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Editorial

We are pleased to publish the first issue of the twentieth volume of the *Coventry Law Journal*.

This issue includes a number of articles, recent developments and case notes in the areas of, human rights, company law, family law, contract, tort, environmental law, cyber law and medical law. We are particularly pleased to include contributions from İpek Sevda a lecturer at Söğüt Kadir Has University in Turkey, and an article on forced marriages from one of our recent graduands – Maryam Aqueel.

Lawrence Vick, a graduate from 1978, has also contributed a piece on medical negligence, which we are delighted to include. Lawrence is a leading practitioner in this area and writes regularly in various journals. Lawrence is currently organising a reunion of his class – 1975-1978 – for September 2015 and will also be involved in the Law School's 50-year celebrations to be held in June 2016. The *Coventry Law Journal* will also be celebrating a 20-year run next year so we will be looking to produce a special issue to coincide with both landmarks.

Our thanks also go to current staff who have contributed articles, cases notes and recent developments for this issue: Sue Vickery, Keith Gompertz and Adrian Wood, who are seasoned contributors, and Aaron Cooper - who has contributed his second piece for the Journal - and Harriet Lodge who has written a piece on Cyber Law. Special thanks go to Adrian, who greatly assisted in the proof-reading and editing of this issue.

This is an opportune time to wish Bob Gingell a happy retirement from the Law School. Bob will retire this summer after more than 40 years' service at the University. Bob has made a truly monumental contribution to the School and the University: teaching EU, Comparative Law, Environmental Law and Social Welfare on our undergraduate and postgraduate courses; and leading many course validations and revisions. His work on Erasmus and related programmes has been outstanding and he will be missed as a colleague, a teacher and a friend of us all.

We hope you enjoy reading this issue. If you wish to contribute to the Journal then please contact the editors: the next publication date is December 2015 and contributions need to be forwarded to the editor-in-chief at aa5961@coventry.ac.uk by November 2015.

The editors

ARTICLES

ROMAN LAW

Bona Fides in Roman and Turkish Contract Law [*]

İpek Sevda Söğüt[**]

Introduction

The concept of "*bona fides*[1]*"* - bound to the values of "not causing prejudice, harm to others" and later on "*aequitas*[2]*"* under Roman law - takes as its basis the values of "keeping secret, confidence between human beings and protection of the weak." In this respect the concept has been used in daily life, in moral values, in social life, and the law. In this process, which lasted from the 3rd century BC to the 6th and 7th centuries, the concept was used first in *bona fides* actions and contracts based on *bona fides*. It then approached the concept of *aequitas*, under the common law, with an expression dissolving the concept of equity inside.[3] In Ancient Rome, *bona fides* was inspired from the word goddess "*fides*." In this period, as the place where *fides* sat was considered as the man's right hand, people who made promises to each other believed that, they placed their promises under the sanction of the goddess.[4] The concept of *bona fides* took a personality seeking more the truth and the just within time and took the form of today's "honesty rules." This concept took place in Civil Laws, with the legalization movement in the 19th century, and was adopted first by lawyers as a value based on God and which cannot be changed by human beings. "Honesty rules" which changed especially after the Second World War, became criteria for the control of contracts, in the form of a general principle of freedom of contract. As against this narrowing approach, the concept became more important by inclusion of new values to content interpretation and expanding its field of application. As such, with honesty rules - which can be defined in fact as "good faith which must be taken into consideration within a legal relationship, according to the behavior of an honest person," (the behavior of a person with average intelligence, aware of the consequences of his honest, reasonable behavior (*bonus pater familias*) being taken as

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[*] The related article was submitted with the heading of "*Bona Fides* in Roman and Turkish Contract Law" at the "Société international Fernand de Visscher pour l'Histoire des Droits de l'Antiquité, 68[ème] *Session* (SIHDA) (Regula Iuris)" International Conference organized on September 16-20, 2014 by the University of Napoli Federico II Faculty of Law.

