWCA Civ 45
[26] It is of note that in footnotes to the text the scope of the statement and the need for its qualification was readily acknowledged.
[27] Ibid n.14, 190
[28] Ibid n.16
[29] Ibid n.6, n.16, n.17

**Which Beast is Best?**

Walker LJ started the trend in *Yaxley*, [30] drawing parallels between proprietary estoppel and Lord Bridge's Constructive Trust in *Lloyds Bank v Rosset*.[31] As a case of Joint Venture the occurrence of a constructive trust in *Yaxley* is not so remarkable. However, in *Kinane,*[32] without clear explanation, Arden LJ went onto expand its scope beyond all recognition. [33] Such a distortion of the constructive trust, a device with its own principles and guidelines of application distinct from those of proprietary estoppel, creates confusion and uncertainty, not only when attempting to enforce interests in land promised orally, but in its widespread application.[34]

The *Rosset*[35] constructive trust Walker LJ first relied upon in *Yaxley*[36] is an exact device. It requires the key element of an agreement or understanding to arise between the parties as to sharing beneficial property ownership.[37] No such agreement existed in *Kinane*.[38] Moreover, the remedy resulting from establishment of a constructive trust should be B's acquisition of the property in question; in *Yaxley*[39] the judgement delivered the option of either a 99 year lease or damages to the equivalent, while *Kinane*[40] concerned an equitable charge.[41] The very situations the constructive trust was being forced to tackle were those that proprietary estoppel was devised and has developed to deal with**.** While not without its own uncertainty's, it is far better suited to use in this context.

Proprietary estoppel requires no agreement as to sharing beneficial ownership or otherwise, thereby allowing greater access to equity, but it is no way so vague in its requirements to warrant the 'floodgates' response. It also offers far more flexibility as to the range of remedies available to the courts on successful application, the expectation of the promisee being central to the extent of the reward, be it personal or proprietary in nature. As noted by Scarman LJ in *Crabbe v Arun*,[42] when applying proprietary estoppel the court should allow the 'minimum equity to do justice'. This flexible yet wisely limited approach ensures a tailored provision of justice; indeed the promisee may receive no reward at all if his expectations are judged to be already adequately fulfilled. The device is clearly the superior of the two in terms of flexibility, certainty and just results.

---

[30] Ibid n.14, 176
[31] [1991] A.C. 107, 132
[32] Ibid n.25
[33] Ibid n.25, 33
[34] Ibid n.16, n.17
[35] Ibid n.31
[36] Ibid n.14
[37] Ibid n.6
[38] Ibid n.25
[39] Ibid n.14
[40] Ibid n.25
[41] McFarlane, 'Proprietary estoppel and failed contractual negotiations' [2005] 6 Conv 501-523
[42] Ibid n.6, *Crabb v Arun District Council* [1976] Ch 179

### Equity Supplementing the Common Law

The judiciary's preoccupation with the policy behind the act has been consistently denounced by the academic community.[43] Their observations, published following the judgement in *Yaxley*,[44] hold true today following *Cobbe's*[45] denouncement of the doctrine. They stress that rather than relying upon unduly complex reasoning, the courts should be attempting to justify the application of proprietary estoppel outside of Section 2 on its own terms, something the academics have managed with great success.[46]

A claim under proprietary estoppel arises entirely independently of Section 2, leaving any discussion as to the merits of compliance with the policy behind the act irrelevant.[47] As Walker LJ himself acknowledged, there is no possibility of a challenge to the operation of proprietary estoppel in a case where, independent of Section 2, no contract can be established.

Fortunately, it is possible to overcome Walker LJ's qualification of his statement, in instances where a contract does not exist *solely* due to noncompliance with Section 2;[48] as both Bedlam and Walker LJ noted, it would be a 'strange policy'[49] that denied remedy to the claimant who came closer to an actual contractual situation.[50] As highlighted by Lord Neuberger extra-judicially,[51] whether purely through noncompliance with Section 2 alone or for additional reasons, the fact that the situation between the parties does not comply with the requisite formalities means there is no contract between them, and so nothing for Section 2 to be applied to. The act deals with *contractual* validity, any subsequent, equitable attempt to rescue the agreement, through for example proprietary estoppel, takes place outside of the scope of Section 2.

## Conclusion

This deft analysis clearly demonstrates it is perfectly rational to refuse effect to a contract not in writing yet enforce some interests in land promised orally, even more so when such enforcement is via proprietary estoppel. The doctrine, while not without its faults,[52] represents the most suitable tool we have before us in respect of enforcing such interests. What is required is fresh Parliamentary intervention. Unfortunately, the fact remains that current law

[43] Ibid n.17
[44] Ibid n.14
[45] Ibid n.21
[46] Ibid n.17
[47] Thompson, 'Oral agreements for the sale of land' [2000] 3 Conv 245 -254
[48] McFarlane, 'Proprietary estoppel and failed contractual negotiations'[2005] 6 Conv 501-523
[49] Ibid n.14,192
[50] Ibid n.17
[51] Lord Neuberger, 'The stuffing of Minerva's owl? Taxonomy and taxidermy in equity' [2009] 68(3) CLJ 537-549
[52] *Cobbe* overturned decades of established case law and principle, this has now been largely rectified by *Thorner v Major* [2009] UKHL 19

is measured by the statements of *Cobbe*.[53] However, the discontent with the judgment displayed since by the judiciary in *Thorner v Major*[54] sparks hope that Lord Scott's views on proprietary estoppel in relation to Section 2 may be interpreted narrowly. Indeed the appropriateness of the commercial-domestic divide in the exercise of equity displayed by C*obbe* [55] and *Thorner* [56] is commendable.[57] Equity rightly mitigates the harshness of the law, however, as Lord Walker remarked in *Cobbe,*[58] the estoppel doctrine is '... not a sort of joker or wild card to be used whenever the Court disapproves of the conduct of a litigant who seems to have the law on his side.'[59]

[53] Ibid n.21
[54] [2009] UKHL 19
[55] Ibid n.21
[56] Ibid n.54
[57] Ibid n.54
[58] Ibid n.21
[59] Panesar, 'Enforcing oral agreements to develop land in English law' [2009] 20(5) ICCLR 165-171

# Case comment: *Re T* (a child) (surrogacy: residence order) [2011] EWHC 33 (fam)

*Emma Woolley*

## Introduction

The inherent risks of surrogacy has been thrust into the media spotlight in the recent case *Re T*[1] due to the possible complexities attached for the parties involved. The complication lies with the clear and unequivocal legal definition of mother in British law,[2] that the woman who carries a child is the child's mother.[3] Hence, following a partial surrogacy arrangement, there is a possibility of multiple claims to parenthood which allows for uncertainty as there is nothing a commissioning couple can do to secure legal parenthood prior to the birth of their child. The implications following a surrogacy arrangement is exemplified in the authority *Re T* which awarded legal parenthood to the surrogate mother.

### Facts and Decisions by the Court

The facts of the case are as follows. The commissioning couple arranged a partial surrogacy arrangement with a surrogate who they met over the internet. This was a private arrangement whereby the commissioning father's sperm was used to inseminate the surrogate mother and it was agreed that once the child was born it would be handed over to the commissioning couple. The agreement was not regulated by a fertility clinic or set up by a non-profit agency which meant that they were not given the appropriate information or support. The relationship broke down when the surrogate mother was gestating the child and she subsequently changed her mind, deciding to keep the child. This led to a very complex scenario when assigning legal parenthood as the surrogate mother was also the biological mother. As surrogacy arrangements are not legally binding contracts, there was little that the commissioning parents could do to secure legal parenthood prior to the birth of the child; once the child was born they applied for a Residence Order to acquire the necessary legal parenthood.

---

[1] (a child) (surrogacy: residence order) [2011] EWHC 33 (fam)

[2] Jackson E, *Regulating Reproduction, law, Technology and Autonomy* (Hart Publishing Ltd. Oxford 2001) 266

[3] Human Fertilisation and Embryology Act 2008, s. 33(1). The woman, who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman, is to be treated as the mother of the child.

However, a Residence Order[4] was granted by Lord Justice Baker to the surrogate mother as the removal of her daughter would cause harm as there was a clear attachment between the biological mother and daughter. Furthermore, the judge was satisfied that this was the more desired outcome as he was convinced that the surrogate mother would allow a close relationship between her daughter and the commissioning father (her biological father), whereas he was less confident that the commissioning couple would respect the relationship between the surrogate mother and her daughter if a residence order was granted to them. Thus, the decision can be seen to preserve good relations between the daughter's biological parents but gave complete disregard to the surrogacy arrangement made between the parties.

## Critical Analysis of the Decision

As the legislation stipulates, the 'surrogate mother' is a woman who has entered into an arrangement with another to carry a child for them, with the intention that, after the birth, the child shall be handed over to the person or persons that commissioned the agreement (herein the commissioning couple).[5] Allowing the surrogate mother legal parenthood contravenes the sole definition of surrogacy itself as it puts no weight on the arrangement that was in place allowing for inconsistency and unconformity within the law. This judgment allows for considerable risks and complexities when asserting legal parenthood, due to the unenforceability of surrogacy agreements despite the clear intentions of the parties when entering into an arrangement. This decision is unjust as the commissioning couple is subject to uncertainty, and when such uncertainty is related to the legal parenthood of a newborn child it is of the utmost importance that parenthood can be given with certitude due to the rights and responsibilities that are attached to legal parenthood. Additionally, the uncertainty regarding surrogacy in the United Kingdom has led couples to seek a more appealing solution of international surrogacy. Couples like the famous Elton John and David are traveling to other jurisdictions such as California where legislation is less strict and where they can be named as parents from birth. The cross border element in surrogacy has led to complex issues regarding immigration control and birth certificates, and also brings with it a whole host of problems regarding the legal rights over the child. Therefore, following the case of *Re T* there is a need for more certainty so that it would inevitably lead to less people traveling to other jurisdictions such as California, which would reduce the incidents of complication arising as a result of the disparity of law. As Gamble asserts, it currently stands that the system that deals with surrogacy leaves children "in limbo far too long" potentially not in the care of their legal parents.[6]

This case highlights the wider issues regarding surrogacy. There is a clear need to regulate informal surrogacy agreements, which are possible to spread

[4] Children Act 1989

[5] Surrogacy Arrangements Act 1985, s. 1(2).

[6] Gamble N, 'After the birth of Elton and David's son, can the UK deliver surrogacy reform?' (2010) <http://www.guardian.co.uk/commentisfree/2010/dec/29/elton-john-david-furnish-surrogacy-law> accessed 15 February 2011

through internet surrogacy sites, so that proper information and advice is given to warn parties of the risks involved. A further point worth noting is that self-insemination is dangerous for the parties involved as they are at risk of disease without the necessary tests.[7] It is apparent that the controls over surrogacy are failing to regulate surrogacy in this respect, which can be problematic as a child will not know of their parentage and the child will be living with parents who have no legal obligations towards them.[8]

# Conclusion

As evidenced in *Re T* there are inadequacies that still plague the current system governing surrogacy. Courts perform a discretionary balancing exercise to find the appropriate legal parents, looking at the welfare and the statutory checklist[9] and the evidence, facts and arguments put forward.[10] This flexibility makes the approach of assigning legal parenthood uncertain and inconsistent. These problems stem from legal parenthood being automatically given to the surrogate mother[11] as the child could be left in limbo for an uncertain period through the judicial process. Regarding the stance of the commissioning parents, this uncertainty in relation to surrogacy agreements on such a wide scale is unacceptable as there are certain rights and responsibilities linked to legal parenthood that is important to the welfare of the child. Since these agreements involve children, the law should not allow such dubious areas of legal parenthood even if the margin for error is low.

[7] Brazier M, 'Regulating The Reproductive Business' (1999) 7Medical Law Review, 166
[8] Diduck A and O'Donovan K, Feminist perspectives on family law (Routledge-Cavendish, London 2006) 72
[9] Children Act 1989, s. 1.
[10] N (a Child) [2007] EWCA Civ 1053 per Miss Anna Hamilton QC
[11] Ibid. n. 3

# Undergraduate Dissertations

*The following are three of the best undergraduate dissertations from the 2010-2011 school year.*

*These dissertations have not been edited.*

# The Problem with Reasonable Force: Rebalancing the Law in Favour of the Householder by Adopting Alternative Jurisdictional Approaches

*Edward Smith*

There is a strong view held among many members of the public that the law favours the rights of intruders over those of the householder. Under the current law, a householder may only use as much force as is "reasonable" in the circumstances to protect themselves, others or their home from intruders. This requires an analysis of the threat posed by an intruder to decide what force is reasonable. This standard has proved problematic for some who have used force that is considered to be excessive, and thus cannot claim self-defence, possibly leading to conviction for the harm that they inflict. In the worst case scenario a householder can be convicted of murder if death is caused by excessive force.

The public have shown sympathy for convicted householders, claiming that the Criminal Justice System has failed to protect the law-abiding citizen from criminal intrusions and punished them when they have had to defend themselves in these instances. There have been calls for greater rights for householders to protect their dwellings, permitting a greater degree of force in order to do so.

This article explores the validity of the assertion that the current law does not adequately protect the rights of the householder, followed by an analysis of alternative jurisprudential approaches that accord different degrees of increased rights to householders: the doctrine of excessive self-defence, complete exculpation for excessive force used due to emotion and a presumption that force used was in the threat of death or serious bodily injury whenever an intrusion or attempted intrusion occurs.

Upon examination, it is discovered that whilst giving householders increased rights solves problems with the current law, the implications of doing so deny individual rights and justice to the intruder. Potential flaws can be found in the rationales for the complete exculpation for excessive force used due to emotion and presumptive proportionate force approaches. Pragmatic difficulties are encountered in the implementation of all three. However most importantly, the complete exculpation for excessive force used due to emotion and presumptive proportionate force approaches would breach the UK's human rights obligations under the European Convention on Human Rights.

This leads to the argument that calls for reform by the public to increase rights may be based on views that lack the full knowledge required to make an informed decision. The current law may not be faultless however a full and

open public discussion would be needed before realistically considering reform.

# Introduction

Under the current UK law, there is no specific provision for the defence of one's home. The capacity to protect your own interests comes under the general law of self-defence, codified within section 76 of the Criminal Justice and Immigration Act 2008. This section provides that the defendant may use such force as is *objectively* reasonable,[1] with regard to an allowance for imprecise human calculation as to the level of force[2] and the admittance as strong evidence of what the defendant honestly and instinctively thought was necessary for a legitimate purpose,[3] in the circumstances in which the defendant subjectively believed them to be.[4] Reasonable force may also be used in the prevention of crime.[5] Thus to protect any of your interests, whether it is your life or your property, force will only be legitimate if it is 'reasonable'.

The reasonable force concept encompasses: necessity of the use of force as the only way in which the assault could be prevented as opposed to non-violent means, and proportionality, meaning that the degree of force used should have been no more than the harm threatened.[6] This standard has proved problematic for householders who have used force to defend themselves that is disproportionate to the harm threatened. It may seem that it would be correct to punish those who use force that is unnecessary. Conversely, the public have shown sympathy towards householders who have used force against intruders, even if it is disproportionate, as well as outrage at the resulting convictions.[7]

Two such *causes célèbre* were those of Tony Martin[8] and Munir Hussain[9] who both used force on intruders and were ultimately convicted. Martin was originally sentenced to life imprisonment for murder for shooting and killing a burglar and injuring an accomplice. Hussain was convicted of assault occasioning grievous bodily harm with intent for the severe beating of an

[1] Criminal Justice and Immigration Act 2008, s 76(3).
[2] Ibid s 76(7)(a)
[3] Ibid s 76(7)(b)
[4] Ibid s 76(4)
[5] Ibid s 76(2)(b)
[6] Jonathan Herring, *Criminal Law: Text, Cases, Materials* (3rd edn, OUP 2008) 637.
[7] BBC News, 'Martin Case Tops BBC's Today Poll' (*BBC News,* 1 January 2004) <http://news.bbc.co.uk/1/hi/uk/3360765.stm> accessed 18 January 2011; Bernard Ginns, '21,500 Reasons Why We Need a Tony Martin Law' *The Mail on Sunday* (London, 11 January 2004) <http://www.findarticles.com/p/news-articles/mail-on-sunday-london-england-the/mi_8003/is_2004_Jan_11/21500-reasons-tony-martin-law/ai_n37113125> accessed 18 January 2011; Joshua Getzler, 'Using Force in Protecting Property' [2006] 7 Theoretical Inq L 131, 141; Tim Shipman, 'Tories' Licence to Kill a Burglar: Homeowners Using Self-Defence Should Escape Prosecution, says Shadow Minister' *The Daily Mail* (21 December 2009) <http://www.dailymail.co.uk/news/article-1237317/Tories-licence-kill-burglar-Homeowners-using-self-defence-escape-prosecution-says-shadow-minister.html> accessed 1 March 2011.
[8] *R v Martin (Anthony)* [2001] EWCA Crim 2245, [2003] QB 1.
[9] *R v Tokeer Hussain and Munir Hussain* [2010] EWCA Crim 94, [2010] 2 Cr App R (S) 60.

intruder who was fleeing. Martin's murder conviction was reduced to manslaughter on appeal as his counsel successfully argued diminished responsibility to mitigate culpability.[10]

Cases like these sparked campaigns for reform,[11] claiming that the law favoured the criminal[12] and should instead be rebalanced in favour of householders, permitting a greater degree of force in defence of themselves and their homes against intruders. Private Member's bills[13] came before Parliament seeking to increase the level of force that householders could use beyond "reasonable force" but ultimately failed due to a lack of support in the House of Commons.[14]

This essay sets out to explore these claims that the current law does not protect the householder sufficiently and instead favours the rights of the intruder. Would alternative approaches to self-defence used in other jurisdictions that reduce culpability or permit a greater degree of force than the harm threatened solve the problems with the current law? Would these approaches come without problematic issues?

The contention of this essay is that some of those who believe in reform want to increase rights of the householder without fully considering the implications of doing so. Taking a look at an alternative jurisdictional approach that increases rights shows that solutions may be provided, however the problems solved may be substituted with those of the alternative approach, demonstrating that our current law may not be as imperfect as others.[15]

The first chapter will examine what are considered by reformists to be the flaws of the present law regarding self-defence in relation to defending the home. The subsequent chapters will proceed with an analysis of the alternative approaches to self-defence from other jurisdictions. Firstly, the doctrine of excessive self-defence will be our focus, which currently exists in some states

---

[10] *R v Martin (Anthony)* [2001] EWCA Crim 2245, [2003] QB 1, [79], [82].

[11] Bernard Ginns, '21,500 Reasons Why We Need a Tony Martin Law' *The Mail on Sunday* (London, 11 January 2004) <http://www.findarticles.com/p/news-articles/mail-on-sunday-london-england-the/mi_8003/is_2004_Jan_11/21500-reasons-tony-martin-law/ai_n37113125> accessed 18 January 2011; Renée Lerner, 'The Worldwide Popular Revolt Against Proportionality in Self-Defense Law' [2006] 2 JL Econ & Pol'y 331, 346; Patrick Hennessy, Melissa Kite, 'Tories Back New Rights to Help Homeowners Protect Themselves From Burglars' *The Sunday Telegraph* (19 December 2009) <http://www.telegraph.co.uk/news/uknews/law-and-order/6844682/Tories-back-new-rights-to-help-home-owners-protect-themselves-from-burglars.html> accessed 17 January 2011.

[12] n 21.

[13] Criminal Justice (Justifiable Conduct) Bill, HC Bill (2003-2004) [36]; Criminal Law (Amendment) (Householder Protection) Bill, HC Bill (2004-2005) [20].

[14] BBC News, 'Tony Martin Law is Blocked' (*BBC News,* 30 April 2004) <http://news.bbc.co.uk/1/hi/uk_politics/3672701.stm> accessed 18 January 2011; Patrick Hennessy, Melissa Kite, 'Tories Back New Rights to Help Homeowners Protect Themselves From Burglars' *The Sunday Telegraph* (19 December 2009) <http://www.telegraph.co.uk/news/uknews/law-and-order/6844682/Tories-back-new-rights-to-help-home-owners-protect-themselves-from-burglars.html> accessed 17 January 2011.

[15] Stephen Skinner, 'Populist Politics and Shooting Burglars: Comparitive Comments on the Lega Nord's Proposal to Reform Italian Self-Defence Law' [2005] Crim LR 275, 284.

in the US[16] and was previously available throughout Australia, but can now only be claimed in certain territories.[17] The doctrine would reduce a conviction for murder to manslaughter when excessive force is used in self-defence. The next step will be to build on this with the complete exculpation for excessive force used due to emotion, providing not just a mitigation of sentence but full acquittal. Finally, the last chapter will concentrate on a presumption that the force used was in the threat of death or serious bodily injury whenever an intruder breaks into your home, granting the householder a wide scope of possible force, even in the absence of a "real" threat of that kind. These approaches have been chosen to each represent a different balance on the scale of rights between the intruder and the householder to examine the effects at each degree. The doctrine of excessive self-defence accords the least rights to a householder of the three, increasing with the complete exculpation for excessive force used due to emotion, up to the use of presumptive legitimate force which grants the most.

It is concluded that although these alternative approaches may provide solutions to some of the problems present in the current law, each has drawbacks, which substitute current problems for different ones. Most notably, the complete exculpation for excessive force due to emotion and presumptive approaches violate the UK's human rights obligations under the European Convention for the Protection of Human Rights and Fundamental Freedoms,[18] tipping the law too far in favour of the householder. The protection of human rights under these obligations sometimes has to protect the rights of the minority against the will of the majority.[19] The current view held by the majority may not be the right one overall and a full and frank discussion is needed before realistically considering reform.[20]

## Criticism of the Current Law

In order to assess the law's desirability, its shortcomings (whether they are perceived or real) must be considered to determine the areas, if any, in need of reform. These criticisms have been categorised under specific heads to promote a more structured approach, but by no means are they restricted to these categories; the issues are interconnected.

[16] n 126.
[17] n 110.
[18] Convention for the Protection of Human Rights and Fundamental Freedoms ('European Convention on Human Rights') (1955) 213 UNTS 221 (Hereafter 'ECHR' or 'Convention')rebarerere.
[19] Political and Constitutional Reform Committee, *Voting by Convicted Prisoners: Summary of Evidence*, (HC 2010-11, HC 776) 7.
[20] Nicola Padfield, 'Rethinking English Homicide Law – Publication Review' [2002] 118 LQR 157, 157.

Failings of the Criminal Justice System

Probably the most voiced criticism in the UK is that the Criminal Justice System is failing to protect its citizens and instead, the balance of the law currently rests in favour of the criminal.[21] A lack of police resources or willingness to help[22] in addition to a lenient attitude towards criminals by the courts[23] both lead to an increase in crime, and thereby an increase in the overall incidence of householders having to protect themselves from crime.[24] These householders that now have to defend themselves against crime, owing to the failure of the state's duty to do so,[25] fear prosecution if they use an "excessive" amount of force. The belief is that instead of focusing on deterring and punishing criminals, the justice system focuses on harassing law-abiding citizens.[26]

Prior to the final encounter on Tony Martin's farm, he accused his local police of failing to take his previous complaints or the more recent threats of burglary seriously.[27] In addition, while Martin was serving his five-year conviction for manslaughter, Brendan Fearon, the accomplice of the burglar Martin shot, had been granted early release from prison on parole for the original conspiracy to burgle conviction, having served just over half of the three-year sentence.[28] Fearon even managed to be imprisoned for drug dealing and released early on parole again all before Martin was released, who was ineligible for parole since he denied any wrongdoing.[29] It is not difficult to see where a fear of prosecution and a belief that the criminal justice system favours the criminal comes from.

In defence of the police, it could be argued that Martin was the paranoid farmer who was forever complaining about intruders on his land. When the police had managed to get to the rural farm, any intruders would have been long gone and any reports of damage or missing items would have been difficult to establish, as the whole property was dilapidated.[30] Equally, the crime of manslaughter carried more gravity than the lesser offences

---

[21] Law Commission, *Partial Defences to Murder* (Law Com No 290, 2004) para 3.79; Renée Lerner, 'The Worldwide Popular Revolt Against Proportionality in Self-Defense Law' [2006] 2 JL Econ & Pol'y 331, 333.
[22] Peter Squires, 'Beyond July 4th?: Critical Reflections on the Self-Defence Debate from a British Perspective' [2006] 2 JL Econ & Pol'y 221, 235.
[23] Denise Drake, 'The Castle Doctrine: An Expanding Right to Stand Your Ground' [2008] 37 St Mary's LJ 573, 596.
[24] Peter Squires, 'Beyond July 4th?: Critical Reflections on the Self-Defence Debate from a British Perspective' [2006] 2 JL Econ & Pol'y 221, 235.
[25] Renée Lerner, 'The Worldwide Popular Revolt Against Proportionality in Self-Defense Law' [2006] 2 JL Econ & Pol'y 331, 361.
[26] Ibid.
[27] Peter Squires, 'Beyond July 4th?: Critical Reflections on the Self-Defence Debate from a British Perspective' [2006] 2 JL Econ & Pol'y 221, 226.
[28] BBC News, 'Timeline: The Tony Martin Case' (*BBC News*, 28 July 2003) <http://news.bbc.co.uk/go/pr/fr/-/hi/england/norfolk/3087003.stm> accessed 14 January 2011.
[29] Ibid.
[30] Peter Squires, 'Beyond July 4th?: Critical Reflections on the Self-Defence Debate from a British Perspective' [2006] 2 JL Econ & Pol'y 221, 235.

committed by Fearon and the fundamental condition to be granted parole is that remorse must have been felt by Martin.

Although prosecutions of householders tackling intruders are very rare,[31] supporters of reform do not want to live in fear of a prosecutor's decision at all.[32]

Clarity of the Law

Although it is recognised that the current doctrine of self-defence takes into account what the defendant honestly and instinctively thought was necessary for the legitimate purpose of self-defence as noted above, the decision of whether the force was reasonable is ultimately at the "black-box" discretion of the jury.[33] Assumptions of a particular judge, jury or magistrate can be disguised behind the discretion of a "reasonable force" test.[34] Such a rule will only command as much clarity as the margin of discretion is restrained.

As the standard of what constitutes reasonable force changes with the circumstances, it has been claimed that it is not easy to define exactly what force is reasonable.[35] Thus a householder does not have a clear rule by which to judge his conduct by and this creates uncertainty as to what he can legally do when an intruder breaks into his home. Listing all the circumstances and what force is considered to be reasonable would most likely be impossible.[36] The lack of certainty in this respect links with the fear of prosecution. If a householder does not know what would be reasonable in the circumstances, he may be prosecuted for making what might objectively be the wrong choice.

