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SHOWCASING EXCELLENCE IN RESEARCH

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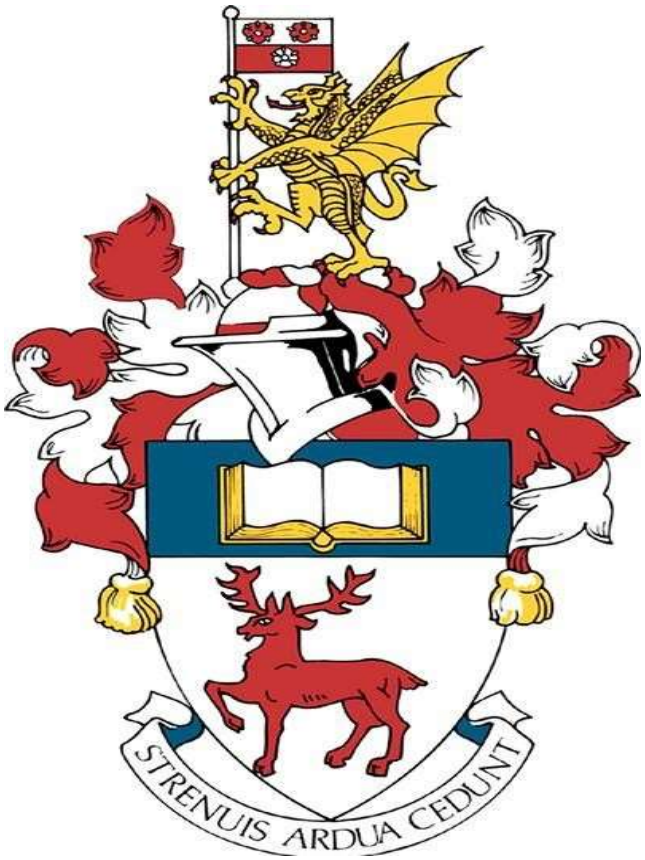

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The Editors also wish to thank all members of Southampton Law School who have aided in the creation of this volume.

Ece Selin Yetkin and Fatih Durmaz
Editors-in-chief, Southampton Student Law Review
September 2024

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Foreword

It is a pleasure and a privilege to be asked by this year's editor to offer a foreword to the 14th Edition of the Southampton Student Law Review. The SSLR operates as an important and innovative pedagogical endeavour on various fronts. On the one hand, it offers an opportunity for members of the Editorial Board to develop the review, editorial and management skills imperative to the running of a legal journal, transferable skills that they will necessarily call upon in their future careers, whether in academia or legal practice. On the other, the SSLR provides students, both past and current, with an opportunity to evidence their excellent research and legal writing skills and a forum to publish some of the exciting research in which they have been engaged during their time at Southampton Law School.

The content of the 14th Edition reflects accurately the high quality of research being undertaken by students at Southampton. The breadth of topics covered by the students in their articles, case notes and dissertations is evidence of their passion for the law, and desire to delve into and unpack pressing legal challenges, both domestic and global. To this end, it is also a reflection of Southampton Law School's mission and pursuit to be a global Law School, firmly rooted in the UK with an international reputation for excellence in education, research and enterprise.

The publications reflect the endeavours by the students to tackle not only legal, but also political challenges. In the field of criminal law and justice, this is reflected in Williamson's critical analysis of "stop and search" practices in policing, Watt's important reflections on the role of the courtroom in cases of miscarriages of justice and Little's unpacking of the causes of this problematic concern. Moreover, Abdullah examines one of the key challenges arising in relation to youth justice, namely the imposition of minimum sentences in instances of serious crimes, while Sivagnanam looks to critically evaluate the minimum age of criminal responsibility. Similarly, other pieces tackle topics with inherent legal and ethical dimensions, including Khan's analysis of the Haynes' case, in which it was held that "there can be no property in a corpse" while Tatsi's piece looks to challenging questions of accountability in the field of healthcare where decisions are made as to how best resources should be allocated. Other publications, including Bower's analysis of The Ocean Victory case, and Rejwerska's extensive review of the doctrine of causation, reflect the longstanding tradition of excellence in the field of maritime law and (marine) insurance at Southampton Law School. While Hristova engages in a thorough assessment of the concept of the insurable interest, Jordan and Wu offer insightful assessments of a fundamental and challenging problematic in the field of insurance law, namely fraudulent claims. Edwards' contribution on paternalism and autonomy in healthcare decision making reflects the importance of approaches to legal research which bridge theory and practice, while Efstathiou tackles the legally, ethically and politically-charged question of the need for reform of the UK's surrogacy regime. Finally, Kaur examines

one of the key challenges arising in the field of law and technology, namely the need to balance the fundamental right to privacy with other interests in a data driven economy.

The scope, depth of analysis and diversity of these contributions is to be applauded, and assures us that the future of legal practice, legal research and academia, is in solid hands. I will end by paying tribute to the hard work and dedication of the Editorial Board and the journal's editors, Ece Selin Yetkin and Fatih Durmaz.

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Striking a Balance Between Paternalism and Autonomy in Healthcare Decision-Making

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Abstract

One of the most important elements of healthcare practice is the act of choosing the desired medical treatment. However, it is disputed whether doctors should be granted freedom to decide treatment plans on behalf of patients, or if patients should be provided with information to decide on their own. This presents a clash between paternalism and autonomy. The courts within England and Wales, as well as the British Medical Association, explore this ethical dilemma and present guidelines pertaining to how these concepts interact in practice. This essay analyses paternalism and autonomy, and argues a balanced approach between the two is necessary to allow patients a degree of freedom in their decision-making, but also in allowing doctors ensure patients follow the best available treatment plan.

Introduction

Paternalism is the interference of a state or individual with another, regardless of their will, claiming the individual will be protected from harm.[1] Alternatively, autonomy grants competent adults the right to make informed decisions.[2] These concepts provide conflicting guidance in healthcare law. Thus, to determine whether paternalism is justified in healthcare, this essay will focus on the extent paternalism should be exercised when providing a patient with medical treatment, and how the degree of autonomy allocated to patients adjusts accordingly.

Firstly, this essay will define and explore paternalism with reference to Dworkin, Farrell and Dove.[3] Secondly, the extent autonomy should be justified in healthcare will be discussed. Thirdly, a reformed approach supporting a balance between paternalism and autonomy will

[1] Gerald Dworkin, 'Paternalism', *The Stanford Encyclopedia of Philosophy* (Fall edn, 2020) https://plato.stanford.edu/archives/fall2020/entries/paternalism/ accessed 5 November 2023.

[2] British Medical Association, 'Autonomy or self-determination as a medical student' (*BMA*, Friday 1 May 2020) https://www.bma.org.uk/advice-and-support/ethics/medical-students/ethics-toolkit-for-medical-students/autonomy-or-self-determination accessed 4 November 2023.

[3] Dworkin (n 1); Anne-Maree Farrell and Edward S Dove, *Mason and McCall Smith's Law and Medical Ethics* (12th edn, OUP 2023), 40.

be proposed with reference to *Re T* and *Burke*, before concluding the British Medical Association (Hereinafter BMA)[4] exhibits progression towards this balance.[5]

1. The Role of Paternalism in Healthcare

Paternalism allows doctors to make medical decisions on behalf of the patient.[6] We can distinguish strong paternalism, which overrides somebody's free and informed choice, and weak paternalism, which overrides somebody's non-voluntary or ill-informed choice.[7] When receiving medical treatment, strong paternalism removes a patient's ability to choose between options. However, if the patient is in a critical condition, one might agree the doctor should exert control due to the time restraint. Furthermore, Chester conveys the difficulty of obtaining patient consent when in unfamiliar surroundings and emphasises the experience of doctors in the medical environment, implying they are in a better position to make decisions.[8] However, applying a strong paternalistic approach here may breach the principle of autonomy as it implies healthcare professionals should go to no extra lengths to accommodate for patients. Therefore, strong paternalism is rarely justified in healthcare.

Alternatively, the BMA establishes instances where paternalism is exercised in healthcare.[9] It recognises ethical dilemmas arise when the patient disagrees with advice from medical professionals.[10] Also, it establishes the extent of choice a patient is attributed, for example they may choose their GP surgery, however cannot choose the location of their emergency services when speed of access is important.[11] This balanced approach between paternalism and autonomy allows some scope for respecting the patient's wishes, however the medical professional retains most control. Accordingly, the extent paternalism is adopted in healthcare and how far healthcare should go to respect patient autonomy as a core principle gives rise to debate.

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[4] The BMA was established in the year 1832. It aims to represent and support UK doctors and medical students through campaigning on issues impacting the medical profession.

[5] [1993] Fam 95; [2005] EWCA (Civ) 1003; BMA (n 2).

[6] Peter Lepping, Tom Palmstierna and Bevinahalli N Raveesh, "Paternalism v. autonomy – are we barking up the wrong tree?" (2010) 2(209) BJPsych https://www.cambridge.org/core/journals/the-british-journal-of-psychiatry/article/paternalism-v-autonomy-are-we-barking-up-the-wrong-tree/1BE3BFE8D82E05C221B632BE8C746533 accessed 6 June 2024.

[7] Farrell and Dove (n 3), 40.

[8] Michael R Chester, 'Consider Paternalism' (2010) 341 BMJ, 688 https://www.bmj.com/content/341/bmj.c5324.

[9] British Medical Association, 'The doctor-patient relationship toolkit' (*BMA*, 2023) https://www.bma.org.uk/media/7051/bma-the-doctor-patient-relationship-toolkit-final.pdf?_gl=1*18vgojv*_up*MQ..&gclid=Cj0KCQjwy4KqBhD0ARIsAEbCt6jY9XjywbROhejnZ-d-UH81vQfAzmWbzb2aJ9ACVhGVrjlheUflm1YaAlndEALw_wcB accessed 5 Nov 2023.

[10] ibid 7.

[11] ibid.

2. The Importance of Autonomy in Healthcare

Chester v Afshar asserts paternalism no longer rules as a dominant law.[12] The case concerned a neurosurgeon, Mr Afshar, who failed to exercise his duty to take reasonable care when examining his patient, Miss Chester.[13] Mr Afshar did not disclose the risk of harm of the surgery to Miss Chester before it was performed.[14] The court concluded had Miss Chester been informed of the risk of harm prior to the surgery, it is likely she would not have agreed to it.[15] Still, with a majority 3-2, the court dismissed Miss Chester's appeal on the grounds that the risk of the harm did not increase due to Mr Afshar's failure to disclose the harm. Lord Steyn purported informing patients of serious risks in procedures is their *prima facie* right:[16]

> "In modern law medical paternalism no longer rules and a patient has a *prima facie* right to be informed by a surgeon of a small, but well established, risk of serious injury as a result of surgery. In modern law medical paternalism no longer rules and a patient has a *prima facie* right to be informed by a surgeon of a small, but well established, risk of serious injury as a result of surgery."[17]

Autonomy poses a stark contrast to paternalism. It is one of four core principles laid out by Beauchamp and Childress, proving its magnitude.[18] However, Coggon debates the extent patients should make autonomous decisions by distinguishing types of autonomy.[19] Ideal desire autonomy compliments paternalism in healthcare as it acknowledges the existence of an ideal treatment which a doctor may persuade a patient to undergo. Alternatively, best desire autonomy allows the patient to exert control over their treatment in consideration of their beliefs. Nevertheless, it is contested whether individual beliefs should override paternalistic decisions in healthcare.

The Mental Capacity Act 2005 establishes a doctor can make decisions in the patient's best interests if they do not have the capacity to express their own wishes.[20] For example, the doctor must consider the beliefs and values of the individual.[21] Many would argue autonomy is further justified in healthcare, rather than paternalism, as it considers the individual as a whole.

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[12] *Chester v Afshar* [2004] UKHL 41, [16].
[13] ibid [4].
[14] ibid [5].
[15] ibid [6].
[16] ibid.
[17] ibid.
[18] Tom L Beauchamp and James F Childress, *Principles of Biomedical Ethics* (1979, OUP).
[19] John Coggon, 'Varied and principled understandings of autonomy in English law: justifiable inconsistency or blinkered moralism?' (2007) 15(3) Health Care Analysis 235.
[20] Mental Capacity Act 2005, s 4 <https://www.legislation.gov.uk/ukpga/2005/9/contents> accessed 6 June 2024.
[21] ibid s 4(6)(b).

However, s 4(6)(b) of the Act provides no practical guidance as how the doctor can decide considering the patient's beliefs.[22] So, how far can we expect healthcare to respect autonomy if it does not provide sufficient remedies?[23] This alludes paternalism is further justified in healthcare than autonomy from a practical perspective because it allows for medical treatments to be administered without considering subjective values of patients.

3. Finding Harmony Between Paternalism and Autonomy

Various cases present paternalism as useful in healthcare, suggesting it is more justified than autonomy. In *Re T (Adult: Refusal of Treatment)*, the court held the doctors were justified in administering the plasma transfusion to the claimant, despite her religious views against it.[24] They successfully applied the principle of necessity, meaning the doctor acted to preserve the life of the patient when she was unable to express her wishes.[25] This portrays a legal justification of the paternalistic approach in healthcare.

Similarly, *R (on the application of Burke) v General Medical Council* expresses how patients cannot place a duty on doctors to keep them alive.[26] As with *Re T*,[27] this case favours paternalism when answering complex moral questions in healthcare as it empowers medical professionals. Nevertheless, some might argue paternalism is tyrannical; since the enactment of the Human Rights Act 1998, there has been a growing focus on rights-based movements in the UK, suggesting autonomy would be justified in healthcare rather than paternalism.[28] Still, medical professionals are trained and experienced, thus they ought to exercise some paternalism in healthcare owing to their expertise. Therefore, a balance between paternalism and autonomy is required in healthcare. This allows healthcare professionals to retain some degree of control in time-restricted or severe situations, whilst attributing more control to the patient in other circumstances to respect their rights.

Brazier supports this perspective and suggests one must consider how patient choices will affect others.[29] This limits autonomy in expressing patients can never have freedom of choice as it could affect society at large. Yet, is this realistic? Perhaps we can apply Brazier's perspective to consider how patient autonomy affects rationing in healthcare services. For example, if a patient favours a more expensive treatment when it is not necessary, one could

[22] ibid.
[23] Arthur J Caplan, 'Why autonomy needs help' (2014) 40(5) J Med Ethics 301.
[24] [1993] Fam 95, [62].
[25] ibid [41], [60].
[26] [2005] EWCA (Civ) 1003, [34].
[27] *Re T (Adult: Refusal of Treatment)* (n 24).
[28] Human Rights Act 1998.
[29] Margaret Brazier, 'Do no harm-Do patients have responsibilities too?' (2006) CLJ 65(2) 397.

justify the doctor preventing this. Therefore, paternalism can be justified in healthcare to some extent.

Conclusion

To conclude, paternalism alone cannot be justified in healthcare due to its lack of respect for patient rights. However, coupled with autonomy, paternalism can be justified when it is necessary, rather than always removing choice from the patient. The BMA provides a step in this direction through identifying instances where paternalism may justifiably intervene and limit autonomy, as previously mentioned.[30] However, further guidelines with adequate details are needed to assert how this balance operates in practice.

[30] BMA (n 2).

No-Property Rule in Light of The Haynes Case

Bibi Khan

Abstract

This article examines the development of the no-property rule for dead bodies and separated body parts in the light of the Haynes Case. The author will include case laws related to the no-property rule for dead bodies and separated body parts and compare them with the Haynes Case. This article also analyses the exceptions to the no-property rule and the limitations of its application. Finally, it then presents recommendations moving forward, regarding the misinterpretation that created the no-property rule for dead bodies and separated body parts.

Introduction

Lord Chief Justice of England and Wales, Edward Coke is criticised for misinterpreting the rights of a dead body in the case of *R v Haynes* (hereinafter Haynes case).[1] Although the case itself draws wide attention, it was the misinterpretation by Coke himself that is the root of the issue that prevails in the common law today: the no-property rule. I discuss how this misinterpretation has negatively impacted the common law and has since been applied by the courts to both dead bodies and separated body parts. Although specified exceptions to the rule exist, this emphasises the contradictory nature of the rule, established by mistake, that urgently calls for reform.

1. Development of the no-property rule

It is put forward that the common law did not set out to establish the no-property rule purposefully, but that it was an accidental result of the ecclesiastical courts.[2] The Haynes case itself concerned a grave robber, William Haynes, who stole the clothing from three corpses to sell second-hand, reburying the corpses afterwards. The issue in the case was whether a dead body had the *capacity* to own.[3] The court ruled that dead bodies do not have the capacity to own, therefore no property right of a dead body can be interfered with. Instead, Haynes had interfered with the right of the person to whom the clothes belonged. The defendant was only convicted for stealing the clothing. Hence, the Haynes case ruled that a dead body does not have the right to own. This has been misunderstood by authors such as James Stephen[4] and

[1] Rohan Hardcastle, *Law and the Human Body: Property Rights, Ownership and Control* (1st edn, Hart Publishing, 2007).
[2] Remigius Nwabueze 'Proprietary interests in organs in limbo' (2016) 36 Legal Studies 279, 281.
[3] *R v Haynes* [1614] 77 ER 1389.
[4] Sir J Stephen, *A Digest of the Criminal Law* (London: Macmillan, 5th edn, 1894) 252.

William Blackstone, consequently regarding the stealing of a corpse as 'no felony'.[5] According to this, it was not the case itself that created the no-property rule.

However, Edward Coke misinterpreted this case. He stated that the burial of a cadaver is *nullius in bonis*.[6] As such, Coke misinterpreted dead bodies not being able to own, to the rule that dead bodies cannot *be* owned, creating the no-property rule over dead bodies. This is a critical misinterpretation, as this mistake has become the law, evidenced by later cases, such as in *Williams v Williams*.[7] The court reinforced that a dead body does not qualify as property, and in the context of a trust, the executor only has a right to possess the body to fulfil the duty of burial. This cannot be transferred to another, as the court affirmed there is no property of a dead body.[8] I criticise this rule for lacking a justificatory basis, raising the question of why a carelessly created rule should govern a crucial issue. This is supported by Nwabueze, who argues that the law should recognise proprietary interests for excised organs.[9] Although the court acknowledges this accidental rule, I contend only Parliament has the ability to amend this mistake through the legislative branch, and not via the judiciary, to achieve legal certainty.

1.2 No-Property Rules Applied by the Case Law

The common law is seen to follow the misinterpreted position made by Coke, that dead bodies cannot be owned. This is confirmed in *Williams v Williams*. This case involved the sister in law of the deceased cremated the remains of the body in Italy based on a secret trust arrangement between them.[10] The court refused her right to enforce the claim of expenses. Instead, the court reinforced Coke's mistaken interpretation, that a dead body cannot be owned, therefore it could not be treated as property in relation to being transferred.[11] This case affirms the no-property rule and is significant in establishing the legal position of the court based on this misinterpretation.

Further, the no-property rule was applied in the case of *R v Sharpe.*[12] This case involved the son of the deceased, who took the mother's corpse to be buried with the father according to the Anglican tradition.[13] His argument that his mother's corpse belonged to him was rejected by the court on the basis of the mistaken no-property rule. The reasoning stated that her dead body could not belong to him under law, so he had no right to take it from the graveyard. As such,

[5] William Blackstone, *Commentaries on the Laws of England* (1st edn, OUP, 1783).
[6] Edward Coke, 'Institutes of the Laws of England' (1669).
[7] *Williams v Williams* [1882] 20 Ch. D 659.
[8] Ibid [659].
[9] Remigius Nwabueze 'Proprietary interests in organs in limbo' (2016) 36 Legal Studies 279, 301.
[10] Ibid.
[11] Heather Conway, 'Succession Law Rules and the Fate of the Dead' (2019) QUB 7.
[12] *R v Sharpe* [1857] Dears & Bell 160.
[13] Ibid.

he was charged with trespass. Although the punishment was nominal, the legal effect was significant, as this case confirmed the establishment and application of the no-property rule. This shows the widespread effect of Coke's misinterpretation, now solidified within the common law.

1.3 No-Property Rule's Application to Separated Body Parts

Coke's misinterpretation of the Haynes case not only effects the common law on dead body parts, but also equally to separated body parts. This is established in *Dobson v North Tyneside Health Authority.*[14] It held that the hospital was not liable for destroying or refusing access to the brain tissue, as no property right of the woman was interfered with. The court confirmed that the no-property rule extends to separated body parts. Despite this, the exception to the no-property rule was acknowledged by the court, that the preservation of the tissue could amount to transformative work to become her property.[15] However, its application was rejected here. This conveys the problem deriving from Coke's misinterpretation, also applied to separate body parts.

1.4 Exceptions to the No-Property Rule

Where the court has taken Coke's misinterpretation to apply under common law, exceptions to the no-property rule have arisen, which can be argued as a partial solution to the longstanding problem. First applied in the Australian case of *Doodeward v Spence*,[16] applying work or skill to a corpse or separated body part, that significantly transforms it, is capable to being property.[17] However, this outcome was criticised by authors such as Brazier, who identify the courts as unfairly favourable towards the biotechnology industry, contrary to the rights of relatives and parents, where this is not regarded as property for them.[18] Brazier criticised the law for being contradictory and failing to account for the emotions of relatives in these cases.[19]

Further, this exception to the no-property rule was applied in *R v Kelly.*[20] The defendant gained illegal access to the Royal College of Surgeons, which preserved bodies containing specialised skills and dissection techniques applied to them. Kelly, who obtained these body parts as an artist, was charged with theft. The court held that a dead body qualifies as property when specialised skills have been applied to it as an exception. This is significant as the court also recognised new exceptions that could possibly apply in the future. However, these to not

[14] *Dobson & Ors v North Tyneside Health Authority* [1996] EWCA Civ 1301.
[15] *Doodeward v Spence* [1908] 6 CLR 406.
[16] *Doodeward v Spence* [1908] 6 CLR 406.
[17] Ibid.
[18] Margaret Brazier 'Retained Organs: ethics and humanity' (2002) 22 SLS 550, 551.
[19] Margaret Brazier 'Retained Organs: ethics and humanity' (2002) 22 SLS 550, 551.
[20] *R v Kelly* [1999] QB 621.

currently apply. Notably, the court acknowledged Coke's misinterpretation in this case. Despite this, no change was made, as the position of the common law historically prevailed. I criticise the transformative exception to the no-property rule, as it does not establish what constitutes as sufficient work or skill, revealing ambiguities and failing to provide an adequate remedy to the problem of the no-property rule.

Conclusion

The problem under the common law is not the Haynes case itself, but rather the misinterpretation that was produced by Edward Coke, leading to the establishment and application of the no-property rule to dead bodies and separated body parts. Although exceptions exist, they lack clear application and fail to remedy the primary issue that the legal position of the no-property rule has no legal basis on which to be applied, and should be reformed to acknowledge dead bodies and body parts as property, which would ensure justice for the deceased and survivors. Acknowledging property rights of dead bodies and separated body parts would be beneficial to survivors of the deceased. This would improve the reasonable wishes of surviving families being upheld,[21] as well as the wishes of the deceased. In the case of separated body parts, justice would be made accessible to victims subjected to unconsented medical extractions and afford them legal remedies, such as the right to compensation.

[21] *Re E (A Child: Burial Arrangements)* [2019] EWHC 3639 [12]; *Fessi v Whitmore* [1999] 1 FLR 767.

The Significance of *The Ocean Victory* Case in Maritime Insurance

Jamie Bowers

Abstract

This case analysis looks at Gard Marine and Energy Ltd and Another v China National Chartering Company Ltd and Another[1]. The judgment of the Supreme Court is critically analysed for its significance; both in the law of maritime insurance and the broader maritime industry. Three main issues were considered by the court and are each dealt with below. Firstly, the court considered whether a standard of absolute, or reasonable, safety should apply to Safe Port clauses. Secondly, Insurer's rights in subrogation were considered and lastly, the Supreme Court looked at the defences available to Charterers under the Convention on Limitation of Liability for Maritime Claims 1976.

Introduction

The Ocean Victory was grounded in the port of Kashima in Japan on 24 October 2006.[2] At the time, the vessel was under a demise charterparty and two-time charterparties, all of which contained a safe port warranty on materially identical terms.[3] Insurers sued to recover indemnity from the time charterers, arguing that there had been a breach of the safe port warranty. In the first instance in *The Ocean Victory*[4] case recovery was allowed[5], however, the Court of Appeal reversed this decision.[6] At the Supreme Court three issues were considered; the safe port warranty, the insurer's rights to recover, and the rights of the charterers to limit their liability[7]. Each of these issues will be critically considered in turn, and their significance to the law of insurance will be explained. It will be shown that this was a significant case in the development of the law of maritime insurance.

1. The Safe Port Warranty

At first instance the judge relied on the classic definition of a safe port from *The Eastern City*[8], that a port is not safe unless the particular ship may arrive in it, use it, and depart from it without, in the absence of some abnormal occurrence, being exposed to danger which cannot be avoided by good seamanship. This led the judge at first instance to determine the issue was

[1] Gard Marine and Energy Ltd and Another v China National Chartering Company Ltd and Another (The Ocean Victory) [2017] UKSC 35

[2] *Gard Marine and Energy Ltd and Another v China National Chartering Company Ltd and Another (The Ocean Victory)* [2017] UKSC 35 [1].

[3] ibid [2].

[4] (n 1).

[5] [2014] 1 Lloyd's Rep 59.

[6] [2015] EWCA Civ 16.

[7] (n 1) [8].

[8] (n 3) [99] and *Leeds Shipping Co Ltd v Societe Francaise Bunge* [1958] 2 Lloyd's Rep 127, [131].

of safety, and not reasonable safety.[9] Author Avgoustis supports this decision, arguing that making the standard one of reasonable safety would add an unwelcome level of uncertainty to the safe port warranty.[10] However, this view is unconvincing for two reasons. Firstly, this is because it did not reflect more recent case law on the issue. Lord Denning in *The Evia No 2*[11] (a judgment a quarter century more recent than *The Eastern City*) provided for a standard of reasonable safety, so long as the ship is competently handled, for instance. Secondly, the impact of holding a standard of absolute, rather than reasonable, safety is that a port cannot be saved from being labelled unsafe even where the port owners have taken every possible precaution to safeguard the vessels within if these vessels still become damaged. This approach is a very strict interpretation of the charterer's duties, and so is disproportionately favourable to the ship's owners. This upsets the commercial balance between the insurer and the insured, as even abnormal occurrences damaging a ship may not be covered by their insurance when the precise point of ensuring a vessel is to get protection from such abnormal occurrences. It follows that the charterers would for all practical purposes be the owner's insurers of the vessel. As such, the decision of the judge at first instance was open to criticism in relation to the safe port issue. The significance of this is more than conceptual. As Kashima is considered to be a port of modern setup and safety standards, as well as a hub of Pacific shipping[12], labelling it an unsafe port for the purpose of safe port warranties caused inconvenience to charterers in the Pacific who would have sought to make use of it. Furthermore, it was possibly an unforeseen consequence of the judgment at first instance that it would afterwards become questionable whether all ports which are known to be susceptible to any of the conditions affecting Kashima, like a long swell, would be labelled as unsafe, affecting all vessels which may have sought to dock in them. For a first-instance judgment, the court therefore managed to cause a significant disturbance to the shipping industry.

The judgment of the Supreme Court benefits, therefore, from taking an alternative approach. Lord Clarke makes clear the difference between foreseeability and abnormal occurrences in the context of insurance law. He echoes the Court of Appeals' observations, giving the example that earthquakes in San Francisco or volcanic eruptions in Syracuse (beneath Mount Etna) are foreseeable, it does not follow that this means they are not abnormal occurrences.[13] He sets the test as asking whether the danger alleged to make a port unsafe was 'something well removed from the normal' which neither the owner nor the charterer would have in mind.[14] Two factors

[9] (n 3) [100].

[10] Ioannis Avgoustis, "Safety' or 'Reasonable Safety'? Interpreting the 'Safe Port' Warranty in Charterparty Agreements' [2013] 19(4) Journal of International Maritime Law 283, 285.

[11] *Kodros Shipping Corporation v Empresa Cubana de Fletes (The Evia) (No.2)* [1982] 1 Lloyd's Rep 334.

[12] Ioannis Avgoustis, "Safety' or 'Reasonable Safety'? Interpreting the 'Safe Port' Warranty in Charterparty Agreements' [2013] 19(4) Journal of International Maritime Law 283, 288.

[13] (n 1) [39].

[14] ibid [27].

combined to cause the grounding of the Ocean Victory, a long swell, and a strong gale.[15] The combination of these factors was a previously unrecorded occurrence at Kashima[16]. As these fell within the characterisation of 'something well removed from the normal', Kashima was therefore considered to be a safe port, and the safe port warranties were not breached. The Supreme Court's judgment here is significant in that it restores the commercial balance between charterers and ship owners that was upset by the judge at first instance.

This decision places significant emphasis on allowing commercial common sense to guide the application of the law. This is not the only case where Lord Clarke has taken this approach. In *Rainy Sky SA v Kookmin Bank*, for instance, he held that the court was entitled to favour contractual interpretations which coincided with 'business common sense' over other interpretations.[17] Similarly in *The Global Santosh*, he opined that the true construction of a charterparty, like the construction of any contract, depends on the language '*having regard to the commercial purpose of the clause'*.[18] Whilst this statement had been made in dissent in *The Global Santosh* however, in *The Ocean Victory* this type of reasoning was supported unanimously by the Supreme Court. As such, it more significantly sets the tone for lower courts to take more appreciation of the commercial balance between these two parties in the future. For this reason, *The Ocean Victory* is a significant case for the development of the law of insurance.

2. Insurer's Right to Recover

The Supreme Court's decision on the safe port issue was unanimous; the rest of the judgment was not. The second issue was whether the provisions of joint insurance in Clause 12 of the widely used Barecon 89 form precluded the insurer's rights of subrogation, and the owner's right to recover losses covered by the insurers against the demise charterer (had the safe port warranty been broken).[19] This is an issue of significant complexity; however the Supreme Court provides some clarity to the law in *The Ocean Victory*.

In the majority Lord Mance (with whom Lords Toulson and Hodge agreed[20]) found that the owner of the vessel and the demise charterer had created a system (through the safe port clause) whereby they had agreed to look exclusively to the insurer, rather than each other, for compensation in the event that the vessel was lost[21]. It followed from this that there was no

[15] ibid [8].
[16] ibid.
[17] *Rainy Sky SA & ors v Kookmin Bank* [2011] UKSC 50 [21]
[18] *NYK Bulkship (Atlantic) NV v Cargill International SA (The Global Santosh)* [2016] UKSC 20 [37]
[19] (n 1) [8].
[20] ibid [57].
[21] ibid, dicta of Lord Mance.

liability for the demise charterer to the owner. Consequently, there were no rights to recover against either of the time charterers that could be subrogated to the insurer.

In terms of the application of this decision going forward, permission to appeal to the Supreme Court was granted on the basis that the Barecon 89 form is an industry standard. *Prima facie* its interpretation is therefore a matter of general importance[22], however the Court's analysis was focussed on the relationship between a clause of Barecon 89 and a safe port warranty, which is not part of the standard form. The significance of this is that the judgment in *The Ocean Victory* turned very clearly on its specific circumstances, lessening its broader application even though it related to a customary agreement. Through savvy contract design, the problem that the insurers experienced in this case can therefore likely be avoided - should, for instance, future insurers be firm that joint insureds under a contract maintain the liability between them. Additionally, an insurer arguing a similar point in court in the future may be able to distinguish their circumstances from *The Ocean Victory*[23] on the basis that they have not made similar adaptations to their Barecon 89 form. As such, this may not be transformative for the shipping industry, should it be taken into account during contractual drafting.

Lords Clarke and Sumption made up the minority on this issue. They essentially argue that the insurers never explicitly gave up their rights in the safe port warranty[24], and as it is a rule of construction that clear words are necessary before a court can find that an agreement has stripped one of the parties of a remedy that they would otherwise have had[25] then the insurers ought still to have the right of subrogation. This rule has recently been affirmed by the Privy Council[26] and the Supreme Court[27], lending weight to the minority position here. This would permit the insurers a remedy. However, considering how intelligent contractual drafting may allow insurers to navigate past this issue anyway, providing an additional remedy here may not have had hugely different consequences for the maritime insurance industry. Furthermore, as the demise charterers were co-assured, it seems strange that they would be able to exercise rights of subrogation to pursue a claim against other co-insured whom they would be liable to indemnify against their claim. As such, the minority position is not wholly convincing.

3. Limitation of Charterer's Liability

The last issue the Supreme Court was whether the charterers could limit their liability[28]. The unanimous decision was to affirm the Court of Appeal's holding in *The CMA Djakarta*[29]. The

[22] ibid [129].
[23] (n 1).
[24] ibid [49].
[25] *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689, 717.
[26] *Primeo Fund (in liquidation) v Bank of Bermuda (Cayman) Ltd* [2021] UKPC 22 [67].
[27] *Cavendish Square Holding BV v Talal El Makdessi*; *ParkingEye Ltd v Beavis* [2017] UKSC 67.
[28] (n 1) [8].
[29] *CMA CGM SA v Classica Shipping Co Ltd (The CMA Djakarta)* [2004] 1 Lloyd's Rep 460.

charterers had argued that *The CMA Djakarta* had been wrongly decided[30], however, at the time *The Ocean Victory* arrived before the Supreme Court, *The CMA Djakarta* had not been criticised in any case since it was written.[31] This means that the court's decision on this point ought not to have been a surprise to any interested parties, notwithstanding that the issue had not been argued before the lower courts. These lower courts had of course been bound by the Court of Appeal's decisions.[32] That is not to say, however, that this part of the judgment was simply superfluous as it clarified matters relating to the Convention on Limitation of Liability for Maritime Claims 1976.

In relation to the interpretation of the 1976 Convention, the Supreme Court noted the definition of "shipowner" in the Convention includes charterers[33], and as such, charterers were similarly permitted to their limit liability as the vessel's owners. Having regard to the decision on the safe port issue, this was not however of practical significance for the parties involved in the grounding of *The Ocean Victory*. However, since the Supreme Court's decision affirming it, *The CMA Djakarta* has been subject to judicial criticism in the lower courts. In *Glencore Energy v Freeport Holdings*[34] the case was treated unfavourably. Similarly, in *The Stema Barge II* at the High Court, the judge considered that *The CMA Djakarta* had placed an impermissible and unjustified gloss on the meaning of the words of the 1976 Convention when interpreting the term "the charterer of the ship". [35] The consequence of the Supreme Court's decision in The Ocean Victory is, however, made more significant by recent developments in case law. It now contributes to the debate around the persuasiveness of the Court of Appeal's decision in The CMA Djakarta, an issue that is more controversial now than when the matter was first litigated.

Conclusion

In summary, *The Ocean Victory* looks to be a fairly significant case for the law of insurance because of the breadth of issues covered and the detailed analysis of the law the Supreme Court gave. Firstly, on the issue of safe ports, the court corrected the errors of the High Court and clarified the law on this matter. The court also confirmed the correctness of the pre-existing law on the limitation of the charterer's liability through affirming *The CMA Djakarta*. Lower courts have however increasingly criticised that decision. Where the court may have made least of a splash in *The Ocean Victory*, however, is on the matter of joint insurance. This is because prudent Insurers may, through careful contractual drafting, be able to avoid some of the issues Insurers

[30] See (n 1) [63].
[31] ib
[32] ibid [59].
[33] ibid [61].
[34] *Glencore Energy UK Ltd and another v Freeport Holdings Ltd* [2017] EWHC 3348 (Comm).
[35] *Splitt Chartering APS and others v Saga Shipholding Norway AS and others (The Stema Barge II)* [2020] EWHC 1294 (Admlty) [100].

How Should We Understand the Policing Tool Known as 'Stop and Search'?

*Emily Frances Williamson**

Abstract

This paper seeks to address how the policing tool known as 'stop and search' should be understood. It does so through comprehensive analysis of the origins, the meaning and purpose, and the nature (in consideration of the statistical trends) of stop and search. Consideration of the future implications of stop and search based on this analysis is also discussed. The use of stop and search is incredibly controversial, and a deep-rooted source of complexity between the law and policing practise. This paper submits that the use of stop and search ought to be understood as damaging, particularly to BAME communities, causing distrust between the police and citizenry for starters. The realities of the use of stop and search are world apart from its theoretical value. However, such criticism is taken in consideration that politicians continue to 'hang on' to the good value stop and search brings, and therefore whilst (limited) reform is likely, its abolition is improbable.

Introduction

Prima facie, the policing tool known as 'stop and search' authorises police to briefly detain persons in attempt to find stolen or prohibited items, such as drugs or offensive weapons.[2] In the year ending March 2023, the police conducted 547,003 stop and searches under both the Police and Criminal Evidence Act (PACE) 1984, s. 1 and Criminal Justice and Public Order Act (CJPOA) 1994, s. 60.[3]

The use of and statistics supporting stop and search, however, hide controversy and complexity concerning the relationship between law and policing practise.[4] Notably, stop and search disproportionately targets Black, Asian and Minority Ethnic (BAME) communities – with black individuals having a 4.1 times higher disparity rate than white across England and Wales.[5] The impact of unjustified disparities in stop and search "undermines community trust, discourages targeted groups from calling the police for help and undermines informal social control."[6] The effectiveness of stop and search can also be questioned, with a report by the Runnymede Trust concluding that "there statistically is no link between existing police stop and search powers and violence prevention or reduction."[7]

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[2] Peter Cane and Joanne Conaghan, 'Stop and Search Powers', *The New Oxford Companion to Law* (1st edn, 2009) < https://www.oxfordreference.com/display/10.1093/acref/9780199290543.001.0001/acref-9780199290543-e-2110 > accessed 22 December 2023; Apla Parmar, 'Stop and Search' in Lucy Welsh, Layla Skinns and Andrew Sanders (eds), *Sanders and Young's Criminal Justice* (5th edn, OUP 2021) [53].

[3] Home Office, 'National Statistics – Police Powers and Procedures: Stop and Search and Arrests, England and Wales, Year Ending 31 March 2023' (UK Government 2023) [1.2].

[4] *Cane and Conaghan* (n 2).

[5] *Home Office* (n 3) [2.2].

[6] Benjamin Bowling, Robert Reiner and James Sheptycki, *The Politics of the Police* (5th edn, OUP 2019) [138].

[7] Runnymede Trust, 'About Us' (*Runnymedetrust.org*, 2023) < https://www.runnymedetrust.org/about/about-us > accessed 24 December 2023.

Considering such controversy, the logical step if "politicians are serious about addressing the […] rise in serious violent crime, […] [is to] stop handing police more powers and funding, and instead address the wider socio-economic determinants of violence in our society."[8]

However, whilst politicians from all sides are pragmatic and recognise the faults with stop and search, under pressure to meet strong reductions in particularly violent and knife crime targets and with the 2024 General Election looming, they are keener than ever to positively 'dress-up' stop and search statistics to win over prospective voters, as seen with then Home Secretary Suella Braverman's (Conservatives) letter in 2023 to the Chief Constables promoting further use of stop and search and police powers.[9]

Therefore, this essay submits that, whilst theoretically stop and search should be understood as a necessary tool in reducing and preventing crime, in reality, stop and search as a policing tool ought to be understood as damaging, particularly to BAME communities, causing distrust between the police and citizenry for starters. With no clear vehicle for complaint against stop and search,[10] it remains unknown just how damaging its impact is. However, such criticism is taken in consideration that politicians continue to 'hang on' to the good value stop and search brings as above, and therefore whilst (limited) reform is likely, its abolition is improbable.

1. Origins of Stop and Search

To contextualise the use of stop and search today, we must first understand its origins. Powers of stop and search have been part of British policing since the Victorian era,[11] entrenched with the passing of the Vagrancy Act 1824.[12] Colloquially known as the 'sus laws,' they empowered the police to arrest any reputed thief or suspected person found of loitering with intention to commit an arrestable offence.[13] Over 150 years later, 'sus laws' were still in use.[14]

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[8] Tim Head, 'Against Serious Violence Reduction Orders: Discriminatory, Harmful and Counterproductive' (*Runnymede Trust*, 2023) < https://www.runnymedetrust.org/publications/against-serious-violence-reduction-orders-discriminatory-harmful-and-counterproductive > accessed 24 December 2023.

[9] Home Office and The Rt Hon Suella Braverman KC MP, 'Police Urged to Use Stop and Search to Save More Lives' *UK Government* (20 June 2023) < https://www.gov.uk/government/news/police-urged-to-use-stop-and-search-to-save-more-lives > accessed 24 December 2023.

[10] Police and Criminal Evidence Act (1984) Introductory Text

[11] Lauren Nickolls and Grahame Allen, 'Police Powers: Stop and Search' (House of Commons Library 2022) [4].

[12] Stopwatch, 'PACE Section 1 Search Powers Factsheet' (*Stop-watch.org*, 22 July 2022) < https://www.stop-watch.org/what-we-do/research/section-1-factsheet/ > accessed 21 December 2023.

[13] Jonothan Law and Elizabeth Martin, 'Sus Law', *A Dictionary of Law* (7th edn, 2014) < https://www.oxfordreference.com/display/10.1093/acref/9780199551248.001.0001/acref-9780199551248 > accessed 21 December 2023.

[14] *Stopwatch* (n 12).

In the early 1970s, however, societal perceptions began to shift and poor, young black youths in deprived inner-city locales were increasing viewed as 'troublesome' and 'potentially criminal.'[15] Increasing concern over street robberies was seen in a 'new light' and moral panic around muggings born, assisted by political and media involvement.[16] Seen as 'black crimes', concern began over the aggressive policing and disproportionate use of ancient 'sus laws' against young black males.[17] Such occurred in light of strong tensions between the police and communities of South London following the New Cross house fire police failures in 1981.[18] Despite increasing tensions, stop and search powers were further notoriously deployed in the early 1980s during 'Operation Swamp 81.' The operation – designed to supress street crime in Brixton (where residents were suffering high unemployment, poor housing and other economic problems resulting from the recession) – ran for 10 days, during which 150 plain clothes officers made 1,000 stops and 150 arrests.[19] These events triggered the three-day long Brixton riots in 1981.[20]

In response, then Home Secretary William Whitelaw commissioned Lord Scarman to make an inquiry into the disturbances.[21] The Scarman Report (1981) concluded the disturbances an "outburst of anger and resentment felt by Black youths about how they were treated by police."[22] Despite both finding clear evidence of disproportionate and indiscriminate use of stop and search powers and recognising the complex political, social and economic factors that caused the rioting, the report explicitly denied the existence of institutional racism.[23] Only with the publishing of The Macpherson Report (1999), eighteen years later, were the Metropolitan Police Service (MPS) finally labelled "institutionally racist."[24]

The Scarman Report however did go so far as to recommend replacing 'sus laws' with new stop and search legislation.[25] They did so through the introduction of PACE 1984, which serves to "make further provision in relation to the powers and duties of the police, […] police discipline and complaints against the police; to provide arrangements for obtaining the views of the community on policing."[26] Despite such, during the 2000s, stop and search use increased,

[15] Tony Jefferson, 'Policing the Riots: From Bristol and Brixton to Tottenham, Via Toxteth, Handsworth Etc.' (2012) 87 CJM 8 [8].
[16] Stuart Hall and others, *Policing the Crisis: Mugging, the State and Law and Order* (2nd edn, Palgrave Macmillan 2013) [1]; *Stopwatch* (n 12).
[17] *Jefferson* (n 15) [8].
[18] *Stopwatch* (n 12).
[19] ibid; *Jefferson* (n 15) [8].
[20] *Stopwatch* (n 12).
[21] *Nickolls and Allen* (n 11) [4.2].
[22] HC Deb 10 December 1981, vol 14, cols 1001 – 1078 [1040].
[23] *Stopwatch* (n 12).
[24] HC Deb 25 February 2019, vol 655, cols 103 – 130 [103].
[25] *Nickolls and Allen* (n 11) [4.2].
[26] *PACE* (n 10) Introductory Text.

peaking at approximately 1.5 million uses in 2008/09.[27] This caused growing concern that the police were still not using stop and search lawfully and effectively. Further persistent ethnic disparities in search rates determined that officers were racially stereotyping and searching people based on skin colour.[28]

In response, then Home Secretary Theresa May asked HM Inspectorate of Constabulary (HMIC) to scrutinise forces' use of their search powers. The resulting report 'Stop and Search Powers: Are the Police Using them Effectively and Fairly?' found worrying levels of non-compliance with the "reasonable grounds" to conduct searches requirement.[29] In response, May introduced a stop and search reforms package designed to generate a "significant reduction in the overall use of stop and search, better and more intelligent stop and search, and improved stop-to-arrest ratios."[30] Notably, the reforms package included the launch of the Best Use of Stop and Search Scheme (BUSS)[31] to "reduce use of s. 60 searches and better monitor the stop and search of Black, Asian and Minority Ethnic (BAME) persons" and revised PACE Code A[32] to "reiterate that personal factors are not 'reasonable grounds' to conduct a search." Additionally, it implemented requirements allowing for the wider public scrutiny of stop and search records and commission the College of Policing to develop "robust professional standards."[33]

Although a substantial reduction in the use of stop and search did follow these reforms, the disparity in stop and search rates by ethnicity did not improve as searches of white persons fell faster than searches of BAME persons.[34]

2. Meaning and Purpose of Stop and Search

Despite its chequered origins, recently there has been a marked renewed purpose behind stop and search. In 2019, then Prime Minister Boris Johnson's Conservative government published its Beating Crime Plan, which supported an increase in the use of stop and search as part of their police response to violence crime.[35] In aiding this plan, the Home Office shortly afterwards announced that it was no longer government policy to encourage forces to comply

[27] *Nickolls and Allen* (n 11) [4.4].
[28] ibid [4.4].
[29] HM Inspectorate of Constabulary, 'Stop and Search Powers: Are the Police Using Them Effectively and Fairly?' (Criminal Justice Inspectorates 2013).
[30] ibid.
[31] Home Office and College of Policing, 'Best Use of Stop and Search Scheme' (UK Government 2014).
[32] Home Office, 'Police and Criminal Evidence Act 1984 (PACE) – Code A' (UK Government 2023).
[33] *Nickolls and Allen* (n 11) [4.4].
[34] ibid [4.5].
[35] ibid [4.5].

with the stricter BUSS guidance on s. 60 searches. In 2022, this guidance was lifted completely.[36]

Today, the main legislative provisions of the power of stop and search are contained within three different Acts. PACE, s. 1 allows an officer who has 'reasonable grounds' for suspicion to stop and search a person or vehicle to look for stolen or prohibited items.[37] CJOPA, s. 60 allows a senior police officer to authorise the stop and search of person or vehicle based on certain pre-conditions. Searches are conducted 'without reasonable grounds.'[38] The Terrorism Act (TERA) 2000, s. 47A (previously s. 44) allows an officer to stop and search people they 'reasonably suspect' are terrorists.[39] In the year ending March 2023, the police conducted 542,723 stop and searches under s. 1 in England and Wales (including the British Transport Police) and 4,280 under s. 60.

The Police, Crime, Sentencing and Courts Act 2022 was introduced as an 'additional power'[40] allowing officers to stop and search individuals who the courts have issued a Serious Violence Reduction Order (SVRO) to without "reasonable grounds" or prior authorisation from a senior officer.[41] The 'additional power' is currently being subject to a two-year trial with the Sussed, Merseyside, Thames Valley and West Midlands police forces[42] as part of the Conservative party's 2019 manifesto to pledge to make it "easier for officers to stop and search those convicted of knife crime."[43] Previously, it was unlawful to search someone just because they had relevant offending history and without "reasonable grounds" or pre-authorisation.[44]

It is notable that the SVRO trials have not run without controversy. A report published in 2023 by the Runnymede Trust accused the Home Office in 2020 of using "unreliable" data to back its claim that "77% of responses to its public consultation" were supportive of new suspicionless stop and search powers.[45] The Runnymede Trust reports that respondents were not given any option to oppose new policing powers altogether – options given were either to

[36] Home Office, 'National Statistics – Police Powers and Procedures: Stop and Search and Arrests, England and Wales, Year Ending 31 March 2023' (UK Government 2023) [2.3.1]; *Nickolls and Allen* (n 11) [4.5].
[37] Tim Newburn, *Criminology* (3rd edn, Routledge 2017) [849].
[38] ibid [849]; *Nickolls and Allen* (n 11) [1.2].
[39] ibid [1].
[40] Christian Fuller, 'Stop and Search: Four Police Forces to Trial New Order' *BBC News* (18 April 2023) < https://www.bbc.co.uk/news/uk-england-65298503 > accessed 22 December 2023.
[41] *Nickolls and Allen* (n 11) [1.3].
[42] *Fuller* (n 40).
[43] Conservative Party, 'Our Plan | Conservative Manifesto 2019' (*Conservatives.com*) < https://www.conservatives.com/our-plan > accessed 21 December 2023.
[44] *Nickolls and Allen* (n 11) [4.5].
[45] Anita Mureithi, 'Opinion Poll That 'Backed Stop and Search Powers' Had No Option to Oppose Them' (*Open Democracy*, 13 November 2023) < https://www.opendemocracy.net/en/suella-braverman-james-cleverly-home-office-stop-search-unreliable-public-opinion-runnymede-report/ > accessed 24 December 2023.

back new police powers or amendments of one of four relatively different sets of old police powers. The sample size used was also "relatively small."[46]

Regardless, following the trajectory to increase stop and search use, the Public Order Act 2023 was passed, sponsored by Priti Patel and Lord Sharpe of Epsom, which created powers for stopping and searching people for objects connected to "protest-related offences."[47] Under this Act, police are given powers to stop and search people if they have "reasonable grounds" for suspecting a person having a relevant item or without needing suspicion if they are pre-authorised to do so by a senior officer.[48]

PACE Code A, s. 2.2[49] outlines a two-part legal test of "reasonable grounds" of suspicion. "Firstly, the officer must have formed a *genuine* suspicion in their own mind that they will find the object for which the search power being exercised allows them to search."[50] "Secondly, the suspicion that the object will be found must be reasonable. This means that there must be an *objective* basis for the suspicion based on facts, information and/or intelligence which are relevant to the likelihood that the object in question will be found, so that the a reasonable person would be entitled to reach the same conclusion based on the same facts or intelligence."[51] The existence of the "reasonable grounds" test is incredibly important in providing the police legitimacy to conduct stop and searches. The College of Policing terms it "key to fair decision making in stop and search."[52] Members of the public are less likely to feel unfairly treated by the police when given a clear, objective reason for being searched.[53]

3. Trends in Stop and Search

Despite this, it is widely acknowledged that disproportionate stop and search has strained relationships between the black community and the police.[54] The extent of disproportion can be evidenced in the 'stop and search and arrest' statistics released by the Home Office for the year ending 31 March 2023 from the 43 territorial forces in England and Wales.[55] Of the

[46] ibid.
[47] *Nickolls and Allen* (n 11) [4.5].
[48] ibid [4.5].
[49] *PACE – Code A* (n 32) [2.2].
[50] ibid [2.2].
[51] ibid [2.2].
[52] College of Policing, 'Stop and Search – Legal Basis' (*College.policing.uk*, 28 December 2022) < https://www.college.police.uk/app/stop-and-search/legal/legal-basis#powers-requiring-reasonable-grounds-for-suspicion > accessed 22 December 2023.
[53] Jennifer Brown, 'New Stop and Search Powers: Serious Violence Reduction Orders' (House of Commons Library, 16 September 2020) < https://commonslibrary.parliament.uk/new-stop-and-search-power-serious-violence-reduction-orders/ > accessed 22 December 2023.
[54] ibid.
[55] *Home Office* (n 36) [1.1].

547,003 stop and searches that were conducted in England and Wales in the year ending March 2023, 7,109 led to arrest – equating to approximately 14% of all searches.[56] From this statistic, the following notable profiles can be ascertained – males between 15 – 19 had the highest stop and search rate, at 71/1000 of the population. Individuals from a black or British black background have the highest disparity rate of 4.1 times higher than those from a white ethnic group across England and Wales (note – no account for different likelihoods of being a suspect or victim of crime is made here), although based on self-defined and officer-observed ethnicity this increases to 5.5. Persons of a black or 'mixed or other' ethnicity have an arrest rate following stop and search of 15%, compared to 13% for white persons. Finally, those serviced by the MPS accounted for 32% of all stop and searches.[57]

3.1 Disproportionate Stop and Search of BAME Communities

The trends in 2023 demonstrate a snapshot of a longstanding history of disproportionate stop and search in the BAME community. In attempt to further understand these statistics, in 2016, then Prime Minister Theresa May asked David Lammy MP to lead an independent review to investigate the treatment and outcomes of BAME individuals within the Criminal Justice System (CJS) in England and Wales.[58] The subsequent report, The Lammy Review, released in 2017, found that "the disproportionate use of stop and search on BAME communities continues to drain trust in the CJS as a whole," contributing to a sense among many in BAME that the CJS is stacked against them. "Amongst those born in England and Wales, BAME persons are less likely than white persons to agree that the CJS is fair. 51% of BAME persons believe 'the CJS discriminates against particular groups and individuals,' compared to 25% of white persons." "The lack of trust starts with policing, but had ripple effects throughout the system, from plea decisions to behaviour in prisons."[59]

Perhaps the most infamous example of the racial disparities of the MPS, which sent shockwaves through the nation, concerned the murder of 18-year-old Stephen Lawrence – who on the 22 April 1993 was stabbed to death at a bus stop in South-East London by a group of white youths in an unprovoked, racist attack.[60] For their role in aftermath of Stephen's murder, the actions of the MPS were heavily criticised. At the time, of the five white youths named suspects and arrested, only two were charged. However, citing insufficient evidence, the Crown Prosecution Service (CPS) later dropped charges.[61] Only twenty years later were two of the group responsible for Stephen's murder convicted. Throughout this period, Stephen's mother,

[56] ibid [1.2].
[57] ibid [2.2].
[58] The Rt Hon David Lammy MP, 'The Lammy Review' (UK Government 2017).
[59] ibid [18].
[60] Lulu Meade and Lauren Nickolls, 'Metropolitan Police Investigation Into the Murder of Stephen Lawrence' (*House of Commons Library*, 09 July 2023) < https://commonslibrary.parliament.uk/research-briefings/cdp-2023-0160/ > accessed 23 December 2023.
[61] ibid.

Doreen Lawrence, campaigned for justice for her son. This prompted an inquiry into the police investigation of Stephen's murder, the Macpherson Report (1999) which was highly critical of the investigation and found the MPS as "institutionally racist."[62] In 2012, a second independent review, the Ellison review, was conducted and also highly critical of how the case was handled.[63] In 2023, details emerged of a sixth suspect involved in Stephen's murder, which re-ignited criticism of the MPS' handling of the case and the failures to follow this line of inquiry in the original investigation. A month later, it was announced the officers involved in the original investigation will not face criminal charges for misconduct in public office.[64]
However, it should be noted that the response that a case such as Stephen's received is rare. In fact, most stop and searches are rarely challenged. If they are challenged, these notably come from "articulate and organised adults," [65] such as Doreen Lawrence – who in 2013 was created a Life Peer for her activism work.[66] The European Convention on Human Rights, PACE, CJPOA and TERA all fall silent on the question of 'what actions or remedies are available if an unlawful stop and search is conducted?', neither making it a crime nor a tort to stop and search someone unlawfully, to fail to provide information before search, or to make a record of its afterwards.[67]

One remedy would involve making an official complaint against the officer(s) concerned. However, the reality is that few people aggrieved by police action ever do so, predominantly because they perceive the chances of their complaint being upheld as low. Of 100 cases concerning formal stop and search practise complaints – 31 were sent to the CPS for consideration, eight cases were substantiated, yet in only one, charges were brought.[68] Low rates of substantiation exist partly because of the difficulty establishing that an officer lacked "reasonable suspicion," failed to give information prior to the search or conducted the encounter in a disrespectful or abusive way, and partly because of the failing or inadequacy of the process of police complaints.[69]

The treatment of Team GB sprinter Bianca Williams and her partner Ricardo Dos Santos in a stop and search on 4 July 2020 provides a rare example of the police admittance of overstepping of their boundaries. The couple and their baby were stopped travelling in their Mercedes by

[62] ibid; Sir William Macpherson of Cluny, *The Stephen Lawrence Inquiry* (Cm 4262 – 1, 1999).
[63] *Meade and Nickolls* (n 60); Home Office and The Rt Hon Theresa May MP, 'The Ellison Review' (Oral Statement by the Home Secretary to Parliament, 06 March 2014) < https://www.gov.uk/government/speeches/the-ellison-review > accessed 23 December 2023.
[64] *Meade and Nickolls* (n 60).
[65] *Apla Parmar* (n 2) [94].
[66] House of Lords, 'Baroness Lawrence of Clarendon' (UK Parliament) < https://members.parliament.uk/member/4290/contact > accessed 24 December 2023.
[67] *Apla Parmar* (n 2) [94].
[68] ibid [96].
[69] ibid [96].

officers claiming the car linked to gang activity. The officers, then further claiming to smell cannabis, detained the couple for 45 minutes and placed them in handcuffs.[70] Williams and Dos Santos believed the incident racially aggravated. In 2023, two MPS officers were "dismissed without notice for breaching the police standard of professional behaviour relating to honesty and integrity for claiming they could smell cannabis on Dos Santos, despite no drugs being found in the search" by the Independent Office for Police Conduct (IOPC). Three other officers were made subject to "reflective practise reviews."[71]

3.2 Impact of Disproportionate Stop and Search

Although it should not be the case, the reality is that Williams and Dos Santos were able to push their case forwards because of their platforms as athletes and media interest in the case. Whilst cases like Williams and Dos Santos are positive in bringing attention to the racial disparities of stop and search, as the IPOC stated retrospectively about the case, it is also publications "like these which emphasise why black people report having low trust and confidence in policing."[72] Unjustified stop and search "undermines community trust, discourages targeted groups from calling the police for help and undermines informal social control."[73]

More widely, disproportionate stop and search also generates issues of police legitimacy. As termed by Bowling et al., "stop and search is experienced as legitimate when good reason is given, when the officer behaves properly […] and when the outcome was deserved."[74] Police legitimacy is important in encouraging voluntary compliance with the police and law, which in turn leads to both short- and long-term reductions in crime.[75] Without this, the police lose their authority to function.

Issues of procedural justice are also just as important. As coined by Jackson et al., "the quality of treatment received is more important in encounters with the police than the objective outcome."[76] "Police legitimacy may flow not simply from factors such as its procedural

[70] Vikram Dodd, 'Met Officers Sacked for Lying in Stop and Search of Black Athletes in Car' *The Guardian* (25 October 2023) < https://www.theguardian.com/uk-news/2023/oct/25/met-officers-guilty-of-gross-misconduct-over-stop-and-search-of-black-athletes > accessed 23 December 2023.
[71] IOPC Staff, 'Statement Following Misconduct Hearing Over Stop and Search of Bianca Williams and Ricardo Dos Santos' (2023) < https://www.policeconduct.gov.uk/news/statement-following-misconduct-hearing-over-stop-and-search-bianca-williams-and-ricardo-dos > accessed 23 December 2023.
[72] ibid.
[73] Benjamin Bowling, Robert Reiner and James Sheptycki, *The Politics of the Police* (5th edn, OUP 2019) [138].
[74] ibid [138].
[75] Levin Wheller and others, 'The Greater Manchester Police Procedural Justice Training Experiment' (College of Policing 2013) [1].
[76] Jonathan Jackson and others, *Just Authority? Trust in the Police in England and Wales* (1st edn, Routledge 2012) [32].

fairness (and general trust and confidence), nor instantiated only in obedience as prerogative, but be partly based in the belief that the police broadly share one's moral values."[77] The perception of unfairness in the system is just as important as the unfairness itself. Procedural justice theory suggests that to the extent stop and search is considered unfair, it may cause crime. This is because the public are no longer incentivised to help solve crime (for example, by acting as witnesses).[78]

Interestingly, in 2023, a Runnymede Trust report, authored by Dr Tim Head, found that "there statistically is no link between existing police stop and search powers and violence prevention or reduction. S. 60 search powers prove particularly ineffective, with an overall arrest rate of 0.5% for offensive weapons between 2001 – 2021."[79] Rather, in keeping with the racial disparities concluded within stop and search statistics, there is a significant link between "similar police interventions and police stops, and negative mental and physical health outcomes such as higher rates of anxiety, self-harm, suicide attempts, diabetes, and high blood pressure. These negative health impacts are disproportionately felt by Black communities."[80] The true validity of these statistics however will likely never be known as their release would likely be contrary to the governments interest.

As queried by Tiratelli et al., if "it seems likely that stop and search has never been effective in controlling crime, why, then, is the power still so commonly used?." The authors offer several suggestions – that the police believe it works as a crime control tool, that it is used by the police for another function, such as order maintenance, and/or that it is used to deepen marginality of certain minority groups.[81] The actions taken by politicians and the police require justification, and for reasons of legitimacy and procedural fairness, those offered by Tiratelli et al. seem plausible.

4. Future of Stop and Search

Despite evidence proving that stop and search statistically does not fulfil its purpose, the future of stop and search sees no signs of its use slowing down.

In 2023, then Home Secretary Suella Braverman (Conservative) wrote to the Chief Constables of all 43 police forces in England and Wales to give her full backing to "common sense policing tactics" and urge officers to be prepared to use the full powers at their disposal to be more

[77] ibid [34].

[78] Matteo Tiratelli, Paul Quinton and Ben Bradford, 'Does Stop and Search Deter Crime? Evidence From Ten Years of London-Wide Data' (2018) 58 Brit J Criminol 1212 [1215].

[79] Tim Head, 'Against Serious Violence Reduction Orders: Discriminatory, Harmful and Counterproductive' (*Runnymede Trust*, 2023) < https://www.runnymedetrust.org/publications/against-serious-violence-reduction-orders-discriminatory-harmful-and-counterproductive > accessed 24 December 2023.

[80] ibid.

[81] *Tiratelli, Quinton and Bradford* (n 78) [1216].

proactive in preventing violence before it occurs.[82] She also called on police to use powers of arrest, investigate instances where someone is unlawfully obstructing a stop and search and for police to publish body-worn footage more quickly – to protect "innocent officers" from being "subject to trial by social media over their actions."[83]

The implementation of such targets has been made in the light of the Conservative party's new data which reveals that "more than 100,000 weapons have been removed from Britain's streets since 2019, leading to over 220,000 arrests." Almost half were seized during stop and searches. This has contributed to reductions in serious violence by 25%.[84]

Combined with the SVRO trials currently being sponsored by the Conservative government, and the fact that the government have invested £170 million in early intervention, education and prevention schemes since 2019, alongside a network of Violence Reduction Units supporting more than 215,000 vulnerable young people in the past year alone,[85] the future of stop and search shows no signs of slowing under the Conservative guise.

Although poll predictions for the 2024 General Elections at the time of writing suggest likelihood of a Labour government,[86] it is considered unlikely that this direction of stop and search will drastically change. Despite Labour currently taking no official stance on stop and search, their manifesto consists of 'Five Missions for a Better Britain.'[87] The second reads to "halve serious violent crime and raise confidence in the police and criminal justice system to its highest levels within a decade."[88]

In 2014, then Home Secretary Theresa May began a series of reforms against stop and search. Labour very much agreed with direction of May's reforms, with then Shadow Home Secretary Yvette Cooper making an offer to May of cross-party co-operation to get urgent reform of the police stop and search laws onto the statute book. Cooper justified her decision by stating that the "practise of setting officers' targets for stop and search should be banned, and legislation introduced to make clear that stopping someone based on skin colour is illegal, discriminatory and shameful."[89]

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[82] *Home Office and The Rt Hon Suella Braverman KC MP* (n 9).
[83] ibid.
[84] ibid.
[85] ibid.
[86] YouGov, 'Who Do People Think Will Win the Next Election' (*Yougov.uk*, 2023) < https://yougov.co.uk/topics/politics/trackers/who-do-people-think-will-win-the-next-election > accessed 24 December 2023.
[87] Labour Party, 'Five Missions for a Better Britain' (*Labour.org.uk*, 2023) < https://labour.org.uk/wp-content/uploads/2023/03/Mission-Safety.pdf > accessed 24 December 2023.
[88] Labour Party, 'Take Back Our Streets' (*Labour.org.uk*, 2023) < https://labour.org.uk/missions/safe-streets/ > accessed 24 December 2023.
[89] Alan Travis, 'Labour Offers Backing for Reform of Police Stop and Search' *The Guardian* (18 February 2014) < https://www.theguardian.com/law/2014/feb/18/labour-reform-police-stop-search > accessed 24 December 2023; HC Deb 30 April 2014, vol 579, cols 831 – 846 [836].