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[1] The expression of *bona fides* means good faith, loyalty, honesty and honorableness. In the field of law *bona fides* means the attitude of honorable, host, duty-bound persons towards each other. Rado, T, *Roma Hukuku Dersleri, Borçlar Hukuku*, (İstanbul 2013), at page 36

[2] *Aequitas* used to mean justice, fairness, equality and equity. *Aequitas*, meaning unity and equality as of basis, expressed before Romans the core and purpose of the law. In *Iustinianus* Law, *aequitas* and *aequus* generally meant the soft and understandable act of the judge, at the discretion of the events in his presence, by taking the general conditions into account. Umur, Z, *Roma Hukuku Lügatı*, (Lügat) (İstanbul 1983), at page 20

[3] Ateş, D, 'Sözleşme Özgürlüğü Yönünden Dürüstlük Kuralları', (2007) TBB Dergisi 72, at page 81.

[4] Ateş, at page 81

basis), the behavior of this person started being transformed into an objective and general principle of law.[5]

Bona Fides in Roman contract law

This text is one example of "*bona fides*" in Roman contract law:

Cic. De Officiis, (3. 66):

> "…….For example, the augurs were proposing to take observations from the citadel and they ordered *Tiberius Claudius Centumalus*, who owned a house upon the *Caelian* Hill, to pull down such parts of the buildings as obstructed the augurs' view by reason of their height. *Claudius* at once advertised this block for sale, and *Publius Calpurnius Lanarius* bought it. The same notice was served also upon him. And so, when *Calpurnius* has pulled down those parts of building and discovered that *Claudius* had advertised it for sale only after the augurs had ordered them to be pulled down, he summoned the former owner before a court of equity to decide "what indemnity the owner was under obligation «in good faith» to pay and deliver to him". The verdict was pronounced by *Marcus Cato*; he as I was saying, was presiding judge and pronounced the verdict that "since the augurs" mandate was known to the vendor at the time of making the transfer and since he had not made it known, he was bound to make good the purchaser's loss."[6]

It has been accepted from this decision that the presence of good faith requires the practice of the principle - that the buyer must be informed of a defect which is known by the seller. In a broad sense, good faith: in other words, objective good faith is the conduct of a reasonable, honest and honorable person.[7] Although *Cicero* essentially worked on the ethical aspects of *bona fides*, during his time, the contents of *actio's* arising from certain legal transactions, subject to *bona fides* - such as trusteeship (*tutela*), partnerships (*societas), fiducia*, attestation of representation (*mandatum*), sale contract (*emptio-venditio*) and lease, service, exemption contracts (*locatio conductio*) - were determined "*ex fide bona*".[8] Later, a similar classification was compiled by *Gaius* [*Gai. Ins*. (4. 62)] and *Iustinianus* [*I. Inst.* (4.6.28)] and the list was enlarged.

From the perspective of the Roman Code of Procedure, in the scope of the actions when the parties of a contract defaulted in its performance, contracts had been grouped into two categories: "narrow law contracts" and "good faith contracts."[9] Therefore, in cases of breach of contract, for the first contract parties were allowed to take a "narrow judicial action" (*iudicia stricti iuris*); for the first and for the second, they were allowed to take a "good faith" (*iudicia bonaefidei*) action where the *"bona*

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[5] Ateş, at page 82.
[6] Miller, W, *Cicero De Officiis with an English Translation,* (London 1928), at pages 335-337
[7] Umur Z, *Roma Hukukunda İktisabi Müruru Zamanda Hüsnüniyet*, (Hüsnüniyet), (İstanbul 1956), at page 54
[8] Schermaier, M, J, 'Bona Fides in Roman contract law', *Good Faith in European contract law*, edited by Zimmermann, R and Whittaker, S, (Cambridge University Press 2000), at page 70.
[9] Buckland, W, W, *A Text Book of Roman Law from Augustus to Justinian*, (Cambridge 1932), p. 411 ff; Umur, Z, *Roma Hukuku Ders Notları*, (Ders Notları), (İstanbul 2013), at page 262.