In an attempt to clarify the law on self-defence, the Crown Prosecution Service and the Association of Chief Police Officers issued joint guidance[37] on 1 February 2005.[38] It laid down what is now the current law outlined above[39] in addition to examples of defence situations and what would considered to be reasonable force in those circumstances. It was argued that the text was misleading making this guidance unreliable; the use of the words "very

---

[31] Ibid 223.
[32] Renée Lerner, 'The Worldwide Popular Revolt Against Proportionality in Self-Defense Law' [2006] 2 JL Econ & Pol'y 331, 341.
[33] Joshua Getzler, 'Use of Force in Protecting Property' [2006] 7 Theoretical Inq L 131, 151.
[34] AJ Ashworth, 'Self-Defence and the Right to Life' [1975] 34 Cambridge LJ 282, 307.
[35] Joshua Rozenberg, 'Definition of Reasonable Force is Calculated in Each Individual Case' *The Telegraph* (27 October 2004) <http://www.telegraph.co.uk/news/uknews/1475141/Definition-of-reasonable-force-is-calculated-in-each-individual-case.html> accessed 18 January 2011.
[36] Ibid.
[37] Joint Public Statement from the Crown Prosecution Service and the Association of Chief Police Officers, *Guidance Published on the Use of Force by Householders Against Intruders* (CPS and ACPO, 2005) <http://www.cps.gov.uk/publications/prosecution/householders.html> accessed 2 March 2011.
[38] Crown Prosecution Service, 'Guidance Published on the Use of Force by Householders Against Intruders Press Release' (CPS, 1 February 2005) <http://www.cps.gov.uk/news/press_releases/110_05/> accessed 2 March 2011.
[39] n 1-5.

excessive and gratuitous force...could be prosecuted" referred to only a possibility of prosecution opposed to what would be certain prosecution.[40] As long as reasonable force remains flexible to apply to different circumstances, it will be difficult to define what would be reasonable in every possible situation and naturally clarity will suffer.

Insufficient Account for Human Frailty

Another major criticism of the current legislation is that it is too insensitive to human error and the unpredictability of behaviour due to emotions. The Holmes Doctrine, "Detached reflection cannot be demanded in the presence of an uplifted knife"[41] has been frequently argued on this issue. The doctrine reflects the position of overwhelming fear and the pressure of facing an intruder in your own home. In these circumstances, is it reasonable to expect the householder to "stop and assess" the situation to determine the best method of preserving one's right to life and physical bodily integrity whilst also minimising disproportionate harm to the aggressor?[42] Such an approach may save lives, however there is often no time to make such calculations and householders may be unable to make "fine-grained distinctions" about what degree of force the circumstances warrant.[43]

It could be argued that any legislation will be unable to curb what are essentially "'instinctive' reactions rooted in the messy reality of human needs and perceptions".[44] This of course depends on how emotions are viewed. If one subscribes to the "voluntaristic" concept that emotions are forces that the will is unable to subdue, this is simple enough to assert.[45] However, if it is implausible that a person does not have the capacity to choose voluntarily whether he fights or flees, instead believing that emotions can be controlled, then an "evaluative" conception is more appropriate.[46] Under this theory, as emotions would be susceptible to control, at least to some degree, a reasonable standard of self-control would be expected.[47]

The issue of excessive force is particularly important when lethal force is used in a confrontation with an intruder. If a jury finds that the force was unreasonable in the circumstances, self-defence will fail completely and the householder will be convicted of murder,[48] the crime of which carries a

[40] Michael Jefferson, 'Householders and the Use of Force Against Intruders' [2005] 69 J Crim L 405, 406.
[41] *Brown v US* (1921) 256 US 335, 343 (US Supreme Court) (Holmes J).
[42] Denise Drake, 'The Castle Doctrine: An Expanding Right to Stand Your Ground' [2008] 37 St Mary's LJ 573, 599.
[43] Ibid.
[44] Peter Squires, 'Beyond July 4th?: Critical Reflections on the Self-Defence Debate from a British Perspective' [2006] 2 JL Econ & Pol'y 221, 223-224.
[45] Dan M Kahan, Martha C Nussbaum, 'Two Conceptions of Emotion in Criminal Law' [1996] 96 Colum Law Rev 269, 328-329.
[46] Ibid 329.
[47] Renée Lerner, 'The Worldwide Popular Revolt Against Proportionality in Self-Defense Law' [2006] 2 JL Econ & Pol'y 331, 354.
[48] Miranda Kaye, 'Excessive Force in Self-Defence After R v Clegg' [1997] 61 J Crim L 448, 448.

mandatory life sentence.[49] This may be appropriate where the force used had a malicious intent, such as revenge, however the householder whose only mistake was as to the degree of force would meet the same result. Under a principle of fair labelling and proportionate sentencing, it would not seem fair to judge the crimes of these two people as the same.

Currently there is no doctrine of excessive self-defence in English law which would seek to mitigate the harsh effects of the mandatory life sentence for murder, reducing the charge of murder to manslaughter, permitting the full panoply of sentencing. This is an issue that will be discussed further in chapter two.

Failure to Recognise Significance of 'The Home'

The crime of burglary recognises the significance of a person's dwelling, treating the offence more severely in relation to a home as opposed to a building of another kind.[50] This recognition does not traverse to the doctrine of self-defence and thus does not currently permit a greater degree of force in its protection. It is not uncommon to see the home referred to as a "castle" in, especially older, legal literature. The concept behind this visualises the home as a fort, its walls protecting the occupiers from the harsh conditions of the outside world.[51]More recently the home has been referred to as the "ultimate place of safety",[52] a "sanctuary"[53] or "retreat".[54] A place where one lets defences down and is therefore more vulnerable.[55] Any minor threats in public would translate into grave threats within the walls of the home.[56]

The dichotomy between private and public spheres of control, distinguishing the home from the outside world is now ever more apparent,[57] the line between them being drawn more sharply, which can be demonstrated by a parent's reluctance to let her children play freely in the street.[58] Since a householder feels safe from the outside world in his home, when private space is invaded he is left vulnerable, unprepared for an attack and should be able to protect himself with a wider scope of force.

---

[49] Ian Dennis, 'What Should Be Done About the Law of Self-Defence?' [2000] Crim LR 417, 417.
[50] Joshua Getzler, 'Use of Force in Protecting Property' [2006] 7 Theoretical Inq L 131, 150.
[51] Stuart Green, 'Castles and Carjackers: Proportionality and the Use of Deadly Force in Defense of Dwellings and Vehicles' [1999] U Ill L Rev 2, 31.
[52] Denise Drake, 'The Castle Doctrine: An Expanding Right to Stand Your Ground' [2008] 37 St Mary's LJ 573, 584.
[53] Renée Lerner, 'The Worldwide Popular Revolt Against Proportionality in Self-Defense Law' [2006] 2 JL Econ & Pol'y 331, 360.
[54] Ibid.
[55] Stuart Green, 'Castles and Carjackers: Proportionality and the Use of Deadly Force in Defense of Dwellings and Vehicles' [1999] U Ill L Rev 2, 30.
[56] Ibid 31.
[57] Benjamin Levin, 'A Defensible Defense?: Reexamining Castle Doctrine Statutes' [2010] 47 Harv J on Legis 523, 530.
[58] Renée Lerner, 'The Worldwide Popular Revolt Against Proportionality in Self-Defense Law' [2006] 2 JL Econ & Pol'y 331, 361.

It could be argued that a householder is not actually more vulnerable in his home. Despite the lowering of defences, one is acutely aware of any disturbance in the status quo and therefore much more likely to know when a threat transpires.[59] The home is rife with potential weapons to be armed with, an abundance more so than in public, therefore providing the householder with greater means by which to arm himself.[60] If an intrusion occurs during the night and the house is under the cover of darkness, the householder is more likely to know the layout of the home, whereas the intruder will generally not and the darkness will further impair him.

Could the home be described as necessary for life? If it were, it could be easier to argue that it requires more force to protect it than non-life essential property. Shelter is a necessary condition for life, but a particular attachment to a single shelter is unnecessary, anything substantial enough will do.[61] This point also seems to neglect that in the case of intrusion, it is not likely that a person's house will be physically taken from them.[62] The violation of security and dignity when the home is intruded[63] can have a colossal impact on the victims of intrusion. Munir Hussain, for example, suffered psychological trauma in the form of post-traumatic stress disorder due to the intrusion, the consultant psychiatrist stating that it may take a number of years to recover fully.[64]

## Retribution, Deterrence and the 'Law Abiding Citizen'

In a criminal justice system that is seen to be failing, how are the aims of deterrence and retribution administered effectively? The notion of an "active citizen" has developed out of a culture of "Responsibilisation". Citizens are encouraged take responsibility for aspects of public wellbeing,[65] in addition to themselves, their dependents and their property.[66] Such citizens will no longer tolerate victimisation[67] and actively take a stand against crime.[68]

But to what extent should citizens actively take a stand against crime? It is argued that state agencies and the law can be a "blunt and inefficient instrument for maintaining order" and "private ordering can usefully supplement state action".[69] The emphasis here is on supplementation. The active citizen from the government's viewpoint would do what he could to help *assist* in tackling crime. This would be carried out as a supporting role, the

---

[59] Stuart Green, 'Castles and Carjackers: Proportionality and the Use of Deadly Force in Defense of Dwellings and Vehicles' [1999] U Ill L Rev 2, 31.
[60] Ibid.
[61] Ibid 34.
[62] Ibid.
[63] Joshua Getzler, 'Use of Force in Protecting Property' [2006] 7 Theoretical Inq L 131, 150.
[64] *R v Tokeer Hussain and Munir Hussain* [2010] EWCA Crim 94, [2010] 2 Cr App R (S) 60, [40].
[65] Peter Squires, 'Beyond July 4th?: Critical Reflections on the Self-Defence Debate from a British Perspective' [2006] 2 JL Econ & Pol'y 221, 250.
[66] Joshua Getzler, 'Use of Force in Protecting Property' [2006] 7 Theoretical Inq L 131, 139.
[67] Peter Squires, 'Beyond July 4th?: Critical Reflections on the Self-Defence Debate from a British Perspective' [2006] 2 JL Econ & Pol'y 221, 240.
[68] Ibid 250.
[69] Joshua Getzler, 'Use of Force in Protecting Property' [2006] 7 Theoretical Inq L 131, 139.

citizen using his skills in observation and alerting the police to any suspicious circumstances.[70]

Encouraging citizens to become responsible appears to have opened a "Pandora's box",[71] with citizens looking to do more than simply assist, but actually taking deterrence and retribution into their own hands because they feel the state is failing to administer these aims effectively.[72]This may be where the line is crossed into vigilantism, but does vigilante justice have a place in modern society? Sympathy was shown for Tony Martin despite the fact that he shot the burglars as they ran away.[73] This is not self-defence as we know it; we cannot pretend that there was any continuing danger. So what reasons could Martin have for shooting at this point? Lerner believes that the only possible justifications are retribution and deterrence.[74]

Permitting a greater degree of force in self-defence would assist in the protection of the "social-legal order", that is, the state of law and order in society.[75] The use of force by the householder would not only serve to repel the original attack but also act as a further deterrent against potential intruders.[76] These effects contribute to a strengthened sense of security of the law-abiding public, safe in the knowledge that citizens are able to enforce the order when the state is unable to do so.[77]

In continental Europe, particularly Germany, individual dignity and autonomy are valued highly.[78] Autonomy is unsusceptible to any trade off on the balance of utilities, and proportionality has traditionally been rejected as a limiting factor in the exercise of self-defence.[79] An underlying concept of this is that the "right need never yield to wrong".[80] Any force that is necessary to defend a legally protected interest is permitted;[81] it protects the law-abiding citizen and the social-legal order. This can be linked to the retributive view that an individual who breaks the law forfeits rights to protection from the state, effectively willing any punishment that results as a consequence of his actions against a law-abiding citizen.[82]

Fletcher contends that the best explanation for a lack of proportionality may not be that it is morally right for a defender to use any force, even lethal force, to protect interests less than those of life or physical integrity, but that it is the

---

[70] AJ Ashworth, 'Self-Defence and the Right to Life' [1975] 34 Cambridge LJ 282, 292.
[71] Peter Squires, 'Beyond July 4th?: Critical Reflections on the Self-Defence Debate from a British Perspective' [2006] 2 JL Econ & Pol'y 221, 241.
[72] Renée Lerner, 'The Worldwide Popular Revolt Against Proportionality in Self-Defense Law' [2006] 2 JL Econ & Pol'y 331, 361.
[73] Ibid.
[74] Ibid.
[75] Fiona Leverick, 'Defending Self-Defence' [2007] 27 OJLS 563, 566.
[76] Ibid 567.
[77] Ibid.
[78] Joshua Getzler, 'Use of Force in Protecting Property' [2006] 7 Theoretical Inq L 131, 146.
[79] George Fletcher, *Rethinking Criminal Law* (3rd edn, Little, Brown and Company 1978) 871-72; T Markus Funk, 'Justifying Justifications' [1999] 19 OJLS 631, 639; Joshua Getzler, 'Use of Force in Protecting Property' [2006] 7 Theoretical Inq L 131, 159.
[80] T Markus Funk, 'Justifying Justifications' [1999] 19 OJLS 631, 638.
[81] Ibid 639.
[82] Benjamin Levin, 'A Defensible Defense?: Reexamining Castle Doctrine Statutes' [2010] 47 Harv J on Legis 523, 536.

defender's choice to make.[83] Theoretically, the state therefore recognises an individual's competence to make the final moral choice.[84] However in practice the right has been restricted by mechanisms that stop it from being abused where the force used was grossly disproportionate to the harm threatened in protection of an interest.[85] Permitting a greater degree of force on the basis that it fuels a greater good denies individual rights and justice. It may not seem just to the intruder for his life or physical integrity to be sacrificed on such a basis.[86]

Leverick rejects the argument of protection of the social-legal order on the basis that the way in which the legitimisation of disproportionate force contributes to the order is unclear.[87] Permitting such force may not actually lead to an overall minimisation of violent attacks, a potential aggressor being unlikely to "deliberate rationally" about the possibility that a householder will use such force. Aggression may actually be promoted: intruders arming themselves more heavily to deal with householders whom equally may be more likely to use force without prior contemplation, safe in the knowledge that they will not be prosecuted.[88]

Indeed it could be argued that a collective approach may achieve the goals of deterrence more efficiently and effectively as opposed to the varying discretion of individuals.[89] If a state highly values human life and the equality of all persons before the law, it is in the interests of society that retribution is not administered by individuals making the final moral choice, but is instead reserved to be applied under the impartiality of the state,[90] trying, convicting and punishing criminals according to proper governmental procedure.[91]

## The Doctrine of Excessive Self-Defence

A doctrine of excessive self-defence provides a further defence to murder if the circumstances were that the defender was entitled to use force, but used an objectively excessive degree in the circumstances as the defender subjectively believed them to be. Under the present law, there is currently an all-or-nothing decision in a murder case where self-defence is pleaded. The jury have two completely different options: conviction for murder or absolute acquittal. Due to the mandatory life sentence, reduced culpability cannot be taken into account in sentencing for murder.[92]

---

[83] George Fletcher, *Rethinking Criminal Law* (3rd edn, Little, Brown and Company 1978) 872.
[84] Ibid.
[85] George Fletcher, *Rethinking Criminal Law* (3rd edn, Little, Brown and Company 1978) 873; T Markus Funk, 'Justifying Justifications' [1999] 19 OJLS 631, 640-41.
[86] Fiona Leverick, 'Defending Self-Defence' [2007] 27 OJLS 563, 567.
[87] Ibid 568.
[88] Ibid.
[89] Peter Squires, 'Beyond July 4th?: Critical Reflections on the Self-Defence Debate from a British Perspective' [2006] 2 JL Econ & Pol'y 221, 252.
[90] Joshua Getzler, 'Use of Force in Protecting Property' [2006] 7 Theoretical Inq L 131, 138-39.
[91] Stuart Green, 'Castles and Carjackers: Proportionality and the Use of Deadly Force in Defense of Dwellings and Vehicles' [1999] U Ill L Rev 2, 39.
[92] Ian Dennis, 'What Should Be Done About the Law of Self-Defence?' [2000] Crim LR 417, 417.

The doctrine would seek to mitigate the harsh effects of the mandatory life sentence for murder, instead substituting the verdict of murder for that of manslaughter, providing the full range of possible sentencing options. This would end the illogical position of convicting a defender of murder when it wasn't deserved, or completely acquitting when some sanction is. Surely then, the solution is to do away with the mandatory life sentence, however abolition of the mandatory life sentence has been strongly opposed by the government, who believe that doing so will reduce the stigma attached to murder and alarm the public.[93]

## *Mens rea* and Morality

Two additional rationales can be contended for the doctrine: that a person who kills in such circumstances lacks the *mens rea* for murder, and the moral culpability of the person who kills where he had an honest but unreasonable belief as to the proportionality of force used falls below that associated with murder.[94] Under the lack of *mens rea* rationale, the starting point is not that the defendant did not have an intention to kill or cause grievous bodily harm, or else the defence would not apply and they would deserve to be acquitted of murder anyhow. Instead, the defendant in believing that he was *honestly acting* in defence, may have the technical state of mind for murder, but does not have the requisite *mens rea* for murder.[95]

In *R v Scarlett (John)*[96] Beldam LJ seemed to say that a defendant who genuinely believed he was acting in self-defence and thought that the force was necessary in this belief, was entitled to be acquitted because he did not intend to apply unlawful force.[97] However it was later held that Beldam LJ's statement did not entitle the defendant to use literally *any* measure of force that he believed to be necessary, no matter how mistaken he was.[98] These statements together appear to imply that a measure of mistaken force could be permitted, however this did not mean that *all* mistaken force was. Kaye states, "It is surely correct that not every reaction in a 'moment of unexpected anguish' can be held to be fully justifiable. However, such reactions should, perhaps be partially excused."[99]

The second additional rationale is that a defendant whose only error[100] is that he lacks reasonable grounds for his belief that the measure of force that he used was reasonable, does not deserve to be held as equally culpable as the defendant who would use such force in the absence of circumstances of self-defence. English law currently recognises reduced moral culpability in the defence of provocation.[101] This creates an anomalous position where loss of

---

[93] Ibid.
[94] Miranda Kaye, 'Excessive Force in Self-Defence After R v Clegg' [1997] 61 J Crim L 448, 451.
[95] Ibid 452.
[96] [1994] 98 Cr App R 290 (CA).
[97] Ibid 295.
[98] *R v Owino (Nimrod)* [1996] 2 Cr App R 128 (CA), 133-34.
[99] Miranda Kaye, 'Excessive Force in Self-Defence After R v Clegg' [1997] 61 J Crim L 448, 454.
[100] *Zecevic v DPP* (1987) 162 CLR 645, 653 (Mason CJ) (High Court of Australia).
[101] Homicide Act 1957, s 3.

self-control through provocation reduces the conviction of murder to manslaughter, however an over-reaction in circumstances of self-defence is not.[102]

In chapter one it was argued that faced with overwhelming fear and pressure, it may be unreasonable to expect homeowners to make fine-grained distinctions as to an appropriate level of force.[103] It would appear logical that "behaviour prompted by reasonable levels of emotions such as fear, despair, and distress are mitigated at least as generously as behaviour prompted by emotions such as anger, jealousy, and self-preservation."[104] In addition, it seems irrational to distinguish between a person who is mistaken as to the occasion of self-defence, who would be completely acquitted[105] and another who is mistaken in thinking that the circumstances called for a degree of force that was regarded as objectively unnecessary.[106]

## Consideration of the Doctrine in the UK

The doctrine was available under the common law of Australia between 1957[107] up until 1987 when it was abandoned.[108] It was still considered to be a good principle; however the complexities of the rule integrating the issue of onus of proof together with rules of substantive law proved too burdensome on juries and trial judges.[109] It was however reintroduced in statutory form into some territories of Australia.[110] The revised section 15(2) of the South Australia Criminal Consolidation Act 1935 provides that a charge of murder is reduced to manslaughter when death results if the defendant "genuinely believed" the conduct was necessary and reasonable[111] in defence of himself or in defence of another,[112] but the conduct was not, in the circumstances as the defendant genuinely believed them to be, reasonably proportionate to the threat that the defendant genuinely believed to exist.[113] Section 421 of the Crimes Act 1900 of New South Wales provides for murder to be reduced to manslaughter on a similar basis as the South Australian provision.

---

[102] Miranda Kaye, 'Excessive Force in Self-Defence After R v Clegg' [1997] 61 J Crim L 448, 455.
[103] n 43.
[104] Nicola Lacey, 'Partial Defences to Homicide: Questions of Power and Principle in Imperfect and Less Imperfect Worlds' in Andrew Ashworth and Barry Mitchell, *Rethinking English Homicide Law* (OUP 2000) 130.
[105] Fiona Leverick, 'Is English Self-Defence Law Incompatible With Article 2 of the ECHR?' [2002] Crim LR 347, 348.
[106] *R v Scarlett (John)* [1994] 98 Cr App R 290 (CA), 295.
[107] *R v McKay* (1957) VLR 560.
[108] *Zecevic v DPP* (1987) 162 CLR 645 (High Court of Australia).
[109] Miranda Kaye, 'Excessive Force in Self-Defence After R v Clegg' [1997] 61 J Crim L 448, 455.
[110] Criminal Law Consolidation (Self-Defence) Amendment Act 1991 (South Australia); Crimes Amendment (Self-Defence) Act 2001 (New South Wales).
[111] Criminal Consolidation Act 1935 (South Australia), s 15(2)(a).
[112] Ibid s 15(3)(a).
[113] Ibid s 15(2)(b).

In the UK, the House of Lords had the opportunity to introduce the doctrine in the case of *R v Clegg*.[114] However Lord Lloyd specifically said that one of the reasons for not introducing the partial defence was that it was 'part of the wider issue of whether the mandatory life sentence for murder should be maintained.'[115]

It has been argued that the availability of the partial defence is detached from the issue of abolition of the mandatory life sentence.[116] Partial defences have an important and separate role to play in labelling of the defendant where it is not appropriate to label him as a murderer.[117] This role would be unaffected by the abolition of the mandatory life sentence, fair labelling remaining an important issue in the absence of such a sentence[118] in addition to the judge's decision on sentencing which will be influenced by the acceptance or rejection of partial defences.[119] If these arguments are accepted, the House of Lords could have had the opportunity to introduce the defence. Nevertheless, the majority found that any changes to be made were to be undertaken by Parliament due to its active involvement in the legislation in other areas of self-defence.[120]

As a result of Clegg, the government formed the 'Interdepartmental Steering Group on the Law on the Use of Lethal Force in Self-Defence or the Prevention of Crime' to assess the desirability of the doctrine.[121] They expressed similar concerns to the Australian High Court regarding workability of the doctrine, rejecting it on the basis that it would risk overcomplicating the law and force juries to draw unrealistically narrow distinctions.[122] However this was prior to the reinstatement of the doctrine in statutory form in some Australian territories.

The Law Commission followed suit, deciding in its paper on partial defences to murder in 2004[123] that the doctrine should not apply, instead directing that a defendant may have a defence under a revised formula of provocation[124] which was contained within the same paper. It was accepted that some burglars do 'the most vile acts of desecration of a person's home and belongings,' which could provoke the householder into using deadly force.[125]

---

[114] *R v Clegg* [1995] 1 AC 482 (HL).
[115] Ibid 500.
[116] Miranda Kaye, 'Excessive Force in Self-Defence After R v Clegg' [1997] 61 J Crim L 448, 452.
[117] Ian Dennis, 'What Should Be Done About the Law of Self-Defence?' [2000] Crim LR 417, 417.
[118] Miranda Kaye, 'Excessive Force in Self-Defence After R v Clegg' [1997] 61 J Crim L 448, 452; Ian Dennis, 'What Should Be Done About the Law of Self-Defence?' [2000] Crim LR 417, 417.
[119] Miranda Kaye, 'Excessive Force in Self-Defence After R v Clegg' [1997] 61 J Crim L 448, 452.
[120] *R v Clegg* [1995] 1 AC 482 (HL), 499-500.
[121] Michael Jefferson, 'Householders and the Use of Force against Intruders' [2005] 69 J Crim L 405, 407.
[122] HC Deb 19 April 1996, vol 275, cols 624-5W.
[123] Law Commission, *Partial Defences to Murder* (Law Com No 290, 2004).
[124] Ibid para 4.18.
[125] Ibid para 3.79.

A similar doctrine exists in some jurisdictions in the United States known as 'imperfect self-defense', operating as a partial defence in much the same way.[126] This defence is distinguished from provocation on the basis that violence in self-defence is induced through fear, whereas violence in provocation is a result of anger.[127]

The Law Commission, asserting that differentiating between fear and anger both psychiatrically and in everyday life was difficult, rejected this distinction.[128] There was no need to consider the assumed workability of the doctrine in the statutory forms from the Australian territories, as it was decided that the route of provocation would be preferable to a doctrine of excessive self-defence.[129]

One cannot be certain that a person who kills in anger is less dangerous than people who kill without that emotion. However, it could be argued that someone who kills in fear of their life might well be.[130] Nevertheless, the mandatory life sentence for murder might provide an effective deterrent against those who would not consider using a proportionate degree of force and actively encourage them to do so.[131] This is of course providing that one subscribes to an evaluative concept of emotion, since under a voluntaristic view, any attempt to deter the instinctive nature of emotion would be futile.[132]

The doctrine only provides a partial defence and therefore prosecution and conviction for manslaughter, including an appropriate sentence, will still result. Thus a fear of prosecution still remains and this may serve to act as a deterrent in itself encouraging those who might use disproportionate force to think twice before doing so, of course subject to the discussion in the previous paragraph regarding control of emotions.