It seems that the post-Blair Labour today shares a similar ethos on stop and search, although perhaps now in greater recognition of the challenges that stop and search faces today. In debate in 2023, still Shadow Home Secretary Copper stated, "stop and search is an extremely important tool in the fight against knife crime, […] but it also needs to be used in an effective and fair way."[90]

The Runnymede Trust (the UK's leading race equality think-tank)[91] take Cooper's view even further, arguing if "politicians are serious about addressing the […] rise in serious violent crime, they need to stop handing police more powers and funding, and instead address the wider socio-economic determinants of violence in our society."[92] "It's time to listen to the evidence and learn from alternative community-led responses to harm, both with and beyond the state."[93] Whilst the Runnymede Trust's proposal is agreeable, the reality is that it is the easiest and most practical route for both the Conservatives and Labour to address stop and search itself. As politicians see it, there is no direct alternative to the effectiveness of the use of stop and search – provided it is acted upon in a fair manner.

Conclusion

Through comprehensive analysis of the origins, the meaning and purpose, and the nature (in consideration of the statistical trends) of stop and search, this paper concludes that the policing tool known as stop and search ought to be understood as damaging, particularly to BAME communities. The use of stop and search is incredibly controversial and a deep-rooted source of complexity between the law and policing practise – with the realities of its use worlds apart from the theoretical value it holds. With no clear vehicle for complaint against stop and search,[94] the true extent of damage of its impact worryingly remains unknown. However, such criticism is taken in consideration that politicians continue to 'hang on' to the good value stop and search brings as above, and therefore whilst (limited) reform is likely, its abolition is improbable.

[90] HC Deb 19 June 2023, vol 734, cols 569 – 581 [571].
[91] Runnymede Trust, 'About Us' (*Runnymedetrust.org*, 2023) < https://www.runnymedetrust.org/about/about-us > accessed 24 December 2023.
[92] *Head* (n 79).
[93] ibid.
[94] *PACE* (n 10) Introductory Text.

An Exploration into The Different Interpretations of Judicial Independence Amongst The European Union and Its Impact on The Rule of Law: Is Judicial Independence Sufficiently Being Achieved In The UK Constitution?

Erin Deane

Abstract

Judicial independence refers to the separation of powers between the judiciary, executive, and legislature. It is fundamental in any democratic society for upholding the rule of law because it ensures the judiciary can freely conduct their role of applying the law without bias or influence from the other branches of power. Despite the importance of judicial independence in a democratic society the interpretation of judicial independence and how it can be achieved is up for debate. This article will highlight the fundamental importance of judicial independence, with acknowledgment of it as a European standard, and explore the different routes taken to achieving judicial independence amongst European member states. The article will primarily focus on the UK's approach to judicial independence, however, there will also be consideration of both Poland and Germany's approach to achieving judicial independence.

Introduction

This article offers an exploration into the requirements for an independent and impartial judiciary. The article will first consider judicial independence as a European Standard outlined in the European Convention on Human Rights (hereinafter 'ECHR').[1] There will be consideration of the different approaches taken to achieving judicial independence across the European member states, with a primary focus on the UK jurisdiction and their approach. The article will question whether the UK's approach to achieving judicial independence is satisfactory, following consideration of UK legislation, the separation of powers, and the Judicial Appointment Commission (JAC). Next, the article will identify the different hard and soft laws of the European Union (EU) including the ECHR, Venice Commission, and Consultative Council of European Judges (CCJE). It will question the extent to which the UK has adhered to these recommendations and, finally, the article will propose changes which could be implemented to improve the UK's judicial independence.

[1] European Convention on Human Rights.

1. Defining Judicial Independence and Impartiality

Independence is defined to be the freedom from being governed, ruled, and influenced by others,[2] both externally from other branches of power and internally from other judges. Independence impacts the judicial branch and is "*a prerequisite to the rule of law and a fundamental guarantee of a fair trial"*[3] whereby "*the court concerned exercise its functions wholly autonomously […] is linked to impartiality."*[12] Thus, judicial independence is fundamental in maintaining democracy and preventing tyrannical leaders because it minimises the risk of judicial politicisation and bias. Whereas impartiality concerns the individual ability to *"judge or consider something fairly without allowing your own interests to influence you."*[4] Lady Justice being blindfolded symbolises impartiality because it represents equality in decision-making and delivering justice without influence from appearances. It upholds the rule of law yet, is problematic because the *"blindfold is often removed"*[5] and so consequently *"impartiality is rare."*[6]

2. European Standards on Judicial Independence

Judicial independence is outlined in Article 6, ECHR as a hard law which provides that "*everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."* [7] This is a minimum standard of law which member states which retain discretion on how to achieve, and it is reiterated in the EU Charter,[8] Treaty of European Union (TEU),[9] and Treaty on the Functioning of the European Union (TFEU).[10] This is because *"judges and the Advocates General of the Court of Justice and the Judges of the General Court shall be chosen from persons whose independence is beyond doubt."*[11] Despite all these conventions, however, there is a failure to define how judicial independence can be reached in national jurisdictions. Consequently, it has resulted in legal interpretations

[2] Cambridge Essential British English Dictionary [2004] < https://dictionary.cambridge.org/dictionary/essential-british-english/independence > accessed 6th May 2024.

[3] CCJE, Opinion No. 1: *Standards Concerning the Independence of the Judiciary and the Irremovability of Judges,* para 10. [12] CJEU, Judgement of 19 November 2019, *A.K and Others*, C-585/18, C-624/18, C-625/18, EU:C:2019:982, 121-122.

[4] Cambridge (n 2).

[5] Roberto Laver, 'The World Bank and Judicial Reform: Overcoming "Blind Spots" in the Approach to Judicial Independence' (2012, 22 Duke J Comp & Int'l L), 183.

[6] ibid.

[7] European (n 1), art 6(1).

[8] EU Charter of Fundamental Rights, art 47.

[9] Treaty of European Union.

[10] Treaty on the Functioning of the European Union.

[11] Treaty of European Union, art 19(2); Treaty on the Functioning of the European Union, art 253.

and member state discretion determining how to achieve judicial independence and impartiality.

The Court of Justice of the European Union (CJEU) acknowledges that implementation of judicial independence and impartiality differs between member state jurisdictions despite each following the same minimum standard.[12] The CJEU determine whether there is judicial independence by questioning whether the judiciary are competent to hear the case. The CJEU conduct this assessment with considerations for the general risks, individual risks, and judicial competence.[13] The CJEU then, however, go beyond judicial competence and also consider judicial appointment, dismissal, and disciplinary processes because they recognise these cannot be subjected to political control;[14] the judiciary should be capable of delivering judgements without fear of political backlash in the form of disciplinaries or removal.[15] Thus, the "*guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment […] in order to dispel any reasonable doubt in the minds of individuals as to […] its neutrality with respect to the interests before it."*[16] This is important because without these procedural guarantees oppression could occur and threaten judicial independence as there would be a perception of corruption between the judiciary, executive, and legislative. It would be detrimental to the democracy because public trust in the judiciary would decline and result in fewer legal proceedings being brought before the courts. Therefore, the CJEU recognise the importance of appropriate judicial processes, such as through the judicial school (bureaucratic model) or judicial experience (professional model), because it prevents judicial politicisation.

3. EU Member States' implementation of Judicial Independence

The failure to define how to achieve independence and impartiality is problematic because it has resulted in differing degrees of judicial independence between member states. It can be exemplified through comparisons of the different approaches taken by member states, such as Germany and Poland. This is because Germany emphasises the importance of judicial independence explicitly stating, *"judges shall be independent and subject only to the law"*[17] and providing rules on appointment, dismissal, and judicial retirement.[18] Whereas Poland acknowledges judicial independence stating that "*courts and tribunals shall constitute a separate power and shall be independent of other*

[12] CJEU, Judgment of 25 July 2018, *LM*, Case C-216/18 PPU, ECLI:EU:C:2018:586.

[13] ibid.

[14] ibid.

[15] ibid.

[16] CJEU, Judgment of 24 June 2019, *Commission v Poland*, Case C-619/18, ECLI:EU:C:2018:910, p 74.

[17] German Basic Law, art 97(1).

[18] ibid, art 97(2).

branches of power,"[19] however, in practice such expositions are inaccurate. Poland is over-ambitious in their claims of independence because in reality their judicial system is heavily politicised with ineffective judicial protections and systematic deficiencies.[20] The different degrees between member states highlight the inadequacies of Article 6's definition because there is a lack of coherence in application.[21] It's resulted in some states prioritising judicial independence whilst others are often in violation. Furthermore, the perception of an independent and impartial tribunal can be challenged for inaccuracies because it fails to consider how the judiciary is inherently political.[22] The executive threatens to politicise the judiciary as demonstrated in Poland,[23] Hungary,[24] and the Czech Republic[24] and this suggests such expositions of independence are unrealistic.[25] This criticism is accelerated by academics[26] and reiterates the previous concern that the politicisation of the judiciary results in a decline of public trust and cases being brought before the courts.

4. UK's implementation of Judicial Independence

The UK possess a common law jurisdiction and so their constitution is established through statue, case law, constitutional conventions, and subordinate legislation. Despite no written constitution, the UK emphasise judicial independence in the Constitutional Reform Act (CRA)[27] which is a primary source of legislation enacted by the sovereign parliament. [28] The CRA obliges the Lord Chancellor and Ministers of the Crown to uphold judicial independence by ensuring adequate separation between the legislature, executive, and judiciary and ensuring the judiciary can adequately conduct their functions.[29] These obligations are reiterated in the Tribunal, Courts and Enforcement Act which requires proceedings to be dealt with quickly, efficiently, and fairly.[30] Moreover, through the UK's perception of judicial independence as "*vitally important to the rule of*

[19] Constitution of the Republic of Poland 2009, art 173.

[20] ECtHR, Judgement of 22 July 2021, *Reczkowicz v Poland*, Applications No. 43447/19.

[21] European (n 1), art 6(1).

[22] Sajo A, & Uitz R, '*Constitution of freedom: An introduction to legal constitutionalism'* (OUP, 2019), ch 9.5 – 9.7.

[23] *Reczkowicz* (n 26).

[24] ECtHR, Judgement of 23 June 2016, *Baka v Hungary*, Application No. 20261/12. [24] ECtHR, Judgement of 9 February 2012, *Kinsky v Czech Republic*, Application No. 42856/06.

[25] Sajo (n 28), ch 9.5 – 9.7.

[26] Beremo N, *'On Democratic Backsliding'* (Journal of Democracy, 2016), p 10.

[27] Constitutional Reform Act 2005.

[28] ibid, Section 3.

[29] ibid, Section 3.

[30] Tribunal, Courts, and Enforcement Act 2007, ch 1.

law, […] public confidence in judges" [31] and *"a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself."*[32] Henceforth, the UK's approaching judicial independence through statutory legislation is significant because it illustrates the importance, gravity, and seriousness they place on it as parliament is supreme thus, cannot be overpowered.

The UK value judicial independence in theory and in practise because they have successfully implemented mechanisms to uphold it. Judicial appointment, dismissal, and disciplinary proceedings in the UK follow a professional model conducted by JAC, based on experience and objective criteria.[33] UK Supreme Justices are required to be an *"experienced judge of at least two years from the High Court or above. Else, an experienced lawyer or holder of relevant qualifications for 15 years"*[34] and be *"of good character, authoritative, fair, have an intellectual capacity, personal qualities, be efficient, communicable, understanding, and have no convictions beside minor motor offences."*[35] This is important because JAC are an independent body that maintains the separation between the judiciary and executive, thus reducing the risk of judicial politicisation. Similarly, judicial dismissal maintains this separation of powers because superior judges retain the security of tenure and so cannot be removed from office by the Lord Chancellor or Government.[36] Instead, judges hold office in good faith or when they retire at 70.[37] These processes in the UK maintain judicial independence because it reduce external influences and allow judgements to be delivered without fear of upsetting the Government. It allows judicial functions to be conducted autonomously, freely, and without pressure to please other branches.

4.1 Evaluating the UK's Approach to Judicial Independence

Despite these mechanisms, it is questioned whether the UK are sufficiently guaranteeing judicial independence in their jurisdiction. The UK demonstrates itself to achieve judicial independence through the separation of powers, however, such expositions are inaccurate. It is vigorously contested that the judiciary is exerting political influence in their judgments, as in Miller[38] which concerned the UK's withdrawal from the EU. From one perspective, the involvement in international affairs heightened judicial power in the

[31] Secretary of State for Justice & Lord Chancellor, *'The Governance of Britain: Judicial Appointments',* (October 2007, CM 7210), pp 16 – 19.

[32] *A and Others v Home Office (Belmarsh Detainees)* [2004] UKHL 56.

[33] Constitutional (n 33), Section 25.

[34] ibid, Section 25.

[35] Tribunal (n 29).

[36] Act of Settlement 1700.

[37] Judicial Pensions & Retirement Act 1993.

[38] *R (Miller) v Secretary of the State for Exiting the European Union* [2017] UKSC 5.

political realm and this is problematic because the judiciary does not state political independence thus, it's beyond their role. Such a perspective is accelerated by the UK's failure to address the rising concern of the judiciary threatening the rule of law. The previous concern of heightened judicial powers is shared here because *"judges intrude too much into politics"*[39] thus, threatening the rule of law. The perception of judicial independence in the UK is becoming obsolete due to heightened judicial power in political issues which infringes their impartiality. Whilst there is recognition that "it *is not for the courts to usurp authority properly belonging elsewhere,"*[39] in practise the judiciary is overstepping its powers. Thus, following these exertions, the UK's approach to upholding judicial independence through the separation of powers is unsatisfactory because instances of political infringement have blurred the separation.

Nevertheless, an alternative perspective to Miller would recognise that the judiciary commenting on political issues upholds the separation of powers and judicial independence.[40] This is because it illustrates an interaction between the branches of power whereby the executive and the judiciary work together to create law and prevent an accumulation of power within one branch. This is significant because Parliament ultimately decides; Miller being sent back to Parliament illustrates that whilst the judiciary is capable of commenting on political issues, it is Parliament deciding which prevents heightened judicial power.[41] This must be acknowledged because it upholds the separation of powers and is significant for checks and balances which maintains judicial impartiality, even in political cases. Therefore, despite a recently published article casting doubt on this perspective because it suggests the judiciary is still going beyond its role[42] such exposition is unsatisfactory. The article fails to consider the interaction of the branches and their role in checks and balances.

This failure limits the credibility of the article because it is these processes which ensure there is no over-step of power; *"the courts on occasion step into the territory which belongs to the executive, to verify not only that the powers asserted accord with the substantive law created by Parliament but also that the way they are exercised conforms with the standards of fairness which Parliament must have intended."*[43] Henceforth,

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[39] *Anonymous (Economist), Government v Judges: Judicial Independence is under threat in Britain', [2021] The Economist <* https://www.economist.com/britain/2021/11/04/judicial-independence-is-under-threat-in-britain *> accessed 16th November 2023.* [39] *A (n 31), Attorney General at 37.*

[40] *Miller* (n 44).

[41] ibid, Lord Nicholls at 98.

[42] *Mark Elliot, 'On why, as a matter of law, triggering Article 50 does not require Parliament to legislate' (Public Law for Everyone, 30 June 2016) <* https://publiclawforeveryone.com/2016/06/30/brexit-on-why-as-a-matter-of-law-triggering-article-50does-not-require-parliament-to-legislate/ *> accessed 16th November 2023*

[43] R. *v Secretary of State for the Home Secretary Ex p. Fire Brigades Union [1995] 2 A.C. 513, Lord Mustill at 567.*

considering the wider judicial role in checks and balances, the UK's approach to the separation of powers is sufficient to maintain judicial independence. The UK are guaranteeing judicial independence to a strong extent because the separation of powers is essential for accountability which prevents abuses of power by the institutions.

4.2 UK's Compliance with EU Hard Laws

The UK's regulation of judicial independence meets European hard law standards established by Article 6 to a strong extent.[44] The UK implemented the ECHR into their domestic legislation through the Human Rights Act (HRA)[45] with similar provisions including Article 6, the right to a fair trial.[46] Whilst previous issues explored regarding clarity and definition remain, it demonstrates how the UK have adhered to European hard law standards. They've gone beyond their own interpretations of independence and explicitly legislated the ECHR into their jurisdiction to ensure protection. It heightens rights protection for UK citizens because it allows them to bring claims before UK courts and it is demonstrated to be successful because in 2014 all Article 6 violations found by the ECHR were not by the UK.[47] Thus, despite other states having low standards of independence, the same cannot be perceived for the UK as they evidently place strong protection on judicial independence through their strong adherence to European hard law standards.

4.3 UK's Compliance to EU Soft Laws

Alongside the UK's compliance with the European hard law standards, there should also be a consideration for their acknowledgement of European soft law standards. These include the Venice Commission's non-binding recommendations, opinions, and suggestions for member states to follow.[48] Whilst they're not binding, the UK meet these soft law standards to a strong extent because the Venice Commission recommend "*explicit constitutional and legal provisions."*[49] As previously explored, this is apparent

[44] European (n 1), art 6(1).

[45] Human Rights Act 1998.

[46] European (n 1), art 6(1); Human (n 51), art 6.

[47] Lord Sumption, '*The right to a court: Article 6 of the Human Rights Convention'* (James Wood Lecture, University of Glasgow, 3 November 2015).

[48] Paul Craig, Transnational Constitution-Making: The Contribution of the Venice Commission on Law and Democracy, UCI Journal of International, Transnational and Comparative Law, Forthcoming.

[49] Venice Commission, CDL-AD (2007) 028, at 46.

in the UK through the CRA,[50] Tribunals Act,[51] and HRA[52] which all place a great emphasis on judicial independence. Implementation through statutory legislation is significant because parliamentary sovereignty becomes the core justification which ensures judicial independence cannot be overpowered. Moreover, as explored, the UK's professional model of the judiciary aligns with the Venice Commission's advice against *"setting probationary periods"*[52] because, instead, the UK utilise an appropriate and objective process for appointment, dismissal, and disciplinary proceedings.[53] Henceforth, this illustrates the UK to adhere to soft law standards established by the Venice Commission to a strong extent.

Furthermore, the CCJE produce advisory opinions for member states to follow as soft law regarding judicial independence.[54] Whilst they're not binding, the UK follow these recommendations to an extent but are hindered due to their problematic approach regarding the media and public. The UK fail to acknowledge the medias influence on judicial independence as demonstrated by the *'Daily Mail,'* who characterised Supreme Court Justices to be *"enemies of the people."*[55] Such exertion highlights the lack of cooperation between the judiciary, public, and media despite this being a recommendation.[56] It alludes to external influences on the judiciary because fear of negative press could drive judicial judgements in a politically favourable manner thus, contrary to independence and the recommendation that *"judges shall not be subject to any order or instruction, or to any hierarchical pressure."*[57] Consequently, these UK deficiencies prevent them from upholding CCJE soft law requirements. However, despite the negative media portrayal, the conduct of the Supreme Court in Miller illustrates their retained independence through their ability to intervene with the executive.[58] It highlights the UK's successful checks and balances system which prevents abusive power and

[50] Constitutional (n 33).

[51] Tribunal (n 29).

[52] Human (n 51).

[52] Venice (n 55), at 40.

[53] ibid, at 41.

[54] Consultative Council of European Judges, *Magna Carta of Judges (Fundamental Principles),* Strasbourg 17th November 2010.

[55] James Slack, *'Enemies of the People: Fury over 'out of touch' judges who have 'declared war on democracy' by defying 17.4m Brexit voters and who could trigger constitutional crisis'* (Daily Mail, 2016) <https://www.dailymail.co.uk/news/article3903436/Enemies-people-Fury-touch-judges-defied-17-4m-Brexit-voters-trigger-constitutional-crisis.html > accessed 16th November 2023.

[56] Consultative Council of European Judges (CCJE) (2021). Opinion No. 24: *Evolution of the Councils for the Judiciary and their role in independent and impartial judicial systems.* The Council of Europe.

[57] *Magna Carta* (n 60), no 10.

[58] *Miller* (n 44).

maintains parliamentary sovereignty. The UK acknowledged the *'Daily Mail'* to be inappropriate and seek to prevent such negative portrayal from re-occurring. It indicates cooperation between the judiciary and media moving forward because the *"independent judiciary is the cornerstone of the rule of law."*[59] Moreover, Lord Neuberger recognised how "*misconceived attacks on judges undermine both the rule of law domestically and the international reputation of the legal system."*[60] Henceforth, following this, the UK has reconciled their issues and aligned its approach with CCJE recommendations to cooperate between the judiciary, public, and media to a moderate extent.

4.4 Recommendations on the UK's approach

Henceforth, there is a fear judicial independence in the UK is declining because their judiciary are becoming too political and over-reaching. However, if Parliament were to amend legislation, like the CRA, then judicial independence could be improved.[61] The CRA is a successful example of parliament preventing a concentration of judicial powers because it supports independence, non-arbitrariness, and fairness.[62] However, parliament could go further than this and revise CRA provisions to have a more explicit focus on the realm of judicial powers, especially the scope of powers in political situations. If this amendment occurred it would prevent instances like Miller[63] occurring and strengthen judicial independence in practice and perception. It would benefit the current blur in the separation of powers and also mitigate future media scandals due to a lack of clarity. Although, whilst further legislative changes would be advantageous for judicial independence, it could be counter-active for the constitutional value of the separation of power. The key problem is that whilst it improves the executive and judicial separation, it could detriment the legislative and judicial separation. Theoretically, the legislative legislating on judicial powers supports parliamentary sovereignty yet, at what point would it become too much? It risks the legislative becoming too involved and tyrannical with the judiciary fearing the legislative. Thus, it could be detrimental.

Alternatively, the UK could improve judicial independence by aligning their approach with other member states, like Germany, to replicate their success. Germany is perceived to have one of the highest judicial independence levels, alongside Denmark and Sweden.[64] In comparison to the UK, Germany approached judicial independence more

[59] Liz Truss [2017] < https://www.gov.uk/government/news/lord-chancellor-response-to-supreme-court-judgment> accessed 16th November 2023.

[60] Lord Neuberger, Valedictory Appearance at the Supreme Court [2017].

[61] Constitutional (n 33).

[62] Ibid.

[63] *Miller* (n 44).

[64] European Commission, 'The 2023 EU Justice Scoreboard' (COM, 2023) 309, p 41. [66] German (n 23), art 97.

explicitly in their basic law and exercise legislative, executive, and judicial powers through five political bodies.[66] These differences are important because they provide amendment inspiration that the UK could implement. For example, the UK could implement more bodies as currently, they have three and not five, this could resolve current issues explored surrounding judicial overstep in political questions. Furthermore, the UK could establish a more explicit document promoting the rule of law, separation of powers, and judicial independence to resolve their current issues regarding inaccessibility as it's spread amongst statutes, cases, and constitutional conventions. If the UK aligned their approach closer to Germany it would improve their judicial independence, however, whilst this is the aim such amendment is also problematic due to their differing jurisdictions. This amendment fails to address why their approaches differ. Germany's explicit law and judicial independence focus is driven by World War 2, the Weimer Constitution, and tyranny whereby their modern approach seeks to prevent abuse re-occurring. Whilst this approach is best suited to Germany the UK history is drastically different thus, it would not necessarily work the same nor achieve the same success. This concern is accelerated by Germany having a civil law system and the UK a common law system which reiterates how the same approach will not work the same in two countries. Aligning the UK with Germany could, therefore, undermine common law values such as flexibility because it would require large constitutional changes. Henceforth, theoretically, it would be a beneficial amendment but in practice, it would be unrealistic.

Conclusion

Henceforth, this article explored different interpretations of judicial independence with consideration for different approaches taken in EU member stated, including Germany and Poland. The article demonstrated judicial independence to be a complex concept going beyond judicial competency and also including processes for judicial appointment, dismissal, and disciplinaries. It took a closer examination of the UK's approach and following exploration of their statutory legislation, separation of powers, and checks and balances it can be concluded that the UK are achieving judicial independence to a strong extent. This is especially true when compared to other states, such as Poland, which have more frequent Article 6 violations. [65] Henceforth, the UK's approach to judicial independence is achieving European standards to a strong extent.

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Resource Allocation Decisions: Accountability For Healthcare Professionals

Galateia Tatsi

Introduction

Healthcare professionals have the important task of making resource allocation decisions. As there are limited resources that can be utilised towards the funding of treatments, healthcare professionals can decide to fund or deny funding of a treatment or medicine that could save lives. The process of decision-making must be one that upholds principles of fairness and respect of life; however, it must also ensure that resources are not wasted. Therefore, it is important that healthcare professionals are held accountable for decisions that impact significant aspects of people's lives. Moreover, accountability is important as patients must be able to trust these professionals that are undertaking decisions that are not prioritising economic factors over their needs.

For the purpose of this essay, the focus on healthcare professionals will be mainly on the National Institute for Health and Clinical Excellence (NICE) and the NHS.

This essay will provide a discussion exploring two ways in which healthcare professionals can be held accountable. Firstly, the notion developed by Daniels and Sabin 'accountability for reasonableness', will be analysed. It will be argued that it is an effective way for practising accountability on healthcare professionals regarding ethical legitimacy. Nonetheless, this discussion will provide academic accounts arguing the limits of the doctrine, and the use of another tool such as decision-making audit tool (DMAT**).** Secondly, challenging resource allocation decisions through judicial review will be the second section of this essay. This is a legal limit imposed by the courts on the discretion of healthcare professionals. Elements of 'accountability for reasonableness' will feature in this section, since elements of this notion can be recognised to exist within judicial review. This part of the essay will also explore the weaknesses of accountability through judicial review. It will be argued that even if the courts have limited discretion when it comes to adjudicating such matters, judicial review is an effective method to keep healthcare professionals in check.

This essay will conclude that healthcare professionals are held accountable for resource allocation decisions through both ethical and legal mechanisms that are suitable for the healthcare system.

Ethical legitimacy for the reasonableness of resource allocation decisions

Accountability for reasonableness

One ethical limit on the discretion of healthcare professionals is that decisions must be reasonable. The notion of 'accountability for reasonableness' was developed in 1997 by Daniels and Sabin.[1] Accountability for reasonableness is the idea that rationales or reasons for significant limit-setting decisions in relation to resource allocation should be made publicly available.[2] Furthermore, these reasons will be accepted by "fair-minded" people as they are decisions relevant in appropriate patient care under necessary resource constraints.[3] Acceptance by fair-minded people means that they seek to cooperate on terms they can justify to one another.[4]

The four conditions of the doctrine of 'Accountability for Reasonableness'

This essay will initially consist of an introduction of the four conditions under the doctrine of 'accountability for reasonableness'. Subsequently, an analysis of the application of this framework will be provided for, followed by an exploration of the decision-making audit tool.

The first condition is that decisions and their reasoning and rationales should be made publicly accessible.[5] This is an important aspect of accountability, as transparency and openness for limit-setting decisions is significant; making it easier for stakeholders to accept a more controversial decision. The explicitness of rationales used for these decisions provides a more coherent and consistent policy toward coverage of treatments under resource constraints.[6] Hence, a transparent and consistent policy for coverage establishes healthcare professionals as morally legitimate; entrusting them with the task of distributing health care fairly.[7] This is a positive consequence of health authorities being publicly explicit about rationales.

Secondly, these rationales provide a reasonable construal of the way the organisation should provide "value for money" to meet the health needs of a population under resource constraints.[8]

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[1] Norman Daniels and James Sabin, 'Limits to Health Care: Fair Procedures, Democratic Deliberation, and the Legitimacy Problem for Insurers' (1997) 26(4) Philosophy and Public Affairs <https://onlinelibrary-wiley-com.soton.idm.oclc.org/doi/epdf/10.1111/j.1088-4963.1997.tb00082.x> accessed 28 December 2023.

[2] Norman Daniels and James E Sabin, *Setting Limits Fairly: Can we Learn to share medical resources?* (OUP 2002), 44.

[3] ibid.

[4] ibid.

[5] Daniels and Sabin, 'Limits to Health Care: Fair Procedures, Democratic Deliberation, and the Legitimacy Problem for Insurers' (n 1) 323.

[6] ibid 327.

[7] Daniels and Sabin, *Setting Limits Fairly: Can we Learn to share medical resources?* (n 2) 43.

[8] Daniels and Sabin, 'Limits to Health Care: Fair Procedures, Democratic Deliberation, and the Legitimacy Problem for Insurers' (n 1) 323.

A construal will only be reasonable 'if it appeals to reasons, including values and principles, that are accepted as relevant' by people affected by this decision.[9] This proves the importance social values have upon rationing decisions taken by healthcare professionals. It provides a framework allowing extensive consideration of the needs of patients as a priority.

Thirdly, mechanisms for challenge and dispute resolution must be in place regarding limit-setting decisions, enabling the revision of a decision in light of new evidence or arguments.[10] As per Daniels and Sabin, these mechanisms must be in place to provide a more deliberative process as required by the principle of fairness.[11] The importance of this condition is fundamental. It enables stakeholders to challenge decisions through an internal mechanism instead of resorting to costly judicial review. Even if decisions remain unchanged, the honest reconsideration of its merits has a vital effect in the legitimacy of decision-making process and the achievement of a fairer outcome.[12] Consequently, establishing this internal mechanism enhances the broader social process.[13]

The fourth condition is the existence of voluntary or public regulation to ensure that the first three conditions are met.[14] This condition is seen to be performed by the courts which have scrutinised the decision-making process in NICE to ensure enforcement of the other three conditions.[15] Regulation/enforcement of these four conditions by the court will be a discussion developed in the second section of the essay; which focuses on judicial review as a tool for the purpose of accountability.

These four conditions, if met, are the essential elements 'in achieving legitimate and fair coverage decisions about new treatments'.[16] Meaning, their purpose is to achieve a fair limit-setting decision-making process, which results in stakeholders' acceptance of health authorities as the morally legitimate bodies making resource allocation decisions and distributing health care in a fair manner.[17]

However, one could argue that their effectiveness is limited due to the focus being solely on procedure. There is a lack of substantive guidelines or principles that would address rationing

[9] ibid 329.
[10] ibid 323.
[11] ibid 323.
[12] ibid 340.
[13] ibid 341.
[14] ibid 323.
[15] Daniel Wei L Wang, 'FROM WEDNESBURY UNREASONABLENESS TO ACCOUNTABILITY FOR REASONABLENESS' (2017) 76(3) CLJ <https://www.cambridge.org/core/journals/cambridge-law-journal/article/abs/from-wednesbury-unreasonableness-to-accountability-for-reasonableness/B8270E55897B31CB662A5103E4C202F9#> accessed 1 January 2024, 665.
[16] Daniels and Sabin, 'Limits to Health Care: Fair Procedures, Democratic Deliberation, and the Legitimacy Problem for Insurers' (n 1) 323.
[17] Daniels and Sabin, *Setting Limits Fairly: Can we Learn to share medical resources?* (n 2) 43.

disputes.[18] Howbeit, this can be justified by the lack of consensus in a pluralist society on controversial issues resulting in an inevitable lack of set principles.[19] Thus making it harder to reach a decision about principles that would govern priority-setting.[20]

i. Application of 'Accountability for Reasonableness'

The notion of 'accountability for reasonableness' of decisions has been explicitly applied in many healthcare systems. Specifically, this framework has been implemented by the National Institute for Health and Clinical Excellence (NICE). NICE's role is to make resource allocation decisions more transparent. Its role includes the assessment of the cost-effectiveness of treatments and the advisal of the NHS on their provision. Fundamentally, the four conditions are evidenced to be core principles in the Social Value Judgements of NICE.[21] It has been demonstrated by NICE in the Social Value Judgments that it places utmost significance on procedural justice through enforcement of 'accountability for reasonableness'. The fact that resources are limited, makes it crucial for taxpayers to have a say in the way the NHS will use them.[22] NICE has demonstrated the application of this framework by establishing a 'citizens' council to provide input on relevant social values' as a criterion when setting limits.[23] The purpose of which is to deal 'with ethical objections to cost effectiveness analysis'; by aggregating benefits and urging the pursuit of best outcomes.[24] This is significant as it allows the public to have input when NICE is tasked with cost-effectiveness analysis. One way this is done is by providing input on the way certain social values such as age affect limit-setting decisions.[25] Specifically, the purpose of this input provided for by the citizens' council is the pursuit of the best outcome,[26] and elimination of discrimination based on a patient's age. The purpose of the citizens' council directly links with the second condition under 'accountability for reasonableness' for considering the relevance of social values when assessing cost-effectiveness.

The application of this framework is further displayed through the NHS. The need for transparency in limit-setting decisions is reflected in the fact that nowadays patients are more

[18] Norman Daniels, 'Accountability For Reasonableness: Establishing A Fair Process For Priority Setting Is Easier Than Agreeing On Principles' (2000) 321(7272) BMJ <https://www-jstor-org.soton.idm.oclc.org/stable/25226260> accessed 28 December 2023, 1300.

[19] Norman Daniels and James E Sabin, 'Accountability for reasonableness: an update' (2008) 337 BMJ <https://www.proquest.com/docview/1778061813/A51CA24D24C0479EPQ/2?accountid=13963&sourcetype=Scholarly%20Journals> accessed 28 December 2023, 2.

[20] Daniels, 'Accountability For Reasonableness: Establishing A Fair Process For Priority Setting Is Easier Than Agreeing On Principles' (n 18) 1300.

[21] NICE, *Social Value Judgments* (2nd edn, 2008).

[22] ibid 10.

[23] Daniels and Sabin, 'Accountability for reasonableness: an update' (n 19) 2.

[24] ibid 1.

[25] ibid.

[26] ibid 2.

aware of their options increases the pressure on the NHS to provide these. As a result of the increased awareness regarding their options, patients can become more demanding through the form of litigation.[27] This increased awareness regarding patients' options is significant because it has made health authorities aware of the fact that their priority-setting decisions are visible and they are more likely to be scrutinised.[28] Hence, highlighting the requirement that decisions alongside their reasoning and rationales should be publicly accessible.[29] Therefore, making the publicity condition one of the key elements contributing to increasing the public's trust.

Appraisal process and transparency

The effectiveness of this framework has been demonstrated through qualitative studies. An example of this has taken the form of a study assessing NICE's appraisal process in relation to treatments for attention deficit/hyperactivity disorder (ADHD).[30] The assessment of this study was done against the background of the use of accountability for reasonableness.[31] In relation to the publicity condition it has been noted that NICE has been explicit; its transparency and processes that have been utilised are regarded as exemplary, as described by Schlander.[32] The study provides information on how NICE has been explicit by posting key documents and allowing stakeholders to participate throughout all phases of the process.[33] This is vital as transparency for limit-setting decisions being the first condition under the doctrine of 'accountability for reasonableness', has contributed in NICE's decision-making process about treatments; as recognised by this qualitative study. However, one could argue that the publicity condition's application is limited in other areas. For instance, economic models for NICE developed by Assessment Groups and uninformative Appraisal Committee meeting minutes appear to lack transparency.[34] The lack of transparency can also impede the advances of methodological standards regarding cost-effectiveness, as there is a lack of public debate.[35] Consequently, this secrecy could lead to the potential detriment of stakeholders.[36] This directly links with the relevance condition, which means that a lack of public debate distorts the process

[27] Wang, 'FROM WEDNESBURY UNREASONABLENESS TO ACCOUNTABILITY FOR REASONABLENESS' (n 15) 659.
[28] ibid 661.
[29] Daniels and Sabin, 'Limits to Health Care: Fair Procedures, Democratic Deliberation, and the Legitimacy Problem for Insurers' (n 1) 323.
[30] Michael Schlander, 'NICE accountability for reasonableness: a qualitative study of its appraisal of treatments for attention-deficit/hyperactivity disorder (ADHD)' (2007) 23(1) Current Medical Research and Opinion <https://www-tandfonline-com.soton.idm.oclc.org/doi/epdf/10.1185/030079906X159461?needAccess=true> accessed 1 January 2024.
[31] ibid.
[32] ibid 209.
[33] ibid 217.
[34] ibid.
[35] ibid 218.
[36] ibid.

of gaining relevant and appropriate information in relation to treatments. This can limit the effectiveness of priority-setting as there is a lack of sufficient knowledge of the relevant health needs that must be met; weakening the moral legitimacy of these healthcare professionals. Their ability to distribute health care fairly is then restricted.

ii. Decision-making audit tool (DMAT) and gaps argued to exist within the notion of 'Accountability for Reasonableness'.

'Accountability for reasonableness' has been significant and has been applied by both NICE and the NHS. Its application is not witnessed in practice only, but it has also acquired academic recognition. However, there is literature criticising its substantial effectiveness. Kieslich and Littlejohns propose that a decision-making audit tool would lead to more efficient outcomes in resource allocation decisions.[37] This is because there is no empirical account of whether the institutions that have performed well with the doctrine of 'accountability for reasonableness', have also performed well in the eyes of those affected by their decisions.[38] DMAT has been designed as an educational tool for decision-makers and stakeholders to enable them to assess the organisation's 'decision-making profile'; including the identification of values and criteria involved in the decision-making process.[39] The tool does so by merging process values (transparency, accountability and participation), with content values (clinical effectiveness, cost-effectiveness and solidarity).[40] This tool seems promising as it attempts to reinforce the process of decision-making, and does so by placing importance on public participation and fairness. This audit tool has the potential to facilitate public participation in priority setting. [41] One way it achieves this is by allowing 'public representatives to audit their local or national healthcare organisations'.[42] This method if implemented might be seen as a more efficient form of accountability, as its focus does not remain solely on procedural fairness.[43] It establishes moral legitimacy of healthcare professionals, ensuring that the procedure utilised is fair, while the content of the decision is fair as well.

[37] Katharina Kieslich and Peter Littlejohns, 'Does accountability for reasonableness work? A protocol for a mixed methods study using an audit tool to evaluate the decision-making of clinical commissioning groups in England' (2015) 5(7) BMJ <https://www.proquest.com/docview/1860811781?OpenUrlRefId=info:xri/sid:wcdiscovery&accountid=13963&sourcetype=Scholarly%20Journals> accessed 28 December 2023.
[38] ibid 2.
[39] ibid 3.
[40] ibid.
[41] ibid 7.
[42] ibid 7.
[43] ibid 5.

However, until DMAT is officially used by healthcare professionals such as NICE and the NHS, 'accountability for reasonableness' remains the ethical criterion holding healthcare organisations accountable.

Uncertainty surrounding fairness

Another criticism that has been put forward is that this notion of accountability lacks a clear definition of 'fairness'. Rid has argued that the concept of fairness in relation to meeting health needs can have different meanings as there are different conceptions of it.[44] Looking at accountability for reasonableness, the focus is on procedural fairness; there is a lack of other substantive requirements.[45] There is no definition of what fairness means and it can be open to interpretation. 'Accountability for reasonableness' does not sufficiently define the fair outcome of limit-setting decisions.[46] As there are not set principles acting as guidelines for decision-making, the task of resource allocation becomes harder. However, this limitation is not sufficient to deny the effectiveness of the framework. As mentioned above, the fact that we live in a pluralistic society means there is and will be a lack of consensus. This means that it would be impossible to set principles that would be satisfactory for all members of society.

Judicial Review

Healthcare professionals such as NICE and the NHS have legal limits on their discretion regarding decision-making for resource allocation. It is important that people have a right to legally challenge decisions that would affect them. Judicial review acts as the mechanism with which people can challenge and hold accountable healthcare authorities for decisions affecting them. This section of the essay will include case law discussion where judicial review has been used to hold healthcare professionals accountable.

i. Case law and 'Accountability for Reasonableness'

A key case explored will be *R v Cambridge DHA Ex parte B* (No.1) (*Child B*).[47] In this case, the funding of treatment for a 10-year-old girl suffering from acute myeloid leukaemia was decided to be against her best interest due to the experimental nature of the treatment; as it would also not have been appropriate use of limited resources.[48] This was an appeal by the health authority which was allowed and the decision was held to be lawful.[49] Even though the outcome of this case was not favourable towards the funding of the treatment, the case opened the doors to high visibility of decision-making about rationing to the public. The increased publicity this case received weakened the public's trust towards decisions made by the health

[44] A Rid, 'Justice and Procedure: How Does "Accountability for Reasonableness" Result in Fair Limit-Setting Decisions?' (2009) 35(1) JME <https://www.jstor.org/stable/27720245> accessed 2 January 2024, 14.
[45] ibid.
[46] ibid.
[47] [1995] 1 WLR 898.
[48] ibid.
[49] ibid.

system.[50] Therefore, making health authorities aware that their resource allocation decisions are more likely to be scrutinised both from the public and courts.[51] However, the effect was not limited to health authorities; it made patients aware of their ability to challenge rationing decision through judicial review.[52] The threat of litigation has made health authorities become increasingly aware of the ethical limits on their discretion. This is evidenced by the establishment of NICE. NICE was an attempt not only to improve decision-making process, but the "why and how" behind the decision reached.[53] This scrutiny meant that accountability and improvement in resource allocation decision-making was necessary in order to fill the gaps in priority setting within the NHS. Consequently, the significance of judicial review through this case is illustrated by the implications it had in the aftermath, as mentioned above. Judicial review has long-lasting effects beyond the courtroom as seen by the consequences of *Child B.*

This case's significance is encapsulated by the application of 'accountability for reasonableness' which reinforces the impact of judicial review. At page 905 of the case's judgement, Lord Bingham M.R. stated that the court's only function is to adjudicate on the lawfulness of decisions.[54] This means that the court assesses whether the procedure was carried out fairly, but not whether the decision itself was fair. This reminds us of 'accountability for reasonableness'. The framework assesses the procedural fairness of resource allocation decision-making which is presented in *Child B* in the form of the publicity condition. In order for a decision to be procedurally fair, it must be transparent.

As a result of this case, health authorities have realised the importance of high visibility regarding their rationing decisions. This means that they take into account the significance transparency has regarding limit-setting on resource allocation.

Moreover, the application of the condition of regulation under the doctrine of 'accountability for reasonableness', is apparent by the courts through judicial review. Although it has not been directly recognised as the application of that condition, it is implicitly performed. One case that illustrates that form of legal accountability is *R (on the application of Rose) v Thanet Clinical Commissioning Group.*[55] The enforcement of the fourth condition which is a key element in supporting the other three conditions (transparency, relevance, appeals and dispute resolution), is implicitly indicated through elements of this case. In this case, a 25-year-old woman was refused funding for her treatment after a clinical commissioning group (CCG) departed from NICE guidelines because it disagreed with NICE'S medical and scientific rationale. Even

[50] Wang, 'FROM WEDNESBURY UNREASONABLENESS TO ACCOUNTABILITY FOR REASONABLENESS' (n 15) 660.
[51] ibid 661.
[52] ibid 660.
[53] ibid 663.
[54] *Child B* (n 47).
[55] [2014] EWHC 1182 (Admin), [2014] WL 1219623.

though the court dismissed the appeal of the claimant (patient), it was still held that the CCG's decision lacked sufficient basis or reasoning, and was held unlawful. Although, the court did not allow the claimant's appeal, it still held the defendant health authority accountable. It did so as the case illustrates the necessity of convincingness in providing justification when making limit-setting decisions. The enforcement of regulation is assessed against the enforcement of the other three elements. The court implicitly enforced regulation by pointing out the necessity of transparency as there was no sufficient basis or reasoning for the CCG's decision. In paragraph 91, Jay J states that 'the public law obligation is to have regard to the relevant NICE guideline and to provide clear reasons for any general policy that does not follow it'.[56] The CCG did not follow the guideline but failed to provide a reasoning other than its disagreement.[57] This reasoning provides that even if policy followed is lawful, a healthcare professional is required to provide a satisfactory reasoning. In other words, one can argue that there is a lack of moral legitimacy in this decision applying accountability for reasonableness. This directly links with the first condition that rationales should be made publicly accessible. In this case, the basis of the reasoning was insufficient. One of NICE's principles as seen in the Social Value Judgements is that of being explicit and transparent about rationales through the publicity condition.

The court reviewing the appeal was itself a form of regulation as the court was in the position of assessing the reasoning provided by the CCG. Accordingly, fulfilling the third condition of having an appeals and dispute resolution system in place.

Finally, the requirement for the relevance condition to be present is that the rationale provides a reasonable construal of the what the organisation should provide "value for money" to meet the health needs of a population under resource constraints.[58] However, no sufficient rationale was provided for in the first place as seen by the judgment of the court. Therefore, the relevance condition cannot be said to have been met by the CCG. The courts are seen to hold accountable health authorities as their decisions lack the reasoning that must be in place to support rationing decisions.

ii. A limit of judicial review

One could argue that judicial review is limited in holding healthcare professionals accountable as the courts are not in a position to substitute their opinions for limit-setting decisions. The functions of decision-making on social policy and allocation of resources are not included

[56] ibid.
[57] ibid [92].
[58] Daniels and Sabin, 'Limits to Health Care: Fair Procedures, Democratic Deliberation, and the Legitimacy Problem for Insurers' (n 1) 323.

within the role of the court. [59] The court's function is to assess the lawfulness of decisions.[60] If courts do assess merits beyond the lawfulness of the decision, they may also be 'putting themselves in a position to second-guess policy decisions and thus reduce administrators' discretion to an extent'.[61] This means that they would be overriding an administrative procedure by a judicial one.[62] This would entail the courts addressing social policy in resource allocation with a lack of expertise on the matter. This kind of expertise is one expected from healthcare professionals that undertake the administrative procedure of resource allocation.

Although, accountability through judicial review may be limited in the ways mentioned above, there is evidence of the court paying deference to health authorities allowing them to perform their discretion on resource allocation decision-making. This is illustrated in both cases mentioned above; even though the courts supported explicitness, transparency, and provision of sufficient rationale for decision-making, these cases demonstrate dismissals of these applications. In page 906 of the judgement for *Child B*, Lord Bingham M.R. explained that judgement on how a limited budget should be allocated is not one that the court can make.[63] Hence, reinforcing the idea that courts are paying deference to the discretion held by health authorities, being the appropriate decision-makers for resource allocation.

The conclusion is that increased judicial scrutiny has pushed the NHS, and in general healthcare professionals, to ration healthcare in a way to "avoid, respond to and comply with judicial review".[64] The ability of stakeholders to legally challenge resource allocation decisions through judicial review poses a legal limit on healthcare professionals' discretion. It is one that incorporates elements of 'accountability for reasonableness' as discussed above.

Conclusion

This essay provides the conclusion that healthcare professionals' discretion is both ethically and legally limited. 'Accountability for reasonableness', developed by Daniels and Sabin, provides a framework for establishing moral legitimacy of healthcare professionals through principles of transparency and procedural justice. This essay's discussion has provided the argument that this framework has been effectively applied by NICE, whilst being enforced by the courts through judicial review. Secondly, judicial review provides legal means by which stakeholders, especially patients affected by resource allocation decisions, are able to challenge

[59] Wang, 'FROM WEDNESBURY UNREASONABLENESS TO ACCOUNTABILITY FOR REASONABLENESS' (n 15) 646.
[60] *Child B* (n 47) 905 (Lord Bingham MR).
[61] Wang, 'FROM WEDNESBURY UNREASONABLENESS TO ACCOUNTABILITY FOR REASONABLENESS' (n 15) 670.
[62] ibid.
[63] *Child B* (n 47).
[64] Wang, 'FROM WEDNESBURY UNREASONABLENESS TO ACCOUNTABILITY FOR REASONABLENESS' (n 15) 668.

decisions. Both forms of accountability have limitations that have been explored within this essay, but their effectiveness in keeping healthcare professionals in check is supported. In conclusion, healthcare professions are held accountable in ways that enable them to improve the process by which they decide on the allocation of limited resources.

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A Critical Discussion of the Causes of Miscarriages of Justice in England and Wales within the Role of the Police and the Steps that Can Be Taken to Prevent These

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Introduction

In the pursuit of justice, the role of the police is fundamental to the integrity of a criminal investigation and the criminal justice system. However, the recent exoneration of Andrew Malkinson, who spent 17 years incarcerated for a crime he did not commit, highlights that despite notable improvements being made over the past 40 years, such as the Police and Criminal Evidence Act 1984 (PACE) significantly reforming police power and conduct to adhere to fair and transparent codes, the police continue to cause miscarriages of justice. Therefore, the current system is not enough to prevent reoccurrence.

A miscarriage of justice caused by the police's role can be described as a successful appeal against a criminal conviction.[1] This does not necessarily establish the defendant's factual innocence, but rather that the police's actions have compromised the integrity of the conviction, rendering it unsafe.[2] Unsafeness does not have to be overt, it merely requires "some lurking doubt or uneasiness whether an injustice has been done".[3] This may stem from a lack of integrity by which the conviction was obtained, such as through coercive means,[4] or through new or missed evidence revealing a flawed or overly narrow investigation by virtue of tunnel vision.

The research underscores that the most frequent causes of miscarriages of justice can be traced back to the police investigative process,[5] namely 3 of the 5 common threads of miscarriages of justice: wrongful identification, false confession and police misconduct.[6] Addressing these causes at their root is paramount to preventing miscarriages of justice as intervention at the

[1] M Naughton, Rethinking Miscarriages of Justice: Beyond the Tip of the Iceberg (1 edn, Palgrave Macmillan UK 2007) 17

[2] Criminal Appeal Act 1995, s2(2)

[3] R v Criminal Cases Review Commission Ex parte Pearson [1999] 3 All ER 498 (CA)

[4] M Naughton, Rethinking Miscarriages of Justice: Beyond the Tip of the Iceberg (1 edn, Palgrave Macmillan UK 2007) 23

[5] S Poyser and R Milne, 'The time in between a case of 'wrongful' and 'rightful' conviction in the UK: Miscarriages of justice and the contribution of psychology to reforming the police investigative process' [2021] 23(1) International Journal of Police Science & Management 7

[6] G Waller Chair of Committee, 'Miscarriages of Justice' (Justice (London), 1989)

primary investigative stage can mitigate against further exacerbation of contributing factors beyond the role of the police that cause miscarriages of justice such as in the courtroom.

1. The Causes of Miscarriage of Justice – Police Tunnel Vision

Miscarriages of justice caused by the role of the police often are rooted in tunnel vision during their investigation. Tunnel vision occurs when police conduct an investigation with a "single-minded and overly narrow focus on a particular investigative or prosecutorial theory, so as to unreasonably colour the evaluation of information received and one's conduct in response to that information".[7] This is a manifestation of an officer's confirmation bias, where they specifically seek out information or witnesses that confirm their predisposition about the case, and so will "identify a potential suspect first, and then work inwards to build a case against them rather than working from the evidence out in criminal investigations".[8] This results in "the police [...] attach[ing] too much weight to or rely[ing] upon a particular piece of information which they believe to be accurate, but in fact may be inaccurate",[9] and other crucial evidence being overlooked.

1.1 How Tunnel Vision Contributes to a Miscarriage of Justice

1.1.1 Barry George's Case

The case of Barry George is a significant example of tunnel vision's detrimental impact on the integrity of a conviction.[10] Barry spent 8 years in prison after being falsely convicted of the murder of the famous presenter, Jill Dando, on the basis of police tunnel vision resulting in overreliance on faulty forensic and bad character evidence. When searching Barry's flat, they found a coat which became subject to forensic testing for DNA evidence linking him to the scene. The testing officer "discovered a single particle [...] of FDR in the internal right pocket of the coat. The particle matched the constituent elements of FDR found in the cartridge case and on the victim's hair".[11] Following this finding, the officer claimed that the likelihood of finding this particle was "remote in the extreme", therefore suggesting that he was at the crime scene.[12] However, in retrospect, the Court of Appeal debunked this assertion as the particle

[7] A Lamer and others, 'The Lamer Commission of Inquiry Pertaining to the cases of Ronald Dalton, Gregory Parsons, Randy Drunken' (Report and Annexes, St. John's, NL, Queen's Printer, 2006) 71

[8] M Diskin Bates, Stand Against Injustice: The untold story of the family of Barry George, wrongly convicted for the murder of Jill Dando (1 edn, Malcolm Down Publishing 2018) 10

[9] A Samuels, 'The Rachel Nickell case: reflections on the significance' [2012] 52(3) Medicine, Science and the Law 182

[10] R v George [2007] EWCA Crim 2722

[11] Ibid 3

[12] Ibid 17

"was no more likely to have come from the gun that killed Miss Dando than from some extraneous source".[13] Since this information was unavailable at the time of the investigation, the police placed heavy reliance on the DNA evidence pointing towards Barry as the murderer. This was supported by their substantial reliance on Barry's character fitting the calibre of a murder. Barry had a questionable past, having "gotten into trouble with the Metropolitan Police several times for impersonating celebrities and police officers", previously "serv[ing] 18 months of a 33-month sentence for attempted rape in February 1982",[14] and had "a reputation for stalking women".[15] Combined with public pressure to identify a murder, the police relied on this weak character evidence despite "the crime [...] [being] carried out with an element of professionalism" by a suspected hitman with only one bullet to the head.[16] Barry was not a sophisticated killer having been an epileptic and "slow, sluggish and a person of low IQ who found it difficult to plan and execute the simplest of tasks".[17] Nevertheless, falling victim to their tunnel vision, the police used this bad character evidence to secure his conviction in 2001, resulting in the miscarriage of justice for Barry George.

Once the investigating officers fall into the trap of tunnel vision, this can interact with other factors contributing to a miscarriage of justice as officers "move from mere interpretation of evidence to more malignant practices".[18] This "could include [consciously or unconsciously] "assisting" witnesses in their recollection and [...] using coercion to attempt to obtain admissions from the single suspect, whose guilt is assumed".[19] Focusing on eyewitness testimony, police tunnel vision can affect witness recollection as every "interaction between [a] witness and police officer, or a witness with other witnesses to the same event, provides an opportunity for an exchange of information".[20] As a result, any "misleading cues" or biases displayed by police officers based on their bias of who the prime suspect is can contaminate witness recollection as their memory is unconsciously altered,[21] to align with the police's theory of events. As a result of the interplay between tunnel vision and eye-witness identification, there is a significant risk of misidentification of suspects.

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[13] Ibid 18

[14] V Jessop, 'Who is Barry George, the man who went to prison for Jill Dando's murder?' (The Standard, 3 October 2023)<https://www.standard.co.uk/culture/tvfilm/who-is-barry-george-jill-dando-netflix-documentary-b1110361.html> accessed 11 December 2023

[15] D Campbell and others, 'A loner and fantasist but not a calculating killer' (The Guardian, 2 August 2008) <https://www.theguardian.com/uk/2008/aug/02/jilldando.ukcrime> accessed 16 December 2023

[16] J Moore, 'Barry George: A likely candidate' (Inside time, 1 September 2008) <https://insidetime.org/barry-george-a-likely-candidate/> accessed 20 December 2023

[17] ibid

[18] A Lamer, 'The Lamer Commission of Inquiry Pertaining to the cases of Ronald Dalton, Gregory Parsons, Randy Drunken' (Report and Annexes, St. John's, NL, Queen's Printer, 2006) 72

[19] ibid

[20] A Roberts, 'The Problem of Mistaken Identification: Some Observations on Process' (2004) 8 E & P 104

[21] J Searcy and others, 'Influence of Post-Event Narratives, Line-up Conditions and Individual Differences on False Identification by Young and Older Eyewitness' (2000) 5(2) Legal and Criminological Psychology 220

1.1.2 John Jerome White's Case:

This transpired in the US case of John Jerome White, who spent over 22 years in prison for the rape of an elderly woman in 1979 that he did not commit by virtue of eyewitness misidentification until DNA testing proved his innocence.[22] He was convicted based on the eyewitness testimony positively identifying him as the attacker. Before seeing John in the line-up, she was shown a photo of him as an investigator thought he matched her initial description. Upon seeing the photo, she was not completely certain he was the attacker, but when later shown the live line-up with him in it again and the remaining fillers being new people she had not seen, the witness positively identified John as the attacker despite the actual attacker also present in the line-up.[23] This false identification was likely the virtue of being familiarised with John's face having seen it multiple times as the investigating officers believed this was the suspect involved, especially since the witness's initial description described the attacker as "well built" with a "round face", which was inconsistent with John.[24] As this identification confirmed the investigator's preconception of who the attacker was, they never questioned the inconsistency between her initial description and later identification. This underpins how the police can influence eyewitness testimony because of their tunnel vision and therefore cause a miscarriage of justice.

1.2 How Tunnel Vision Could Be Prevented?

Memory is malleable and there is little that the police can do to prevent alterations in memory from occurring other than preventing police tunnel vision causing errors in witness recollection. Recognising the risks of police influence on witness identification, PACE has introduced important safeguards during parades aiming to prevent police influence over witnesses and to improve the reliability of identifications. The police must not prompt or guide an eye-witness in any way and they must make a selection without any police help,[25] as well as the police being prohibited from directing an eye-witnesses' attention to any one individual image or give any indication of the suspect's identity.[26] By minimising contact between the police officer conducting the parade and the witness, witnesses' identifications will be more accurate and free from police influence, making misidentification caused by tunnel vision and hence a miscarriage of justice less likely.

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[22] The National Registry of Exonerations, 'John Jerome White' (The National Registry of Exonerations, 22 November 2016) <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3735> accessed 16 December 2023

[23] G Wells and others, 'Test a Witness's Memory of a Suspect Only Once' [2021] 22(1S) Psychological Science in the Public Interest 13S

[24] ibid

[25] Police and Criminal Evidence Act 1984, Code of Practice D, Annex E, Para 5

[26] Ibid, Code of Practice D, Annex E, Para 13

Despite these provisions, the existing PACE safeguards may not be sufficient to prevent the influence of tunnel vision on witnesses. Currently, there is no requirement to conduct double-blind parades, where neither the police officer administering the parade nor the witness is aware of who the prime suspect is.[27] Without double-blind parades, it is possible for officers to influence the eyewitness as tunnel vision occurs unconsciously, so therefore may be displayed through the use of tone or body language unknowingly.

Therefore, to prevent this from contributing to miscarriages of justice, further training and safeguards would be appropriate. Police officers should be educated on the dangers of tunnel vision. This will inform them how overreliance on narrow investigations can compromise the effectiveness of their efforts and negatively influence witness identification. Officers should also be equipped with the skills to recognise signs of their own and others' tunnel vision along with strategies to mitigate its effects. Beyond initial training, officers need to consolidate these practices throughout their careers. This continual professional development ensures they stay vigilant against tunnel vision and will prevent the effects from worsening due to insufficient training.

Furthermore, in line with international best practices, compulsory double-blind parades should be implemented by PACE to ensure there is zero scope for police influence on witness recollection as recently adopted in California's penal code.[28] Psychologists have noted the effectiveness of double-blind parades to avoid unintentional cues such as body language or tone of voice impacting the reliability of eyewitness evidence,[29] and therefore if adopted in England and Wales it could result in more professional identification procedures, minimising the chance of a miscarriage of justice.

Although the recommended safeguards will require additional police resources, staff and time, these efforts will have a significant positive impact upon preventing further miscarriages of justice. Therefore, if the government is to make preventing miscarriages of justice a priority in light of the recent Andrew Malkinson case, such resources would greatly help improve the integrity of the current investigatory procedures.

[27] G Davies and L Griffiths, 'Eyewitness Identification and the English Courts: A Century of Trial and Error' [2008] 15(3) School of Psychology, University of Leicester, Leicester, England 444

[28] CA Penal Code 2018, s859.7(2)

[29] US Department of Justice, 'Eyewitness Evidence: A Guide for Law Enforcement' (October 1999) <https://www.ojp.gov/pdffiles1/nij/178240.pdf> accessed 11 December, 9

2. The Causes of Miscarriage of Justice – Coercive Police Interrogation Tactics:

Another significant cause of miscarriage of justice within the police is the use of coercive interrogation tactics during the investigative process. These tactics often involve using intimidation with physical violence or threats, manipulation, and psychological pressure through lengthy and intense interrogations. The Reid method of interrogation, originating from and commonly used in the US, encourages these methods through its 9-step interrogation technique.[30] These steps require the isolation of the suspect in a small room before interrogation to "increase anxiety", and then the confrontation with "strong accusations of guilt with no opportunity of denial", and eliciting a confession as "a means of escape" by "minimising and normalising the crime" and to escape the intense interrogation.[31] Despite the Reid method never being formally adopted by the police in England and Wales, similar coercive interrogation tactics have been deployed by the police as identified by Gudjonsson, including the 3-step – delivery, maximisation and manipulation tactics during interrogation.[32] During the maximisation stage, similar techniques are used to "increase a suspect's internal anxiety" and there is "intimidation or challenge directed at the suspect", including "the threat of continued detention" and "challenges that the suspect's replies were simply not believable".[33] These "continued and persistent challenges and verbal assaults" have a "deleterious effect on the defendant's willpower and resistance",[34] illustrating its similarity to the Reid method.

3. How Do Coercive Police Interrogation Tactics Contribute to a Miscarriage of Justice?

The issue with these coercive interrogation tactics is that they tend to produce false confessions leading to miscarriages of justice. The interrogating officer creates a high-pressure and unpleasant environment for the suspect being interrogated, this will make them more at risk of a coerced false confession to remove themselves from the situation as "he or she is unable to cope with [the] interrogation", combined with feelings of "[a]nxiety, fear and depression [which] may make it difficult to make a rational choice".[35]

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[30] REID, 'The Reid Technique of Investigative Interviewing and Advanced Interrogation Techniques' (REID, 2023) <https://reid.com/programs/program-descriptions/the-reid-technique-of-investigative-interviewing-and-advanced-interrogation-techniques> accessed 20 December 2023

[31] S Easton, 'False Confessions' in S Easton, Silence and Confessions: The Suspect as the Source of Evidence (Palgrave 2014) 157

[32] G Gudjonsson, Psychology of Interrogations and Confessions (Wiley 1992) 80

[33] Ibid 81, 82

[34] Ibid 82

[35] S Easton, 'False Confessions' in S Easton, Silence and Confessions: The Suspect as the Source of Evidence (Palgrave 2014) 151

3.1 The Birmingham Six Case:

The negative effects of coercive interrogation tactics are evident in the case of the Birmingham Six,[36] who all had spent 16 years imprisoned after being wrongfully convicted of the murder of 21 people in 1974.[37] Upon arrest, a forensic scientist used the Griess test, which detects the presence of nitrite compounds from burnt gunpowder. His findings suggested that "there was evidence of nitroglycerine on the hands of Paddy Hill and Billy Power",[38] the explosive substance found in the bomb, and he was 99% certain of his results.[39] It was not until the case reached the Court of Appeal that the test was ruled "not specific" with "other substances [...] yield[ing] a positive reaction".[40] The findings "undoubtedly misled the investigators and gave them a false sense of confidence that they had arrested the right people".[41] Combined with the effects of tunnel vision and overreliance on this evidence, the police engaged in coercive interrogation tactics. Such tactics included "[e]xtreme physical and verbal assault, sleep and food deprivation",[42] inducing the false confessions of four suspects who implicated the other two who did not. Examining these confessions, Gudjonsson found that the four who falsely confessed also scored highly in suggestibility and compliance tests, unlike the other two who did not, demonstrating those four lacked the ability "to resist interrogation under extreme pressure",[43] falling into the trap of falsely confessing.

Once a false confession is given like in the Birmingham Six, it is "inherently prejudicial and highly damaging to a defendant" and even if supported with no other evidence will "almost always seal the defendant's fate" of conviction,[44] due to the weight given to this by a jury, resulting in a miscarriage of justice. This emphasises the importance of preventing false confessions produced by police tactics interconnected with tunnel vision.