fides" (good faith), - the main principle determining the basis of liability in contracts by consent in Roman law - was determinant.[10]
From the end of the Republican era, the contents of many relationships with obligations had been stated in very broad *formula*,[11] leaving a broad area of interpretation for the judge.[12] The Romans inserted into their *formulas* a general rule - "everything required to be performed or delivered is under the principle of good faith."[13] Therefore, in court actions where good faith is involved, judges were deciding on the case within the perspective of good faith principles by verifying that the necessary obligations were fulfilled. Also in these cases, the plaintiff was able to claim, without requiring any other court action, secondary obligations such as interest and *fructus* and corroborating contracts (*pacta adiecta*). Additionally, *bona fides* limited the amount of interest demanded by the claimant; for example, if the interest was claimed before the incumbent's default, this case was regarded as *contra bona fidem*. By employing *bonae fidei iudicia*, it was also possible to balance the counter claims (*compensatio*) arising from the same legal relation: this issue was accepted in *actio stricti iuris*. As a result of *bona fides*, although the *exceptio* (exception) may not be added to *formula* in good faith cases, it might still be taken into account and claimed directly.[14] Examples of the clear effect of *bona fides* can be seen in the development of the notion of the seller's liability for the defects in the sale contract.[15] *Bonae fidei iudicia* was usually executed as a sanction against a fraudulent action.[16]

The function of *bona fides*' in contract law

Iustinianus Law describes *bona fides* as a general principle of contract law.

C. 4.10.4 : "*bonam fidem in contractibus considerari aequum est*".

It is observed in the law that the principle of *bona fides* has two main functions: one is that it is the inner reason for the binding character of contracts; and secondly, it helps the content of the obligation become solid. This second function was frequently stated in the law: *bona fides* was referred to in the judge's interpretation and in the case before the court it served as a measure to define the obligations that had to be fulfilled.[17] Its first function is not mentioned in such clarity: sources mention "*fides humana*" as a reason[18] for the binding character of a contract; although, at times, invalidity of a contract is justified by its violation to the *bona fides* principle.[19]

[10] Schermaier, at page 77
[11] *Quidquid Numerius Negidus Aulo Agerio dare facere oportet ex fide bona*". "Everything required to be given or made by the defendant to the claimant as a necessity of good faith". Rado, T, *Roma Hukuku Dersleri, Borçlar Hukuku*, (İstanbul 2013), at page 36
[12] Umur, Ders Notları, at page 263; Karadeniz-Çelebican, Ö, *Roma Hukuku, Tarihi Giriş-Kaynaklar-Genel Kavramlar-Kişiler Hukuku-Hakların Korunması*, (Ankara 2014), at pages 303-304.
[13] Rado, at pages 36-37
[14] Leage, R. W, *Roman Private Law Founded on the Institutes of Gaius and Iustinian*, (Oxford 1955), p. 291; Schermaier, at pages 84-85; Rado, Borçlar, 37-38; Karadeniz-Çelebican, Roma, 292 *ff.*
[15] See. D. 19.1.4.pr; D.19.1.6.9; D. 19.1.11.5.
[16] Schermaier, at page. 86
[17] Horn, N, *Aequitas, In Den Lehren Des Baldus*, (Köln 1968), at page 162. I. Inst. 4.6.30; I. Inst. 3.22.3; I.Inst. 3.24.5, D. 16.3.31; D. 19.1.11.1
[18] C 2.4.20; D 2.14.1. pr.
[19] D 50.17.116.

Therefore, lawyers were confronted with settling the question of determining the function of *bona fides* more precisely; especially *bona fides'* becoming a general principle of contract law and on the other hand it being mentioned as a category where only specific contracts are listed.[20]

"*Bona fides*" (Rule of Good Faith) in Turkish Law

Article 3 of Turkish Civil Code states:

> *"II. Good Faith*
>
> Good faith is presumed whenever the existence of a legal position is dependent on the observance thereof. However, no person can plead good faith in any case where he has failed to exercise the degree of care required by the circumstances."