## Criminal Sanctions and the Right to Life under the ECHR

The UK is a signatory to the ECHR and thus has obligations to fulfil those rights provided for under the Convention. Article 2(1) provides that "everyone's right to life shall be protected by law", however, Article 2(2) grants an exception to this rule in three cases, in this essay the relevant exception permits life to be taken in the case of self-defence of the person or others, only when it is 'absolutely necessary'.[133]

There is little case law on Article 2(2) specifically. Any that is available only addresses the use of force by state agents, as opposed to private citizens.[134]

---

[126] Renée Lerner, 'The Worldwide Popular Revolt Against Proportionality in Self-Defense Law' [2006] 2 JL Econ & Pol'y 331, 346.
[127] Ibid.
[128] Law Commission, *Partial Defences to Murder* (Law Com No 290, 2004) paras 4.27-4.28.
[129] n 124.
[130] Renée Lerner, 'The Worldwide Popular Revolt Against Proportionality in Self-Defense Law' [2006] 2 JL Econ & Pol'y 331, 355.
[131] Ibid.
[132] n 44.
[133] ECHR Article 2(2)(b).
[134] *McCann v UK* (1995) 21 EHRR 97; *Andronicou and Constantinou v Cyprus* (1998) 25 EHRR 491; *Gül v Turkey* (2002) 34 EHRR 28.

Consequently the horizontal effect of the Convention might be called into question[135] and there can be no question that a Convention right may not be claimed against a private individual directly.[136]

However, in the case of *Osman v UK*,[137] the European Court of Human Rights[138] ruled that the obligation to protect the right to life under Article 2(1) extended to create a positive obligation on the state to protect citizens from the breach of their Convention rights by other private individuals. This obligation required the state to implement, 'effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions.'[139] Therefore the conduct of a citizen can be the subject of a Convention right, albeit indirectly[140] and the failure of a state to legislate in the criminal law to deter offences against the person can amount to a violation of Article 2(1).[141]

Dealing with the Doctrine of Excessive Self-Defence specifically, it is my contention that its implementation would not breach Convention rights under Article 2(1). Whereas a deterrent effect on the use of disproportionate force may have been higher with the perceived consequences of a mandatory life sentence under a conviction for murder, deterrent effect still remains as the criminal sanction of manslaughter applies instead.[142]

## Conclusions

This reform mainly addresses the potential severity of the mandatory life sentence and certainly does not resolve some of the wider issues expressed in the previous chapter, however it can be seen as a step in the right direction for those who wish to rebalance the law in favour of the householder. Rights to defend your home from an intruder may not be increased as such, but the sentence imposed will be less severe than under the current law. The practical problems in implementing the doctrine may prove a hurdle to overcome. Although the doctrine has been reintroduced in some parts of Australia, it should be noted that the majority of the country has not chosen to do so, suggesting that the pragmatic issues have not been resolved to a satisfactory enough standard for state-wide adoption. Alternatively, as the Law Commission suggests, protection of those who use excessive self-defence could be achieved through a provocation approach. Nevertheless, there is sense in mitigating the effects of the mandatory life sentence of murder when a person's only mistake is the degree of force he uses.

---

[135] Fiona Leverick, 'Is English Self-Defence Law Incompatible With Article 2 of the ECHR?' [2002] Crim LR 347, 358.
[136] Ibid.
[137] *Osman v UK* (1998) 29 EHRR 245.
[138] Also referred to as "ECtHR" and "Strasbourg".
[139] *Osman v UK* (1998) 29 EHRR 245, [115].
[140] David Harris and others, *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights* (2nd edn, OUP 2009) 20.
[141] Fiona Leverick, 'Is English Self-Defence Law Incompatible With Article 2 of the ECHR?' [2002] Crim LR 347, 359.
[142] Ibid 361.

### Complete Exculpation for Excessive Force used due to 'Emotion'

An English or Commonwealth conception of the doctrine of excessive force operates only as a partial defence to murder, the defender remaining susceptible to conviction for manslaughter. In contrast, a continental European doctrine of *excess of legitimate defence* creates a blanket ban on prosecution for anyone who finds himself in the situation necessary for self-defence but exceeds the limits of legitimate force due to confusion, fear or terror, or sometimes possibly wider emotions.

This approach to excessive force can be seen clearly in the German Criminal Code[143] and the Dutch Criminal Code.[144] The former can be found in section 33, which provides that no one will be punished if he exceeds the bounds of self-defence because of 'confusion, fear or terror'.[145] The latter however allows for a much wider scope of excess, section 41 stating that anyone 'exceeding the limits of necessary defence, where such excess has been the direct result of a *strong emotion* brought about by the attack, is not criminally liable.'[146]

A similar Italian reform was proposed[147] which would have afforded individuals protection from prosecution if they acted in excess of legitimate defence due to 'anxiety, fear or panic',[148] however that provision was dropped when the legislation was ultimately passed.[149] The remainder of the reform is discussed in the next chapter.

#### The Problem with Emotion

Arguably, a 'strong emotion' allows for a wider scope than 'confusion, fear or terror', however would this distinction make any difference in practice?

---

[143] *Strafgesetzbuch*
[144] *Wetboek van Strafrecht*.
[145] Michael Bohlander, 'Translation of the German Criminal Code', <http://www.legislationline.org/download/action/download/id/3235/file/Germany_CC_1971_amended_2009_en.pdf> accessed 13 January 2011.
[146] Renée Lerner, 'The Worldwide Popular Revolt Against Proportionality in Self-Defense Law' [2006] 2 JL Econ & Pol'y 331, 352 (emphasis added).
[147] Stephen Skinner, 'Populist Politics and Shooting Burglars: Comparitive Comments on the Lega Nord's Proposal to Reform Italian Self-Defence Law' [2005] Crim LR 275, 280-81.
[148] *Proposta di Legge No. 4926 (April 22, 2004, Deputies Cè, Luciano Dussin et al.) Camera dei Deputati*, "Modifica dell' articolo 52 del codice penale in material di legittima difesa" (Proposed Law No. 4926 (April 22, 2004, Deputies, Luciano Dussin et al.) Chamber of Deputies, "Changing the 'Article 52 of the Criminal Code in material self-defense"); Translation of the provision is provided in Stephen Skinner, 'Populist Politics and Shooting Burglars: Comparitive Comments on the Lega Nord's Proposal to Reform Italian Self-Defence Law' [2005] Crim LR 275, 281.
[149] *Legge 13 Febbraio 2006 n 59* "Modifica all'articolo 52 del codice penale in materia di diritto all'autotutela in un privato domicilio" *(GU n. 51 del 2-3-2006)* (February 13, 2006 Law No. 59 "Amendment to Article 52 of the Penal Code Law self-defence in a private residence"(GU No 51, 02/03/2006)).

It can be contended that the emotional states of confusion, fear and terror are seemingly 'all-encompassing' and broad,[150] and therefore there would be no difference in the two standards. The Law Commission certainly believes that emotions such as fear and anger are hard to distinguish between.[151] Conversely, if one subscribes to the view that emotions can be distinguished, the German standard would not approve of killing in anger or rage, certainly not enough to grant complete exemption from prosecution, whereas a killing provoked by confusion, fear or terror would. This proposition would appear to say that a defender must show emotion about the right thing to be granted the defence, an evaluative view;[152] emotions relating to anger should be controlled while it is accepted that those related to confusion, fear or terror might not.

The Dutch approach however would adopt the voluntaristic view that emotions overwhelm the will, fully exculpating any defender who has used excessive force due to a "strong emotion". The discussions in chapter two relating to whether a person who kills in anger is more dangerous than one who kills in fear would be irrelevant, as would any attempt to deter such defenders, as such a reaction is instinctive and deterrence impossible.[153]

Focusing on the emotions of the defender at the time of the attack would no doubt "dilute the objectivity" of any test of reasonable force,[154] producing a predominantly subjective standard. Such standards have a common problem; how can emotions be *proved*? Lerner dismissively suggests the presentation of evidence by psychiatric experts, or just as likely, a simple claim to have felt the emotion sufficing.[155] She instead concludes that the defence would actually be based on an objective appraisal that emotions would likely be felt in these circumstances, transforming this defence into a presumption to use deadly force in response to attack or threats.[156] The effects of presumptions are discussed in the next chapter. Whether the defence acts as a presumption or not, the effect is to legitimise an excessive degree of force in a wide range of circumstances, the effects of which are considered immediately below.

Can Proportionality be Preserved?

The notion of proportionality in English law plays a restrictive role, seeking to minimise the overall damage done in a given situation, in order to maximise the right to life of both attacker and defender.[157] It accepts that in order to protect rights, sometimes rights must be violated, but the harm caused must

[150] Stephen Skinner, 'Populist Politics and Shooting Burglars: Comparitive Comments on the Lega Nord's Proposal to Reform Italian Self-Defence Law' [2005] Crim LR 275, 281.
[151] n 128.
[152] Renée Lerner, 'The Worldwide Popular Revolt Against Proportionality in Self-Defense Law' [2006] 2 JL Econ & Pol'y 331, 356.
[153] n 44.
[154] Stephen Skinner, 'Populist Politics and Shooting Burglars: Comparitive Comments on the Lega Nord's Proposal to Reform Italian Self-Defence Law' [2005] Crim LR 275, 281.
[155] Renée Lerner, 'The Worldwide Popular Revolt Against Proportionality in Self-Defense Law' [2006] 2 JL Econ & Pol'y 331, 358.
[156] Ibid.
[157] AJ Ashworth, 'Self-Defence and the Right to Life' [1975] 34 Cambridge LJ 282, 293, 296-97.

be approximately no more than the original harm sought to be avoided.[158] It is important, since leaving necessity as the only limiting factor would permit any degree of force to be used, even lethal force, to protect even trivial interests.[159]

Undoubtedly, permitting overreactions due to emotion offends the notion of proportionality as it is understood in English law. The intruder may not present a threat of death or serious bodily injury to the defender, yet lethal force used by the latter will be legitimate if it was the direct consequence of a violent emotion brought on by the attack. Can proportionality be preserved in another fashion? That is, can other factors in addition to protecting the defender's threatened interest outweigh the intruder's right to life?

The defence generously accounts for human frailty, but it also provides a clear rule. The main advantage of a clear rule is that it is easier to apply than a traditional rule of proportionality,[160] creating certainty for householders who know without fear that they will not be prosecuted if they overreact in the circumstances, in addition to those applying the rule such as police, prosecutors or the courts. Green quotes Joshua Dressler, 'It is preferable to have a clear rule that can be obeyed nearly all of the time, even if it will lead to a correct result in, perhaps, only ninety percent of the cases, than it is to implement unclear rules that should lead to the correct result all of the time, but which only well-intentioned officers are able to apply correctly in only seventy-five percent of cases.'[161]

Attempting to justify the death of a human being, even one that has broken the law, under such a cold, administratively efficient rule does not (in my opinion) strike a chord with popular morality. Green certainly describes it as a 'blunt instrument' in the role of justified homicide.[162] As with justification due to protection of the "social-legal" order argued above,[163] it may not seem just to the aggressor that his life or physical integrity should be sacrificed for administrative efficiency or legal certainty.

While the doctrine recognises a general vulnerability of defenders, the dwelling remaining undifferentiated from any other place, since the rule applies regardless of location. Thus any rationale for permitting excessive force on the basis of any unique nature of the home cannot be submitted. However by virtue of recognising a general vulnerability, the rights of a householder also increase.

Although the doctrine appears to focus on concession for human frailty, the effects that such a rule produces may have subsidiary results in the form of deterrence, and indeed possibly retribution. A potential intruder may be deterred, knowing that a householder could use potentially lethal force,

---

[158] Ibid 296.
[159] Ibid.
[160] Stuart Green, 'Castles and Carjackers: Proportionality and the Use of Deadly Force in Defense of Dwellings and Vehicles' [1999] U Ill L Rev 2, 27.
[161] Ibid.
[162] Ibid 28.
[163] n 86.

however it is unclear whether such an intruder will be deterred, following the counter-arguments outlined in the first chapter.[164]

Perhaps not under a 'confusion, fear or terror' rule, but certainly under a 'strong emotion rule', a defender acting in anger or rage may well be using force in the aims of revenge or retribution, wishing to see the aggressor 'pay' for the violation of interests. On the other hand, this theory is inhibited by the immediacy of attack. A defender must find himself in the situation necessary for self-defence,[165] before allowance for emotions is made, therefore limiting the timeframe in which revenge or retribution can be carried out and the ability to 'seek out' such opportunities to do so.

If a state values the right of a defender, as a law-abiding citizen, to protect his interests at the cost of the aggressor, administering retribution will contribute to the maintenance of law and order in society.[166] However, if as argued in chapter one, the state highly values human life and equality of all before the law, it is in the state's interest for it to be the only party that provides for retribution, through the courts under a proper and impartial procedure.[167]

Green contends that although individual rationales such as these may not by themselves be enough to satisfy proportionality, an aggregation of reasoning such as the rationales given above could well achieve this task.[168] However, an 'aggregative' approach is not without pragmatic issues[169] and proponents of human rights approaches to self-defence undoubtedly argue that no aggregation of lesser interests could possibly justify the loss of human life, 'the deprivation of life is a permanent loss that cannot be remedied or compensated for in any meaningful way.'[170] This is a view that I accord with. Human life should not be devalued by comparing it with lesser interests in such a way. Following this argument, proportionality is not preserved and while it may be possible to alter the law within the UK to adapt to this, obligations to protect human rights under the ECHR must still be fulfilled.

Deterrence and the ECHR

Is the right to life under Article 2(1) ECHR protected under these rules? If we recall in the last chapter, a state was under an obligation to protect the right to life by providing methods including criminal sanctions for any deprivation of life that was not 'absolutely necessary' in self-defence in order to deter offences against the person.[171] The question is, can emotional reactions be deterred by criminal sanctions? The German view would appear to say that

---

[164] n 88.
[165] Renée Lerner, 'The Worldwide Popular Revolt Against Proportionality in Self-Defense Law' [2006] 2 JL Econ & Pol'y 331, 354.
[166] Stuart Green, 'Castles and Carjackers: Proportionality and the Use of Deadly Force in Defense of Dwellings and Vehicles' [1999] U Ill L Rev 2, 37, 39-41.
[167] n 91.
[168] Stuart Green, 'Castles and Carjackers: Proportionality and the Use of Deadly Force in Defense of Dwellings and Vehicles' [1999] U Ill L Rev 2, 39-40.
[169] Ibid 40.
[170] Fiona Leverick, 'Defending Self-Defence' [2007] 27 OJLS 563, 574.
[171] n 139.

confusion, fear or terror are unsusceptible to any deterrent effect which would be provided by the criminal law, whereas under the Dutch approach no 'violent emotion' is capable of deterrence. Such emotions are instinctive and are difficult, if at all possible to control.[172] If one accords with this view, no criminal sanction would have a deterrent effect and thus would not increase any protection for the intruder;[173] a householder would use the same force regardless.

This proposal may seem to go too far for some, the ECtHR included. The Court in applying the "absolutely necessary" criteria are applying a strict proportionality test,[174] although allowance is made for stress and fear in the circumstances, to a degree.[175] If the view is that emotions can to some extent be controlled, a requirement of proportionality may act as a deterrent,[176] encouraging householders to take a better hold of their emotions rather than completely losing control in the heat of the moment.

Under this view, the lack of a criminal sanction for the deprivation of life in self-defence when it was not "absolutely necessary" breaches Article 2(1). Unfortunately the Strasbourg courts have made no rulings regarding the legitimacy of the German or Dutch laws and so it is not possible to say with any certainty what the result would be, however it has been argued that making emotion "preclude, rather than mitigate, assessment of the absolute necessity of defensive action" is out of line with Strasbourg case law,[177] and indeed the fact that the Court only makes a limited allowance for stress and fear in the circumstances would appear to lead to a conclusion that the complete exculpation for excessive force used due to emotion would breach Article 2(1).

## Conclusions

Notwithstanding the assumption that an implementation of this approach to self-defence in UK law would breach the right to life under Article 2(1), the method itself is problematic. The problem of proving emotions cannot be neglected and allowing a full exclusion from liability may protect those who kill with malice as much as it protects those who make grave errors in the face of pressure and stress.

---

[172] n 44.
[173] Fiona Leverick, 'Is English Self-Defence Law Incompatible With Article 2 of the ECHR?' [2002] Crim LR 347, 359.
[174] *McCann v UK* (1995) 21 EHRR 97, [149].
[175] *Andronicou and Constantinou v Cyprus* (1998) 25 EHRR 491, [192].
[176] Fiona Leverick, 'Is English Self-Defence Law Incompatible With Article 2 of the ECHR?' [2002] Crim LR 347, 359.
[177] Stephen Skinner, 'Populist Politics and Shooting Burglars: Comparitive Comments on the Lega Nord's Proposal to Reform Italian Self-Defence Law' [2005] Crim LR 275, 282.

### Defence of Premises

A "Defence of Premises" doctrine typically provides that whenever a person has unlawfully entered or is attempting to unlawfully enter a dwelling (sometimes including other buildings), the defender is presumed to have had a reasonable fear of an imminent threat of death or serious bodily harm.[178] Thus, the level of force is considered to be proportionate unless facts can be produced to successfully rebut the presumption, that is, if it was intended to be 'rebuttable'.[179] If however a presumption was intended to be 'conclusive', when basic facts are proved, the presumed element is removed from the case, and as such, arguments showing the non-existence of a presumed fact will not be entertained.[180]

The continuing focus will be on conclusive presumptions, as this provides the strongest rights for the householder, concluding the assessment of the differing degrees of rights accorded to homeowners with the approach that accords the most. In addition, the position on rebuttable presumptions is unclear, both as to whether in reality the presumption can be displaced and how this can be done. Drake argues that in reality there would be immaterial difference between conclusive and rebuttable presumptions as when the intruder has been killed, who is able to contradict the householder's story that the use of lethal force was necessary.[181]

The United States is the country most notorious with this implementation of householder self-defence, although it is not widespread. The Florida law[182] is an example of a presumption that was intended to be conclusive;[183] the basic fact is satisfied when an unlawful forceful entry or attempted forceful entry is made.[184] Closer to home, an example of what appears to be a conclusive presumption in self-defence law[185] can be found in Europe. Article 52 of the Italian Penal Code[186] specifies that if a person is found to be trespassing in a dwelling… proportionate force is presumed, even if the defender uses a legally owned weapon.[187]

---

[178] Renée Lerner, 'The Worldwide Popular Revolt Against Proportionality in Self-Defense Law' [2006] 2 JL Econ & Pol'y 331, 358.
[179] Denise Drake, 'The Castle Doctrine: An Expanding Right to Stand Your Ground' [2008] 37 St Mary's LJ 573, 590.
[180] Ibid 591.
[181] Ibid 592.
[182] Florida State Ann § 776.013.
[183] Denise Drake, 'The Castle Doctrine: An Expanding Right to Stand Your Ground' [2008] 37 St Mary's LJ 573, 591.
[184] n 182.
[185] Stephen Skinner, 'Populist Politics and Shooting Burglars: Comparitive Comments on the Lega Nord's Proposal to Reform Italian Self-Defence Law' [2005] Crim LR 275, 283.
[186] *Codice di Procedura Penale.*
[187] Translated by author.

A Rational Risk to Presume?

The most principal feature of this doctrine is that no actual or perceived threat of death or serious bodily injury is required.[188] This threat is presumed upon the proving of the basic fact that there was an intrusion or attempted intrusion into a dwelling, and thus any force including lethal force will be considered to be proportionate to the presumed threat. In reality however, the force used may be disproportionate to the "actual" harm threatened.[189]

If a threat of death or serious bodily injury is to be presumed when an intruder enters or attempts to enter the dwelling or building, surely the risk must be at least likely to materialise. Has this threat been assessed actuarially, that is calculated based on statistics, or predicted, based on what is thought *might* be likely to happen in the circumstances?[190]

An unlawful entry into a dwelling or building is usually made for the purposes of burglary.[191] Under English law, the offence of burglary is committed if a person enters or attempts to enter any part of a building as a trespasser, stealing, unlawfully damaging anything therein or causing grievous bodily harm to an occupant.[192] Intent to cause any of these harms when entering or attempting to enter is sufficient for the offence.[193]

The perceived risk of victimisation of burglary in the UK is moderately higher than the actual risk, the apparent level at 15%[194] whereas the real risk is lower at 2.2%.[195] In fact, when burglary does occur it is statistically not a violent crime. Last year, of the 28% of householders who encountered an intruder during a burglary, 48% of those occurrences involved the threat or actual use of force.[196] Thus violence is statistically only likely to happen in 13.44% of all burglaries.

This would appear to accord with the view that burglars will typically prefer to avoid contact with the occupants,[197] only looking to the theft of household property rather than the commission of violent crimes.[198] A high percentage of

---

188 Stuart Green, 'Castles and Carjackers: Proportionality and the Use of Deadly Force in Defense of Dwellings and Vehicles' [1999] U Ill L Rev 2, 9.
189 Ibid.
190 Joshua Getzler, 'Use of Force in Protecting Property' [2006] 7 Theoretical Inq L 131, 142.
191 Stuart Green, 'Castles and Carjackers: Proportionality and the Use of Deadly Force in Defense of Dwellings and Vehicles' [1999] U Ill L Rev 2, 28-29.
192 Theft Act 1968, s 9.
193 Ibid.
194 J Flatley and others, *Home Office Statistical Bulletin: Crime in England and Wales 2009/10* (Home Office 2010) 115.
195 Ibid Table 4.01.
196 Home Office, *Crime in England and Wales 2009/2010 Supplementary Tables: Nature of Burglary, Vehicle-Related Theft, Bicycle Theft, Other Household Theft, Personal and Other Theft, Vandalism and Violent Crime* (Home Office 2010) Table 1.8.
197 Renée Lerner, 'The Worldwide Popular Revolt Against Proportionality in Self-Defense Law' [2006] 2 JL Econ & Pol'y 331, 360.
198 Stuart Green, 'Castles and Carjackers: Proportionality and the Use of Deadly Force in Defense of Dwellings and Vehicles' [1999] U Ill L Rev 2, 29.

entries into a home would not actually present a threat of death or serious bodily injury, making the risk a statistically unreasonable one to presume.

Concessions for Clarity

The adoption of a conclusive presumption avoids the difficulties associated with the weighing up of competing interests both by the defender and the courts when applying a traditional proportionality standard.[199] It provides a clear rule, granting a licence to use force in defined circumstances as opposed to a possibility to use force in certain conditions.[200] Thus a householder has clarity: as to the law because the rule is simple to apply and also that he will not face prosecution if he overreacts since concession for human frailty is encompassed in the presumed proportionate force.

The cost for providing clarity is the aggressor's life, regardless of whether he poses a threat of death or serious bodily harm. This rule is situation insensitive, denying individual rights and justice, creating a potential punishment of death when the burglar's moral culpability may be limited to being a mere thief, albeit one who has broken into dwelling. Granting such a wide scope to use force may make it all too easy for householders to use lethal force without thinking.[201] Of course, if an intruder who had violent intent were killed, the presumption would be seen to be serving its purpose. However if force is used without thought, an occupant or even a "ten-year old boy found stealing apples from the kitchen"[202] could be killed; the cost of error in these circumstances would be high.

Drake describes the legalisation of lethal force without an imminent threat of death or serious bodily injury as a "no-win situation", the risk of the householder being unable to survive an attack increasing as use of pre-emptive force is restrained, but the greater the chance of this force being used in error if force has less restriction.[203]

The Protection of Interests other than Life and Bodily Integrity

If one is not protecting his life or person, what is the intent of using force? Undoubtedly, the legitimisation of lethal force in the absence of a threat of death or serious bodily integrity permits the ability to protect lesser interests than those of life and bodily integrity. The significance of the "home" was argued in chapter one, an intrusion of which can be seen as violations of

[199] Renée Lerner, 'The Worldwide Popular Revolt Against Proportionality in Self-Defense Law' [2006] 2 JL Econ & Pol'y 331, 359.
[200] Stephen Skinner, 'Populist Politics and Shooting Burglars: Comparitive Comments on the Lega Nord's Proposal to Reform Italian Self-Defence Law' [2005] Crim LR 275, 283.
[201] Joshua Getzler, 'Use of Force in Protecting Property' [2006] 7 Theoretical Inq L 131, 142.
[202] Ian Dennis, 'What Should Be Done About the Law of Self-Defence?' [2000] Crim LR 417, 417.
[203] Denise Drake, 'The Castle Doctrine: An Expanding Right to Stand Your Ground' [2008] 37 St Mary's LJ 573, 598.

dignity and security capable of creating harmful effects on the occupants.[204] It could be argued that although an intrusion into the home can produce these harmful effects, they are merely temporary in comparison to death. Quoting above, death is a permanent loss that cannot be compensated or remedied for in any meaningful way.[205]

Additionally, permitting such force can lead its use to protect property, either the home itself as property or the possessions within.[206] However the above argument applies to any attempted justification of the taking of life on the grounds of protecting any interests lesser than life. To allow death to be a justifiable consequence of protecting these interests would be to devalue human life below that of property, dignity or security.[207] A presumptive rule can also be seen as promoting the aims of deterrence and retribution.

The ability of the householder to use a level of force at his own discretion can not only deter an intrusion in action, but also future intruders, knowing that deadly force may be used.[208] The counter-argument was that an intruder may not be deterred, but will in fact arm himself more heavily, increasing the overall occurrence of violence as opposed to minimising it.[209] There is no concrete evidence either way, however there is opinion that in both the US and in continental Europe, the permission of these laws has not led to such a "bloodbath".[210]

Ultimately, if a person kills without a threat of death or serious bodily injury, he has substituted a decision of the courts for his own punishment. The issue of citizen-enforced retribution was discussed in chapter one, the conclusion being that if a state highly values human life and equality of all persons before the law, punishment is a task for the state and not individuals, the final moral choice to punish being left to the former rather than the latter.[211]

Negative Effects

A householder may be able to defend his home by any means, even in the absence of a threat of death or serious bodily harm, but this may not bring the anticipated security or peace of mind. Drake gives examples of householders who resorted to lethal force, one had his house burned down allegedly in retaliation for the gang member that he shot[212] and the other feared revenge

[204] n 64.
[205] n 170.
[206] Stuart Green, 'Castles and Carjackers: Proportionality and the Use of Deadly Force in Defense of Dwellings and Vehicles' [1999] U Ill L Rev 2, 32.
[207] Stephen Skinner, 'Populist Politics and Shooting Burglars: Comparitive Comments on the Lega Nord's Proposal to Reform Italian Self-Defence Law' [2005] Crim LR 275, 283; Fiona Leverick, 'Defending Self-Defence' [2007] 27 OJLS 563, 574.
[208] n 76.
[209] n 88.
[210] Renée Lerner, 'The Worldwide Popular Revolt Against Proportionality in Self-Defense Law' [2006] 2 JL Econ & Pol'y 331, 353, 364.
[211] n 90.
[212] Denise Drake, 'The Castle Doctrine: An Expanding Right to Stand Your Ground' [2008] 37 St Mary's LJ 573, 611.

by the friends of the man he killed, who continued to send him and his wife hate mail.[213]

The effects may also be internal to the defender. Having killed someone when it was not in fear of life or bodily integrity may bear too heavy on a person's conscience, changing his life forever, when the use of force could have been avoided altogether.[214]

## Presumptions and the ECHR

With regard to the actual risk of a threat of death or serious bodily injury when an intruder breaks into your home, a conclusive presumption that force was proportionate would certainly not be 'absolutely necessary' under Article 2(2). The permission of lethal force in the absence of such a threat could by no means be logically interpreted to satisfy a test of strict proportionality.