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[36] R v McIlkenny, Hunter, Walker, Callaghan, Hill and Power (1991) 93 Crim App R 287 (CA)

[37] J Robins, 'Miscarriages of Justice in England and Wales' in Jon Robins (ed), Murder, Wrongful Conviction and the Law (Routledge 2023) 2-3

[38] G Gudjonsson, 'The Impact of Real-Life Cases on Legal Changes, Police Practice, and Science' in G Gudjonsson, The Psychology of False Confessions (Wiley 2018) 35

[39] R v McIlkenny, Hunter, Walker, Callaghan, Hill and Power (1991) 93 Crim App R 287 (CA) 9

[40] Ibid 40

[41] G Gudjonsson, 'The Impact of Real-Life Cases on Legal Changes, Police Practice, and Science' in G Gudjonsson, The Psychology of False Confessions (Wiley 2018) 35

[42] C Hoyle and M Sato, Chapter 9: A Responding to Applicants' Allegations of Policing Without Integrity, Reasons to Doubt: The Criminal Cases Review Commission (OUP 2019) 176

[43] G Gudjonsson, 'The Impact of Real-Life Cases on Legal Changes, Police Practice, and Science' in G Gudjonsson, The Psychology of False Confessions (Wiley 2018) 35

[44] S Drizin and A Leo, 'The Problem of False Confessions in the Post-DNA World' [2004] 82(1) North Carolina Law Review 958-959

3.2 How Coercive Police Interrogation Tactics Could Be Prevented?

Preventative measures have been taken in England and Wales against coercive interrogations, including the disbandment of the West Midlands Police Serious Crime Squad in 1989 following the coercive and violent tactics they used in the Birmingham Six Case and many others.[45] Additionally, PACE now prevents unreliable confessions from being put forward as evidence at trial,[46] such as confessions obtained through oppression,[47] including hostile and aggressive questioning.[48] This means false confessions such as those given by the Birmingham Six will not be used against defendants, giving them a better chance at proving their innocence at trial.

Most importantly, the police in England and Wales now commonly use the PEACE model when interrogating: Planning and preparation, Engagement and explanation, Account – clarification and challenge, Closure, and Evaluation, which was adopted to make interviews less confrontational and more transparent.[49] PEACE differs from other coercive tactics as the focus is on investigative interviewing,[50] rather than eliciting a confession irrespective of guilt. The interrogating officer must approach the interview with "an open mind" and should actively test the information received rather than accepting the first answer they are told to fit their hypothesis.[51] The primary objective of the interrogation is to obtain accurate and reliable information using an investigative mindset, specifically assuming and believing nothing and challenging everything through means of open-ended questions maximising information gathering.[52] Researchers have praised the PEACE model as being a "more ethical approach"[53] and noted an "improvement in interviewing skills following the training in PEACE techniques" preventing tunnel vision and coercive methods.[54] This means that confessions under PEACE are more likely to be reliable as there will be no coercion involved, and therefore the chances

[45] For example, Twitchell [2000] 1 Cr App R 373 (CA)
[46] Police and Criminal Evidence Act 1984, s76(2)
[47] Ibid, s76(2)(a)
[48] R v Fulling [1987] 2 All ER 65 (CA)
[49] Forensic Interview Solutions, 'PEACE: A different approach to investigative interviewing' <https://www.fis-international.com/assets/Uploads/resources/PEACE-A-Different-Approach.pdf> accessed 20 December 2023
[50] S Easton, 'False Confessions' in S Easton, Silence and Confessions: The Suspect as the Source of Evidence (Palgrave 2014) 161
[51] Ibid
[52] Forensic Interview Solutions, 'PEACE: A different approach to investigative interviewing' <https://www.fis-international.com/assets/Uploads/resources/PEACE-A-Different-Approach.pdf> accessed 20 December 2023 6, 10
[53] S Poyser and R Milne, 'The time in between a case of 'wrongful' and 'rightful' conviction in the UK: Miscarriages of justice and the contribution of psychology to reforming the police investigative process' [2021] 23(1) International Journal of Police Science & Management 11
[54] S Easton, 'False Confessions' in S Easton, Silence and Confessions: The Suspect as the Source of Evidence (Palgrave 2014) 161-2

of miscarriages of justice are less likely in comparison to methods such as Reid or the 3-step tactic discussed.

Although PEACE has improved interrogations, its incorporation into interrogations is still not perfect. It is unclear whether the reduction of interrogation producing false confessions can be attributed to the PEACE model or whether there has been a general shift in attitude of interrogating officers as Clarke found minimal differences in the performance of PEACE-trained and untrained officers in his study across six police forces.[55] Further, those trained in the PEACE model expressed dissatisfaction with it and that their training was limited, with little supervision or feedback given on performance.[56]

Therefore, to ensure interrogation methods remain efficient at preventing false confessions, there must be a continued commitment to evidence-based policing with more officers being trained on the importance of the PEACE model and the risks associated with using coercive interrogation tactics. Training must be updated and tailored to individual officers providing feedback and supervision of performance to ensure that performance improvements can be seen once officers are PEACE-trained. These recommendations will strengthen the PEACE model and ensure it is taught to more officers, resulting in fewer coercive tactics being used and hence less false confessions resulting in miscarriages of justice.

4. Remedying Police Caused Miscarriages of Justice

Where the police do secure a conviction through tunnel vision or coercive tactics and the defendant's appeal options are exhausted, they may apply to the Criminal Cases Review Commission (CCRC) to have their case reviewed. The CCRC is responsible for reviewing alleged miscarriages of justice and was introduced by the Criminal Appeal Act 1995, following the Runciman Commission recommending improvements to the criminal justice system.[57] The CCRC can refer convictions to the Court of Appeal,[58] when they believe there to be a real possibility that the conviction, verdict, finding or sentence will be overturned if the reference is made.[59]

The CCRC is effective at finding police errors which have caused miscarriages of justice, such as discovering fresh evidence, which was not considered by the police, due to their tunnel

[55] C Clarke and others, 'Interviewing Suspects of Crime: The Impact of PEACE Training, Supervision and the Presence of a Legal Advisor' [2011] 8(2) Journal of Investigative Psychology and Offender Profiling 149-162
[56] B Snook and others, 'Let 'em Talk! A Field Study of Police Questioning Practices of Suspects and Accused Persons' [2012] 39(10) Criminal Justice and Behavior 1328-1339
[57] Viscount W Runciman, The Royal Commission on Criminal Justice (London: HMSO 1993) 11
[58] Criminal Appeal Act 1995, s9(1)
[59] Ibid, s13(1)

vision for example. They can access this evidence and refer it to the Court of Appeal requiring any police force,[60] to produce documents or other materials.[61] This occurred in the case of John Kamara, who spent 20 years in prison wrongfully convicted of murder.[62] The CCRC believed there was a real possibility of the conviction being overturned based on unfair identification evidence and the failure of the police to disclose "201 witness statements taken during the investigation, which were deemed "non-material" despite there being sightings of possible suspects" near the crime scene.[63] The CCRC were able to discover these exonerating pieces of evidence "sitting in a [police] storage room".[64] Furthermore, because the CCRC is made up of at least a third of legally qualified personnel,[65] they had the expertise to conclude that this non-disclosure of evidence was in breach of the Attorney-General's Guidelines of 1976 which were in place at the time.[66] As a result, John Kamara was exonerated, illustrating the CCRC's effectiveness as a review mechanism.

However, the CCRC has little influence on overall police accountability for their contribution to miscarriages of justice. Due to the nature of the review, they deal only with miscarriages of justice on a case-by-case basis, and therefore cannot remedy the root causes perpetuating within the police, other than in a specific case which has made the conviction unsafe.

Therefore, to prevent miscarriages of justice, the focus should remain on pre-emptive measures and systemic reform of the police before cases reach the CCRC. If policing was improved, this would "militate against the negative effects of fallible witnesses and imperfect forensic expertise",[67] and so there would be less need for the CCRC to remedy miscarriages as there would be fewer.

5. Preventing Miscarriages of Justice More Generally

There remain two overarching limitations of the criminal justice system which must be addressed to promote the efficiency of the existing safeguards and recommendations put forward to prevent such factors discussed by the role of the police from causing miscarriages of justice.

[60] Ibid, s22(1)
[61] Ibid, s17(2)
[62] R v Kamara (John) [2005] 5 WLUK 171 (CA)
[63] Ibid 1
[64] J Humphries, 'Innocent man sat in jail for 20 years as key witness statement gathered dust' (Liverpool Echo, 3 June 2022) <https://www.liverpoolecho.co.uk/news/liverpool-news/innocent-man-sat-jail-20-24133596> accessed 7 December 2023
[65] Criminal Appeal Act 1995, s8(5)
[66] R v Kamara (John) [2005] 5 WLUK 171 (CA) 11
[67] Ibid 175

5.1 Strengthening Compliance with Current And Recommended PACE Safeguards

There has been a "steady trickle of 'post-PACE' cases going to appeal" which indicate that "the safeguards created by PACE and the Codes are not completely effective or are not always properly applied".[68] This could be attributed to a lack of significant consequences following a breach of the PACE code of practices by police officers. Originally, a breach of PACE would render officers liable to disciplinary proceedings,[69] but this has now been repealed.[70] Instead, a failure of any police officer to comply with a provision shall not itself render him liable to any criminal or civil proceedings.[71] This means that the effort and research expended on developing sophisticated procedures to improve policing and the possibility of miscarriages of justice is compromised as there have not been "similar efforts to [...] enforc[e] adherence to the scheme".[72] The Court of Appeal have also demonstrated reluctance to sanction police officers' failure to adhere to PACE codes, with many ruling that breaches will not inevitably lead to the exclusion of evidence that may be tainted by a breach.[73] Therefore, non-compliance is likely to occur as there is little incentive for police officers to spend time and effort strictly following the complicated abundance of PACE rules when they will suffer "no adverse consequences [...] from any breach".[74]

For this reason, tougher consequences must arise following a police officer's breach of PACE to strengthen the regulations, strengthening the integrity of a conviction. However, it is equally important to pay regard to the nature of the breach as it would not be appropriate to impose onerous sanctions for any and every slip in compliance no matter how trivial, as this would negatively impact effective policing, resulting in unnecessary delays and the potential for key evidence being excluded from prosecution's case due to technical breaches posing no hindrance on the integrity of a conviction. Therefore, a balance must be struck, potentially with disciplinary procedures and sanctions being left to the discretion of higher-ranking officers with the possibility of appeal to an outside body separate to the police, such as an appellate court, ensuring the decision reached is fair and proportionate to the impact of the breach upon the conviction.

[68] M Ventress, 'Keeping PACE: fitness to be interviewed by the police' [2008] 14(5) Advances in Psychiatric Treatment 369–381
[69] PACE 1984, s67(8)
[70] Police and Magistrates' Courts Act 1994, s37
[71] PACE 1984, s67(1)
[72] A Roberts, 'The Problem of Mistaken Identification: Some Observations on Process' (2004) 8 E & P 109
[73] R v Khan [1997] Crim LR 584 (CA), R v McEvoy [1997] Crim LR 887 (CA), R v Selwyn [2012] EWCA Crim 2968, R v Lariba [2015] EWCA Crim 478, DPP v Jobling [2016] EWHC 2707 (Admin)
[74] A Roberts, 'The Problem of Mistaken Identification: Some Observations on Process' (2004) 8 E & P 118

5.2 Increased Funding and Police Resources

To maximise current police training and the further training recommended, as well as effectively incorporating the safeguards such as double-blind parades as mentioned above, sufficient additional funding is needed. Long-term implications of austerity in England and Wales have resulted in central government funding for policing depleting by 20% in real terms since 2010,[75] and a real-term reduction in the number of officers by 11% over the past decade,[76] inevitably resulting in fewer resources for the police. Without adequate funding or officers, the amount and quality of the PEACE model and tunnel vision training will suffer. Police have reported the negative impacts on their investigations due to the demands of time and caseload leaving little investigative capacity,[77] and how scarce resources have resulted in limited training.[78] Therefore, to prevent police inexperience of conducting an effective investigation and minimising the chances of a miscarriage of justice, more funding must be allocated to educate officers on a wider and ongoing basis and to make investigations more thorough and effective.

Conclusion

To conclude, there are significant ways the role of the police may compromise the integrity of an investigation causing a miscarriage of justice. Tunnel vision and coercive interrogation tactics illustrate how bad policing can reproduce and exacerbate other factors which contribute to a miscarriage of justice, increasing the likelihood of a miscarriage occurring. Therefore, it is important to address these initial causes from the root of the initial investigation. Although significant progress has been made by introducing the PEACE model and safeguards in PACE which has completely reformed the policing system, more must be done to prevent further miscarriages of justice. As identified, there are clear ways this can be done to address the

[75] E Facchetti, 'Policing on a budget: Understanding the impacts of austerity cuts on crime, police effectiveness, and local welfare' (Centre for Economic Policy Research, 6 April 2023) <https://cepr.org/voxeu/columns/policing-budget-understanding-impacts-austerity-cuts-crime-police-effectiveness-and#:~:text=At%20the%20heart%20of%20these,900%20police%20stations%20in%20England.> accessed 20 December 2023

[76] R Syal, 'Police chiefs blame Tory cuts for fall in crime detection and charge rates' (The Guardian, 31 August 2022) <https://www.theguardian.com/uk-news/2022/aug/31/police-chiefs-blame-tory-cuts-for-fall-in-detection-and-charge-rates#:~:text=There%20are%20now%20235%20police,back%2Dto%2Dbasics%20approach.> accessed 20 December 2023

[77] Suffolk police federation, 'Austerity cuts have hit policing, as Federation warned' (Police Federation, 15 August 2022) <https://www.polfed.org/suffolk/news/2022/austerity-cuts-have-hit-policing-as-federation-warned/#:~:text=The%20chair%20of%20Suffolk%20Police,to%20make%20difficult%20operational%20decisions.> accessed 13 December 2023

[78] S Poyser and R Milne, 'The time in between a case of 'wrongful' and 'rightful' conviction in the UK: Miscarriages of justice and the contribution of psychology to reforming the police investigative process' [2021] 23(1) International Journal of Police Science & Management 12

specific causes mentioned, with the most important being to strengthen compliance with PACE whilst ensuring the police have sufficient resources to do so. Until these regulations are strengthened, there remains the possibility of tunnel vision and coercive interrogation tactics producing further miscarriages of justice.

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Reconsidering The Minimum Age of Criminal Responsibility to Eight Years Old

Luxsana Sivagnanam

Abstract

This paper focuses on lowering the minimum age of criminal responsibility (MACR) to eight years in the United Kingdom. It comprehensively reviews historical, legal, developmental, international comparative, and socio-economic perspectives. Furthermore, this paper examines influential cases, such as the James Bulger[1] murder and critically evaluates the potential implications of such reform. It argues against lowering the MACR, mentioning issues with children's cognitive development, international human rights standards, the efficiency of alternate diverting programmes, and the amplification of social and economic inequalities. The paper concludes that decreasing MACR would be regressive and ineffectual in addressing juvenile delinquency's root causes and damaging to children's rights and rehabilitation prospects. Instead, it advocates for alignment with international age standards and investment in alternative interventions to support young offenders.

Introduction

The concern of criminal responsibility for children has created debate because of their evolving capacities and understanding of criminality and its consequences. Moreover, the diversion process in juvenile criminal justice programmes has been recognised as preventing a negative impact on children's future development.[2] Acknowledging the importance of child development is significant because it creates an individual's future growth and well-being.

Within modern society, it is vital to adopt a prudent approach to raising children to ensure their well-being and develop them into responsible individuals. The impact of criminal responsibility on children's growth underscores the importance of carefully considering factors such as parental virtues and societal trends and implementing criminal responsibility systems to promote positive development. Thus, the age of criminal responsibility can significantly impact their psychological, emotional and social development.

The minimum age of criminal responsibility (MACR) has fluctuated for centuries due to legal and social construction on childhood. Historically, the MACR was 12 in the 13th century because the concept of childhood was absent[3], and children were not viewed differently from

[1] Reg. v. Secretary of State for the Home Department, Ex parte V. and Reg. v. Secretary of State for the Home Department, Ex parte T [1997] UKHL J0612-4

[2] Ayu E, Heni W and Glory Y, 'Requirement Analysis for Diversion in Juvenile Criminal Justice Proceeding' (Universitas Maritim Raja Ali Haji 2022), 1 < https://eudl.eu/pdf/10.4108/eai.18-9-2022.2326023 > accessed 12 May 2024

[3] The Economist, 'In the Middle Ages there was no such thing as a childhood'(3 January 2019) < https://www.economist.com/special-report/2019/01/03/in-the-middle-ages-there-was-no-such-thing-as-childhood > Accessed 2 May 2023

adults as they are today. The Children and Young Persons Act 1933[4] initially set the age of criminal responsibility at 8, however, it was raised to 10 by the Children and Young Persons Act 1963[5] and has not changed since. The current government has consistently opposed increasing the age of criminal responsibility, maintaining that children over 10 years old are capable of differentiating between misbehaviour and grave offenses.[6] Nevertheless, neuroscientific research argues that the frontal lobe in the brain occurs at the age of 14 years old and does not fully develop until the age of 25.[7] Notwithstanding the policymakers' belief that reducing the age of criminal responsibility may serve as a deterrent or improve public safety, recent research has demonstrated otherwise.

England and Wales have been criticised as the countries with the lowest age of criminal responsibility in Europe.[8] The average age at which children can be held criminally responsible and prosecuted in Europe is 14.[9] Despite having the lowest age of criminal responsibility, England and Wales detain the highest number of children in penal institutions and have the poorest rehabilitation and reoffending outcomes.[10] Therefore, this discussion will cover a child's development, the legal framework from a domestic and international scale, mass media influence and the socio-economic factors that influence a child. To critically evaluate the statement, the historical, comparative, theoretical and empirical works, including the various types of models of youth justice, will be explored. Besides relevant facts and figures, appropriate cases such as official criminal statistics and the James Bulgar case[11] will be mentioned to measure the statement.

1. Development of a child

Lowering the age of criminal responsibility to 8 will have a significant impact because children's brain development is not fully developed, and they may not have the cognitive capacity to make reasonable decisions. Notably, the prefrontal cortex, which plays a crucial

[4] Children and Young Persons Act 1933, s. 50

[5] Children and Young Persons Act 1963, s. 16(1)

[6] Tim Bateman, 'Criminalising children for no good purpose: The age of criminal responsibility in England and Wales', (National Association for Youth Justice 2012), 2 < https://thenayj.org.uk/wp-content/uploads/2015/06/2012-The-Age-of-Criminal-responsibility.pdf > 28 April 2024

[7] Claire McDiarmid, 'An Age of Complexity: Children and Criminal Responsibility in Law', Sage Publication, 13 (2) Youth Justice (2013), 154< https://doi.org/10.1177/1473225413492056 > Accessed 1 May 2024

[8] Russell Webster, 'Ensuring Custody Is A Last Resort For Children' (2020) < https://www.russellwebster.com/child-custody-scyj/ > Accessed 28 April 2024

[9] Ido Weijers, 'The minimum age of criminal responsibility in continental Europe has a solid rational base' (Utrecht University School of Law 2016) < https://doi.org/10.53386/nilq.v67i3.119 > Accessed 28 April 2024

[10] Penelope Brown, 'Children in Lockdown: Time to Review the Age of Criminal Responsibility?' (*Inspire The Mind,* 9 June 2020) < https://www.inspirethemind.org/post/children-in-lockdown-time-to-review-the-age-of-criminal-responsibility > accessed 16 May 2024.

[11] Secretary of State (n.1).

role in decision-making, impulse control, and cognitive control, is one of the last brain regions to fully develop, not reaching maturity until around the age of 20.[12] Hence, young adolescents have a greater tendency to take risks and have less control over their actions than adults, choose short-term over longer-term consequences, and especially participate in inappropriate behaviour that would, from an adult perspective, be regarded as ill-judged.[13] This links to the dual system model, which suggests that "the later development of prefrontal cortex of the brain develops later than the reward system within adolescence".[14]

It is crucial to create age-appropriate standards in family law and age-restricted regulations to safeguard the well-being of children, noticing their vulnerability and active role in development. One may argue that children should be entitled to support in developing their capabilities, as a lack of such support may lead to their experiences having a detrimental impact on their growth and development. The English legal system recognises this right to assistance and protection as age-restricted regulations that necessitate specific actions and a particular level of maturity and capacity. Within the family law, young people are presumed to lack the competence to engage responsibly and express or form their desires and feelings if they can prove to the court that they have sufficient understanding.[15] While this argument recognises children's vulnerability, they are active agents in their development. Thus, lowering the age of criminal responsibility to eight would neglect the role of accountability, which can hinder a child's development and fail to prepare them for adulthood.

Considering that the MACR in England and Wales is 10, this mirrors a simplistic functionalist perspective that emphasises a policy of containment by blaming young people's behaviour or personal pathology.[16] This view on childhood is reflected in a punitive model, which centres on the offence solely to the detriment of contemplating the influences between the child and their broader social situation. It could be criticised that the approach overlooks young people's socio-economic and cultural circumstances and fails to respect the child's current and upcoming rational autonomy and capacity. For instance, Well and Rankin revealed that 10% to 15% more of these children who dealt with a broken home were prone to delinquency than

[12] Alok Jha, 'Age of criminal responsibility is too low, say brain scientists', The Guardian (13 December 2011) < https://www.theguardian.com/science/2011/dec/13/age-criminal-responsibility-brain-scientists > Accessed 2 May 2023

[13] The Royal Society,'Brain waves 4: neuroscience and the law'(London, 13 December 2011) < https://royalsociety.org/topics-policy/projects/brain-waves/responsibility-law/ > Accessed 2 May 2023

[14] Elizabeth P. Shulmanan, 'The dual systems model: Review, reappraisal, and reaffirmation' (2016) 17 Developmental Cognitive Neuroscience 107.

[15] Gillick v West Norfolk & Wisbech AHA [1986] AC 112, Mabon v Mabon [2005] EWCA Civ 634, Re H [1993] 1 FLR 440.

[16] Raymond Arthur, 'Exploring childhood, criminal responsibility and the evolving capacities of the child: the age of criminal responsibility in England and Wales', (2017) 67 (3) Northumbria University: Northern Ireland Legal Quarterly 6.

those who came from intact homes.[17] This demonstrates that children need protection and support in a paternalistic form from the long-term consequences of their immaturity in several areas of their lives. Furthermore, the current law- Children and Young Persons Act[18], disregards the evidence that a child's inexperience and underdeveloped powers of self-control and reasoning make them inclined to behave in ways they cannot help, comprehend or propose.

Alternatively, children involved in offending behaviour are reconstructed as non-children and challenged with the right to respect for their evolving capabilities. Contrarily, restorative justice processes require full participation, encouragement, empathy, and accountability-demanding a necessary capacity level.[19] Thus, lowering the criminal age of responsibility to eight would fail to omit young offenders' limited understanding and capacity for rehabilitation. By shifting the focus to an international comparison, it becomes evident that the current approach to the juvenile justice system needs to be reconsidered. Through exploring how other countries deal with the age of criminal responsibility and integrate socio-economic factors into their policies, England and Wales can gain valuable insights into more universal and coherent methods of tackling juvenile delinquency.

2. International comparison

Globally, the UK is considered as one of the least progressive countries in terms of its 'unreasonably low' MACR. The jurisdictions of the UK have the lowest ages of criminal responsibility in Europe.[20] Although the age of criminal responsibility has a similar age range, it differs widely worldwide. There is a more significant variance that is evident across Europe, where children until the age of 14 (Austria, Italy and Germany), 15 years (Denmark, Sweden, Norway, and Finland), or 18 years (Belgium and Luxembourg) have seemed to lack full criminal responsibility and consequently inclined to be processed in civil tribunals instead of criminal courts.[21] It is submitted that such differences reveal how compliance with international standards – regarding the criminalisation of children – oscillates between nations and, more controversially, how certain jurisdictions overtly defy their human rights obligations.

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[17] Wells L. E., Rankin J. H., 'Families and delinquency: A meta-analysis of the impact of broken homes' (1991) 38 Social Problems 89

[18] Children and Young Persons Acts 1963 (n.5).

[19] William R Wood and Masahiro Suzuki, 'Getting to Accountability in Restorative Justice' (2024) Victims & offenders 5 < https://www.tandfonline.com/doi/full/10.1080/15564886.2024.2333304 > Accessed 17th June 2024

[20] Tim Bateman, 'Keeping up (tough) appearances: the age of criminal responsibility' *Centre for crime and justice studies* (June 2013) 35 < https://www.crimeandjustice.org.uk/sites/crimeandjustice.org.uk/files/09627251.2015.1143641.pdf > Accessed 4 May 2023

[21] Child Rights International Network,'Minimum ages of criminal responsibility in Europe' (2019) < https://archive.crin.org/en/home/ages/europe.html > Accessed 4th 2023

There are several countries where, even though MACR is considerably higher than in England and Wales, "there are no negative consequences regarding crime rates".[22] Across 86 countries surveyed globally, the median age of criminal responsibility was found to be 14 years. Despite the variations among nations, there is a growing international trend to raise the minimum age at which an individual can be held criminally liable for their actions.[23] However, Pillay argued that the lack of consensus on an appropriate age of criminal responsibility can be attributed to the diverse historical traditions and cultures among countries.[24] Nevertheless his argument fails to consider individual differences and needs when determining suitable age ranges for different activities.

While there may not be a universal agreement on the appropriate age for social rights, there are objective ways to determine suitable age levels. For instance, age-related laws are usually based on scientific research and evidence about developmental and cognitive abilities, including risk factors for certain activities, such as drinking, driving and voting. The role of consent here is to emphasise the significance of reflecting the psychological and neuroscience evidence when determining the age of criminal responsibility, which can help balance the protection of society and the rights and development of minors.

Countries, such as Austria, Italy, and Germany have the exact age of criminal responsibility, and the age of consent is 14.[25] In England, Wales, and Northern Ireland, the age of consent is 16. According to English law, a person under 16 is not old enough to make a conscious decision to consent and cannot consent.[26] Nonetheless could be held criminally responsible for an offence. It can be criticised that the legal framework appears contradictory, as the current MACR needs to align with most of the legislative framework with an age-related threshold; this can be illogical and unjustifiable.[27] Muncie et al. recently highlighted the paradoxical nature of youth justice, where young people are considered not sufficiently rational and responsible to be fully empowered, yet they are treated as entirely rational and responsible

[22]Cunneen C, 'Arguments for Raising the Minimum Age of Criminal Responsibility, Research Report, Comparative Youth Penality Project' (University of New South Wales 2017), 6 < https://justicereinvestment.net.au/wp-content/uploads/2020/02/macr-final-2020-2.pdf 3

[23] Barry Goldson, 'Unsafe, Unjust and Harmful to Wider Society': Grounds for Raising the Minimum Age of Criminal Responsibility in England and Wales', (2013) 13 (2) Youth Justice 123 < https://journals.sagepub.com/doi/abs/10.1177/1473225413492054?journalCode=yjja > Accessed 5 May 2023

[24] Yuxi Shang and others, 'Psychometric Challenges in the Measurement of Constructs Underlying Criminal Responsibility in Children and Young Adults: A Cross-Sectional Study' (2022) 12 Frontiers in Psychology 3 < https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8792403/ > Accessed 6 May 2023

[25] UK Parliament,'Age of Criminal Responsibility Bill [HL]', (8 September 2017) < https://hansard.parliament.uk/Lords/2017-09-08/debates/D3E4D198-43BB-4B60-9FF0-CFF5B0EA1CB6/AgeOfCriminalResponsibilityBill > Accessed 16 May 2024

[26] The Sexual Offences Act 2003, s. 9

[27] Bateman (n.6), 10.

when they commit offenses.[28] It can be criticised that the youth justice system lacks consistency within its law-making and takes a confrontational approach. Instead, the age of criminal responsibility should focus on becoming more comprehensive through resembling or increasing on equal terms as other domestic legal minimum ages. Lowering the minimum age of criminal responsibility to eight creates a problematic issue in maintaining or understanding the methodology in England and Wales. It appears to be incompatible and 'out of line'[29] with European practice, especially out of step with international treaties on children's rights and children's civil rights in the UK.

3. International Human rights frameworks

It is important to acknowledge the substantial impact that the United Nations Committee on the Rights of the Child (UNCRC) has had on promoting and protecting the rights of children worldwide since its implementation by the General Assembly of the United Nation in November 1989.[30] It highlights its obligatory influence under international law. Even though the UNCRC has not been included in the domestic law of England and Wales, it is still considered an influential basis of human rights customs. This foundation recommends that "the minimum age of criminal responsibility should be 12 years old".[31]

However, it can be posited that England and Wales have disregarded the recommendations from international rights conventions since the age of criminal age of responsibility is two years lower than the minimum that the conventions propose. As evident from the case of V and T v UK[32], the European Court of Human Rights identified that minimum age varies across Europe. Despite the age of criminal responsibility in England is at the lower end of the scale, it was held that 'it cannot be said to be so young as to differ disproportionately from the age limit followed in other European States'.[33]

In light of the comparison between the recommended age of twelve and the proposed age of eight, it is necessary to reflect on the possible consequences of such a reduction. The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (also known as

[28] Muncie, J., Hughes, G. and McLaughlin, E,*Youth Justice: Critical Readings*. (1st edn , SAGE Publications 2002) 15.

[29] House of Lords and House of Commons, ' The UN Convention on the Rights of the Child' (2023) 19 < https://publications.parliament.uk/pa/jt200203/jtselect/jtrights/117/117.pdf > Accessed 9 May 2023

[30] United Nations, 'Background to the Convention: Committee on the Rights of the Child' (OHCHR) < https://www.ohchr.org/en/treaty-bodies/crc/background-convention > Accessed 5 May 2024

[31] Old Bailey Solicitor, 'The Age of Criminal Responsibility – Should it be increased?' < https://www.oblaw.co.uk/the-age-of-criminal-responsibility-should-it-be-increased/ > Accessed 9 May 2023

[32] V and T v UK [2000] 30 E.H.R.R. 121.

[33] ibid.

Beijing Rules) are not legally binding on the UK; however, states can employ them. The current age of 10 infringes Rule 4 of the Beijing Rules[34], especially lowering the MACR to 8.

The change could be a potentially detrimental and degrading treatment when considering the perspective of children's rights. This rule suggests that legal systems acknowledging the concept of the age of criminal responsibility should not set the threshold too low, considering factors such as emotional, mental, and intellectual maturity.[35] The official Commentary is linked to the Rules and is seen as vital. This mentions that there should be "a close relationship between the notion of responsibility of delinquent or criminal behaviour and other social rights and responsibilities (such as marital status)".[36] According to the welfare model's positivist approach, the youth justice system should prioritise suitable support or treatment for children displaying problematic behaviour instead of punishment.[37]

Moreover, Article 3, section 1 of the UNCRC[38] mentions a crucially important principle: 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'. Even though the 'best interest' has not been completely defined, General Comment No.10 implies that the traditional objectives of criminal justice, such as repression and retribution, should be replaced by rehabilitation and restorative justice when dealing with child offenders.[39] This can be achieved through focusing on effective public safety.[40] The comment emphasises the child's needs and 'best interests'[41] instead of the deeds they may have committed. This is because the children may not know the difference between right and wrong due to their inadequate inhibitory self-control.

The UNCRC, in Article 40, calls for the establishment of a minimum age under which children are presumed to lack the capacity to violate penal law.[42] Hence, this reveals that to have a MACR children cannot be prone to criminal law. Nevertheless, through the Beijing Rules, no specific MACR is mentioned as a suitable type. Although these human rights mechanisms do not define an arbitrary age of criminal responsibility, these international measures aim to

[34] United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), 4.
[35] United Nations Convention on the Rights of the Child 4(1)
[36] The Beijing Rules (n.34)
[37] James Dignan, 'Juvenile Justice Systems: A Comparative Analysis', 3 < https://www.oijj.org/sites/default/files/documentos/documental_1263_en.pdf > Accessed 5 May 2024
[38] United Nations Convention on the Rights of the Child (n.35), 3(1)
[39] United Nations Committee on the Rights of the Child, 'General Comment No. 10 (2007): Children's Rights in Juvenile Justice' (2007) CRC/C/GC/10 https://www2.ohchr.org/english/bodies/crc/docs/crc.c.gc.10.pdf accessed 17th June 2024.
[40] ibid.
[41] Arthur (n.17), 9.
[42] United Nations Convention on the Rights of the Child (n.35), 40(3)

prevent or prompt nations. In order evade implementations that expose children as young as ten years to an adversarial criminal justice system's full force.

4. Doli Incapax

The current age of criminal responsibility was created in 1963, though, until 1998, the common law principle of 'doli incapax' had facilitated a level of protection for children between the age of 10 to 14 years.[43] This decision was reached by requiring the prosecution to provide evidence demonstrating not only the child's commission of the alleged act but also their understanding that the behavior was gravely wrong, rather than merely naughty or mischievous.[44] The New Labour Government justified its decision to abolish the doli incapax principle by asserting that the notion of 10-year-olds not comprehending the distinction between naughtiness and serious wrongdoing defied common sense.[45]

Arguably, the justification appears to overlook the empirical[46] and theoretical framework that conveys the inadequate understanding of young children reflecting their consequences and moral dimensions of their actions. Jean Piaget's theoretical works studied 'The Moral Judgment of the Child', which recognised that apart from cognitive development and moral development, they do not partake in tasks until they are mentally mature enough.[47] Correspondingly, Kohlberg expanded on this instituting that children under 10 are not fully capable of making moral decisions except if they have been taught to do so.[48] Policymakers should take a more broader approach when determining criminal responsibility, through looking at the individual circumstances and maturity levels of young offenders instead of solely relying on the age. By aligning the justice system with current understanding of child development, this approach could improve the effectiveness of rehabilitation and prevention strategies for juvenile offenders.

[43] Corker Binning ' Old enough to know better? The minimum age of criminal responsibility' (16 February 2018) < https://corkerbinning.com/old-enough-to-know-better-the-minimum-age-of-criminal-responsibility-2/ > Accessed 9 May 2023

[44] Bateman (n.6), 4.

[45] ibid, 5.

[46] Institute of Medicine and National Research Council, 'Transforming the Workforce for Children Birth through Age 8', (National Academies Press 2015), 122 <https://www.nap.edu/read/19401/chapter/13> accessed 16 May 2024.

[47] Stuart I. Hammond, 'Children's early helping in action: Piagetian developmental theory and early prosocial behavior' (17 July 2014) < https://www.frontiersin.org/articles/10.3389/fpsyg.2014.00759/full > Accessed 9 May 2023

[48] Hye-Jeong Baek "Children's moral development examined through Kohlberg's hypthothetical dilemmas and fables", (University of London 1999) 35 < https://discovery.ucl.ac.uk/id/eprint/10007299/7/Baek_Hye-Jeong_Redacted.pdf > accessed 10 May 2023

5. The murder of James Bulger

It is important to note that the James Bulger case is a prominent example that sheds light on the issue of a minimum age of criminal responsibility. This case has sparked considerable debate and played a fundamental role in abolition of principle of doli incapax. The case involved two 10-year-old boys, Robert Thompson and John Venables, who abducted and brutally murdered 2-year-old James Bulger.[49] The nature of the crime committed by the two boys has raised important questions about the appropriateness of holding children of that age criminally responsible. Subsequently, this case proved that children of younger age were perceived as able to differentiate right and wrong.[50]

However, it can be argued that these young offenders do not understand the implications of what they have done and what has to happen due to those actions. Whilst the justice model states that "people are responsible for their actions, they should also be accountable"[51], to prove the mens rea for this offence, it overlooks that a young person with learning difficulties might have been unaware of this harm. The mens rea principle suggests that criminal liability should only be imposed on individuals who are aware of their actions and the potential consequences, to the extent that they can be said to have consciously chosen the behavior and its outcomes.[52] This principle questions the application of a fixed minimum age of criminal responsibility, especially for children who might lack the cognitive maturity to fully understand the insinuations of their actions. Hence, it can be reasoned that having a rigid minimum age does not account for the individual differences in children's developmental stages and capacities, reinforcing the need for a more adjustable approach to criminal responsibility.

6. Influence on Mass Media

James Bulger's case fed into political and mass media, which stimulated a "moral panic" surrounding juvenile criminality.[53] According to Cohen, 'moral panic' happens when a "condition, episode, person or group of persons emerges to become defined as a threat to societal values and interests".[54] This case uprooted public opinion and labelled young offenders

[49] Crime Plus Investigation, 'The James Bulgar Case' < https://www.crimeandinvestigation.co.uk/crime-files/james-bulger > accessed 9 May 2023
[50] Age of Criminal Responsibility Bill [HL] (n.25).
[51] Dignan (n.37).
[52] Jeremy Horder, Ashworth's s Principles of Criminal Law, (4th edn, Oxford:Oxford University Press, 2003) 158.
[53] Deena Haydon and Phil Scraton, '"Condemn a Little More, Understand a Little Less": The Political Context and Rights' Implications of the Domestic and European Rulings in the Venables-Thompson Case', (2000) 27(3) Journal of Law Society 423 < https://www.jstor.org/stable/1410383 > Accessed 15 May 2024
[54] Stanley Cohen, Folk Devils and Moral Panics: The creation of the Mods and Rockers (3rd edn, Routledge Classic 2011) 7.

'wicked, irresponsible, immoral and evil'.[55] One may argue that the media may intend to exaggerate or overrepresent the crime rates of young offenders[56] due to advanced publicity, resulting in stigmatisation from increased labelling and misconceptions about them within society.[57] Instead, the media should be targeted to confront one-dimensional and inaccurate portrayals of children who break the law.

Furthermore, the media's role in consumerism can create a sense of relative deprivation by placing materialistic goals that many members of minority communities may not attain through lawful means.[58] This further implies that the accessibility of media and technology enables children to become rowdier, though this also confesses that children are prone to more threats and dangers. Within James Bulger's case, it has been mentioned that video games influenced the murder of James Bulger.[59] This might confirm the demand for advanced protection for children that commit crimes, mainly where they have been affected.

7. Diversion

Instead of lowering the age of criminal responsibility, one may argue diverting young offenders to alternate programmes would be a more beneficial strategy for both the child and society, especially in preventing reoffending.[60] It would involve the criminal justice system placing more importance on resolving the underlying causes of the child's delinquent behaviour rather than merely imposing punishment and preventing them from reoffending. These substitute programmes can handle the core issues such as trauma, neglect and other forms of adversity that played a part in their offending. This dramatically relates to the developmental model for

[55] The Conversation, ' The James case should not set the age of criminal responsibility' (8 February 2018) < https://theconversation.com/the-james-bulger-case-should-not-set-the-age-of-criminal-responsibility-91342 > Accessed 22 May 2023

[56] Karen Halsey and Richard White, 'Young people, crime and public perceptions: a Review of the Literature' LGA Research Report, (National Foundation for Educational Research, 2008) 8 < https://www.local.gov.uk/sites/default/files/documents/young-people-crime-and-pu-68a.pdf > Accessed 15 May 2024.

[57] ibid, 26.

[58] Craig Webber, 'Rediscovering the Relative Deprivation and Crime Debate: Tracking Its Fortunes from Left Realism to the Precariat' (2021) 30 Critical Criminology 323 <https://link.springer.com/article/10.1007/s10612-021-09554-4> accessed 15 May 2024.

[59] Edward Pilkington, 'Boys guilty of Bulger murder – Detention without limit for 'unparalleled evil': Judge attacks video violence' The Guardian (1993) < https://www.theguardian.com/uk/2004/jul/29/ukcrime.colinblackstock > Accessed 11 May 2023

[60] Centre for Justice Innovation, 'A fairer way: Procedural fairness for young adults at court' (2018) 5 < https://justiceinnovation.org/sites/default/files/media/document/2019/A%20fairer%20way.pdf > accessed 17th June 2024.

youth offenders, as these programmes are alternatives to severe approaches and take an approach where youth could move forward and promote positive development.[61]

The restorative model also favours supportive services to help young offenders: this is achieved through promoting accountability towards those whom an offence has harmed[62] and functional rehabilitation of offenders themselves back into the community.[63] Regarding communities, the aim is to enable and revitalise civil society through practical and self-repairing social relationships. Hence, the young offenders can return to the communities[64] and act as positive role models through the support of interventions. By subjecting children as young as eight to the criminal justice system without suitable rehabilitation methods, society may involuntarily contribute to an increase in offences. This minimal intervention provides support that involves risk and needs assessments, individualised treatment, collaboration, and a strength-based approach.[65] Hence, this intervention will act as a deterrent to prevent future activity and enable the young offender to change their behaviour and attitudes for their benefit through learning skills and knowledge to thrive.

Contrastingly, implementing alternative programmes for youth offenders instead of custodial sentences may present challenges due to limited resources and potential accessibility issues. However, several studies and reports show the effectiveness of alternative programmes in decreasing reoffending rates and promoting positive outcomes for young offenders.[66] One major study on this is the Intensive Supervision and Surveillance Programme (ISSP) conducted by the Ministry of Justice in the UK. This study found that young offenders who participated in the ISSP had profoundly lower reconviction rates than those who received a custodial sentence. For instance, the ISSP evaluation revealed a breach rate of 60%, with 31% of those

[61] Ciara Keenan, Lily Strange, Peter Neyroud and Mary-Louise Corr, 'An evidence review on youth diversion programmes', (Youth Endowment Fund, National Children's Bureau 2024), 11 < https://youthendowmentfund.org.uk/wp-content/uploads/2024/03/NCB-YEF-Diversion-Evidence-Review-for-Publication.pdf > accessed 15 May 2024

[62] Leah Robinson and Rebecca Banwell-Moore, 'Understanding barriers to Restorative Justice for young people, young adults and victims of crime', (Why me? 2023), 50. < https://why-me.org/wp-content/uploads/2023/03/Understanding-barriers-to-Restorative-Justice-23.pdf > Accessed 15 May 2024

[63] Jake Shepherd and Niamh Regan 'Roads to recovery: Exploring UK prison rehabilitation and its alternatives', (Social Market Foundation 2023), 4 < https://www.smf.co.uk/wp-content/uploads/2023/11/Roads-to-recovery-Nov-2023.pdf > Accessed 12 May 2024

[64] Pippa Goodfellow and others, 'Effective Resettlement of Yound People Lessons from beyond Youth Custody' (Beyond Youth Custody 2015), 13. <http://www.beyondyouthcustody.net/wp-content/uploads/Effective-resettlement-of-young-people-lessons-from-Beyond-Youth-Custody.pdf>. Accessed 12 May 2024

[65] Her Majesty's Inspectorate of Probation, 'Tailoring Delivery to Service Users' Needs and Strengths' (2020) 6 <https://www.justiceinspectorates.gov.uk/hmiprobation/wp-content/uploads/sites/5/2020/06/Tailoring-delivery-to-service-users%E2%80%99-needs-and-strengths-RAB03-1.pdf>.

[66] Richard Mendel, 'Effective Alternatives to Youth Incarceration' (The Sentencing Project 2023) 9 < https://www.sentencingproject.org/app/uploads/2023/06/Effective-Alternatives-to-Youth-Incarceration.pdf > accessed 16 May 2024

breaches resulting in custodial sentences.[67] The youth justice system experienced a substantial 20% decrease in first-time entrants in 2020-2021, marking the most significant decline over the past eight years. Concurrently, the average number of young people in custody dropped by 28% compared to the previous year.[68] This portrays that alternative programmes for youth offenders instead of custodial sentences can be more efficient in reducing reoffending rates and ensuring young offenders make positive life choices. Fundamentally, the age of criminal responsibility should not be lowered to eight as it would be ineffective and restrictive, considering that diversion can help youth offenders grow out of crime.

8. Social and economic deprivation

Lowering the age of criminal responsibility to eight could result in young children being criminalised for the behaviour often resulting from their upbringing and environment instead of their own free will. It is critical to reflect on the social background, race and ethnicity and family situation to justify the need for protection in the legal frameworks of children. Left realists view crime as the product of relative deprivation[69], subculture[70] and marginalisation.[71] This is mainly affected by ethnic minorities who experience economic marginalisation due to a lack of employment, poverty and inadequate housing.[72] These are worst in inner cities where the most depriver youth live, which may be caused by the organisation of capitalism.[73]

Arguably, urban areas are more prone to criminal activity than rural areas[74] because young people who are socio-economically disadvantaged may be enticed to engage in criminal behaviour[75] to compensate for their daily struggles and challenges with deprivation and

[67]Emily Gray,'What Happens to Persistent and Serious Young Offenders When They Grow Up', (Youth Justice Board for England and Wales 2013) < https://dera.ioe.ac.uk/id/eprint/18855/1/issp-follow-up-report.pdf > Accessed 7 May 2023

[68]The Youth Endowment Fund Charitable Trust 'Statistics update: The latest data on criminal and violence affecting young people' (2022) < https://youthendowmentfund.org.uk/wp-content/uploads/2022/02/YEF-Statistics-update-February-2022-FINAL.pdf > Accessed 7 May 2023

[69] Webber (n.58).

[70] Eric Madfis and Jeffrey Cohen, 'Critical Criminologies of the Present and Future: Left Realism, Left Idealism, and What's Left in Between' (2016) 43 (1) Social Justice 6 <https://www.jstor.org/stable/26380311> accessed 15 May 2024.

[71] ibid.

[72] Webber (n.58), 328.

[73] John Heddle, 'Inner Cities'(Hansard, UK Parliament 1986), < https://hansard.parliament.uk/Commons/1986-05-16/debates/b62fe45e-a9df-478e-a30b-287214fc2373/InnerCitieshighlight=inner > Accessed 12 May 2024

[74] Government Website, 'Statistical Digest of Rural England' (Governmental Statistical Service, August 2022) 192<https://assets.publishing.service.gov.uk/media/630620558fa8f5536c077dcc/07_Statistical_Digest_of_Rural_England_2022_August_edition.pdf> accessed 12 December 2023.

[75] David Fergusson, Nicola Swain-Campbell and John Horwood, 'How Does Childhood Economic Disadvantage Lead to Crime?', (2004) 45 (5) Journal of Child Psychology and Psychiatry 956 <https://pubmed.ncbi.nlm.nih.gov/15225338/> accessed 16 May 2024.

discrimination. Hence, the disproportionate amount of youth crime in the official criminal statistics might be because of the over-policing of urban inner-city areas and council estates, which indicates that such youth is more likely to be stopped, searched, and arrested.

In England and Wales, black children were over 3 times more likely to be arrested than white children in 2020.[76] This reveals that young "black people need protecting from stereotyping and racial biases"[77] due to the institutionalised racism from the police abuse of their stop and search power. It can be challenged that statistics may overrepresent and generalise young black people and ethnic minorities due to being targeted by the police force, leading to a possible false confession.[78] Although lowering the age of criminal responsibility to eight can help children who commit crimes understand the seriousness of their actions early, it can have long-lasting negative consequences for their prospects, limiting their probability of rehabilitation and restoration into society.

Conclusion

Ultimately, the proposed reform "to lower the minimum age of criminal responsibility to eight years of age" in the UK would be viewed as having an outdated system on a national scale and less progressive from an international scale. Lowering the age of criminal responsibility attempts to reinforce the seriousness of the juvenile system and enables children to become aware at an earlier stage. However, it is futile and ineffective in addressing the root causes of juvenile delinquency. Within this society, children are considered vulnerable due to their limited capacity to fully comprehend their actions and the complex procedure associated with the legal system.

Instead, aligning with European nations' age standards would protect children's rights and prevent cruel treatment. Alternative programmes can discipline young offenders to avoid any potential negative repercussions on their future and prevent unfair labelling. If this proposed reform were to be implemented, it would deprive young people of their right to a fair trial. The media's involvement would leave them at risk and unprotected, leading to the possibility of

[76] Home office, 'Ethnicity facts and figures: Arrests' Government website (12 May 2022) < https://www.ethnicity-facts-figures.service.gov.uk/crime-justice-and-the-law/policing/number-of-arrests/latest > Accessed 8 May 2023

[77] Vikram Dodd, 'Police watchdog: ethnic minorities need protection from unfair stop and search' The Guardian (2022) < https://www.theguardian.com/uk-news/2022/apr/20/police-watchdog-ethnic-minorities-need-protection-from-unfair-stop-and-search > Accessed 8 May 2023

[78] Cynthia J. Najdowski, 'How the "Black Criminal" Stereotype Shapes Black People's Psychological Experience of Policing: Evidence of Stereotype Threat and Remaining Questions' (Psychology Faculty Scholarship, Scholar Archive 2023) 4 < https://scholarsarchive.library.albany.edu/cgi/viewcontent.cgi?article=1039&context=psychology_fac_scholar > 4 May 2024

keeping the law as it is or even reducing the age of criminal responsibility. Overall, the age of criminal responsibility should not be lowered. Instead, it should be increased and modified to correspond with other legal responsibilities based on age.

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Insurable Interest in "Double Sold" Commodities: Unveiling The Grain of Truth Through *Quadra Commodities V XL Insurance Co* [2022][1] and Its Significance in Modern Insurance Law

Mikaela Hristova

Abstract

The purpose of this essay is to critically analyse the decision of *Quadra Commodities v XL Insurance Co* [2022][2] and comment on its significance in modern insurance law. The first paragraph provides a brief overview of the facts and decision of Butcher J. The second section engages in a discussion on insurable interest considering earlier authorities. A conclusion is then reached that *Quadra Commodities* does not revolutionise modern insurance law, rather it reconfirms the principles stated in the earlier authority of *Feasey*[3] and the case of *Martin P.*[4]

Introduction

The doctrine of insurable interest is said to serve as the anchor of insurance contract law, providing the essential nexus between the subject matter of the insurance and the assured, without which the contract would be without any legal basis.[5] It is said to originate from eighteen-century anxieties over fraudulent seafarers and habitual gamblers.[6] Therefore, controversy arises on the extent to which it has or should have a place in modern insurance law.[7] Despite the wide spectrum of views, as Arnold-Dwyer points out, the doctrine is very rarely litigated.[8] A potential reason behind this notion is that English courts have long recognised their duty to lean in favour of finding insurable interest, where possible.[9] This was reconfirmed by Ward LJ in *Feasey.*[10] Hence, it appears surprising that in the case of *Quadra Commodities*[11] the insurer sought to oppose a claim made from its assured on the basis of lack of insurable interest. The purpose of this essay is to critically analyse the decision and comment on its significance in the modern insurance law. The first paragraph provides a brief overview of the facts and decision of Butcher J. The second section engages in a discussion on insurable interest considering earlier authorities. A conclusion is then reached that *Quadra Commodities*

[1] Quadra Commodities SA v XL Insurance Company SE & Ors [2022] EWHC 431.
[2] Ibid.
[3] Feasey v Sun Life Assurance Company of Canada [2003] Lloyd's Rep IR 637.
[4] 0'Kane v Jones (The Martin P) [2004] 1 Lloyd's Rep. 389.
[5] Franziska Arnold-Dwyer, 'Insurable Interest and the Law' (Routledge, 2020), chapter III, page 14.
[6] Thacker v Hardy (1878-79) L.R. 4 Q.B.D. 685, 695; ibid, page 4; Gary Meggit 'Insurable interest – the doctrine that would not die' Legal Studies, Vol. 35 No. 2, 2015, pp. 280.
[7] Franziska Arnold-Dwyer. 'Taking an Interest in Insurable Interest' [2015] LMCLQ 271-9
[8] Ibid, page 271.
[9] Inglis v Stock (1884) 12 QBD 564, per Sir William Brett MR [571]; Quadra Commodities SA v XL Insurance Company SE & Ors [2023] EWCA Civ 432 at [91].
[10] Feasey v Sun Life Assurance Company of Canada [2003] Lloyd's Rep IR 637, para [146].
[11] Quadra Commodities (N'71)

does not revolutionise modern insurance law, rather it reconfirms the principles stated in the earlier authority of *Feasey*[12] and the case of *Martin P.*[13]
It is important to note that the issue of late payment[14], although interesting, is beyond the focus of this article. A second remark is that the recently decided appeal,[15] which confirms the findings of Butcher J, is acknowledged but not analysed in detail in the below paragraphs. The focus of the discussion is on the original judgment.

Case Overview

Quadra had a marine cargo open policy, to cover the storage, transportation and delivery of cargoes and their physical loss by misappropriation, of which the defendants were underwriters.[16] Between 2014-2018 Quadra was heavily involved with Agroinvestgroup, an association of companies dealing with the production and storage of agricultural products in Ukraine. The sale-purchase contracts they entered with several entities established an advance payment of 80% of the price.[17] In exchange, Quadra received warehouse receipts stating the quantity of the cargo. In 2019 Agroinvestgroup collapsed and a fraud of selling the same cargoes to different commercial entities was revealed. Quadra notified the insurers of its loss, claiming an indemnity in respect of the cargoes which had either been misappropriated or for which it had been given fraudulent warehouse receipts.[18] The court was asked to consider whether Quadra was entitled to recover under the policy considering the goods it had purchased went missing in the Ukrainian warehouses prior to their delivery at ports and then exportation. Hence the two central issues of the case concerned: the subject matter of the insurance and whether Quadra had an insurable interest.[19]

The insurers challenged the existence of the goods insured,[20] arguing that the loss suffered by Quadra was purely financial, and therefore fell outside cover of the policy. Furthermore, considering Quadra lacked proprietary, security or any interest in the cargoes that were present in the warehouses, it failed to demonstrate insurable interest. On the other hand, Quadra's primary case was built on the notion that the subject of the insurance was the success of the adventure.[21] Alternatively, the counsel presented an argument that even if the subject matter of the insurance was property, Quadra was entitled to recover on 'the straightforward basis that

[12] Feasey (N'77)
[13] 0'Kane v Jones (The Martin P) [2004] 1 Lloyd's Rep. 389.
[14] Insurance Act 2015 s.13A .
[15] Quadra Commodities SA v XL Insurance Company SE & Ors [2023] EWCA Civ 432.
[16] Ibid.
[17] Ibid, para [11].
[18] Ibid.
[19] Ibid, para [52].
[20] Ibid, para [49]
[21] Ibid, para [50]

goods for which it paid, and which had been physically present in the Warehouses, have been lost to it'.[22]

Butcher J's decision

The judge began his analysis looking at the Marine Insurance Act,[23] which defines insurable interest as the legal or equitable relationship a person has with the adventure or property at risk. He stated that the statutory provision is not exhaustive, but rather provides three characteristics. Namely, the potential for benefit or prejudice resulting from the safety or loss of the property, a legal or equitable relationship to the adventure or property, and a connection between the relationship and the benefit, or liability incurred.[24] To determine the subject matter of the insurance, Butcher J turned to the judgment of Waller LJ in *Feasey*[25], which highlights the need to consider all surrounding circumstances and the terms of the policy. Furthermore, it set out that a broad interpretation of the legal or equitable relation to the adventure is sufficient for finding insurable interest even without a traditional legal or equitable interest in the property.[26] Applying these principles and considering Waller LJ's four groups, Butcher J rejected Quadra's argument that the subject matter of the policy was the success of the adventure.[27]

As regards the burden of proof, Butcher J determined that it is on Quadra as the assured to prove the existence of insurable interest.[28] Interestingly, this is inconsistent with another recent decision on insurable interest - *Western Trading v Great Lakes,*[29] in which *Judge* Mackie KC cited with approval a passage from Professor Clarke[30] to the effect that the insured does not have to prove their interest to make a claim, but the lack of it might be raised as a defence by the insurer.[31] However, both *Western Trading* and *Quadra Commodities*' outcomes reconfirm the longstanding position that follows from *Inglis v Stock*[32] that an English court shall always find insurable interest where possible.[33]

Having established that the subject matter of the policy was property, the judge turned to considering whether Quadra has successfully proven insurable interest.[34] He analysed in turn hree categories of evidence presented – receipts, reports and inspections as well as the physical

[22] Ibid , [50]
[23] Marine Insurance Act 1906 s. 5(2)
[24] Quadra Commodities (N'71), para [56].
[25] Feasey (N'3).
[26] Ibid, per Waller LJ, para[75]
[27] Quadra Commodities (N'71) para [64]
[28] Ibid.
[29] Western Trading [2015] EWHC 103 (QB)
[30] Clarke, The Law of Insurance Contracts, 4th edn (2009), section [4.1D].
[31] Western Trading [2015] EWHC 103 (QB) para [60]; Franziska Arnold-Dwyer (N'), page 274.
[32] Inglis v Stock (1884) 12 QBD 564.
[33] Ibid.
[34] Quadra Commodities (N'1), paras [82]-[83].

receipt of cargoes.[35] He took into account the nature of the Agroinvestgroup fraud, the essence of which was presence of grain the warehouses, so it could be presented as sold several times. All this evidence led to the conclusion that the grain was in existence in the warehouses. Butcher J then concluded that Quadra had insurable interest in the existing cargoes by reason of its payment under the purchase contracts. Additionally, Quadra had a right to the goods in accordance with "a contract about the property" as in the words of Lord Eldon in *Lucena v Craufurd.*[36] As well as an insurable interest in the unascertained goods for which it had paid, irrespective of whether it had obtained a proprietary or possessory title or whether there were other potentially conflicting interests in them.[37] In support of this, he cited with approval *Cumberland Bone,*[38] in which Barrows J ruled that the assured had insurable interest in goods although he advanced the price but left them in storage with the seller's undivided stock. This Maine Court decision cited a passage from *Arnould* founded on *Lucena v Craufurd*[39] and other English authorities. Butcher J noted that this decision is cited in current insurance leading texts.[40] A counter argument that was previously raised by the insurers revolved around the fact that the seller was acting in good faith, did not constitute a material difference on the present facts and therefore could not stand.

Therefore, Quadra had successfully demonstrated insurable interest and was entitled to indemnity under the policy. The Court of Appeal recently upheld all the above points and held that *Cumberland Bone* should in fact become a recognised principle under English law.[41]

Insurable interest

It is raised that, on these facts, *Quadra Commodities* is not a decision that revolutionises the law on insurable interest. The reason behind this conclusion is twofold. Firstly, the judgment reconfirms principles stated in the earlier authorities of *Feasey*[42] and *Martin P*[43]*,* which shall be analysed in the following section. Secondly, Butcher J did not provide any commentary on the relevance of the requirement for insurable interest in modern times, as neither the judge, nor the parties were in doubt of the requirement of Quadra having insurable interest in the cargoes. This is of significance as some commentators and the Law Commission have recently questioned its relevance, considering the court's relaxed approach,[44] however the arguments

[35] Ibid, para [70].
[36] Lucena v Craufurd 127 E.R. 630
[37] Quadra Commodities [2022] (N'), para [81]; Quadra Commodities [2023] (N'), para [30]
[38] Cumberland Bone Co. v. Andes Insurance, 64 Me. 466 (1874) 1874 · Maine Supreme Judicial Court 64 Me. 466
[39] Lucena (N')
[40] MacGillivray on Insurance Law 15th Edition, Mainwork & 1st Supplement Series.
[41] Quadra Commodities [2023] (N'80)
[42] Feasey (N'77)
[43] Martin P (N'80)
[44] Franziska Arnold-Dwyer (N'74), page 275.

for and against the retention of the doctrine, although significant and very interesting, is beyond the discussion in this essay. The following sections demonstrate the role of Quadra in modern insurance law by reference to previous authorities and its significance for the insurance industry.

Firstly, as already emphasised *Quadra Commodities* is not novel as in essence, the outcome restates that English courts are increasingly reluctant to accept lack of insurable interest as a technical defence for its 'moral bankruptcy'.[45] Instead, they will indulge in a thorough 'investigation' of the specific wording of the policy and all surrounding circumstances to find it where possible. Feasey already demonstrated the courts' current relaxed approach. Following The Moonacre case[46], even in stricter situations involving property[47], like in Quadra, something less than a legal, equitable, or even merely financial interest has been considered sufficient.

Prior to *Quadra Commodities*, in *Martin P*, the court also adopted the approach from *Feasey* and ruled that the right to possession of the property insured is not a necessary requirement of an insurable interest. Although this decision was not relied upon by Butcher J in reaching his conclusion, it is relevant as to the insurer's arguments that because Quadra did not have any property rights to the grain existing in the warehouses there could be no insurable interest.[48] Potentially, it could be raised that the novelty of *Quadra Commodities* was the importance the court placed on commercial convenience, as it was obvious by the evidence at trial that Quadra was an innocent victim of the fraud. It is submitted that the court's decision in *Martin P* already achieved that, as this was also a material consideration in reaching the outcome. If the court found in favour of the insurers, this would have resulted in significant future challenges for businesses involved in commodity trading, finance and inventory who fall victim of similar fraud.[49] This would be a step back for the insurance industry under English law, resulting in businesses being in fear of falling victim of similar fraud and being denied indemnity because of lack of insurable interest.

Secondly, *Quadra Commodities* does not address (or add anything new to) the ongoing debate as to whether there is a need for the requirement of insurable interest in modern law.
Birds is among the commentators who concluded that proper reconsideration of the doctrine and perhaps a reform is needed in order to prevent the insurers from seeking to rely on such a technical point.[50] Many were hoping that the joint review of insurance contract law by the

[45] Ibid.
[46] Moonacre [1992] 2 Lloyd's Rep 501.
[47] Macaura v Northern Assurance [1925] AC 619.
[48] Quadra Commodities (N'77)
[49] David Osler, 'Court of Appeal finding in Quadra v XL strengthens hand of insureds' (Lloyd's List, Informa, May 2023) (accessed on 26 May)
[50] John Birds "Insurable Interest – Orthodox and Unorthodox Approaches" [2006] JBL 224

English and Scottish Law Commissions in 2006[51] would lead to the doctrine becoming a relic of the past.[52] However, years later it is clear that the doctrine is here to stay. The Insurable Interest Bill of 2016[53] concluded that following *Feasey* and *Martin P*, the English courts have already done enough to reform the doctrine in commercial scenarios, and instead the focus on reform shall be on life-related insurance, which is not considered in this article. *Prima facie*, this conclusion seems plausible, considering that it is now settled that as long as the insurance policy is not a wager, the courts are likely to find insurable interest.[54] A question then arises as to why insurers are still litigating (and appealing) claims based on lack of insurable interest. It is suggested that insurers litigate aiming to shift the law towards a more favourable for them direction.[55]

Nevertheless, the case of *Quadra* and its recent appeal raises important questions as to the rationale of the doctrine in 2023. In the earlier decision of *Western Trading*[56], the judge briefly considered the rationale behind the requirement by focusing solely on anti-wagering,[57] similarly to Butcher J.[58] However, as emphasized by Clarke, preventing gambling under the guise of insurance is no longer a sound reason for the requirement since gambling is now widespread[59] and has been legalised by statute.[60] Professors Lowry and Rawlings both share this view and emphasize that such regulation should be a matter of public, not contract law.[61] Beyond what was mentioned by Butcher J, a commonly cited rationale is also the avoidance of moral hazard. On the contrary, Loshin argues that insurable interest creates reverse moral hazard as insurers are incentivised to accept assureds with ambiguous or no interest in the subject matter.[62] Therefore, it can be concluded that the justifications behind the requirement of insurable interest in modern insurance law are unclear and the question as to whether it should be abolished remains open.

[51] Law Commission of England and Wales, Scottish Law Commission: 'Insurable interest', Issue paper IV .
[52] Gary Meggit 'Insurable interest – the doctrine that would not die' Legal Studies, Vol. 35 No. 2, 2015, pp. 280–301.
[53] Insurable Interest Bill 2016
[54] Franziska Arnold-Dwyer (N'72)
[55] Clarke, 'Law of Insurance Contracts'.
[56] Western Trading (N'98)
[57]Ibid, para [58]
[58] Quadra Commodities, (N'77) para [54].
[59] M. Clarke, 'An Introduction to insurance contract law' in J Burling and K Lazarus (eds.).; Gary Meggit 'Insurable interest – the doctrine that would not die' Legal Studies, Vol. 35 No. 2, 2015.
[60] Gambling Act 2005
[61] J Lowry and P Rawlings, 'Rethinking Insurable Interest' in Sarah Worthington (ed.), Commercial Law and Commercial Practice, (Oxford, Hart Publishing, 2003) 335
[62] J Loshin, 'Insurance Law's Hapless Busybody: A Case Against the Insurable Interest Requirement' (2007) 117 Yale LJ 474)

Conclusion

In conclusion, the case of Quadra Commodities reaffirms existing principles of insurable interest without significantly altering the legal framework. The facts of the case concern the misappropriation of commodities and fraudulent warehouse receipts. Butcher J determined that the subject matter of the policy was property and that Quadra had an insurable interest. This aligns with precedents set by *Feasey* and *Martin P*, which advocate for a broad interpretation of insurable interest based on the relationship between the insured and the subject matter, rather than strict proprietary rights. While the judgment supports commercial convenience and protects businesses from fraud, it does not engage with the broader debate on the relevance of the insurable interest doctrine within the modern legal framework. Consequently, the ruling underscores the necessity for further consideration and potential reform to ensure the doctrine's alignment with contemporary insurance practices.

Evaluating The Need for Comprehensive Reform: An Analysis of The UK's Surrogacy Laws and Proposed Changes

Nikoleta Efstathiou

Abstract

The Law Commission's proposals for reform of surrogacy law have been welcomed by many stakeholders, but there are others who are very critical and argue that these proposals have failed to adequately address many of the problems under the current provisions. Using a range of relevant sources as an evidence base for this discussion, this essay will discuss whether the Law Commission's reform proposals, if enacted, would resolve the issues with the current law of surrogacy.