Yet this good faith is not defined. In the old version of our Civil Law, Article 2 mentioned honesty and Article 3 mentioned good faith, thereby causing a conceptual disturbance. Accordingly, in doctrine, to underline the difference between the terms of "good faith" used in two different articles, the one in Article 2 was named as "objective good faith" and the one in Article 3 was named as subjective "good faith."[21] New Turkish Civil Code resolved this complexity: Turkish Civil Code Article 3 is on good faith and the side heading under Turkish Civil Code Article 2 says "conducting honestly" - its text (paragraph 1) using the term "compliance with the honesty rule." Therefore the terms good faith and honesty were clearly separated.[22]

The honesty rule (objective good faith) envisages the conduct of honesty in using the rights and fulfilling obligations, and good faith (subjective good faith) means being unaware or unable to be aware of a legal impediment before acquisition of a right or a legal outcome. Despite the differences in terms of meaning and application, both terms are based on the notion of honorable, correct and honest conduct. This is the reason why both terms are stated with "*bona fides*" in Roman law. When a person purposefully acts by being aware of an impediment before the acquisition of a right, he/she is regarded as not acting with honesty and integrity: they do not have good faith. Although referring to the same fundamentals, good faith is presumed objective when used as a code of conduct for the acquisition of rights and the fulfillment of obligations. When it is used in the sense that a person is acting by being unaware of a certain impediment before a legal outcome, however, since it considers the inner self of this person, it becomes subjective.[23]

The honesty rule means an expected conduct of an honorable, honest person as a human being. Whether certain conduct fits to that definition will depend on the presumed morality, common practices adopted by the society, customs and the

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[20] Horn, at page 162
[21] Oğuzman, K. and Barlas, N, *Medeni Hukuk, Giriş-Kaynaklar- Temel Kavramlar* (İstanbul 2008), at page 207
[22] Oğuzman and Barlas, at page 207, dn. 256
[23] Oğuzman and Barlas, at page 208

purpose of the persons granting the rights.[24] One of the most important areas of the application of the honesty rule is, in broader terms, the interpretation of legal transactions and fulfilment of obligations. Article 2 of Turkish Civil Code is as follows:

"*B. Scope of legal relations*

Honesty

> Every person is bound to exercise his rights and fulfill his obligations according to the principles of honesty. The legal order does not protect the manifested abuse of a right."

All rights are expected be used according to their purpose of granting. Using a right against its purpose does not comply with the honesty rule and therefore the right is said to be abused. Paragraph 1 of Article 2 of Turkish Civil Code regulates the "honesty rule" (by defining the content of the rights and obligations) and paragraph 2 regulates the "rule of not abusing a right" (in other words the one who abuses his/her right is deprived of the right to claim or plea), a rule first applied by Roman Law by recognizing that the party whose right is abused has a right to defense (*exceptio doli generalis*).[25]

In doctrine, the honesty rule and the rule of not abusing a right are seen as related to each other, as with two faces of a medallion. Those opposing this view assert that paragraph 1 applies to the interpretation of the provision of laws and contracts, whereas paragraph 2 functions as a corrective tool for the provisions of law (*corrigendi gratia*).[26] The application of the honesty rule in contract law shows itself in the determination of the rights and obligations of the payee and obliged, in the interpretation and completion of legal transactions and declaration of intent, and in the foundation of confidence. The honesty relationship has four main functions. The first is for concretization, aiming to clearly set out the concrete obligations of the parties in a relationship with obligations. The second is of definition, used to determine the various secondary obligations in a relationship with obligations. The third is of restriction - that every right has an intrinsic restriction. The fourth is for correction - that if the relationship with obligation is collapsed from its foundation, it must be reconstructed according to the new situation and necessary corrections must be made. The honesty rule is, therefore, one of the fundamental principles which the judge will consider in the interpretation and completion of contracts.[27]

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[24] Oğuzman and Barlas, at page 220

[25] Ateş, at page 82

[26] Oğuzman and Barlas, at page 219, dn. 278. Abuse of right and honesty rules are the expression of two different law institutions, completing each other however different from each other at the same time. As the first paragraph of Article 2 of the Turkish Civil Code regulates the mutual responsibility of monitoring each other of the persons in legal relationship, the second paragraph forbids basing it on a right that will cause clear injustice: Ateş, at page 83.