The protection of property or lesser interests are not provided for in the exceptions to the right to life under Article 2(2),[215] and the use of lethal force to protect such interests would fail the strict proportionality test applied by the ECtHR.

Whereas a requirement to use "reasonable force" under the current law of the UK would seek to deter householders from using disproportionate force by providing a criminal sanction,[216] the lack of any sanction in the case of a conclusive presumption would act against the aims of deterrence. The state would be seen to be failing its positive obligation to protect the rights of citizens from breach by others by providing no punishment under the criminal law for the use of disproportionate force.[217] Therefore a violation of the right to life under Article 2(1) would be found.

It has been contended that the Italian legislation providing presumptive legitimate force would inadequately protect the right to life under Article 2(1) and would thus be a violation of the Convention.[218] I would agree, however as the matter has not come before Strasbourg, the legislation will remain.

## Conclusions

Permitting life to be taken, even a criminal's, in the absence of a threat of death or serious bodily injury is offensive to the notions of individual justice and the right to life of the intruder.

---

[213] Ibid 612.
[214] Ibid 613.
[215] David Harris and others, *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights* (2nd edn, OUP 2009) 63.
[216] n 139.
[217] n 141.
[218] Francesca Consorte, 'The Effects of the European Convention on Human Rights in National Criminal Law: The Harmonizing Process' [2009] 6(1) Ankara Law Review 17, 23.

The UK has agreed to undertake the protection of human rights as a party to the ECHR, and as such the obligation on the state to protect human rights extends to all, protecting the right to life as far as possible, not only for the householder but also the intruder. Legitimising lethal force in the pursuit of protection of property, dignity or security of the home would be to devalue the life of the intruder below these interests, failing to adequately protect his right to life and thus breaching the Convention.

It may be argued that the law currently favours the intruder in circumstances of self-defence in the home,[219] however a Defence of Premises approach, goes past redressing the balance and weighs the law too far in favour of the householder.

# Conclusion

At the beginning of this essay we set out to explore the claim that the current law regarding self-defence in the UK was not sufficiently protecting householders against intrusions into the home, but instead seemed to be favouring the protection of the rights of the intruder. The insufficiencies of the law were discussed in depth in the first chapter, followed by an analysis of the alternative approaches to self-defence in the subsequent chapters.

It was found that the current law can never provide complete clarity and may not sufficiently take into account human frailty, completely disregarding any significance of the home in particular. The mandatory life sentence for murder can be potentially severe and would result in a perverse conviction or acquittal in some cases. However it was decided that citizen-enforced retribution was counter-productive to the values of the protection of human life and equality of all before the law.

The alternative approaches did solve some of the insufficiencies of the current law: the doctrine of excessive-self defence sought to mitigate the harsh effects of the mandatory life sentence for murder, complete exculpation on the basis of emotions provided an extremely generous allowance for human frailty in circumstances of self-defence and presumptive legitimate force gave the householder a wide scope of force with which he could defend himself, others or his home with a level of force at his own discretion.

Ultimately these legislative solutions, if implemented in the UK, would seek to redress the balance of the law in favour of the householder, either subtly under the doctrine of excessive self-defence, or less so under either the complete exculpation or presumptive routes. These methods do not come without costs.

For the issues with the current law that these approaches solved, each came with its own problems. The doctrine of excessive self-defence would risk overcomplicating the law and would provide a complex task for juries to undertake. A complete exculpation on the basis of emotion would risk over-

[219] n 21.

inclusiveness acquitting those who genuinely killed in the heat of the moment but also those who killed with malice. Additionally, the problem of proving emotions would be difficult to overcome. Presumptive legitimate force also carried with it the drawbacks of over-inclusiveness, but presented a high cost of error when pre-emptive force was used in the absence of a threat of death or serious bodily harm. It was contested that the reasoning behind the approach was flawed; death or serious bodily harm occurring whenever an intruder broke into a home was statistically unlikely.

With the exception of the doctrine of excessive self-defence, it was concluded that the remaining two approaches would breach the right to life under Article 2(1) ECHR. The UK has agreed to undertake the protection of human rights obligations by signing and ratifying the Convention. In theory, the UK could renounce the Convention, a possibility that has been discussed recently following an increasingly activist Strasbourg court.[220] The UK would be free to pass laws without restriction. However to withdraw from the ECHR would be politically disastrous, setting a bad example to other states including those newly democratic states who have agreed or will potentially agree to the Convention, that they do not have to abide by the law, rendering the Convention ineffective.[221]

What the ECHR provides is too important to simply disregard. Even if the view of the majority in the UK was in favour of increasing the rights of the householder at the expense of the human rights of the intruder, 'The law is not simply about majorities, about power being exercised by the State. It is also fundamentally ... about the protection of minorities against the will of the majorities sometimes. In some ways you can say, 'That is antidemocratic; that is lacking in sovereignty'; but it is an essential part to the notion of human rights that we now have: that individuals and minorities are protected by them.'[222] Thus although a view may be expressed by a majority, it might not be the 'right' one, especially in an age of "value-pluralism', the idea that contrasting moral values can vary widely across society.[223]

These public views may not be fully informed and comprehension about the relevant issues may be lacking. 'If public attitudes are to weigh heavily in the balance, the need for fuller and more honest discussion of criminal justice issues in public is obvious. But politicians must be discouraged from paying undue heed to ill thought out public responses to crime and punishment.'[224] This essay has sought to bring to the forefront the real implications of

---

[220] Ben Emmerson, 'The European Court of Human Rights Enhances our Democracy' (*The Independent,* 8 February 2011) <http://www.independent.co.uk/opinion/commentators/ben-emmerson-the-european-court-of-human-rights-enhances-our-democracy-2207503.html> accessed 16 February 2011; Patrick Wintour, 'British Bill of Rights Review Imminent, says David Cameron' (*The Guardian*, 16 February 2011) <http://www.guardian.co.uk/law/2011/feb/16/bill-of-rights-review-imminent-david-cameron> accessed 16 February 2011.

[221] Political and Constitutional Reform Committee, *Voting by Convicted Prisoners: Summary of Evidence*, (HC 2010-11, HC 776) 7.

[222] Ibid.

[223] JP Burnside, 'Rethinking English Homicide Law Publication Review' [2002] 61 CLJ 721, 722.

[224] Nicola Padfield, 'Rethinking English Homicide Law Publication Review' [2002] 118 LQR 157, 157.

adopting alternative self-defence approaches, considering the desirability of each.

With the information from this essay in mind, would your view on the issue of self-defence of the home be any different? Would a change in the law affect how you might defend yourself or your home? Or is the law a mere after-thought when acting to defend?

# Does a Rose by any Other Name Smell as Sweet? A Discussion of Whether Perfume can be Protected under Intellectual Property Law from Smell-a–Likes, and Whether it Should be?

*Jasmin Eames*

Currently there is no model of protection. English intellectual property law should protect perfume. Patents offer monopoly protection, and trade marks can be renewed indefinitely, making them the more advantageous of choices; due to the nature of perfume but neither is appropriate. The method of protection most appropriate for perfume is copyright. Perfume should be regarded as an 'artistic work', as per s.1(1)(a) of the Copyright, Designs and Patents Act 1988 (hereafter CDPA), for its creation involves an extensive amount of skill and craft. A comparative look to the continent is key to this discussion. The Supreme Court of the Netherlands in *Lancôme v Kecofa*[1] held the scent of a perfume could be copyrighted and making a smell-alike constituted an infringement. The Cour D'Appel in the French case of *L'Oreal v Bellure*[2] made a similar judgement, although the Cour de Cassation in a separate, later case, *Bsiri-Barbir v Haarmann & Reimer*[3], ruled the opposite. It is shown that the judgement in *Lancôme v Kecofa* was correct and should be followed in English courts if similar facts arose.

## Introduction

### Problem

'Everyone in the industry knows that the first twenty bottles of IFF's perfumes are bought by IFF's competitors'.[4] Perfumes are easily reverse engineered using the right tools or by the right people.

[1] *Kecofa B.V. v Lancôme Parfums et Beauté et CIE S.N.C* [2006] E.C.D.R 26
[2] *L'Oreal SA v Bellure NV* [2006] E.C.D.R 16
[3] *Bsiri-Barbir v Haarmann & Reimer* [2006] E.C.D.R. 28
[4] Burr C, *The Perfect Scent: A year inside the perfume industry in Paris and New York,* (Henry Holt, New York, 2008)

Perfumers (those who create perfumes) are highly skilled in identifying individual ingredients just by their scent, and recreating classic perfumes from smell only is part of their training.[5] Furthermore the invention of the gas chromatograph in 1952, a machine that can analyse the molecular composition of a perfume and identify all the ingredients, means that any perfume can be easily recreated and imitated.

And recreated and imitated they are: Katie Price's sickly sweet *Stunning* smells almost identical to the expensive *Miss Dior Cherie* by *Dior*; the warm muskiness of *Narciso Rodriguez For Her* can be found in Sarah Jessica Parker's *Lovely*. The list of comparisons goes on. Further, manufacturers have been known to purposely copy expensive perfumes and sell them at a fraction of the price, but under a different name so as to avoid liability for passing off.[6] There are even websites which give instructions on how to recreate popular perfumes at home.[7]

The common dominator between the activities above is: they are all legal. For while a company can protect the name of their fragrance, the bottle it is contained in and the packaging in which it is sold (namely through copyright and trade mark); it would appear English law does not provide adequate protection for the actual fragrance itself.

## Perfume

### What is 'perfume'?

Before this discussion can continue, it is most important to define what modern 'perfume' actually is: a highly scented liquid which is sprayed, dabbed or splashed onto the skin. They comprise of three parts, called notes[8]. The top note is the first impression of the scent. It fades into the heart note, the main theme of the fragrance, evaporating finally into the base note- the last element of the scent to leave the skin. Perfume, in its most basic form, dates back to the Ancient Egyptians and Ancient Greeks.[9] Today, the packaging, the brand and the advertising of a fragrance can be just as important as the scent. While a designer handbag can cost thousands, a designer perfume is a cheaper alternative for those wanting a taste of luxury. As a direct consequence of its accessibility, resulting in wide-ranging distribution and high profit margins, the perfume industry is worth billions worldwide.

---

[5] The following books offer extensive information on the training of perfumers: Burr C, *The Perfect Scent: A year inside the perfume industry in Paris and New York*, (Henry Holt, New York, 2008); Irvine S, *Perfume: The creation and allure of classic fragrances*, (Crescent Books, New York, 1995); Barillé E and Laroze C, *The Book of perfume*, (Flammarion, Paris/New York 1995)

[6] *L'Oreal SA, Lancôme Parfums et Beauté & Cie and Laboratoire Garnier & Cie v Bellure NV, Malaika Investments Ltd* [2010] EWCA Civ *535*

[7] One example: <http://www.theperfumereport.com/designer_perfume.html> [Accessed 22 October 2010]

[8] Irvine S, *Perfume: The creation and allure of classic fragrances*, (Crescent Books, New York 1995), 56

[9] For a more detailed history of perfume see: Irvine (n8)

Perfume is created by perfumers who are highly trained in the art of creating perfume. The beginning of a modern perfume is the concept or brief; given by the client (e.g. Dior) usually to one of the large international companies most perfumers work for (such as: Givaudan, Firmenich, IFF and Taskasgo).[10] While perfumers are seen as creative artists, in the modern world they have to work within the constraints laid down by their client.

There are around 600-700 natural and over 4,000 synthetic extracts for a perfumer to choose from. A single perfume can contain anything from 30 to several hundred of these.[11] Perfume creation is far from putting a few of them together, hoping they smell nice: '*Perfume, is, fundamentally, mastering organic chemistry, and it involves cutting and sewing pieces of the periodic table of the elements, trying to choreograph electrons that often react to each other in surprising ways, and cajoling molecules into a single mesh that has structure, durability and stability- not to mention beauty, originality and commercial appeal.*' [12] It can take years of daily tweaking to perfect a fragrance.

Is it worth protecting under Intellectual Property law?

The most referred to justification for intellectual property rights, in general, is Locke's: 'The labour of his body, and the work of his hands, we may say, are properly his'. [13] A creator should be able to own and protect what he or she produces: perfumers should be able to own and protect their perfumes.

Those who oppose the intellectual property protection of the scent of a perfume believe that to think of perfume creation as artistic is too 'romantic'. Seville[14] has written: '*such thinking sits comfortably with the romantic vision of the author as uniquely entitled to proprietorship of created works, but this paradigm has been seriously challenged in postmodern times'*. [15] Jehoram[16], speaking of the judge in the Dutch perfume case *Lancôme v Kecofa* said he '*extensively quote[d] from the fantastic novel Perfume*[17]*...which with its utterly unrealistic view on perfume makers may well have inspired many lawyers in the case'*. [18] Further, in French case of *Bsiri-Barbir* copyright was not granted for '*the fragrance of a perfume results from the mere implementation of know how*'.[19] The comments suggest that perfume creation is far from creative, and giving intellectual property rights to the scent of a

[10] Burr (n1) XVIII
[11] Irvine (n8) 62
[12] Burr (n1) 117
[13] John Locke, 'The Second Treatise', Section 27 (at 305 to 306), in *Two Treatises of Government*, edited by Peter Laslett, Cambridge University Press, 1970, as cited in H.M Spector, 'An outline of a theory justifying intellectual property rights' [1989] 8 EIPR 270, at 270
[14] Catherine Seville, 'Copyright in perfumes: smelling a rat' [2007] C.L.R 66(1) 49-52,
[15] Seville (n14) 51
[16] Herman Cohen Jehoram, 'The Dutch Supreme Court recognises copyright in the scent of a perfume. The flying Dutchman: all sails, no anchor' [2006] E.I.P.R. 28(12), 629-631
[17] Süskind P, Perfume: The Story of a Murderer, (Penguin 1985), as referenced (n16)
[18] Jehoram (n16) 629
[19] *Bsiri-Barbir* (n7) 381

perfume is somewhat naïve. But in light of the perfume literature referenced, this does not seem incredibly fair.

Chandler Burr's profile of the perfumer Jean-Claude Ellena followed him through the creation of *Un Jardin Sur Le Nil.*[20] The client, *Hermès*, gave Ellena the brief: to create in a bottle the scent of a garden on the Nile. He travelled to Egypt for personal inspiration- and found it in '*the fresh cool inky black water of the Nile and the ancient wood of the old Cataract Hotel*'[21], as well as the scent of green mango. Ellena then spent months creating the notes, and trying to harmonise them until he and *Hermès* were happy with the final product. Ellena's journey can be compared to that of a painter- he had a concept, searched for inspiration, and tried to portray it in a physical form. It is hard to conclude a perfumer's journey is not creative.

Seville noted that times have changed, and that it cannot be said modern perfume is creative[22]. It is true that perfumers have to work within commercial constraints; their finished product has to be attractive to a mass audience and the cost of each extract must be monitored to ensure a profit can be made. It is also true that technology is significant in perfume creation- computers can measure the amount of each extract used for example. However, just because commercialism is the underlying issue and technology is used, does not mean to say a work is not artistic. The music industry provides the perfect analogy. Technology is relied on for almost everything in music. Computers can create beats and melodies, the artist can be auto-tuned to sound note perfect. The industry, like the perfume industry, is a money making machine and like perfumers, main-stream songwriters and producers will be weary that the success of the song is dependent on its attractiveness to the masses. It could be said that the perfect pop song '*results from the mere implementation of know how'*. So the question can be asked, if music is protected by intellectual property, then why can perfume not.

<u>What would be protected- the scent or the liquid carrying the scent?</u>

The interesting question of whether the liquid ('*the substance which distributes a specific fragrance as a result of its composition and which is manufactured and used for this*'[23]) or the scent ('*that which a human being can perceive by using his olfactory sense*'[24]) would be protected arose in the Dutch case of *Lancôme v Kecofa*.

The two tiers of the judicial system, which heard the case, offered a differing opinion as to which was protected by Dutch Copyright Law. The Court of Appeal[25] understood that by repeatedly mentioning "its perfume Trésor", Lancôme intended to invoke protection for the liquid contained in the

[20] Burr (n1)
[21] Burr (n1) 23
[22] Seville (n8) 51
[23] As defined in the Netherland's Court of Appeal: *Lancôme v Kecofa* [2005] E.C.D.R. 5, at 6
[24] *Lancôme* (n23) 6
[25] *Lancôme* (n23)

bottles[26], and thus this was what the Court gave protection to. Counsel for Lancôme further stated the composition was what was creative. The decision to award copyright to the composition of the perfume received much academic criticism.

Jehoram was very strong in his criticism: *'This of course is impossible; copyright only protects immaterial works, in this case eventually the scent, but never the material carrier of the work, here the liquid in the bottle'*. By analogy he then noted *'with respect to a book, the copyright does not rest in the printed paper but in the literary work embodied in the material pages'*.[27] This point was reiterated by Field: *'copyright infringement has never depended on materials. Images are infringed by ones of substantial similarity, regardless of media or lack of permanence'*.[28]

As well as not sitting correctly with the nature of copyright, protecting the composition does not provide as adequate a degree of protection as one would think. Under this protection, a liquid that has the same ingredients/composition as the perfume would constitute an infringement. But, the same scent can be produced by a number of variations of different extracts.[29] So a liquid that smells identical to another perfume but has been created by different extracts would not be caught by the copyright protection of the composition. As this point highlights, the value of the perfume is in the scent and not the composition. The Supreme Court in the same case later decided it was the scent which was protected.[30] This is a more appropriate approach. In giving copyright protection to the scent means that a perfume which smells identical to another perfume, regardless of any difference in their composition, could be regarded as an infringement.

## Continental Position

Civil law

In any comparison to continental legal systems, it is imperative to note that England's common law system is not mirrored across the continent: all other European countries have a civil law system. An in-depth comparison of each system is outside the scope of this essay, but a brief discussion is necessary. A common law tradition[31] is to emphasise the holder of the economic power.[32] Thus the model's approach to intellectual property is most concerned with encouraging the production of new works and protecting the economic rights of the author: the rights which allow the author to exploit his or her work. This is evident in the fact that the categories of qualifying works are exhaustive, the employer is said to be the first owner of a work if it is created in the course of

[26] *Lancôme* (n23) 7
[27] Jehoram (n16)
[28] Thomas Field, 'Copyright protection for perfumes' [2004] 45 IDEA 19, 28
[29] As noted by the Supreme Court, (n5) 24.
[30] *Kecofa* (n5) 28
[31] For a more in depth discussion, see Bently L and Sherman B, *Intellectual Property Law* (2nd edn, OUP, Oxford, 2004), Ch. 2
[32] Dutfield G and Suthersanen U, *Global Intellectual Property Law* (Edward Elgar, Cheltenham, 2008), 76

employment[33] and moral rights were only introduced fairly recently by the CDPA 1988. But even with statutory protection of moral rights, they are easily curtailed. [34]

Civil law,[35] said to be a more codified legal system, has a different approach. While economic rights are still protected, civil law emphasises the need to protect the author and their moral rights. Copyright in civilian systems such as France believe a work of art expresses the personality of the author, thus the emphasis on moral rights: which protect the connection the author has to their work. [36]This is reflected by the name given to French copyright: *droit d'auteur*- meaning author's right. Civil law does not provide an exhaustive list of works capable of protection; it protects any work which bears the stamp of the author's personality.[37] A stark difference between the two models is that while common law requires literary, musical and dramatic works to be fixed in a tangible form, civil law has no such requirement, allowing protection for a work of any mode or form of expression, tangible or intangible, as will be seen.[38]

How do other legal systems protect perfume under IP Law? The Netherlands

The Netherlands and France, both French civilian legal systems, have rendered the scent of a perfume to be a work capable of copyright protection, thus making it an infringement to copy a perfume and produce a smell-a-like.

In *Lancôme v Kecofa*[39] French perfume manufacturer Lancôme alleged the perfume it sold under the Trademark *Trésor* had been copied by Kecofa, a Dutch perfume manufacturer, and sold under the name 'Female Treasure'. Lancôme claimed this constituted a copyright infringement under Art.10 of the Copyright Act 1912. The Court of Appeal[40] and the Supreme Court of the Netherlands[41] both held that perfume was capable of copyright protection and here it had been infringed.

Unlike the copyright law of the UK, which has an exhaustive list of works capable of copyright protection, Article 10 of the (Dutch) Copyright Act 1912 is non-exhaustive. It lists twelve examples of what a literary, scientific or artistic work can include before continuing: '*and* generally *any* creation in the

[33] S.11(2) CDPA 1988
[34] See Lauriane Nocella 'Copyright and moral rights versus author's right and droit moral: convergence or divergence?' (2008) 19(7) Ent. L.R. 151-157
[35] The following books offer more depth and discussion: Nicolas Bouche, *Intellectual Property in France* (Kluwer Law International, The Netherlands, 2011), Graham Dutfield and Uma Suthersanen, *Global Intellectual Property Law* (Edward Elgar, Cheltenham, 2008) and Karcla Shippey, *A Short Course in International Intellectual Property Rights* (World Trade Press, California, 2002)
[36] Dutfield G and Suthersanen U (n32) 82
[37] Dutfield G and Suthersanen U (n32) 82
[38] For a more in depth discussion on fixation see Antoine Latreille, 'From ideas to fixation: a view of protected works' In Dercleye E, ed. Research Handbook on the Future of EU Copyright (Edward Elgar, Cheltenham 2009), Ch. 6, particularly p. 141
[39] *Kecofa* (n5)
[40] *Lancome* (n23)
[41] *Kecofa* (n5)

literary, scientific or artistic areas, whatever the mode or form of its expression' [emphasis added]. As the list is so general, and does not specifically exclude scent, the court held that a scent could be included in this category.[42]

The case then turned on whether *Trésor* had original character, which in civil law means whether the work bears the personal stamp of its maker: a standard more stringent than the UK. The respondent, Kecofa, argued that *Trésor w*as not original for it was comparable to two pre-existing perfumes: *Eternity* by Calvin Klein and '*Exclamation*', manufactured by Coty. The Supreme Court was dismissive of this argument, holding '*the mere circumstance that a creation fits within an existing tradition of similar works does not hinder the possibility of protection under copyright law'*.[43] Further on the requirement of 'originality' it held: '*copyright law does not require that the work is new in an objective sense, but that it suffices that it is original in a subjective sense, i.e. seen from the perspective of the maker*'.[44]

France

French copyright law is contained in Part I of the Intellectual Property Code. Article L112-2 similarly does not present an exhaustive list of works capable of protection, but states it protects 'the authors rights on any work of mind, whatever its kind, form of expression, merit or destination'.

The facts of *L'Oreal v Bellure* are almost identical to those of *Lancôme*, as was the reasoning of the court. The Cour d'Appeal de Paris held that as a scent is not directly excluded in the provision, it is capable of copyright protection, provided it was an original work of mind.[45] The Court held that because the scent was the result of a novel combination of essences, it transcribed the creative input of the author and was thus original.[46] It was also noted that fixation is not a required criterion: all that was required was that the form of work was perceptible. Because the olfactory composition is determinable and the scent is perceptible, the court concluded that a scent is protected.[47] It was held to be irrelevant that to individual people a scent may be perceived differently.[48] The Cour d'Appeal held the perfumes were protected by copyright, and Bellure in reproducing them had infringed it.

Unfortunately for this argument, in the same year the Cour de Cassation case of *Bsiri-Barbir v Haarmann & Reimer*[49] came to a different conclusion. It held that perfume could not constitute a work of the mind, for 'the fragrance of a perfume results from the mere implementation of know-how'.[50] This can be explained as a consequence of the civil law model: unlike the common law,

[42] *Kecofa* (n5) 25
[43] *Kecofa* (n5) 30
[44] *Kecofa* (n5) 31
[45] *L'Oreal* (n6) 12
[46] *L'Oreal* (n6) 18
[47] *L'Oreal* (n6) 13
[48] *L'Oreal* (n6) 13
[49] *Bsiri-Barbir* (n7)
[50] *Bsiri-Barbir* (n7) 4

which follows a precedential system of case law; legal decision of the civil law are thought to be one time applications of the law.[51] Despite *Bsiri-Barbir*, the findings of *L'Oreal* can still prove useful to this argument.

## UK Position

What, if any, protection does UK IP Law offer?

To date there has not been an opportunity for the English Courts to rule on whether the scent of a perfume can be protected by intellectual property law as no such case has ever been brought. The closest a UK court has come is in the case of *L'Oreal v Bellure*[52].

L'Oreal manufactured perfumes under trademarks such as *Trésor*, *Miracle*, *Anaïs Anaïs* and *Noa*. Bellure distributed and sold a range of products which smelt identical to the perfumes sold by L'Oreal; producing comparison lists which indicated the corresponding brand named perfume their products smelt like. L'Oreal alleged Bellure had, in doing so, infringed their registered trade marks. The Court of Appeal sought a preliminary ruling from the European Court of Justice, to question some of the European aspects of the case, which are out of the scope of this piece. Jacob L.J, interpreting the judgement of the ECJ, 'with regret' held that the comparison lists did constitute a trade mark infringement.

Jacob L.J was not shy in voicing his opinion on the case, believing the ECJ had come to the wrong decision: '*Does trade mark law prevent the defendants from telling the truth? Even though their perfumes are lawful and do smell like the corresponding famous brands, does trade mark law nonetheless muzzle the defendants so that they cannot say so? I have come to the conclusion that the ECJ's ruling is that the defendants are indeed muzzled*'.[53] He continued: '*My own strong predilection, free from the opinion of the ECJ, would be to hold that trade mark law did not prevent traders from making honest statements about their products where those products are themselves lawful*'.[54]

Jacob L.J, 'favouring free speech'[55], thought there was '*no good reason to dilute the predilection in cases where the speaker's motive for telling the truth is his own commercial gain*'.[56] But Bellure were not merely making a commercial gain out of the truth (which seems rather noble), they were making a commercial gain because they copied and recreated a competitor's exceptionally well known products. It is fair to say Bellure were 'riding on the coat-tails' of L'Oreal. Bellure created products that smelt identical to L'Oreal's

[51] As explained in Karla Shippey, *A Short Course in International Intellectual Property Rights* (World Trade Press, California, 2002), p121
[52] *L'Oreal* (n3)
[53] *L'Oreal* (n3) 6-7
[54] *L'Oreal* (n3) 8
[55] *L'Oreal* (n3) 9
[56] *L'Oreal* (n3) 9

and then promoted this comparison when selling them. Clearly this venture would not have been as successful but for the success and reputation of L'Oreal and it would be unlikely Bellure would have had the same success without the connection to L'Oreal.