Introduction

The UK's surrogacy laws, governed by the Surrogacy Arrangements Act 1985 and the Human Fertilisation and Embryology Act (HFEA) 2008,[1] face challenges in adapting to societal changes and increased 21st-century demands.[2] 'Tinkering at the edges' of the HFEA[3] has done little to address the inadequacies of surrogacy law.[4] A project for law reform is currently underway, led by the Law Commissions (LCs) of England, Wales and Scotland.[5] Their recent proposals for the reform of surrogacy law have ignited a variety of responses, with some viewing them as potentially positive and others arguing they fall short of addressing key issues in contemporary surrogacy. 'It remains open to discussion whether the LCs proposals have successfully addressed the issues of 21st century surrogacy.'[6]

This essay, after analysing the current surrogacy provisions and their inadequacies, it assesses the LCs' reform proposals to determine their potential effectiveness in resolving the complicated issues affecting surrogacy law nowadays. By delving into the nuances of the proposals and considering the concerns raised by both supporters and critics, this analysis, will conclude by supporting an opinion on the impact of the suggested reforms on the future regulatory landscape of surrogacy.

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[1] Amel Alghrani and Danielle Griffiths , 'The regulation of surrogacy in the UK: the case for reform, [2017] Child and Family Law Quarterly165, 166.

[2] Department of Health, 'Review of the Human Fertilisation and Embryology Act: Proposals for revised legislation (including establishment of the Regulatory Authority for Tissue and Embryos)', Cm 6989 (2006), p 36.

[3] Human Fertilization and Embryology Act 2008.

[4] Marie Fox, 'The Human Fertilisation and Embryology Act 2008: Tinkering at the Margins' (2009) 17 Feminist Legal Studies 333, 342.

[5] Kirsty Horsey, 'UK surrogates' characteristics, experiences, and views on surrogacy law reform', Int J Law Policy Family, (1 April 2022) 36 (1): p 2.

[6] Mary Welstead, 'The Law Commissions' Report on Surrogacy – a missed opportunity' [2023] Fam Law 1074, 1075.

1. Recent Amendments to the Updated Legislation

The updated HFEA 2008 provisions modernized assisted reproduction and surrogacy, recognizing a broader range of individuals, including same-sex[7] females and unmarried opposite-sex couples.[8] These provisions clarify legal parenthood transfer from the surrogate[9] to Intended Parents (IPs), establishing criteria such as the common law definition of the 'legal' mother[10] and the common law doctrine of *pater est*[11] for married surrogates, regardless of the child's genetic origins.[12] Parental Orders (hereinafter POs), allowing the transfer of legal parenthood from the surrogate to IPs, were revised for joint[13] and single applicants,[14] whose only avenue to attain legal parental status was via an adoption order,[15] aligning with adoption law's child-centred focus,[16] where the child's welfare is the court's 'paramount consideration, throughout his lifetime'.[17] The time limit for applying for a PO was relaxed, for instance, in the case of *Re X,*[18] when an application for a PO was made two years and two months after the child was born, allowing flexibility beyond the initial six months after birth.[19] Additionally, the prohibition of payments to surrogates, except for 'reasonable expenses', [20] is in line with the Warnock Committee's concern for the 'risk of commercial exploitation of surrogacy',[21] criminalizing it under the Surrogacy Arrangements Act 1985.[22]

Despite these changes, surrogacy law is riddled with inconsistencies, as evidenced by various cases. Until a PO is obtained, the surrogate and her spouse or civil partner[23] are the legal parents of the child limiting the IPs' decision-making authority. Justifiably, the transformative

[7] Human Fertilization and Embryology Act 2008 ss 42 – 46.
[8] Human Fertilization and Embryology Act 2008 ss 36-38.
[9] Human Fertilization and Embryology Act 2008 s 33.
[10] *Ampthill Peerage Case* [1977] AC 547 [577A]-[577B], [582A]-[582C] (Lord Simon).
[11] *Banbury Peerage Case* (1811) 1 Sim & St 152-158.
[12] Lydia Bracken, 'Surrogacy and the genetic link' [2020] Child and Family Law Quarterly (CFLQ) 303, 304.
[13] Human Fertilization and Embryology Act 2008 s 54 (Parental Orders).
[14] House of Commons Briefing Note, Number 8076, April 2019, 'Children: Surrogacy, and single people and parental orders (UK), p 5-6.
[15] *B v C (Surrogacy: Adoption)* [2015] EWFC 17 (Fam), [2015] 1 FLR 1392 [22]-[23].
[16] Adoption and Children Act 2002 s 1(2).
[17] Adoption and Children Act 2002 s 1(2), s1(4).
[18] *Re X (A Child) (Surrogacy: Time Limit)* [2014] EWHC 3135 (Fam), [2015] 1 FLR 349 [4].
[19] Alan Brown, "Two means two, but must does not mean must: an analysis of recent decisions on the conditions for parental orders in surrogacy" (2018) 30(1) Child and Family Law Quarterly 23, 33.
[20] Human Fertilization and Embryology Act 2008 54(8).
[21] Dame Mary Warnock, 'Report of the Committee of Inquiry into Human Fertilisation and Embryology', Cmnd 9314 (1984), p 46 (§8.18).
[22] Surrogacy Arrangements Act 1985, s 3.
[23] Human Fertilization and Embryology Act 2008, s 35.

phycological impact[24] of a PO on a child's identity[25] was emphasized by Theis J in *Re C and D*[26] and Sir James Munby.[27] The six-month application limit, initially strict, was in practice relaxed[28] in the aforementioned *Re X*,[29] leading to orders for children beyond six months; [30] in *Re A and B,*[31] in which the children were aged 8 and 5; in *AB v CD,*[32] with children aged 12 and 13; and for the first time in *X v Z*[33] with a 'child' born in 1998![34] This raises concerns about the judiciary's role in bending statutory rules for individual cases,[35] so that the child's welfare can be facilitated, doubting the court's authority against Parliament's law-making role.[36]

The requirement that the surrogate must freely and unconditionally agree to the order within six weeks[37] after birth,[38] unless she cannot be found as in *D v L,*[39] or is incapable of giving consent,[40] has also presented challenges.[41] In the case of *Re AB*[42] an application for POs was adjourned due to the surrogate's refusal to consent to the order being made when the relationship between herself and the commissioning parents broke down.

2. The New Domestic Surrogacy Pathway

The LCs therefore, to respond to the problem of delayed post-birth legal parenthood through a PO, proposed a new domestic surrogacy pathway, avoiding an application to courts making the

[24] Susan Golombok, Clare Murray, Vasanti Jadva, Emma Lycett, Fiona MacCallum and John Rust, "Non-genetic and non-gestational parenthood: consequences for parent-child relationships and the psychological; well-being of mothers, fathers and children at age 3" (2006) 21 Human Reproduction 1918, 1922.

[25] Amel Alghrani, and Danielle Griffiths, 'The regulation of surrogacy in the UK: the case for reform, [2017] *Child and Family Law Quarterly* 165, 172.

[26] *Re C and D (Children) (Parental Order)* [2015] EWHC 2080 (Fam), [2015] Fam Law 1192 (Theis J) [76].

[27] *Re Human Fertilisation and Embryology Act 2008 (Cases A, B, C, D, E, F, G and H*) [2015] EWHC 2602 (Fam), [2017] 1 FLR 366 (Sir James Munby) [3].

[28] *Re X (A Child) (Surrogacy: Time Limit)* [2014] EWHC 3135 (Fam), [2015] Fam 186 [55].

[29] *Re X (A Child) (Surrogacy: Time Limit)* [2014] EWHC 3135 (Fam), [2015] 1 FLR 349.

[30] Human Fertilization and Embryology 2008, s 54(3).

[31] *Re A and B* (2015) EWHC 911.

[32] *AB v CD* (2016) EWFC 42.

[33] *X v Z (Parental Order Adult)* [2022] EWFC 26.

[34] *X v Z (Parental Order Adult*) [2022] EWFC 26 [1], [12], [13], [56].

[35] Katarina Trimmings, 'Six-month deadline for applications for parental orders relaxed by the High Court' (2015) 37(2) Journal of Social Welfare and Family Law 241, 243.

[36] Amel Alghrani and Danielle Griffiths, 'The regulation of surrogacy in the UK: the case for reform, [2017] Child and Family Law Quarterly 165, 177.

[37] Human Fertilization and Embryology Act 2008, s 54(7).

[38] Human Fertilization and Embryology Act 2008, s 54(6).

[39] *D v L (Surrogacy)* [2012] EWHC 2631 (Fam), [2013] 1 WLR 3135 [14], [28].

[40] Human Fertilization and Embryology 2008 Act, s 54(7).

[41] *Re C* (a child) (surrogacy: consent) [2023] EWCA Civ [56]-[57] (-reiterated the importance of unconditional consent).

[42] *Re AB (Surrogacy: Consent)* [2016] EWHC 2643 (Fam), [2017] Fam Law 57 [28].

IPs legal parents at birth.[43] This new pathway will set clear eligibility conditions[44] and will introduce essential pre-conception safeguards[45] (i.e. screening,[46] criminal record checks of the surrogate, her spouse or civil partner, and the IPs,[47] counselling,[48] independent legal advice[49] and a written agreement/Regulated Surrogacy Statements (RSS)), preventing surrogacy being enforceable[50] as a contract.[51] If their arrangement will be signed off by a Regulated Surrogacy Organisation (RSO),[52] state regulation occurs before birth,[53] ensuring suitability checks, resolving at the same time the concern of the lack of checks carried out on the 'suitability' of surrogates/parents before the agreement is entered.[54] The surrogate will also have a six-week post-birth window to object, prompting a PO application by IPs if needed as she will be the legal mother at birth.[55]

The new pathway will secure the child's welfare, ensuring that caregivers with whom the child lives are also the legal parents,[56] respecting the surrogate's objection rights. With the pre-conception welfare assessment of the child and the parties' entrance into a written surrogacy agreement,[57] the need for a post-birth assessment is removed,[58] thus eliminating the dilemmas

[43] Law Commission & Scottish Law Commission, 2019, ' Building Families Through Surrogacy: A New Law, p 9<https://www.scotlawcom.gov.uk/files/5615/5980/7881/Summary_of_joint_consultation_paper_on_Building_families_through_surrogacy_-_a_new_law_LCCP_244_SLCDP_167.pdf > accessed 1 November 2023

[44] Law Commission and the Scottish Law Commission ,Building families through surrogacy: a new law Volume II: Full Report of Law Commission Proposals Chapter 2: Introducing the new pathway, p33-34 <https://s3-eu-west-2.amazonaws.com/cloud-platform-e218f50a4812967ba1215eaecede923f/uploads/sites/30/2023/03/2.-Surrogacy-full-report.pdf > accessed 6 December 2023

[45] Ibid, Chapter 8: Screening and Safeguarding p 195.

[46] Ibid, Chapter 8: Screening and Safeguarding p 195.

[47] Ibid, Chapter 8: Screening and Safeguarding p 214-215.

[48] Ibid, Chapter 8: Screening and Safeguarding p 201.

[49] Ibid, Chapter 8: Screening and Safeguarding p 208.

[50] Human Fertilization and Embryology Act 2008 s 1A.

[51] Ibid, Chapter 15:Surrogacy and other substantive rights p 472, (§15.151).

[52] Ibid, Chapter 9: The form and content of Regulated Surrogacy Statements, p 241 (§9.1).

[53] Law Commission & Scottish Law Commission, 2019,'Building Families Through Surrogacy: A New Law', p 1.

[54] Law Commission and the Scottish Law Commission, Summary of the 2023 Law Commission's Surrogacy Law Reform proposals, p 9< https://cloud-platform-e218f50a4812967ba1215eaecede923f.s3.amazonaws.com/uploads/sites/30/2023/03/LC_Surrogacy_Summary_of_Report_2023.pdf > accessed 1 November 2023

[55] Law Commission and the Scottish Law Commission, Building families through surrogacy: a new law Volume II: Full Report of Law Commission Proposals, Recommendation 3 p 83.

[56] Law Commission & Scottish Law Commission, 2019, ' Building Families Through Surrogacy: A New Law',p 9.

[57] Law Commission and the Scottish Law Commission, Building families through surrogacy: a new law Volume II: Full Report of Law Commission Proposals, Chapter 3: International law considerations, p 51 (§3.58).

[58]Law Commission & Scottish Law Commission, 2019, ' Building Families Through Surrogacy: A New Law', p 9.

courts face when any failure to make the order will impact negatively the child's best interests.[59] Critics argue that the minimum ages for surrogates (21) and IPs (18),[60] are deemed too young[61] to make such important decisions undertaking the complex process and that RSO checks may be costly and time-consuming as surrogates and IPs may be subject to a 'bureaucratic scrutiny'.[62] If the surrogate withdraws her consent post-birth, she would have to apply for a PO,[63] suggesting that her ability to withdraw her consent from the RSS at any point from the date of its signing to 6 weeks after the child's birth,[64] 'makes her written acceptance meaningless',[65] placing the baby in a parental limbo until the court determines the question of parenthood.[66] This consent withdrawal provision may encourage UK surrogacy over jurisdictions where agreements are legally recognised.[67]

3. The Issue of Payments in Surrogacy

Another controversial issue in surrogacy law is ambiguity on 'reasonable expenses',[68] lacking a defined meaning. In *Re C*[69] there was heavy criticism for a £6500 payment as a 'baby-for-cash-deal'.[70] In practice, courts have flexibly authorized payments exceeding 'reasonable expenses,' prioritizing child's welfare. Hedley J authorising payments of €25,000, persuasively said that it is nearly implausible to predict a scenario in which, the welfare of especially a foreign child, would not be seriously jeopardized by a refusal to issue an order,[71] later stating

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[59] *Re X and Y(Foreign Surrogacy)* [2008] EWHC 3030 (Fam), Hedley J [24].

[60] Law Commission and the Scottish Law Commission, Summary of the 2023 Law Commission's Surrogacy Law Reform proposals, p 11.

[61] Labour Women's Declaration, 'LWD Hosting Two Fringe Meetings At Labour Conference 2023'(24 August 2023) < https://labourwomensdeclaration.org.uk/lwd-hosting-two-fringe-meetings-at-labour-conference-2023/#:~:text=LWD%20is%20hosting%20two%20fringe,inside%20the%20ACC%20Conference%20Centre.&text=Panel%20%E2%80%93%20Shabana%20Mahmood%20MP%2C%20Diana,Dianne%20Hayter%20and%20Lisa%20Mackenzie > accessed 20 October 2023

[62] Mary Welstead, 'The Law Commissions' Report on Surrogacy – a missed opportunity' [2023] Fam Law 1074, 1078.

[63] Law Commission and the Scottish Law Commission, Building families through surrogacy: a new law Volume II: Full Report of Law Commission Proposals - Recommendation 3 p 83.

[64] Ibid, p79 (§4.104-4.106) -Recommendation 2.

[65] Mary Welstead, 'The Law Commissions' Report on Surrogacy – a missed opportunity' [2023] Fam Law 1074, 1078.

[66]Ibid, p. 1079.

[67] Owen Igiehon, 'Should The UK Law On Surrogacy Be Reformed?' (18 January 2021), New Law Journal < https://www.newlawjournal.co.uk/content/should-the-uk-law-on-surrogacy-be-reformed- > accessed 15 December 2023

[68] Human Fertilisation and Embryology Act 2008 s 54(8).

[69] *Re C (A Minor) (Wardship: Surrogacy)* [1985] FLR 846 (Latey J).

[70] Amel Alghrani and Danielle Griffiths, 'The regulation of surrogacy in the UK: the case for reform, [2017] Child and Family Law Quarterly 165, 167.

[71] *Re X & Y (Foreign Surrogacy)* [2008] EWHC 3030 [24].

in *Re L*[72] that the courts should only refrain from issuing an order only in the most evident cases of public policy abuse.[73] It is thus, obvious that the law on payments is unclear[74] and difficult to apply in practice. A more explicit choice should be made between these different available rationales for payments within the reformed law,[75] underpinned by a principled and coherent rationale.[76]

The LCs proposed a stricter payment regime for surrogates. Payments made by the IPs to the surrogate, should be based on reimbursing her actual costs against a specific list of permitted categories,[77] not an allowance that is paid on a regular basis,[78] with criminal charges[79] for the IPs if they do not confirm the legally acceptable payments via a statutory declaration after birth.[80] In practice, a schedule of anticipated payments, approved by an RSO at the outset, will be required.[81]

These payment rules protect the surrogate from gaining or losing financially, minimizing the risk of exploitation and financial inducement of becoming a surrogate,[82] endorsing the view that surrogacy has to be an altruistic act.[83] Though, the meticulous adherence to a narrow permitted expenses list by IPs, facing legal consequences if exceeded,[84] may be impractical, insensitive and unpleasant for surrogates to seek specific reimbursement for every item they spend potentially stimulating distrust.[85] The proposals also risk discouraging UK surrogacy, [86] leading IPs to choose international surrogacy, as spotted by NGA Law.[87] Despite the non-profit

[72] *Re L (Commercial Surrogacy)* [2010] EWHC 3146 (Fam), [2011] 1 FLR 1423.
[73] *Re L (Commercial Surrogacy)* [2010] EWHC 3146 (Fam), [2011] 1 FLR 1423 [9]-10].
[74] Ruth Lamont, *Family Law*, 2022, (2nd edn), Ch8, 346-347, 349.
[75] Alan Brown, 'Surrogacy law reform in the UK: the ambiguous position of payments to the surrogate', [2021] CFLQ 95, 108.
[76] Ibid, p 113.
[77] Law Commission and the Scottish Law Commission, Building families through surrogacy: a new law Volume II: Full Report of Law Commission Proposals, p 326 (§12.119)- Recommendation 55.
[78] Ibid, p 315-316- Recommendation 53.
[79] Ibid, Chapter 2: Introducing the new pathway, p 36 (§2.32).
[80] Ibid, p 319-324- Recommendation 54.
[81] Ibid, Chapter 12: Payments, p 358 (§12.270).
[82] Ibid, p 315.
[83] Mary Welstead, 'The Law Commissions' Report on Surrogacy – a missed opportunity' [2023] Fam Law 1074, 1079.
[84] Law Commission and the Scottish Law Commission, Summary of the 2023 Law Commission's Surrogacy Law Reform proposals, p 18-19
[85] Brilliant Beginnings, 'Law Commissions: Tightening up what UK surrogates are paid' < https://brilliantbeginnings.co.uk/law-commission-payments-to-surrogates/> accessed 14 December 2023
[86] Ibid.
[87] NGA LAW The Law Commission's proposals for surrogacy law reform are a positive step, but represent a missed opportunity to make real change' (29 March 2023) < https://www.ngalaw.co.uk/law-commission-final-report-surrogacy-law-reform-key-takeaways-response/> accessed 12 December 2023

requirement for RSOs and the LCs' persistence on non-commercial surrogacy, mandatory checks may increase surrogacy costs, benefiting those conducting checks[88] and potentially excluding crucial contributors like surrogates. [89]

4. International Surrogacy and Legal Challenges

Concerns arise regarding foreign surrogacy affecting a child's welfare in obtaining a PO, risking the child being left abroad while awaiting necessary[90] UK entry documentation,[91] as in *Re Z.*[92] Apart from the IPs seeking legal recognition in the UK, the requirement for a PO presents complexities that domestic laws cannot fully control.[93] In the case of *Re X and Y,*[94] the law left the children 'stateless and parentless.'[95] This case serves as a cautionary tale for international surrogacy agreements, highlighting the absence of global consistency in surrogacy laws. This lack of global uniformity in surrogacy laws can lead to uncertain parentage as seen in *Paradiso and Campanelli v Italy,* [96] and challenges in citizenship, nationality, and residency, possibly exposing children to the risk of deportation.[97]

The LCs in order to tackle the hazards that international surrogacy agreements entail, have proposed reforms to streamline international surrogacy agreements, [98] accelerating child return to the UK and reducing delays.[99] Under the new process, one IP must be UK-domiciled or

[88] Mary Welstead, 'The Law Commissions' Report on Surrogacy – a missed opportunity' [2023] Fam Law 1074, 1079.

[89] Mary Welstead, 'The Law Commissions' Report on Surrogacy – a missed opportunity' [2023] Fam Law 1074, 1081-1082.

[90] Law Commission and the Scottish Law Commission, Building families through surrogacy: a new law Volume II: Full Report of Law Commission Proposals, Chapter 16: International surrogacy arrangements, p 497 (§16.340) & p 498 (§16.41).

[91] Law Commission and the Scottish Law Commission, Summary of the 2023 Law Commission's Surrogacy Law Reform proposals, p.10< https://cloud-platform-e218f50a4812967ba1215eaecede923f.s3.amazonaws.com/uploads/sites/30/2023/03/LC_Surrogacy_Summary_of_Report_2023.pdf >

[92] *Re Z (Care proceedings: Surrogacy)* [2021] EWHC 589 [29].

[93] Law Commission and the Scottish Law Commission, Building families through surrogacy: a new law Volume II: Full Report of Law Commission Proposals, Chapter 16: International surrogacy arrangements, p 489-493, (§16.9-16.21).

[94] *Re X and Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam), [2009] 1 FLR 733.

[95] *Re X and Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam), [2009] 1 FLR 733 [9], [13].

[96] *Paradiso and Campanelli v Italy* [2017] Application No. 25358/12.

[97] Louisa Ghevart, 'Challenges in international surrogacy arrangements.' [2022] April, Fam Law 527, 530.

[98] Law Commission and the Scottish Law Commission, Summary of the 2023 Law Commission's Surrogacy Law Reform proposals, p 10< https://cloud-platform-e218f50a4812967ba1215eaecede923f.s3.amazonaws.com/uploads/sites/30/2023/03/LC_Surrogacy_Summary_of_Report_2023.pdf >

[99] Law Commission and the Scottish Law Commission, Building families through surrogacy: a new law Volume II: Full Report of Law Commission Proposals, Chapter 16: International surrogacy arrangements, p 501 (§16.59).

habitually resident.[100] For nationality[101] and immigration[102] law, a recommended change involved submitting applications before the child's birth[103] and recognizing the intended father for British nationality. [104] The proposed immigration guidance aims to replace inconsistent government sources, clarifying the new pathway.[105] This means that IPs of children born outside the UK will still have to apply for a PO post-birth.[106]

Undoubtedly, these reforms will help IPs to speed up the process of bringing surrogate-born children to the UK encouraging IPs to choose national surrogacy for quicker procedures and enhanced protection that the reforms would provide.[107] Nevertheless, the existing UK legal process should either automatically recognize overseas surrogacy or resolve parentage before birth.[108] Promptly recognizing British parents' children as British from birth and issuing UK passports is crucial for their welfare.[109] Clearer guidance is not a panacea to the underlying legal difficulties[110]

5. The Right to Access Origin Information

Another area of the law, which was not developed with surrogacy in mind, is the right of individuals to access original information due to unreliable and insufficient[111] data on

[100] Ibid, Chapter 2: Introducing the new pathway, p 34 (§2.21) AND Law Commission and the Scottish Law Commission, Summary of the 2023 Law Commission's Surrogacy Law Reform proposals, p 11.
[101] Ibid, Chapter 16: International surrogacy arrangements, p 503 (§16.70-16.73) - Recommendation 79 p 509 & Recommendation 80 p 511.
[102] Ibid, Chapter 16: International surrogacy arrangements, p 514 §16.127-Reccomendation 81 at p 519.
[103] Ibid, Chapter 16: International surrogacy arrangements, p 494 (§16.27).
[104] Ibid, Chapter 16: International surrogacy arrangements, p 495 (§16.31).
[105] Ibid, Chapter 16: International surrogacy arrangements, p 525-526, (§16.194-16.196)- Recommendation 83 at §16.211 p 528.
[106] Law Commission and the Scottish Law Commission, Summary of the 2023 Law Commission's Surrogacy Law Reform proposals, p 15< https://cloud-platform e218f50a4812967ba1215eaecede923f.s3.amazonaws.com/uploads/sites/30/2023/03/LC_Surrogacy_Summary_of_Report_2023.pdf >
[107] Law Commission and the Scottish Law Commission, Building families through surrogacy: a new law Volume II: Full Report of Law Commission Proposals, Chapter 16: International surrogacy arrangements, p 489 (§16.9).
[108] Brilliant Beginnings, 'Law Commissions: no significant change for international surrogacy <https://brilliantbeginnings.co.uk/law-commission-changes-to-the-way-uk-surrogacy-is-regulated/> accessed 14 December 2023.
[109] Law Commission and the Scottish Law Commission, Summary of the 2023 Law Commission's Surrogacy Law Reform proposals, p 22.
[110] Brilliant Beginnings, 'Law Commissions: no significant change for international surrogacy <https://brilliantbeginnings.co.uk/law-commission-changes-to-the-way-uk-surrogacy-is-regulated/> accessed 14 December 2023
[111] Amel Alghrani and Danielle Griffiths, 'The regulation of surrogacy in the UK: the case for reform, [2017] Child and Family Law Quarterly 165, 170.

surrogacy.[112] Due to the lack of data, the extent of the problem in international surrogacies jeopardizes the child's welfare during the PO process.[113] In *Re E and F*[114] and the *Ampthill Peerage Case,*[115] it was stated that the lack of data contrasts the importance that law and society have always attached to a person's status. Dr. Crawshaw supports surrogacy law reform prioritizing human rights and ensuring access to genetic information with international standards criminalizing child selling, avoiding statelessness, and enhancing regulation.[116]

Hence, the LCs propose a national Surrogacy Register, maintained by the HFEA,[117] to record all surrogacy agreements.[118] It will include both identifying and non-identifying information about the surrogate and IPs. [119] Children born through surrogacy would be able to have access to non-identifying information at the age of 16 and identifying information at the age of 18,[120] with access available earlier[121] if deemed '*Gillick* competent'.[122] The register's broad scope ensures genetic information access for surrogate-born individuals, [123] addressing their autonomy[124] and ECtHR-recognised[125] right to know[126] their genetic heritage, the surrogate's background, or health-related information.[127] Despite its importance, the perplexing rules regarding the age of information access pose challenges.[128]

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[112] Kirsty Horsey, 'Surrogacy in the UK: Myth Busting and Reform', p 13 <https://www.familylaw.co.uk/docs/pdf-files/Surrogacy_in_the_UK_report.pdf >

[113] Amel Alghrani and Danielle Griffiths, 'The regulation of surrogacy in the UK: the case for reform, [2017] Child and Family Law Quarterly 165, 171.

[114] *Re E and F (Assisted Reproduction: Parent)* [2013] EWHC 1418 (Fam), [2013] 2 FLR 1357 [1]

[115] *Ampthill Peerage Case* [1977] AC 547 [568G]–[568H] (Lord Wilberforce).

[116] Dr Marilyn Crawshaw, Chair of the Project Group on Assisted Reproduction (PROGAR) Law Commission & Scottish Law Commission, 2019, ' Building Families Through Surrogacy: A New Law, p 9 <https://www.scotlawcom.gov.uk/files/5615/5980/7881/Summary_of_joint_consultation_paper_on_Building_families_through_surrogacy_-_a_new_law_LCCP_244_SLCDP_167.pdf >

[117] Law Commission and the Scottish Law Commission, Building families through surrogacy: a new law Volume II: Full Report of Law Commission Proposals, Chapter 13: Surrogacy Register, p 375 (§13.38).

[118] Law Commission and the Scottish Law Commission, Summary of the 2023 Law Commission's Surrogacy Law Reform proposals, p 20.

[119] Law Commission and the Scottish Law Commission, Building families through surrogacy: a new law Volume II: Full Report of Law Commission Proposals, Chapter 13: Surrogacy Register, p 377 (§13.55) & (13.74-13.75)-Recommendation 61 at p 384.

[120] Ibid, Chapter 3: International law considerations, p 49 (§3.52).

[121] Ibid, Chapter 13: Surrogacy Register, p 388 (§13.112).

[122] *Gillick v West Norfolk and Wisbech Area Health Authority and Another* [1986] 1 FLR 224.

[123] Law Commission and the Scottish Law Commission, Summary of the 2023 Law Commission's Surrogacy Law Reform proposals, p 20.

[124] Andrew Bainham, 'Arguments about parentage', (2008) *Cambridge Law Journal*, 322, 347.

[125] *Jaggi v Switzerland* (2006) App No 58757/00 13 July 2006 [38].

[126] United Nations Convention on the Rights of the Child, Arts 7, 8.28.

[127] Andrew Bainham, 'Arguments about parentage', (2008) *Cambridge Law Journal* 322, 336.

[128] Mary Welstead, 'The Law Commissions' Report on Surrogacy – a missed opportunity' [2023] Fam Law 1074, 1083.

Conclusion

Conclusively, the LCs' recommended surrogacy reforms are criticized for not addressing the real challenges faced by surrogacy families. 'A once-in-a-generation chance to make real change is being missed.'[129] The proposed creation of RSO's is seen as turning surrogacy into a rigorous bureaucratic process, potentially lacking the sensitivity of the current judicial supervision.[130] Doubts are raised about RSOs' ability to assess surrogates and IPs adequately.[131] Likewise, Mary Welstead expressed her distress on the right of the surrogate to withdraw her consent as a potential challenge to legal parenthood.[132] Overall, she is justifiably sceptical about the government's willingness to invest in the proposed law overhaul, with a logical preference for a revised PO regime as a more reasonable solution for surrogacy arrangements.[133] Thérèse Callus accurately concluded that, despite that the report makes a significant contribution to necessary reform, society and Parliament (by March 2024), must scrutinize the details for better surrogacy regulation.[134] Indeed, 'it might be a good start, but more work will be needed to reform the legislation.'[135]

[129] NGA LAW, 'The Law Commission's proposals for surrogacy law reform are a positive step, but represent a missed opportunity to make real change' (29 March 2023) < https://www.ngalaw.co.uk/law-commission-final-report-surrogacy-law-reform-key-takeaways-response/> accessed 12 December 2023 & Alan Brown, Surrogacy law reform in the UK: the ambiguous position of payments to the surrogate', [2021] CFLQ 95, 98, 114.

[130] Mary Welstead, 'The Law Commissions' Report on Surrogacy – a missed opportunity' [2023] Fam Law 1074, 1084.

[131] Ibid, p 1078.

[132] Ibid, p 1084.

[133] Ibid, p.1084.

[134] Professor Thérèse Callus, 'Expert comment: Law Commission surrogacy report' (University of Reading, 29th March 2023) < https://www.reading.ac.uk/news/2023/Expert-Comment/Expert-comment---Law-Commission-surrogacy-report > accessed 16 December 2023

[135] Ibid.

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Miscarriages of Justice: Is the Courtroom Still Fit for Purpose?

Samantha Watts

Abstract

This paper examines miscarriages of justice in England and Wales' criminal justice system. It assesses the contribution of eyewitness misidentification and erroneous evidence as leading causes of miscarriages of justice, before engaging in a jurisdictional comparison with the United States of America and proposing reform recommendations. Miscarriages of justice remain a contested issue in the twenty-first century despite advances in scientific technology, which has led to doubt over whether a defendant's presumption of innocence is more of symbolic effect than a practical reality. This paper engages in both library-based and case study-based analyses to evaluate the challenges facing the United Kingdom's justice system that contribute to the ongoing issue of miscarriages of justice. In assessing eyewitness misidentification and flawed evidence, it is demonstrated that reform is required to maintain the integrity of criminal convictions. This paper proposes two recommendations for the future of the criminal justice system which balance the need to introduce novel evidence into the courtroom against the need to protect defendants' presumption of innocence.

Introduction

This paper provides a critical discussion of miscarriages of justice arising from issues within the courtroom. It considers the contribution of eyewitness misidentification and the admissibility of unreliable evidence in causing wrongful convictions. In England and Wales, the two factors have contributed to over two hundred miscarriages of justice between 1972 and 2016,[1] which illustrates the danger of the courtroom in causing miscarriages of justice. Miscarriages of justice threaten the integrity of the criminal justice system because they undermine the system's capacity to deliver justice, subverting public confidence in the law.

First, however, 'miscarriages of justice' must be defined. Academics have attempted to define the phenomenon on a spectrum between a point of expansive 'justice-related issues',[2] and a point where an applicant successfully appeals a criminal conviction.[3] For the purposes of this paper, the latter definition is adopted: a miscarriage of justice occurs when an individual has their conviction squashed. This position acknowledges that both the factually innocent and the factually guilty can be victims of miscarriages of justice, if their conviction is considered unsafe.[4] In theorising criminal justice systems, Packer developed the 'due process' and 'crime

[1] Evidence-Based Justice Lab, 'Miscarriages of Justice Registry' (University of Exeter) < https://evidencebasedjustice.exeter.ac.uk/miscarriages-of-justice-registry/> accessed 20th December 2023

[2] Malcom David Birdling, 'Miscarriages of Justice: A Definition' (DPhil thesis, University of Oxford 2008)

[3] Michael Naughton, Rethinking Miscarriages of Justice: Beyond the Tip of the Iceberg (1st edn., Palgrave Macmillan UK 2007) 17

[4] Criminal Appeal Act 1995, s2(1)(1)(a)

control' models.[5] Due process embodies an 'obstacle course', whereby stringent oversight of the criminal process upholds the suspect's fundamental rights.[6] Practically, this has the effect of ensuring that the rights of the individual take priority in criminal proceedings, insinuating that there is equality between the parties.[7] Though, due process is discrepant with the England and Wales criminal justice system which aligns closer with the crime control model.[8] The 'conveyer-belt' approach to justice[9] arguably facilitates miscarriages of justice as decisions made at haste are inextricably bound in a diminished emphasis on the defendant's rights. Unsafe convictions can be appealed to the Criminal Cases Review Commission ("CCRC") which was founded in the late twentieth-century.[10] Whilst an organisation such as the CCRC exists to uphold the emphasis of a defendant's rights, the fact that it has received over 30,000 applications since its inception indicates that the accordance with the crime control model in this jurisdiction poses a substantial threat to justice .[11]

This paper advances a comprehensive analysis on issues experienced in the courtroom as a cause of miscarriages of justice, structured across two core sections. First, this paper will consider eyewitness misidentification as an issue in the courtroom, in light of the three memory stages. Second, the inadmissibility and unreliability of scientific evidence will be discussed. To advance a thorough understanding, both sections will offer a comparative analysis between the United States of America ("USA") and England and Wales. In addition, reform and preventative measures will be introduced to address such failings and prevent miscarriages of justice. In conclusion, this paper intends to demonstrate how the current state of the criminal justice system is plagued by internal errors which undermine the integrity of the system.

I. Eyewitness Misidentification

Eyewitness evidence is 'among the least reliable forms of evidence and yet is persuasive to juries'.[12] Mock-juror trials consistently reflect the value of eyewitness identification, with one study finding that 72% of participants would elect for a guilty verdict despite the only available

[5] Herbert L. Packer, 'Two Models of the Criminal Process' (1964) 113 (1) University of Pennsylvania Law Review 1, 9
[6] ibid. 13
[7] Lucy Welsh, Layla Skinns and Andrew Sanders, Sanders & Young's Criminal Justice (5th edition, Oxford University Press 2021) 19
[8] Naughton (n 3) 14
[9] Packer (n 5) 9
[10] Criminal Appeal Act 1995, s8; 'About Us' (*CCRC: Criminal Cases Review Commission*) < https://ccrc.gov.uk/what-we-do/> accessed 20th December 2023
[11] 'About Us: Facts and Figures' (*CCRC: Criminal Cases Review Commission*) <https://ccrc.gov.uk/facts-figures/> accessed 20th December 2023
[12] Gary L. Wells, 'Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads' (1998) 22 Law and Human Behaviour 603, 605

evidence being a singular eyewitness identification.[13] Whilst this study can be criticised for lacking generalisability due to its small sample size, the fact that 174 miscarriages of justice in England and Wales between 1970 and 2018 are attributable to flawed eyewitness testimonies demonstrates the privileged position that eyewitness identification occupies in criminal proceedings and also, the inherent vulnerability of identifications in causing miscarriages of justice.

Psychological research consistently concludes that the reliance placed on eyewitness identification by jurors is misplaced. This reliance raises particular issues in England and Wales where such evidence is often the only evidence put before a jury.[14] The accuracy of an identification is highly susceptible to distortion and contamination at three stages: encoding, retention and retrieval. Impacted memories can hinder the ability of a witness to correctly identify a suspect, causing a susceptibility to miscarriages of justice. This section will critically examine the challenges experienced at each respective stage of memory in influencing misidentifications, before engaging in a critical comparison with the USA and introducing reform.

Encoding

Encoding is the initial memory stage, where an individual acquires information from their environment. In the context of criminal proceedings, encoding is the point when a witness first observes the suspect. Whilst a common understanding is that memory operates akin to a camera, this view is highly mistaken and fails to account for extraneous factors which impact an individual's perception and their subsequent identification.[15] Psychological research has established a non-exhaustive list of influences that can alter how an individual remembers a person. This section delivers an acute focus on the influence of stress and anxiety as 'estimator' variables on encoding.[16]

When a witness is confronted with a suspect, they will likely experience emotional arousal. Yet, psychological research presents a conflicted picture of the impact of anxiety on witness identification. One interpretation depicts anxiety as adversely impacting a witness's ability to

[13] Elizabeth F. Loftus, 'Reconstructing Memory: The Incredible Eyewitness' (1975) 15 (3) Jurimetrics Journal 188, 188

[14] Helen Kaye, Deborah H. Drake and Graham Pike, 'Harmful Evidence – Wrongful Conviction or Suspicion on the Basis of Flawed Eyewitness Testimony' (Harm and Evidence Research Collaborative, The Open University) < https://www5.open.ac.uk/research-centres/herc/blog/harmful-evidence-–-wrongful-conviction-or-suspicion-basis-flawed-eyewitness-testimony> accessed 1st December 2023

[15] Mark L. Howe, Lauren M. Knott and Martin A. Conway, *Memory and Miscarriages of Justice* (Taylor & Francis 2017) 8

[16] Jules Epstein, 'Eyewitnesses and Erroneous Convictions: An American Conundrum' in Sarah L Cooper (ed), *Controversies in Innocence Cases in America* (Routledge 2014) 46

accurately identify a suspect. Johnson and Scott found that participants subjected to a 'high stress' condition could only accurately identify the perpetrator in 33% of the cases, whereas participants in a 'low stress' condition had a 49% accuracy rate.[17] These findings suggest that heightened anxiety impairs the accuracy of witness identification, which can discredit the utility of the testimony. The discrepancy between the witness's identification and the actual event presents a significant risk in causing miscarriages of justice because the flawed eyewitness identification may comprise a substantial proportion of the evidence introduced into the courtroom, and can subsequently form the basis of a wrongful conviction. Thus, there appears to be an indispensable need to re-evaluate the circumstances in which a memory is encoded, including the witness's physiological state, to examine the credibility of the identification. Conversely, however, a field experiment found greater accuracy amongst 'extremely anxious' witnesses to a shooting when asked to identify the suspect.[18] The variance in research findings in this area indicates that anxiety effects witnesses inconsistently. Such inconsistencies undermine the utility of eyewitness identification as evidence on which to found a conviction because jurors cannot unfailingly depend upon the identification as a means of ascertaining guilt, which heightens the likelihood of a miscarriage of justice. The discrepancies in psychological research reveal a need for the courtroom to adopt a more active role in scrutinising eyewitness identification before it is deemed 'conclusive' and become more cautious when this form of evidence is the predominant 'proof' introduced to the courtroom.

Moreover, jurors' interpretation of eyewitness identification exacerbates the issue. Contrary to the preceding research on the unpredictability in identifications made under stress and anxiety, 33% of jurors believe that stress would have no effect on a witness's identification.[19] This prevailing attitude amongst jurors is incongruous with the reality of eyewitness misidentification, which research has shown to be affected in a disparate manner by anxiety and stress. Therefore, a chasm exists between the myriad of processes informing the encoding of a memory and juror perception that a witness's memory is sufficiently robust to withstand physiological pressures. Consequently, this divergence reveals a need to enhance juror education in this area in order to mitigate miscarriages of justice from occurring on the grounds of eyewitness misidentification.

Retention

The accuracy of a witness's identification can decline further during retention. Gabbert *et al*. coined 'memory conformity' to refer to witnesses altering their perception to align closer with

[17] Elizabeth Loftus, Geoffrey R. Loftus and Jane Messo, 'Some Facts about "Weapon Focus"' (1987) 11 (1) Law and Human Behaviour 55, 56

[18] John C. Yuille and Judith L. Cutshall, 'A Case Study of Eyewitness Memory' (1986) 71 (2) Journal of Applied Psychology 291, 294

[19] Dr Elizabeth F. Loftus, Timothy P. O'Toole and Catharine F. Easterly, 'Juror Understanding of Eyewitness Testimony: A Survey of 1000 Potential Jurors in the District of Columbia' [2004]

their co-witnesses.[20] Their research found that post-event discussions amongst witnesses led to 71% of witnesses reporting information that they had not seen, but that their co-witnesses had.[21] These findings denote the malleability of memory when witnesses discuss the offence with others who also observed the suspect, which augments the risk of misidentifications and thus, compounds the possibility of miscarriages of justice. Whilst Gabbert's research can be criticised for lacking ecological validity due to the artificial environment, numerous miscarriages of justice have occurred in this jurisdiction which irrefutably support the proposition that post-event discussion can distort eyewitness identification.

Barry George served seven years in prison for the murder of Jill Dando.[22] The case against George was contingent upon eyewitness identification in light of a noteworthy absence of corroborating evidence.[23] Initially, only one witness identified George but following a shared lift home with other witnesses, two retrospective identifications of George were made.[24] Similarly, Sam Hallam's wrongful murder conviction was conceived upon colluded identifications where witnesses discussed their observations amongst themselves, resulting in distorted identifications.[25] George and Hallam's cases demonstrate how a witness's recollection of an event can become contaminated by subsequent information that they are exposed to, so that their own perception becomes aligned with their co-witnesses. Consequently, the significant impact of post-event discussions can skew and distort how a witness remembers a suspect which can significantly contribute to a miscarriage of justice, demonstrating an urgent need to assess how witnesses are treated within criminal justice proceedings.

Both George and Hallam relied upon the CCRC to reinstate their liberties. The CCRC, as an error-correction commission, has the power to 'initiate police investigations'[26] which entitled the organisation to gather evidence pertaining to Hallam and George's involvement in the respective murders. This power distinguishes the CCRC from other justice organisations whose ability to retrieve information is contingent upon the cooperation of law-enforcement bodies. Consequently, the CCRC was effective at exonerating the two men, more so than other interested organisations. Though, the ultimate success of the CCRC in quashing Hallam and George's convictions rested upon the Court of Appeal and its 'interpretations of its […]

[20] Fiona Gabbert, Amina Memon and Kevin Allan, 'Memory Conformity: Can Eyewitnesses Influence Each Other's Memories for an Event?' (2003) 17 (5) Applied Cognitive Psychology 533

[21] ibid. 539

[22] Evidence-Based Justice Lab, 'Barry George' (*University of Exeter*) < https://evidencebasedjustice.exeter.ac.uk/case/barry-george/> accessed 1st December 2023

[23] Graham Davies and Laurence Griffiths, 'Eyewitness Testimony and the English Courts: A Century of Trial and Error' (2008) 15 Psychiatry, Psychology and Law 435, 441

[24] ibid.

[25] *R v Sam Hallam* [2012] EWCA Crim 1158 [77]

[26] 'Appeals, Reviews and Retrials' in Liz Campbell, Andrew Ashworth and Mike Redmayne (eds), The Criminal Process (5th edition, Oxford University Press 2019) 407

powers'.[27] The CCRC is effectively redundant in situations where applications do not present a 'real possibility' of the Court of Appeal overturning the conviction[28] since the organisation cannot make exonerations on its own accord. This unequivocally undermines the notion that the CCRC is an independent body, as its success at remedying miscarriages is inextricably bound in decisions made by the Court. For both Hallam and George, the Court of Appeal found in favour with the CCRC's referral, but there are cases which have significant doubt over their convictions yet remain unchallenged.[29] Therefore, it is submitted that the effectiveness of the CCRC is inherently limited by its reliance upon the Courts which are, ostensibly, responsible in part for the miscarriage occurring in the first place.

Retrieval

'Retrieval' involves witnesses recalling information. Psychological research has shown that the accuracy of eyewitness identification can fluctuate when a memory is retrieved in response to leading questions used in the pre-trial procedure and the resultant notion of suggestibility. Loftus examined 'leading questions' amongst students and found that the particular phrasing of a question determined the answer given: when participants were asked if they witnessed 'the' item in the video, 15% admitted to observing a non-existent item, compared to a 7% false-positive response when asked if they saw 'a' non-existent item.[30] Furthermore, when the modal verb used to describe the speed that cars were travelling when an accident occurred was changed, participants' responses altered: there was an estimate of 40.8mph when 'smashed' was used, compared to 31.8mph when 'contacted' was substituted.[31] Together, these findings demonstrate how the particular phrasing of questions can alter a witness's perception of an event and the subsequent testimony provided.

This research has significant ramifications on the criminal justice system in England and Wales. Leading questions may be employed during identification parades and interviews which can cause witnesses to become more sensitive to an administrator's cues, encouraging either a particular identification or to answer a question in accordance with a perceived desire from the interviewer. Accordingly, a witness's identification may be inaccurate as it ceases to be informed by their own perception but rather, by subjective inferences from their environment. Whilst identification parades and interviews are now largely overseen by the Police and Criminal Evidence Act 1984 ("PACE"),[32] leading questions remain problematic given that the

[27] ibid. 411
[28] Criminal Appeal Act 1995, s13
[29] 'Criminal Justice System Still Failing the Innocent' (Innocence Network UK) < http://www.innocencenetwork.org.uk/criminal-justice-system-still-failing-the-innocent> accessed 18th December 2023
[30] Loftus (n 13) 191
[31] ibid. 192
[32] PACE 1984, Code D

information drawn from these answers remain admissible to the courtroom.[33] Evidence of this kind constitutes a significant risk to miscarriages of justice since the factually innocent could be erroneously identified by a witness as a result of suggestibility. Therefore, it is submitted that there is a burgeoning need to introduce stringent measures to oversee the manner in which witnesses are prompted to give information on the offender.

USA Comparison

When considering comparative points between America and England and Wales, it must first be stated that whilst there are federal laws that apply to each state universally, the predominant body of legislation governing the American criminal procedure is governed at state level. For example, in Georgia and Florida there is currently no requirement that the composition of the identification parade share similar characteristics of the suspect. In Georgia, the composition of the identification should 'generally resemble' the offender[34] and Florida remains silent on this matter. By not appropriately moderating the line-up, this system promotes suggestibility amongst witnesses, whereby the 'distinct' foil can reflect the police's own suspicion as to the perpetrator. In contrast, PACE requires the identification parade in England and Wales to 'resemble the suspect in age, height and general appearance'.[35] By controlling the composition of the identification parade, legislation seeks to curtail bias from distorting a witness's perception as to the alleged offender, enabling an identification to be a product of a witness's own recollection. Consequently, it is submitted that this jurisdiction affords a substantive advantage, which the Floridian and Georgian state law would benefit greatly from adopting.

Preventative Measures

Eyewitness identification 'remains to serve as the centrepiece of the legal arena'[36] despite the preceding analysis demonstrating its inherent fragilities. For the law to 'keep pace' with contemporary understandings of the instability of eyewitness identification, it is imperative that reform is introduced.[37]

First, there must be greater direction given to a jury when ascertaining the credibility of an identification. Where witness identification is introduced into the courtroom, the 'Turnbull

[33] Ministry of Justice and National Police Chief's Council, 'Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures' (Home Office 2022) 192

[34] 2022 Georgia Code, Title 17 – Criminal Procedure, Chapter 20 – Identification Procedures for Live Lineups, Photo Lineups, and Showups – 17-20-2. Written Policies for Live Lineups, Photo Lineups, and Showups (b)(4)

[35] PACE 1984, Code D, Annex B(c)(9)

[36] Howe (n 15)

[37] Robin Sanders, 'Helping the Jury Evaluate Eyewitness Testimony: The Need for Additional Safeguards' (1984) 12 Am J Crim L 189, 192

Guidelines'[38] are employed to distinguish between 'good' and 'poor' quality identifications.[39] Precedent has demonstrated that the application of these directions has been haphazard at best, as reflected in Steve Davis' case where the direction was only given when prompted by Counsel.[40] Therefore, it is recommended that the Turnbull guidelines are given a legislative basis in the Criminal Procedural Rules to ensure that when eyewitness identifications are used, juries are directed about the accuracy of the identification. Consequently, this would enable the jury to make more informed decisions about a suspect's involvement which, in turn, reduces the likelihood of miscarriages of justice.

Furthermore, it is recommended that jurors are educated about the malleable nature of eyewitness identification. It is submitted that jurors must have their position challenged, from a 'predisposition to believe the eyewitness to a predisposition to be analytical in evaluating the eyewitness evidence'.[41] In doing so, the presence of miscarriages of justice can be significantly reduced because jurors will have a greater appreciation of the fallibility of witness identification, allowing them to make more informed decisions relating to the guilt of an individual.

II. Inadmissible and Unreliable Scientific Evidence

The relationship between law and science is nebulous. Faigman stated that whilst 'science progresses, law slowly builds on precedent'.[42] This assertion encompasses the conflict that exists between the need to acknowledge novel sciences and the need to safeguard defendants against unreliable evidence. Such tension manifests in the influence that inadmissible and unreliable evidence has in causing miscarriages of justice, which accounts for nearly a quarter of all miscarriages in England and Wales between 1972 and 2016 (79 cases).[43] Ostensibly, it can be discerned that inadmissible and unreliable evidence have a profound impact on jurors' decision-making, especially when the evidence is perceived to be credible due to its 'scientific' presentation.[44] Thus, this section will consider the issues emanating from inadmissible and

[38] *R v Turnbull* [1977] QB 224
[39] Davies and Griffiths (n 23) 440
[40] ibid.
[41] Michael R. Leippe and Donna Eisenstadt, 'The Influence of Eyewitness Expert Testimony on Jurors' Beliefs and Judgements' in Brian L Cutler (ed.), Expert Testimony on the Psychology of Eyewitness Identification (Oxford University Press 2009) 175
[42] David L. Faigman, *Legal Alchemy: The Use and Misuse of Science in the Law* (W.H. Freeman & Co Ltd. 2000) 56
[43] Evidence-Based Justice Lab, 'Forensic Evidence Related Miscarriages of Justice in the UK' (*University of Exeter*) < https://evidencebasedjustice.exeter.ac.uk/miscarriages-of-justice-registry/the-issues/forensic-evidence/> accessed 5th December 2023
[44] David Ormerod and Andrew Roberts, 'Expert Evidence: Where Now? What Next?' (2005) 5 *Archbold News* 5-9

unreliable scientific evidence before engaging in a jurisdictional comparison with the USA, and introducing preventative measures.

Admissibility and Reliability

Whilst 'admissibility' and 'reliability' are two theoretically distinct concepts, the practical application of the two often overlap. Though the overlap can raise concerns about the effectiveness of legal safeguards in upholding the integrity of criminal proceedings, the focus of the following analysis is to highlight systemic flaws in relation to evidence admissibility and reliability, and analyse the two concepts simultaneously to offer a utile insight.

Evidence is admitted to the courtroom provided it satisfies the 'Turner Rule' threshold. This rule stipulates that evidence must be helpful, within the expert's expertise, impartial and reliable.[45] Expert evidence that is presented as 'scientific' is often accepted by the courts with little deliberation over its reliability.[46] Though, the assumption that scientific evidence is reliable often overlooks the tangible quality of the testimony, which can lead to a miscarriage of justice if adequate safeguards are absent. Thus, the criteria for admitting evidence into the courtroom is relatively low. This is a double-edged sword. Whilst the absence of any substantive threshold enables the court to utilise current science,[47] it also means that there is no screening over the reliability of evidence, which can obstruct the delivery of justice if the evidence is later found to be flawed. The consequence of this attitude was demonstrated in Sally Clark's case, where she was convicted on the grounds of flawed statistical evidence pertaining to cot deaths. Clark had her conviction overturned by the CCRC[48] after serving three years in prison.[49] Whilst Clark's period of imprisonment was shorter than other victims of miscarriages of justice, a success which can be attributed to the overall effectiveness of the CCRC, the protracted delay between a defendant's application and exoneration has been shown to undermine the efficacy of the CCRC. Hoyle and Sato concluded that the inconsistency in the CCRC's 'speed of response' created variable treatment amongst applicants.[50] Such inconsistencies can severely impact the wellbeing of victims who are then subjected to prolonged periods of unfair imprisonment. In Clark's case, the delay proved too much and led to the fatal incident of her suicide. This case demonstrates the need for the Turner Rule[51] to be

[45] *R v Turner* [1975] 1 QB 835; 'Expert Evidence' (*The CPS*, 20th November 2023) < https://www.cps.gov.uk/legal-guidance/expert-evidence> accessed 19th December 2023

[46] Jane Ireland and John Beaumont, 'Admitting Expert Evidence in the UK: Reliability Challenges and the Need for Revised Criteria – Proposing an Abridged Daubert' (2015) 17 (1) The Journal of Forensic Practice 3, 4

[47] Parliamentary Office of Science and Technology, *Science in Court* (2005, 248)

[48] Ireland and Beaumont (n 46) 4

[49] Evidence-Based Justice Lab, 'Sally Clark' (*University of Exeter*) < https://evidencebasedjustice.exeter.ac.uk/case/sally-clarke/> accessed 3rd January 2024

[50] Carolyn Hoyle and Mai Sato, *Reasons to Doubt: Wrongful Convictions and the Criminal Cases Review Commission* (Oxford University Press 2019) ch4

[51] *Turner* (n 45)

re-evaluated, to ensure that justice is delivered to both the injured party and the defendant. The blind acceptance of scientific evidence can threaten the integrity of the criminal justice system as convictions can be founded on misleading, unreliable evidence. Consequently, the current status of the law reveals a need for a greater balance to be struck between ensuring a thorough evaluation of evidence is pursued and ensuring that victims can have their rights vindicated through novel science.

Furthermore, the issues raised by inadmissible and unreliable scientific evidence are compounded by the fact that the adversarial system is inadequately equipped to scrutinise evidence. Legal professionals 'generally lack the scientific expertise necessary to comprehend and evaluate forensic evidence'[52] yet, remain responsible for scrutinising evidence to ascertain its reliability. The courtroom prevails as the arena in which the adversarial system is depended upon 'to ensure the quality of scientific evidence or scientific experts'.[53] However, this juxtaposition between lawyers' capabilities and responsibilities can lead to situations where flawed evidence is introduced into the courtroom, contributing to the likelihood of miscarriages of justice. This desert in STEM education for legal professionals reflects a need for lawyers to develop a heightened awareness of science and evidentiary matters to enhance their scrutiny of evidence before it is introduced into the courtroom.

USA Comparison

Admissibility of evidence into the American federal courtroom is determined by the '*Daubert*'[54] test. *Daubert*[55] evaluates evidence on the basis of four factors: whether the technique has been tested, peer-review, the known or potential error rate, and acceptance of the evidence within the broader scientific community.[56] The American Bar Association stated that *Daubert*[57] allows the court to adopt a 'gatekeeper' role.[58] Theoretically, this enhances the evidentiary reliability because unreliable and inadmissible evidence is filtered out before it can influence jury decision-making. Therefore, if the only evidence that is submitted to the courtroom is that which has surpassed the *Daubert*[59] threshold,[60] American juries are grounding

[52] Committee on Identifying the Needs of the Forensic Science Community, *Strengthening The Forensic Sciences in the United States: A Path Forward* (National Academies Press 2009) 12
[53] Parliamentary Office of Science and Technology, 'Science in Court' (Postnote No. 248, October 2005) < https://www.parliament.uk/globalassets/documents/post/postpn248.pdf> accessed 18th December 2023
[54] *Daubert v Merrell Dow Pharmaceuticals Inc*., 509 US 579 (1993)
[55] ibid.
[56] Parliamentary Office of Science and Technology, *Science in Court* (2005, 248)
[57] *Daubert* (n 54)
[58] Ebony S. Morris, 'Daubert-Proofing Your Expert' (*American Bar Association*, 29 December 2021) < https://www.americanbar.org/groups/litigation/resources/newsletters/mass-torts/daubert-proofing-your-expert/> accessed 6th December 2023
[59] *Daubert* (n 54)
[60] Ireland and Beaumont (n 46) 7

their decision-making in established science, limiting the likelihood of miscarriages of justice. A *Daubert*[61] framework could have instrumental benefits in England and Wales for curtailing miscarriages of justice conceived on unreliable and inadmissible evidence.

Preventative Measures

Although the 'Turner Rule'[62] states how evidence 'should be included', it does not discuss how 'it should be tested'.[63] A *Daubert*-style test would encourage separate proceedings to discern the reliability and admissibility of evidence. Yet, in light of the current backlog facing the courts,[64] such a test would place an additional burden on already limited resources. Instead, it is proposed that a two-stage test should be introduced. Expanding on the Law Commission's recommendation to introduce a 'reliability test',[65] Ireland and Beaumont suggest that evidence should be assessed in two stages: first, a 'preparation stage', enabling both parties to obtain the necessary information required to acutely scrutinise the testimony before it enters the courtroom, and a second stage which adopts the premise of the 'Turner Rule'[66] by excluding common-sensical evidence.[67] A two-stage test of this kind would enable a more rigorous evaluation of evidence before it is presented to the judge and jury, preventing decision-making from becoming clouded by erroneous evidence which is indispensable in eliminating miscarriages of justice.

A further recommendation is that there is greater scientific education within the law. Gabel recognised that the law is a 'blackhole for STEM education'[68] which can have detrimental implications when it is the law that is trusted with evaluating scientific evidence. Thus, there is a need to enhance the scientific literacy of legal professionals. It is hoped that through greater education of legal professionals, miscarriages of justice can be significantly reduced since the courtroom will be better equipped to ask more probing questions and generate answers which reveal the true value of the evidence.

[61] *Daubert* (n 54)
[62] *Turner* (n 45)
[63] Ireland and Beaumont (n 46) 7
[64] 'Charge to Case Completion at Court' (Gov.uk, 7th December 2023) < https://criminal-justice-delivery-data-dashboards.justice.gov.uk/improving-timeliness/courts?offence=Adult%20rape&area=National&time=Rolling%20annual&custody=both#time_to_completion-national--table> accessed 19th December 2023
[65] Law Commission, Expert Evidence in Criminal Proceedings Report (Law Com No 325, 2011) paras 9.1-9.7
[66] *Turner* (n 45)
[67] Ireland and Beaumont (n 46) 9
[68] Jessica D. Gabel, Forensiphilia: Is Public Fascination with Forensic Science A Love Affair or Fatal Attraction? (2010) 36 New England Journal on Criminal and Civil Confinement 233, 257-8

Conclusion

The foregoing analysis has demonstrated the instrumental role of eyewitness misidentification and unreliable evidence in causing issues in the courtroom and subsequently, miscarriages of justice. When considering research and legal commentary, it is contended that there are three prominent justifications to substantiate this conclusion.

Predominantly, there is an issue with jurors' understanding of evidence. There appears to be an assumption that because evidence has reached the courtroom, it must be objectively certain. Yet, this paper has demonstrated that this belief inaccurately reflects the need of jurors to act critically when presented with evidence. Juror education is one way that this normative state can be adequately challenged, and the courts should encourage this development where possible. Second, there is a disproportionate reliance on eyewitness identification. With nearly 75% of false convictions attributable to flawed witness identifications,[69] it is indisputable that grounding a conviction in such capricious evidence augments the likelihood of miscarriages of justice. Whilst recommendations to abandon cases which rest solely on eyewitness identifications[70] fall out of favour with the practical realities of the law, it is submitted that the most appropriate action is to enshrine the 'Turnbull warnings'[71] into the Criminal Procedural Rules. In doing so, the jury will be directed that though a witness testifies to observing the suspect, the quality of this observation can be undermined by numerous factors. Consequently, this reform will distinguish between the situations where an eyewitness had a fleeting observation of the suspect from those of a longer duration, which will have the effect of reducing the likelihood of wrongful convictions. Third, it is submitted that there must be greater dialogue between science and law. The courtroom is tasked with determining the validity of evidence but lacks the requisite scientific knowledge to sufficiently highlight issues in research,[72] which can lead to miscarriages of justice if the evidence persuades the jury. Through greater education of legal professionals and equipping them with the necessary tools to oversee such evidence, convictions should only occur on the grounds of substantive evidence.

In conclusion, issues in the courtroom significantly hinder the delivery of justice and play an instrumental role in causing miscarriages of justice. It is established that if the criminal justice system is committed to limiting wrongful convictions, it must take proactive steps to prevent the flawed and misleading evidence from entering the courtroom.

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[69] Dara Mojtahedi, 'New Research Reveals How Little We Can Trust Eyewitnesses' (The Conversation, July 13th 2017) < https://theconversation.com/new-research-reveals-how-little-we-can-trust-eyewitnesses-67663#:~:text=In%20fact%20research%20shows%20that,because%20of%20these%20false%20eyewitnesses.> accessed 20th December 2023

[70] Lord Patrick Devlin, *Report to the Secretary of State for the Home Department on the Departmental Committee on Evidence of Identification in Criminal Cases* (1976)

[71] *Turnbull* (n 38)

[72] Gabel (n 68) 257-8

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A Review of the Youth Justice System: To what extent should there be a mandatory minimum sentence for serious crimes?

Syeda Abdullah

Abstract

This paper addresses a statement which aims to reform the law. The statement suggests that young people under 18 should have a mandatory minimum custodial sentence of two years when convicted for a range of serious offences. The overall argument elucidated is that this is punitive, as there are many factors that should be considered. Firstly, it foreshadows a departure from the current law, which takes a welfarist view and steers away from custodial sentences where possible. Additionally, in relation to scientific evidence, this paper identifies that youth brains are still in their developmental stages; thus, this should be accounted for when making sentencing decisions. Furthermore, the paper outlines an alternative restorative approach, which involves all parties involved discussing how to deal with the situation, after the offence has taken place, encouraging the youth to seek accountability and understand the consequences of their actions.

Introduction

This reform aims to introduce a mandatory minimum custodial sentence of two years for young people under the age of eighteen, convicted of; robbery, assault causing injury, drug dealing, and sexual offences. Evidentially this is a growing issue, given that 13,800 children were cautioned or sentenced.[1] Further, 31.2% of young people continue to reoffend.[2] Thus, it must be critically assessed which is the most appropriate state response to mitigate this. This essay critically analyses the reform, arguing it is excessively punitive. As it will be explained below, despite potential advantages, overall custody has an adverse effect on the child's welfare. To tackle this, the minister should give attention to building a suitable custodial environment to aid the child's development during their stay.

The current law

The current law on youth custodial sentencing is displayed in the official sentencing guidelines.[3] Essentially, when sentencing young people, the court must have regard to 'the principal aim of the youth justice system',[4] which is to prevent young people offending, [5]and the welfare of the young person is also taken into account.[6] It is the Children and Young Persons Act 1933[7] which provides a statutory footing to have regard to the child's welfare. These

[1] Ministry of justice: Youth Justice Statistics, ch 5

[2] Ministry of justice: Youth Justice Statistics, ch 9

[3] Sentencing Guidelines Council, 'Overarching Principles- Sentencing Children and Young People-Definitive Guideline

[4] Sentencing Guidelines Council, 'Overarching Principles- Sentencing Children and Young People-Definitive Guideline para 1.1

[5] Ibid

[6] Ibid

[7] Children and Young Persons Act 1933 s44

simultaneous provisions are what influence sentencing decisions regarding young people. Overall, the position of the current law is to make custodial sentences for youth a last resort,[8] given that 68% of offenders are issued with a community sentence rather than custody. [9] Thus, the reform marks a departure from this cautious attitude towards sentencing. The minimum age of criminal responsibility in the UK is 10 years old against s50 of the Children and Young Person's Act,[10] an age which is comparatively low to that of other jurisdictions. Despite this, those under eighteen will be dealt with by youth courts, have their sentence adjusted according to their age and sent to secure estates.[11] These are essentially prison like environments adjusted to meet the needs of youth offenders. In their research, Gelsthorpe and Morris highlight that the introduction of the Children and Young Persons Act 1933[12] marked a departure from ideas of criminal justice towards a more welfare orientated approach.[13] Historically, there was less of a boundary between young offenders and adult offenders, as can be illustrated in *R v Accrington Youth Court, ex p Flood*.[14] Here a sixteen year old offender was initially sent to a prison which was designed for adult offenders. Moreover, with the introduction of the secure estate and young offender institutions, this signals progression for the youth justice system.