[27] Eren, F, *6098 Sayılı Türk Borçlar Kanuna Göre Hazırlanmış Borçlar Hukuku-Genel Hükümler*, (Ankara 2012), at page 19

Applications of the honesty rule in Turkish contract law

1. When an obligation arises

a) *Obligation of Signing a Contract*

There may be certain restrictions to freedom of contract stemming from the law or the joint intentions of the parties disclosed earlier (or from a preliminary contract). The obligation of signing a contract occurs in these cases. This obligation may result because of private or public law, or, where there is no applicable special and clear provision of the law, from the "honesty rule" pursuant to Article 2 of Turkish Civil Code. For example, the legal basis for the obligation of all monopolistic private companies and public places (restaurants, hotels, theaters) for making contracts with any people willing to do so (unless there is a good cause for behaving otherwise) is Article 2. The avoidance of making this contract will construe an abuse of right and the party suffering damage due to this conduct may take an action to conclude a contract as well as filing for compensation for the damages inflicted due to this action.[28]

b) *Secondary Obligations*

Parties or the law usually only regulate the principal obligations in a relationship with obligation. Though it may not be clear from the interpretation of the law or the contract, the honesty rule is the source of the existence of certain secondary obligations. Some secondary obligations are for protection and preservation. The honesty rule also imposes upon the person fulfilling the principal obligation the duty to take measures to protect the life, integrity and well-being of the payee. The 13th Chamber of Law of the Supreme Court of Appeals relied on Article 2 of Turkish Civil Code in a case where a store was found liable for a bag stolen from a customer at the store and it was stressed in the decision that the obligation of the store to protect the customer is not related with "its principal obligation."[29] In addition to the protection and due care resulting from the fulfilment of the obligation, under the honesty rule there is also an obligation to protect the subject of the obligation and to take due care for its fulfilment.[30]

Secondary obligations may be in the form of disclosure and informing, especially informing the other party of a certain matter. The obligation of the preservation of documents pertaining to a legal transaction (for example, documents relevant to the assigned debt in Article 190 of the Turkish Code on Obligations) can be cited as a secondary obligation under the honesty rule. The obligation to co-operate might, under certain circumstances, also be a secondary obligation which needs to be fulfilled as part of the honesty rule.[31]

c) *The obligation to act honestly in contract negotiations*

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[28] Oğuzman and Barlas, at pages 247-248

[29] 13th Chamber of Law of the Supreme Court of Appeal, [31 Mar. 2006] No: 15654/4848.

[30] Oğuzman and Barlas, at pages 247-249; Akyol, Ş, *Dürüstlük Kuralı ve Hakkın Kötüye Kullanılması Yasağı*, (İstanbul 2006), at pages 46 and 51.

[31] Oğuzman and Barlas, at page 250; Akyol, at pages 47-49

The honesty rule also imposes upon on parties starting to negotiate for a specific contract the obligation to act honestly and inform each other of the issues which may affect their decisions on making the contract or the determination of its terms, and to conduct the negotiations in an honest and serious manner. If a party, in breach of this obligation, inflicts damage on the other party for not disclosing the necessary information, giving false information, not paying due care, initiating and conducting a negotiation without intending to make a contract, it must indemnify this damage. Stemming from the honesty rule, this principle is called *culpa in contrahendo*.[32] In one case the 19th Chamber of Law of the Supreme Court of Appeals[33] ruled that the sudden halting of negotiations conducted for undertaking a car dealership, and which gave a justified confidence to the plaintiff that the contract would be signed, and the non-singing of the contract, gave rise to a duty to compensate for expenses incurred by the plaintiff - the defendant's liability based on the principle of *culpa in contrahendo*.