This case has created an anomaly, which Jacob L.J fully appreciates. The legality of Bellure copying the scent of L'Oreal's perfumes and recreating them was not contended: as Jacob L.J states above, the products are lawful.[57] So while it is perfectly sound to manufacture a 'smell-a-like' of a famous brand of perfume, after *L'Oreal v Bellure* the manufacturer cannot inform the consumer which famous perfume it smells like. The effect of which is some sort of reverse plagiarism- a person can copy from another so long as the original source is not referenced- which does not sit right. There are two ways to rectify this anomaly: re-interpreting the law to hold that stating there is a likeness between products does not amount to a trade mark infringement; or protect the scent of the perfume so neither the copying of the perfume or the making of comparisons is lawful.

It is submitted that perfume should be protected by intellectual property law. This case, while a step in the right direction, is a mere preparatory step. This essay contends that not only should the comparison to a branded perfume in relation to a smell-a-like be an infringement of trade mark law, the actual manufacture and selling of a perfume which purposely copies another should constitute an infringement of intellectual property law.

## Can scent be adequately protected by Trade Mark Law?

### *What is a trade mark?*

The statutory definition of a trade mark can be found in s.1(1) of the Trade Mark Act 1994. It states: 'a "trade mark" means any sign capable of being represented graphically which is capable of distinguishing goods or services of one undertaking from those of other undertakings.

Trade marks are inherently linked with business and commerce. Long used by manufacturers and merchants alike, trade marks enable consumers to identify the origin of goods and distinguish products sold by others. It is a valuable form of intellectual property for it enables goodwill to be built up and consumer expectations in the quality of a product can develop. Trade marks also protect the consumer from being misled and purchasing substandard goods in the mistaken belief they originate from another trader.

The phrase 'unregistered trade mark' actually refers to the common law tort of passing off. Passing off protects the goodwill of a business. The 'trinity' requirements in finding passing off are 'reputation, deception, and damage'[58]: the existence of goodwill, a misrepresentation as to the goods or services offered by the defendant and damage to the goodwill as a result of the misrepresentation. Goodwill manifests itself in a badge- usually a mark, get up

[57] *L'Oreal* (n3) 8
[58] *Reckitt & Coleman v Borden* [1990] 1 WLR 419, 499 per Lord Oliver

or logo- which is distinctive and indicates the source of the product or service. Being a tort, it has a wider scope than registered trade marks, but registration offers powerful statutory protection.

Registered trade marks are governed by the TMA 1994. S.2(1) states that a registered trade mark is a property right. Registration prevents the use of identical or similar marks whether they are directly copied or created independently and there is no requirement that the proprietor has suffered harm or damage to its reputation of goodwill. Another positive feature of a registered trade mark (for the proprietor), in contrast to other intellectual property rights, is that there is no limit on the number of times registration can be renewed.

*'Smell Marks'*

The list of elements a registered trade mark may consist of in s.1(1) is non-exhaustive which in theory leaves open the possibility to trade mark a scent, provided the scent is (a) capable of being represented graphically and (b) capable of distinguishing goods or services. The protection of a smell or scent through trade mark has been achieved, but with limited success.

'Smell marks'- trade marks for scent- were first awarded in the UK in 1996: the scent of roses as applied to car tyres[59] and the smell of bitter beer as applied to flights for darts[60] were granted trade mark protection. In 1999, a Community trade mark was granted for the smell 'freshly cut grass as applied to tennis balls'.[61] Two important points can be made from this. As can been seen, it is not the scent in isolation that is trade marked, protection is awarded to the novel application of a scent to an inanimate object which is not usually known for its smell. Further, a written description of the smell and object was enough to amount to 'graphical representation'.

Despite this early willingness to grant smell marks, later applications have not proved successful. In European case *Sieckmann*,[62] the application sought to register a smell mark for the pure chemical substance methyl cinnamate. The chemical formula was submitted ($C_6H_5$-CH=CHOOC$H_3$) with the application along with a sample of the scent and a written description: 'balsamically fruit with a slight hint of cinnamon'. The ECJ upheld that in principle a scent can be trade marked if it is capable of distinguishing goods,[63] but in this case the application did not succeed for the scent was not graphically represented.

The ECJ reiterated a trade mark must be '*complete, clear and precise, so that the object of the right of exclusivity is immediately clear*'.[64] It must also be '*intelligible to those persons having an interest in inspecting the register, in other words other manufacturers and consumers*'.[65]

---

[59] Trade Mark No GB 2001416, as referenced in: Laura Gow, 'Creating a stink?' [2007] Bus. L.R. 28(4), 86-89, at 87
[60] Trade Mark No GB 2000234, (n50)
[61] *Vennootschap Onder Firma Senta Aromatic Marketing's Application* [1999] ETMR 429
[62] Case C-273/00 *Sieckmann v Deutsches Patent- und Markenamt* [2003] 3 W.L.R 424
[63] *Sieckmann* (n62) 22, 29, 30
[64] *Sieckmann* (n62) 39
[65] *Sieckmann* (n62) 39

Of the questions '*Can an odour be "drawn"? Can an olfactory sign be graphically represented in a way which is precise and clear for everyone?*' the answer of the ECJ was negative.[66] The chemical formula was also held to lack clarity, as well as failing at the intelligibility hurdle for '*only very few persons would be able to interpret a smell on the basis of the chemical formula representing the product from which it emanated*'.[67] The court similarly dismissed the sample, stating it was not a graphical representation of the distinctive sign and it lacked clarity and precision for odour changes over time and can even disappear completely.[68]

Interestingly, ECJ here held written language does not meet the criteria of clarity and precision and does not graphically represent a scent. At [41] the court asked: '*What does "balsamically" mean? What should be understood by "fruity"? How intense is the slight hint of cinnamon?...Even if the description were longer, it would not gain in precision and nobody could ever know beyond doubt of what the odour in question consisted*'.

Two further creative attempts to trade mark scent have been made. In *Institut pour la Protection des Fragrances*[69] the applicant attempted to graphically represent a scent though a graph from a gas chromatograph. A rectangle containing red, green and blue stripes was submitted, which was the result of the electrical signals emitted by the scent. A written description was also submitted. The Office for Harmonisation in the Internal Market rejected the application for a Community trade mark, holding that the graph was not 'intelligible' to the general public.[70] The graph was distinguished to a musical score, which is a code universally known by the relevant public to represent a melody. The written description was also rejected, for it was held to be hard to perceive.

The case of *Eden SARL*[71] involved an application for a Community trade mark for the smell of ripe strawberries for use in various goods such as leather goods and cosmetics. The applicant purported to represent the scent graphically by a picture of a red strawberry accompanied by the written description: 'smell of ripe strawberries'. Neither were accepted by the Court of First Instance. It was pointed out by the court that the smell of strawberries varies from one variety to another. Thus, as the broad description did not specify which variety, it was held to not to be precise or unequivocal.[72] The image of the strawberry was subject to the same criticism for it did not specify the variety of the strawberry either.[73] The outcome of this case does appear very strange in the light of the smell marks previously granted for unusual scents applied to objects- 'the scent of roses' as applied to car tyres did not specify the region of which the roses came from. The only explanation for the

[66] *Sieckmann* (n62) 39
[67] *Sieckmann* (n62) 40
[68] *Sieckmann* (n62) 42
[69] Case R 186/2000-4 *Institut pour la Protection des Fragrances (I.P.F)'s Application* [2005] E.T.M.R 42
[70] *(I.P.F)'s Application* (n69) 17
[71] *Case T-305/04 Eden SARL v Office for Harmonisation in the Internal Market [2006] E.T.M.R. 14*
[72] *Eden SARL* (n71) 33
[73] *Eden SARL* (n71) 41

change of heart is that the Court did not approve of the path the law was taking.

*Trade marking perfume*

The ability to trade mark a perfume would be very beneficial to perfume manufactures for the protection offered through registration is very robust. It would prevent the creation of similar or identical perfumes which are either directly copied or even if they are the result of independent creation. The manufacturer does not actually need to suffer any harm for infringement proceedings to commence and a registered trade mark can be renewed infinitely.

The main issue in seeking trade mark registration for the scent of a perfume is the near impossibility to graphically represent scent. As the cases previously discussed have illustrated, written descriptions of the ingredients or scent, samples, images depicting the scent and graphs from an electronic nose have all proved unsuccessful. Without any other options to attempt; it must be held a scent simply cannot meet the first requirement of a trade mark in s.1(1).

Furthermore, the purpose of a trade mark is to enable customers to identify the origin of goods and distinguish goods or services of one undertaking to another. This is usually done by the sense of sight: the logo of Armani on one perfume bottle and the word Prada engraved in another is the most obvious way to indicate their origin and distinguish them. Can a customer's sense of smell enable them to distinguish between two different perfumes? The answer is most likely yes. But could a customer smell a perfume and automatically identify its origin like they could at the sight of a logo?

Interestingly, French perfume house Guerlain includes in all of its fragrances the accord 'Guerlinade', which Irvine states '*it is this which makes a Guerlain perfume so instantly recognisable*'.[74] In reality, only a person with a very detailed knowledge of the perfume industry would be able to identify the origin of a perfume from its scent- but even then it would seem that they are guided by their knowledge rather than the scent acting as a 'complete, clear and precise' sign. For the average customer it would appear that the smell of a perfume is not capable of identifying the origin of goods. Thus it would seem scent is not intelligible to manufacturers and consumers alike as *Sieckmann* requires.

In Trade Mark Law, a distinction can be drawn between scents as applied to objects, and scents in isolation. The former can be trade marked (although not very easily); the latter is not suitable for trade mark protection. The scent of a perfume is not a device to distinguish goods; rather it is part of the complete product which is sold under a trade mark. Thus, the only conclusion which can be drawn is that a trade mark is not a suitable form of protection of the scent of a perfume.

[74] Irvine (n8) 63

*Passing off*

Being a tort, passing off has a wider scope than registered trade marks. In theory despite failing to qualify as a registered trademark, the scent of a perfume could still be awarded protection under passing off. As will be discussed however, passing off would not provide assistance here either. In the case where a manufacturer produced '*Channel no 5*', with extremely similar black and white packaging, text and scent identical to '*Chanel no.5*'- this would clearly be a case of passing off. The conglomerate of the packaging, logo and colour scheme of Chanel acts as a badge of goodwill. The manufacturer of 'Channels" use of it would constitute a misrepresentation likely to damage the reputation of Chanel.

If the manufacturer copies the scent of Chanel No.5, but changes the packaging, text and colour scheme, a consumer is not likely to be deceived as to the quality or origin of the perfume. As noted above, the scent of a perfume is not a device to distinguish goods or the origin thereof; rather it is part of the complete product which is sold under a trade mark. Thus passing off provides no protection- scent alone is not a sign that can attract goodwill.

*Can it be adequately protected by Patent Law?*

As well as working towards briefs set by clients, the large international perfume companies' work towards creating novel synthetic extracts to be included in their perfumes. An example is *Hindanol*, created by Taskasgo, which smells identical to sandalwood, but unlike its natural counterpart is light and highly diffusive. [75]

Patent law offers monopoly protection for up to 20 years to inventions, provided they are novel, involve an industrial step and are capable of industrial application. [76] They are frequently used in the perfume industry to protect these novel extracts- and/or the processes by which they are created. A quick patent search on Firmenich or Taskasgo, for example, will uncover extensive chemical compositions for use in perfumes which have been patented.[77] It would appear no patent has ever been awarded for the chemical composition of a fragrance in its entirety, but entire chemical compositions are patentable per se provided they fulfil the criteria above. Patent protection of a perfume however would not be appropriate nor provide adequate protection from smell-a-likes.

The value of the chemical composition of a pharmaceutical is its effect- the relief of a symptom for example, not the actual liquid. Similarly the value of a perfume is its effect- its scent. In the pharmaceutical, the patented formula is usually the only way of achieving the valuable effect. The valuable end product

[75] Chandler Burr, 'Ahh, the seductive fragrance of molecules under patent', *The New York Times*, (New York, 23 February 2008) Available at: <http://www.nytimes.com/2008/02/23/business/worldbusiness/23perfume.html?pagewanted=all> [Accessed 28 February 2011]

[76] S.1 Patents Act 1977

[77] Including UK Patent Applications: GB 2010678A, GB 2390810B, GB 2423081B, GB 2001848A.

of a perfume, the scent, however can be created by many different chemical formulas, as noted above.

Infringement of a patent, where the invention is a product, involves making or keeping it[78]. Where the invention is a process, it is an infringement to use it without consent[79]. Patenting the chemical composition of a pharmaceutical would award monopoly protection to the formula, preventing others making or using it. As the effect can only be achieved through that formula, it is thus protected by the patent. Patenting the chemical composition of a perfume however would not adequately protect its effect. A patent would only provide monopoly protection to a specific formula; if the scent were created using a different formula, it would not infringe the patent. Thus, patent protection is not appropriate for perfumes.

Can it be adequately protected by Copyright Law?

*What is copyright?*

Copyright is a property right[80] that subsists in specific categories of work which prevents others taking advantage of a person's creative efforts. Copyright does not create monopolies: it is perfectly possible for two identical works to be produced and both will be protected separately by copyright, so long as they were both created independently and one was not substantially copied from the other. The key to this intellectual property right is that it does not protect ideas; rather it protects the expression of that idea. [81]

S.1(1) of the CDPA 1988 provides a closed list of what constitutes a work for the purpose of copyright protection: (a) literary, dramatic, musical or artistic works, (b) sound recordings, films or broadcasts and (c) the typographical arrangement of published editions. Originality is required of the works featured in s.1(1)(a), but it does not demand novelty (as with patents) rather the work has originated from the author and not copied from another source.

The Act distinguishes between the author of the work and the owner. The author, as defined by s.9(1) of the CDPA 1988, is the person who created the work. Copyright grants to the author a set of moral rights[82] which give the author a stake in the work even when the ownership has been assigned to someone else. S.11(1) of the Act states, subject to some exceptions[83], the author of a work is the first owner of any copyright The owner of the copyright is awarded exclusive rights regarding the control and exploitation of the work. These exclusive rights include the rights to copy[84], rent[85], perform[86],

[78] S.60(1)(a) Patents Act 1977
[79] S.60(1)(b) and (c) Patents Act 1977
[80] S.1(1) CDPA 1988
[81] As noted per Peterson J in *University of London Press v University Tutorial Press* [1916] 2 Ch. 601, 608
[82] S.77-85 CPDA 1988
[83] (n33)
[84] s.16(1)(a) CPDA 1988
[85] s.16(1)(ba) CPDA 1988
[86] s.16(1)(c) CPDA 1988

communicate[87] and make an adaptation of the work.[88] As per s.16(2) of the Act, copyright in a work is infringed by a person who without the licence of the copyright owner does, or authorises another to do, any of the acts restricted by the copyright.

The justifications[89] put forward for copyright include the Locke argument. Following the European approach which protects works which have the authors' personal stamp, it can be said that copyright is justified for a work is a personal expression of the author's personality and derives from the mind of that author. Another justification is the reward and incentive to create new works; to thank and encourage authors disseminating their ideas into the public domain.

Copyright is controversial for it restricts the use of certain works. It can have the opposite effect of what is intended as it can potentially stifle creativity. There are only so many ways to arrange notes in music: only so many ways to arrange extracts in a perfume. Most works take inspiration from another. To insist there can be no sampling of another work would be unworkable and would hinder creativity. It must be remembered that copyright does not create monopolies and a balance must be struck between protecting the author and protecting the creation of new works.

It is arguable that copyright is the most appropriate intellectual property right to award to a scent due to its creative and artistic nature and the skill and effort expended during creation. Copyright would also provide legal certainty, for it is automatic and needs not to be registered.

*Perfume as an 'original' work*

All literary, dramatic, musical and artistic works must be original. There is no statutory definition of 'original'; however it is clear it does not mean inventive and novel.[90] In *Ladbroke v William Hill*[91], Lord Pearce stated original in this context means 'only that the work should not be copied but should originate from the author'. Further, 'the originality which is required relates to the expression of thought'.[92] Arguably this is a very low standard- most European countries require the work to be the 'authors own intellectual creation'.

Whether a work can be classed as original is dependent on the amount of labour, skill or judgement the author has exercised in producing it; insignificant or trivial labour will not suffice.[93] As per Lord Atkinson in *Macmillan v Cooper*, originality 'must depend largely on the special facts of that case, and must in each case be very much a question of degree'.[94] Obviously without a specific set of facts to deal with here, the discussion will

---

[87] s.16(1)(d) CPDA 1988
[88] s.16(1)(e) CPDA 1988
[89] A very thorough account of Lockean theory and 'personality theory', as put by the author, is given in J Hughes, 'The philosophy of Intellectual Property' (1988) 77 Geo. L.J. 287
[90] *University of London Press* (n81) 608 (per Peterson J)
[91] [1964] 1 W.L.R. 273
[92] *Ladbroke* (n91) 291
[93] *Merchandising Corp v Harpbound* [1983] F.S.R. 32; *Greyhound Services v Wilf Gilbert* [1994] F.S.R. 723
[94] [1923] 93 LJPC 113, at 36

have to be a more general one. But in looking to the account of the creation of *Un Jardin Sur Le Nil* as documented by Burr[95], it is hoped an informed discussion can be had as to whether perfume can be said to be original.

In the context of perfume, the author is the perfumer. Even though the idea to create the scent of a garden on the Nile in a bottle was formulated by his employer, *Hermès*, the author of *Un Jardin Sur Le Nil* would be perfumer Jean-Claude Ellena for he created the expression, the composition of the fragrance. In accordance with the conception of copyright, it would be perfectly acceptable for another person to also create their own interpretation of the scent of a garden on the Nile and copyright it, so long as they do not copy Ellena's work.

From Burr's account of the creation of *Un Jardin Sur Le Nil*, it would appear that the work did originate from Ellena. His creation was based upon the inspiration he gathered on his trip to Egypt and he spent months creating his own formula '*to re-create the feelings and emotions of what he found in Aswan*'.[96] In reference to a previous work, Ellena commented '*and what I bought [the client] was completely mine*'[97]- a statement which suggests a very personal connection with his creations. Presumably this is true of the relationship between most perfumers and their perfumes.

It is well documented however, that perfumers can tend to copy older perfumes, adding modifications. Ellena, for example, in reference to an earlier work of his, noted: 'when I did *Eau de Bulgari*... [i]n two years everyone had copied it-it gave birth directly to *CK One'*.[98] But he also admitted in reference to another work, 'for *L'Eau d'Hiver* I took my inspirations from [Guerlain's perfume] *Après L'Ondée*'.[99] The question of whether a work, which copies an older work but adds modifications, can be copyrighted was answered in *Interlego AG v Tyco Industries Inc*.[100]

Lord Oliver stated that '*copying, per se, however much skill or labour may be devoted to the process cannot make an original work*'.[101] He held there must be a material change to the derivative work to give rise to copyright '*which suffices to make the totality of the work an original work*'.[102] This would suggest that taking inspiration from an earlier fragrance would not damage the chance of gaining copyright protection in a new work so long as there is a substantial change made. However, if it could be shown, for illustrative purposes, that *CK One* did not make a material change to *Eau de Bulgari*; this would mean *CK One* could not be classed as an original work. This outcome highlights the issue of potentially stifling creativity.

The second facet of originality, the requirement of labour, skill or judgement, is clearly present. Perfume creation is a full time occupation, and perfumers

[95] Burr (n1)
[96] Burr (n1) 21
[97] Burr (n1) 104
[98] Burr (n1) 104
[99] Burr (n1) 105
[100] [1989] 1 AC 217
[101] *Interlego* (n100) 263
[102] *Interlego* (n100) 263

are trained for years to perfect their craft. Perfumers are required to use their own taste and judgement to decide on a composition from a choice of thousands of extracts. They have to decide on the concentrations of each extract and ensure the scent emitted from the fragrance is appealing both at the beginning and right the way through to the base notes. It cannot be said that the labour involved is either trivial or insignificant.

The threshold for originality is very low- railway timetables and football coupons[103] have been amongst works held to be original. It is a rare occasion where subject matter has been excluded from copyright protection on the ground of originality. In light of discussion above, perfume can potentially be classed as an original work for the purposes of copyright.

*Perfume as a 'literary work'*

The CDPA 1988 provides a closed list of 'works'. For perfume to be copyrightable, it must fit in to one of the categories specified in the Act. The only two which perfume could possibly fit would be literary or artistic work.

A literary work is defined in s.3(1) of the CDPA 1988 as any work which is written, spoken or sung, and accordingly includes, inter alia, a table or compilation. The courts take a broad view of what may constitute a literary work; as per Peterson J in *University of London Press v University Tutorial Press* it can cover '*work which is expressed in print or writing, irrespective of the question whether the quality or style is high*'.[104] A literary work must be original.

Obviously the perfume itself is not capable of literary protection; but it may be possible that the composition, as expressed in writing, could be classed as a literary work. In her discussion that haute cuisine dishes should be awarded copyright protection, Cheng[105] concluded that a simple recipe, a list of ingredients is capable of copyright protection. Factual information in a table, such as sunrise and sunset times for example, is not generally copyrightable for 'there is so far no room for taste or judgement.'[106] As a list of ingredients is not automatic, has room for judgement, and involves labour; Cheng held a recipe could be an original literally work.[107] By analogy this could refer to a list of ingredients of a perfume. Referring back to Burr's account of the creation of *Un Jardin Sur Le Nil*, he described how Ellena carried around a notebook, and scribbled down a rough formula of thirteen ingredients for the perfume. It would seem this would qualify for copyright protection. It is argued however that this would not provide adequate protection against smell-a-likes.

Copying is one of the acts restricted by copyright.[108] This means reproducing the work in any material form.[109] There must be sufficient objective similarity

[103] *Ladbroke* (n91) 97
[104] *University of London Press* (n81) 608
[105] Tania Su Li Cheng, 'Copyright protection of haute cuisine: recipe for disaster' [2008] E.I.P.R. 30(3), 93-101
[106] *Cramp v Smythson* [1944] A.C. 329 per Viscount Simon at 336
[107] Cheng (n105) 95
[108] S.17(1) CDPA 1988
[109] S.17(2) CDPA 1988

between the infringing work and the copyright work for there to be an infringement.[110] With regard to a written list of ingredients for a perfume, it would constitute a copyright infringement if another were to copy this list- for example by photocopying it or rewording it. However, it would not constitute an infringement in a *literary* work to copy a two-dimensional work in three dimensions-'dimensional shift' applies only to artistic works[111]. For example, literary copyright in a recipe would not be infringed by making a cake from it.[112] This is also true with regard to making a jumper according to a knitting pattern.[113] Accordingly, if a person were to *follow* the rough formula for *Un Jardin Sur Le Nil* as scribbled down by Ellena, this would not amount to a copyright infringement of the literary work-and this is where the problem lies.

The value of the perfume is in the scent and not the composition. Creators of smell-a-likes presumably would not copy a written list of ingredients; they would reverse engineer the scent of the original perfume. As the same scent can be produced by a number of variations of different extracts, for a perfume to be protected from smell-a-likes, it has to be the scent, not the composition that is protected. As a scent is not literary, perfume cannot be adequately protected as a literary work.

*Perfume as an 'artistic work'*

In order to protect the scent of a perfume, the most valuable element, it is put forward it is most appropriate to class perfume as an artistic work. An artistic work is subdivided in s.4(1) as (a) a graphic work, photograph, sculpture or collage, irrespective of artistic quality,(b) a work of architecture or (c) a work of artistic craftsmanship. It is submitted that perfume is a work of artistic craftsmanship.

Unlike the works under s.4(1)(a), it would appear from case law that works of artistic craftsmanship do require some element of artistic or aesthetic quality. Those who oppose the intellectual property protection of the scent of a perfume believe that to think of perfume creation as in anyway artistic is too 'romantic'.[114]The meaning of 'artistic' was discussed in *George Hensher v Restawile Upholstery*.[115] The case turned on question of whether a prototype of a mass market, 'boat shaped' chair was a 'work of artistic craftsmanship' as per s.4(1)(c). While all of the Law Lords were in agreement that the prototype was not a work of artistic craftsmanship, each of the Law Lords differed in their reasoning. It shall be analysed whether perfume can fit within the judges' definitions of what 'artistic' is.

Lord Reid stated he would accept something as artistic if '*any substantial section of the public genuinely admires and values a thing for its appearance and gets pleasure or satisfaction, whether emotional or intellectual, from*

[110] *Francis Day & Hunter v Bron* [1963] Ch. 587, per Diplock L.J at 623
[111] S.17(3) CDPA 1988
[112] *J & S Davis (Holdings) Limited v Wright Health Group Limited* [1988] RPC 403, per Whitford J at 414
[113] *Brigid Foley v Ellott* [1982] RPC 433
[114] Seville (n14) 51
[115] [1976] A.C. 64

*looking at it*'.[116] Obviously the scent of a perfume cannot be looked at, but a perfume can admired for its outward characteristic: its scent. The point of a perfume is to make the skin smell attractive, and there is no doubt consumers take pleasure from wearing it for a perfume is not a mandatory essential, it is an elective luxury. The sheer power and size of the perfume industry suggests, generally speaking, a substantial section of the public genuinely admires the scent of perfumes.

Both emotional and intellectual pleasure can be gained from perfume. The sense of smell is very closely linked to the parts of the brain that affect memory and emotions and it has been shown that a single smell has the power to conjure up entire scenes from the past.[117] Vanilla, a frequently used scent in perfumes, is thought to be a comforting smell, reminding people of their mothers' baking. Thierry Mugler's bestselling gourmand ('good enough to eat') fragrance *Angel*, with notes of praline, caramel and vanilla, is said to be inspired by childhood memories of the fair. Its popularity suggests it reminds others also. Thus it would seem perfume in general is artistic as per Lord Reid's description: but the art of a specific perfume would be a question of fact for the judge to determine.[118]

Lord Kilbrandon felt the authors' intention was important; going so far as saying the conscious intention of a craftsman to produce a work of art was the 'primary test' in deciding whether a product is artistic.[119] While Lord Reid thought of importance the intention of the maker or designer to create something with artistic appeal, he did not think this was neither '*necessary* [n]*or conclusive*'.[120] With regard to the prototype in *Hensher*, Reid noted the maker's intention was to produce something which would sell[121], which appeared to supersede any artistic intention. So, can it be said perfumers have a conscious intention of a craftsman to produce a work of art? Once again, a general discussion will have to be had.