How the reform differs and which issues with existing policy and practice might the reform address:

As has been laid out above, the current law does not favour custodial sentences as it believes this is disruptive and does not effectively meet the child's welfare needs, seeking to make this measure a last resort.[15] Often, the courts seek to turn to restorative approaches where possible. By introducing a mandatory sentence, the reform represents a stark contrast. The sentence, when issued, also aims to be 'individualistic',[16] focusing on the individual child at question, rather than objectively at the offence. To further highlight this fact, existing policy includes a non-exhaustive list of mitigating factors, such as the child's upbringing, displaying remorse, mental illness, and a handful of other categories.[17] These factors aim to lower culpability, thus

[8] Sentencing Guidelines Council, 'Overarching Principles- Sentencing Children and Young People-Definitive Guideline, para 1.3

[9] Ministry of justice: Youth Justice Statistics

[10] Children and Young Persons Act 1933, s50

[11] Criminal Justice and Courts Act 2015 s38

[12] Children and Young Persons Act 1933

[13] Irene Antonopoulos, 'The Continuing Chronology of Confusion: Crime Prevention, Welfare, and the Why of Youth Justice' (2018) JCL 402, 403

[14] R v Accrington Youth Court, ex p Flood [1998] QB 2 ALL ER 313

[15] Sentencing Guidelines Council, 'Overarching Principles- Sentencing Children and Young People-Definitive Guideline, para 1.3

[16] Sentencing Guidelines Council, 'Overarching Principles- Sentencing Children and Young People-Definitive Guideline, para 1.2

[17] Sentencing Guidelines Council, 'Overarching Principles- Sentencing Children and Young People-Definitive Guideline, para 4.7

reducing the sentence. To illustrate, in the case of *R v P*,[18] the judge initially erred when issuing a sentence for the young person found culpable of the offence, as he failed to give adequate weight to the overarching sentencing principles for young people. Moreover, it was held in the judgement that 'generally a young person will be dealt with less severely than an adult,'[19] because they are likely to have 'less capacity than adults'[20]. In addition, in the case of *R v PS*,[21] the young offender was charged for murder, the most serious offence in English law. However, mental health was considered as a mitigating factor when sentencing, highlighting the discretion available to youth courts. Thus, this serves to emphasise the difference between adult and young offenders, and how sentences should be adjusted accordingly. The evidence highlights that the reform aims to take this list of discretion out of the hands of the youth court, by introducing a mandatory sentence. The youth courts will have no choice but to impose these sentences for the specified offences, a juxtaposition to the current system.

Potential effectiveness of the reform:

Those taking a punishment and justice centred approach would favour mandatory minimum custodial sentences of two years. In his research, Alex Newbury has argued that theories based on utilitarian principles justify punishment by pointing to its intended purposes.[22] These can be listed as follows: deterrence from future offending, protection of the public by incapacitating the offender, and deterrence from offending.

Deterrence:

Drawing upon this, one advantage to be explored is the deterrence element. By giving a more serious sentence, Carla and Nicholas note that this serves to reduce the likelihood of recidivism, whilst also broadcasting a warning to potential youth offending, as to the consequences. This prevents youth from ever offending at the outset.[23] Thus, this has a two layered advantage, as the youth serving the sentence are less likely to reoffend, and youths considering offending will be deterred away from offending in the first place if the unpleasant consequence of offending is presented to them. In rebuttal, studies have represented that deterrence does not have an impact on the rate of juvenile crime,[24] as children act spontaneously and fail to weigh up the consequences of their actions. [25]

[18] Regina v RP [2013] EWCA Crim 444
[19] Ibid [3.1]
[20] Ibid
[21] Regina v PS [2019] EWCA Crim 2286
[22] Alex Newbury, 'Very Young offenders and the criminal justice system: are we asking the right questions?' (2011) CFLQ 94, 96
[23] Carla Cesaroni and Nicholas Bala, 'Deterrence as a Principle of Youth Sentencing: No Effect on Youth, but a significant Effect on judges' (2008) 34 QUEEN'S L.J. 447, 452
[24] Thomas Crofts, Enys Delmage, Laura Janes, ' Deterring Children From Crime Through Sentencing: Can it be Justified? (2022) Youth Justice 1, 8
[25] Ibid

Public policy benefit

Furthermore, another advantage which demonstrates the effectiveness of the reform is the public policy benefit that arises, through the physical incapacitation of the youth offender. As the offender is physically restrained in a custodial setting, for a minimum of two years they are unable to carry out the offence in which they were imprisoned for. Therefore, this ensures public safety. To further illustrate this point, is the case of *ex Parte Venables and Thompson,*[26] where two ten-year-old youths were sent to prison for the murder of a two-year-old boy. On his release, those supervising held it of 'paramount importance to protect the public'.[27] Moreover, this represents the extent to which a public threat youth offenders can be, and thus having this two-year custodial sentence effectively separates them from the public for an adequate term, so that on release the likelihood of them being a threat is sufficiently reduced. However, it will be argued below whether custody is an adequate means of rehabilitation.

Victim's viewpoint

In addition, the victim's viewpoint will now be discussed. Victims have been described as the 'rhetorical and practical focus of contemporary criminal justice policies. [28] This emphasises how the victim should be at the centre of consideration when issuing punishment. The overarching sentencing principles makes clear that when assessing harm, the court is to consider the level of loss and harm caused to the victim,[29] further highlighting their role when issuing an appropriate sentence. Furthermore, this increases both the public confidence in the system, from a procedural justice point of view, but also the victim of the crime has a sense of confidence that their offender is being dealt with by the system adequately. In sum, this section has examined possible strengths of the reform should it be enforced. The next part of this essay will examine possible weaknesses.

Potential weaknesses of the reform

Having established a few merits to this reform, this section will proceed to examine the disadvantages, and argue that the measure should not be put into place. The overarching disadvantage is that a two-year mandatory custodial sentence for the offences listed is extremely draconian, and will not serve the child's welfare needs in the long run.

Treatment and conditions in custody

One major concern is the way young people are treated in custody, and how this shapes their outlook on crime in the future. As mentioned above, the current law places offenders under

[26] R v Secretary of the State for the Home Department ex parte Venables and Thompson [1997] UKHL 3 ALL ER 97

[27] Anisha Mehta, 'Independent Serious Further Offence Review: The Case of Jon Venables' (2011) 58 PROB. J. 274, 274

[28] Ian Edwards, 'Sentencing Councils and Victims' [2012] 75 The Modern Law Review 325,326

[29] Sentencing Guidelines Council, 'Overarching Principles- Sentencing Children and Young People-Definitive Guideline para 4.6

eighteen in a secure estate, which is an institution specifically for young people. Against the Criminal Justice and Courts Act 2015,[30] in the secure estate setting, the use of reasonable force is legal and exercised by the officers. To illustrate, statistics present that in 2009/2010, there have been 6904 incidents of restraint, of which 257 resulted in injury.[31] Given this figure, it must be challenged whether this force and restraint effectively rehabilitates the youth or has adverse impacts on their physical and mental health. Research has shown that this use of force ultimately leads to perceptions of unfairness, broken spirit, and re-traumatisation.[32] This highlights how feelings of resentment towards authorities arise in the event of a young person being subject to such harsh punishments by the youth justice system. In contrast, fair treatment by staff serves to reduce feelings of anger and contribute to future law-abiding behaviour.[33] Building on, in her research, Zia Akhtar argues that custody has a brutalising effect on young offenders, which have the potential to develop into hardened criminals. [34] Overall, this evidence collectively demonstrates that punishment through custodial sentences is an ineffective means of rehabilitation, as youth end up emotionally and physically disturbed.

This alludes to Lemert's labelling theory. In his research, Lemert notes the criminal label gives people a new way to think about themselves, and so they develop new habits and skills as their criminal career develops. [35] Labelling theory originates from the concept that a person develops their identify through interactions with others,[36] thus in applying this, by placing youth in a custodial institution amongst other offenders, their behaviour and persona is moulded to befit that of a criminal. To briefly summarise, the physical environment of custodial institutions exposes youth to more violence, thus not effectively rehabilitating, allowing 'negative labels to become entrenched'.[37] Fundamentally, the young person internalises a criminal label which clings to them into adulthood. From a welfare model perspective, the youth justice system should give a heightened priority to the welfare of the children who come

[30] Criminal Justice and Courts Act 2015 schedule 10 s10

[31] HM Chief Inspector of Prisons for England and Wales, Annual Report 2009–10 (London: HM Inspectorate of Prisons, 2011)

[32] Tania D. Strout, 'Perspectives on the experience of being physically restrained: An integrative review of the qualitative literature' [2010] International Journal of Mental Health Nursing 416, 423

[33] Raymond Arthur, 'The Criminal Justice and Courts Act 2015- Secure Colleges and the Legitimisation of State Sponsored Violence (2016) Modern Law Review 102, 105

[34] Zia Akhtar, 'Young Offenders, 'Secure Colleges' and Reforming Criminals' (2015) JCL 79 9 211,218

[35] David J Smith, Susan McVie, 'Theory and Method in the Edinburgh Study of Youth Transitions and Crime' [2003] (43) The British Journal of Criminology 169, 174

[36] Richard Edney, 'Models of Understanding Criminal Behaviour and the Sentencing Process: A Place for `Criminological Theory?'[2006] (70) The Journal of Criminal Law 247, 259

[37] Jo Deakin, 'Help of Hindrance? Rethinking interventions with troubled youth' [2022] 18 International Journal of Law in Context 100, 115

before the courts,[38] as is obliged upon the law through international treaties. [39] Given this punitive background, introducing a mandatory two- year sentence on youth fails to serve their welfare interests or rehabilitate them, as has been explained above.

Furthermore, by placing a high concentration of young offenders in custody, this can be a trigger to spark internal violence amongst the youth. Consequentially, this does not effectively rehabilitate the young offender, as they are still engaging in violent acts, and it also places strain on the staff to effectively control this behaviour. The Children in Custody report put forth that the ability of the youth estate to reduce violence in these environments is 'proving challenging'.[40] To illustrate using statistics, 44% had reported incidents of bullying,[41] and children complained of poor management structures which were ineffective at dealing with this. [42] Building on, to place a young offender in this type of institution for two years would not effectively rehabilitate, going against the aims of the youth justice system. Furthermore, statistics show that it is black and ethnic minority youth who have had the most unfavourable experiences in custody. They were more likely to be restrained and inadequately cared for by staff.[43] Given these findings, the environment in youth custodial institutions only acts as a nest for further violence, rather than preventing future offending.

Age-crime curve and neuroscientific evidence

Another weakness is made apparent from the findings in the age-crime curve. This is a graph which represents the relationship between chronological age and levels of offending and has been regarded as 'one of the most consistent findings in developmental criminology',[44] highlighting its legitimacy. To illustrate, the graph represents the peak of offending to be during the adolescent years, and a gradual decrease from the age of twenty and onwards. What is striking is that approximately 20,627 young adults in this category were serving community sentences, showcasing the mere breadth of offending in these age groups. The decrease in offending after the adolescent periods can be explained through neuroscientific evidence. Research suggests that there is a direct correlation between development of the brain and activity.[45] Focusing particularly on the youth brain, studies show that it is not fully formed until they reach their twenties, and this has an impact upon decision making, which in turn can

[38] Caroline Ball, 'R v B (Young Offender: Sentencing Powers) Paying due regard to the welfare of the child in criminal proceedings' [1998] (10) CFLQ 417, 424

[39] Ibid

[40] HM Inspectorate of Prisons *Children in Custody 2019-20* (2021), page 4

[41] Ibid

[42] Ibid

[43] Ibid

[44] Elizabeth P Shulman, Laurence D Steinberg, Alex R Piquero, 'The age-crime curve in adolescence and early adulthood is not due to age differences in economic status' (2013) Journal of Youth and Adolescence 848, 848

[45] Charlotte Walsh, 'Youth Justice and Neuroscience' [2011] 51 21, 21

lead to making poor decisions to co-operate in a crime.[46] Furthermore, it has also been discovered that in youths, their 'pre-frontal cortex' has not fully developed, which hinders the ability to think rationally, and so they make decisions based on emotions. [47] In sum, an underdeveloped brain is the driving factor in youth making impulsive decisions, often to commit crime, a fact which the age-crime curve visually represents. Overall, these findings on brain development, against the age crime curve, explains that often young people go through a phase of crime, which then wears off as they enter adulthood, and their brain effectively develops to be fully functioning. Given this context, it would seem unfair to hand out two-year custodial sentences, as evidence shows that children grow out of crime regardless. Therefore, these mandatory sentences would be a waste of government money and resources. The leading judgment in this area is that of *Clarke*,[48] where the Lord Chief Justice declared that more attention must be paid to youth's lack of maturity when sentencing, given the scientific research on brain development. This alludes to the idea that due to lack of capacity, youth often make irrational decisions, and this should be considered when sentencing. This differs from the reform, which states that for the specified offences there should be a two-year mandatory sentence, taking any form of discretion out of the hands of the sentencing judge. Post Clarke, several cases followed its principles and took age as a factor when issuing sentencing. To further emphasise this point, in the case of *Jobson*,[49] which involved a young adult offending, on review the judge decided to reduce the minimum term by one year. This was on the basis that at the time of committing the offence, she was a 'wild and immature 15-year-old' in a 'violent relationship with a drug dealer', however she is now a 'young adult; with 'every sign of being mature'.[50] This further demonstrates the courts willingness to look at other factors when it comes to punishing young offenders, showing that age and lack of brain capacity should be considered when issuing sentencing decisions. Overall, given this scientific background which is supported by findings in the age-crime curve, a two-year sentence would be an ineffective measure, as the evidence above explains how youth naturally mature and grow out of offending with chronological age.

Restorative approach

Given these weaknesses, it can be argued that an effective alternative to custodial sentences is restorative justice. As defined by Marshall, this is a process whereby all the parties involved collectively resolve the issue of how to deal with the aftermath of an offence.[51] Furthermore, restorative justice methods have been praised by the sentencing guidelines, for encouraging

[46]Charlotte Walsh, 'Youth Justice and Neuroscience' [2011] 51 21, 23
[47] Charlotte Walsh, 'Youth Justice and Neuroscience' [2011] 51 21, 33
[48] R v Clarke (Morgan) [2018] EWCA Crim 185
[49] Jobson [2014] EWHC 3254
[50] Ibid [35]
[51] T Marshall, Restorative Justice: An Overview, Home Office 1999

children and young people to take responsibility and understand the impact of their actions.[52] An example includes a referral order,[53] which is an alternative to a custodial sentence. It involves the young offender being referred to a Youth Offender Panel. This is a non-court setting, which allows for a meeting with the young offender, community volunteers, a member of the youth offending team, and at times the victim of the offence. The outcome of this is to come up with an agreed contract which the young person will follow, in repairing the harm they caused through various supervised programmes. [54] Arguably, this method positively departs from the reform, enabling the young person to understand the nature of the harm they have caused, rather than merely being punished. To summarise, this approach strives to empower victims, offenders, and the community alike to be partners in the justice process. [55]

Barriers in implementing this reform.

As the potential strengths and weaknesses have been explored in depth, this section will analyse any major barriers should the reform be introduced.

Resources and costs

One barrier to be explored is the government costs and resources involved in subjecting youth to custodial institutions. The costs involved would need to be balanced against the overall effectiveness of the reform. To illustrate, the Audit Commission have put forth that a stay in a young offender institution costs around £25,400, and the chairperson of the Youth justice Board states that overall costs for creating such an institution was around £293.5 million.[56] Given that government resources are finite, and funds are often scarce, it may be practicably burdensome to introduce a mandatory custodial sentence. Jones challenges these findings, arguing that the Commissions statistics seem to lack an understanding of the complexity of the youth justice system.[57] This is demonstrated through their arrival at concerningly rounded and over simplistic figures, which fails to adequately reflect the deep realities of the youth justice system.[58] Furthermore, one of the most cited findings is that in total, public services spent around £1billion per annum in 1996 on youth justice,[59] however the lack of evidence to this figure causes concerns.[60] This outlines a skewed interpretation on the costs of the youth justice

[52] Sentencing Guidelines Council, 'Overarching Principles- Sentencing Children and Young People-Definitive Guideline para 1.4

[53] Sentencing Guidelines Council, 'Overarching Principles- Sentencing Children and Young People-Definitive Guideline para 6.19

[54] Ian Edwards, 'Referral Orders after the Criminal Justice and Immigration Act [2008] 75 Journal of Criminal Law 45

[55] Tim Newburn, 'Recent Developments in Restorative Justice for Young People in England and Wales [2002] 42 The British Journal of Criminology 476, 481

[56] Barry Goldson, 'Child Imprisonment: A case for Abolition' [2005] 5 Youth justice, 77, 83

[57] Dennis Jones, 'Misjudged Youth' [2001] 41 362, 363

[58] Ibid

[59] Dennis Jones, 'Misjudged Youth' [2001] 41 362, 367

[60] Dennis Jones, 'Misjudged Youth' [2001] 41 362, 366

system. Moreover, aside from these statistics, it can generally be concluded that the maintenance of a custodial system would yield a large amount of public funds.

Building on from this, if aiming to create and maintain a suitable environment for young people, with the correct educational and healthcare facilities to assist in their development and welfare as outlined above, this would only add to the total cost. This issue is discussed in the Taylor Review of Youth Justice,[61] which put forth the proposal that health, education, social care, and other services should form a multi-agency approach.[62] Furthermore, it was also argued that 'education needs to be central'[63] to the response, emphasising the point that youth offenders should not have an educational gap. The importance of education is that it has the potential to serve a rehabilitative function, and so cannot be overlooked. Studies have shown that there is a causal connection between receiving high levels of education and lowering the likelihood of offending.[64] To illustrate, in his research, Hjalmarsson et al found that each additional year of schooling reduced the likelihood of conviction by 6.7%.[65] However, to hire the correct staff and have the correct facilities to assist the development of a young person, would cost the state large sums of money and resources. Thus, a balancing exercise must take place, as to whether this investment will be worth it in the long run. To compliment this point, David Downes[66] has noted that despite a grand total of costs in the short term, if the system effectively rehabilitates offenders, thus preventing reoffending, this will reduce long term spending as it would reduce the number of youths admitted to custody in the beginning. Essentially, one large sum can prevent the government constantly putting money forwards to imprison young offenders. Investing in appropriate facilities to help the development of young people in custodial settings will prove ultimately efficient. This section has argued that the costs, albeit grand, particularly when considering the welfare of the child, must be balanced against the overall effectiveness of the reform, taking the long-term benefits into account when deciding.

Public opinion

Another barrier to be discussed is the public opinion on the reform. Drawing upon Roberts and Hough's study of public attitudes towards youth justice,[67] it was discovered that, initially, when given little context regarding the offender, the public leaned towards more punitive

[61] Charlie Taylor,' Review of the Youth Justice System in England and Wales', December 2016
[62] Ibid, para 7
[63] Ibid para 8
[64] Kathleen Kennedy-Turner Prevention of Criminal Offending: The Intervening and Protective Effects of Education for Aggressive Youth [2020] 60 The British Journal of Criminology 537
[65]Ibid ,541
[66] Dennis Jones, 'Misjudged Youth' [2001] 41 362, 370
[67] Julian Roberts and Mike Hough, 'Sentencing young offenders: Public opinion in England and Wales [2005] 5(3) Criminal Justice 211

punishments. However, when given a brief backstory about the offender, they became more empathetic in approach. This emphasises, as outlined previously, the importance of mitigation factors when issuing a sentence.[68] It also reinforces how English law is individualistic when sentencing, rather than solely focusing on the crime committed. Furthermore, the study also showed that, in comparison to custodial sentences, the public voted restorative sentences to be more befitting to the youth offending scenarios given to them. Despite initial punitive remarks, this study effectively demonstrates that the public believe contextual information is relevant when issuing custodial sentences, and where possible a restorative approach should be used, which is in line with the current position of the law.[69] Thus, drawing back to the reform, the public would find the two-year sentence overly draconian for the young person, and would lean to more restorative options instead.

In conclusion, giving young people these mandatory minimum custodial sentences of two years is punitive and hinders their development into adulthood. To mitigate the negative effects of this, as discussed above, the minister should focus on institutions which effectively rehabilitate youth and focus on their welfare, rather than merely punishing. Therefore, a more welfare model-based approach should be taken, rather than a punishment justice model type of approach, to ensure effective rehabilitation, and meet the overarching principles of the youth justice system; to prevent offending with regards to the child's welfare.[70]

[68] Ibid

[69] Ibid

[70] Sentencing Guidelines Council, 'Overarching Principles- Sentencing Children and Young People-Definitive Guideline, para1.1

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Man V Machine: How Ai Is Testing The Legal Notion of Copyright

Victoria Ellen Amos

Abstract

The fundamentals of intellectual property law are continuously tested by modern day advances in innovations and new technologies.[1] Yet the way in which different jurisdictions respond to such developments differs throughout national and international law.

This essay will consider the complexities that artificial intelligence (AI) has brought on the legal notion of copyright and argue whether computers are merely tools that assist with, but do not generate, AI-produced works and, as such, are unable to fulfil the copyright requirements.[2] However, current inconsistencies in the international approach suggest that unless international legislation is prepared to adapt and respond to the pace and scale of such change the legal protections of intellectual property rights will be at risk.

In review of the laws on copyright, the discussion will be centred around the view held by B Williams which declares that *'AI is complex, but it is still just a tool. The law's apparent preoccupation with "sufficiently proximate" relationships is therefore untenable in this context and creates an unnecessary hierarchy of technologies. Indeed, until technology is so advanced as to genuinely replicate human creativity, all art made using computers is "computer-assisted" and the "computer-generated" distinction is redundant.'*[3] This statement, and the rules of authorship and originality, will be considered alongside the approaches of different jurisdictions, to conclude whether computer-generated works could or could not be capable of fulfilling the copyright requirements.

Introduction

Advancements in technology have introduced some important innovations in society, but also some legal challenges. The creation of artificial intelligence (AI), which uses technology to simulate human intelligence, conflicts with the legal notion of copyright, especially in relation

[1] Massimo Maggiore, 'Artificial Intelligence, computer generated works and copyright' (Edward Elgar Publishing, 2018) 18, 382.

[2] Benjamin Williams, 'Painting by Numbers: Copyright Protection and AI-generated Art' (2021) EIPR 43:12.

[3] ' Williams, B 'Painting by Numbers: Copyright Protection and AI-generated Art' (2021) E.I.P.R 43(12), 786-792.

to the concepts of authorship and originality. This statement provides that, whilst AI is a machine-based operation, its development relies on human intervention, suggesting that copyright protection should be afforded to the humans creating AI, and not AI itself. This essay will evaluate this position and discuss the opinion of Williams on authorship and originality in the context of current legislation. It will begin with discussion on the basic structure of copyright and its requirements before considering how different jurisdictions approach authorship and originality using relevant case-law. Comparisons will be drawn on the relationship between AI and copyright across jurisdictions and the extent to which these approaches align with the opinion of Williams.

Under the basic notion of copyright, five key concepts are required for works to gain protection: it must be a 'work' which encompasses expressions, not ideas;[4] by an author; be sufficiently original; of the right kind; and be fixed in a tangible medium. In consideration of AI, the concepts of both authorship and originality are critical. However, this is problematic when considering the current plethora of AI-produced works, including music, photographs, and clothing,[5] and innovations such as The Next Rembrandt experiment, which seeks to recreate a new Rembrandt painting which imitates the late artist.[6] Arguments principally centre around whether there is sufficient causal proximity between the creator, the AI and the AI-produced work, who should be granted authorship, and whether such works among the mentioned keys to copyright protection fulfil the requirements of originality and authorship.

[4] TRIPS 1994, Article 9(2); Title 17 of the US Code, Section 102(b) (Copyright Act 1976).

[5] Hayleigh Bosher, 'Inside the music industry's battle with the UK government over AI song generators' (The Conversation, 2023); Jamie Grierson, 'Photographer admits prize-winning image was AI-generated' (The Guardian, 2023); Rachel Douglass, 'Fashion in the age of AI: From design to customer experience' (FashionUnited, 2023).

[6] 'The Next Rembrandt' (2018); Nicole Pickett-Groen, 'The Next Rembrandt: bringing the Old Master back to life' (Medium, January 2018) <https://medium.com/@DutchDigital/the-next-rembrandt-bringing-the-old-master-back-to-life-35dfb1653597> accessed April 2023; Maggiore (n 1).

1 The 'Originality Requirement'

The requirements of originality are conditional on the jurisdiction where the copyright protection is being afforded, although the basic copyright requirements are broadly similar, with the main variance applying to specific legal tests. Consequently, jurisdictions hold different perceptions towards the relationship between AI-produced work and the concepts of authorship and originality. These will be discussed below.

The case of *Infopaq* impacted the perceptions of copyright in the EU and the UK and harmonised an 'originality' standard throughout the EU.[7] However, as the UK jurisdiction remains connected to EU legislation on copyright, it has also embraced this standard. The EU perception of originality states that to be sufficiently original, works should be the 'author's own intellectual creation.'[8] Such expression involves a 'choice, sequence and combination of words,'[9] and involves the author's 'personal touch' and creative choices.[10] This perception contrasts with that of the US, which disagrees that the selection and arrangement of information deems something original.[11] Whilst the US has no express legal definition for 'originality',[12] it stresses the importance of creativity as a component. The historic *Trade mark Cases* defined works as original when 'founded in the creative powers of the mind.'[13] This was later affirmed in *Feist*, which required 'more than a de minimis quantum of creativity.'[14] Explicitly, US

[7] Case C-5/08 *Infopaq International v. Danske Dagblades Forening* [2009] ECDR 16, para 36.

[8] Ibid, Berne Convention for the Protection of Literary and Artistic Works (adopted 14 July 1967, entered into force 29 January 1970) 828 UNTS 221, Art 2.

[9] *Infopaq* (n 7) para 45.

[10] Case C-145/10 *Painer v. Standard Verlags GmbH, Axel Springer AG, Süddeutsche Zeitung GmbH, Spiegel-Verlag Rudolf Augstein GmbH & Co. KG, Verlag M. DuMont Schauberg Expedition der Kölnischen Zeitung GmbH & Co KG* [2012] ECDR 6, paras 90-95.

[11] Andres Guadamuz, 'Do Androids Dream of Electric Copyright? Comparative analysis of originality in artificial intelligence generated works' (June 2020) IPQ (2) 3.3.1.

[12] Title 17 of the US Code, Sections 101-122.

[13] *Trademark Cases* (1879) 100 U.S. 82 and 94.

[14] *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 363 (1991).

copyright guidelines asserted that works will be copyright protected provided they are 'created by a human being.'[15] However, some argue that such provisions could be interpreted as allowing protection for computer-generated works (CGWs) where there is sufficient human intervention.[16]

1.1. The Position of the UK on Differing Views of the EU and US Perspective on the Originality Requirement

A comparison of the EU and US indicates that for a work to be original in either jurisdiction, it must have sufficient causal proximity to the author and be the causal result of human action. In application to AI, Maggiore reiterates the lack of sufficient proximity or 'causal link' between AI and the human programmer, stating that such creative outcomes are 'random' or 'unpredictable' as they depend on the machine, not humans.[17] Given that such choices are 'random' and that computers cannot make creative choices, but, rather, follow instructions by the human creator, indicates that the creativity element required for originality cannot be met by AI alone.

Comparatively, UK copyright law applies a lower threshold for originality. The Copyright, Design and Patents Act 1988 (CDPA) was deemed to be the first copyright legislation 'which attempts to deal specifically with the advent of artificial intelligence.'[18] Whilst the current extent of AI may not have been foreseen when the Act was introduced, its relevance is more significant than ever. The CDPA traditionally required that for a work to be original, it must be the result of an author's own 'labour, skill or judgement' –[19] requiring only minimal levels

[15] US Copyright Office, *Compendium of U.S. Copyright Office Practices* (3rd edn, 2017) 306.

[16] Guadamuz (n 11).

[17] Maggiore (n 1).

[18] UK Parliament, 'Copyright, Designs and Patents Bill Hl' (Hansard, 12 November 1987) 489, per Lord Young of Graffham; UK Intellectual Property Office, 'Artificial intelligence call for views: copyright and related rights' (Consultation Outcome, 23 March 2021).

[19] *Interlego AG v. Tyco Industries* [1989] AC 217, per Lord Oliver.

of creativity, intellectual labour, and creation.[20] However, following Infopaq, the UK has embraced the EU opinion that an 'author's own intellectual creation' provides originality. This, however, introduces complexity on how to equate prior and post-Infopaq approaches, and has led UK courts to adopt differing approaches to case-law.[21] Some courts discount the EU perception, and apply the traditional UK approach, which, in the context of AI, raises doubt about the applicability of 'labour, skill and judgement'.

Whilst developments such as *Infopaq* have harmonised the EU approach to an extent, the current position of the UK remains unclear. Meanwhile, whilst the US may make greater provision for CGWs in affording copyright protection, this remains a high threshold. What is compelling is that movements such as The Next Rembrandt and other innovations in AI will continue to challenge perceptions of originality.[22] Consequently, existing copyright laws may struggle to keep up with the pace and sophistication of technology. Such developments have led some to recommend new and specific originality definitions and requirements for AI and CGWs within a proviso that would supplement existing requirements.[23]

2. The 'Authorship' Requirement

In addition to originality, for a work to become copyright protected, there needs to be an 'author'.[24] However, discussion centres around who can claim authorship of CGWs. Using the 'sufficient causal proximity' concept, considerations include the extent to which proximity exists between the creator, the AI, and the user. Williams highlighted these three distinct relationships in an attempt to establish authorship of AI creations, concluding that, whilst the

[20] Brigitte Vézina and Brent Moran, 'Artificial Intelligence and Creativity: Why We're Against Copyright Protection for AI-Generated Output' (CreativeCommons, 2020) <https://creativecommons.org/2020/08/10/no-copyright-protection-for-ai-generated-output/> accessed March 2023.

[21] *Temple Island Collections Ltd v New English Teas Ltd* [2012] EWPCC 1; *Taylor v Maguire* [2013] EWHC 3804.

[22] Andres Rahmatian, 'Originality in UK Copyright Law: The Old "Skill and Labour" Doctrine under Pressure' (2013) 44 *IIC* 4.

[23] UK Intellectual Property Office (n 18).

[24] Williams (n 3); Copyright, Design and Patents Act 1988, s9.

three relationships individually fulfil aspects of the UK's 'skill, labour and judgement' perception, the end user provides the greatest 'creative judgement'.[25] The idea of proximity, however, creates ambiguity in the case of AI, where there is 'no human author' of the work,[26] only one that creates the machine.

2.1 The Position of the UK on Differing Views of the EU and US Perspective on the Authorship Requirement

In the US, *Noruto v Slater* considered whether non-human beings can claim authorship of a work.[27] This case examined whether a monkey taking its own photograph using a camera could claim authorship. The court determined that there could be no such copyright as there was no form of human intervention. In a similar vein, it could be contested that authorship of AI works should not be granted to machines. However, unlike Noruto, the aspect of human intervention that exists within AI raises distinct questions about authorship.

The UK's approach assigns authorship to the provider of the most creative judgement and aligns with the opinion of Williams. The CDPA protects CGWs despite them having no 'human creator or author'.[28] The Act defines an author as 'the person who creates it',[29] however, as machines do not offer 'any personal, creative effort' towards the work,[30] they cannot attain authorship.[31] Rather, human intervention allows protection of CGWs through assigning authorship to the person making 'the arrangements necessary for the creation of work.'[32] This

[25] Ibid, 790-791.

[26] Copyright, Design and Patents Act 1988, s178.

[27] Naruto v. Slater - 888 F.3d 418 (9th Cir. 2018).

[28] CDPA (n 25); UK Intellectual Property Office (n 18).

[29] Copyright, Design and Patents Act 1988, s9(1).

[30] HL Deb vol 493 col 1305 25 February 1988.

[31] "Report of the Whitford Committee to Consider the Law on Copyright and Designs" (Cmd 6732, 1977) 513; Guadamuz (n 11).

[32] Copyright, Design and Patents Act 1988, s9(3).

demonstrates how section 9(3) has effectively introduced a 'loophole' to the authorship requirements of copyright that allows for the protection of CGWs.[33]

Outside the UK, there is no equivalent provision to s9(3). CGWs typically follow the same criteria for authorship as other works. However, neither the Berne Convention nor EU legislation provides a definition for an 'author' – the Convention merely stipulates that 'protection shall operate for the protection of the author.'[34] Further, Handig expressed how EU legislation designates authorship beyond the limits of AI, noting that 'a human author is necessary for copyright work.'[35] Meanwhile, it is suggested that in some cases no author may exist at all if no sufficient causal proximity can be made between a human and a machine.[36]

Evidently, copyright laws in the EU, UK and US define the author of a work as being the person who created it or who made the arrangements for a work to be generated. Despite challenges to this notion, it seems likely that human intervention will remain a requirement for the allocation of authorship to CGWs.

Conclusion

Having reviewed the statement and opinion of Williams on AI and copyright protection and compared these to the legislative requirements in the EU, UK and US, it seems that the UK approach is most closely aligned. Specifically, Williams rescinds the idea that AI constitutes a 'computer-generated' work, and instead highlights the human 'computer-assisted' role of AI.

[33] Guadamuz (n 11).

[34] Berne Convention (n 8) art 2.6.

[35] Christian Handig, 'The copyright term "work" - European harmonisation at an unknown level' (2009) 40 *IIC* 665, 668.

[36] Megan Svedman, 'Artificial Creativity: A Case Against Copyright for AI-Created Visual Artwork' (2020) IP Theory 9(1), art. 4, 6-7 and Joanna Zylinska, 'AI Art: Machine Visions and Warped Dreams 13' (Open Humanities Press CIC, 2020) 54-55, as in D Burk, 'Thirty-Six Views of Copyright Authorship, by Jackson Pollock' (2020) 58(2).

Through imitating this and supporting the idea of human intervention, UK case-law rarely identifies cases where AI work is produced without human involvement.

Consequently, the UK reasonably argues that, in most cases, the function of AI is to act as a tool in the process of human creativity.[37] This contrasts with approaches in the EU and US which are more closely allied to scholars, whereby the notion that AI can attain authorship or originality is disregarded. Overall, the international community, but more significantly the EU and US, needs to adopt a more uniform outlook on the protection of AI within the realms of copyright.

[37] UK Intellectual Property Office (n 18).

Critical Analysis of Versloot's Challenge to Lord Hobhouse's Doctrine on Fraudulent Insurance Claims

Yi Wu

Abstract

There are two crucial cases in English law on what constitutes a fraudulent insurance claim - The DC Merwestone and The Star Sea. Whilst the former judgement is ostensibly the opposite of the latter, their rationale and definitions are not contradictory. The DC Merwestone judgement emphasised the distinction between a fraudulent claim and a collateral lie, holding that only a lie relating to a material issue of the claim constitutes fraud and that a collateral lie does not invalidate the claim. This judgement reflects a more mature and balanced approach to fraud by the courts, moving away from the harsh penalties of the past to more preventative measures. Whilst The DC Merwestone may create uncertainty for the insured and the insurer, this uncertainty can be mitigated by inserting contractual provisions. This article argues that The DC Merwestone judgement is a positive development that provides new ideas for addressing insurance fraud.

Introduction

At common law, an insurer is not liable if the insured makes a fraudulent claim against the insurer.[1] Section 12 of The Insurance Act 2015 (IA 2015) defines the consequences of a fraudulent claim. However, there is still debate about what constitutes a fraudulent claim, and IA 2015 does not fully address this issue. Three categories of circumstances include a fraudulent claim at present. First, the entire claim may be fabricated.[2] Second, there may be a genuine claim, but its amount has been dishonestly exaggerated.[3] Third, there may be a legitimate claim, but the information provided supporting the claim may be dishonest.[4] The dispute arises in the third category of fraudulent claims, where the issue becomes whether the insured can be compensated when the fact of the lie is irrelevant to the insured's right to compensation. In the case of *Versloot Dredging BV v hdis -gerling Industrie Versicherung (the DC Merwestone),* the majority view of the Supreme Court held that a claim is equally compensable if the statement is irrelevant, regardless of whether it is true or false. The evidence provided by the insured is not related to or does not interfere with the insured's right to claim compensation, which is called the collateral lie or fraudulent device.[5] This view would seem *prima facie* to negate what Lord Hobhouse said in the case of *Manifest Shipping Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea):* 'The fraudulent insured must not be allowed to think:

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[1] Michael J. Mustill and Joseph Arnould, *Arnoulds Law of marine insurance and average v.II.* (16th ed, Stevens 1981).

[2] *Versloot Dredging BV v HDI Gerling Industrie Versicherung* [2016] UKSC 45, [2017] AC 1.

[3] *Axa General Insurance Ltd v Gottlieb* [2005] EWCA Civ 112, [2005] 1 CLC 62.

[4] *Sharon's Bakery (Europe) Ltd v AXA Insurance UK plc* [2011] EWHC 210 (Comm).

[5] [2016] UKSC 45, [2017] AC 1; [2016] 3 WLR 543.

if the fraud is successful, then I will gain; if it is unsuccessful, I will lose nothing'.[6] Substantively, however, there is no contradiction between the two views, and the Supreme Court's view in *The DC Merwestone* is more of a development of what Lord Hobhouse said in *The Star Sea*. This article will first illustrate *The DC Merwestone* decision on its face ostensibly rejects Lord Hobhouse's said, and the two decisions are inconsistent in terms of the scope of the fraudulent claims found. It then analyses in substance the rationale behind the two judgments and the fact that the essential elements of determining fraud remain the same. Finally, it is emphasised that *The DC Merwestone* is a further refinement and development of Lord Hobhouse by limiting the extent to which a claim can be considered fraudulent and amending a policy that was initially disproportionately harsh on the insured. Despite criticisms that *The DC Merwestone* increases the uncertainty for the insured and unsettles the insurer, the insured can contractually constrain the insurer, thereby reducing the limitations of the judgment. Overall, the emergence of *The DC Merwestone* judgement has been positive.

1.The Relationship between *The DC Merwestone* and *The Star Sea*: Contradictions?

On the face of it, the majority decision in *The DC Merwestone* somewhat invalidates what Lord Hobhouse said in *The Star Sea*. In *The Star Sea*, Lord Hobhouse argued that if the means used were substantial and likely to provide an advantage to the insured seeking a settlement, the claim would be considered a fraudulent claim.[7] Lord Hobhouse's purpose was to prevent the insured from dishonestly obtaining something he was not entitled to. If a fraudulent claim is made, what one would otherwise be entitled to is lost.[8] Lord Hobhouse's logic is well understood that the fraudulent insured must not be left thinking that if the lie succeeds, there will be an illegal gain. If it fails, there will be no loss.[9] Such a case law would not deter fraud and might even encourage it if the insured, having achieved a fraudulent claim, was still entitled to be compensated for that part of the lost loss. This logic was equally reflected in the much earlier case of *Britton v Royal Insurance Co*, where the judge held that it would be hazardous to allow parties to commit such fraudulent behaviour and then recover the actual value of the goods consumed.[10] The insured must pay for the fraudulent claim to deter other insureds from following this fraudulent behaviour. Where fraud exists, forfeiture of the actual portion of the claim amounts to a penalty.[11] This is a harsh principle despite the lack of evidence that such

[6] [2001] UKHL 1, [2001] 1 Lloyd's Rep. 389.
[7] ibid.
[8] Gerald Swaby, 'A critical examination of the disproportionate rights and duties of insurers and insured vis-à-vis good faith, fraud and the settlement of insurance claims' (Doctoral Thesis, University of Huddersfield 2016).
[9] ibid.
[10] [1866] 4 F & F 905.
[11] Philip John Rawlings and John Lowry, 'Insurance Fraud and the Role of the Civil Law' (2017) 80(3) Mod LR 525 < https://onlinelibrary-wiley-com.soton.idm.oclc.org/doi/epdf/10.1111/1468-2230.12269 > accessed 18 December 2023.

penalties effectively deter fraud.[12] In the case of *Agapitos v Agnew (The Aegeon)*, the Court of Appeal suggested that an insurer could benefit from the fraudulent claim defence if there were a collateral lie.[13] In this case, the judge expressed more directly that a collateral lie is dishonest and that the insured's claim is invalid. Based on the case of *Britton v Royal Insurance Co* and *The Aegeon*, the High Court and Court of Appeal in *The DC Merwestone* ruled against the insured. Christopher Clarke LJ agreed that the case law of fraudulent device was draconian but argued that it was necessary as it acted as a deterrent to deception by insurers.[14] However, the Supreme Court in *The DC Merwestone* gave a seemingly new and opposed view with High Court and Court of Appeal. The majority decision in the Supreme Court held that there is a difference between a fraudulent claim and a claim supported by fraud, which is also referred to as 'collateral lies' or 'fraudulent devices', are irrelevant, should not fall within the scope of a fraudulent claim, and do not result in the invalidity of the claim. In the fact of *The DC Merwestone*, the flooding was caused by crew negligence, contractor negligence and unseaworthy pumps. In discussing the claim with the insurer, the insured's false allegation that the bilge alarm went off hours earlier than it is think did was irrelevant to the final claim amount.[15] In other words, the Supreme Court held that claims supported by lies unrelated to the case were not fraudulent claim. A similar situation arose in the case of *K/S Merc-Scandia XXXXII v Lloyd's Underwriters (The Mercandian Continenta)*, the judge held that the insured's deliberate and incriminating statement of facts involving whether the English courts had jurisdiction over the claim against the insured had no legal relevance to the claim under the policy itself. Therefore, the insurer's claim based on section 17 of the Marine Insurance Act 1906 (MIA 1906) was dismissed.[16] The Court of Appeal later affirmed this opinion.[17] The Supreme Court in *The DC Merwestone* and *The Star Sea* disagreed on whether collateral lie constituted a fraudulent claim which is the main reason why the two cases seem to contradict each other. To sum up, in terms of the outcome produced by the judgement, the Supreme Court in *The DC Merwestone* somewhat overruled the well-known case law of 15 years ago, The Star Sea.

2. The Relationship between *The DC Merwestone* and *The Star Sea*: No Contradiction?

Analysed substantively, the Supreme Court in *The DC Merwestone* did not reject Lord Hobhouse said in *The Star Sea* in its entirety, but rather it was a further refinement and development of Lord Hobhouse. In the first place, the rationale behind the Supreme Court in *The DC Merwestone* and Lord Hobhouse said in *The Star Sea* is the same. The rationale and

[12] ibid.
[13] [2002] EWHC 1558 (Comm), [2003] Lloyd's Rep. I.R. 54.
[14] ibid.
[15] ibid.
[16] [2000] 2 Lloyd's Rep. 357.
[17] [2001] EWCA Civ 1275, [2001] 2 Lloyd's Rep. 563.

purpose of both judgements is to disallow an insured to obtain by fraud what he is not entitled to, and this is the main reason why the two judgements are not in substance completely opposed. In the second place, the basic definition of the concept of fraud in both decisions is also not contradictory. Under common law, a statement constitutes fraud if it meets the following three conditions: (1) intentionally, (2) without belief in its truth, (3) without regard to the consequences and regard to its truth or falsity.[18] In addition, fraud is not only narrowly related to the subject matter of the claim but may involve any aspect of the claim's validity and, therefore, defences.[19] Thus, fraud in insurance claims appears to contain at least three elements: Firstly, The insured must behave dishonestly. On a civil standard balance of probabilities, dishonesty requires that the insured knew that what he was doing would be regarded as dishonest by an honest person.[20] Secondly, it must be intentional.[21] Intentional where a false representation has been made knowingly, or without belief in its truth, or recklessly as to its truth.[22] Thirdly, the requirement that the fraud must be material rather than minimal.[23] It relates primarily to the insurer's state of mind, which must be material to the decision to pay.[24] Both judgments endorse the above definition of fraud, which is dishonest, intentional, and material to the decision to pay. Hence, in *The DC Merwestone*, the Supreme Court affirmed Lord Hobhouse's views on the grounds for judgement and the basic definition of fraud. The difference between the two judgements is that the Supreme Court limits the extent to which a claim can be regarded as fraudulent. Arguing that if a collateral lie merely helps the insured to get what he is already entitled to, it cannot prevent the insured from obtaining what he is entitled to when it does not affect the value or validity of the claim.[25] The important reason is a lie such as collateral lie has no effect of its own on the value or validity of the claim, the insurer does not suffer a loss, and the insured does not profit from it beyond the right itself. To deprive the insured of his right because of such a lie, which does not materially affect the interests of either party, would be too drastic an approach to be consistent with the principle of proportionality. The Supreme Court's in *The DC Merwestone* held, which builds on Lord Hobhouse's distinction between collateral claims and other fraudulent claims, makes the means of punishment more proportional to the harm produced by the fraud, and is therefore a step forward and a development. Although there has been criticism of the judgement made by *The DC Merwestone*, the Association of British Insurers (ABI) has criticized the Supreme Court's decision as being detrimental to the fight against fraudsters and unfair to other honest and trustworthy insured, as well as potentially driving up the risk of insurance costs and prolonging

[18] *Derry v. Peek* (1889) 14 App. Cas. 337.
[19] *Agapitos v Agnew* [2002] EWCA Civ 247, [2002] 2 Lloyd's Rep. 42.
[20] *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164.
[21] *Black King Shipping Corp v Massie* [1985] 1 Lloyd's Rep. 437 (QB).
[22] ibid.
[23] *Lek v Mathews* (1927-28) 29 Ll. L. Rep. 141.
[24] *Galloway v Guardian Royal Exchange (UK) Ltd* [1999] Lloyd's Rep. I.R. 209.
[25] ibid.

the insured's payment process.[26] However, as held above, unlike collateral lies, which are fundamentally different from other fraudulent claims, the insured does not receive an additional benefit for collateral fraud, and therefore, allowing such lies does not encourage the insured to do so, as it lacks the most basic motivations because the insured is motivated by profit. To conclude, the Supreme Court in *The DC Merwestone* and Lord Hobhouse said in *The Star Sea* share the same rationale and basic definitions, and Supreme Court's exclusion of lies unrelated to the claim from the scope of fraudulent claims is a refinement and a development of Lord Hobhouse.

3. Revisiting the Relationship between *The DC Merwestone* and *The Star Sea*

The relationship between *The DC Merwestone* and *The Star Sea* is not simply the former replacing the latter. As noted above, *The DC Merwestone* did not overrule Lord Hobhouse because the jurisprudence behind the two judgements remains highly consistent. The basic definitions of the concept of fraud in the two judgments do not contradict each other as well.[27] *The DC Merwestone* decision amends and develops Lord Hobhouse in *The Star Sea* for four vital reasons. First of all, *The DC Merwestone* introduces the concept of collateral lies, distinguishing collateral lies from other fraudulent claims.[28] The unique feature of non-claims-related lying devices is that because the insurer will not suffer any harm, so there is no need for the law to intervene to protect it. There is also no policy reason why an insurer should be able to avoid a claim in such circumstances while other fraudulent claim would result in a substantial loss to the insurer. Second, by identifying the extent of the fraud and imposing the appropriate consequences, *The DC Merwestone* amends otherwise draconian case law to make the harm of fraudulent claims and the legal means set more proportional. Not all fraudulent claims are created equal, and there is a significant difference in the aim of targeted financial gain or speeding up a claim.[29] Different lies have different purposes, levels of harm and consequences, and it is neither rigorous nor reasonable to impose the same measure on all of them. If the existence of collateral lies or fraudulent practices does not increase the liability of the insurer, and the insured does not profit as a result, then other measures with adverse consequences should not be adopted to deal with the collateral lies. In other words, no need to use draconian legal means to regulate collateral lies or fraudulent devices, which would result in undue favouritism to undeserving insurers. In insurance law, the benefits of confiscation

[26] James Dalton, 'Supreme Court ruling is setback in fight against fraudulent claims' (Insurance Times, 21 July 2016), <https://www.insurancetimes.co.uk/supreme-court-ruling-is-setback-inspurious-claim-fight-abi/1419111.article> accessed 18 December 2023.

[27] Richard Aikens, 'When is a "fraudulent claim" only a "collateral lie"?' [2023] Lloyd's Maritime & Commercial Law Quarterly 340 < https://www.i-law.com/ilaw/doc/view.htm?id=379392#CLQ:20170339.21 > accessed 18 December 2023.

[28] ibid.

[29] Katie Richards, 'Time's up for wholly fraudulent insurance claims: the case for new statutory remedies' (2020) 7 Journal of Business Law 580 < https://orca.cardiff.ac.uk/id/eprint/125448/ > accessed 17 December 2023.

rules are grossly overestimated and less intrusive methods are not properly considered.[30] In Lord Sumption's view, if the law were to do confiscation rules, it would be disproportionately harsh on the insured because the fraudulent claims rule does not apply to the right to indemnify the insured once the admitted or facts indicate irrelevant lies.[31] Even if the collateral lies are allowed to exist, the moral quality of the insured's lie is not mitigated because it proved unnecessary. The third thing is the majority opinion in The *DC Merwestone* emphasised that the wider objective of curbing fraud in the insurance industry should be pursued through effective market incentives rather than harsh, but not necessarily effective, punitive measures, which signals a shift away from severe penalties for fraud to a more preventative approach. An approach orientated towards the benefits of such outcomes is more effective and sensible for insured than punitive measures, as insureds lack the incentive to lie if it does not result in benefits. It has also been argued that the original harsh forfeiture rule was at best a weak deterrent and its effectiveness was questionable. In the past, the forfeiture rule served as the only civil sanction for insurance fraud. Fraud is still rampant in the insurance industry, so the effectiveness of seemingly draconian penalties has to be rethought.[32] Last but not least, The *DC Merwestone* performs a measure of interest that delicately balances deterring fraudulent claims with ensuring fairness to the insured. *The DC Merwestone* changed Lord Hobhouse's held in favour of insurers, who were entitled to be exempt from liability regardless of whether the type of lie caused damage to the insurer. The legal rights and interests of the insured are protected, no longer having to pay a legally harsh and unjustifiable price for a lie that did not cause any harm, while at the same time preserving the trust and integrity of the insurance system and rationalising the entire legal framework. Neither has it allowed the insured to profit from fraudulent behaviour, thereby encouraging more fraudulent behaviour in the insurance industry. Nor does it condone the abuse of the insurer's right to exempt itself from liability for insurance coverage, resulting in an injustice to the insured. To summarize, *The DC Merwestone*'s introduction of collateral lies is an amendment and development of Lord Hobhouse said in *The Star Sea* rather than a complete overruling.

4. The Impact of the *DC Merwestone*

Although *The DC Merwestone* judgement may also have a temporary adverse effect on the insured and the insurer, there is a solution and therefore *The DC Merwestone*'s judgement is positive. On the one hand, *The DC Merwestone* sees the biggest problem as introducing an element of uncertainty: a lie is ultimately a fraudulent claim or a collateral lie that requires the judge's judgement and, therefore, may challenge the predictability and fairness of the outcome

[30] James Davey and Katie Richards, 'Deterrence, human rights and illegality: the forfeiture rule in insurance contract law' [2015] LMCLQ 314 < https://orca.cardiff.ac.uk/id/eprint/83056/ > accessed 17 December 2023.
[31] ibid.
[32] Katie Richards, 'Forfeiture rule and deterrence' [2017] Insurance Fraud Symposium <https://orca.cardiff.ac.uk/id/eprint/102649/ > accessed 17 December 2023.

of an insurance contract.[33] This uncertainty may affect honest insureds who inadvertently provide inaccurate information. Once the lie emerges, the insurer and the insured may dispute whether the lie is a fraudulent claim resulting in the insurer's exclusion or an inconsequential collateral lie, and the contract may not evolve as the insurer and the insured initially expected. For the vast majority of honest insureds, the potential adverse effect is to drive up the cost of insurance and prolong the payment process.[34] This is because insurers need to prevent fraud by thoroughly investigating claims. The insurer will have to spend more time and fund to determine whether the insured's fraud is a fraudulent claim or simply the use of a fraudulent device, and the insured will ultimately bear the cost of this investigation. Hence, premiums will likely increase, and the payment process will likely be lengthened, which is unfair to most honest insureds. Although sections 12 and 13 of IA 2015 provides some certainty as to the remedies available to address fraudulent claims, it neither defines fraud nor provides any other guidance as to when a claim is to be considered fraudulent, leaving the determination of fraudulent claims to the case law.[35] However, just as there are two sides to the coin, there are advantages to this element of uncertainty, which favours the delicate balance of interests between maintaining fairness and equity for the insured and disciplining fraudulent claims. Judges need to consider all the particular circumstances and apply the necessary materiality test of each case, assessing whether the deprivation of the right to claim is just and proportionate to the guarantees of his substantive rights so as to arrive at a more proportionate and proportional response, rather than a sweeping one-size-fits-all approach.[36] On the other hand, the judgement of the ruling that English insurance law does not prohibit the use of fraudulent device may be unsettling for insurers. That's because the industry has invested a lot of funds over the years to fight insurance fraud. Research by the ABI suggests that the value of fraudulent claims detected in 2014 was over £1 billion in 2014, while undetected fraudulent claims cost the UK economy £2 billion in that year.[37] With fraudulent claims costing the insurance market a fortune, *The DC Merwestone* appears to have shot down 15 years of industry endeavour, which hurts the insured and the insurer and market.

However, MIA 1906 and IA 2015 seem to offer some insights to address uncertainty and unease among insurers. It is worth noting, that the question of whether fraudulent claims are part of

[33] Daniel Brinkman, 'The benefit of hindsight?: An analysis of the United Kingdom Supreme Court's approach to the fraudulent devices rule in "Versloot Dredging"' (2018) 29(3) Insurance Law Journal 288 <https://search.informit.org/doi/abs/10.3316/agis.20190103005357 > accessed 17 December 2023.

[34] ibid.

[35] Özlem Gürses, *Marine Insurance Law* (3rd Edition, Routledge 2023).

[36] Malcolm Clarke, 'Fairness for Fraudsters?' (2016) 8 EJCCL 36 <https://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/ejccl8&id=38&men_tab=srchresults > accessed 17 December 2023.

[37] HM Treasury and Harriett Baldwin MP, 'Insurance Fraud Taskforce final report' (January 2016) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/494105/PU1817_Insurance_Fraud_Taskforce.pdf > accessed 18 December 2023.

the principle of utmost good faith and whether the relevant provisions can be applied is still a matter of debate.[38] One view is that principle of utmost good faith can be used to justify the development of fraudulent claims rules.[39] Going back to section 17 of the MIA 1906, it provides that if either party fails to comply with the principle of utmost good faith, the other party can avoid the contract. The application of the principle of utmost good faith in the context of fraudulent claims is that both parties to an insurance contract are obliged to observe the principle of utmost good faith. The insurer has a duty to provide true and complete information and the insured has a duty to comply with the terms and conditions of the insurance contract. If the insured intentionally provides false information or conceals material facts, this is considered a breach of the principle of utmost good faith. The principle of utmost good faith guides in the context of fraudulent claims, and both parties to an insurance contract have a duty to comply with it.[40] The court will objectively assess whether the parties were open, fair, practical, reasonable and honest in their contractual dealings.[41] This section seems overly draconian today, as having the insurer avoid liability from the beginning of the agreement would force the insured to repay prior payments unrelated to the fraud. The opposite view in the case of *Agapitos v Agnew (The Aegon)* was expressed that fraud under the standard law rules was not a claim within the scope of section 17 of the MIA 1906 and that extending the scope of the utmost good faith principle to the claims stage was problematic.[42] With the adoption of the IA 2015, the prevailing view is that fraudulent claims should be considered separately from utmost good faith.[43] In the case of *The Star Sea*, Lord Hobhouse who noted that avoidance of a contract where the cause that lack of good faith occurred prior to the formation of the contract and materially affected the formation of the contract was appropriate. But if the lack of good faith occurred later, it would be anomalous and disproportionate to categorise it so and entitle the aggrieved party to such a result, which is, in effect, punitive. A fully enforceable contract where the insured has paid the premiums, claims for covered losses

[38] Philip Rawlings and John Lowry, 'Insurance Fraud: the "Convoluted and Confused" State of the Law' (2016)132 The Law Quarterly Review <https://discovery.ucl.ac.uk/id/eprint/1493001/3/Rawlings%202016%20Insurance%20Fraud%20Revisions%20and%20Resubmission.pdf > accessed 15 December 2023.

[39] James Davey, 'A smart (er) approach to insurance fraud' (2020) 27 Connecticut Insurance Law Journal <https://cilj.law.uconn.edu/wp-content/uploads/sites/2520/2021/04/CILJ-Vol.-27.1-Davey-Article-FINAL.pdf > accessed 15 December 2023.

[40] Howard Bennett, 'The Three Ages of Utmost Good Faith' in S. Watterson, & C. Mitchell (eds), *The World of Maritime and Commercial Law: Essays in Honour of Francis Rose* (Bloomsbury Publishing 2020).

[41] Özlem Gürses, 'What does "utmost good faith" mean?' (2016) 27(2-3) ILJ 124 <https://kclpure.kcl.ac.uk/portal/files/60864431/What_does_utmost_good_faith_mean.pdf > accessed 15 December 2023.

[42] ibid.

[43] Baris Soyer, 'Lies, Collateral Lies and Insurance Claims: The Changing Landscape in Insurance Law' (2018) 22(2) EdinLR 237 <https://heinonline.org/HOL/Page?lname=Soyer?utm_source=thirdiron&handle=hein.journals/edinlr22&collection=&page=237&collection=journals > accessed 15 December 2023.

arise and are paid. However, if the insured cannot in some way perform his duties in full and complete good faith during the insurance period, the insurers can further regard itself not only as discharged from liability, but also to set aside any previous fully and correctly occurred. There is no authority, either before or after the MIA 1906, which supports the principle of such a scope.[44] It is also clear from the UK Supreme Court's judgement that the use of fraudulent means will not be affected by the principle of utmost good faith without an express agreement between the parties.[45] IA 2015 gives two ideas for solving the problem of fraudulent claims ambiguity. To start with, the IA 2015 allows insurers to contractually insert a clause into their standard terms and conditions to address the fraudulent claims, subject to transparency requirements.[46] The insurer can insert an express clause in the contract the right to rescind the policy or claim in the event of collateral fraud on the part of the insured or, in the absence of such a clause, the insurer may charge a higher premium.[47] Although this is not currently common practice in marine insurance, it is believed to develop in the future.[48] Secondly, the IA 2015 also makes it clear that section 12 does not constitute the 'exclusive remedy' for fraudulent claims, and it is possible that the IA 2015 could be further amended to create a unique remedy for outright fraudulent claims.[49] It means the IA 2015 makes the possibility of an effective legal deterrent where none currently exists. All in all, *The DC Merwestone* may have a detrimental impact on the insured and the insurer, but for now the limitations of the judgement can be mitigated by contractual agreement, so overall *The DC Merwestone* is positive.

Conclusion

In conclusion, this article adopts the methods of citing case law, analysing legal provisions, introducing concepts and weighing interests to critically analyse the Supreme Court's view in *The DC Merwestone* and Lord Hobhouse said in *The Star Sea*. The result of *The DC Merwestone*, on the face of it, is a certain amount of overrule of what Lord Hobhouse said.

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[44] Naraya Lamart, 'Certainty vs. Equity: A Case for Reform of the Duty of Utmost Good Faith?' (2018) 32 Austl & NZ Mar LJ 59 < https://www8.austlii.edu.au/au/journals/ANZMarLawJl/2018/10.pdf > accessed 15 December 2023.

[45] Poomintr Sooksripaisarnkit, 'Marine insurance–collateral lies: when lies are not fraud' (2017) 2(1) MarBR 52 <https://www.emerald.com/insight/content/doi/10.1108/MABR-09-2016-0020/full/pdf > accessed 15 December 2023.

[46] Johanna Hjalmarsson, 'Fraudulent insurance claims: legal definition and judicial consequences' (Doctoral Thesis, University of Southampton 2016).

[47] Ashok Ghosh, 'Briefing: recent developments in construction and engineering insurance law' (2017) 170(1) Procurement and Law 3 < https://www.icevirtuallibrary.com/doi/epdf/10.1680/jmapl.16.00041 > accessed 13 December 2023.

[48] Johanna Hjalmarsson, 'Maritime law in 2016: a review of developments in case' (2017) < https://static.i-law.com/ilaw/SFE/pdf/good_law_article2017.pdf > accessed 10 December 2023.

[49] Katie Richards, 'Fraud unravels all? A critical examination of the fraud rules in marine insurance and documentary credit transactions' (Doctoral Thesis, Cardiff University 2017).

Lord Hobhouse held that all fraud is considered a fraudulent claim whether it is a collateral lie or an exaggeration of the amount claimed, there is no essential difference. Fraudulent insureds must not be allowed to get away with the idea that if the lie succeeds, there will be an illegal gain, and if it fails, there will be no loss. More stringent measures are therefore required to deter the insured from dishonestly obtaining what he is not entitled to. Fifteen years later, the Supreme Court of *The DC Merwestone* held that a collateral lie was not a fraudulent claim because it did not benefit the insured or detriment to the insurer. The central conflict between the two decisions is whether a collateral lie constitutes a fraudulent claim. However, the rationale, purpose, and basic definition of fraudulent claims behind the two judgments are the same. The Supreme Court just based on Lord Hobhouse by identifying the extent of the lie and imposing the corresponding consequences, making the harm of fraudulent claims and the imposition of legal means more in line with the principle of proportionality and shifting from severe punishment of fraud to a more preventive approach which is a more subtle balance of the principle of proportionality. The Supreme Court's approach is a delicate balance between deterring fraudulent claims and ensuring justice for the insured. Therefore, The Supreme Court refined and developed Lord Hobhouse's views. However, there are also criticisms that *The DC Merwestone* introduces an element of uncertainty as to whether a lie is ultimately a fraudulent claim or a collateral lie is a matter for the judge's judgment. It may challenge the predictability and fairness of the outcome of an insurance contract. It impacts honest policyholders who inadvertently provide inaccurate information and most direct insureds. The result of a ruling that does not prohibit the use of collateral lies may also be unsettling for insurers. However, as uncertainty also brings the possibility of different analyses for different situations, it favours the delicate balance of interests between maintaining fairness and impartiality for the insured and disciplining fraudulent claims. The insurer's unease can be mitigated by the insertion of clauses in the standard terms of the contractual agreement. So overall *The DC Merwestone* is a positive development rather than an absurd deviation from Lord Hobhouse's view. After critically analysing the cases of *The DC Merwestone* and *The Star Sea*, this article argues that The *DC Merweston*'s argument that there is a distinction between a fraudulent claim and a collateral lie provides a new way of looking at the legal exploration of fraudulent claims and offers fresh insights. Compared with similar research and studies, this article delivers a more in-depth analysis of the logic of the two judgements. The tension between deterring fraud and maintaining justice for insurers and the insured remains a theme worth exploring. In the future, there will be a need to maintain a more dynamic balance between deterrence and justice in different cases and think about a complete statutory framework to meet the challenges posed by *The DC Merwestone*. Moreover, the reasonable time determined by the courts in investigating suspected fraudulent devices, particularly those that do not affect the validity of the claim, may be another subject of future disputes.

Assessing Fraudulence in Insurance Claims- A Comprehensive Analysis of an Evolving Concept and Regime

Zachary Jordan

Abstract

The question of what is considered 'fraudulent' in a claim of insurance is cardinal both in understanding fraudulence theoretically from the point of scholars and academics seeking to ascertain a complete conceptualisation and from the point of the practitioner (be it lawyers, brokers, underwriters, and those they insure) seeking certainty and fairness- as understood from their differing perspectives.

This article discusses how English case law has developed to shape the concept of fraudulence in insurance claims over the years and will seek to ascertain the specific content that exists within the law's current understanding in light of more recent case law. After a comprehensive analytical discussion of the content of the current law and its merits, this article will suggest reforms to the fraudulent claims regime in the form of a more flexible system of judicial discretion.

Introduction

This article will explore and critically analyse if the majority opinion in the *DC Merwestone*[1] and, more specifically, the permittance of honest insurance claims brought by the assured, which are supported by collateral lies, appears to have invalidated what Lord Hobhouse said in *The Star Sea*- "[t]he fraudulent insured must not be allowed to think: if the fraud is successful, then I will gain; if it is unsuccessful, I will lose nothing".[2] Ultimately, it will conclude that Lord Hobhouse's point has been invalidated by *The DC Merwestone*[3]; the extent to which however is nuanced considering the parties' freedom to contract. First, it is necessary to properly place the concept of fraudulent claims made by the assured within the current insurance law regime/framework and how the law has developed to adopt the current position within this jurisdiction.