2. The modification or termination of contracts (improvisation)

Initially, adapting contracts to changing conditions lacked a legal basis, but the New Code of Obligations introduced the possibility of covering the area of adapting contracts in the law:

III. Hardship in Performance

Turkish Code of Obligations Article 138:

> ''When an unexpected event that is not foreseen and not expected to be foreseen by the parties during the conclusion of the contract arises not resulting from negligence on the obliged part, and if the conditions present during the conclusion of the contract are modified to the detriment of the obliged to such an extent that demanding performance from the obliged would violate the principle of the honesty rule, and if the obliged has not yet discharged his/her debt or has discharged his/her debt by reserving the right of hardship, the obliged shall be entitled to demand from the judge the adaptation of the contract to new circumstances, or to rescind the contract where such adaptation is not possible. In continuous contracts, as a rule, the obliged shall use the right to termination instead of the right to rescind."

The main principle governing contract law is the principle of *pacta sunt servanda* (full performance). However, in certain cases, expecting full performance in the face of aggravated circumstances becomes unjust and against the honesty and integrity rule- especially in continuous contracts where the conditions prevalent at the time of the signature of the contract and the ones during its performance may be substantially different. Expecting full performance in the face of these changes may be against the honesty rule regulated under Article 2 of the Turkish Civil Code. Here, changes in the conditions and status that occurred between the signature date of the contract and its performance must be reflected in the contract. Abiding strictly by the principle of

[32] Oğuzman and Barlas, pp. 250-251; Akyol, at page 73
[33] 19th Chamber of Law of the Supreme Court of Appeal, [01 Dec. 2005] No: 2865/11959.

pacta sunt servanda may result in many undesired outcomes, and the Improvisation theory was introduced for use in such cases. The Improvisation theory has been adopted both in doctrine and by Supreme Court of Appeals on the grounds that the basis for the legal transaction collapses partially or completely and therefore the contract is arranged under new conditions.[34]

Conclusions

Cases filed under Article 2 of Turkish Civil Code are cases of reinstatement, prevention and cessation of abuse, material compensation, immaterial compensation, negative declaratory, judge's intervention to the contract, rescinding from the contract/termination and general declaratory.[35] The judge must *ex officio* consider Article 2 when the case is based on it. Furthermore, for each case the judge applies the honesty rule and under the prohibition of abuse of a right, must clearly explain his/her concrete justifications.[36] There are different views in Turkish Law doctrine whether the honesty rule and the prohibition of abuse of a right are enforceable. According to one, it is possible, as a rule, that parties with a contract may eliminate the possibility of the application of Article 2, on the interpretation and completion of the contract. However, any such contract must not by nature pose a breach to personal rights; otherwise, this contract will definitely be regarded as void and it will not cancel the provision of Article 2. According to the opposing view, the honesty rule and the prohibition of abuse of a right are enforceable and no contract will cancel them.[37]

The Rule was known by *glossators* of the Middle Ages, then by Pandect lawyers in the 19th century and by Roman law. Roman lawyers attempted to determine the numerous principles to be applied among the honest persons up to the very details thereof by using the principle of *bona fides*. In Roman law, the number of relationships with obligations relying on good faith increased and it was regarded as far more just and an advanced principle compared to contemporary law systems. The *bona fides* principle, together with other general principles, has significantly contributed to the development of codifying the norms with changing social values. It helped the realization of social ideals. Roman law would not have survived for centuries in the absence of continuous attention on honesty and justice.[38]

The honesty rule is sometimes used as complementary and corrective *aequitas,* and is sometimes used as *bona fides* in determining the obligation of an obliged person. Even in common law, the term "*bona fides*" is used to represent both the honesty rule and good faith. Roman law introduced a restriction on when an obliged person fulfils their obligations which, in a way, regulates their behavior. The Rule and the prohibition of abuse of a right are general rules which prevent the undesired results caused by a strict application of laws and which are against fairness, justice and morality. Although this principle was not clearly regulated by Article 2 of Turkish Civil Code, the honesty rule and the prohibition of abuse of a right may always be

[34] http://www.erdem-erdem.com/articles/yeni-borclar-kanunu-cercevesinde-emprevizyon-teorisi/,(02 Sept. 2014)
[35] Akyol, at pages125-129
[36] Oğuzman and Barlas, p. 260
[37] Akyol, at pages 9-10
[38] Rado, Borçlar, at page 37.

applicable. However, attempting to settle all problems with the honesty rule by omitting other provisions will cancel the confidence in justice.