From the perfume literature referenced above[122], the overall (but perhaps biased) view is that perfume creation is an art form and perfumers are artists[123]; thus their intention is to create art. Of course there are extremes in every industry. In his book[124], Burr quotes a French perfume industry executive, who makes a distinction: *'[French perfumers] consider that what they create is great art...In America people in perfumery are interested in money, money and then money...If you ask them about the beauty of their perfumes, they say "what do you mean 'beauty of my perfumes?"'*.[125] It is presumed the intention behind Jennifer Lopez's eighteenth fragrance *L.A.*

---

[116] *Hensher* (n115) 78
[117] Hopkins, M. 2004. Link proved between senses and memory, *Nature News* [online]. Available at: <http://www.nature.com/news/2004/040531/full/news040524-12.html> [Accessed 06 February 2011]
[118] *Hensher* (n115) per Lord Kilbrandon at 96 and Viscount Dilhorne at 87
[119] *Hensher* (n115) 97
[120] *Hensher* (n115) 78
[121] *Hensher* (n115) 79
[122] Burr (n1)
[123] Burr (n1) 106 in particular; Irvine (n8) 64
[124] Burr (n1)
[125] Burr (n1) 53-54

*Glow*, for example, was not to create a work of art, but commercially led to expand her line of merchandise. This is implicit from the price of the product (which is very low), and it is the eighteenth to carry her name in eight years (which is very high considering Jean Claude Ellena only created eight fragrances for *Hermès* in the same time). But there is an argument that there can be an intention behind a perfume to create a work of art, with regards to higher end perfumers such as Ellena and clients like high fashion house *Hermès*.

The only worry is the comment by Lord Reid that the maker's intention in *Hensher* was to produce something which would sell[126], and this appeared to supersede any artistic intention. The perfume industry is commercially led. While is presumed this would not have been the main focus of Ellena when creating *Un Jardin Sur Le Nil* (the main focus appeared to be create the illusion of the green mangos in Aswan[127]), commercial factors were surely in the back of his mind: the price of ingredients and the need to create something of mass appeal. It appears the distinction between the chair prototype in *Hensher* and the perfume created by Ellena can made; for commercial considerations and intentions were deemed to be at the forefront of the chair makers mind.

Lord Simon in *Hensher* took a different approach. He emphasised the statutory phrase is not *'artistic work of craftsmanship*,' but *'work of artistic craftsmanship'*, thus the relevant question being '*is this the work of one who was in this respect an artist-craftsman?*'[128]. Simon stated an artist craftsman would manifest pride in his workmanship and had '*special training, skill and knowledge*'.[129] A perfumer would fit this definition; specialist training, skill and knowledge is required in perfume creation as evident in the literature listed above.[130] Further, the fact a perfumer may spend years of daily grind[131] to perfect a work, this suggests pride in workmanship.

Viscount Dilhorne considered that works of artistic craftsmanship were items made by hand, not mass produced.[132] Perfume is however mass produced, and a central piece of equipment in modern perfume making is a computer.[133] Under Dilhorne's view, perfume would not be a work of craftsmanship. Lord Simon on the other hand stated craftsmanship 'cannot be limited to handicraft; nor is the word 'artistic' incompatible with machine production'.[134] This opinion was followed in the Australia case *Coogi Australia v Hysport*[135] where Drummond J held the product of a computer-controlled machine[136] could constitute a work of artistic craftsmanship. It would appear

[126] Burr (n1) 79
[127] Burr (n1)106-107
[128] Burr (n1)94
[129] Burr (n1) 91
[130] (n2)
[131] Irvine (n8) at 63
[132] *Hensher* (n115) 84
[133] Burr (n1) 22
[134] *Hensher* (n114) 91
[135] [1998] 157 ALR 247
[136] *Coogi* (n136) 168

that perfume, despite being computer controlled and mass produced, can still constitute an artistic work.

One final point of interest is flagged by Burr, in that the while the perfumer creates the perfume formula, this is put together by lab technicians who then send it back to the perfumer. He adds 'if the formula is simple, it may be put together by a robot.'[137] The case of *Vermaat v Boncrest*[138] held, applying New Zealand case *Bonz Group (Pty) Ltd v. Cooke*[139], that while the author must be both artistic and a craftsman, each component could be provided by different persons. Thus this is irrelevant. In conclusion, it would seem that perfume could be awarded copyright protection as a work of artistic craftsmanship under s.4(1)(c) of the CDPA 1988.

*Fixation*

Article 2(2) of the Berne Convention leaves it to the contracting countries to prescribe whether copyright protection requires a work to be fixed in some material form. As noted above, most civil countries do not have a fixation requirement[140]; but s.3(2) of the CDPA 1988 states that copyright does not subsist in a literary, dramatic or musical work unless and until it is recorded, in writing or otherwise. The fixation requirement is said to create certainty; it makes it easier to define the scope of what is protected and provides evidence as to the existence of the work.

Artistic works are not mentioned in this provision, and thus it could be argued that fixation is not required of artistic works. The point is usually irrelevant for most artistic works, such as painting, are recorded in physical form. But, with regard to moving sand pictures in *Komesaroff v Mickle*[141], the judge stated *'[I]t must be possible to define the work of artistic craftsmanship on which she bases her action and this can be done only by reference to a static aspect of what has been referred to be counsel as a 'work of kinetic art".*[142]

*'Static aspect'* seems to suggest that an artistic work does need to be fixed. If this is the case, this may provide the same problem as was seen with trade marks: for a scent is intangible and cannot be written or graphically represented. Furthermore, scent as applied to the skin is fleeting and not permanent. These were not problems in *L'Oreal* or *Lancôme* as civil law countries do not require fixation for copyright protection: a work can be in any form, and it was sufficient in *L'Oreal* that the work could be perceived.[143] Even in *Bsiri-Barbir*, where it was held perfume was not copyrightable, the issue of fixation was never contended. There are three approaches to overcome the fixation problem in the UK.

The most convenient option would be to remove the need for fixation altogether. This however would be inappropriate. Civil law systems have a

[137] Burr (n1) 22
[138] [2001] F.S.R 49
[139] [1994] N.Z.L.R. 216
[140] Antoine Latreille (n38)
[141] [1988] R.P.C. 204
[142] Taken from Bently and Sherman, Intellectual Property Law, 2ne rev. edn (OUP 2004) pp.87-88 fn. 9 As referenced by Cheng (n105)
[143] *L'Oreal* (n6) 13

more stringent originality requirement compared to the UK. The fixation requirement in the UK is therefore needed to set the threshold higher. If it were removed (which would require Parliamentary intervention), the low originality threshold, on its own, would allow almost anything to be copyrightable. Unless the originality requirement of the continent is also adopted (which is out of the scope of this essay, but not out of the question, for databases now require 'own intellectual creation'[144]) fixation is needed to balance the current system and so cannot be removed.

The second is argued by Cheng.[145] She distinguishes perfume from the moving sand pictures in *Komesaroff*, for perfume is '*made up of a constant and distinct composition of chemicals emitting a particular fragrance... [it has] more unity and stability*'.[146] *Thus it can be said perfume does have a static aspect, and is therefore 'fixed'.* The final approach is described by Antoine Latreille, and implicit in L'Oreal[147]: '*the fragrance can be considered as fixed in the perfume's juice, fragrance and juice being co-substantial.*'[148]

The latter approaches however confuse the principle that the value is in the scent not the liquid/juice and it is the scent that needs to be protected. A resolution would be to hold that while it is the scent that is protected, the scent is fixed in the constant and stable composition of the liquid: the fragrance and juice are co-substantial. This resolution allows perfume to be protected by copyright. As all other elements of original artistic work are fulfilled, it would be odd for perfume to fall at a hurdle which is not explicitly required in statute.

Finally, as to the fleeting nature of the perfume, Cheng notes that UK copyright law does not require permanence[149]. This can be seen in *Metix v Maughan*[150], where an ice sculpture, though not permanent, was protected by copyright. In *L'Oreal*, the nature of perfume was held to be irrelevant.[151]

# Conclusion

The scent of a perfume is not only worthy of intellectual property protection, it is capable of being so protected. It has been shown that the creation of a perfume is more than a commercial venture, but an artistic endeavour by the perfumer. Thus the perfumer deserves recognition and the ability to protect what he or she produces, which is provided by intellectual property rights.

Patents and trade marks, from the point of view of the perfume industry, would be the most advantageous rights. Patents offer monopoly protection, awarding exclusive rights towards an invention. Registered trade marks can be

144 S.3A(2) CDPA 1988
145 Cheng (n105)
146 Cheng (n105) 99
147 *L'Oreal* (n6) 13
148 Latreille (n38) 142
149 Cheng (n105) 99
150 [1997] FSR 718
151 *L'Oreal* (n6) 13

renewed indefinitely. They prevent the use of a similar mark, even if it is created independently from the original mark and there is no requirement of harm. But, due to the nature of perfume, neither can accommodate for the scent of a perfume. Trade marks are not an appropriate source of protection: a scent is incapable of being graphically represented and distinguishing goods or services of one undertaking from another as per s.1(1) of the TMA 1994. Patents are also not appropriate, for the value of a perfume is in the scent. Protecting the liquid does not protect the value of a perfume because a scent can be recreated using different formulas.**A**The scent of a perfume (as fixed in the liquid) can however be regarded as an original work of artistic craftsmanship as per s.1(1) and s.4(1)(c) of the CDPA 1988. This analysis provides the best protection from smell-a-like perfumes. It means that a perfume, which substantially copies the scent of another perfume resulting in an objective similarity, would infringe the copyright of the original scent under s.17(2) of the 1988 Act. As it is the scent that is protected, it would be immaterial whether the compositions of the liquids are different (made with cheaper alternatives for example). Thus, if a case similar to *Lancôme* came to an English court, the same outcome as from continent can be achieved. Despite the differences in the prospective legal systems, harmonisation and therefore legal certainty can be attained. The anomaly created in the UK case *L'Oreal v Bellure* is hereby rectified.**A**It is worth mentioning however that copyright will not solve all the problems. Copyright demands a causal connection; a claimant must prove the defendant copied the work, consciously or unconsciously[152]. There may be evidential problems in proving this. It is anticipated there will be problems with sampling, as seen in the music industry.[153] It is well documented that perfumers take inspiration from older perfumes- after all there are only so many extracts and ways to assemble them. It will be hard to determine when inspiration transpires into infringement, and harder still to police this. There is also the related issue of determining what a 'substantial part' of a fragrance is.**A**One final point is that copyright expires 70 years after the authors' death and enters the public domain.[154] Usually the most popular fragrances, and therefore most likely to be copied, are those which have longevity. The bestselling fragrance in the world, Chanel no5, was created in 1922. It's copyright will expire in 2031 (The author, Ernest Beaux, died in 1961), leaving the authors creative efforts to be freely taken advantage of. The nature of intellectual property law is changing. Its scope is ever expanding so as to protect businesses and individual creators alike. This piece has demonstrated that strict statutory requirements imposed in this field can be interpreted as to include situations probably not thought about when the statutes were drafted. This can only be a good thing in the light of the ever changing technological background of intellectual property law.

[152] Francis Day (n110)
[153] Richard Salmon, 'Sampling and sound recording reproduction - fair use or infringement?' (2010) Ent. L.R. 174
[154] S.12(2) CDPA 1988

# Pirates… A Charterers' Peril of the Sea?

Giulia Argano

Can piracy be contemplated as a 'peril of the sea'? This will be the main question that shall be addressed in this piece of work as well as any possible ramifications. I decided to write my dissertation on the issue of piracy in Maritime law as it is a very problematic topic, which is becoming a more common occurrence with the passing of time. As I greatly enjoy Carriage of Goods by Sea, I decided to associate piracy with charterparty issues. I looked at off-hire and seaworthiness which were of particular interest to me and found a common element in these two issues; that of 'perils of the sea'. This issue is of extreme relevance as it can consider cases such as that of "The Saldanha" and view them in a different light.

I shall endeavour to answer and research this focal point in four parts; first by looking at the definition of piracy, and examining the difficulties found there. Then I will investigate the phrase 'perils of the sea' and discuss how this has been interpreted and where it can be found. The third and fourth part shall deal with the two charterparty issues mentioned above; off-hire and seaworthiness. This study will reveal how all four parts interlink and complement each other. My initial knowledge on the subject was rather scarce however, after working at a P&I Club I was able to experience firsthand the great problem that is piracy. Following this experience I further enriched my knowledge by attending presentations. These included "Protecting your business on the high seas", organised by Lloyd's of London, as well as Ince & Co's Shipping brief, a section of which was dedicated to piracy. Here I listened to talks from international security and risk mitigation specialists discussing how to mitigate the chances of a successful pirate attack and was made aware of the overall situation of piracy in 2010. The final part of my research was based in the library, where I was encircled by books, journals and cases referring to the subject at hand.

Notwithstanding the attempts made to ameliorate the situation, piracy remains such a problematic issue that finding an absolute solution seems unlikely. Nowadays, suggesting a Roman-style 'eradication by use of force' argument would not be the ideal solution, as the 'use of force' is strictly controlled by the United Nations. Therefore, this work will not provide a clear-cut method to solving piracy, but rather propose possible solutions. Piracy is the most ancient problem facing vessels in Maritime law, and is a problem that will continue to exist. I do, however, wish to produce evidence supporting the argument that piracy is indeed a 'peril of the sea' and outline the possible outcomes associated with this affirmation. The potential effect that this interpretation may have on charterparties will also be examined, by looking in particular at the effect it will have on off-hire and seaworthiness.

# Introduction

Piracy has always negatively affected the marine market, and is a problem which dates back to ancient times. Cicero[1] defined it as "the common enemy of all mankind[2]", which is probably the reason for which it became the first crime to be given universal jurisdiction[3]. Even in the modern era, piracy persists and the number of attacks is increasing; between January and September 2010, there have been 214 pirate attacks, 17 attacks of which were solely during the month of September[4]. A three to four fold increase was observed in the month of January 2011, compared with January 2010, with 30 attacks recorded[5]. Not only has the number of attacks increased, but the period the vessel and its crew and cargo are held captive has also increased. To date the average release time is of 213 days[6]. Based on trend predictions from 2010, both of these statistics are only expected to increase in the future[7]. It appears therefore that piracy is not only a persisting problem but also an ever increasing one.

A completely new aspect relating to piracy will be the focal point of this dissertation; whether piracy can be included as a 'peril of the sea' with regards to charterparties. This question shall be discussed in four parts: the concept of piracy must initially be explored in order to fully comprehend its meaning, as well as the problems associated with it. Secondly, what constitutes a 'peril of the sea' will be analysed as well as the problematic list of exceptions found in the Hague/Hague-Visby Rules and The Rotterdam Rules. In the event that piracy is included in this list, the carrier would be exempt from liability. The final two chapters will demonstrate the relevance of 'perils of the sea' in charterparties through the examination of off-hire and seaworthiness. The link between the two and the concept of 'peril of the sea' will be explained and established in order to fully appreciate the importance of piracy as a 'peril'. Subsequent to the examination of these four areas, whether piracy is indeed a peril of the sea shall be assessed, taking into account arguments both for and against as well as the problems which may flow from each answer.

## Definition of Piracy

Piracy is a problem which hampers marine transactions in a variety of ways; this work will focus on an aspect of those problems relating to charterparties. However, piracy in itself is laced with controversies and before investigating how it affects others, it is important to define what exactly piracy is.

---

[1] Marcus Tullius Cicero – Roman philosopher, lawyer and political theorist
[2] *Communis hostis omnium* used in his works De Officiis and Contra Verres II
[3] Every state has the jurisdiction to try a person(s) of an alleged crime which occurs outside the boundaries of any country as a result of its offensive nature. Discussed later.
[4] International Maritime Security Report
[5] Ince & Co International Law Firm, 'Ince Quarterly Shipping Brief', 20th January 2011
[6] *Ibid*
[7] *Supra* at fn. 5; GAC and AKE Presentation, 'Protecting Your Business on the High Sea', 20th October 2010

(i)UN definition

The United Nations provides a detailed definition of piracy which states that: "Piracy consists of any of the following acts:

> (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
>
> (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
>
> (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
>
> (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
>
> (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b)."[8]

This has resulted in much controversy as piracy is only recognised on the high seas, therefore any act which occurs within territorial waters[9] which otherwise would have amounted to piracy, instead falls under the category of armed robbery.

The marine insurance aspect differs greatly from the general definition given from case law and UNCLOS. The Marine Insurance Act[10] defines pirates as "passengers who mutiny and rioters who attack the ship from the shore". This was upheld by Staughton J. who states that lawfully, piracy could occur within territorial waters as well as near the shore and adds that force or a threat of force is essential to piracy[11]. However, the general consensus[12] tends to follow the definition given by case law and UNCLOS, retaining that it cannot occur within territorial waters. It would seem, therefore that the insurance definition remains and is solely accepted within the insurance context. An associated matter is that of jurisdiction, an issue previously mentioned but which will be explained in greater depth here. This is important because it

---

[8] United Nations Convention on the Law of the Sea 1982 ("UNCLOS"), Article 101

[9] *Ibid*, Part V – extends to 200 nautical miles from the coast.

[10] Marine Insurance Act 1906, Schedule 1, Part 1 Rules for Construction of Policy para. 8. Pirates

[11] *Athens Maritime Enterprise Corp v Hellenic Mutual War Risks Association (Bermuda) Ltd (The Andreas Lemos)* [1983] QB 647 (QB), [1982] 2 Lloyd's Rep 483 (QB)

[12] *Piracy Jure Gentium, Re* [1934] AC 586 (PC); Cooke, J., Young, T., Taylor, A., Kimball, J., Martowski, D., Lambert, L., *Voyage Charters*, 3rd Edition (Informa, London, 2007); Boyd, S. C., Berry, S., Burrows, A. S., Eder, B., Foxton, D., Smith, C. F., *Scrutton on Charterparties*, 21st Edition (Sweet & Maxwell, London, 2008)

gives us more of a practical insight and outlines a problem which piracy causes; mainly how one can seize a vessel.

Once again the United Nations outlines the jurisdiction for seizure of a pirate ship or aircraft:

> "On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith."[13]

This in effect means that under International law there is universal jurisdiction[14] for combating piracy; as the high seas have no jurisdiction, it is difficult to capture, prosecute or even find pirates, as the high seas encompasses a vast area extending from 200 nautical miles from the coast. It can even be compared to a type of 'no man's land' as any event occurring in the high seas is contestable in respect to jurisdiction, thus the use of the term 'universal'.

(ii)UK Statutory definition

In 1698 the UK created the first Act of Parliament dealing with the suppression of piracy[15]. This was repealed and has now been replaced by the Piracy Act[16], which abolished the death penalty initially established for these types of crimes. This short Act[17] however, does nothing to define what piracy actually is, and the only mention of a possible definition in English law, can be found in the Merchant Shipping and Maritime Security Act[18]. This Act incorporates UNCLOS[19] into English law, thereby including the very same definition of piracy mentioned above.

(iii)Case law definition

Case law defines piracy as "robbery and depredation on the sea or navigable rivers, etc., or by descent from the sea upon the coast, by persons not holding a commission from an established civilised state[20]." Recent case law has also

[13] *Supra* at fn. 8, Article 105
[14] It has already been mentioned that this type of jurisdiction was first given to prosecute piracy above.
[15] Piracy Act 1698
[16] 1837
[17] Only sections 2 and 4 remain
[18] 1997
[19] Set out in Schedule 5 and including UNCLOS Articles 101-103
[20] *Republic of Bolivia v Indemnity* [1909] 1 KB 785 (CA); *Piracy Jure Gentium, Re* [1934] AC 586 (PC); *Supra* at fn. 11

held that it involves theft[21] or attempted theft at sea, without authority of any lawful state, accompanied by the use or threat of violence before or at that time[22]. They also include all persons who plunder indiscriminately for their own ends and not persons who simply operate against the property of a particular state for a public political end[23].

(iv)Findings

As has been demonstrated above, there are some evident problems in relation to how piracy has been defined and interpreted. The legislative difficulties in defining piracy are not partial to the UK and have arisen in other countries. Italy, for example, fails to provide a definition of piracy[24], opting instead for the establishment of a punitive jail sentence for "acts of piracy"[25]. It is now clear that under UK law, the definition provided for by UNCLOS is the accepted definition. Even the case law definition of piracy is exceptionally similar, albeit more brief, to that given by UNCLOS.

## Perils of the Sea

Being 'laced' with controversies its definition is not the only aspect of piracy which has been largely debated and contested; most issues dealing with pirates are not well established, especially when regarding piracy and the effect it has on others. Robbers, thieves, men committing illegal acts of violence, whilst detaining people with the use or threat of violence. These have been the common words associated with pirates but can we add 'perils of the sea'? This addition is important because it is central to understanding the effects of piracy, and in particular its impact on charterparties.

(i)'Perils of the sea' at common law

The term 'perils of the sea' includes any damage to the goods carried caused by sea-water, storms, collision, stranding, or other perils peculiar to the sea or to a ship at sea, which could not be foreseen and guarded against by the shipowner or his servants as necessary or probable incidents of the adventure[26]. This meaning is stated to be the same in policies of insurance, bills of lading and charterparties[27]. UK courts have held that perils of the sea

[21] *Masefield AG v Amlin Corporate Member Ltd (The Bunga Melati Dua)* [2011] EWCA Civ 24 (CA)
[22] *Piracy Jure Gentium, Re* [1934] AC 586 (PC)
[23] *Republic of Bolivia v Indemnity* [1909] 1 KB 785 (CA)
[24] Codice della Navigazione, Art. 1135 – 1136
[25] 10 to 20 years imprisonment
[26] Boyd, S. C., Berry, S., Burrows, A. S., Eder, B., Foxton, D., Smith, C. F., *Scrutton on Charterparties*, 21st Edition (Sweet & Maxwell, London, 2008), Chapter 11: Liability of shipowner for loss of, or damage to, goods carried, Article 112 – Perils of the Sea at 206
[27] *Thames and Mersey Insurance Co Ltd v Hamilton Fraser & Co* (1887) LR 12 App Cas 484 (HL); *Thomas Wilson Sons & Co v Owners of Cargo of the Xantho (The Xantho)* (1887) LR 12 App Cas 503 (HL); *Hamilton Fraser & Co v Pandorf & Co* (1887) LR 12 App Cas 518 (HL); *Goodfellow (Charles) Lumber Sales v Verreault Hovington & Verreault* [1971] 1 Lloyd's Rep 185 (Supreme Court (Canada)); *Sabine, The* [1974] 1 Lloyd's Rep 465 (QB)

can only be unforeseeable events that cannot be avoided by the reasonable person[28], thus no peril is one "which could be foreseen as one of the necessary incidents of the adventure[29]". So can piracy fall under this definition and be construed as a 'peril of the sea'?

In the case of The Xantho[30] the definition of 'peril of the sea' was examined; here the vessel carrying goods was foundered as a result of a collision. The question to be addressed was whether the vessel carrying the goods was at fault. Should the shipowner be at fault he would be unable to rely on the exception of 'dangers and accidents of the sea'[31]. Here negligence was also an issue as it could negate the ability to rely of 'perils of the sea'. Lord Herschell answering this last point held that "a loss by foundering, owing to a vessel coming into collision with another vessel, even when the collision results from the negligence of that other vessel, falls within the 'perils of the sea' category[32]." It could be argued therefore, that as a result of this case, even where the successful pirate attack was caused by the negligence of the crew, piracy itself would still be considered a 'peril of the sea' so long as it could not be foreseen.

(ii)Carriage of Goods by Sea Act 1971 ("COGSA 71") & Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading 1968 ("The Hague-Visby Rules")

Although case law has held piracy to be a 'peril of the sea'[33], there is also a list of perils in the contract of affreightment, more commonly known as "excepted perils", which should now be considered. Should piracy fall under this list, provided the loss or damage could not have been avoided through the use of reasonable care and diligence by the person performing the contract, they would be exempt from liability. In bills of lading the due diligence requirement is held by the shipowner or the carrier; "the contract is to be carried with reasonable care unless prevented by the excepted perils.....if the loss through perils of the sea is caused by previous default of the shipowner, he is liable for his breach of contract[34]." This duty to take reasonable care with due diligence for the safety of the cargo etc. can be associated with the implied warranty of seaworthiness[35]; this will be discussed below in Chapter 4.

---

[28] *Thames and Mersey Insurance Co Ltd v Hamilton Fraser & Co* (1887) LR 12 App Cas 484 (HL); *Tilia Gorthon, The* [1985] 1 Lloyd's Rep 552 (QB); *Great China Metal Industries Co Ltd v Malaysian International Shipping Corp Bhd (The Bunga Seroja)* [1999] 1 Lloyd's Rep 512 (High Court (Australia))

[29] *Thomas Wilson Sons & Co v Owners of Cargo of the Xantho (The Xantho)* (1887) LR 12 App Cas 503 (HL); per Lord Herschell at [509]

[30] *Ibid.*

[31] *Supra* at fn. 29; per Lord Macnaghten at [516]

[32] *Supra* at fn. 29; per Lord Herschell at [509]

[33] *Pickering v Barkley* (1648) Styles 132 (KB)

[34] *Supra* at fn. 29; per Lord Hershell at [510]

[35] *Supra* at fn. 29; per Lord Macnaghten at [515]; *Peterson Steamships Ltd v Canadian Cooperative Wheat Producers Ltd* [1934] AC 538 (PC (Canada)); per Lord Wright at [545]; *Smith Hogg & Co Ltd v Black Sea & Baltic General Insurance Co Ltd* [1940] AC 997 (HL); per Lord Wright at [1004]

Early bills of lading and charterparties did not contain this list of exceptions; the first exception was seen in the 18th century and provided for "the danger of the sea only excepted[36]." Later "the act of God, the King's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever excepted[37]" was included to the list of exceptions.