The Development of Fraudulent Claims as an Autonomous Concept

Carter v Boehm[4] is the origin of the duty of utmost good faith, codified into ss.17-20[5] of the Marine Insurance Act 1906 (MIA 1906). Whilst the MIA 1906 never expressed this principle as a duty per se- the "contract is based upon the utmost good faith"[6], it has been described as

[1] *Versloot Dredging BV v HDI-Gerling Industrie Versicherung (The DC Merwestone)* [2016] UKSC 45.
[2] *Manifest Shipping Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea)* [2001] UKHL 1 [62] Lord Hobhouse.
[3] *The DC Merwestone* (n 1).
[4] *Carter v Boehm* (1766) 3 Burr 1905.
[5] Marine Insurance Act 1906 (MIA 1906), ss.17-20.
[6] MIA, s.17.

"customary"[7] to refer to it as such. This duty could be divided into two sub-duties: the duty of disclosure[8] and the duty of non-misrepresentation.[9] Critically speaking, this codifying statute failed to mention the duty's duration. This was initially addressed in *The Litsion Pride*[10], where Hirst J held that there had been a breach of the duty of utmost good faith at the post-contractual stage and a fraudulent claim. Not only does this case illustrate the temporal extent of the duty, but also that the submission of fraudulent claims constituted a breach of this duty. This 'traditional' understanding that includes fraudulent claims within s.17[11] dates back to *Britton v Royal Insurance Co*.[12], where Willes J referred to good faith when directing the jury regarding remedies for fraudulent claims.

Arguably, the presence of a post-contractual duty of utmost good faith in the same form that it exists pre-contractually is illogical and ill-fitting. Lord Mansfield said an insurance contract is "a contract upon speculation".[13] This highlights the rationale behind the need for such a duty in the first place: to safeguard the insurer who relies on, in absolute, the accuracy and validity of the information provided by the assured to make the policy and calculate the premium. This explanation lacks relevance when attempting to justify its presence post-contractually as the representations and disclosures upon which the insurer relies have already been utilised to create the policy; thus, they have no bearing on the post-contractual stage, and there is no information asymmetry which needs to be appeased. Bennet recognises this premise, "the doctrine of utmost good faith serves the process of contractual negotiation".[14] This shows that an extension beyond this point unfairly impacts the sanctity of the commercial bargain that the parties have struck.

Following *The Star Sea*[15], there is no longer a post-contractual duty of utmost good faith that includes its two sub-duties of non-misrepresentation and disclosure. Therefore, the post-contractual duty, as currently understood, has no fixed, substantive content nor a remedy. Thus, it can be understood as merely an interpretive doctrine that adapts to the different stages in the lifecycle of an insurance contract and the varying degree of openness between the parties that diminishes after contract formation and the insurer has agreed to underwrite the assured's risk. Lord Hobhouse demonstrates this: "[a] coherent scheme can be achieved by distinguishing a lack of good faith which is material to the making of the contract itself … and a lack of good

[7] HN Bennett "*Mapping the Doctrine of Utmost Good Faith in Insurance Law*" [1999] LMCLQ 165, 166.
[8] MIA 1906, s.18-19.
[9] MIA 1906, s.20.
[10] *Black King Shipping Corp. v. Massie (The Litsion Pride)* [1985] 1 Lloyd's Rep 437.
[11] MIA 1906, s.17.
[12] *Britton v Royal Insurance Co.* (1866) 4 F. & F. 905 [909] (Justice Willes).
[13] *Carter v Boehm* (n 4) (Lord Mansfield).

[14] Bennett "*Mapping the Doctrine of Utmost Good Faith in Insurance Law*" (n 7) 198.
[15] *The Star Sea* (n 2).

faith during the performance".[16] This shows how the duty transforms throughout the contract's lifecycle. Whilst it is accepted that fraudulent claims developed from the general duty of utmost good faith from s.17[17] as enacted, it has since become self-guided and independent and is no longer a part of this duty; this much has been made clear by Lord Hughes in *The DC Merwestone*.[18]

The Insurance Act 2015 (IA 2015) has reformed this duty from a duty of utmost good faith as provided for by s.17[19] (only a short insubstantial phrase remains) to a duty of fair presentation[20] which still includes the sub-duties of disclosure[21] and non-misrepresentation[22] in this way, the contents remain similar. However, effective reform has taken place regarding remedies where the scope for the remedy of avoidance has been limited to only deliberate or reckless breaches[23] or where the breach was neither deliberate nor reckless, but the insurer proves they would not have entered into the policy on any terms and in this scenario the premium is repaid to the assured.[24] However, the duty of fair presentation can be contracted out, and, in its place, the traditional duty of utmost good faith is inserted from ss17-20.[25] In all, the concept of fraudulent claims has branched off independently from the duty of utmost good faith and the duty of fair presentation. It is worth noting that the rules on fraudulent claims end where litigation begins; here, the Civil Procedure Rules become authority.

Categories of Fraudulent Claims

Fraudulent insurance claims may be placed into different categories. The first is where the loss is wholly non-existent, either completely fabricated (an invented loss) or the loss is non-fortuitous and deliberate (a procured loss). The second is where the fraudulently submitted claim is exaggerated. For example, in *Galloway*[26], the assured supplemented his actual losses with a fabricated loss of £2,000. The third category is when the assured submits a 'genuine' claim but suppresses evidence of a defence available to the insurer. For example, in *The Litsion Pride*[27], the insurer would have the defence of a lack of notification and additional premium payment due to the assured entering an additional premium zone in the modern-day fraudulent claims jurisdiction. Following *The DC Merwestone*[28], the next category is not considered a

[16] *The Star Sea* (n 2) [52] (Lord Hobhouse).
[17] MIA 1906, s.17 (as enacted).
[18] *The DC Merwestone* (n 1) [64] (Lord Hughes).
[19] MIA 1906, s.17.
[20] Insurance Act 2015 (IA 2015), s.3.
[21] IA 2015, s.3(3)(a).
[22] IA 2015, s.3(3)(c).
[23] IA 2015, Schedule 1, Part 1, Para 2.
[24] IA 2015, Schedule 1, Part 1, Para 4.
[25] MIA 1906, ss.17-20.
[26] *Galloway v Guardian Royal Exchange (UK) Ltd* [1999] Lloyd's Rep IR 209.
[27] *The Litsion Pride* (n 10).
[28] *The DC Merwestone* (n 1).

fraud. Collateral lies are those where the assured dishonestly supplements/embellishes their claim with forged evidence; however, the claim is a true indemnity. For example, in *Sharon's Bakery*[29] the assured provided to the insurer fraudulent invoices to help prove title to the insured goods. The categorisation of this fourth scenario and its relationship with the concept of fraud is crucial to this discussion and will be examined.

Collateral Lies Are More Than Merely 'Collateral'- Claims Brought on False Facts Should Be Considered Fraudulent

It could be argued that the majority decision in *The DC Merwestone*[30] has, to some extent, invalidated what Lord Hobhouse said in *The Star Sea*.[31] In *The DC Merwestone*[32], the UKSC majority distinguished instances of fraud that should be caught by the rule from 'collateral lies' which they thought should not be considered fraudulent. This premise has alternatively been referred to as 'fraudulent means or devices'; however, Lord Sumption said the latter expression was "archaic and hardly describes the problem."[33] Following *The DC Merwestone*[34], a whole class of scenarios in which the assured has provided a lie in their claim will now be permitted and left unpunished. Such treatment arguably undermines the premise from *The Star Sea*[35] that a fraudulent assured should face consequences for their fraud because the claim itself and the evidence used therein should be legitimate and truthful. If lies have been used to prove the claim, it should not be understood as non-fraudulent, as was decided in *The DC Merwestone*[36]. Thus, for this category to be treated as falling outside the scope of fraudulent claims represents a curtailing of the concept's remit, and in turn, this invalidates Lord Hobhouse's point from The Star Sea[37].

The lie being described as merely 'collateral' is misleading and inaccurately belittles the gravity of the deceit/dishonesty the assured has employed. The lie provided plays a pivotal role in ultimately deciding the claim's fate. Lord Hughes described the use of collateral lies as merely the assured "gilding the lily"[38], but arguably, this is disingenuous. The legitimacy of the assured's loss remains intact in a collateral lie claim scenario - this is relatively inarguable. It is, however, arguable that the legitimacy of the claim itself (irrespective of the legitimacy of the loss) is corrupted nonetheless by the provision of the collateral lie by the assured. Support for such an argument can be seen from Mance LJ initially from his obiter comments in *The*

[29] Sharon's Bakery (Europe) Ltd v AXA Insurance UK plc [2011] EWHC 210 (Comm).
[30] *The DC Merwestone* (n 1).
[31] *The Star Sea* (n 2) [62] (Lord Hobhouse).
[32] *The DC Merwestone* (n 1).
[33] *The DC Merwestone* (n 1), [1] (Lord Sumption).
[34] *The DC Merwestone* (n 1).
[35] *The Star Sea* (n 2) [62] (Lord Hobhouse).
[36] *The DC Merwestone* (n 1).
[37] *The Star Sea* (n 2) [62] (Lord Hobhouse).
[38] *The DC Merwestone* (n 1) [51] (Lord Hughes).

Aegeon[39] where he states that fraudulent means and devices invalidate a claim brought by the assured as the deceit leads to a claim on false facts and a false premise.[40] Mance LJ maintained this opinion in his dissenting judgement in *The DC Merwestone*.[41] Whilst being a rather strict/harsh understanding of the concept of fraudulent claims, Mance LJ's dissenting opinion aligns with Lord Hobhouse in The Star Sea[42]. Thus, the majority decision in this case allows the assured to provide lies with effective immunity from consequences.

It is paramount to consider the impact that the available remedies to the insurer may have had on the decision that the UKSC reached in *The DC Merwestone*[43] to distinguish collateral lies from fraudulent claims. S.12[44] codifies the remedy of forfeiture of the fraudulent claim in its entirety, with premium payments not returnable to the assured[45]. The insurer's notice to the assured of the claim's forfeiture is retrospective and backdates to when the fraud occurred.[46] This allows the insurer to adopt an extremely powerful 'wait-and-see' approach where they can remain silent about their knowledge of an assured's more minor fraud until such a time that suits them; a commercially sensible time to reveal their knowledge to the assured would be after the assured brings an expensive and legitimate claim. During this period of time (after the assured's smaller fraud but before their larger legitimate loss), they will still be able to collect premiums that do not need to be returned when the insurer finally gives notice of the forfeiture.[47] To add insult to injury, there is no time limit for when the assured has to give such notice. Considering how unmistakably draconian this remedy is, it is understandable why the UKSC majority adopted the position that collateral lies should not be considered fraudulent claims. The judgement could arguably be viewed as an attempt to find an equilibrium within the fraudulent claims regime and modern insurance law. Lord Hughes substantiates this line of thinking: "[t]he extension of forfeiture to a purely collateral lie is not justified …. It is simply too large a sledgehammer for the nut involved."[48] This shows how powerful and disproportionate the majority viewed this remedy when compared to the making of a collateral lie and how they justified their judgement. Regardless of the rationale behind the decision, when considering Mance LJ's dissenting opinion, *The DC Merwestone*[49] does invalidate, to some extent, Lord Hobhouse's point in *The Star Sea.*[50]

[39] *Agapitos v Agnew (The Aegeon)* [2002] Lloyd's Rep IR 573.
[40] *The Aegeon* (n 39) [37] (Lord Mance).
[41] *The DC Merwestone* (n 1) [110] et seq (Lord Mance).
[42] *The Star Sea* (n 2) [62] (Lord Hobhouse).
[43] *The DC Merwestone* (n 1).
[44] IA 2015, s.12.
[45] IA 2015, s.12(2)(b), also see MIA 1906, s.84(3)(a).
[46] IA 2015, s.12(1)(c).
[47] IA 2015, s.12(2)(b).
[48] *The DC Merwestone* (n 1) [100] (Lord Hughes).
[49] *The DC Merwestone* (n 1).
[50] *The Star Sea* (n 2) [62] (Lord Hobhouse).

Nebulous Relationship and Boundary Between the Categories of Collateral Lies and Fraudulently Suppressing a Defence

Flowing from the previous point, arguably, the distinction drawn between the two categories of collateral lies and instances where the assured suppresses a defence is illogical and tends to suggest that Lord Hobhouse's point in *The Star Sea*[51] has been invalidated by the majority decision in *The DC Merwestone*[52]. As aforementioned, *The DC Merwestone*[53] is the authority for the proposition that collateral lies are to be considered non-fraudulent, and this can be contrasted with instances when the assured suppresses evidence of a defence that would otherwise be available to the insurer, as this category is considered a fraudulent claim[54]. Bugra and Merkin have expressed the opinion that the category of suppressing a defence "overlaps"[55] with the category of collateral lies, indicating that there exists some level of academic support for this point. Arguably, these two categories could neatly fit within an umbrella term of 'lies provided by the assured' (or some similar wording) that catches both categories and places them within the remit of fraudulent claims. It is submitted that considering the parallels in the substance of the two categories, it could be argued that a distinction drawn between them is incorrect or at least tenuous and undoubtedly illustrates how *The DC Merwestone*[56] has invalidated Lord Hobhouse in *The Star Sea*[57]. This is because collateral lies could be considered, fundamentally, as a subset/part of a category that includes the suppression of (evidence of) a defence. As the category of suppression of a defence is considered fraudulent, the fact collateral lies are permitted post *The DC Merwestone*[58] has indeed invalidated Lord Hobhouse's point as some instances of fraud slip through the cracks under the guise of collateral lies.

Further, the judiciary's distinction of these two categories is a policy decision. That is to say, the distinction drawn in *The DC Merwestone*[59] does not strictly interpret and adhere to principles laid down by previous courts and Lord Hobhouse in The Star Sea[60]. In this case, the previous ruling would be *The Star Sea.*[61] The subsequent court has made the active decision to differentiate between types of lies provided by the assured. This has been acknowledged in the judgement itself; Lord Clarke described whether collateral lies should fall within the fraudulent

[51] *The Star Sea* (n 2) [62] (Lord Hobhouse).
[52] *The DC Merwestone* (n 1).
[53] *The DC Merwestone* (n 1).
[54] *The DC Merwestone* (n 1) [96] (Lord Hughes).
[55] A Bugra and R Merkin, '"Fraud" and Fraudulent Claims' (2012) 125 *Journal of British Insurance Law Association* 3, 7.
[56] *The DC Merwestone* (n 1).
[57] *The Star Sea* (n 2) [62] (Lord Hobhouse).
[58] *The DC Merwestone* (n 1).
[59] *The DC Merwestone* (n 1).
[60] *The Star Sea* (n 2) [62] (Lord Hobhouse).
[61] *The Star Sea* (n 2).

claims jurisdiction as "essentially a policy question."[62] This shows that the court accepts the curtailing of the scope of fraudulent claims in a way that invalidates Lord Hobhouse's point in *The Star Sea*[63] because there is a considered (policy) reason as to why a distinction is necessary. The merits of the policy decision made by the majority notwithstanding, this decision can be seen as increasing the scope for unpunished dishonesty.

Freedom of Contract and the Scope for 'Merwestone Clauses'

On the other hand, it could be argued that due to the ability of the parties to contract freely, the insurer can negotiate express clauses into an insurance policy which would treat the category of collateral lies as fraudulent and would provide the same remedies for the insurer as if they were a species of fraudulent claims even after the UKSC judgement from *The DC Merewestone*[64]. In this sense, the position reached in this case provides only the default position of the fraudulent claims jurisdiction that governs insurance policies. Within his dissenting judgement in this seminal case, Mance LJ concluded by acknowledging the likelihood/possibility that a prudent insurer may look to exercise their freedom of contract to combat this ruling.[65] Naturally, the party attempting to negotiate such clauses into the policy will invariably be the insurer (as opposed to the assured), as such a reduction of their liability improves their commercial bargain as it decreases the scope of their liability. An example of similar express contracting can be seen in the International Hull Clauses (2003)[66]. Whilst this example significantly pre-dates *The DC Merwestone*[67] such that chronologically, it would be incorrect to call this a 'Merwestone Clause' per se, the purpose of the clause is identical, namely, to increase the scope of fraudulent claims under an insurance policy and thus improve the insurer's position by expressly limiting their liability as a result.

In a non-consumer insurance setting, for the parties to create their own remedies expressly, they must contract out the remedy regime provided in s.12[68]. To accomplish this and replace it with a less favourable regime in the form of express contractual terms, they must abide by the contracting out rules for non-consumer insurance in s.16[69] as well as the transparency requirements in s.17.[70] These transparency requirements require the insurer to take sufficient

[62] *The DC Merwestone* (n 1) [39] (Lord Clarke).
[63] *The Star Sea* (n 2) [62] (Lord Hobhouse).
[64] *The DC Merwestone* (n 1).
[65] *The DC Merwestone* (n 1) [133] (Lord Mance).
[66] ICC, International Standard Banking Practice 681 (2007 Revision, ICC Publication no. 681) International Hull Clauses (01/11/03) cl. 45.3.
[67] *The DC Merwestone* (n 1).
[68] IA 2015, s.12.
[69] IA 2015, s.16.
[70] IA 2015, s.17.

steps to alert the assured of the new, less favourable term before the insurer signs the slip.[71] What counts as sufficient is left undefined in the statute, and thus, the courts are arguably encouraged here to intervene as they see fit. The disadvantageous term itself must have a "clear and unambiguous effect".[72] To add, the characteristics of the assured and the transaction will be taken into consideration when deciding both these points. In all, whilst the contracting out requirements provide a high bar for the insurer to reach, it is submitted that they are not unobtainable for the insurer to fulfil on a consistent commercial basis.

In consideration of the availability of the mechanism of contracting out in non-consumer insurance, it could be argued that Lord Hobhouse in *The Star Sea*[73] has not been invalidated by *The DC Merwestone*[74] as it pertains to marine insurance because 'Merwestone Clauses' can be successfully negotiated into the policy by insurers. The effect of such a clause would be to completely nullify the changes brought to the default fraudulent claims jurisdiction by *The DC Merwestone*[75]. Thus, specific to the individual policy employing these express terms, there would be no scope whatsoever to say Lord Hobhouse's point has been invalidated by *The DC Merwestone*[76]. The strength of this argument is limited to individual cases for which a 'Merwestone Clause' has been provided. Therefore, holistically speaking, despite the availability of contracting out in marine insurance, it is still accurate to say Lord Hobhouse's point has been invalidated by *The DC Merwestone*[77], considering the impact the latter case had on the default regime. However, this argument does provide the ability to argue that the invalidation of Lord Hobhouse's statement in *The Star Sea*[78] is limited, and the decision in *The DC Merwestone*[79] will not impact marine insurance if/where the parties do not want it to.

The Impact of *Orakpo*

Arguably, *Orakpo*[80] shows that it is inaccurate to say that *The DC Merwestone*[81] invalidated Lord Hobhouse's point in *The Star Sea*[82] as it could be seen as persuasive authority for the point that it is acceptable for some material lies provided by the assured to go unpunished.

[71] IA 2015, s.17(2).
[72] IA 2015, s.17(3).
[73] *The Star Sea* (n 2) [62] (Lord Hobhouse).
[74] *The DC Merwestone* (n 1).
[75] *The DC Merwestone* (n 1).
[76] *The DC Merwestone* (n 1).
[77] *The DC Merwestone* (n 1).
[78] *The Star Sea* (n 2) [62] (Lord Hobhouse).
[79] *The DC Merwestone* (n 1).
[80] *Orakpo v Barclays Insurance Services* [1995] LRLR 433.
[81] *The DC Merwestone* (n 1).
[82] *The Star Sea* (n 2) [62] (Lord Hobhouse).

Thus, Lord Hobhouse's statement has not been invalidated by *The DC Merwestone*[83] but rather by Lord Hoffman's in *Orakpo*.[84] Whilst not a marine insurance case, there is no reason to suggest that this decision should not apply to instances of marine insurance. In *Orakpo*[85], the assured significantly exaggerated his losses when they filed their claim for indemnity to the insurer by overstating the number of tenants that would be present and the amount of rent that would have otherwise been payable if the loss had not occurred. If believed by the insurer, this had the obvious effect of leading to payment above true indemnification. Whilst the facts of the case and the lie provided by the assured would fit felicitously within the category of exaggerated claims considered fraudulent per *Galloway*[86] for example, the distinction was made. Lord Hoffman, obiter, stated, "[o]ne should naturally not readily infer fraud from the fact that the insured has made a doubtful or even exaggerated claim … it will be a legitimate reason that the assured was merely putting forward a startling figure for negotiation."[87] It is also important to note that this was seemingly accepted by the Law Commission where it was stated the breadth of fraudulent behaviours "makes it difficult to be precise about the exact boundary between fraud and, for example, exaggeration as part of the negotiation process."[88] Critically speaking, it is inherent to the Law Commission's point here that exaggeration by way of negotiation is distinguishable from a fraudulently exaggerated claim. For this point to then be treated as authoritative by the Law Commission indicates that this case is powerful persuasive authority for a curtailment of fraudulently exaggerated claims as a concept. Therefore, it can be used as a case which invalidates Lord Hobhouse's point from *The Star Sea*[89] instead of *The DC Merwestone.*[90]

However, this argument is flawed for numerous reasons. Firstly, *Orakpo*[91] was decided before *The Star Sea*[92], so to say that *Orakpo*[93] invalidated it subsequently perhaps stretches both the truth and logic of what may constitute invalidation in this context. Secondly, Lord Hoffman's point is merely obiter; thus, it does not have the authority to invalidate another judicial opinion regardless of how the Law Commission treat it. It is submitted that this argument provides only weak and flawed support for the idea that *The DC Merwestone*[94] has not invalidated Lord Hobhouse in *The Star Sea.*[95]

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[83] *The DC Merwestone* (n 1).
[84] *Orakpo* (n 80) [451] (Lord Hoffman).
[85] *Orakpo* (n 80).
[86] *Galloway v Guardian Royal Exchange* (n 26).
[87] *Orakpo* (n 80) [451] (Lord Hoffman).
[88] Law Commission of England and Wales and Scottish Law Commission 'Reforming Insurance Contract Law Issues Paper 7: The Insured's Post-Contract Duty of Good Faith' 3.64.
[89] *The Star Sea* (n 2) [62] (Lord Hobhouse).
[90] *The DC Merwestone* (n 1).
[91] *Orakpo* (n 80).
[92] *The Star Sea* (n 2).
[93] *Orakpo* (n 80).
[94] *The DC Merwestone* (n 1).
[95] *The Star Sea* (n 2) [62] (Lord Hobhouse).

Potential Reform- A Move Towards a System of Judicial Discretion and Proportionality

The fraudulent claims regime in its current form is arguably too inflexible. Instead, it would be expedient for the law to adopt a more flexible approach. Such an argument has been supported by Bugra and Merkin who express the opinion that the position the law takes is "too rigid".[96] Arguably, a system which introduces the element of judicial discretion would aptly address and validate Lord Hobhouse's concerns in *The Star Sea.*[97] This is because the court, on a case-to-case basis, would be empowered to identify and punish the fraudulent assured such that they cannot gain from their fraud and will also face consequences that are proportionate to the severity of their fraudulent act/claim. In addition to addressing Lord Hobhouse's concerns, such a system of judicial discretion and flexibility would also enjoy the benefit of being able to respect the decision in *The DC Merwestone*[98] in which collateral lies were held to be non-fraudulent. Considering how this system could resolve this legal issue, it is submitted that the Law Commission should explore implementing this type of system.

In Australia, if the assured makes a fraudulent claim, the court may "order the insurer to pay, in relation to the claim, such amount (if any) as is just and equitable in the circumstances."[99] The Australian system gives the court discretion over the amount/proportion of the indemnity payment to which the fraudulent assured is entitled. This allows the court to apply principles of fairness in the assessment of claims on an individual level. The fact that such a proposed system would be able to reconcile the issue that *The DC Merwestone*[100] arguably invalidated Lord Hobhouse in *The Star Sea*[101] shows how useful such a flexible system is compared to the existing regime. The current system of fraudulent claims employed in the English common law does not confer upon the court the ability to proportionally reduce the payment of the claim to which the assured is entitled. Instead, the courts can only classify a factual scenario/case as either fitting into one of the aforementioned species of fraudulent claims or not in accordance with common law. If they are categorised as fraudulent, then no indemnification will occur as the insurer may refuse liability for the claim.[102] The proposed reforms would allow the court to assess the level and seriousness of the potential fraud and the need for deterrence when deciding the proportion of the indemnification that would be appropriate. This would be particularly useful in assessing individual cases of both exaggerated claims and/or collateral lies. However, it is noted that in the vast majority of insurance disputes (including but not limited to fraudulent claims disputes) the parties elect to settle the claim before it reaches the

[96] Bugra and Merkin, '"Fraud" and Fraudulent Claims' (2012) 125 *Journal of British Insurance Law Association* 3 (n 55) 7.
[97] *The Star Sea* (n 2) [62] (Lord Hobhouse).
[98] *The DC Merwestone* (n 1).
[99] Insurance Contracts Act (1984) (Australia), s.56(2).
[100] *The DC Merwestone* (n 1).
[101] *The Star Sea* (n 2) [62] (Lord Hobhouse).
[102] IA 2015, s.12.

litigation stage or sometimes the claim is even settled during the litigation stage. See for example *Feasey*[103] which is a case on insurable interest that was appealed to the House of Lords and had been fully argued but the parties decided to settle before the judgement was delivered. Where parties settle, the agreed figure is likely less than what full indemnification would be. In this way, a system in which indemnity payments are reduced already exists, but it is not controlled by the judiciary's discretion. In all, it is submitted that a move towards judicial discretion in the assessment of fraudulent claims and indemnification would resolve the discord provided by *The DC Merwestone*[104] to Lord Hobhouse in *The Star Sea.*[105]

Conclusion

In conclusion, the majority decision in *The DC Merwestone*[106] has invalidated what Lord Hobhouse said in *The Star Sea*[107]. The re-classifying of collateral lies/fraudulent means and devices from fraudulent in *The Star Sea*[108] to non-fraudulent in *The DC Merwestone*[109] has curtailed the scope of the regime of fraudulent claims and has allowed the assured to act with the knowledge that they have the possibility of benefitting if the lie is successful yet bearing no risk if the lie is unsuccessful as it will not be considered fraudulent. This conclusion employs parallel reasoning to Mance LJ in *The Aegeon*[110] and his subsequent dissenting opinion in *The DC Merwestone*[111] in the sense that ultimately, the claim is tainted by the assured's dishonesty; therefore, it should be understood as fraudulent strictly speaking. But, because it is not treated as fraudulent in *The DC Merwestone*[112], this case has directly invalidated Lord Hobhouse's point in The Star Sea.[113] This protection provided for the assured has been framed, in the context of exaggerated claims, as a "one-way bet".[114] This illustrates the unfairness of the strength the assured has. Prior to *The DC Merwestone*[115], the idea that dishonesty resulted in a claim being considered fraudulent was concrete, with the possible exception of exaggeration by way of negotiation from *Orakpo*[116], as discussed. But now the dishonesty must be qualified

[103] *Feasey v Sun Life Assurance Co of Canada* [2003] EWCA Civ 885.
[104] *The DC Merwestone* (n 1).
[105] *The Star Sea* (n 2) [62] (Lord Hobhouse).
[106] *The DC Merwestone* (n 1).
[107] *The Star Sea* (n 2) [62] (Lord Hobhouse).
[108] *The Star Sea* (n 2).
[109] *The DC Merwestone* (n 1).
[110] *The Aegeon* (n 39).
[111] *The DC Merwestone* (n 1) [110] et seq (Lord Mance).
[112] *The DC Merwestone* (n 1).
[113] *The Star Sea* (n 2) [62] (Lord Hobhouse).
[114] *The DC Merwestone* (n 1) [26] (Lord Sumption).
[115] *The DC Merwestone* (n 1).
[116] *Orakpo* (n 80).

by also not being collateral in order to be considered fraudulent. This change does appear to invalidate Lord Hobhouse in *The Star Sea.*[117]

However, as submitted in the introduction, the invalidation of Lord Hobhouse's point is perhaps limited and more ambiguous in practice, considering the freedom of contract and the possibility for express terms which allow the insurer to create their own, wider definition of fraudulent claims essentially. Accordingly, any invalidation has only occurred to the default position. In keeping with the point, the extent to which Lord Hobhouse can be invalidated is limited as the parties can ultimately decide what they think should be caught/prohibited by their own notion of fraudulent claims and what the remedy for a breach should be.

In all, it is submitted that the policy decision made in *The DC Merwestone*[118] by the majority was well-reasoned even if it did invalidate Lord Hobhouse in *The Star Sea*[119] when the strength of the insurer's remedies to fraudulent claims is considered. The proposed regime of judicial discretion and proportionality could be the sensible way for the law to develop; further research could focus on this regime in more detail.

[117] *The Star Sea* (n 2) [62] (Lord Hobhouse).

[118] *The DC Merwestone* (n 1).

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Dissertations

The following dissertations have not been edited.

A Contemporary Review of Causation in Marine Insurance

Jasmina Rejwerska

Introduction

Causation in marine insurance is the key determinant of liability for insurers as it determines in the case of an incident whether the assured can recover the loss or damage under their agreed terms of the insurance contract. If the incident is found to be caused by an insured risk, or peril, then the insurer is liable to indemnify the assured. Therefore, it is of vital importance that the rule of causation is clear, efficient, and suitable for the practices of the insurance industry. The current position on causation identifies that a cause should be dominant and the most efficient cause of the loss or damage, this position replaced ideas of temporal causation where the most immediate in time cause was found to be the proximate. As insurance, and specifically the doctrine of causation is governed by 'a distinctive mixture of contract, law and practice'[1], when ideas of proximity have changed, these aspects have been differently prioritised. The existing ideas of causation in marine insurance are outdated and a contemporary reading will identify the current issues and consider whether a new conception of causation can be on the grasp of emergence. The necessity of this review has been probed by the inherent defects with the doctrine which need to be addressed academically as the judiciary has made little progress in certifying a definite position on causation until more recent years. Especially as 'despite market reforms and modernisation of the practice of marine insurance, there continue to be calls for reform of the underlying law'.[2] The recent advances have occurred in general insurance cases, of various subject-matters, yet their impact could be extensive if appropriately appreciated. This paper will argue that this different, more technical approach to establishing causal judgements can born many advantages for the modern marine insurance industry, as well as mediate the existing doubts that previous theories of causation has created. Although the new approach is not a clear-cut, established approach yet, it is important to review the existing law to justify the foreseeable change and welcome new reasons for arriving at a causal judgement.

A contemporary reading entails addressing the current position of the law to assess its appropriateness and efficiency, however, to arrive at the most current understanding of the doctrine, its fundamental theory must first be analysed. The second chapter will illustrate, where the concept of causation came from and the historical redefinitions of *causa proxima* from temporal proximity to efficiently proximate. The question that the first analysis entertains is whether the law on causation has been historically consistent as this will evidence whether a contemporary review is necessary. It will become evident that there were a few unsteadfast positions on what the concept should factor because of a lack of a definition of proximate

[1] F.D. Rose, *Marine insurance: Law and Practice* (2nd edn, Informa Law London 2012), p 1
[2] *ibid*

causation in statute, giving rise to the idea that the doctrine inherently possessed some defect. This section will also address general contractual principles that complement the legal rule on causation to decide whether these principles can supplement guidance in how to determine if a cause is proximate or not.

Once the enquiry arrives at the current conception of causation, the next section explores whether the new methods of testing for a proximate cause are satisfactory for the needs of the marine insurance industry. The change from temporal causation to ideas of efficiency and dominance made way for the new test of causation which is best referred to as the common-sense approach. The common-sense test created many fears due to its extremely vague nature, leading people to question whether the test would result in arbitrary decisions. The greatest issue for the common-sense test is in how it addresses situations where there may be more than one possible proximate cause. The issue of concurrent causation will explore situations where there are combinations of causes that are either insured, uninsured or expressly excluded. This chapter will conclude that where the test for causation is impractical, one can appeal to general principles of contract to decide which of the multiple causes should create liability for the insurer. The general theme across these two chapters will showcase that where the law is deficient, the principles of contract law can prevail and produce a fair and justified causal judgement.

As cases regarding concurrent causation are becoming increasingly frequent since the 19th century, it will be important to address how the established test for causation accounts for these cases and determines a causal judgement. The increase in frequency is because of more complex commercial arrangements and new risks constantly arising. Thus, this chapter will turn to assess how appropriate the test is for these circumstances and whether the justifications behind these binding decisions were correctly decided using the existing rule. As this chapter will identify the decisions chronologically and compare the justifications behind the decisions, it will become evident just how conflicting and unsteadfast the position on causation truly is. Disagreement between Courts is customary when the issue at case concerns causation. Unsurprisingly, this has led to inconsistent rulings and more importantly, unreliable guidance for more modern cases disputing causation. The uncertain rule on causation has even led Judges to avoid addressing the concept in significant detail, preventing any new rules or precedents to be born. The avoidance of questions regarding causation have contributed to the doctrine being such a grey area and making it of crucial importance for academic research.

The decisions in landmark cases are one of the governing facets of insurance, and as in the previous chapters on the legal aspect, this evidenced preference for principles of contract law will become more obvious. Especially as the current position on causation is outdated and requires review, it is important to understand how a few modern cases have treated issues of causation. The modern case law has demonstrated a preference for this new, more ‘technical’

approach over ideas of common-sense to justify a causal judgement. The technical approach showcases a preference for relying on principles of contract law and principles of interpretation of contract terms, even if it is on a microscopic scale, to establish an efficient cause. The technical approach determines the facts of a case in respect of the terms of the contract being granted the most ordinary and natural meaning, to establish a proximate cause. These advancements come as no surprise as the shortfalls of the law and in practice has produced much ambiguity for the doctrine. As there has been no express renunciation of the common-sense approach, many academics have overlooked this progress and possibility of a new doctrinal approach. Therefore, a contemporary review must highlight the recent advancements and stress their potential impact on the future of marine insurance contracts.

The enquiry will arrive at the position that, although, the law on causation is not much clearer at this moment in time, due to no clear-cut definitive rule arising. A prioritisation of principles of contract and its interpretation, could be the resolution for the existing deficiencies with the doctrine. A new approach favouring principles of contract, rather than legal principles or precedent, has indicated that the doctrine is potentially on the grasp of redefinition and a new test. The most current, yet still limited, academic discussion has identified this new emerging test as the test of inevitability. Thus, this article aims to make way for this new technical approach by attempting to define it and suggest what advantages and impact it may imply for marine insurance.

Chapter Two:
The Current Position of the Law

To begin the enquiry, the existing rules on causation must be scrutinized, more specifically how we define causation as proximate. To truly understand the existing ideology, this chapter will begin with explaining the inherent defect with the doctrine in its definition that has bled into judicial analysis of *causa proxima* over time, to evidence how the rule changed from temporal proximity to efficient proximity. The justifications for this change will highlight the aims of the current position on causation which will empower the enquiry to determine whether the current rule has achieved its intended purpose or whether it is outdated and requires review. The change in the idea of causation believed the new rule of efficient proximity to offer reliability, consistency and maintain reasonable expectations for parties as to the effect of their insurance contracts. The lack of a true, stable definition will become apparent, which has inspired ideas that the doctrine may not be capable of being consistent. In turn, this will allow the essay to establish whether the current rule is appropriate to maintain.

The most fundamentally significant account of proximity in the law on causation featured in the Marine Insurance Act 1906 (hereinafter 'MIA 1906'), successfully drafted by Sir Mackenzie Chalmers, which remains one of the most generally significant measures for marine insurance to this day. The MIA 1906 section 55 provides that, 'unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against', but the insurer is not 'liable for any loss which is not proximately caused by a peril insured against'.[3] The statute successfully highlighted how causation is crucial to marine insurance, as it determines whether an insurer is liable to pay for damages or loss incurred by the policyholder. It is a tool in determining whether the loss was brought about by something insured against, thus, something claimable. This legislation was critical to formally cementing the importance of *causa proxima* into marine insurance, however, it failed to give any explicit account of what 'proximate' causation should include.

The lack of a definition for proximity has posed one of the greatest issues for causation and its lack of clarity has divided judiciary. As stated before, the definition is merely the first defect in the doctrine, as the greater issue is the sensitivity of the matters it occurs in.[4] The greatest difficulty in causation is to adequately account for all circumstances of concurrent causation. Especially as section 55[5] offers little guidance or remedy for the prospect of concurrent causation, where one cause is insured, and another is either uninsured or expressly excluded. Few examples such as: wilful misconduct, delay or latent defects or inherent vice are offered

[3] Marine Insurance Act (MIA) 1906, s 55(1)
[4] Özlem Gürses, 'The Proximate Cause of Loss' in D Rhidian Thomas, *The Modern Law of Insurance,* vol 5 (Routledge 2023) p 172
[5] MIA 1906, s 55

to guide situations where the insurer should not be found liable, unless the policy otherwise provides.[6] Which are useful, but not extensive. This was the effect of the MIA 1906 being a codifying bill, which intended to state what the law is at one point in time, 'neither to improve the existing law through proposing reform' or to 'extend it by proposing solution to questions that had not yet generated reported legislation'.[7] Bennet inspired the idea that the MIA 1906 reflects how the law stood in the past, although providing some foundation to the doctrine, its applicability to modern, complex situations is limited. On the other hand, the MIA 1906 achieved more than its word, by adopting values of freedom of contract and certainty.[8] It does so by the inclusion of wording 'unless the policy otherwise provides'[9], which permits the parties in contract to freely choose their liability in particular occurrences that the Courts must uphold and respect. The commonly referred to 'intentions of parties' are reference to the standard principles of English contract law, that all contracts, even insurance contracts, are subject to.[10] Such as freedom of contract, privity, and sanctity of contract and more. Sanctity of contract refers to the honour of parties in respect to their obligations, commonly referred to as the reasonable expectations of parties to uphold the terms they agreed upon. Privity of contract is the principle that ensures that only the parties to the contract can enforce such terms against one another. As true for all contracts, contracting parties are 'generally free to formulate their contract or contracts as they wish'[11] and this means that as parties are the 'best judges of their own interests… the only function of the law [is] to enforce it'.[12] Thus, the vagueness of proximity in statute was left to the judiciary's interpretative facility to develop a definition and test for causation, in respect of these principles of contract law, to fit commercial contexts in marine insurance.

To appreciate the tradition of causation, it is important to go back to the first accounts of causation in English insurance law which can be traced back to 1630[13], and this generally entertained the concept of the temporal cause. The immediate cause, or proximate in time, was deemed to be the effective cause, irrespective of the context before it.[14] This was found by looking at the succession of events.[15] The common adage of "*causa proxima et non remota spectator"*[16], highlights the purpose of causation concerning immediacy and not a remote cause. Otherwise, best understood as the act of deciding that the cause is always the last

[6] *ibid,* S 55(2)(a)-(c)
[7] Howard Bennett, 'The Marine Insurance Act 1906: Reflections on a Centenary' (2006) 18 SAcLJ, p 670
[8] *ibid,* p 685
[9] MIA 1906, s 55
[10] Meixian Song, *Causation in Insurance Contract Law* (Routledge 2014), p 2
[11] F.D. Rose, *Marine insurance: Law and Practice* (2nd edn, Informa Law London 2012), p 119
[12] Hugh Beale, *Chitty on Contracts: General Principles,* vol 1 (32nd ed Sweet & Maxwell 2015)
[13] Meixian Song, *Causation in Insurance Contract Law* (Routledge 2014) p 2
[14] *ibid*
[15] *Pink v Fleming* [1890] 25 Q.B.D 396
[16] *Dudgeon v Pembrook* [1877] 2 AC 284, 296

occurrence that happens before the damage or loss occurs, regardless of the actual impact of that last occurrence.

The greatest change to causation came near the end of the 19th century and beginning of the 20th century[17], where the law began looking at the efficiency of a cause rather than is proximity to the loss or damage in time. This was due to circumstances arising where the last occurrence before the loss or damage was virtually arbitrary to bringing about the cause. The idea of proximity relating to efficiency rather than time was inspired by Aristotle's notion of an 'efficient' cause, meaning 'something that is the agency of change'.[18] Despite the change in meaning[19], the term 'proximate causation' lexically remained stasis. This may appear problematic or confusing, especially considering the dictionary defines proximate as 'Coming immediately before or after in a chain of causation, agency, reasoning or other relation… as opposed to remote or ultimate'.[20] The association with immediacy is naturally understood with closeness in time. However, legally this did not appear problematic for the acceptance of proximity being understood as efficient[21], as the landmark case of *Leyland Shipping Ltd v Norwich Union Fire Insurance Society Ltd* (hereinafter *Leyland* case)[22], which was the catalyst for this change, was generally welcomed. Though the debate on the lexical nuances of the concept of proximity 'is not the reason for such lengthy disputes and arguments', proximity has troubled academics more due to the 'high level of its sensitivity to the legal context in which it arises'.[23] Nevertheless, despite the transition away from temporal determination of causation, the *Leyland* case did not intend to entirely reject that the immediate cause can be the effective cause too. The Courts contended their decision as adding another layer of consideration, as one can now ask whether the immediate cause was applied with 'good sense to give effect to, and not to defeat the intention of the contracting parties'.[24] Meaning that if the immediate cause in time was found to be the cause of the loss, and it defeated the purpose of the insurance policy, this would create an unjust result and would undermine the privity of contract. Thus, when making a causal judgement, the judiciary can now turn to common-sense principles to determine whether the proximate cause is efficient.

The most significant development, and the most leading authority, in the definition for proximity in causation can be derived from the *Leyland* case*,* which confirmed the position in

[17] Meixian Song, *Causation in Insurance Contract Law* (Routledge 2014) p 2
[18] *Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] UKSC 1, 165
[19] *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* [1918] AC 350
[20] 'Proximate' Definition extracted from Oxford English Dictionary Online <https://www.oed.com/dictionary/proximate_adj?tab=meaning_and_use> accessed 25 September 2023
[21] *Leyland* (n 19)
[22] *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* [1918] AC 350
[23] Özlem Gürses, 'The Proximate Cause of Loss' in D Rhidian Thomas, *The Modern Law of Insurance,* vol 5 (Routledge 2023) p 172
[24] *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* [1918] ICLJ (HL)

Reischer v Borwick[25] giving rise to efficient proximity as we now know it. The case concerned a ship, *Ikaria,* being insured on a policy which 'warranted free of capture seizure and detention and the consequences thereof or of any attempt thereat of piracy excepted, and also from all consequences of hostilities or warlike operation whether before or after declaration of war'.[26] As the *Ikaria* was making a voyage in the midst of the first World War, when the vessel stopped near La Havre, she was torpedoed by a German submarine near a port, her salvage swiftly began as the ship was towed to the outer harbour. Due to its damages, the harbour authorities feared that the vessel would cause a blockage at the busy berth area. During the process of towage, the vessel was damaged after a collision with the quay, that resulted in the bulkheads giving way and causing the ship to sink, becoming a total loss within a few days of the torpedo. The issue in the case was determining whether the cause of the vessel becoming a total loss was the collision with the harbour or the torpedo by German submarine. Especially as the torpedo was a peril that was expressly excluded by the insurance policy, if the cause was found to be the collision with the harbour, then the insurer would be liable. The House of Lords examined the issue with a temporal proximate cause as in this case the damage caused by the collision during the towage of the vessel was not the efficient cause, the damage that caused the vessel to sink originated from the torpedo, thus the cause prior to the immediate one. To avoid an unjust result, the House of Lords reviewed that proximity should be determined with consideration of efficiency and this was to be determined based on common-sense on a case-by-case basis. A truly efficient cause does not lose its hold[27], and the judiciary felt that once the vessel was struck by the torpedo, the vessel was deemed a loss unless it could reach safety, which failed. The House of Lords stated that causation should be envisioned as a net rather than a chain[28], and this is justified by the idea that 'every event may lead to various incidents in which one of them may subsequently become an immediate cause to the loss'.[29] Yet, efficiency can be 'preserved although other causes may meantime have sprung up'[30], the House of Lords believed that this matter was really a question of fact. In the confirmed judgement of *Reischer v Borwick*, Lopes LJ exemplified that causation cannot be viewed in a linear method as events that occur after the main damage is suffered should be capable of being considered as mere independent yet intervening causes, without being attributable to the proximate cause of the damage.[31] The consideration that fundamentally led to this decision was the application of the common-sense of the ordinary seafaring man.[32] Lindley LJ stated that the rule must be

[25] [1894] 2 QB 548
[26] *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* [1917] ICLR (CA), p 1
[27] *Leyland* (n 19), 369
[28] *ibid*
[29] Bima Manopo, Robert Merkin QC, 'A Critical Analysis of Causation Rules in Marine Insurance' (2021) 9 BESTUUR 2, p 10
[30] *Leyland* Case (n 19)
[31] [1894] 2 QB 548
[32] *ibid,* 363

applied with 'good sense' to not defeat the intentions of parties.[33] On the facts of this case alone, the definition of proximity as efficient deems itself as a stable and fair decision, however, as concurrent causation cases become more complex the ideology is challenged. With no set definition, the rules are open to interpretation, based on common-sense. This explanation for choosing one cause over another in circumstances of concurrent causation resulted in the feeling that decisions are guided by an 'unguided gut feeling'[34] potentially leading to arbitrary decisions.[35] This suggests that even with the judicial development of the definition of proximity, the current progress has produced weak means of justifying decisions and may be inappropriate for contemporary marine insurance. The following chapter will in turn identify the features of the current test for causation and the ideologies behind them to identify whether the current position on causation can be practically consistent and justified.

[33] [1894] 2 QB 548

[34] *Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] UKSC 1, 168

[35] Meixian Song, *Causation in Insurance Contract Law* (Routledge 2014) p 28

Chapter Three:
Is the Current Test for Causation Satisfactory?

To establish a proximate cause, one must know how to arrive at such a position, and this is typically done by instituting a test for causation. This is how we can best assess the applicability of the ideas so far explored and whether the test for causation is capable of accounting for all forms of concurrent causation. This chapter will explore the issue of concurrent causation in more detail before analysing whether the current test for causation is satisfactory for contemporary marine insurance practice.

When proximity was redefined to efficiency rather than the immediate in time, academics such as Meixian Song expressed a concern that this development would cause issues with identifying what a proximate cause is.[36] Especially as temporal causation was a considerably easier test once the facts of the events were established. The new rule of determining efficiency intended to determine a dominant singular cause, giving rise to a new debate in the circumstance that when one appeals to the common-sense approach, one may arrive at two efficient causes. If there are multiple dominant causes in the events, this makes the task for determining liability far more difficult, thus, more likely to require expensive litigation to determine.

As causation has moved away from the test of which possible cause came immediately before the loss or damage has occurred, the test for proximity now considers which cause is 'predominant' and 'efficient'.[37] Dominancy and efficiency are determined on a common-sense basis such as in *Leyland*[38], when the House of Lords appealed to common-sense principles, they believed that the 'ordinary man would have any difficulty in answering… [*Ikaria*] was lost because she was torpedoed'.[39] In a later case, which applied the *Leyland* rule*,* Lord Wright highlighted that 'the choice of the real or efficient cause from out of the whole complex of the facts must be made by applying common sense standards.'[40] Therefore, to understand efficiency, it appears fundamental to know what is meant by the common-sense approach. However, it is not uncommon for judges to appeal to 'common-sense principles' without expressly explaining such a concept in their understanding, they tend to 'fail to identify any of the specific factors or principles influencing their decision'.[41] As Song presents, 'common sense connotes a general and indefinite meaning'[42] so far as to conclude that the common-sense test has led to 'arbitrary decisions'. [43] Although we cannot say with certainty which specific

[36] *ibid*
[37] *Leyland* (n 19), 363
[38] *ibid,* 362
[39] *ibid*
[40] *Yorkshire Dale SS Co Ltd v Minister of War Transport, 'Coxwold'* [1942] 73 LI.L. Rep 1 HL, p 10
[41] Andrew Summers, 'Common-Sense Causation in Law' (2018) 38 OJLS 4, p 795
[42] Meixian Song, *Causation in Insurance Contract Law* (Routledge 2014), p 28
[43] *ibid*

factors the House of Lords then considered as part of their approach, academic, Andrew Summers offers two principles from Hart and Honoré's theory of causation to justify what the common-sense test is. [44] These include the abnormality principle which states that 'what is abnormal … is what "makes the difference" between the accident and things going on as usual'.[45] Abnormal and normal are determined on the contexts of the case, such that in the case of *Leyland* the abnormal event was the torpedo of the *Ikaria*. Abnormality is best explained in the negative, as normality is typically context-specific custom or habit, or something ordinary. In *Leyland* the salvage of the *Ikaria* was custom, despite it resulting in its further damage. Hart and Honoré's second principle is the 'choice principle', which requires the cause to be relating to a 'voluntary action intended to bring about what in fact happens'.[46] Such that the German soldier who had started the torpedo of the *Ikaria* to bring about its loss, rather than the salvors who intended to save the vessel. Summers supports these theories on the basis that the law is concerned with the 'plain man's notions of causation'.[47] However, despite Summers' promotion of this theory, Summers agreed that the vagueness of the approach remains[48] as even the principles were said to be based of 'assertion rather than evidence'.[49]

In *Monarch Steamship Co Ltd v Karlshamns Oljefabriker*, this theory was considered as the judiciary appealed to the 'ordinary, every-day life, thoughts, and expressions'.[50] In the context of marine insurance, the judiciary must consider that the knowledge of this ordinary person to make a causal judgement must be informed with some maritime knowledge due to the complexity of the nature of work and industry. An obvious but great shortfall of this test is how one determines what an 'ordinary person' considers when deciding a causal judgement not based on legal reasoning, and how judges reach an agreement on what this 'ordinary person' would decide. The common-sense approach is not a truly objective test, and where views differ, the law arrives at different positions. For this reason, Song and other scholars have argued that the law based on common-sense principles cannot be consistent, as it is too broad of a test, leaving terms of insurance contracts to subjective interpretation. Perspectives between judiciary may differ, producing unpredictable results. Such that the contracting parties have limited certainty in the effect of their terms in dispute. The application of the common-sense approach is too uncertain to produce that stability.

There are two instances that prove difficult for the efficiency test and that is independent and interdependent concurrent causes. Independent causes can be equally efficient but unrelated to

[44] Andrew Summers, 'Common-Sense Causation in Law' (2018) 38 OJLS 4, p 798
[45] HLA Hart, Tony Honoré, *Causation in the Law* (2nd edn, Clarendon 1985), p 35
[46] *ibid,* p 42
[47] Andrew Summers, 'Common-Sense Causation in Law' (2018) 38 OJLS 4, p 799
[48] *ibid*, p 800
[49] Jane Stapleton, 'Causation in the Law' in Helen Beebee, Christopher Hitchcock, Peter Menzies (eds), *The Oxford Handbook of Causation* (OUP 2009), p 756
[50] [1949] AC 196 HL, 228

each other, a lot of discussion with independent causation arises in the context of when one cause is an inherent vice, which means that the fault occurs at the tendency of the vessels deterioration or self-destruction. Inherent vice considers the 'inherent characteristics of or defects in a hull or cargo leading to it causing loss or damage to itself'[51], such that the fault must bring about the object's own self-destruction without 'any fortuitous external accident or casualty'.[52] Inherent vice proves problematic because they cannot occur in conjunction with a peril of the sea, and most policies exclude inherent vices or defects, as supported by s55(2)(c) MIA 1906. A peril of the sea is what a marine insurance policy insures against.[53] The insurance policy will expressly offer indemnity for the assured if they suffer a loss or damage due to this risk. This often requires some fortuity of the event, so not every accident or loss that occurs at sea is necessarily a 'peril of the sea'.[54] The next instance is interdependent causation which describes when there are concurrent causes that would not have occurred if it were not for the other, these are not entirely distinct perils, yet possess somewhat-equal efficiency in causing the effect. Interdependent causes are causes that could not have produced the result on their own. It will become evident how interdependent causes were commonly accepted to satisfy the test for efficiency, as equally efficient causes to the same loss or damage therefore it was easier to determine whether uninsured or excluded perils can be recovered from. It begs to question how we determine the cause when there are concurring independent causes, this is where the traditional test, known as the 'But-for test' could be utilised.

In addition to the common-sense approach to causation, there are other traditions that the judiciary can appeal to when concluding a causal judgement, one of these commonly known traditions is the but-for test. The leading case for the 'but-for' tradition in insurance law is the *Orient Express Hotels v Assicurazioni Generali.*[55] Although not a marine insurance case, this case had a great impact on many insurance sectors. When a hotel in New Orleans was damaged by hurricanes Katrina and Rita in 2005, it was forced to close for two months and thereafter it operated under limited services. Much of New Orleans was heavily damaged after the hurricanes and businesses had to operate under curfews. When the owners of the Orient Express Hotel attempted to claim under their insurance policy, they had the choice of two potential clauses: the material damage clause that contained all physical loss destruction or damage within a set meaning, or under the business interruption clause which covered the loss due to interference with the business directly arising from damage and as otherwise more specifically detailed. The issue in the case here was that the damage was solely assessed by the arbitrator on the basis that the loss was attributed to the damage to the hotel rather than wider damage to the city. To claim on the business interruption clause the hotel would have had to prove that

[51] *Syarikat Takaful Malaysia Berhad v Global Process Systems Inc* (The Cendor Mopu) [2011] UKSC 5, 81
[52] *ibid*
[53] *Anderson & Co and Mersey Marine Insurance Company* [1898] 2 Q.B. 114
[54] *Cullen v Butler* [1816] 5 M & S 461
[55] [2010] Lloyd's Rep IR 531

the hotel suffered business interruptions due to the damage to the city in general, not just the hotel. Must the damage to the city be an indispensable cause of the loss, or can it be mere explanation? The Courts famously decided that this is where the but-for test can be applied. The but-for test is the question to decide between independent causes which asks: would the damage or loss have been suffered if it were *but for* the cause? The but-for test has been seen in other areas of law, but this was the first account in insurance law, as the Courts felt that there was no error in the law in applying the but-for test to limit recovery to such losses solely attributable to damage to the hotel only. In this instance the but-for test was applied so that the business interruption would not have occurred if it were not for the damage the hotel sustained in the hurricanes. But the damage to the city was too remote to permit the insured to claim on the same business interruption clause. Here the two clauses were purposely divided to determine two independent causes. This evidences that perhaps when there are two efficient causes to business interruption, some additional test must be considered to narrow the ambit of what the insurer could be liable for. This test was frequently used to narrow the broader common-sense approach, although, the but-for test's use is limited to circumstances of independent causes, and the question of how the but-for test treats insured and excluded perils remains undecided.

The entire ideology of concurring causation is problematic, it is natural to doubt how one determines which cause is more efficient than the other, or what it means for the insurer's liability if there are two equally efficient causes. The matter is further complicated when the concurring causes are either an insured peril of the sea, not an insured peril or a peril that is expressly excluded from the policy from creating any liability for the insurer. Due to the change, the test for proximity would need to effectively account for all these instances and achieve a fair distribution of liability for insurers and policyholders. This is where the enquiry will try to address the issues that recent cases have presented to the potential tests for proximity in these situations, highlighting that a review of the doctrine of causation in marine insurance may be due.

Chapter Four:
Inconsistency of Causal Judgements in Practice:

To determine whether the now-accepted test for causation accounts for all cases of concurrent causes and whether it can be consistently applied in marine insurance, it is necessary to observe the application of the common-sense test in the cases that followed. The first significant case to appeal to the *Leyland* rule is the case of *Wayne Tank and Pump Co Ltd v Employer's Liability Assurance Corp Ltd*[56] which concerned two concurrent causes where one cause was an insured peril, and the other was excluded from the policy. The case involved a new piece of machinery being fitted into a mill, which was negligently installed, the same night an employee of the mill left the heating tank on unattended, which later set on fire. The issue at case was that the negligent installation of the mill machinery was included in the insurer's exemption from liability in the policy, so the only possible avenue for the claimant to recover for damages on their policy would be if the cause of the damage was found to be as a result of their employee's actions. The Courts applied the *Leyland* rule and found that the dominant cause was in fact the negligent installation of the mill machinery as the dangerous installation meant that the machinery was never fit for its purpose, hence, it posed an extreme danger if turned on.[57] The Courts believed the fire would have broken out regardless of whether the employee had attended the defected mill. This case crucially highlighted that when Courts are faced with two possible causes, with potentially equal efficiency, if one of the causes is an exempt peril, the Courts must uphold the parties' intentions when drafting the policy and retain the exemption from liability. This indicates that although judges will apply the common-sense approach to determining which is the efficient cause, this will be balanced with the appreciation of sanctity of contract[58] and the parties' intentions at the time of the policy being opened. This indicates the power of general principles of English contract law in conjunction with the common-sense test. By looking at contract formation, the parties' intentions can help form an understanding of what a reasonable seagoing man would determine in its causal judgement. This case presented a straightforward question of causation as one of the causes had a greater effect at bringing about the damage, making it an obvious dominant cause. Effectively creating the *Wayne Tank* rule which states that where there are two or more proximate causes of damage, where one is insured and another is excluded on the policy, the exclusion must apply to both causes equally, therefore the exclusion will apply to the whole potential claim. Thus, presenting how the principle of sanctity of contract can limit the common-sense approach. In the circumstance of excluded risks, the Court has no power to 'improve' on the instrument that it is called on to interpret[59], thus it must respect the parties intentions to prevent liability for the insurer for such excluded occurrences.

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[56] [1974] QB 57 (CA)

[57] *ibid*, [1973] Vol 2 LLR, p 240

[58] Hugh Beale, *Chitty on Contracts: General Principles,* vol 1 (32nd ed Sweet & Maxwell 2015), p 21

[59] *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10; 1 WLR 1988, 22

The next case to demonstrate the applicability of the *Leyland* test is *The Miss Jay Jay*[60], in which a vessel which was poorly designed in manufacture encountered adverse weather conditions, resulting in *The Miss Jay Jay's* breaking apart at sea. The faulty manufacture made the ship unseaworthy, however, if it were not for the poor conditions at sea, which were not extreme but considerably worse than expected, the vessel would not have suffered such damage. Ship defects or manufactural defects (also known as inherent vice) are not typically insured in a marine insurance policy, and although it was not expressly excluded, it could not purely be claimed upon. The policy included an exclusion for the claim to remedy manufactural faults with the vessel, similar as seen in *The Wayne Tank* case, however, the Courts decided that this did not cover manufactural faults that have caused greater damage or loss to the vessel itself in a fortuitous event. The Courts believed that the causes had equal efficiency in bringing about the damage to the ship, and as one of the proximate causes were fortuitous weather conditions, this could validly satisfy the policy cover for 'external accidental means'.[61] When the common-sense approach was applied, the judges felt that the two causes were equal, or at least almost equal, in their efficiency.[62] This case can be differentiated from the *Wayne Tank* rule as the uninsured peril was not expressly excluded from the policy, so the judiciary have a wider ambit in determining whether the policy is contrary to parties' intentions as it is less clear whether the parties intended to exclude this risk. As the causes had a somewhat contributory effect to equally bringing about the damage, which was previously defined as interdependent causes, the judiciary are prepared to acknowledge this connection to permit recovery on the insurance policy. This position was reaffirmed in *IF P and C Insurance Ltd v Silversea Cruises Ltd.*[63] More significantly, *The Miss Jay Jay*[64] and *Wayne Tank*[65] both demonstrate how the determination of insured, uninsured, or expressly excluded perils has the power to affect the equilibrium of interests and liability between insured and insurer by principles of contract law. Judging from the reasoning behind the differentiation of the two cases, principles of contract law and interpretation play a bigger role than the common-sense approach.

Since the Courts are not to 'improve' on the instrument that they are called onto construe[66], it appears unnatural for Courts to interpret on a clause that is not expressly excluded or an insured peril to create liability for an insurer. Naturally, the absence of an inclusion or exclusion of a risk in an insurance policy should indicate a lack of intention of the parties. In this case it appears that the Courts almost fashioned or extended the insurance policy to widen the insurer's liability. Especially as the parties to the contract 'are to be the best judges of their own

[60] *Lloyd Instruments Ltd v Northern Star Insurance Co Ltd* (The Miss Jay Jay) [1987] 1 Lloyd's Rep 32 CA
[61] *ibid*
[62] *ibid,* p 40
[63] [2003] EWHC 473
[64] *ibid*
[65] [1974] QB 57 (CA)
[66] *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10; 1 WLR 1988, 22

interests'.[67] This contradicts the position in *The Miss Jay Jay* as it can be argued that by no mention of the peril on the insurance policy, this should be read as equal to an express exclusion, as this could be increasing the number of perils that the claimant can claim against that the insurer is not anticipating covering, thus potentially not reflecting their commercial expectations or capabilities. The general position on liability for the insurer is calculated as 'the lower sum insured under the policy and the amount of loss'[68], however, this method of calculating the insurer's reasonable expectations to claims would be rendered futile if any risk, despite not being included in the policy, could generate liability. Thus, disturbing the commercial expectations for insurers and creating uncertainty when adjusting premiums for insurance policies.

Nonetheless, this position can be read as only occurring in the situation where there are interdependent concurrent causes where one is insured and one is uninsured, which limits what uninsured perils can be recovered against. This is because without one of the causes happening, the other would not have occurred, thus the uninsured peril has some way, or another contributed to the loss or damage equally caused by the insured peril. This rule does not provide any guidance for independent concurrent causes because for an uninsured peril to create liability for the insurer it must be causally connected to the insured peril. Although, the issue of independent causation did not preclude the acceptance of this rule because of the complimentary 'but-for test'.[69] The 'but-for test' provided a necessary minimum requirement for independent causes to satisfy to determine their effect to bring about the loss or damage. Nonetheless, insurance companies can be clearer about excluded perils, as they have freedom to contract and if they did not wish to cover such claims, a clearly worded exemption must be put in place and agreed to, to prevent them from deriving liability. Reaching a satisfying equilibrium, as an insurer's liability is not exposed to unlimited uninsured risks, whilst allowing an assured to claim on all aspects that have equally and jointly contributed to the loss or damage. In turn, balancing both parties' reasonable expectations as to the effect of their insurance contract. As the maritime industry is constantly adapting, in commercial arrangements, vessel capabilities and etc, all risks cannot be foreseen by the insurer. As new risks are constantly presenting themselves, if an uninsured risk presents itself as interdependent to an insured risk, and it does not defeat the general purpose of the contract. There is no reason that the assured's expectations to adequately protect their vessel should be limited. By limiting these new unforeseen risks exclusively to only being permitted to create liability if they occur interdependently to an insured risk reaches a sensical equilibrium. In conjunction, the landmark cases of *The Wayne Tank* and *The Miss Jay Jay* have produced rules that operate 'as the

[67] Hugh Beale, *Chitty on Contracts: General Principles,* vol 1 (32nd ed Sweet & Maxwell 2015) p 22
[68] F.D. Rose, *Marine insurance: Law and Practice* (2nd edn, Informa Law London 2012), p 132
[69] *Orient Express Hotels* (n 55)

equilibrium between assureds and insureds'[70] based on general principles of contract law, more so than the common-sense test.

The first case that signified a greater issue in the test for causation is *The Cendor Mopu*[71], which was another case determining an efficient cause between two interdependent causes where one is insured, and another is excluded. Controversially, the Courts decided that when an insured peril sufficiently intervenes in the occurrence of the expressly excluded risk then the insured peril prevails, thus generating liability for the insurer. The case regarded a claim under the policy for three legs part of an oil rig, which were insured under a policy incorporating the institute cargo clauses (a).[72] When one of the legs broke off due to fatigue cracking on the barge, it was unclear whether the cause of the loss of the leg was due to an inherent vice, or whether it was due to the weather conditions the barge encountered in the voyage. The High Court and Court of Appeal disagreed whether the inherent vice which caused the loss of the leg was the efficient cause, as inherent vices are not covered by the policy. The Court of Appeal reversed the earlier decision and held that the insurer should be liable as the loss was proximately caused by the perils of the sea, such as the weather conditions encountered; this was upheld by the Supreme Court. This case evidenced the extent of disagreement behind decisions regarding causation, specifically on how to apply the test for efficiency to circumstances where an uninsured inherent vice and insured peril are concurring. This meant that the insured peril of poor weather conditions or rough sea conditions has sufficiently intervened with the cause of inherent vice, to break the chain of causation. Such that the position is read that these two events cannot happen concurrently.[73] This case was crucial as it demonstrated that acceptance of two causes may not be the appropriate way to be treating concurrent causes and in the instance of inherent vice that has been interfered with by an insured peril of the sea, the latter is the true cause. This merely demonstrates that English law does not have a set up rule of causation as to the proof of the cause of loss[74] as the divergence of the treatment of inherent vice does not fit with the understanding of concurrent causation from the *Wayne Tank* case. This reasoning in this case interestingly considers whether the adverse weather conditions broke the chain of causation where the inherent vice was the initial cause, yet the Courts were attempting to refrain from looking at causation as a chain.[75] The Court's decision shocked insurers as the Supreme Court went to 'considerable lengths to explain the meaning of inherent vice and perils of the sea'[76] before contemplating

[70] Bima Manopo, Robert Merkin QC, 'A Critical Analysis of Causation Rules in Marine Insurance' (2021) 9 BESTUUR 2, p 105
[71] *The Cendor Mopu* (n 51)
[72] International Chamber of Commerce, Institute Cargo Clause (A) 1982
[73] Bima Manopo, Robert Merkin QC, 'A Critical Analysis of Causation Rules in Marine Insurance' (2021) 9 BESTUUR 2, p 102
[74] M Song, *Causation in Insurance Contract Law* (2014, Routledge) p 102
[75] *Leyland* (n 19), 369
[76] M Song, *Causation in Insurance Contract Law* (2014, Routledge) p 81

which was the proximate cause. Further indicating that perhaps intentions of parties can be found in the natural meaning of words before any idea of common-sense.

Further doubt was casted upon the test for causation in the case of *The Kos*[77] where the Courts had to decide whether in the circumstance of lawful withdrawal of non-payment for hire under a time charterparty, the claimants or shipowners, could recover damages either by indemnity clause or bailment. This was because in the almost three days that the offloading of cargo took for the charterer, it had to be determined whether the shipowner was entitled to be remunerated for the offloading services in this time, bunkers consumed and the time it took to negotiate the withdrawal. There was a big disagreement between the High Court, and the Court of Appeal, but the Supreme Court upheld the ruling which decided that the owners of *The Kos* could recover under the indemnity clause. Interestingly, although dissenting, Lord Mance considered that although two causes are capable of being effective, and one recognises that there are concurrent causes upon the facts, it may not mean that they are both necessarily proximate causes in law.[78] Lord Mance emphasised the 'theoretical' nature of concurrent causation[79] which has 'little practical application in the authorities'.[80] More notably, Lord Mance stressed the lack of a set rule nor a true precedent. Therefore, to sympathise with Lord Mance's view, it is clear how despite all attempts to establish a test, there is not one stable satisfactory account for all circumstances of concurrent causation.

Producing another contradictory position, the acceptance of two causes being potentially equally efficient and dominant[81] continued to be emphasised, as Courts accepted that with the new approach, a singular cause may not always be the right answer as temporal *causa proxima* would have concluded. This was the view in the foreground of *Atlasnavios Nevgacao Lda (formerly Bnavios Nevegacau Lda) v Navigators Insurance Co Ltd (The B Atlantic)*.[82] In this case, the vessel was insured under a war risks policy which contained an exclusion for the arrest or detainment under quarantine regulations or by reason of infringement of any customs or trading regulations.[83] The vessel was found with cocaine-filled parcels strapped to the vessel underwater, placed there by an unknown third-party attempting to smuggle the drug from Venezuela. Under Venezuelan law, this was a criminal offence that resulted in seizure of the vessel for precautionary measure. As the vessel was considered a constructive total loss after over six months in detention, the question was raised whether the shipowner could recover the ship's insured value from the vessel's war risk insurer. The claimants sought resolution on the

[77] *Petroleo Brasileiro SA v E.N.E Kos 1 Ltd (The Kos)* [2012] UKSC 17
[78] *ibid,* 41
[79] Meixian Song, 'Revisiting Concurrent Causation and Principles in English Insurance Law: A Legal Fiction?' (2021) 6 JBL
[80] *Petroleo Brasileiro SA v E.N.E Kos 1 Ltd* [2012] UKSC 17, 40
[81] *Wayne Tank & Pump Co Ltd v Employers Liability Assurance Corp Ltd* [1974] QB 57
[82] [2018] UKSC 26
[83] *ibid,* p 24

two issues: whether the concealment of drugs constitute a malicious act which was covered within their war risk policy by clause 11.5, or whether the arrest of the vessel constituted the excluded peril in clause 4.1.5.[84] Although, at first instance the exclusion was rejected, the Court of Appeal reversed the decision as they held that the loss was caused by both the concealment of the drugs by the unknown third-party, and the detention of the vessel by Venezuelan Authorities.[85] When the case reached the Supreme Court, the judiciary identified that it is almost unnatural for insurance to accept more than one proximate cause of loss. However, in some cases, there may be two concurrent causes of loss, particularly where there is an exclusion of perils under the policy.[86] Continuing the position on excluded perils, the claim failed as the seizure and detainment were found to arise from the excluded peril of infringement of customs regulations. It was generally concluded that perhaps it is no longer necessary to identify a singular efficient and dominant cause as the ruling prioritised giving the natural meaning of the words in the contract prior to applying causation principles.[87] Priority was granted to the rules of interpretation and general contract law prior to the common-sense test. *The B Atlantic* case occurred shortly after the *The Cendor Mopu*[88]*,* which instilled doubt as to the treatment of excluded perils, especially as in *The Cendor Mopu* the Courts did not consider concurrent causation as a substantial subject in their decision.[89] However, *The B Atlantic* followed the established *Wayne Tank* rule[90], whilst providing the same reasoning and preference, as *The Cendor Mopu,* for granting the words of the contract their natural meaning to aid their interpretation to determine intentions rather than the common-sense test. This produces a confusing position of the law, and an unhelpful guide for future cases. As the analysis on concurrent causation in these cases has been limited, it becomes clear that there is almost an avoidance in addressing the deficiencies in the rules on concurrent causation in the Courts. Both rulings have stressed the importance of the wording of the contract, but do not renunciate the use of the common-sense test, creating a sense that the doctrine is in a limbo. The difficulty in the law on causation in all matters of insurance is that it is extremely difficult to establish one rule to fit all possible circumstances of insurance, thus, overruling an old precedence would mean suggesting there is a new rule in place of it, though none of these cases have attempted to suggest a new rule nor a renunciation of the old rule. Making this an even more significant topic to discuss academically. The Supreme Court stressed the principles of contract and principles of interpretation as they are far clearer rules to rely on and apply, as they are

[84] *ibid*
[85] *Atlasnavios Nevgacao Lda (formerly Bnavios Nevegacau Lda) v Navigators Insurance Co Ltd (The B Atlantic)* [2016] EWCA Civ 808
[86] *ibid,* [2018] UKSC 26
[87] *ibid,* 40
[88] *The Cendor Mopu* (n 51)
[89] Meixian Song, 'Revisiting Concurrent Causation and Principles in English Insurance Law: A Legal Fiction?' (2021) 6 JBL
[90] *Wayne Tank* (n 81)

generally less subjective. Instigating that the future of causation and its progression could be better found in more objective means of testing.

The law on causation has not made many significant advancements since the *Leyland* case and this is exemplified in the back-and-forth applicability to concurrent causation in the circumstance of either cause being an insured peril with an excluded peril or an uninsured peril. Although, it is not wholly consistent, the general progress over the century has been towards the acceptance of multiple causes resulting in the same loss or damage. The position at this point can now be summarised as: to achieve a causal judgement, the Courts look towards the contract formation and wording, the parties' intention at the time of contracting, and the policy wording against the context of the event. If there are two causes, and one is insured and another is uninsured, then if the causes are interdependent, then the insurer will be liable for the loss or damage so far as the policy permits for the damage or loss caused by both causes. If there are two causes, and one is insured and another is excluded, then even if the causes are interdependent, they cannot produce liability for the insurer for the excluded peril as the intention of the parties' at the time of construction of contract was to not produce liability for the insurer in such circumstances, and this must be upheld by the Court. If contract construction does not produce an obvious solution for the causal judgement, the Courts can appeal to common-sense principles to justify their decision. Thus, reducing the possibility of having to resort to the obviously arbitrary common-sense test. As suggested throughout the essay, if this was the position that the Courts settled on, there would be little question as to whether we have an established doctrine of causation in marine insurance. The doctrine of causation requires greater objectivity and clarity, something that a more technical analysis of the wording of the contract can mediate. The lack of certainty in concurrent causation still poses an issue that will be demonstrated in more modern cases, which is an unsurprising progression considering the frequent disagreement between different Courts. The next chapter will put these positions to the test and illustrate how perhaps it is finally time for a more in-depth revision of the *causa proxima* concept and the test for causation.

Chapter Five:
Modern Insurance Cases and their Impact on *Causa Proxima*

To determine the modern position on causation in marine insurance, it is vital to consider a wider context, such as when the rule has been applied in recent general insurance cases. These cases have finally addressed issues of subjectivity of the common-sense test and independent causation. As concurrent causation posed the biggest issue for the test for causation, it is interesting to see how the Courts have applied the existing rule to such unique circumstances such as the Covid-19 pandemic. The three cases discussed have arguable significance to the general precedent, with commentators being quite unsettled on whether they signify a change or a simple application of the existing position.

The first modern case that explored the doctrine of causation is the *Financial Conduct Authority v Arch Insurance (UK) Ltd.*[91] This case was brought by the Financial Conduct Authority under the Financial Markets Test Case Scheme, which is a new method of adjudicature brought about for the benefit of policyholders in the general market. The test case scheme aims to decide matters of 'general importance' to a specific industry market entirely, which requires the attention of authoritative English law guidance fast.[92] These are brought by mutual agreement between market participants, in this case, eight insurers brought the claim collectively before the Court. The case regarded the business interruption clause in policies and whether assureds can claim on this clause during the period of the nationwide lockdowns during the Covid-19 pandemic. Businesses were interrupted not only by the nationwide implementation of lockdowns but also by staff falling ill and having to isolate for unexpected periods of time. The issue at case was whether the policy wording accounted for both types of business interruptions faced in the pandemic and to what extent the pandemic satisfied the 'disease clause' in the policy.

In the first instance, the case believed that the test for causation should not overly focus on the nuances of the wording in the policy, yet rather the wording of 'following' can be interpreted to mean a looser form of causal connection than would normally be required.[93] The initial decision held that 'following' creates a requirement that 'is less than proximate causation'[94], thus covering indirect effects of diseases. In contrast, if the parties used the wording 'directly or indirectly caused by'[95], this would have created a stronger impression of whether the peril

[91] [2021] UKSC 1

[92] Sean Burke, 'A Contemporaneous evaluation of the Degree of Success of the Financial Markets Test Case Scheme in the seminal case of Financial Conduct Authority v Arch Insurance UK Ltd and Others [2021] UKSC 1' (2023) VIII LSE LR, p 288

[93] *Financial Conduct Authority v Arch Insurance (UK) Ltd* [2020] EWHC 2448 (Comm), 162

[94] Johanna Hjalmarsson, Meixian Song, 'The FCA Test Case: Causal Expressions in the Insurance Context' (2021) Lloyd's Shipping & Trade Law 1

[95] *Coxe v Employers' Liability Assurance Corporation Ltd* [1916] 2 KB 629

must be a proximate cause, thus demonstrating a clearer intention of the parties. However, this did not prevent the Courts permitting the assured's recovery under both clauses, as the law on causation did not turn on such 'nuances'[96] in contract. The Courts felt that such 'microscopic' analysis was overly pedantic over singular wording choices, conveying too strong of a deliberate choice of semantics.[97] Such that it was better to observe the intention of the parties from the whole clause rather than singular words. It was believed that it was unlikely the insurers and assureds gave that much attention to the meaning behind each word agreed upon. The High Court avoided opening a discussion on causation by addressing the insured peril to be all of Covid-19 under the notifiable disease clause, this meant that they were able to provide a ruling without relying too much on previous precedence.[98] This demonstrates the avoidance of discussing the established law as perhaps it complicates matters and decisions too much for effective decision-making. Although, considering this case is the first Test case of its kind, perhaps it was appropriate to leave the question of old precedent to cases that were not attempting to achieve a fast resolution. Especially as it was not the intention of a Test case to provide a 'thorough analysis' which was the view contested by Johanna Hjalmarsson and Meixian Song.[99] In agreement, Sarah Turpin commented that the Test Case Scheme intended to provide clarity for only the most significant market-wide contractual disputes, despite appreciating the multitude of issues at play here for assureds.[100] This is largely because of the fast pace of this case, this scheme intended to bring about quick, general decisions that affected the whole market or industry, affecting policy-making more than legal precedent.

Upon appeal, the *FCA Test* case was leap-frogged to the Supreme Court, where the insurers argued that the policyholders would have suffered equal or nearly equal business interruption regardless of whether the Covid-19 regulations had come into force. The claimants attempted to rely on the but-for test from *The Orient Express*[101], to claim that if it were not for the Covid-19 regulations, the business interruptions would not have occurred. Although, the appeal focused largely on issues of proving causation, the Courts felt that the nature of the clause could be properly determined by giving the natural interpretation to the meaning of the disease clause which supplemented the business interruption clause.[102] The real issue was felt not to be one of causation but 'the legal effect of the insurance contract as applied to a particular factual

[96] *FCA Test* (n 91), 162
[97] Bima Manopo, Robert Merkin QC, 'A Critical Analysis of Causation Rules in Marine Insurance' (2021) 9 BESTUUR 2, p 103
[98] John Dunt, 'Marine Insurance and the FCA Test Case: The Impact of the Modified and Refined Test of Causation on Marine Insurance, in particular Marine Cargo Insurance' (2021) Lloyd's Shipping & Trade Law
[99] Johanna Hjalmarsson, Meixian Song, 'The FCA Test Case: Causal Expressions in the Insurance Context' (2021) Lloyd's Shipping & Trade Law 1
[100] Sarah Turpin, Oliver Richardson, Edward Brown-Humes, 'Covid-19: FCA Business Interruption Test Case-Unresolved Issue and Wider Implications of Supreme Court Judgement' (2021) 11 NLR 75, 210
[101] *Orient Express Hotel* (n 55)
[102] *FCA Test* (n 91), 59

situation'.[103] Due to the subject of the appeal, some discussion was offered on the topic of proximity and the Supreme Court famously stated that the requirement of proximity is 'based on the presumed intention of the contracting parties'[104] and this presumption is capable of being displaced if, the natural wording of the contract indicates otherwise, or the policy provides for some other connection between the loss suffered and the concurrence of another insured peril. The Supreme Court disagreed that 'following' did not convey a strong enough requirement for proximate causation, thus demonstrating a more technical approach to establishing the parties' intentions from the contract formation. The technical approach refers to the objective consideration of specific language used in the terms of the contract, instead of interpreting the intention behind the overall term. Also understood as an analytical approach, this method determines the requirement of causation by granting each word of the clause in the contract its natural and generally universal definition to determine its desired effect and intention by the contracting parties. To highlight, this approach believes that the 'causal degree depends to a great extent on matters of linguistic meaning'.[105] Instead of justifying decisions on presumed intention of parties, the intention of parties is derived from the exact wording of the contract. The common-sense approach was not wholly rejected, but the judges felt that it requires further analysis as causal judgements should not be made on an 'unguided gut feeling'.[106] Hjalmarsson and Song contemplated that 'the Supreme Court should not be taken to have decided… as a matter of rule of law… to search for shades of semantics'[107], however, by turning to the intricacy of the wording in the contract, the Court did not have to resort to the common-sense approach. It is relevant to consider that various phrases, such that arose in this case, in contract and specifically marine insurance contracts, are frequently used and have commonly accepted meaning and these should be upheld by the Courts for commercial consistency.[108] If there was a certain rule based on the commonly-used specific language of an insurance contract, then those who rely on that same wording, can reasonably expect what the effect of each contractual term will be, and personally dictate what causal power a peril may require. Considering the marine insurance industry uses many forms of standard form contracts[109], these categories of words could be easier to implicate through the reform of these standard forms, thus easy to implicate into customary practices. By having more certain terms in standard forms of contract, leaves less room for disputes to arise. Interestingly in a similar case, the High Court of Ireland reached the same decision on the contract containing clauses implying a causal relationship through the word 'following' by characterising it as 'less forceful' in requiring a risk to be a

[103] *ibid,* p 47
[104] *ibid*
[105] Özlem Gürses, 'The Proximate Cause of Loss' in D Rhidian Thomas, *The Modern Law of Insurance,* vol 5 (Routledge 2023) p 178
[106] *FCA Test* (n 91), 168
[107] Johanna Hjalmarsson, Meixian Song, 'The FCA Test Case: Causal Expressions in the Insurance Context' (2021) Lloyd's Shipping & Trade Law 1
[108] *ibid*
[109] F.D. Rose, *Marine insurance: Law and Practice* (2nd edn, Informa Law London 2012)

dominant cause.[110] By reading these contracts with a more technical approach, this can only encourage more prudent contract formation by insurers, especially as the specific semantic choices are common, and these traditions should be upheld and relied on.

The FCA Test case produced another significant ruling regarding the but-for test, rejecting it's use in insurance law[111], thus overruling *The Orient Express.*[112] In the *FCA Test* case, the insurers' argument was that the but-for test was a minimum requirement to satisfy, to show the loss would not have been sustained but-for the event of the insured risk. There had been a few historic attempts to showcase the inappropriateness of the 'but-for' test such as *Ionides v The Universal Marine Insurance Co*[113], where the test was observed to permit causes which were 'too distantly connected with each other to stand in the relation of cause and effect'.[114] The justification the Supreme Court for their rejection in the *FCA Test* case was based on the argument that in *The Orient Express* the Tribunal did not consider that the damage that the hurricanes caused to the city was an uninsured peril and not an excluded one.[115] The Supreme Court in the *FCA Test* case held that the but-for test is a 'minimum threshold to establish what caused the loss, but it is not appropriate for the context of insurance'.[116] This was because some cases of independent concurrent causation proved problematic for the test, and the test was generally overinclusive.[117] Following the rule of *The Miss Jay Jay*[118], it was decided that if an uninsured peril and an insured peril were concurrent and interdependent, this produced liability for the insurer on the close causal connection between the two perils.[119] Thus, the but-for test was used wrongly and eliminated the uninsured peril from creating any liability for the insurer. The Supreme Court emphasised that concurrent causation should really be all about the appreciation of the process of construction of the contract and interpretation of the parties' intentions. Highlighting that the real question should be whether 'the insurers should compensate the policyholders as the result of the occurrence of the insured peril?'.[120] The importance placed on contract formation and giving the wording of the contract its natural meaning evidence that the Courts attempted to stem away from common-sense justifications and support their decision through a more technical approach. There were doubts with the but-for test's capability of handling cases of concurrent causation, as academically there are two

[110] *Hyper Trust Ltd v FBD Insurance Plc* [2021] IEHC 78, 174
[111] *FCA Test* (n 91), 308
[112] *Orient Express Hotels* (n 55)
[113] [1863] 14 C.B. N.S. 259, 285
[114] Özlem Gürses, 'The Proximate Cause of Loss' in D Rhidian Thomas, *The Modern Law of Insurance,* vol 5 (Routledge 2023) p 182
[115] *Orient Express Hotels* (n 55)
[116] Özlem Gürses, 'The Proximate Cause of Loss' in D Rhidian Thomas, *The Modern Law of Insurance,* vol 5 (Routledge 2023) p 186
[117] *ibid*
[118] *The Miss Jay Jay* (n 60)
[119] *ibid*
[120] *FCA Test* (n 91), p 94

well-recognised textbook examples.[121] Nigel Eaton QC and Jeremy Briar encapsulated the first scenario from the case of *Cook v Lewis*[122], as the situation where two independent hunters simultaneously and coincidentally inflict a fatal wound on a rogue hiker by accident.[123] Where it would be practically impossible to tell which of the two hunters should be responsible for the death of the hiker as both blows would have efficiently and equally killed the hiker. The second textbook example deliberated the scenario where there are two fires which converge into one fire and cause the burning down of one building. It will always be difficult to ascertain which of the two fires would be the cause of the damage to the building, evidencing why many scholars such as Özlem Gürses, have considered the test to be overinclusive.[124] If it were not but for both fires, the convergence of the fire would not have occurred hence neither would the damage. This 'textbook example'[125] was always anticipated, hence it does not come as a surprise that the Supreme Court has rejected this rule that encompassed 'near universal acceptance' and set a 'threshold which claimants must cross if their claim for damages is going to get anywhere'.[126] Although, the rejection taking place in the format of the Test Case Scheme was most likely not the anticipated moment of change, the actual rejection of the but-for test in relation to concurrent causation was clearly awaited.

The FCA Test case had a more significant impact on the law of causation than most scholars, appreciated.[127] This was largely because this was the first case to utilise the new form of adjudicature via the FCA Test Scheme which was quickly decided. Despite being a new method of adjudicature it is important to appreciate that the style of case is the likely reason for the limited analysis on causation.[128] Perhaps, if the case resorted to the usual process of adjudicature, the position on causation would have produced a more definite position. Nevertheless, it demonstrated a general move away from the common-sense approach, in

[121] Nigel Eaton, Jeremy Briar, 'Covid, Causation and Coverage: How the Courts are Responding to Covid Insurance Claims' 10th May 2021- < https://essexcourt.com/publication/covid-causation-and-coverage-how-the-courts-are-responding-to-covid-insurance-claims/> last accessed 16th August 2023

[122] [1951] SCR 830

[123] Nigel Eaton, Jeremy Briar, 'Covid, Causation and Coverage: How the Courts are Responding to Covid Insurance Claims' 10th May 2021- < https://essexcourt.com/publication/covid-causation-and-coverage-how-the-courts-are-responding-to-covid-insurance-claims/> last accessed 16th August 2023

[124] Özlem Gürses, 'The Proximate Cause of Loss' in D Rhidian Thomas, *The Modern Law of Insurance,* vol 5 (Routledge 2023) p 186

[125] Nigel Eaton, Jeremy Briar, 'Covid, Causation and Coverage: How the Courts are Responding to Covid Insurance Claims' 10th May 2021- < https://essexcourt.com/publication/covid-causation-and-coverage-how-the-courts-are-responding-to-covid-insurance-claims/> last accessed 16th August 2023

[126] James Edelman (ed), *McGregor on Damages* (20th ed, Sweet&Maxwell 2019), para 8-006 - *cited ibid*

[127] John Dunt, 'Marine Insurance and the FCA Test Case: The Impact of the Modified and Refined Test of Causation on Marine Insurance, in particular Marine Cargo Insurance' (2021) Lloyd's Shipping & Trade Law

[128] Sean Burke, 'A Contemporaneous evaluation of the degree of success of the Financial Markets Test Case Scheme in the seminal case of Financial Conduct Authority v Arch Insurance UK Ltd and Others (2021) UKSC 1' (2023) VIII LSE LR

favour of a more technical method of establishing a causal judgement. The Covid-19 pandemic was an incredibly difficult time for the whole nation, which was felt even harder for Courts and policymakers to navigate, in conjunction with this being a Test case, critics were fast to conclude that the matter was decided too quickly with no intention of a significant change in precedence.[129] John Dunt argued against the reading of the *FCA Test* case as a mere 'restatement of the existing rule' by offering some observations that prove otherwise.[130] For example, Dunt states that the wording used by the Supreme Court shows a deliberate diversion away from ideas of dominancy.[131] The frequent use of 'efficient' with no mention of 'dominant' suggests a divergence of the existing test. The analytical treatment of the facts is also a deliberate move away from the common-sense approach.[132] Instead, the *FCA Test* case turned the discussion and focus to the interpretation of contract, which could be the catalyst for the move away from common-sense reasoning behind causal judgements and introduction of a doctrine on causation based solely on general principles of contract law.

The next modern case of relevance is *Brian Leighton Garages v Allianz*[133]*,* in which the Court of Appeal made various references to many of the somewhat established rules in the doctrine of causation. The case takes a different subject matter than marine insurance as it concerns a claimant who insured his Garage under an 'All risks policy' with Allianz Insurance covering the property and business interruption. When the claimant suffered a fuel leak, caused by a sharp stone rupturing one of the fuel lines in the forecourt of the building, the leak caused a contamination to the forecourt and the building itself. Allianz refused the claimant recovery for the clean-up, reinstatement, and loss of profits during period of closure on the basis that there was an exclusion in the contract that excepted 'damage caused by pollution or contamination'.[134] The competing causes in this case were either the sharp object piercing the fuel pipe or the fuel itself contaminating the land, the latter would have triggered the exclusion. The established rule of excluded perils in conjunction with insured perils is that the Courts always upheld the exclusion as an intention to limit liability at the point of contract construction.[135] This was the position of the Court in the first instance, however, the Court of Appeal reversed this decision and differentiated the facts from the *Wayne Tank* rule because the wording of the exclusion should have been stronger if it was intended to apply to contexts such as where the fuel leak was a non-dominant cause. The Courts stated that the exclusion should have included more specific wording to demonstrate how the exclusion should apply if the cause was efficient or not and use wording such as 'directly or indirectly caused by' rather

[129] John Dunt, 'Marine Insurance and the FCA Test Case: The Impact of the Modified and Refined Test of Causation on Marine Insurance, in particular Marine Cargo Insurance' (2021) Lloyd's Shipping & Trade Law
[130] *ibid*
[131] *ibid*
[132] *ibid*
[133] [2023] EWCA Civ 8
[134] *ibid*
[135] *Wayne Tank* (n 81)

than simply 'caused by'.[136] This is an interesting comment that references *Coxe v Employers' Liability Assurance Corporation Ltd*[137], which the Court relied on in the justification of the judgement in the first instance decision in the *FCA Test* case.[138] Although the first instance decision did not wish to turn on such 'nuances'[139], upon appeal this technical approach was more favoured by the Supreme Court. This develops the position of s55 MIA 1906 which provides, on its proper interpretation, that the policy provides for some connection between loss and the occurrence of an insured or excepted peril.[140] The connection in contract must be of traditional meaning and conveying the appropriate causal importance.

The Court of Appeal compared the wording of the pollution exclusion to other exclusions in the contract, and it was found that many other exclusions included the 'directly or indirectly caused by' phrase, which demonstrated that 'the drafter knew how to extend causation to non-proximate causation when required'.[141] The Court of Appeal was not unanimous in this decision, the dissenting opinion believed the exclusions should be given a 'whole' reading which would have been obvious to the reasonable reader that 'even if it is possible to give some meaning to the write-back provisions… does not render them redundant'.[142] The dissenting view was of one with the first instance decision in the *FCA Test* case. This case is the perfect illustration of the competing positions of the judiciary, in prioritising principles of common-sense or a more technical interpretative approach of the exact wording in the contract.

To further exemplify the progression, the latter case of *Allianz v University of Exeter*[143], expressed support for the first instance decision of the *FCA Test* case.[144] The case of *Allianz v University of Exeter*[145] concerned the University insuring their property under a policy which contained an exclusion for war occurrences. When a World War II bomb was located beneath the premises, there was no choice but to conduct a controlled, planned detonation, for which the University would suffer some property damage which it wanted to recover from its insurer, Allianz. The Courts in this case had to decide whether the cause of the damage to the University's property was the controlled detonation of the bomb or whether it was the German attack dropping the bomb there in the first place. The insurer claimed that the damage to the property fell within the meaning of the exclusion which was caused by the German army's attack and dropping of the bomb in the 1940s. The Courts ruled in favour of the Insurer's

[136] [2023] EWCA Civ 8, 43
[137] [1916] 2 KB 629
[138] *Financial Conduct Authority v Arch Insurance (UK) Ltd* [2020] EWHC 2448 (Comm), 162
[139] *ibid*
[140] MIA 1906, s 55
[141] [2023] EWCA Civ 8, 62
[142] *ibid,* 68
[143] *Allianz Insurance Plc v University of Exeter* [2023] EWHC 630
[144] *Financial Conduct Authority v Arch Insurance (UK) Ltd* [2020] EWHC 2448 (Comm)
[145] *Allianz Insurance Plc v University of Exeter* [2023] EWHC 630

argument, supporting their decision on the basis that *causa proxima* no longer considers which cause was temporally closer rather which cause was more dominant in contributing to the loss or damage. The Judges referred to the case of *The Wayne Tank*[146] to consider that intervention of human action does not break the impact of the dominant cause, especially since causation is no longer considered as linear but 'a net'.[147] Such that the Courts believed the controlled detonation of the bomb had no causal significance.

However, this case is open to appeal and many commentators, such as Terry Gagngcuangco, are anticipating it in the next couple of months[148], especially since the recent case law suffered from much disagreement amongst the judiciary. It is uncertain how to interpret exclusions and uninsured perils to determine how wide of an ambit they should be given as to whether they apply to proximate and non-proximate causes. However, from the reasons offered in the judgements of each case, it is obvious that the cases decided through the appeal to contractual principles are clearest. This is not an entirely stable position yet as the judiciary remain in disagreement on how microscopic they should be in their interpretation of each word of the policy to presume an intention or whether they should look at clauses and policies to presume a more general intention. It is unclear which precedence the Courts should follow at this point. Although this case could be up for appeal in the following months, this enquiry must agree with the decision of HHJ that within the war policy exclusion, a controlled detonation of a bomb that can be linked to a war cannot as an action be an act of war.[149] A controlled detonation is a mere procedure to prevent further damage, however, the damage itself was inevitable if it were not for the bomb being placed there in the first place, and the act of dropping that bomb there by the German Army, is an act of war. Therefore, even in the case of an appeal, it appears unlikely that the Courts would decide otherwise. However, the possibility of an appeal and the previous trends indicate that causal judgements are unpredictable, this justification could even be considered as an 'unguided gut feeling'.[150] Perhaps it would be more useful to objectively define acts of war and each word in the exclusion and that may derive a much more definite answer.

The cases that have arisen in the last two years indicate a progression and preference for a more technical reading or analysis of causation. This would drastically resolve many anxieties surrounding the common-sense test, specifically addressing that causal decisions should not be based on 'a "hypothetical oracle"… which is liable to elicit different conclusions'.[151] Although,

[146] *Wayne Tank* (n 81)
[147] *Leyland* (n 19)
[148] Terry Gangcuangco, 'Allianz Wins Bomb Case- Ruling 'Likely to be Appealed' (March 27th 2023) Insurance Business Magazine < https://www.insurancebusinessmag.com/uk/news/legal-insights/allianz-wins-bomb-case--ruling-likely-to-be-appealed-440722.aspx> last accessed 18th August 2023
[149] *Allianz Insurance Plc v University of Exeter* [2023] EWHC 630
[150] *Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] UKSC 1, 168
[151] F.D. Rose, *Marine insurance: Law and Practice* (2nd edn, Informa Law London 2012), p 405

the technical approach has not arrived at an utmost, certain position yet, the empowerment of contractual terms in closer analysis by the judiciary implies a more predictable solution and certain process that will over time make stronger precedents. If words are given greater linguistic effect to determine causal significance, this will force marine insurers to take greater prudence in contract formation as they will benefit from these established traditional meanings having certainty. Such that, if a dispute arises, the wording of the contract can always be given its traditional and technical reading. It almost encourages a categorisation of terms which will be deemed as granting of a wider causal meaning or prescribing stronger requirements for proximate causation. Academics, Hjalmarsson and Song, have inspired a curiosity for whether this approach could even lead to the neglect of 'one particular category of contractual language characteristic to insurance policies'[152], as this category of words could be 'less forceful'[153] in prescribing requirements of proximity of causation. Less forceful in prescribing a strong causal connection, such as in the previously explored cases, 'followed' was deemed weaker than 'directly or indirectly caused by'. This suggested the clause required a weaker connection between two events, preventing temporally remote events, but not actually requiring for the event to bring about the effect of the loss or damage. Although, currently uncertain to what effect the movement towards a more technical approach to causation will entail, the advancement should be welcomed considering the deficiencies with the existing position on causation. It is clear from this review that any new rule of causation must improve predictability and consistency in judgements, to improve parties' reasonable expectations to the effect of their contract. The technical approach can improve parties' reasonable expectations when constructing a contract, whether by categorising particular words by the extent they prescribe proximity or by merely producing more consistent precedents that will trigger more predictable results in disputes. More stringent analysis of wording of contracts will encourage more deliberate and thought through choices of language at the point of construction. Basing a rule of causation on the analysis of the wording in the contract leaves less room for judicial discretion and subjectivity of common-sense, this is because the judiciary will simply be able to grasp the intention of parties from the wording they freely chose, instead of some subjective imagining of what an ordinary person would think they meant in their construction. Prioritising principles of contract such as sanctity of contract and freedom of construction gives better effect to the doctrine of causation, although to truly benefit from this advancement, there needs to be an established rule or test of causation.

Chapter Six: Where the Doctrine of Causation Stands Today:

Despite the future and effect of the technical approach being uncertain, scholars, such as John Dunt have attempted to infer whether a new test might be on the brink. Dunt commented that

[152] Johanna Hjalmarsson, Meixian Song, 'The FCA Test Case: Causal Expressions in the Insurance Context' (2021) Lloyd's Shipping & Trade Law 1

[153] *Hyper Trust Ltd v FBD Insurance Plc* [2021] IEHC 78, 174

the *FCA Test* case is not a mere restatement of the existing rule because the analysis made 'deliberate' preference for analytical treatment of the facts to determine an efficient cause, 'with no mention of the dominant or predominant cause'.[154] This significantly highlights that in situations of multiple concurrent causes, finding a 'dominant' one amongst them may be harder than finding an 'efficient' one. Although, the lack of a mention of a dominant cause may not amount to an exact rejection, it is obvious that the Courts are more accepting of there being multiple efficient causes, such that to this author, the term 'dominant' is outdated. Dunt offered a conception of a new emerging test called the test of 'inevitability'.[155] Dunt observed that the Supreme Court considered a new aspect in the *FCA Test* when an insured peril arises in conjunction with an uninsured peril with a 'sufficient degree of inevitability', there is nothing in the concept of causation that precludes it being considered a proximate cause.[156] 'Even if the occurrence of the insured peril is neither necessary nor sufficient to bring about the loss itself',[157] suggests that it is conceivable that events exist without these dominant or necessary causes, this would have been where the but-for test would have faced a paradox. Such as in the textbook example of the two hunters shooting the same innocent bystander, where 'neither shot can be said to be a "but for" cause of the death'.[158] Inevitability holds that an event would occur in all conceivable circumstances and the loss would occur in the traditional course of events.[159] The Supreme Court stated that human intervention or 'human actions are generally not to be regarded as "negativing" the causal connection unless they are wholly unreasonably or erratic'.[160] Such that in the case of *Allianz v University of Exeter*[161], one can argue that the explosion of the bomb found beneath the property belonging to the University was inevitable, thus the more natural solution of the two possible causes disputed. The human intervention of the controlled explosion would not have a negative effect on the inevitability of the bomb exploding at one conceivable point in time.

The requirement of an event occurring in all conceivable circumstances is a much firmer requirement to satisfy, almost too strong which could be debilitating for insurance recovery, as the assureds would be required to prove an event was certain to happen. The ability to judge

[154] John Dunt, 'Marine Insurance and the FCA Test Case: The Impact of the Modified and Refined Test of Causation on Marine Insurance, in particular Marine Cargo Insurance' (2021) Lloyd's Shipping & Trade Law
[155] *ibid*
[156] *FCA Test* (n 91), 191
[157] *ibid*
[158] Jumana Rahman, Thomas Shortland, Charlotte Ritchie, 'A New Approach to Causation? The UK'S Supreme Court Hands Down Judgement in the Business Interruption Insurance Test Case*'* (Cohen&Gresser 18 February 2021) < https://www.cohengresser.com/app/uploads/2021/02/The-UKs-Supreme-Court-Hands-Down-Judgment-in-the-Business-Interruption-Insurance-Test-Case.pdf> accessed 25 September 2023
[159] *FCA Test* (n 91), 168
[160] Pollyanna Deane, Georgina Candy, 'The COVID-19 Business Interruption Insurance Test Case: The "Lay of the Land" post the Supreme Court Judgement' (8 March 2021) < https://uk.practicallaw.thomsonreuters.com/w-029-8992?transitionType=Default&contextData=(sc.Default)&firstPage=true> accessed 20 September 2023
[161] *Allianz Insurance Plc v University of Exeter* [2023] EWHC 630

whether an event is conceivable in all possible circumstances is not an easy task, as it would be difficult to foresee all the possible orders of events. Thus, it may require some extent of subjectivity as to how far these conceivable events cover. Dunt refers to the *Leyland* case[162] to consider whether inevitability is too strong as in the events of the German torpedo, as it still could not be said with certainty that the loss of the *Ikaria* would have been inevitable[163], rather very probable. Highlighting to this contemporary analysis, that the real problem with determining a set doctrine of causation is in prescribing the right requirement of proximity for causes. The test of inevitability likely arose because of the weak, vague requirement of proximity that the common-sense test induced. As the common-sense test has a weaker acceptance of causes to have brought about the loss or damage and the test of inevitability displays a narrower reading of proximity. Therefore, a satisfactory position for a contemporary reading to arrive at is if some equilibrium can be achieved.

An equilibrium could be expected to fall somewhere on the scale of probability as requiring an event to be highly probable, this was an idea considered in *The Cendor Mopu* case which concluded that the loss was not 'inevitable' but 'highly probable'.[164] Although, *The Cendor Mopu* directly disagrees with the test of inevitability, it is interesting to see the progression over time for a stronger requirement of proximity. An almost inevitable progression considering the weaknesses of the common-sense approach. The conflicting cases of *The Cendor Mopu* and *The FCA Test* suggest that their applications are limited, especially as *The FCA Test* case is not a marine insurance case, and it has only been referred to in few marine cargo insurance cases on the topic of the non-controversial topics.[165] However, if the issue of inherent vice were to arise, the Courts would appeal to *The Cendor Mopu.* A contemporary reading on causation may not be capable of establishing a definite and obvious rule on the law of causation at this moment in time. However, the brief references to the test of inevitability offer some hope in the emergence of a new test. Even if the test of inevitability is found too strong for the requirement of proximity, the current progress of the judiciary still suggests that the common-sense test is too weak, and perhaps the future of the doctrine is found somewhere in between. This author believes we can reasonably anticipate more frequent reference to the technical approach, and we should welcome such a change as it is a great advancement away from the imprecise test of common-sense. By increasing the requirement of proximity, the new test of inevitability favours the principle of sanctity of contract, as it prescribes a stronger requisite for uninsured perils, thus limiting the extension of the written insurance policy contract. A stronger requirement for causation, not only encourages more stringent and deliberate contract construction, but also prevents insurers covering uninsured perils, thus

[162] *Leyland* (n 19)
[163] *ibid*
[164] [2009] 2 Lloyd's Rep 72, 104
[165] John Dunt, 'Marine Insurance and the FCA test case: The Impact of the Modified and Refined Test of Causation on Marine Insurance, in particular, Marine Cargo Insurance' (2021) Lloyd's Shipping & Trade Law

accommodating their commercial expectations to the effect of their contract. As argued in the commentary against *The Miss Jay Jay*[166], for the limitation of uninsured perils amounting to a proximate cause to situations where an uninsured peril is interpedently concurring with an insured peril. The previous concern was to avoid the Courts 'improving' on the instrument they were called onto construe.[167] However, *The Miss Jay Jay* ruling applied to interdependent causes, whereas, in the *FCA Test* case the causes were independent, and the loss was caused 'cumulatively by all nationwide COVID-19 occurrences'.[168] Thus, the test for uninsured perils needed to be extended to the concept of inevitability. By further limiting uninsured perils and using a more technical approach to interpreting the terms of the contract in pair, better achieve this goal of sanctity of contract than merely limiting it to ideas of interdependency. Thus, whether the test of inevitability or some other new strong requirement for proximity is developed, will bear great benefits for advocating the principles of causation.

The test of inevitability and a more technical approach to contract interpretation could derive many benefits for the doctrine of causation such as greater predictability of the effect of insurance clauses, or their requirements of proximity. It is important to highlight that these inferred advantages are not exclusive to the conception of the test of inevitability, instead it conceptualises any benefit from a stricter test than the existing common-sense test. Firstly, through the greater importance granted to the wording of the contract, should inspire greater deliberation when constructing the insurance contract in the first place. Such that when parties propose their terms of insurance they wish to be bound by, they can explore what wording has been interpreted by the Courts to be granting of greater or weaker requirement for proximity. Secondly, a more consistent rule of causation will establish predictability in case of disputes, as parties will be able to foresee how the Courts will read their chosen terms from previous decisions. Suggesting that if one category of wording is commonly used and recognised by the Courts to establish a stronger sense of proximity, then if insurers intend to limit their liability with exclusions in policy, it will be far clearer which choice of words to make. A clearer choice of exact wording to use in policy will reduce the possibility of a dispute arising, thus preventing litigation and all the great costs associated. The predictability offered by this idea of categorically establishing causal importance would allow for more consistent judgements and precedents in a variety of circumstances. Generally, the direction that the recent decisions are leading towards is the final move away from the common-sense test, which has produced largely inconsistent rulings. Any clearer rule of causation than the test of common-sense will produce a more objective and consistent doctrine. Thus, the marine insurance market would derive great benefit from the appreciation of the direction of the recent adjudicature.

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[166] *The Miss Jay Jay* (n 60)

[167] *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10; 1 WLR 1988, 22

[168] Özlem, Gürses 'The Proximate Cause of Loss' in D Rhidian Thomas, *The Modern Law of Insurance* vol 5 (Routledge 2023) p 186

The previous but-for test was over-inclusive[169] and outdated for the context of insurance which justifies this progression. Although, the test of inevitability that is proposed to replace it, may 'open new directions for the principles of insurance'.[170] Such that scholar, Gürses, queried how the test of inevitability may affect the existing rule on excluded perils provided by the *Wayne Tank* case.[171] 'A big question mark now appears for those who will be analysing the effectiveness of express exclusion clauses in commercial contracts'.[172] This merely highlights how difficult of a task it is to pinpoint one rule for causation to fit all circumstances, contexts, and categories. This has even inspired some scholars, such as Song to consider that perhaps 'it should be accepted that there is no certain or unified principle which we must struggle to discover'.[173] However, the purpose of this contemporary enquiry is to attempt to showcase that this new approach may be less problematic than all previous attempts to define and test for proximity, such that marine insurance could be on the grasp of the closest attempt at a unified rule of causation yet. This author believes, the issue of excluded perils can quickly be diffused for the same reasons used in the recent case law. Excluded perils must always be upheld as this was the intended effect of the parties. This new conception of causation enforces principles of contract law, more so than the common-sense test or but-for test did. The new considerations of inevitability or pure linguistic interpretation encourage greater objectivity, technicality, and greater appreciation of the general principles of English contract law.

[169] *ibid*

[170] Özlem, Gürses, 'The Supreme Court on Business Interruption Insurance and Covid-19: *Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021 UKSC 1' (2021) 32 KLJ 1, p 83

[171] *Wayne Tank* (n 81)

[172] Özlem, Gürses, 'The Supreme Court on Business Interruption Insurance and Covid-19: *Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021 UKSC 1' (2021) 32 KLJ 1, p 83

[173] Meixian Song, '*Revisiting Concurrent Causation in English Insurance Law: A Legal Fiction?'* (2021) 6 JBL, p 474

Chapter Seven:
Conclusion

The aim of this contemporary reading of causation in marine insurance was to determine whether the current rule of causation fit the crucial role of the determinant of liability for insurers. The necessity for the rule of causation to be clear, efficient, and suitable for contractual practices of insurance was continuously stressed, and throughout the enquiry it became evident that the current rules of causation are outdated, and a new approach was being favoured. By first turning to the most fundamental ideas of causation, held in statute and the landmark case of *Leyland,* the enquiry explored how the rule has changed historically and more specifically highlighted the reasons for those changes. The idea of efficient proximate causation reformed previous ideas of temporal causation for the purpose of giving greater effect to the significance of events and not defeat the intentions of parties to the contract. The first defect with the rule arose here, as proximity was undefined in the MIA 1906[174], thus, the interpretation of this fundamental concept to causation was left up to the judiciary. As insurance is governed by law, general principles of contract law and practice, this section identified the general rules of contract law that can fill in the gaps for the doctrine. These principles include sanctity or privity of contract, freedom to contract and principles of contractual interpretation. The judiciary arrived at the position that proximity should be decided through ideas of efficiency and dominance, determined using the common-sense test. The common-sense test determined the efficiency of a cause by appealing to ordinary thoughts and general quotidian expressions. The test considered what the ordinary person would appeal to when making a causal judgment in every-day life. Although, the test quickly became obviously unsatisfactory due to the issue of concurrent causation. Concurrent causation is the possibility of having multiple causes potentially equally bringing about the loss or damage, which becomes more complex when concurrent causes include a variety of insured, uninsured and excluded risks. These causes can be wholly independent but equally efficient, or interdependent, meaning a cause could not have occurred without the occurrence of the other cause. The common-sense test failed to adequately account for all instances of concurrent causation as a stand-alone test and this emphasised that when the question of causation becomes more complex, the common-sense test would reach subjective and arbitrary decisions. The common-sense test could not resolve the hypothetical issue of having two equally efficient causes that were wholly independent, this is where the complimentary test of 'but-for' could mediate. The 'but-for' test determined whether the loss or damage would occur if it were not for the occurrence of the event in question of being the proximate cause. Equally to the common-sense test, the 'but-for' test was also deemed outdated and inappropriate for the context of insurance later in the enquiry. The common-sense test faced much criticism throughout this essay, as it has in academia for a long period of time, whether this is because of its difficulty to pinpoint exactly what is meant by common-sense or whether it inspires greater discretion and subjectivity in the judiciary. The enquiry then turned

[174] MIA 1906, s 55

to highlight the inconsistency in practice, highlighting the mixture of approaches to various issues of concurrent causation. The landmark decisions could be differentiated on facts, but the reasoning used in every judgement confused the position on causation. Especially as the judiciary would either reverse every decision of the lower Courts upon appeal or would avoid addressing the rules of causation thoroughly because of how difficult it was to create a precedent that produced a unified rule of causation. This exasperated the inappropriateness of the current position on causation for the modern marine insurance industry. The enquiry then addressed three recent, significant cases that arose in more general insurance that could influence the marine insurance industry and inspire a unified rule of causation. Most importantly, the *FCA Test* case rejected the but-for test and conveyed a preference of prioritisation of principles of contract over the test of common-sense. The *FCA Test* case conveyed a preference for linguistically analytical style of decision making, to enforce the intentions of parties solely based on granting the terms of the contract their natural, ordinary meaning. Although the Supreme Court in the case did not expressly renunciate the common-sense test, this was one of the first fundamental cases to address it's arbitrariness. The *FCA Test* case mediated the issues with prescribing the correct requirement of proximity to the chosen terms of the contracts and justifying it purely through principles of contract law. As the *FCA Test* case was the first Test Case under the new Scheme, sceptics of the new form of adjudicature argued that it may limit its ability to reform the existing doctrine. However, this ruling should not be overlooked because of the potential impact it could born for marine insurance in practice. The *FCA Test* case was followed by two later cases, that continued to appeal to the idea of proximate, efficient causation through this more technical reading of the plain language in the contract. The *FCA Test* case had a greater impact on the concept of independent, equally efficient causes, as the 'but-for' rule was reversed. This made way for a new potential test that scholars, such as Dunt, called the test of inevitability. Inevitability raised the standard for independent concurrent causes to qualify as proximate as it now must be proved that an event would occur in all conceivable circumstances and the loss would occur in the traditional course of events. This test, alongside the technical approach, evidence a greater prioritisation of principles of contract law over other principles or legal rule. The new test and approach encourage greater objectivity, which resolves the issue with the old position of causation. Although this new test and approach has not been wholly developed or defined yet, it possesses potential to have a great effect on marine insurance, such as improving standards of insurance policies through greater predictability and prudence in construction. Thus, this contemporary review attempted to make way for this new development and raise awareness to this progression and appreciate the likelihood of this style of analytical reasoning in future marine insurance disputes regarding causation.

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The Cost of Protecting Privacy: A Critical Analysis of How in the Current Data Driven Economy Chapter V of the General Data Protection Regulation Operates as a Barrier to International Digital Trading

Simran Kaur

Abstract

This dissertation examines how Chapter V of the General Data Protection Regulation (GDPR) restricts the free flow of data in the current data-driven economy. With the significant growth of the Internet and other digital technologies, companies and organisations from different industries are given the opportunity to collect, process, and transfer information across borders to increase their profit and gain more consumers. Accordingly, cross-border data flows become essential to increase economic growth internationally. However, the European Union (EU), by adopting the GDPR, has blocked non-EU countries from transferring data freely across the globe. To show how the GDPR restricts non-EU countries, Articles 45 and 46 of the GDPR are explored. By evaluating Schrems I and Schrems II, it is revealed that the GDPR needs to give companies economic freedom and flexibility to access and participate in the digital economy effectively. Data localisation has been an unintended and indirect consequence of the rigid GDPR requirements. Furthermore, the assertion of EU values, including fundamental rights and freedoms, undermines the commercial benefit of allowing the free flow of data. Finally, this dissertation analyses whether the EU violates its obligations under the General Agreement on Trade in Services (GATS). Articles II, XVI and XVII of the GATS are used to suggest that the EU discriminates against a country that is not recognised as providing an adequate level of protection despite that country having strict privacy laws.

Introduction

Contemporary technological developments have facilitated the transferring, processing, and storing of large amounts of information. Innovation and industrial changes have resulted in 'personal data' being an entirely new source of economic growth.[1] In the current digital age, personal data is used by businesses and organisations to gain new customers and make a profit. Thus, personal data holds a significant economic value.[2] Large internet companies such as Google, Meta (Facebook), Amazon and Twitter can offer their services to users and benefit in return from the personal data of their customers.[3] These companies have the world's largest databases of personal information, which they can share with others for marketing reasons, such as for advertising purposes and sending exclusive emails to customers to gain further engagement.[4] Additionally, the unprecedented mobility and accessibility of the Internet allows businesses to conduct online transactions across the world effectively.[5] There are, of course,

[1] W. Gregory Voss, 'Cross-Border Data Flows, the GDPR, and Data Governance' (2020) 29 *Washington International Law Journal* 485, 487.
[2] Asuncion Esteve, 'The Business of Personal Data: Google, Facebook, and Privacy Issues in the EU and the USA' (2017) 7(1) *International Data Privacy Law* 36.
[3] Ibid, 46.
[4] Margaret Byrne Sedgewick, 'Transborder Data Privacy as Trade' (2017) 105 *California Law Review* 1513, 1514.
[5] Ibid.

strict privacy regulations for such business models, which may diminish their revenue.[6] This is visible in the European Union (EU), where privacy rights are recognised as fundamental rights[7] essential for human dignity and autonomy.[8] However, these rights are threatened by technological advances requiring personal information input across various digital transactions.[9] Given the importance of digital trading, a question arises as to whether the privacy protection measures are proportionate to the requirements needed to transfer data across borders.

In 2018, the EU drafted and passed the General Data Protection Regulation (GDPR),[10] which intended to protect the personal information of European citizens whilst ensuring that the free movement of personal data is '*neither restricted nor prohibited*'.[11] The GDPR addresses the issues caused by digital trading, especially where personal data is processed by controllers or processors not established in the Union.[12] This dissertation focuses on how the current GDPR requirements limit non-EU companies' ability to operate within the EU and transfer data to other countries for successful digital trading. By connecting privacy laws and international trade considerations, the dissertation advances a legal argument in an area of law that scholars often overlook.[13] For the present purpose, digital trading refers to any commerce enabled by electronic means such as '*telecommunications or ICT services*',[14] which covers the '*production, distribution, marketing, sale or delivery*' of the services provided online.[15] Moreover, personal data is any information '*relating to an identified or identifiable natural person*', which is the data subject.[16] The type of information considered to be 'personal data' includes the name, location data, an identification number or any other factors that explicitly indicate a natural person's physical, economic, social, and cultural identity.[17] The question of whether data is a good or a service is widely debated. Here, because the transfer and movement

[6] Bert-Jaap Koops, 'The Trouble with European Data Protection Law' (2014) 4 *International Data Privacy Law* 250.

[7] See Articles 7-8 Charter of Fundamental Rights of the European Union [2016] OJ C202/389 (Charter).

[8] Angela Daly, Private Power, *Online Information Flows and EU Law: Mind The Gap* (Hart 2016), 21.

[9] W. Gregory Voss (n 1) 489.

[10] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1 ('GDPR').

[11] Article 1(3) GDPR.

[12] Article 3(2) GDPR.

[13] Margaret Byrne Sedgewick (n 4) 1515.

[14] European Commission, 'Digital trade' (EU, 2018) <https://policy.trade.ec.europa.eu/help-exporters-and-importers/accessing-markets/goods-and-services/digital-trade_en> accessed 1 February 2023.

[15] WTO, 'Electronic commerce' (WTO, 2017) <https://www.wto.org/english/thewto_e/minist_e/mc11_e/briefing_notes_e/bfecom_e.htm> accessed 1 February 2023.

[16] Article 4(1) GDPR.

[17] Ibid.

of data are addressed, data is interpreted as a service and is analysed accordingly under the General Agreement on Trade in Services (GATS).[18]

From individuals to large companies rely on cross-border data flows to access information and services freely. Despite this, there are certain measures affecting the movement of data that could constitute towards being trade barriers. This dissertation recognises the wording and interpretation of Chapter V of the GDPR as one of the barriers to international digital trading (Chapter 2). In Chapter 3, data localisation is presented as an unintended consequence of the strict GDPR requirements, which affects the domestic and international economy. Subsequently, an assessment of the compatibility of the GDPR with international trade law is necessary to see whether EU restrictions could amount to a breach of the global trade regime (Chapter 4). The overall submission is that the GDPR is a significant barrier to international digital trading as it imposes an unnecessary burden on third countries and corporations to comply with its strict EU requirements. Furthermore, it is apparent that the EU fails to comply with its agreement under the World Trade Organisation (WTO) as by imposing different legal requirements to transfer data to third countries, it discriminates against non-EU countries and treats them less favourably. There is no perfect model that can be submitted; however, protecting privacy requires careful balancing with global digital trading, a balance the EU does not currently provide.[19] The privacy regulation system will be improved if the wording of the GDPR is interpreted in light of the international commitments made by the EU.

[18] General Agreement on Trade in Services: April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994) (GATS).

[19] Daniel J. Solove, 'A Taxonomy of Privacy' (2006) 154 (3) *University of Pennsylvania Law Review* 477, 488

Chapter 2

Digital Blockage: how Chapter V of the GDPR restricts free flow of data

This chapter explores the complex regulation adopted by the EU regarding the transfer of personal data to third countries and international organisations. Chapter V of the GDPR offers different legal mechanisms to secure the free flow of data outside the EU.[20] This includes data transfers through various 'appropriate safeguards'[21] such as binding corporate rules (BCRs), standard contractual clauses (SCCs), certification mechanisms as well as in the absence of these safeguards the transfer of personal data through 'derogations'.[22] Despite this, there has been a clear emphasis in Article 45 of the GDPR to assess whether a third country provides an 'adequate' level of protection.[23] Consequently, it is the interpretation of adequacy and the shift to 'equivalency' that is outlined to show the lack of practicality in the application of the EU data protection framework.

The GDPR rules are in essence an evolution of the privacy rules found under the Data Protection Directive (DPD),[24] which previously regulated the international transfer of data. As such, vital case law such as *Schrems I* [25] decided under the old framework remains authoritative and valuable to understand the GDPR framework.[26] At the core of these rules is the objective evident in Article 44 to ensure that '*the level of protection of natural persons guaranteed by the [GDPR] is not undermined*'. The level of protection guaranteed by the GDPR must be in connection with its overall aim to '*protect fundamental rights and freedoms of natural persons*' and to enable '*free movement of personal data*'.[27] By reflecting on this dual objective of the GDPR, this chapter illustrates how the assertion of EU values, including fundamental rights and freedoms, undermines the commercial benefit of allowing the free flow of data.

2.1 Data transfer mechanism: defining an 'adequate' level of data protection

The legal and jurisprudential development of the concept of adequacy has significantly impacted the conditions a third country must satisfy to transfer data outside of the EU. Article 45(1) of the GDPR states that personal data can be transferred where the European Commission has decided that the third country or international organisation ensures an 'adequate' level of

[20] GDPR (n 10).
[21] See Article 46 GDPR.
[22] See Article 49 GDPR.
[23] See Article 45 GDPR.
[24] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31 (Data Protection Directive).
[25] Case C-362/14 *Maximillian Schrems v Data Protection Commissioner* [2015] ECR II–0000 (Schrems l).
[26] Andrew Murray, *Information Technology Law: The Law and Society* (4th edn, OUP 2019), 621.
[27] Article 1(2) and (3) GDPR.

protection.[28] Currently, there are fifteen countries that fall under the adequacy provision outlined in Article 45, not including the US which is governed with different terms.[29] This subsequently creates an unequal awarding of decisions whereby some non-EU countries are illogically denied access to transfer data. The GDPR seems more prescriptive in its approach as it monitors the developments in third countries on an ongoing basis.[30] Even countries that are provided with access can, at any moment in the future, be suspended from being able to transfer data from the EU if, following the review by the Commission, a territory no longer complies with the adequacy requirements.[31]

Although the regulation outlines the 'elements'[32] which will be taken into account by the Commission when assessing the adequacy and there is a reference to an '*essentially equivalent level of protection*'[33] being required, beyond this, the GDPR does not define what adequacy means in 'qualitative terms'.[34] As result, the Court of Justice of the European Union (CJEU), through case law, has attempted to provide guidance and address the circumstances when a third country or international organisation would be seen as failing to sufficiently protect personal data.[35]

2.2 *Schrems I*: the emergence of 'equivalency'

Initially, under the DPD, only the concept of adequacy was outlined, and unlike the GDPR, 'equivalency' merely applied in the intra-EU context.[36] Nevertheless, the CJEU in *Schrems I* relied on the concept of 'essential equivalence' to define an adequate level of protection.[37] In *Schrems I*, an Austrian data protection activist, challenged Facebook's business practice to transfer personal data of its European users to the servers located in the US.[38] The challenge was motivated by concerns that US surveillance laws and practices, as previously disclosed by Edward Snowden, demonstrated a 'significant over-reach' by public authorities to have unrestricted access to personal data.[39] In its judgement, the CJEU agreed with the conclusions

[28] Article 45(1) GDPR.

[29] European Commission, 'Adequacy decisions: How the EU determines if a non-EU country has an adequate level of data protection' <https://commission.europa.eu/law/law-topic/data-protection/international-dimension-data-protection/adequacy-decisions_en> accessed 18 January 2023.

[30] Article 45(4) GDPR.

[31] Article 45(5) GDPR.

[32] See article 45(2) GDPR.

[33] Recital 104 of the GDPR.

[34] Ian J. Lloyd, *Information Technology Law* (9th edn, OUP 2020), 141.

[35] Case C-362/14 *Maximillian Schrems v Data Protection Commissioner* [2015] ECR II–0000 (Schrems I); Opinion 1/15 *Draft agreement between Canada and the European Union – Transfer of Passenger Name Record data from the European Union to Canada* [2017] ECLI-592 (Opinion 1/15); C-311/18 *Data Protection Commissioner v Facebook Ireland Limited and Maximillian Schrems* [2020] ECR II– 1 (Schrems II).

[36] See Recital 8, 9, and Art 30(2) DPD.

[37] *Schrems I* (n 25) para 73.

[38] *Schrems I* (n 25) para 2.

[39] *Schrems I* (n 25) para 30.

of Advocate General (AG) Bot, finding that a high level of protection of fundamental rights and freedoms are required in countries receiving data from the EU.[40] Accordingly, the Safe Harbour agreement, which governed the exchange of data between the US and EU and self-certified companies to be in compliance with EU data protection standards, was declared to be invalid.[41] The consequences of this case for cross-border data transfers has been significant as it has led to uncertainty and forced non-EU companies to reconsider their data protection practices, including collecting and transferring a large amount of data.

The definition adopted by the Courts, and subsequently by the GDPR, arguably demands international organisations to provide a high level of compliance with the EU data protection standards. Although the Court has made it clear that 'an identical' level of protection is not needed, individuals nevertheless enjoy a degree of protection which is substantially 'equivalent' to that offered by the EU law.[42] Rather than using the literal approach, the Court seems to have used the objective of the DPD, including the objective to obtain a high level of protection as the criterion to interpret the term 'adequacy'.[43] The word 'adequate' can be interpreted as designating a level of protection that is acceptable or sufficient.[44] Despite this, by defining an adequate level of protection to include a protection that is equivalent to the privacy regulation, the Court has given 'adequacy' its proper meaning. Subsequently, international organisations and companies must adopt a legal framework that aligns with European privacy laws. The AG Bot explains that third countries require an adequate standard of data protection to be 'guaranteed' through sufficient control mechanisms on the basis that the protection of personal data plays an important role in the EU as it is considered to be a fundamental 'right' that needs to be safeguarded.[45] This can be seen as a reasonable explanation for the rigid approach adopted to assess adequacy decisions. However, the AG fails to demonstrate what the 'right' to data protection comprises, which suggests that the EU has adopted a formalistic mechanism to 'protect rights' that does not demonstrate the methods that must be used to protect privacy in practise.

According to the Court, an equivalent degree of protection is required '*by virtue of an interpretation*' of the DPD '*in light of the Charter*'.[46] The reference to the EU Charter of

[40] *Schrems I* (n 25) para 98.
[41] Commission Decision 2000/520/EC Commission Decision of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce [2000] OJ L215/7.
[42] *Schrems I* (n 25) para 73.
[43] Case C-362/14 *Maximillian Schrems v Data Protection Commissioner* [2015] ECR II–0000, Opinion of Advocate General Bot, para 142
[44] Ibid.
[45] Ibid, paras 139-140.
[46] *Schrems I* (n 25) para 73.

Fundamental Rights (Charter)[47] suggests how the decision by the CJEU follows a '*wave of judicial activism*' whereby the Charter is used by the Court to manipulate the parameter of 'adequacy'.[48] The Court seems to have taken inspiration from the coming into force of the Charter to revisit and reinterpret the provisions of the DPD.[49] This is problematic as it shows how the meaning of adequacy in relation to the transfer of data has been affected as a result of the Court taking a broader interpretation of the DPD provision in comparison to when the Directive was adopted.[50] A potential argument can be made that it is the CJEU that has primarily set up the higher privacy standards which are unachievable by countries such as the US who has taken a philosophically different view compared to the EU on how data protection should be regulated.[51]

However, criticising the Court too harshly would undermine the EU concept of 'rule of law', which the CJEU is applying when considering, in this instance, whether the Safe Harbour agreement is valid.[52] As affirmed by the Court, the EU is a union based on the rule of law in which '*all acts of its institutions are subject to review of their compatibility*' with, in particular, the general principles of law, fundamental rights and the Treaties.[53] This suggests that by 'reviewing' the data protection provision, the CJEU is regulating within its given power.[54] By reading the DPD provision in light of fundamental EU rights, the CJEU is ensuring that the integral rights and freedom of the EU are upheld. Additionally, the interpretation by the CJEU has been adopted in the GDPR, which suggests that it is the overall EU data protection regulation that undermines the free flow of data and subsequently restricts data-driven trading rather than the Courts' strict scrutiny being the reason for the excessive requirements that non-EU countries must satisfy.[55]

As stated by Kuner, the CJEU judgement shows how the EU data protection law is based on an 'illusion' which fails to consider the reality that the EU regulation cannot be extended globally especially when third countries are likely to have completely different data protection laws in comparison to the Union.[56] This legal fiction is evident in the fact that, globally, there

[47] Charter of Fundamental Rights of the European Union [2016] OJ C202/389 (Charter).
[48] Oreste Pollicino and Marco Bassini, 'Bridge Is Down, Data Truck Can't Get Through …: A Critical View of the Schrems Judgment in the Context of European Constitutionalism' in Giuliana Ziccardi Capaldo (ed.), *The Global Community Yearbook of International Law and Jurisprudence* (OUP, 2017), 246.
[49] Ibid, 251.
[50] *Schrems I* (n 25) para 37.
[51] See Murray (n 26) 627.
[52] *Schrems I* (n 25) para 60.
[53] Ibid.
[54] Laurent Pech, 'The Rule of Law as a Well-Established and Well-Defined Principle of EU Law' (2022) 14 *Hague Journal on the Rule of Law* 107, 110.
[55] See Article 1 GDPR.
[56] Christopher Kuner, 'Reality and Illusion in EU Data Transfer Regulation Post Schrems' (2017) 18 *German Law Journal* 881, 884.

has been little enforcement related to the *Schrems I* judgement which suggests that whilst the EU privacy laws are crucial to protect personal data, beyond its territory the ability to enforce EU standards is limited.[57] The assessment carried out by the Commission and Court is not based on reaching a reasonable accommodation between EU standards and those of the third countries, but rather on an unilateral effort to assert EU values.[58] The formalistic mechanism adopted by EU can be seen as being impractical as it does not recognise how the widespread enforcement of data transfer regulation can produce certain challenges and disruptions, especially to cross-border communication and international trade. Thus, the definition and interpretation of the concept of adequacy can be seen as being arbitrary and flawed as the current system does not provide an effective data protection framework that balances the rights of individuals with the practical recognition that the transfer of data is essential for global trading.