The relevant statutory authority which now deals with 'perils of the sea' is the Carriage of Goods by Sea Act 1971, under "perils, dangers and accidents of the sea or other navigable waters[38]."Under this statute piracy is not expressly mentioned and Scrutton is of the opinion that "it seems doubtful how far 'pirates, robbers, and thieves' or 'pilferage' are permissible exception under the Carriage of Goods by Sea Act 1971[39]." The carrier is able to rely on the list of exceptions found in Article 4, rule 2 of The Hague/Hague-Visby Rules and their "liability would depend on whether a reasonable shipowner would have foreseen that the voyage being undertaken involved a risk of damaging the cargo and, if so, what it would have done in response to the risk[40]." In the case of concurrent causes of damage, the carrier must prove they fall exactly into the excepted peril to be able to rely on it to exclude liability[41].

There are numerous events listed under the peril of the sea exceptions, many of which are rarely used today, but which were created for events occurring in cases dating years back. "Act of public enemy[42]" is one of these and arose as a quasi non-monarchical version of "Queen's enemy" exception which dealt with enemies of the shipowners' monarch. Carver believes the latter does not apply to pirates where they are under the afore-mentioned sovereign's power[43] whereas the former, "act of public enemies", may encompass piracy.

On the whole notwithstanding the court having established that piracy is indeed a 'peril of the sea', there seems to be a lot of debate as to whether or not this is a peril of the sea exception. It is believed that whilst drafting the Hague-Visby Rules, should they have wished to incorporate piracy as an exception, they would have drafted it so, in clear and unequivocal writing.

---

[36] *Wright and Rathbone, Assignees of Richard Scott, a Bankrupt v George Campbell, the Younger, and Stephen Hayes* (1767) 4 Burr 2046 (KB)
[37] *Smith v Shepherd* (1792) 5 Term Rep 9 (KB)
[38] Article IV, rule 2
[39] *Supra* at fn. 26, Chapter 11: Liability of shipowner for loss of, or damage to, goods carried, Article 114 – Pirates, Robbers by Land or Sea, Thieves; at [213]
[40] Gaskell, N., Asariotis, R., Baatz, Y., *Bills of Lading: Law and Contracts* (LLP, London, 2000), Chapter 8: Carrier's liability for sea carriage, C – Liability of carrier, (iii) Exceptions and burden of proof: Art. IV r.2; at [280] para. 8.63
[41] *Aktieselskabet de Danske Sukkerfabrikker v Bajamar Compania Naviera S.A. (The Torenia)* [1983] 2 Lloyd's Rep 210 (QB); *Hamilton Fraser & Co v Pandorf & Co* (1887) LR 12 App Cas 518 (HL)
[42] COGSA 71 Article IV, rule 2 (f)
[43] Treitel, G. H., Reynolds, F.M.B., *Carver on Bills of Lading*, 2nd Edition (Sweet & Maxwell, London, 2005), Chapter 9: The Hague and Hague-Visby Rules, 1. The Common Law Regime for Carriage by Sea; at [497]-[498] para. 9-006

(iii)The "Rotterdam Rules[44]"

Under the Rotterdam Rules, however, a new list of exclusions to 'perils of the sea' has been created which does include pirates[45]. This is wider in scope as it encompasses a variety of issues as well as terrorism, piracy, riots and civil commotions.

Whilst drafting the Rotterdam rules, one of the issues which was not and continues to be unaddressed, is the variation in the meaning of the phrase "peril of the sea". This is important because the United Nations involves various countries, not solely the UK, therefore the definitions of 'perils of the sea' would differ according to each country. The main definition as we know it is that "there must be a peril, an unforeseen and evitable accident, not a contemplated and inevitable result....[46]" if we look at the US, Canadian and Israeli definitions, the courts have held that 'perils of the sea' will solely apply where the losses are "of an extraordinary nature or arise from irresistible force or overwhelming power, and which cannot be guarded against by the ordinary exertions of human skills and prudence" or "something so catastrophic as to triumph over those safeguards by which skilful and vigilant seamen usually bring ship and cargo to port in safety[47]."

Under Article 17.1 the claimant must prove the loss, damage, or delay took place during the period of the carrier's responsibility whereas under Article 17.2 the carrier may prove that the circumstances relied upon caused or contributed to the loss, damage, or delay which took place. These[48] are important because before considering whether the carrier can rely on the list of exceptions, he/she must satisfy these requirements.
The so-called 'laundry list[49]' of exclusions established under Article IV, rule 2 of the Hague-Visby Rules was included here.
There was much debate on whether or not the list of exclusions should be included in the Rotterdam rules and, if so, the extent to which they should be included[50]. It was later decided however, that they should be included, the list being "followed closely[51] in order to preserve the certainty and predictability

[44] United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2008 ("The Rotterdam Rules"); Thomas, D. R., *A New Convention for the Carriage of Goods by Sea – The Rotterdam Rules* (Lawtext Publishing Limited, Witney, 2009); Baatz, Y., Debattista, C., Lorenzon, F., Serdy, A., Staniland, H., Tsimplis, M., *The Rotterdam Rules: A Practical Annotation* (Informa, London, 2009); Working Group III (2002-2008): Transport Law
[45] Article 17.3 (c)
[46] *P Samuel & Co Ltd v Dumas* [1923] 1 KB 592 (CA); per Scrutton LJ at [618]
[47] *The Giulia* 218 F 744 (2nd Cir 1914); per Rogers CJ at [746]; *Goodfellow (Charles) Lumber Sales v Verreault Hovington & Verreault* [1971] 1 Lloyd's Rep 185 (Supreme Court (Canada)); *Zim Israel Navigation Ltd v The Israeli Phoenix Assurance Co Ltd (The Zim-Marseilles)* [1999] ETL 535 (Supreme Court of Israel)
[48] Articles 17.1 and 17.2
[49] Force, R., 'Comparison of The Hague, Hague-Visby, and Hamburg Rules: Much Ado About (?)' (1995) 70 Tulane L. Rev. 2051-2089
[50] Working Group III (2002-2008): Transport Law
[51] Diamond, A., 'The Next Sea Carriage Convention?' [2008] L.M.C.L.Q. , 2 (May), 135-187; at [150]

associated with the development of a significant body of law on these issues[52]." The list of exclusions can now be found in Article 17.3, there have been various changes which will be discussed below.

> "3. The carrier is also relieved of all or part of its liability....if it proves that one or more of the following events or circumstances caused or contributed to the loss, damage, or delay:
> .....
> b) Perils, dangers, and accidents of the sea or other navigable waters;
> c) War, hostilities, armed conflict, piracy, terrorism, riots, and civil commotions..."

Should the carrier successfully rely on these exceptions, they would exclude him from part or all liability.

The original list of exceptions found in the Hague-Visby Rules is significantly different to that found under the Rotterdam Rules as few exclusions have remained unaltered, the rest have either been deleted, amended or added.
With regards to those exclusions which have been removed[53], the one most relevant in this present analysis is "acts of public enemies[54]" which is where many believed piracy fell under. Four of the events listed in the exclusions for 'perils of the sea' remain unaltered[55] and three are new provisions created under these new rules[56]. The majority have been amended from those found under The Hague/Hague-Visby Rules. The first of these is the only one of note here: "war, hostilities, armed conflict, piracy, terrorism, riots, and civil commotions[57]". 'Piracy' was added as a result of the increased attacks, especially in the Gulf of Aden, but there is no fixed definition of piracy given throughout these Rules[58] which is possibly the reason why it was drafted with such a wide scope. Others include Articles 17.3 (d)[59], (e)[60], (f)[61], (h)[62], (k)[63], (l)[64] and (m).

---

[52] Thomas, D. R., *A New Convention for the Carriage of Goods by Sea – The Rotterdam Rules* (Lawtext Publishing Limited, Witney, 2009), Chapter 5: The Right of the Carrier to exclude and limit liability by Prof. Stephen Girvin; at [114]
[53] The most noted of these being Article IV rule 2 (a): exclusion for any 'act, negligent, or default of the master, mariner, pilot or the servants of the carrier....in navigation or in the management of the ship'; as well as Article IV rule 2 (f): exclusion from 'public enemies'; and Article IV rule 2 (q): 'catch-all clause'
[54] Article IV rule 2 (f)
[55] Article 17.3 (a); Article 17.3 (b); Article 17.3 (g); Article 17.3 (j)
[56] Article 17.3 (i); Article 17.3 (n); Article 17.3 (o)
[57] Article 17.3 (c) which result from the merger of Hague-Visby Rules Article IV rule 2 (e) and (k) as well as new additions
[58] United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2008 ("The Rotterdam Rules"); *Supra* at fn. 11
[59] This results from the merger of Hague-Visby Rules Article IV rule 2 (h) and (g)
[60] This results from a modification of Hague-Visby Rules Article IV rule 2 (j)
[61] This results from a modification of Hague-Visby Rules Article IV rule 2 (b)
[62] This results from a widening of Hague-Visby Rules Article IV rule 2 (i)
[63] This results from the merger of Hague-Visby Rules Article IV rule 2 (n) and (o)
[64] This results from a modification of Hague-Visby Rules Article IV rule 2 (l)

(iv)Findings

The fact that piracy has been mentioned in the exclusions to 'perils of the sea' under the Rotterdam Rules means that, since it was not expressly included in the list of exceptions under The Hague and Hague-Visby Rules it must, at that time, have been contemplated as a peril of the sea. This argument is strengthened in the case of "The Xantho" where piracy was indeed held to be a 'peril of the sea'. This plays a fundamental role in the conclusions made in the chapters concerning off-hire and seaworthiness.

## Off-Hire

The connection between piracy, 'perils of the sea' and off-hire clauses may not be obvious or even contemplated at first glance. In this chapter the links between all three of these issues will be explored, discussed and evaluated. As with piracy and 'perils of the sea', it is important to establish the meaning of off-hire clauses in order to piece together the three topics.

(i)What are off-hire clauses?

Off-hire clauses are in the majority of time charterparties and are an exception to the general rule that hire is payable continuously, unconditionally and without deduction for the period of the charter, commencing with the delivery of the vessel and terminating with the vessels redelivery[65]. These enable the charterer to avoid paying hire because the vessel cannot perform the duties for which she was hired[66]. Off-hire clauses are a protection for charterers as they deny the shipowners of their legal right to the hire of the vessel. It is for this reason that an off-hire clause will only be available if the charterers are completely within the ambit of the clause. The presumption therefore is for the charterers to prove beyond any reasonable doubt that their situation fits within the scope of the clause, thus where the situation is ambiguous the owner retains the right to the hire of the vessel[67]. They do not cause the charterparty to operate any differently apart from the payment of hire which is suspended and there is no specific wording which is common to off-hire clauses, as they will be written to satisfy the charterers need. They do however, relate to the vessel chartered as well as her ability to perform the duty for which she was chartered.

Off-hire clauses deal with navigational errors, still however caused by the internal mechanics of the vessel. Now external events may also cause the vessel to go off-hire, such as bad weather and third party interference. This is a novelty and an example of how the scope of off-hire clauses has been

[65] *Mareva Navigation Co v Canaria Armadora SA (The Mareva AS)* [1977] 1 Lloyd's Rep 368 (QB); per Kerr J. at [381]-[382]
[66] *Ibid.*
[67] *Ibid.*; *Actis Co v Sanko Steamship Co (The Aquacharm)* [1980] 2 Lloyd's Rep 237 (QB); per Lloyd J. at [239]

extended. Could this extended meaning possibly justify marine piratical acts as constituting an off-hire event? It would seem that provided the off-hire clause is expressed unambiguously, as was the case in The Saldanha[68], piracy could come within the scope of the off-hire clause. This case also demonstrates the link between piracy, off-hire clauses and 'perils of the sea'.

Although no off-hire clause is the same, since they are negotiated by the parties, it is possible to find trends and to spot the main characteristics of off-hire events. These events usually include[69]:

- Breakdown, damage, deficiency, defect (including fire damage) to hull, machinery and equipment;
- Drydocking and other measures necessary to maintain the vessel;
- Collision and grounding;
- Detention, seizure and arrest of vessel;
- Deficiency/default/strike of men;
- Deficiency of stores/documentation;
- Unjustified deviation and putting back.

It is important to evaluate whether piracy can realistically fit into these events in order to prove that marine piracy, as an event external to the vessel, can trigger the off-hire clause.

Piracy may fit into the first and third event listed above, but solely where it is the cause or the reason for which damage was caused to hull, machinery and equipment or the reason for which the vessel was ground. This would not entitle piracy itself however, to cause the vessel to become off-hire. The most evident event listed which would qualify piracy as an off-hire event is the fourth event listed: detention and seizure of vessel. Here piracy would clearly qualify as an off-hire event as pirates do indeed detain and seize vessels, thus triggering the off-hire clause. There is one last event for which piracy could be applicable, and that is the fifth point: deficiency/default of men. This point was also argued in "The Saldanha", discussed below.

(i)"The Saldanha"

This landmark decision has decided on the issue of whether piracy is truly an off-hire event under the NYPE form. As it is such an important case, the facts shall be discussed as well as the reasons behind the judicial findings. In "The Saldanha" the court decided that during a seizure by pirates, the vessel remained on hire. In this case Somali pirates attacked and seized the bulk carrier whilst laden and traversing through the Suez Canal in the Gulf of Aden. The charterers argued that the vessel was off-hire during the period of

[68] *Cosco Bulk Carrier Co Ltd v Team-Up Owning Co Ltd ("The Saldanha")* [2010] EWHC 1340 (Comm) (QB)
[69] Thomas, D. R., *Legal Issues relating to Time Charterparties* (Informa, London, 2008), Chapter 7, The Ambit of Off-hire Clauses; at [141] para. 7.86

detention and until the vessel had reached its equivalent position. The court did not agree with the charterers and held in favour of the owners, that the vessel had remained on hire throughout.

Hiring a vessel is very expensive therefore for charterers having to pay hire whilst the vessel is controlled by pirates means that they cannot actually use the vessel and will make all attempts to avoid paying hire during this period. The owners, on the other hand, would seek to enforce charterers having to pay hire, otherwise they would lose out on months of hire. Normally they would seek another charterer to hire the vessel, however, where the vessel is unavailable for chartering, or should the vessel be off-hire, there is nothing that can be done to recuperate the profit lost.

The off-hire clause in the case was taken from clause 15 of the NYPE 46 form charterparty, and the charterers based their off-hire argument on the various aspects of the clause. It is also from this clause that the judges found that "average accidents" should be read in the context of a marine peril, thus demonstrating the inclusion of whether piracy was a 'peril of the sea'. Had this been proven, the off-hire clause would have been triggered, resulting in the vessel being off-hire and the charterers released from their obligation to pay for the hire of the vessel.

(ii)NYPE 46 form

> "That in the event of the loss of time from default and/or deficiency of men including strike of Officers and/or crew or deficiency of or stores, fire, breakdown or damages to hull, machinery or equipment, grounding, detention by average accidents to ship or cargo, dry-docking for the purpose of examination or painting bottom, or by any other cause preventing the full working of the vessel, the payment of hire shall cease for the time thereby lost...[70]"

"Under Lines 97 to 98 of Clause 15 of the New York Produce form, dealing with interruption to service, there are three matters that the charterer must establish in order to put the ship off-hire: first, the full working of the ship must have been prevented; second, it must have been prevented by one of the causes or risks listed in the clause; and third, there must have been a loss of time to the charterers[71]." Although only the second point shall be discussed for the purpose of this analysis, it is important to mention, that all three aspects must be satisfied in order to prove the vessel was off-hire.

*The loss of time was caused by an event listed in the clause*

Under a natural construction of the word, "default" was capable of meaning negligent and inadvertent acts of the Master and the crew. However, the historical development was based on the case of Royal Greek Government v

[70] NYPE 46 form Clause 15 lines 97-99

[71] Coghlin, T., Baker, A. W., Kenny, J., Kimball, J. D., *Time Charters*, 6th Edition (Informa, London, 2008), Chapter 25: Off-hire; at [442] para. 25.6

Ministry of Transport (The Ilissos)[72] which dealt with a claim of whether the crew's refusal to sail amounted to an off-hire event. This more restrictive approach was considered and applied in this case and the court held that "default and/or deficiency of men" referred more to "numerical insufficiency[73]" and an off-hire event would therefore occur where, for example there is a numerical deficiency of the crew. Had this argument been accepted, the court held that on almost every occasion, where as a result of the default and deficiency of the crew by way of negligence there was a loss of time, the vessel would result off-hire under this heading.

A distinction must be made between the breakdown and its cause[74]; breakdown occurs when it ceases to produce its function, but it may have been the result of either an external or internal event which predated the actual breakdown. Also this occurs when it is held reasonable to dismiss the charter for repairs as a result of the breakdown[75]. Damages to hull, machinery or equipment must be accidental and unexpected rather than caused in the ordinary use of the vessel by the charterers[76].

Detention by average accidents to ship or cargo was the basis of the charterers' first argument and will be discussed in three parts: detention; average; and accidents. It is the latter two parts which deal with the issue of 'marine peril'. The "detention" must be more than a delay; "some physical or geographical constraint upon the vessel's movements in relation to her service under the charter[77]." "Average" must mean an accident which causes some type of damage[78] and "accidents" must include both unexpected accidents and those not small enough to be negligible[79]. As an accident in its ordinary sense would require a lack of intent, the capture of the vessel by the pirates falls outside the definition as it is more of a deliberate and violent attack, notwithstanding the element of surprise which may have occurred[80]. Furthermore the wording "average accident" points towards an insurance context, where "average" refers to a damage which is less than a constructive loss. Also the court looked at the importance of certainty within commercial law, and found that they supported the long-standing position[81] in which the court in "The Mareva

---

[72] (1948-49) 82 Ll L Rep 196 (CA)

[73] Shepherd, N., 'The London Commercial Court rules that vessel chartered on NYPE terms remains on hire whilst detained by pirates' (11 June 2010), Ince & Co International Law Firm

[74] *Portolana Compania Naviera Ltd v Vitol SA Inc (The Afrapearl)* [2004] 2 Lloyd's Rep 305 (CA) (question here was whether a discharge pipe at a shore facility had suffered a breakdown)

[75] *Giertsen v George Turnbull & Co* [1908] SC 1101 (Court of Session); per Lord Ardwell at [1110]

[76] *Santa Martha Baay Scheepvaart and Handelsmaatschappij NV v Scanbulk A/S (The Rijn)* [1981] 2 Lloyd's Rep 267 (QB)

[77] *Supra* at fn. 65 (here damage to cargo during discharge causing delay did not constitute detention); approved in *Nippon Yusen Kaisha Ltd v Scindia Steam Navigation Co Ltd (The Jalagouri)* [2000] 1 Lloyd's Rep 515 (CA)

[78] *Supra* at fn. 65; per Kerr J. at [381]

[79] *Andre & Cie SA v Orient Shipping Rotterdam BV (The Laconian Confidence)* [1997] 1 Lloyd's Rep 139; per Rix J. at [144] (here 0.16% of cargo of rice residue in vessel was seen to be normal, and so not exceptional/out of the ordinary)

[80] Amos, P., Sailor, D., 'Piracy - an Off Hire Event?' September 2010, Steamship Mutual P&I Club

[81] Almost 30 years

A.S." held that the essential ingredient for "average" to apply was in the context of an 'ordinary marine peril'. The term 'marine peril' includes any damage to the goods carried caused by sea-water, storms, collision, stranding, or other perils peculiar to the sea or to a ship at sea, which could not be foreseen and guarded against by the shipowner or his servants as necessary or probable incidents of the adventure[82]. This was the definition also given in the previous chapter. As we know, according to Pickering v Barcley[83] piracy was seen to be a 'peril of the sea'. This was not sustained, however in "The Saldanha" where it was held that a pirate attack was in no way a normal 'maritime peril' but rather a clear example of an extraneous event. An extraneous event, could be included here should the word "whatsoever" have been used.

"In the absence of "whatsoever" "any other cause" should be construed either ejusdem generis (rule of construction) or at any rate in some limited way reflecting the general context of the charter and clause[84]." These causes must relate to the condition of the vessel, include both legal and administrative acts and are not restricted to physical or tangible causes. Many rely on this sweeping-up phrase in order to utilise the off-hire clause. Courts have proved to be unwilling to leave this as wide as possible so tend to construe it in the light of internal[85] rather than external[86] causes. In its ordinary meaning, without the word "whatsoever", the clause should be construed generally, thus excluding extraneous causes. Had the clause included the word "whatsoever" it is likely that piracy could fall within this sweep-up provision as it would have included extraneous events[87], such as bad weather, port congestion and obstruction, physical and marine impediments such as bars, shallow water, tides, currents and narrow channels, the closure or blocking of an international canal, the outbreak of war, hostilities or civil unrest, unlawful or capricious seizure and third party interference and detention by persons, groups, governments, port, health and other authorities and organisations and would encompass acts of piracy as well[88]. A further restriction to this sweeping-up phrase to counteract the general wording is to adopt the phrase "any other similar cause[89]", thus making this wide clause more specific in nature.

There are two implied limits on the causes by Clause 15[90]: the first is that only an unexpected cause can trigger the off-hire clause, thus a normal event

---

[82] *Thames and Mersey Insurance Co Ltd v Hamilton Fraser & Co (1887) LR 12 App Cas 484 (HL); Hamilton Fraser & Co v Pandorf & Co (1887) LR 12 App Cas 518 (HL); Goodfellow (Charles) Lumber Sales v Verreault Hovington & Verreault [1971] 1 Lloyd's Rep 185 (Supreme Court (Canada)); Sabine, The [1974] 1 Lloyd's Rep 465 (QB)*

[83] *Supra* at fn. 33

[84] *Supra* at fn. 79; per Rix J. at [150]

[85] *Supra* at fn. 76; per Mustill J. at [272]

[86] *Supra* at fn. 79; per Rix J. at [149]

[87] *Belcore Maritime Corp v Fratelli Moretti Cereali SpA (The Mastro Giorgis)* [1983] 2 Lloyd's Rep 66;

per Lloyd J. at [68] (phrase covered the arrest of the vessel due to cargo interest); *Supra* at fn. 79 (local authority actions could be covered as well)

[88] *Supra* at fn. 69; at [145] para. 7.98

[89] NYPE 93 cl. 17

[90] NYPE form

arising from orders by the charterer as to the use of the vessel will not constitute an off-hire event[91]. The second limit is that the vessel is probably not off-hire where the event was caused by the charterer; this can sometimes be excluded by a term in the contract[92] but in general there is no authority for this point. There have been, however, various persuasive authorities which would seem to agree with this issue[93].

Sometimes there are a number of circumstances which could have caused the prevention of the full working of the vessel but it may be difficult to know what actually caused it. One would have to identify the risks which emanate from the off-hire clause and then see the type of risk that has occurred[94].

(iii)Findings

It has been established in earlier cases how piracy is a 'peril of the sea[95]'. The judgement given by the judges in the case of The Saldanha does not seem to take this factor into account. The fact that they held that piracy was an extraneous event is irrelevant as, under the phrase "average accident", "average" relates to whether piracy can be construed as a 'ordinary peril', a feat that has already been proven. This outcome should have resulted in a clear triggering of the off-hire clause, allowing the charterer to avoid paying for hire.

Furthermore, the law seems to suggest that parties are free to incorporate any clause they choose by way of freedom of contract[96], therefore it is submitted that it would be dependent on the parties to include external events, in which piracy would be included, for it trigger the off-hire clause. As a result of freedom of contract, should parties wish to include piracy as an event which would trigger the off-hire clause, they should try to utilise clear and unequivocal wording in that clause. The incorporation of such a favourable clause for the charterers would however depend on which party has the market advantage; should the owners have a more favourable position it is unlikely they should agree to such an off-hire clause, as it would be easier to prove. Where the charterer has the market advantage the owner's only preoccupation would be to hire the vessel, and would therefore agree to the incorporation of external events affecting the hire of the vessel. The case of

---

[91] *Supra* at fn. 76

[92] *Sig Bergesen DY & Co v Mobil Shipping and Transportation Co (The Berge Sund)* [1993] 2 Lloyd's Rep 453; per Staughton J. at [462]

[93] *Board of Trade v Temperley Steam Shipping Co Ltd* (1927) 27 Ll L Rep 230 (CA) (charterer' breach of an implied or express term which caused loss of time did not allow them to rely on the off-hire clause); *Supra* at fn. 79; per Rix J. at [151]; *James Nourse Ltd v Elder Dempster & Co Ltd* (1922) 13 Ll L Rep 197 (KB) (the delay was caused by faulty bunker coal which had been supplied by the charterers – this did not constitute as an off-hire event); *Lensen Steamship Co v Anglo-Soviet Steamship Co* (1935) 52 Ll L Rep 141 (CA) (safe berth obligation had been breached by the charterers resulting in hull damage – the time for repairs was not an off-hire event); *Supra* at fn. 92; per Staughton J. at [462]

[94] *Hyundai Merchant Marine Co Ltd v Furness Withy (Australia) Pty (The Doric Pride)* [2006] 2 Lloyd's Rep 175 (CA)

[95] *Supra* at fn. 33

[96] *Supra* at fn. 79; per Rix J. at [140]

"The Saldanha" underlines the importance of incorporating clear and express clauses when regarding the problem of piracy. An ideal off-hire clause incorporating piracy would state:

> "That in the event of the loss of time including that arising from piracy or armed robbery which results in a fire, breakdown or damages to hull, machinery or equipment, grounding, detention of the ship or cargo, dry-docking for the purpose of examination or painting bottom, or by any other cause whatsoever which prevents the full working of the vessel, the payment of hire shall cease for the time thereby lost."

Such a clause would in effect eliminate all the problems, as well as litigation, as there could be no doubt as to the off-hire of the vessel.

To conclude, piracy being a 'peril of the sea' can indeed trigger an off-hire clause under the "average accidents" phrase. This connection was initially discussed by the judges themselves, and is a perfectly logical argument. The outcome of the case however, should have been different when viewed against previous case law. That piracy was an extraneous cause, should not have even been an issue, as the initial question had already been answered. It is because of this case that we are able to identify, however, the connection between off-hire and 'peril of the sea' which was initially dubious. The link between seaworthiness, another charterparty issue, and 'perils of the sea' is far easier to identify and will be discussed in the following chapter.

## Seaworthiness

Seaworthiness is a duty which is central to all charterparties; should the vessel prove to be unseaworthy, it would not be permitted to sail, until its seaworthy status is returned. The link between seaworthiness and 'perils of the sea' is clearer here than in the previous chapter, as the vessel must be fit to withstand the perils of the sea for it to be seaworthy. Therefore it can be submitted that 'perils of the sea' is an extension if not an essential ingredient to the topic of seaworthiness.

### (ii)Seaworthiness

The definition of "seaworthiness" finds its root in the common law which stated that the carrier should provide a vessel "fit to meet and undergo the perils of the sea and other incidental risks which of necessity she must be exposed in the course of the voyage"[97]. So, at the time of delivery the vessel must be fit, seaworthy and ready. For the purpose of this dissertation only the second needs to be discussed, however it is important to note that these three requirements overlap. The fact that the vessel needs to be fit for business assumes that it is seaworthy[98], a duty which according to the same case is an

[97] *Kopitoff v Wilson* (1875-76) LR 1 QBD 377 (QB); at [380]
[98] *Cheikh Boutros Selim El-Khoury v Ceylon Shipping Lines (The Madeleine)* [1967] 2 Lloyd's Rep 224 (QB)

express warranty. Should this obligation not be expressed, the warranty will be implied by common law into the charterparty[99]. "Although it seems probable to me that there is rarely any practical difference between seaworthiness and fittedness… they are not necessarily the same thing[100]."

There will always be a duty on the owner to provide a seaworthy vessel, whether that duty arises from a contractual obligation or through the common law.

> "The vessel must be fit in design, structure, condition, and equipment to encounter whatever perils of the sea a ship of that kind, and laden in that way, may be fairly expected to encounter[101]."

We could say that there are two different types of seaworthiness obligations[102]: the first that the vessel, the crew and equipment will be able to withstand the ordinary 'perils of the sea' envisioned during the voyage; and the second, that the vessel must be suitable to transport the cargo. At this early stage, we can see the inclusion of the phrase 'perils of the sea' and it has clearly been established that a 'peril of the sea' does indeed include piracy. Seaworthiness also implies a duty for the vessel to be cargoworthy; this is not strictly pertinent to the topic at hand, but remains nonetheless a fundamental aspect of the obligation of seaworthiness. By acting as a shipowner rather than a charterer, he/she has an implied duty to provide a seaworthy vessel[103]. This does not however, apply to the approach voyage[104].

As mentioned above, seaworthiness will also be affected by the efficiency of the master and crew[105]. This would allow the person who wishes to rely on the unseaworthiness of the vessel to argue said unseaworthiness in two ways: that piracy was envisioned as a 'peril of the sea' and that the competency of the seamen affected the ability of the vessel to withstand a pirate attack. This second point would also refer to off-hire, which was the topic of discussion in the previous chapter. There is no initial presumption that the vessel is unseaworthy when she breaks down[106], or sinks[107] but there are limited circumstances in which these points could cause the burden of proof to be reversed[108].

---

[99] *Supra* at fn. 75; *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd (The Hongkong Fir)* [1962] 2 QB 26, [1961] 2 Lloyd's Rep 478 (CA)
[100] *Athenian Tankers Management SA v Pyrena Shipping (The Arianna)* [1987] 2 Lloyd's Rep 376 (QB); per Webster J. at [389]-[390]
[101] *Stanton v Richardson* (1873-74) LR 9 CP 390 (Court of Exchequer)
[102] *Actis Co v Sanko Steamship Co (The Aquacharm)* [1982] 1 Lloyd's Rep 7 (CA); per Griffiths LJ at [11]
[103] *Supra* at fn. 97
[104] *Compagnie Algerienne de Meunerie v Katana Societa di Navigatione Marittima SpA (The Nizetti)* [1960] 1 Lloyd's Rep 132, [1960] 2 QB 115 (CA)
[105] *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd (The Hongkong Fir)* [1962] 2 QB 26, [1961] 2 Lloyd's Rep 478 (CA)
[106] *Pickup v Thames and Mersey Marine Insurance Co Ltd* (1877-78) LR 3 QBD 594 (CA)
[107] *Ajum Goolan Hossen & Co v Union Marine Insurance Co Ltd* [1901] AC 362 (PC)
[108] *Fiumana Societa di Navigazione v Bunge & Co Ltd* [1930] 2 KB 47 (KB)

The shipowner must use the ordinary standard of care in selecting a fit master[109]. The requirement for the vessel to be seaworthy is affected by the competency of the Master and the crew[110]. Either the master and crew are inefficient or they refuse to use the skills and knowledge acquired would render the vessel unseaworthy[111]. In one case the fact that on sailing the Master was drunk rendered the vessel unseaworthy[112].

In the case of "The Saldanha"[113] the charterers counterclaimed that as a result of the unseaworthiness of the vessel and of the incompetency of the crew, the vessel was captured by pirates. This argument was not upheld by the court who took the view that piracy could not be held to account as an "ordinary" 'peril of the sea', as there was nothing ordinary about piracy. On the contrary the court believed that piracy should be considered as more an extraneous event of marine peril. They therefore concluded that seaworthiness was not an issue to be discussed when dealing with the problems of marine piracy. Case law would seem to disprove this conclusion, since it has held that piracy is a 'peril of the sea'. It could also be argued, as a secondary issue that as piracy is increasing with time, preventative measures such as travelling at a speed of 16 knots (18 knots if possible) and conducting evasion manoeuvres such as zig-zagging[114] would decrease the likelihood of a successful attack. Also, travelling during poor weather conditions has been advised, as it is unlikely the pirates will be able to withstand poor weather conditions in their small crafts[115]. For example on 2nd April 2010, both an Italian flagged container vessel, M/V Ital Garland, and a Liberian flagged vessel, M/V Westermoor, managed to withstand and escape a pirate attack by using evasive procedures[116]. If the seamen did all in their power to ensure the vessel was not captured by the pirates, as occurred in the above cases, then it can be submitted that they acted in a competent manner. Conversely, should the seamen allow the vessel to be seized by pirates by not behaving in a proficient manner then it could be established that the vessel was captures as a direct result of their incompetent and negligent behaviour.

By having these measures in place it can be stated that the crew can safeguard the vessel and therefore any negligence in following these instructions should result in the incompetency of the crew. In the case of the "Hongkong Fir" the vessel was found to be unseaworthy as a result of the incompetence or insufficiency of her engine staff. There was a clear breach of the owners' obligation of due diligence here. The Court of Appeal held that unseaworthiness by itself would not allow termination of the contract although the charterer would be entitled to damages. The breach would have

---

[109] *Rio Tinto Co Ltd v Seed Shipping Co Ltd* (1926) 24 Ll L Rep 316 (KB)
[110] Argued in the *Hong Kong Fir* [1961] 2 Lloyd's Rep 478
[111] *Owners of Cargo Lately Laden on Board the Makedonia v Owners of the Makedonia (The Makedonia)* [1962] 1 Lloyd's Rep 316 (Probate, Divorce & Admiralty Division)
[112] *Moore v Lunn* (1923) 15 Ll L Rep 155 (CA)
[113] *Supra* at fn. 68
[114] Best Management Practices 3 ("BMP 3"), 'Best Management Practices to Deter Piracy off the Coast of Somalia and in the Arabian Sea Area', Version 3, June 2010, at section 3.5
[115] *Ibid*
[116] EU NAVFOR Public Affairs Office, 'MVs Ital Garland and Westmoor evade pirate attack', EU NAVFOR Press Releases, April 2 2010

to be assessed in order to evaluate whether the breach is serious enough to constitute the frustration of the contract.

With regard to "The Wreck of the Hesperus[117]" the fictional vessel, the Hesperus, was unseaworthy as a result of the master's lack of navigational skills and knowledge as well as his over-confidence, rather than the violent storm. Hewson J observed "I can see no real difference between those two, that is, drunkenness or physical unfitness on the one hand and a disabling lack of will to use the skill and knowledge on the other. The reason why I can see no distinction is that the result is the same, or may be[118]." All this relates to piracy in that the crew's incompetence to deal with the storm can be equated to that of an incompetent crew dealing, or rather unwilling to deal with the approaching attach of pirates. Thus should they not act competently with all their knowledge, the vessel being captured by the pirates would be caused as a result of the incompetency of the seamen, thus rendering the vessel unseaworthy.

There is also the legal aspect of seaworthiness where the necessary documents for the voyage must be provided by the shipowner[119]; these include documents relating to the seaworthiness of the vessel. This illustrates how the doctrine of seaworthiness has been continuously stretched. As a result, as pirate attacks continue to increase, charterers and shipowners should be better prepared to not only withstand a pirate attack, being a 'peril of the sea' but also to include the necessary contractual provisions or obtain the relevant insurance which would protect them in the event of such an attack. Consequently, this enatils that although pirate attacks cannot be foreseen with absolute certainty, the possibility of a pirate attack could be foreseeable and therefore the seamen should do all in their capacity to act in a competent manner and safeguard the vessel and her cargo. According to the definition of 'perils of the sea' given earlier, this may prove to be a problem. A 'peril of the sea' cannot be foreseen, which is the reason for which the shipowner cannot protect the vessel against such perils. Preventative measures are an additional security for the vessel they do not necessarily imply that the vessel will be attacked by pirates. Thus acts of piracy are never a certainty at sea; it is this notion of uncertainty which would allow piracy to continue being considered a 'peril of the sea'.

(ii)Factors

The standard of seaworthiness is "relative, among other things, to the state of knowledge and the standards prevailing at the material time[120]." The level of seaworthiness is therefore, dependent on a variety of factors[121] such as:

[117] Longfellow, H.W., 'The Wreck of the *Hesperus',* 1840
[118] *Supra* at fn. 111
[119] *Alfred C. Toepfer Schiffahrtsgesellschaft mbH v Tossa Marine Co Ltd (The Derby)* [1985] 2 Lloyd's Rep 325 (CA)
[120] *FC Bradley & Sons Ltd v Federal Steam Navigation Co Ltd* (1926) 137 LT 266 (CA); per Lord Sumner at [268]
[121] *Supra* at fn. 26; at [90]-[91 ]

- nature of the ship[122]
- voyage contracted for[123]
- stages of that voyage: summer or winter voyages, river, lake or sea navigations[124]
- loading in harbour and sailing[125]
- particular cargo contracted to be carried[126]

With increased knowledge of ship-building the standard of seaworthiness may increase, but this does not mean the vessel is required to be perfect[127] or contain the most up-to-date and expensive equipment.

In order to prove unseaworthiness the person relying on the unseaworthiness must prove that: "a prudent owner would have required that the defect should be made good before sending the ship to sea, had he known of it[128]." Here the vessel must have the same level of fitness an ordinary, careful and prudent owner would have expected the vessel to have on commencement of the voyage[129].

(iii)When must the vessel be seaworthy?

Seaworthiness provides a different standard of duty in common law than in statutory form.

*Common law*

The common law states that whether expressed or implied, the shipowner has an absolute duty to provide a seaworthy vessel[130] when contracting to carry goods. Therefore, the duty on the shipowner to provide for a seaworthy vessel is an absolute duty; not only is there an obligation on the fitness of the ship but also that she is able to withstand those ordinary perils of the sea[131]. It has already been established that according to case law piracy is a 'peril of the sea'.

---

[122] *Burges v Wickham* (1863) 3 B & S 669 (KB)
[123] *Empresa Cubana Importada de Alimentos Alimport v Iasmos Shipping Co SA (The Good Friend)* [1984] 2 Lloyd's Rep 586 (QB)
[124] *Thin v Richards & Co* [1892] 2 QB 141 (CA); *Daniels v Harris* (1874-75) LR 10 CP 1 (Court of Common Pleas); *Annen v Woodman* (1810) 3 Taunt 299 (Court of Common Pleas)
[125] *McFadden v Blue Star Line* [1905] 1 KB 697 (KB)
[126] *Supra* at fn. 101; *Tattersall v National Steamship Co Ltd* (1883-84) LR 12 QBD 297 (QB); *The Marathon* (1879) 40 LT 163; *Owners of Cargo on the Maori King v Hughes* [1895] 2 QB 550 (CA); *Queensland National Bank Ltd v Peninsular and Oriental Steam Navigation Co* [1898] 1 QB 567 (CA); *Owners of Cargo on Board the Waikato v New Zealand Shipping Co Ltd* [1899] 1 QB 56 (CA)
[127] *Supra* at fn. 122
[128] *Supra* at fn. 26; at [92]
[129] *Anthony Gibson v Robert Small and Others* (1853) 4 HL Cas 353 (HL); *Supra* at fn. 122
[130] *Steel v State Line Steamship Co* (1877-78) LR 3 App Cas 72 (HL); *The Marathon* (1879) 40 LT 163; *Cohn v Davidson* (1876-77) LR 2 QBD 455 (QB); *Supra* at fn. 97; *Lyon v Mells* (1804) 5 East 428 (KB)
[131] *Steel v State Line Steamship Co* (1877-78) LR 3 App Cas 72 (HL)

The vessel must be seaworthy at the beginning of loading and must be fit, not only to receive the cargo but also for the ordinary peril of lying afloat in the harbour. As with off-hire the point to be made here on whether the vessel is in full working conditions, will be dependent on the type of work the vessel was hired to perform. The fact that for example, the vessel may not be fit for sailing[132] does not diminish its seaworthiness in simply loading the cargo, as it must be fit to do the work it is set out for. She must also be fit for the relevant voyage or for the subsequent stage[133].

Where the vessel's voyage has various stages there is a warranty that the vessel be made fit for each stage it enters into[134]; the loading stage is treated as a different stage in the voyage[135]. The vessel is able to take necessary fuel and stores at intermediate ports; there is no breach of warranty where the voyage begins with an insufficient stock of fuel so long as there is enough fuel for each stage[136]. Where there are consecutive voyages the vessel has to be seaworthy at the beginning of each voyage[137].

*Hague-Visby Rules*

Under the Hague-Visby Rules there is a further duty of seaworthiness, different to that provided by common law. They can be incorporated into the charterparty by two means: the Carriage of Goods by Sea Act 1971 and the various forms which include a clause Paramount.Article III Rule 1 establishes that:

> "The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to –
>
> a) Make the ship seaworthy;
>
> b) Properly man, equip and supply the ship;
>
> c) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation."

The common law doctrine of stages has been excluded, and under the Hague-Visby Rules the absolute duty becomes one of due diligence and introduces the obligation to provide a seaworthy vessel before and at the beginning of the voyage. This, in a voyage charterparty, means from the beginning of loading[138]

---

[132] *Albert E Reed & Co Ltd v Page Sons & East Ltd* [1927] 1 KB 743 (CA); *C Wilh Svenssons Travarnaktiebolag v Cliffe Steamship Co* [1932] 1 KB 490 (KB)
[133] *Albert E Reed & Co Ltd v Page Sons & East Ltd* [1927] 1 KB 743 (CA)
[134] *Sadler v Dixon* (1839) 5 M & W 405 (Court of Exchequer)
[135] *Supra* at fn. 125
[136] *Vortigern, The* [1899] P 140 (CA)
[137] *Adamastos Shipping Co Ltd v Anglo Saxon Petroleum Co Ltd* [1957] 2 QB 233 (CA), [1959] AC 133 (HL)
[138] *Linea Naviera Paramaconi SA v Abnormal Load Engineering Ltd* [2001] 1 Lloyd's Rep 763 (QB)

until the vessel starts on her voyage. Where there is more than one loading the beginning of the voyage would occur once the loading of all the cargo is complete and the vessel sets from the last port. The approach voyage stage is not seen to trigger the seaworthiness obligation[139].

Where there are two conflicting clauses as to when seaworthiness should apply, Moore-Bick J believes that in some charterparties "the voyage" normally means the whole voyage, including the approach to the port[140]. The Court of Appeal disagreed[141] and held that "the correct construction when read together in the context of the contract as a whole and in the light of commercial considerations is that the disponent owners' obligation as to seaworthiness at each stage was the same, namely to exercise due diligence to make the vessel seaworthy."

Due diligence is said to be the equivalent of reasonable care and skill[142], which is why a lack of due diligence is seen as negligence[143]. The duty to exercise due diligence is a non-delegable duty as it attaches itself to each person who carries out work on the vessel. If anyone however, does not exercise the required care and skill, the carrier will be held liable for the damages arising out of the unseaworthiness[144]. For example, should the vessel not go as fast as she should, as a result of faulty equipment, resulting in her being unable to escape a pirate attack, the vessel would be unseaworthy and the carrier held liable.

It has already been argued that this duty, can also relate to piracy when we look at The Hague-Visby Rules mentioned above, which incorporate the importance of the competency of seamen on the vessel. This could be construed to extend to situations involving pirates as a competent seaman could help in withstanding a pirate attack. Furthermore under The Hague/Hague-Visby Rules, the list of exceptions to 'perils of the sea' does not include piracy and as a result of case law establishing that piracy is indeed a 'peril of the sea', this would be incorporated into the charterparty, and seaworthiness would therefore be affected.

(iv)Duties to ensure seaworthiness

The shipowner will be held responsible for any damages to the cargo where the vessel proved to be unseaworthy at the beginning of the voyage and the damage occurred as a result of the condition of the vessel[145].
As a result of the applicable Hague and Hague-Visby Rules, the obligation of seaworthiness switches from an absolute duty, as in common law, to a duty to

[139] *Supra* at fn. 104
[140] *Eridania SpA v Oetker (The Fjord Wind)* [1999] 1 Lloyd's Rep 307 (QB)
[141] *Ibid;* per Clarke LJ
[142] *Papera Traders Co Ltd v Hyundai Merchant Marine Co Ltd (The Eurasian Dream) (No.1)* [2002] 1 Lloyd's Rep 719 (QB)
[143] *Union of India v NV Reederij Amsterdam (The Amstelslot)* [1963] 2 Lloyd's Rep 223 (HL)
[144] *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd (The Muncaster Castle)* [1961] 1 Lloyd's Rep 57 (HL)
[145] *Europa, The* [1908] P 84 (Probate, Divorce & Admiralty Division)

use due diligence. This due diligence obligation contains two requirements: the first is that the owner must undertake inspections, repairs or preparations to the vessel, which a skilled and prudent shipowner would reasonably undertake to perform; the second is that the work carried be out with reasonable care, skill and competence. This work ethic must be followed by every person carrying out work there, for the owner to qualify as working diligently[146]. Where the bad work was concealed and could not be uncovered with reasonable care, the owner shall not be held responsible[147]. The seaworthiness also encompasses the duty to provide for bunkers and they have to last for the entire journey. As with stages the bunkers need to be checked at the beginning of each voyage/stage, responsibility of which rests with the carrier.

(v)Damages due to unseaworthiness and causation

"Neither the undertaking of seaworthiness at the time the charter is made nor the undertaking as to seaworthiness at the time of delivery are conditions. They are intermediate terms and whether breach of them allows the charterers to treat the charter as discharged depends on the nature and the consequence of the breach[148]." This means that the consequence of a breach of this term, the events of which could constitute this have been noted above, would depend on how serious the breach really is and whether it goes to the root of the contract[149]. Although the obligation of seaworthiness, whether implied or expressed, has been found to not be a condition but rather an intermediate term[150], under a time charterparty should the vessel arrive in an unseaworthy condition, the charter has the right to refuse the vessel.

Where the vessel is delivered and she is not seaworthy the owner will have breached his/her duty and the charterer will be entitled to damages. Due to freedom of contract a shipowner may contract out of his/her implied duty to provide for a seaworthy vessel, so long as it is done in clear and unambiguous words[151]. This breach however would not qualify the charterer to terminate the contract unless the breach was so substantial that it went to the root of the subject of the contract[152]. Piracy, as a 'peril of the sea' could cause the vessel to become unseaworthy, thereby qualifying for whatever remedy is deemed necessary by the court; whether termination of the contract, damages, or the vessel simply going off-hire.

---

146 *Supra* at fn. 144
147 *Supra* at fn. 111
148 Wilford, M., Coghlin, T., Kimball, J. D., *Time Charters*, 4th Edition (Informa, London, 1995) at [97]
149 *Supra* at fn. 105; *Maredelanto Compania Naviera SA v Bergbau-Handel GmbH (The Mihalis Angelos)* [1971] 1 QB 164 (CA); Supra at fn. 101; *Tully v Howling* (1876-77) LR 2 QBD 182 (CA); *J&E Kish v Charles Taylor & Sons & Co* [1912] AC 604 (HL); *Supra* at fn. 145; *New York & Cuba Mail Steamship Co v Eriksen & Christensen* (1922) 10 Ll L Rep 772 (KB); *Snia Societa di Navigazione Industriale et Commercio v Suzuki & Co* (1924) 18 Ll L Rep 333 (CA)
150 *Supra* at fn. 105
151 *Nelson Lines (Liverpool) Ltd v James Nelson & Sons Ltd* [1908] AC 16 (HL); per Lord Loreburn LC at [19]
152 *Supra* at fn. 105

Where the unseaworthiness, however, causes a delay in the charter, the contract will cease to exist, and the charterer discharged, as the delay frustrated the object of the charterparty[153]. The detention period of the vessel by the pirates has increased; it could be submitted therefore that should she be detained excessively by the pirates this loss of time would result in the vessel being unseaworthy, and the possibility of the charterparty being frustrated.

If she is initially unseaworthy, but the breach is not serious enough to go to the root of the charterparty, there will be no option to terminate. If however, the owner refuses to rectify this damage, this could act as an indication that the owner no longer wishes to be bound by the contract and the charterer has the option to be discharged from the charterparty. The unseaworthiness need not be the most significant cause so long as it is an actual, effective or real cause of the loss[154]. It must be more than a causa sine qua non of the loss[155].

The carrier will however be obliged to prove which damages occurred as a result of the unseaworthiness, and which from the excepted peril. Piracy is considered a 'peril of the sea' under case law however, since under The Hague and Hague-Visby Rules piracy isn't listed as a 'peril of the sea' exception but is under the Rotterdam Rules, it could be submitted that piracy was envisioned as a peril, thus being a cause for the vessel becoming unseaworthy. Also a vessel could be found to be unseaworthy where she is fit to encounter the ordinary 'perils of the sea' during most of the year, but not equipped to handle ice or where she should have expected a hurricane[156]. This could relate to piracy where the crew is not well equipped to fend off pirates, and as it is considered a 'peril of the sea', this would constitute the unseaworthiness of the vessel.

(vi)Findings

It could be argued that this charterparty issue has little if nothing to do with piracy, as it was ruled in "The Saldanha", that seaworthiness should not be taken into consideration when discussing piracy. As argued throughout, however, it is believed that this judgment is erroneous since piracy should indeed affect the seaworthiness of the vessel. It has been established that the seaworthiness of the vessel can be affected not only by the 'peril of the sea' argument but also by the competency of the crew. It is submitted therefore, that both these factors are what links piracy to the issue of seaworthiness.
Where the argument is based on 'perils of the sea', on countless occasions it has been established that piracy is a 'peril of the sea' according to case law, even when regarding the Hague/Hague-Visby Rules, as piracy has not been listed as an exception to 'perils of the sea'. It could be stated that taking into

[153] *Snia Societa di Navigazione Industriale et Commercio v Suzuki & Co* (1924) 18 Ll L Rep 333 (CA)
[154] *Smith Hogg & Co Ltd v Black Sea & Baltic General Insurance Co Ltd* [1940] AC 997 (HL)
[155] *Paterson Zochonis & Co Ltd v Elder Dempster & Co Ltd* [1924] AC 522 (HL)
[156] *Texas and Gulf S.S. Co v Parker* (1920) 263 Fed Rep 864; *Hanson v Haywood Bros. & Wakefield Co.* 152 F 401 (7th Cir 1907)

consideration what was established in case law, piracy would indeed be a 'peril of the sea' and therefore be closely linked with seaworthiness, to such an extent that it would cause the vessel being unseaworthy.

As discussed above, the competency of the crew should also be evaluated in how effectively they complete and execute their duties, and this relates to the previous chapter discussing off-hire. The most important of these duties is looking after the vessel itself and it is in this respect that piracy becomes a problem. Piracy renders a vessel unsafe, however the Master and the crew can safeguard the vessel by protecting it in simple ways. Preventative measures have proved successful in deterring most pirates as seen in the scenarios mentioned above, therefore it can be stated that in using these measures the crew would indeed be protecting the vessel from any harm arising from a pirate attack. Should the crew execute in a competent manner the exercises and measures to be taken on the vessel to protect it, the risk of a successful pirate attack would diminish. Should the crew not execute these exercises and measures in a competent manner, it is likely that a pirate attack would prove successful. This clearly evidences that preventative measures would indeed affect the competency of the seamen; thereby further ensuring the seaworthiness of the vessel.

# Conclusion

The future looks rather bleak for all those who are affected by piracy. It is ever increasing and becoming more problematic; with the statistics mentioned in the introduction only expected to increase. Difficulties arising from the definition of piracy only add to the complicating factors surrounding it. It is for these reasons that defining piracy as a 'peril of the sea' is important. In "The Saldanha" the court did not believe piracy was a 'peril of the sea', and that the efficiency of the crew could thus be affected by piracy. As a result the vessel was held to be on hire. Additionally, where seaworthiness is concerned there are two requirements that need to be fulfilled; that the vessel is seaworthy, and that it can withstand the 'perils of the sea', whilst still taking into consideration the efficiency of the crew. Thus in these two charterparty issues, both the efficiency of the crew, and 'perils of the sea' are factors which are constantly referred to throughout.

According to case law, piracy is a 'peril of the sea', however when viewing both the Hague/Hague-Visby Rules as well as the Rotterdam rules, the position becomes slightly more confusing. The list of exceptions to 'perils of the sea' now applies and in the event that piracy falls within these exceptions, the carrier will be exempt from liability. The Rotterdam rules' list of exceptions does include piracy, however, the previous Hague-Visby rules do not. Surely this should mean that piracy was identified as a 'peril of the sea', but not enough to be made an exception, as occurred later. Therefore, under the Hague-Visby rules it can be submitted that piracy is a 'peril of the sea'.

Where the event occurs as a result of the negligence of the carrier he should be held liable. Thus where the Rotterdam Rules apply but, due to negligence on

behalf of the carrier the vessel is successfully attacked by pirates, he will held liable notwithstanding the fact that piracy falls under the excepted perils list.
After having established that piracy is indeed a 'peril of the sea' what would the consequences be? It could be contemplated that as a result of a pirate seizure the vessel could become unseaworthy as well as going off-hire. As mentioned above with regards to seaworthiness, a 'peril of the sea' that caused the loss or damage would result in the vessel becoming unseaworthy, as well as the carrier being in breach. Should this breach be serious enough, there would be a right to terminate the charterparty. Where, however, she is detained for a long period, as is now the case with piracy, the contract may become frustrated, but this argument has rarely been accepted by the courts. Furthermore, should the crew or Master act in an incompetent or inefficient manner the vessel could not only become unseaworthy but she would also go off-hire. The consequence of this would be that the charterer would not be obligated to pay hire of the vessel during that period.