2.3 *Schrems II*: the lack of economic freedom and flexibility

The landmark case of *Schrems II*[59] is a continuation of the CJEU's case law in *Schrems I* as both cases are based on similar facts. *Schrems II* has legally challenged and invalidated an EU-US data transfer agreement (Privacy Shield Framework)[60] for the second time in just five years. In relation to the standard of essential equivalence, *Schrems II* clarified that 'equivalency' was the relevant level of protection to be guaranteed by a third country not only for adequacy decisions but also for international agreements (as in *Opinion 1/15*)[61] and for appropriate 'safeguard' mechanisms such as the SCCs found in Article 46 of the GDPR. This reflects how there is a guarantee that an 'equivalent' level of protection is required for all international transfers regardless of the provision of Chapter V of the GDPR a third country is using to comply with EU privacy laws. In other words, a 'single standard of protection'[62] has been introduced, which involves like *Schrems I*, '*a level of protection of fundamental rights and freedoms that is essentially equivalent'* to that guaranteed within the EU.[63] As stated by the AG Saugmandsgaard, the 'essential equivalence' test needs to be applied with 'certain flexibility' to ensure that the various international legal and cultural traditions are taken into account.[64] Despite this, the CJEU in *Schrems II* equates the level of protection offered by the GDPR with

[57] Ibid, 885.
[58] Ibid, 917.
[59] *Schrems II* (n 35).
[60] Commission Implementing Decision (EU) 2016/1250 of 12 July 2016 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the EU-U.S. Privacy Shield [2016] OJ L207/1.
[61] Opinion 1/15 (n 35).
[62] Zuzanna Gulczyńska, 'A certain standard of protection for international transfers of personal data under the GDPR' (2021) 11(4*) International Data Privacy Law* 360, 362.
[63] *Schrems II* (N 35) para 94.
[64] C-311/18 *Data Protection Commissioner v Facebook Ireland Limited and Maximillian Schrems* [2020] ECR II– 1, Opinion of AG Saugmandsgaard, para 249.

the fundamental rights protected in the Charter.[65] This shows how the requirements of the GDPR become the 'foundation' to afford fundamental Charter rights instead of regulating the transfer of data in relation to purely economic matters, which was the original intention of the act.[66] As such, the privacy regulation undermines the ability of data exporters to successfully monitor and transfer personal information which is needed to carry out commercial digital activities.

Additionally, it is argued that the *Schrems II* judgement has failed to recognise the extremely practical and commercial importance of being able to transfer personal data from EU to the US.[67] By invalidating the Privacy Shield Framework, the CJEU has imposed impossible challenges on data exporters. This includes challenges to assess the laws of a third country and accordingly ensure that sufficient additional safeguards are implemented to transfer data.[68] The Court seems to have narrowed the formula which exporters can use to ensure legality of their transfers. For example, by acknowledging that SCCs are only binding on the third country recipient of the data rather than the public authorities, the CJEU has provided for a reasoned explanation in relation to why supplementary measures that align with EU privacy rights must be incorporated by data exporters.[69] However, neither the Court nor the GDPR outlines what the substantial (minimum) requirements of the standard of 'essential equivalence' are.[70] The lack of guidance or concrete understanding of the desired level of protection leaves third countries in an uncertain position whereby there is no awareness of the precise measures they should take in order to comply with the GDPR standards.

As previously specified by the Court, EU legal provisions must be certain, and its application must be foreseeable by those 'subject to it'.[71] The requirement of legal certainty must be observed more 'strictly' in the case of rules that entail financial consequences as is the case with the GDPR.[72] However, the reality of the GDPR is that despite forming a single standard of protection for all international data transfers, there remains uncertainty in relation 'what the substantial content' of the privacy standard actually is.[73] Whilst *Schrems I* introduced a standard of essential equivalence for adequacy decisions, *Schrems II* extended this further to cover data transfers subject to appropriate safeguards, which illustrates remaining legal ambiguity in

[65] *Schrems II* (N 35) para 101.
[66] Oreste Pollicino and Marco Bassini (n 48) 257.
[67] Barbara Sandfuchs, 'The Future of Data Transfers to Third Countries in Light of the CJEU's Judgment C-311/18 – Schrems II' (2021) 70(3) *GRUR International* 245, 246.
[68] Ibid, 248.
[69] *Schrems II* (N 35) paras 132-137.
[70] Maria Helen Murphy, 'Assessing the implications of Schrems II for EU-US data flow' (2022) 71 *International & Comparative Law Quarterly* 245, 259.
[71] Case 325/85 *Ireland v Commission of the European Communities* [1987] ECR II-5083, para 18.
[72] Ibid.
[73] Zuzanna Gulczyńska (n 62) 362.

relation to how the different Chapter V provisions are going to be interpreted. It is submitted that the system created by the GDPR is complex and questionable from the perspective of the principle of legal certainty.[74] The GDPR lacks flexibility, as data protection interpretation favours the extensive application of EU values and Charter rights rather than realising the reality that cases such as *Schrems II* involve parties in an international context.[75] Therefore, the disregard by the Court of other national and international instruments, such as the World Trade Organisation rules (explored in Chapter 4)[76], suggests that the approach taken by the EU is flawed.

Moreover, *Schrems II* demonstrates the difficulties created by the legislature's unwillingness to explicitly address and place international agreements in the data protection framework.[77] This is also evident in *Opinion 1/15* where the CJEU found that the draft agreement between the EU and Canada for the transfer of passenger name record (PNR) data cannot be concluded as its provisions were incompatible with the fundamental rights.[78] Following both of these rulings, arguably non-EU countries such as US and Canada may be reluctant to invest their time and resources to reach an international agreement on data protection with the EU knowing that this could later be repealed by the CJEU.[79] The CJEU Safe Harbour decision has shown how it is not only confusing but also time-consuming for companies to modify and frequently change their business processes.[80] This means that the global regulatory differences can be controversial, as the excessive cross-border 'spill over' can create 'wasteful bureaucracy, confusion and inefficiencies' for companies involved and could disrupt the economy of the different countries.[81] On this basis, the current GDPR system does not sufficiently acknowledge how its stringent desire to regulate personal data is damaging the ability of companies and consumers to benefit from using the digital economy which requires data to be accessible more freely.

2.4. Transfers of personal data as an interference with EU fundamental rights

[74] Ibid,374
[75] Ibid, 370.
[76] See Chapter 4, page 20.
[77] *Schrems II* (N 35) paras 170-172.
[78] Opinion 1/15 (N 35) paras 125-126.
[79] Christopher Kuner, 'Article 45 Transfers on the basis of an adequacy decision', in Christopher Kuner and others (eds), *The EU General Data Protection Regulation (GDPR): A Commentary* (Oxford Academic 2020), 779-780.
[80] Julian Wagner, 'The transfer of personal data to third countries under the GDPR: when does a recipient country provide an adequate level of protection?' (2018) 8(4) *International Data Privacy Law* 318, 319.
[81] Lauren B. Movius and Nathalie Krup, 'US and EU Privacy Policy: Comparison of Regulatory Approaches' (2009) 3 *International Journal of Communication* 169, 171.

Based on the above arguments, it is evident that in the EU, the privacy and personal data of its citizens and residents are protected as fundamental rights.[82] The Charter protects both the right to privacy (Article 7) and the right to protection of personal data (Article 8) as fundamental rights. As examined in *Schrems I* and *Opinion 1/15*, any interference by data transfers on these rights and freedoms must be '*provided by law*' and the transfers must '*respect the essence*' of fundamental rights.[83] As such, the GDPR and the interpretation of its provisions by the Court have held privacy rights at the highest 'normative value'.[84] Similar to a coin, personal data can be viewed as a valuable 'trade commodity' but also as an asset that has societal value.[85] Whilst it is essential to ensure that individuals have control over their personal data, a balance needs to be maintained so that the economic growth attached to the flow of data is not undermined.[86] The gradual expansion of EU data protection rights is reflected in *Schrems II* whereby the right to privacy not only applies in adequacy decisions but also in relation to other appropriate safeguards measured adopted by a third country.[87] This shows how there is an extraterritorial expansion of EU data protection rights far beyond its borders which could lead to complications when making international agreements and in the ability to enforce an uncompromising legal regime abroad.[88]

2.5 The connection between cultural values and the concept of privacy

Globally, different cultures have distinctive attitudes towards privacy which often reflect their traditions, beliefs, and values. Both the concept of privacy and data protection is linked to culture, making them 'context-bound'.[89] In European cultures, privacy is deeply rooted in the values of individual autonomy and dignity.[90] In contrast, individuals from other countries, such as the US, have traditionally emphasised the importance of personal freedom and economic interests over privacy concerns.[91] This illustrates the social and cultural context of the grounds for the Commission's and CJEU's invalidation of transatlantic agreements that were challenged in cases such as *Schrems I* and *Opinion 1/15*. From this perspective, the cultural values of the EU have influenced the provisions of the GDPR, and the interpretation of international data

[82] Article 45(2)(a) GDPR.
[83] Article 52 Charter of Fundamental Rights of the European Union.
[84] Svetlana Yakovleva and Kristina Irion, 'Pitching trade against privacy: reconciling EU governance of personal data flows with external trade' (2020) 10 *International Data Privacy Law* 201.
[85] Svetlana Yakovleva, 'Should Fundamental Rights to Privacy and Data Protection be a Part of the EU's International Trade 'Deals'?' (2018) 17(3) *World Trade Review* 477, 478.
[86] Ibid.
[87] *Schrems II* (N 35) paras 198-199.
[88] Maja Brkan, 'The unstoppable expansion of the EU fundamental right to data protection' (2016) 23(5) *Maastricht Journal of European and Comparative Law* 812, 841.
[89] Manuel José Cepeda Espinosa, *Privacy, in The Oxford Handbook of Comparative Constitutional Law* (2012) 967.
[90] James Whitman, 'The Two Western Cultures of Privacy: Dignity versus Liberty' (2004) 113(6) *The Yale Law Journal* 1151, 1163.
[91] Ibid.

transfers adopted by the Court. These different approaches to privacy regulation have implications for businesses that are operating on a global level. By asserting EU values, the GDPR has led to the fragmentation of data protection rules, complicating the worldwide data policy requirements that companies and international organisations must fulfil.[92]

On the other hand, it may not be possible for EU legislatures to embrace a less restrictive data protection system. This is because if, culturally, EU citizens value the ownership over their personal information and private space, changing the regulation could lead to political tension. Individuals could question the legality and validity of the power given to the EU and whether its provisions reflect the democratic understanding of those residing in the EU. Nonetheless, it is recognised that even EU Member States are not always entirely compliant with the GDPR which shows how it would be 'inequitable' if third countries are required to hold a higher private standard based on the cultural values of EU citizens.[93]

2.6 Effectiveness of the approach adopted in the GDPR

In the absence of the internationally workable privacy standards, the GDPR in Articles 44, 45 and 46 has created a legal wall which blocks the free flow of personal data.[94] It is readily apparent that the transatlantic flow of data is important for global commercial transactions.[95] Nevertheless, the inadequate support and limited cost-effective methods to help different business sectors achieve and maintain compliance with the GDPR suggests how ineffective its provisions are in practice.[96] Although recommendations to help data exporters in processing personal data are provided by the European Data Protection Board (EDPB), in the fast growing digital market these recommendations are incompetent.[97] Rather, as suggested by Torre, there is a necessity for the creation of 'automated model-based' GDPR compliance analysis solutions which would allow companies to ensure individual rights are protected under the GDPR.[98] Moreover, the decisions made by the Commission, allowing some countries to permit the transfer of personal data whilst unfairly rejecting others suggests the lack of capacity of EU

[92] Svetlana Yakovleva, 'Should Fundamental Rights to Privacy and Data Protection be a Part of the EU's International Trade 'Deals'?' (n 85) 482.

[93] Paul Roth, 'Adequate Level of Data Protection in Third Countries Post-Schrems and under the General Data Protection Regulation' (2017) 25(1) *Journal of Law, Information and Science* 49, 63.

[94] Loic Azoulai and Marijn van der Sluis, 'Institutionalizing Personal Data Protection in Times of Global Institutional Distrust: Schrems' (2016) 53 *Common Market Law Review* 1343, 1366.

[95] Ionna Tourkochoriti, 'The Transatlantic Flow of Data and the National Security Exception in the European Data Privacy Regulation: In Search for Legal Protection Against Surveillance' (2014) 36 *University of Pennsylvania Journal of International Law* 459, 450.

[96] Damiano Torre and others, 'Modeling data protection and privacy: application and experience with GDPR' (2021) 20 *Software and Systems Modeling* 2071.

[97] See European Data Protection Board 01/2020 'Recommendations 01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data [2021] 1.

[98] Damiano Torre and others N (96) 2085.

regulation to provide the reasonable conditions that third countries must adhere to.[99] As a result, the GDPR has not provided a satisfactory and well-defined framework in relation to cross-border data transfers.

[99] Article 45(1) GDPR.

Chapter 3

Unintended consequences: data localisation and the obstacles it creates

This chapter identifies data localisation as an indirect consequence of the rigid GDPR standards. First, the concept of data localisation is outlined to show its relevance and connection to the data protection requirements. Second, practical justifications that are used by EU lawmakers to limit the flow of data are rebutted. To do so, this chapter returns to *Schrems II* whereby the surveillance activities in the US are considered for comparison purposes.

3.1 The concept of data localisation

Data localisation refers to any legal measures that require data to be stored locally within a particular jurisdiction in which it is being collected, preventing data from moving internationally.[100] This ranges from *de jure* restrictions to *de facto* restrictions. *De jure* restrictions include the legal right of the state to exercise its power and authority to have specific data storage requirements or policies, such as the need to have data centres within the local geographical territory of the state.[101] On the other hand, *de facto* restrictions are restrictions that exist in practice which can limit the ability of companies to move, store, process and handle the personal data of their users.[102] The central intention of these restrictions is to not only protect the privacy and security of the country but also to promote the enhancement of the local economy by encouraging the use of local data centres and other related services.[103] Nonetheless, data localisation has unintended consequences which reduce the efficiency in cross-border data transactions, increase business costs and limit innovation.[104]

Unlike countries such as China and India, the EU does not localise its data explicitly.[105] Despite and after *Schrems II* and the EDPB guidance, there have been numerous enforcement actions against data exporters.[106] The GDPR does not require the localisation of data or the establishment of specific data centres in the EU. However, it is the specific privacy standards stated in Chapter V of the GDPR[107] that put pressure on companies to localise, as the steps to

[100] Bret Cohen, Britanie Hall, and Charlie Wood, 'Data Localization Laws and Their Impact on Privacy, Data Security and the Global Economy' (2017) 32 *Antitrust* 107.

[101] Melissa Lukings and Arash Habibi Lashkari, *Understanding Cybersecurity Law in Data Sovereignty and Digital Governance: An overview from a Legal Perspective* (Springer 2022), 25

[102] Ibid, 30.

[103] Ibid, 32

[104] Ibid.

[105] See John Selby, 'Data localization laws: trade barriers or legitimate responses to cybersecurity risks, or both?' (2017) 25(3) *International Journal of Law and Information Technology* 213.

[106] Peter Swire and DeBrae Kennedy-Mayo, 'The Effects of Data Localization on Cybersecurity' (2022) Georgia Tech Scheller College of Business Research Paper 1/4030905, 12 <https://ssrn.com/abstract=4030905> accessed 29 January 2022

[107] See Articles 44-50 GDPR.

comply with EU regulation are both 'legally risky' and potentially unwise.[108] For example, in the EDPB guidance, recommendations are made for companies and third country organisations to 'adopt supplementary measures' and re-evaluate, on an ongoing basis that the importer complies with the developments of the EU.[109] This shows how in practise, the complicated requirements of the GDPR have indirectly led to the EU localising and controlling the circumstances under which external companies can access the data of its consumers. On this basis, it is suggested that the post-*Schrems II* reality is that there is *de facto* data localisation of personal data in the EU.[110]

However, one could argue that in theory, the EU's GDPR standards, such as transfers on the basis of an adequacy decision,[111] allow for cross-border data flows to be possible under certain conditions, which shows how the level of localisation is trivial, especially where the third country provides the same level of data protection as the EU.[112] This explanation is undermined by the evidence that many EU Member States have introduced narrow data localisation policies which impose strict requirements either on specific types of data, particular industry sectors or subsets of the population rather than ensuring an equal general application towards all internet users.[113] In these circumstances, the easiest and sometimes only solution for non-EU companies is to localise its data so that they can continue to operate within the EU without receiving an extensive amount of scrutiny. As Brown and Marsden point out, the determination of the 'adequacy'[114] requirement overseen by the European Commission demands other countries introduce most of the key protection from the EU data protection regulation in their own national laws.[115]

Furthermore, this is shown in *Schrems II* which determines that cloud-based services in the US are incapable of complying with the GDPR and with other EU privacy laws.[116] The decisions made by data exporters are not merely financial decisions but also decisions concerning the fundamental rights of the users which are a matter of priority. [117] According to Brehmer, invaliding the SCCs and the Privacy Shield agreement leaves third countries with two options:

[108] Anupam Chander, 'Is Data Localization a Solution for Schrems II?' (2020) 23(3) *Journal of International Economic Law* 771, 772.
[109] European Data Protection Board 01/2020 (n 97).
[110] Anupam Chander, 'Is Data Localization a Solution for Schrems II?' (2020) (n 108)
[111] See Article 45 GDPR.
[112] Melissa Lukings and Arash Habibi Lashkari, (n 101) 34.
[113] John Selby, (n 105) 215.
[114] Article 45(2) GDPR.
[115] Ian Brown & Christopher T. Marsden, *Regulating Code: Good Governance and Better Regulation in the Information Age* (MIT Press 2013), 59.
[116] Schrems II (n 35) para 201.
[117] Ibid, para 169.

either legislating greater privacy protections to meet EU standards or localising data.[118] In theory, the significance of the EU digital market for the economy renders the second option unavailable or ineffectual for the commercial benefit of a third country. The invalidation of the Privacy Shield also indicates that over 5300 companies (both European and American) had to rethink how to transfer data across the Atlantic.[119] It is asserted that in *Schrems II*, while the putative defendant was Facebook, it was the US government that was on trial.[120] This is accurate as in the judgement, CJEU has made reference to the US surveillance laws which were compared and analysed with Chapter V of the GDPR.[121] Thus, countries are implicitly required to adopt a system similar to the EU if they desire to export data from and into the EU, suggesting that the EU is localising its data to a great extent.

In addition, *de facto* localisation by the EU impacts large-scale global data operators such as Google Analytics and the Meta corporation.[122] This is evident in the warning issued by Meta to the EU in their annual report filed with the Securities and Exchange Commission (SEC) which states how both Facebook and Instagram will no longer be available within the EU unless data is allowed to flow to its servers in the US.[123] Meta argues that not having an acceptable data transfer framework would 'materially and adversely affect [the] business, financial condition, and results of operations' which rely on data transfers between the EU and US in order to operate global services.[124] Although the European Commission and the US announced that they have agreed in principle to a new 'Trans-Atlantic Data Privacy Framework', it has been over a year since this announcement was made, and no concrete agreement is finalised.[125] This is inequitable as under the current system, only larger companies will be able to afford legal advice and resources to review a nation's surveillance law for compatibility with EU law whereas smaller companies will avoid this route entirely.[126] It amounts to 'data sovereignty' whereby only those that can afford and contest the additional cost with respect to the flow and control of data can effectively operate a digital business across national borders.[127]

[118] H Jacqueline Brehmer, 'Data Localization The Unintended Consequences Of Privacy Litigation' (2018) 67(3) *American University Law Review* 927, 957.
[119] Anupam Chander, 'Is Data Localization a Solution for Schrems II?' (n 108) 773.
[120] Ibid.
[121] Schrems II (n 35) para 65.
[122] Melissa Lukings and Arash Habibi Lashkari, *Understanding Cybersecurity Law in Data Sovereignty and Digital Governance: An overview from a Legal Perspective* (Springer 2022), 166.
[123] United States Securities and Exchange Commission, 'Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange of 1934' (2 February 2022) < https://d18rn0p25nwr6d.cloudfront.net/CIK-0001326801/14039b47-2e2f-4054-9dc5-71bcc7cf01ce.pdf > accessed 2 February 2023.
[124] Ibid, 9.
[125] European Commission, 'European Commission and United States Joint Statement on Trans-Atlantic Data Privacy Framework' (EU, 25 March 2022) <https://ec.europa.eu/commission/presscorner/detail/es/ip_22_2087> accessed 2 February 2023.
[126] Anupam Chander, 'Is Data Localization a Solution for Schrems II?' (2020) (n 108) 774.
[127] Richard D. Taylor, 'Data localization: The internet in the balance' (2020) 44 *Telecommunications Policy* 1, 2.

Accordingly, data localisation by companies and international organisations is a practical response to the constraints imposed on cross-border data flows in *Schrems II*.[128]

Ultimately, the consequence of GDPR requirements is the fragmentation it creates restricting businesses and leaders from communicating, profiting, and connecting over the internet. Whilst these consequences are unintended, the EU regulation and cases such as *Schrems II* have created a 'territorial regulatory regime' for data privacy.[129] It is argued that this regime is opposed to the free and secure flow of information, leading to the localisation of data.

3.2 Practical considerations

A variety of justifications are given for localising data. These include protecting individuals' fundamental rights online, in light of foreign surveillance, and promoting security and privacy, as well as providing a competitive advantage to domestic companies to compete in the digital economy.[130] Rather than solving the issues of surveillance, data security, individual rights and the domestic economy, these justifications have unintended consequences. The implications of these justifications are considered below presenting the costs they will impose on economic development and social freedom globally.

3.2.1 Balkanisation of the Internet

Originally, the internet was created with the intention of being an 'open, interoperable and unified' worldwide system which had no regard for national borders as data routed across the world 'autonomously and automatically'.[131] The legislative development namely the GDPR has led to what has been called 'the splinternet' which describes the trend of dividing the global internet into fragmented parts based on geographical, political, or cultural reasons.[132] This phenomenon has the risk of damaging the economy, 'hampering' digital innovation, and restricting freedom of speech.[133] The extraterritorial effect of GDPR is evident in Article 4(4) which states that the EU's GDPR provisions apply to any form of automated processing of personal data which is used '*to evaluate certain personal aspects relating to a natural person*' such as economic situation, behaviour, location, or interests of an individual.[134] This shows how any personal data of the EU citizens which is collected digitally must comply with the relevant GDPR provisions. More remarkably, the GDPR standards apply to companies processing the personal data of EU individuals even if the company itself is not established in

[128] Anupam Chander, 'Is Data Localization a Solution for Schrems II?' (2020) (n 108) 778.
[129] H Jacqueline Brehmer (n 118) 969.
[130] Anupam Chander and Uyen P. Le, 'Data Nationalism' (2015) 64(3) *Emory Law Journal* 679, 713.
[131] Jonah Force Hill, 'The Growth Of Data Localization Post-Snowden: Analysis And Recommendations For U.S. Policymakers And Business Leaders' (The Hague Institute for Global Justice, Conference on the Future of Cyber Governance, May 2014) 1, at 6 and 19 <https://ssrn.com/abstract=2430275> accessed 2 February 2022.
[132] W. Gregory Voss (n 1) 503.
[133] Ibid.
[134] See also Article 2(2) GDPR.

the Union.[135] If the processing activities are related to the offering of goods or services to data subjects in the EU, the GDPR will apply.[136] Thus, Balkanisation of the internet by the EU hinders cross-border communication and commerce negatively impacting on businesses and consumers in the EU who are restricted from participating in the global digital market.

Additionally, if a controller or processor is not establishment in the EU, they are under an obligation to designate 'in writing' a representative in the EU.[137] This shows the way in which the EU manipulates data exporters into adhering and adapting to its regulations leading to the flow of data being localised. There are serious consequences where a company fails to comply with the GDPR. Infringement of the GDPR provisions, including Articles 44 to 49, permits administrative fines for up to ten million euros or up to 2% of the total 'worldwide annual turnover' of the preceding financial year being issued to the controller or processor.[138] Therefore, because of the difficulties facing non-EU companies and international organisations, data localisation becomes an 'attractive' alternative in order to avoid fines under GDPR. A study conducted by Ferracane, Kren and Marel found that more restrictive data policies do have a significant negative impact on the productivity performance of firms in downstream data-intense sectors.[139] This negative impact is 'stronger' for EU countries that have a better digital-enabling environment and for manufacturing companies that also produce services.[140] Therefore, localising data does not only impact non-EU countries but also EU Member States and their established businesses that rely on data in order to grow their global commercial performance.

3.2.2 Foreign and domestic surveillance

The prevention of foreign surveillance is a common justification for data localisation policies. It is grounded in the belief that placing data abroad can threaten the security and privacy of EU Member States.[141]As held in *Schrems II*, applying the principle of proportionality, the surveillance programmes based in the US[142] cannot be regarded as being limited to what is strictly necessary to safeguard citizens privacy.[143] Using this assessment the Privacy Shield was nullified leading to the CJEU unintentionally localising data. While data localisation requirements can serve as a public repudiation for foreign governments, it is unlikely that data

[135] Article 3(2) GDPR.
[136] Article 3(2)(a) GDPR.
[137] Article 27(1) GDPR.
[138] Article 83(4) GDPR.
[139] Martina Ferracane, Janez Kren and Erik van der Marel, 'Do Data Policy Restrictions Impact the Productivity Performance of Firms and Industries?' (2020) 28(3) *Review of International Economics* 674, 675.
[140] Ibid, 676.
[141] Erica Fraser, 'Data Localisation and the Balkanisation of the Internet' (2016) 13 *Journal of Law, Technology & Society* 359, 364.
[142] See s702 of the Foreign Intelligence Surveillance Amendments Act 2008.
[143] *Schrems II* (n 35) para 184.

localisation restrictions will, in principle, limit other countries' ability to conduct foreign surveillance activities.[144] It is submitted that keeping data in the EU does not insulate the information being shared by the European intelligence services with the US.[145] Further, limiting the flow of data and consequently localising, may facilitate foreign surveillance by centralising information in the EU, thus allowing agencies to focus their surveillance efforts in one particular place. If the objective of GDPR is to ensure that foreign protection is 'essentially equivalent' to that available under the EU, it seems reasonable to question whether EU Member State surveillance laws are more protective, especially if a EU country was the one being scrutinised.[146] Even transmissions between two EU countries might be routed through the US or through another internet infrastructure, therefore it is impractical to have national or regional routing on the basis of foreign surveillance concerns as this is likely to raise costs for internet access far beyond the imaginary surveillance risks that concern EU decision-makers.[147] EU standards to controlled information is a 'tactic' used by the EU decision-makers to 'maximise the bargaining power' with foreign intelligence agencies.[148]

Moreover, keeping information in the EU does not ensure that data is being protected from the surveillance of the European Member States' own intelligence services. Domestic surveillance can be used as a 'tool' by legislators to ensure that data is available to domestic law enforcement agencies for 'investigative and evidence-gathering purposes.[149] However, localising data for these domestic purposes may not be effective and it can make surveillance easier for a foreign government. As explained by Chander and Le, by compelling companies to use local services rather than global ones, there is a 'greater likelihood' of choosing providers that have weak security measures.[150] Global services are subject to international competition whereas the local services are shielded by data localisation requirements, unable to distribute information across multiple servers in different places. There is the 'protected local provider' problem whereby weaker security and infrastructure for local services make such systems easier targets for foreign surveillance and cyber-thieves.[151] Though this is a valid point, it is essential to understand that European citizens and governments can legitimately be more concerned about access by foreign surveillance services. than within the EU, precisely because they are not subject to democratic control by the third country that is spying.[152]

[144] Erica Fraser (n 141) 364.
[145] Anupam Chander, 'Is Data Localization a Solution for Schrems II?' (n 108) 781
[146] Ibid.
[147] Ibid, 782.
[148] Erica Fraser (n 141) 365.
[149] Ibid.
[150] Anupam Chander and Uyen P. Le, 'Data Nationalism' (n 130) 716.
[151] Ibid, 717.
[152] Christopher Kuner, 'Data Nationalism and Its Discontents' (2015) 64 *Emory Law Journal* 2089, 2094.

3.2.3 Data Security

Closely connected to the goal of avoiding surveillance is the justification that restrictions to the flow of data enhance data security, thereby protecting the privacy and security of personal information against non-governmental actors.[153] The EU data protection laws have used privacy and security to maintain control over the transfer of sensitive information outside the EU borders.[154] These GDPR standards operate as data localisation measures which undermine, not strengthen, the ability of cloud service providers to take advantage of the Internet's distributed arrangement to use and benefit from 'sharding' on a global scale.[155] Here, 'sharding' is the process in which different rows of database are held in servers across the world in smaller, more manageable 'shards' which provide enough data for operation but not enough to identify a person.[156] Sharding the data allows companies to increase the 'efficiency of distribution' and security surrounding the information.[157] As such, data localisation is no 'panacea' to protect against cybersecurity. [158] Instead, the unachievable EU standards, which require a company to update and defend multiple versions of its systems across different regions and states, open a larger 'attack surface for malicious hackers'.[159] This will lead to a company needing to employ a series of technical and non-technical controls. Additional firewalls and intrusion detection systems will be needed to identify unauthorised access of data exfiltration as well as additional vendors and employees to recognise threats and defend against attacks.[160] This shows how having a regulatory system that confines data, leads to additional costs for business operators.

To better illustrate this point, consider a hypothetical company 'Z', which has customers and provides services in the US, EU, India, China, Mexico, Canada, and Singapore. Before localisation, company Z has data centres in US, India, and Singapore which are used to manage all user data. In 2018, the EU, Canada, and Mexico all pass laws which require to an extent localising data by having specific requirements in relation to when the personal data of its citizens can leave their borders. Although prior to these laws, company Z only needed three sets of firewalls and intrusion detection systems, the new strict standards require the company to have six sets of these technical controls in each of the jurisdictions with different rules. Therefore, the justification of data security for data localisation is weak and can cause issues in the smooth running of a corporation.

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[153] Anupam Chander and Uyen P. Le, 'Data Nationalism' (n 130) 718.
[154] Article 44 GDPR.
[155] Patrick S. Ryan, Sarah Falvey and Ronak Merchant, 'When the Cloud Goes Local: The Global Problem with Data Localization' (2013) 46(12) *COMPUTER* 54, 57.
[156] Ibid.
[157] H Jacqueline Brehmer (n 118) 966-967.
[158] Ibid, 967.
[159] Anupam Chander, 'Is Data Localization a Solution for Schrems II?' (n 108) 784.
[160] H Jacqueline Brehmer (n 118) 964.

Furthermore, EU requirements prevent access to global cloud computing services. Whilst the EU assumes that monitoring the transfer and processing of data ensures that information of the citizens is safeguarded, such hopes are likely to prove unwarranted. This is because local corporations will be denied access to larger companies that could help them scale up and take their business to a global level.[161] For example, a company like Zoho can use Google Apps to enhance businesses, demonstrating how accessing global services allows for a small company to maintain an international presence.[162] *De facto* localisation could ban the use of cloud services such as Google Cloud, Amazon Web Services and Microsoft Azure especially post-*Schrems II* as these companies could be compelled to give their data to the US authorities. [163] This is a disadvantage as it will indicate that a company is not in compliance with the GDPR, therefore would causing difficulties in providing its services within the EU.

3.2.4 Individual Rights

As discussed in Chapter 2, the protection of fundamental rights in relation to the online transfer and processing of data is a legitimate concern for nations.[164] One could argue that the GDPR through data localisation performs several functions including giving back control of personal data to data subjects.[165] This arguably gives individuals private autonomy so that the government can 'stand back' and let citizens decide the personal information they want to share, giving them a 'choice as to how to conduct their own lives'.[166] However, limiting the ability of citizens to access data and services across the world may interfere with an individual's right to the freedom of expression specifically the right to receive and impart from ideas.[167] This indicates that data localisation distracts from the ability of the government to create better protection and more opportunities for its citizens.[168] There are potential benefits from localisation such as privacy protection and strategic autonomy. However, the risks including the obstacles to 'integrated cybersecurity management' and blockchain business models have more serious consequences including restricting trade, tariffs, and quotas.[169] Therefore, as proposed by Christakis data localisation is disproportionate and an unnecessary response to foreign access to data as more satisfactory and less disruptive solutions exist.[170] One potential

[161] Anupam Chander and Uyen P. Le, 'Data Nationalism' 726-727.
[162] Ibid, 728.
[163] Anupam Chander, 'Is Data Localization a Solution for Schrems II?' (n 108) 777.
[164] Article 1(2) GDPR.
[165] Robert Herian, 'Regulating Disruption: Blockchain, GDPR, and Questions of Data Sovereignty' (2018) 22(2) *Journal of Internet Law* 1, 12.
[166] Joseph Raz, *Liberty and Trust, in Natural Law, Liberalism, and Morality*, (OUP 1996) 113.
[167] Article 11 Charter of Fundamental Rights of the European Union.
[168] Anupam Chander and Uyen P. Le, 'Data Nationalism' 739.
[169] Shin-yi Peng, 'Digital Trade' in Daniel Bethlehem and others (eds), *The Oxford Handbook of International Trade Law* (2nd edn, Oxford Academic 2022), 780.
[170] Theodore Christakis, 'European Digital Sovereignty: Successfully Navigating Between the "Brussels Effect" and Europe's Quest for Strategic Autonomy' (Multidisciplinary Institute on Artificial Intelligence/Grenoble Aples Data Institute, 2020) at 74-75 <http://dx.doi.org/10.2139/ssrn.3748098> accessed 27 January 2023.

solution to better protect personal data is for a customer to process the data themselves and decide whether to accept or reject the data being transferred to another non-EU country.[171] This will allow an individual to assert their autonomy and protect their right to privacy whilst ensuring that digital trading and the ability of an individual to contribute to the global market is not undermined.

3.3 Impact of data localisation on the global economy and businesses

Data privacy regulation has two main economic objectives. First, the legislation intends to ensure that natural rules do not become a barrier to trade as flow of personal data is necessary for transactions and provision of services.[172] Second, the economic objective of data protection laws is to protect 'consumer confidence in e-commerce' as large amounts of personal data are often gathered by online service providers.[173] This leads to data localisation laws being hailed a means of 'boosting domestic economic development' when in reality localisation has contrary effects on the economic growth.[174] In regards to this, the Organisation for Economic Co-operation and Development (OECD) has warned nations against imposing 'barriers to the location, access and use of cross-border data facilities and functions' so that cost effectiveness is maintained.[175] Although the OECD guidelines are not binding, they are influential in permitting the legitimate free flow of data and, therefore, should be adopted by the EU. The GDPR provisions are negatively impacting both domestic and international trading opportunities. By adopting the argument asserted by Hill, this section demonstrates how the EU privacy standards are threating economic prosperity, global communication, and innovation of the Internet.[176]

3.3.1 Domestic Economy

Data localisation allows local businesses and internet users not to pay foreign companies to host their 'data offshore'.[177] This is because the strict EU laws can be used as a strategy to ensure that local businesses are given the opportunity to increase their share of domestic IT markets which are otherwise dominated by US companies.[178] A significant weakness in this argument is that local data centres are likely to have higher prices for local businesses to store

[171] W Kuan Hon, *Data Localization Laws & Policy: The EU Data Protection International Transfers Restriction Through a Cloud Computing Lens* (Edward Elgar Publishing, 2017), 148.
[172] Ian Brown & Christopher T. Marsden (n 115) 50.
[173] Ibid, 51.
[174] Erica Fraser (n 141) 367.
[175] Organisation For Economic Co-operation and Development, 'OECD Council Recommendation on Principles for Internet Policy Making' (OECD, 2011) <http://www.oecd.org/sti/ieconom/49258588.pdf> accessed 27 January 2023
[176] Jonah Force Hill, 'A Balkanized Internet? The Uncertain Future of Global Internet Standards' (2012) *Georgetown Journal of International Affairs* 49.
[177] John Selby, (n 105) 226.
[178] Erica Fraser (n 141) 367.

data compared to more efficient global data centre operators.[179] These higher prices would have disadvantages for local online businesses which would undermine the overall efficiency of the local economy.[180] In practise, a heavily regulated privacy framework creates 'costly and burdensome tasks' for service suppliers who want to engage in the digital data-driven economy.[181] Research conducted by Potluri, Sridhar and Rao indicates that whilst local firms can effectively compete against global multinationals, limiting the free flow of data restricts the ability of companies to engage more international consumers.[182] Additionally, localisation affects the ability of EU citizens to have consumer choice so that they can have better pricing and overall better-quality services being provided to them by using the online digital market.[183]As estimated by the European Centre for International Political Economy (ECIPE), data localisation regulation costs EU citizens $193 billion per year due to higher domestic costs.[184] Whilst the EU has raised concerns about the transfer of data to third country, the European Commission has emphasised the 'critical importance of data flows notably for the transatlantic economy'.[185] The internet raises profits which consequently has an economic impact. For example, across the major sectors such as electricity, security, retail and healthcare, the economic impact is estimated at $2.7 to $6.2 trillion per year.[186]

3.3.2 International Trade

The flow of data affects international trading between consumers and producers of digital services to varying degrees. Globalisation and decentralisation of production have made the movement of information across the globe essential for the 'production and provision of services' that are happening both online and offline in the everyday management of companies.[187] Considering this reality, the domestic legal systems should reflect the economic profits driving globalisation so that its benefits are acknowledged when legislating privacy-related laws.[188] The issues of data localisation are on the agenda of the WTO as these are

[179] Philip E. Agre and Marc Rotenberg, *Technology and Privacy: The New Landscape* (MIT Press, 1998), 168-169.
[180] Ibid.
[181] Shin-yi Peng (n 169) 780.
[182] Sai Rakshith Potluri, V Sridhar and Shrisha Rao, 'Effects of data localization on digital trade: An agent-based modeling approach' (2020) 44(9) *Telecommunications Policy* 1
[183] Ibid, 13.
[184] Matthias Bauer et al, 'The Costs of Data Localization: Friendly Fire on Economic Recovery' (2014) ECIPE Occasional Paper 3/2014, 2 <https://ecipe.org/wp-content/uploads/2014/12/OCC32014__1.pdf> accessed 20 February 2023
[185] Commission, 'Communication from the Commission to the European Parliament and the Council on the Functioning of the Safe Harbour from the Perspective of EU Citizens and Companies Established in the EU' (Communication) COM (2013) 847 final, at 3.
[186] Anupam Chander and Uyen P. Le, 'Data Nationalism', 727.
[187] Svetlana Yakovleva, 'Personal Data Transfers in International Trade and EU Law: A Tale of Two 'Necessities'' (2020) 21 *The Journal of World Investment & Trade* 881, 887.
[188] Ibid.

addressed in the WTO Public Forum.[189] Under the main theme of 'Trade 2030', one of the sub-themes is to address the significant expenses caused by localisation and balancing trade disciplines with national policy objectives [190] Therefore, the provisions of the GDPR and its interpretation should be flexible so that the negative impact that data localisation has on commercial digital trading is limited especially considering the fact that one of the objectives of the GDPR is to ensure the 'expansion of international trade and cooperation'.[191]

[189] World Trade Organization, 'Public Forum 2018: "Trade 2030"' (WTO, 2018) < https://www.wto.org/english/forums_e/public_forum18_e/public_forum18_e.htm> accessed 20 February 2023
[190] World Trade Organization, 'Session 76 Summary: Data localisation: Balancing trade disciplines and national policy objectives' (WTO, 2018) < https://www.wto.org/english/forums_e/public_forum18_e/rep_76.pdf> accessed 20 February 2023.
[191] Recital 101 GDPR.

Chapter 4

Limiting a service: how the EU privacy regime violates its international trade commitments

This Chapter analyses the potential inconsistency of the GDPR rules for transferring personal data with the EU's commitments under GATS. A case study example is used to analyse the potential outcome if a complaint were brought before the WTO Dispute Settlement Body (DSB) concerning the trade-restrictive measures adopted by the EU. Firstly, the EU's core obligations under GATS are explored, followed by the general exception that the EU can use to justify its strict privacy laws.

4.1 GATS' purpose in protecting trade in services and bringing a complaint

The objective of the GATS rules is to design a consistent and predictable system of international rules for trade in services as well as to facilitate the progressive liberalisation of service markets.[192] Services account for twenty per cent of global trade, but that percentage has risen significantly in recent years.[193] The purpose of GATS is not to constrain its Members from regulating the supply of services but rather to establish rules that ensure regulations are created transparently and impartially, which can promote economic growth by not creating excessive trade barriers.[194] Applying the pre-Internet era norms and commitments to the digital economy can be problematic as GATS does not acknowledge cross-border data flows.[195] Yet, both the WTO and its dispute settlement panels have adopted an 'evolutionary' interpretation of the GATS to accommodate measures affecting the electronic delivery of services.[196]

In becoming a WTO Member, the EU is committed and obligated to provide a specified level of market access and national treatment to other WTO members.[197] More importantly, it has made a commitment not to implement any measures that would restrict entry into the market by foreign suppliers.[198] The GDPR requirements are at issue in determining a GATS violation because they relate to the differing treatment between countries as a whole.[199] As shown in Chapter 2, data transfers are predominately determined by adequacy decisions made by the

[192] World Trade Organisation, 'The General Agreement on Trade in Services (GATS): objectives, coverage, and disciplines' (WTO) <https://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm> accessed 15 February 2023.
[193] Ibid.
[194] Ibid.
[195] Nivedita Sen, 'Understanding the Role of the WTO in International Data Flows: Taking the Liberalization or the Regulatory' (2018) 21(2) *Journal of International Economic Law* 323, 347.
[196] Wentong Zheng, 'The Digital Challenge to International Trade Law' (2020) 52(2) *New York University Journal of International Law and Politics* 539, 581.
[197] Gary Winslett and Taylor Phillips, 'The Evolving Legal Architecture Shaping the Digital Trade in Services' (2021) 2021(2) *University of Illinois Journal of Law, Technology & Policy* 257, 277.
[198] Article II GATS.
[199] See Article 44-45 GDPR.

European Commission.[200] Although a complaint that the GDPR violates the GATS rules has not been previously brought before the DSB. Nevertheless, a case study is used to propose that if a Member was to object to the legality of the GDPR, this national legislation would be found to be in violation of the GATS requirements.[201] Previous case examples of when national legislation has been the basis of a complaint before the DSB are used to draw similarities and establish the basis on which the GDPR is incompatible with the GATS requirements.[202] Possibly, the US can bring a claim against the EU because they are one of the countries that are not recognised as providing an 'adequate' level of protection within the EU.[203]

Whether a complaint can be brought before the DSB is another matter. Currently the Appellate Body (AB) is in crisis due to the US blocking the appointment of new officials.[204] However, this does not affect the analysis carried out in this Chapter, as irrespective of this blockage, the EU has an obligation to comply with the commitment it has made.

4.2 GATS Article II: Most-Favoured-Nation Treatment

Article II of GATS states that each Member 'immediately and unconditionally' needs to ensure that services and service suppliers of any other WTO Member are treated no less favourably than any other country.[205] This is a horizontal and absolute general obligation which is applicable to any service regardless of the commitment that has been made.[206] The issue to determine is whether formal discrimination among foreign data service providers is necessary or simply an 'un-level competitive playing field'.[207] As established in the *Bananas* case,[208] the DSB is likely to hold that the GDPR treats WTO Members less favourably than other countries.[209] Certain arrangements between countries, such as the EU-US Safe Harbour Agreement or the Privacy Shield, to circumvent regulations limiting free transfer of data could

[200] Article 45(1) GDPR.

[201] Elisabeth Meddin, 'The Cost of Ensuring Privacy: How the General Data Protection Regulation Acts as a Barrier to Trade in Violation of Articles XVI and XVII of the General Agreement on Trade in Services' (2020) 35(4) *American University International Law Review* 998, 1036.

[202] Markus Krajewski, *National Regulation and Trade Liberalization in Services: The Legal Impact of the General Agreement on Trade in Services (GATS) on National Regulatory Autonomy* (Kluwer Law International, 2003), p95.

[203] European Commission, 'Adequacy decisions: How the EU determines if a non-EU country has an adequate level of data protection' <https://commission.europa.eu/law/law-topic/data-protection/international-dimension-data-protection/adequacy-decisions_en> accessed 18 January 2023.

[204] Tetyana Payosova et al, 'The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures' (2018) *Peterson Institute For International Economics* 1750.

[205] Article II (1) GATS.

[206] Mitsuo Matsushita et al, *The World Trade Organization: Law, Practice, and Policy* (3rd edn, OUP 2015), 567.

[207] Raj Bhala, 'The Bananas War', (2000) 31 *McGeorge Law Review* 839, 916.

[208] European Communities - *Regime for the Importation, Sale and Distribution of Bananas*, Report of the Appellate Body (May 1997) WT/DS27/R/USA, at 7.303.

[209] Federico Marengo, 'Regulating Data Transfers through the International Trade Regime' (2020) 17 *Manchester Journal of International Economic Law* 266, 275.

amount to a violation of the most-favoured nation commitment outlined in Article II.[210] Similarly, adequacy decisions can be issued by the European Commission which allow the free flow of data without requiring any further safeguards to comply with the requirements set forth by the GDPR.[211] There is no formal equality in the conditions that each country must satisfy, as 'adequacy' is treated differently for different countries.[212] Therefore, WTO Member States not listed could potentially assert that they suffer an unfavourable treatment compared to the countries that are included in the adequacy list.

4.3 GATS Article XVI: Market Access

Article XVI is the GATS 'market access' provision. If a country has not listed any limitations or conditions to a particular sector on its Schedule of Specific Commitments, that nation must provide access to foreign supplies of that sector to its market.[213] Similar to Article II, Article XVI states that WTO Members must provide foreign service suppliers a treatment 'no less favourable' than that provided to its domestic service suppliers.[214] This is a restrictive approach which focuses precisely on what a WTO Member State cannot do.[215] A Member State has full discretion to add and remove a service from its Schedule of Commitments.[216] In its original commitments, the EU mentioned no limitations on market access for digital data retrieval services.[217] The DSB have held that a service that falls into one of the categories of Commitments made in a Schedule must be governed by regulations consistent with Article XVI.[218] For example, in *US-Gambling*, gambling and betting were seen as being part of the US' Schedule of Commitments.[219] This meant that the US could not create laws restricting certain nations such as Antigua and Barbuda from providing gambling services.[220] This case can be used to assess the GDPR standards. Within its commitment, the EU listed no limitations, except for a specific restriction on financial data processing, which exempted it from the market

[210] Ibid.
[211] Article 45(3) GDPR.
[212] Federico Marengo (n 209) 284.
[213] Laurel S. Terry, 'GATS' Applicability to Transnational Lawyers and its Potential Impact on Domestic Regulation of U.S. Lawyers', (2001) 34 *Vanderbilt Journal of Transnational Law* 989.
[214] Article XVI (1) GATS.
[215] Ibid.
[216] Elisabeth Meddin (n 201) 1022.
[217] See *European Communities and Their Member States: Schedule of Specific Commitments*, WTO Doc. GATS/SC/31 (April 15 1994).
[218] Federico Marengo (n 209) 275.
[219] United States – *Measures Affecting the Cross-Border Supply of Gambling and Betting Services, Report of the Appellate Body* (7 April 2005) WT/DS285/AB/R (US-Gambling),670.
[220] Ibid. 671.

access and national treatment provisions in the GATS.[221] Therefore, because only financial data was mentioned, it is reasonable to argue that all other data is excluded from this restriction.[222]

It is submitted that the requirements for non-EU companies under the GDPR show that these companies are treated less favourably than companies operating within the EU. The GDPR can be seen as imposing additional barriers on non-EU companies which in comparison EU countries do not have. This includes the necessity of establishing an EU-based representative and a company having to localise its processing of EU nationals' data, evidencing differential treatment.[223] The EU has committed to allowing the free movement of data services between itself and other WTO members as it has failed to add an exception for digital services and personal data.[224] As mentioned in the Preamble, the primary goal of GATS is to expand international trade in services by eliminating any barriers caused by different countries.[225] On this basis, the barriers imposed by the GDPR to the free flow of this data between the EU and third countries have infringed its commitments under Article XVI.

4.4 GATS Article XVII: National Treatment

Article XVII is the national treatment rule, which requires countries to provide 'equal' market access to both domestic and foreign service providers.[226] Under the GDPR, non-EU companies are unable to operate within the EU like they did before the adoption of the GDPR.[227] This is because either they originate in countries such as US which are not considered to have adequate protections or because some companies find the excessive cost of compliance a 'financial burden'.[228] However, withdrawing from the EU standards denies foreign corporations access to the entire internal market of the EU.[229] On the other hand, companies located within the EU do not have these constraints and are thus provided with a better opportunity to operate in the internal market.[230] The GDPR goes far beyond being an EU legislative measure as its

[221] Joshua D. Blume, 'Reading the trade tea leaves: A comparative analysis of potential United States WTO-GATS claims against privacy, localization, and cybersecurity laws' (2018) 49 *Georgetown Journal of International Law* 801, 810.
[222] Ibid, 815.
[223] Article 3(2) GDPR.
[224] Holger P. Hestermeyr and Laura Nielsen, 'The Legality of Local Content Measures under WTO Law' (2014) 48 (3) *Journal of World Trade* 553, 588.
[225] World Trade Organisation, 'The General Agreement on Trade in Services (GATS): objectives, coverage, and disciplines' (WTO) <https://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm> accessed 15 February 2023.
[226] Article XVII (1) GATS.
[227] Paul M. Schwartz, 'Global Data Privacy: The EU Way' (2019) 94(4) *New York University Law Review* 771, 792
[228] Ibid.
[229] Elisabeth Meddin (n 201) 1025.
[230] Ibid.

application concerns any organisation or company operating anywhere around the globe that offers data services to individuals within the EU.[231]

In *China-Trading Rights*, the US alleged that China violated Articles XVI and XVII due to the products relating to specific publications and audio-visual entertainment falling under the category of 'sound recording distribution services'.[232] The DSB found that because the items fell under one of the China's GATS Schedule of Commitments, the measures prohibiting foreign entities from distribution were inconsistent with Articles XVII as it afforded foreign companies a less favourable treatment.[233] Similarly, the fact that non-EU companies are essentially given the opportunity to either withdraw or localise data reflects a clear instance of favourable treatment towards EU companies, thereby advantaging companies established in the EU.[234] Whilst one could argue the EU measures are not as extreme as the measures taken by China to completely prohibit the importation of certain services, the GDPR standards do have the same effect. The restriction on cross-border data flows falls under the category of an EU Commitment.[235] As with China, by making access to non-EU companies difficult, the EU directly violates Article XVII.

4.5 Potential defence for the EU

If a case were to be brought before the DSB, the EU could argue its right to retain the GDPR under one of the listed exceptions.[236] The most probable defence would be under Article XIV(c)(ii) which asserts that Member States may violate their other GATS commitments if they do so in a way that is '*necessary to secure compliance with laws or regulations*' that provide '*the protection of the privacy of individuals in relation to the processing and dissemination of personal data*'.[237] In order to see whether the EU would be able to use an exception, the two tier approach established in *US-Gambling* is applied.[238] There is no case raised where GATS Article XIV(c)(ii) has been an effective defence. Nevertheless, the AB ruling in *Argentina-Financial Services* can be utilised as it suggested that for a measure to be justified generally under Article XIV(c), the respondent must show that the measure was

[231] Gráinne de Búrca, 'Introduction to the Symposium on the GDPR and International Law' (2020) 114 *American Journal of International Law* 1.

[232] *China-Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, Report of the Appellate Body (21 December 2009) WT/DS363/AB/R, *(China-Trading Rights)*, para 338.

[233] Ibid, para 377.

[234] Eric Shapiro, 'All Is Not Fair in the Privacy Trade: The Safe Harbour Agreement and the World Trade Organization' (2003) 71(6) *Fordham Law Review* 2781, 2821.

[235] Jan Xavier Dhont, 'Schrems II. The EU adequacy regime in existential crisis?' (2019) 26(5) *Maastricht Journal of European and Comparative Law* 597, 600.

[236] See article XIV.

[237] Article XIV (c)(ii) GATS.

[238] *US-Gambling* (n 219) para 292.

designed to secure compliance with laws or regulations that are not themselves inconsistent with the GATS; and that '*the measure must be necessary to secure such compliance*'.[239]

4.5.1 The Necessity Test

To use the exception under Article XIV, the EU must provide evidence that the GDPR is a 'necessary' measure needed to achieve a specified objective. The AB has noted that a 'necessary' measure is located significantly closer to a measure that is 'indispensable' rather than the one '*making a contribution*'.[240] When using the exception, the EU can argue that the strict requirements of the GDPR are necessary to protect the privacy rights of its citizens. The existing AB case law has established a high threshold to meet the necessity test.[241] At the outset, the necessity test is an objective standard which requires 'weighing and balancing' to see whether an alternative less trade restrictive measure is available. [242] To qualify as a 'genuine alternative', the AB has stated that the proposed measure must not only be less trade restrictive in comparison to the original measure at issue,[243] but the proposed measure should also ensure that the right to achieve the desired level of protection is well-maintained.[244] The GDPR is not the 'least trade restrictive' measure, especially towards companies that do not have an establishment or business partner in the EU.[245] There are other less restrictive alternatives that are reasonably available for the attainment of EU's required 'effective and complete' level of data protection.[246] The EU could adopt a legal system that achieves the pursued public policy objective, namely the protection of EU citizens' privacy rights, without requiring non-EU companies to satisfy additional requirements such as an adequacy decision to transfer personal data across the globe.[247] On this basis, the EU would fail the necessity threshold.

4.5.2 Application of the chapeau

If the GDPR falls within one of the paragraphs of Article XIV, the *chapeau* or introductory provision of Article XIV will be analysed by the Court. The *chapeau* requires for a measure to

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[239] *Argentina – Measures Relating to Trade in Goods and Services* Report of the Appellate Body (9 May 2016) WT/ DS453/R at 6.202.

[240] Korea – *Measures Affecting Imports of Fresh, Chilled and Frozen Beef* Report of the Appellate Body (11 December 2000) WT/DS169/AB/R, at 161.

[241] Svetlana Yakovleva, 'Personal Data Transfers in International Trade and EU Law: A Tale of Two 'Necessities'' (n 187), 900.

[242] *US-Gambling* (n 219) para 304

[243] Joshua P. Meltzer, 'Governing digital trade' (2019) 18 *World Trade Review* 23, 40-41.

[244] **E**uropean Communities – *Measures Prohibiting the Importation and Marketing of Seal Products* Report of the Appellate Body (22 May 2014) WT/DS4-00/AB/R, at para. 5.261.

[245] Svetlana Yakovleva (n 187) 906.

[246] Mira Burri, 'The Governance of Data and Data Flows in Trade Agreements: The Pitfalls of Legal Adaptation' (2017) 51 *UC Davies Law Review* 67, 92.

[247] Andrew D. Mitchell and Neha Mishra, 'Regulating Cross-Border Data Flows in a Data-Driven World: How WTO Law Can Contribute' (2019) 22(3) *Journal of International Economic Law* 389, 399.

be applied in a manner that does not constitute '*arbitrary or unjustifiable discrimination*' between countries where like conditions prevail.[248] Under Article XIV(c)(ii), the EU could put forward an argument that the GDPR falls in this exception as the objective of the GDPR is to protect the privacy of EU citizens. However, the argument would fail under the second analysis.[249] Though the GDPR targets privacy protections, in examining the countries that have not received adequacy decisions despite having strict data protections law, it is clear that the European Commission process of making these adequacy decisions is arbitrary as the implementation of the adequacy decisions does not depend on procedural rules or specific criterions.[250] Accordingly, both political and economic reasons can influence the EU Commission's decision to grant or refuse to grant an adequacy decision.[251] A clear example of this arbitrariness in adequacy decision making is the case of South Korea which was only accepted as providing an adequate level of protection in 2022[252] despite having some of the strictest data privacy laws globally and having made an application in 2015.[253] Therefore, arguing that data protection is a fundamental right that is safeguarded under Article XIV(c)(ii) becomes challenging the closer the adequacy decisions are scrutinised.

The lack of transparency by the decision makers and the amount of nations which have strong data protections law but fail to receive decisions suggests how arbitrary the process is.[254] Out of the forty-four occasions that an exception was invoked, only once has the invocation succeeded.[255] This was in the *EC-Asbestos* case which was invoking an exception under Article XX of the GATT rather than GATS.[256] In *US-Gambling*, where the GATS Article XIV was invoked, the WTO panel found that the United States failed the necessity test as there were existing reasonable alternatives to the measure enacted.[257] Therefore, it is unlikely that the EU

[248] Article XVI (1) GATS.
[249] *US-Gambling* (n 219) Para 292.
[250] Jessica Lauren Koffel, 'GDPR adequacy decisions vs GATS: how may the EU's privacy and digital trade commitments be conciliated within a GDPR adequacy decision on cross-border personal data flows?' (2018) 24(3) *International Trade Law and Regulation* 122, 132.
[251] Ibid.
[252] European Commission, 'Adequacy decisions: How the EU determines if a non-EU country has an adequate level of data protection' <https://commission.europa.eu/law/law-topic/data-protection/international-dimension-data-protection/adequacy-decisions_en> accessed 18 January 2023.
[253] See article 70-76 Personal Information Protection Act (2011).
[254] Norman Zhang, 'Trade commitments and data flows: the national security wildcard: reconciling passenger name record transfer agreements and European GATS obligations' (2019) *World Trade Review* 49, 61.
[255] Carla L Reyes, 'WTO-Compliant Protection of Fundamental Rights: Lessons from the EU Privacy Directive' (2011) 12(1) *Melbourne Journal of International Law* 141, 167.
[256] European Communities – *Measures Affecting Asbestos and Asbestos-Containing Products* (12 March 2001) WT/DS/135/AB/R (EC-Asbestos).
[257] *US-Gambling* (n 219) Para 292.

would be able to use a general exception under Article XIV as a defence for its strict data protection framework.[258]

4.6 Governing the movement of data: the way forward

Agreeing with Meddin, two recommendations are made to resolve the tension between data protection and the global free flow of information.[259]

First, the EU can pass a regulation which ensures that no EU Member State is able to enact explicit data localisation laws.[260] Data localisation can be avoided by adjusting the requirements for an adequacy decision to be granted by the Commission. Currently, there are only fifteen countries that have received an adequacy decision.[261] This shows the insufficiency in the process used by the EU.[262] To resolve this arbitrary process, the EU can publish the process that the European Commission uses to decide whether a country provides an adequate level of protection.[263] This will ensure that the EU data framework is transparent whereby non-EU countries and companies are able to clearly understand the specific requirements that they need to meet.[264] Moreover, the EU can work closely with countries such as US and Canada to provide them with reasons for why their adequacy application is rejected and negotiate the steps that can be taken by non-EU countries in order for them to be given access to transfer data freely.[265] The expansion of adequacy decisions is essential to ensure that the digital economy is growing.[266] Making countries wait for years to be able to operate freely in the EU will limit digital innovation and could potentially result in countries and corporations not wanting to do business with the EU,[267] negatively impacting the EU market economy.[268] Therefore, to ensure the free flow of data, the adequacy decision process must be updated.

[258] Elisabeth Meddin (n 201) 1036.
[259] Ibid, 1030.
[260] Mira Burri, 'Interfacing Privacy and Trade' (2021) 53 *Case Western Reserve Journal of International Law* 35, 66.
[261] European Commission, 'Adequacy decisions: How the EU determines if a non-EU country has an adequate level of data protection' <https://commission.europa.eu/law/law-topic/data-protection/international-dimension-data-protection/adequacy-decisions_en> accessed 18 January 2023.
[262] Ibid.
[263] Nivedita Sen, 'Understanding the Role of the WTO in International Data Flows: Taking the Liberalization or the Regulatory' (2018) 21(2) *Journal of International Economic Law* 323, 347.
[264] Jennifer Stoddart et al, 'The European Union's Adequacy Approach to Privacy and International Data Sharing in Health Records' (2016) 44 *The Journal of Law, Medicine & Ethics* 143, 147.
[265] Barbara Sandfuchs, 'The Future of Data Transfers to Third Countries in Light of the CJEU's Judgment C-311/18 – Schrems II' (2021) 70(3) *GRUR International* 245, 248.
[266] Andrew D. Mitchell and Neha Mishra (n 247) 416.
[267] Tiffany Light, 'Data Privacy: One Universal Regulation Eliminating the Many States of Legal Uncertainty' (2021) 65(4) *Saint Louis University Law Journal* 873, 892.
[268] Aaditya Mattoo and Joshua P. Meltzer, 'International Data Flows and Privacy: The Conflict and Its Resolution' (2018) 21 *Journal of International Economic Law* 769, 789.

Second, if the EU decides not to address the process by which adequacy decisions are made, then 'it is up to the international community' to bring a case to change the EU privacy system.[269] A third country can attempt to bring a case against the EU before the WTO.[270] Although this would be futile, as a result of the current state of the DSB, the AB is no longer operating. However, it is hoped these issues are solved rapidly so that one of the WTO Members can challenge the flawed EU privacy laws.

[269] Elisabeth Meddin (n 201) 1032.

[270] See Article 26 and 27 of the Vienna Convention on the Law of Treaties 1969.

Conclusion

This dissertation discussed whether Chapter V of the GDPR operates as a barrier to international digital trading in the current data-driven economy. To summarise, Chapter V of the GDPR is a significant barrier to the global digital economy. Articles 45 and 46 of the GDPR show how the requirement to have an adequate level of protection leads to non-EU companies being denied access to the EU internal market. Demanding non-EU countries to have an equivalent level of data protection to that offered within the EU is problematic because different countries around the globe have a range of different legal systems which may not recognise privacy as a fundamental right. The interpretation adopted by the CJEU in *Schrems I* and *Schrems II* further reflects the practical problems with the adequacy standards, including how the EU data protection law creates an 'illusion' which fails to understand the reality of the current digital market and how EU rules cannot extend to third countries. It is concluded that both the legislation and the interpretation of the GDPR by the CJEU place great emphasis on the fundamental Charter rights whilst completely disregarding the commercial advantages of allowing the free flow of personal data.

Moreover, this dissertation has shown how the strict requirements of the EU privacy laws have led to the unintended consequence of data localisation. *De facto* restrictions are imposed on non-EU companies and organisations, giving them no choice but to localise its data in local data centres. In practise, this leads to less efficiency and higher management costs for companies which reflects how the GDPR blocks the free flow of data. The consequence of the GDPR requirements is that it restricts non-EU businesses and organisations from connecting and profiting freely over the internet. The argument that there are potential benefits from localising data, such as protecting individual rights, is undermined by the fact that there are more significant risks of cybercrimes occurring if data is held in one specific place. Restricting accessibility to data affects both domestic and international trading.

By exploring the EU's core obligations under GATS, it is concluded that the GDPR is acting in violation of the GATS Articles. Under Article II, the EU treats non-EU nations less favourably than its Member States. Under Articles XVI and XVII of GATS, the EU has an obligation not to adopt any measures that favour domestic suppliers of services over foreign ones. Nonetheless, the requirements contained in the GDPR place an undue burden on non-EU corporations to comply with its impossible standards, disfavouring them against EU companies. Although the EU could attempt to use the defence of Article XIV, this would not be possible as the EU would fail the necessity test, and the application of the *chapeau* of Article XIV would show that the GDPR as well as its adequacy decisions cause arbitrary discrimination between countries where like conditions prevail. Therefore, unless changes are made to either the adequacy decision or the way data can be transferred to third countries, the

GDPR will remain in violation of the GATS and open to potential litigation by non-EU companies affected by the privacy provisions.

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