HUMAN RIGHTS

Repealing the Human Rights Act – no not delay, just don't do it

Dr Steve Foster*

Introduction

Before the recent election, the Conservative government promised to repeal the Human Rights Act 1998 and replace it with a British Bill of Rights and Responsibilities, and after the election the Prime Minister appointed Michael Gove as the new Minister of Justice, providing him with the mandate to repeal the Act.[39] The details of this repeal and any new provisions for protecting human rights are unclear, but it is apparent from the manifesto that the main aim is to reduce the domestic law's reliance on European law and principles – most significantly the jurisprudence of the European Court of Human Rights. These proposals stem from concern and, in some cases, anger, over a number of decisions from the European Court which have forced the government to change our law in order to comply with our obligations under the European Convention on Human Rights. Accordingly it is tentatively suggested that the domestic courts should no longer have to rely on the case law of the European Court,[40] and that the UK Supreme Court should instead have the 'final say' on human rights matters.

More significantly, the government appears to want to introduce a *British* Bill of Rights *and Responsibilities*, not only entrenching essential principles of British justice and tradition, but also encompassing corresponding duties on individuals that would act as conditions of their entitlement.[41] Two successive governments have been warned against such a proposal, yet the present government seems set on a departure from a Convention compliant system of recognizing rights and a return to a more traditional process, by which rights are protected by common law and traditional constitutional principles. At the time of writing the government has withdrawn the repeal of the Act from the Queen's speech on their legislative programme, instead delaying any legislative plans, perhaps for a year, to allow time to draw up a Draft Bill and, possibly, to allow consultation.[42]

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[39] Coleman, C 'Human Rights Law is Gove's big challenge' BBC news: bbc.co.uk/news 15 May 2015.

[40] As is currently required by s.2 of the Human Rights Act 1998.

[41] See Fenwick, H ' Protecting Human Rights in the UK – Conservative Plans post-2015 (2015) 74 *Student Law Review* 3

[42] Coates, S 'Government delays the introduction of a British Bill of Rights' *The Times*, 27 May 2015 (Online edition)

This short article will argue that the repeal of the Act and its replacement with a British Bill of Rights is unnecessary and represents a backward step in the protection of basic rights and the UK's relationship with the Council of Europe and the European Court of Human Rights.

The proposals

The Conservative Party Manifesto made these promises with respect to repealing current human rights law:

> We have stopped prisoners from having the vote, and have deported suspected terrorists such as Abu Qatada, despite all the problems created by Labour's human rights laws. The next Conservative Government will scrap the Human Rights Act, and introduce a British Bill of Rights. This will break the formal link between British courts and the European Court of Human Rights, and make our own Supreme Court the ultimate arbiter of human rights matters in the UK.[43]

Further on it states

> We will…introduce a British Bill of Rights which will restore common sense to the application of human rights in the UK. The Bill will remain faithful to the basic principles of human rights, which we signed up to in the original European Convention on Human Rights. It will protect basic rights, like the right to a fair trial, and the right to life, which are an essential part of a modern democratic society. But it will reverse the mission creep that has meant human rights law being used for more and more purposes, and often with little regard for the rights of wider society. Among other things the Bill will stop terrorists and other serious foreign criminals who pose a threat to our society from using spurious human rights arguments to prevent deportation. [44]

Further details will be available when the government produces its Draft Bill, but it is clear that the government is concerned about the amount of influence that the Convention is having on domestic human rights law, and their perception of the European Court's power with respect to judging the scope of Convention rights and the balancing of those rights with social interests and others' rights. Specifically, it is concerned that the Human Right Act may have become a 'rogues' charter' – being employed by the 'undeserving' who should only enjoy their rights subject to them exercising their responsibilities, towards society and others.

The validity of those concerns, and the feasibility of implementing these proposals, will be considered later, but this piece will now consider the wisdom, and legality, of returning to a system based on British principles of justice and traditional constitutional principles.

[43] Conservative Party Manifesto 2015, at page 60.
[44] *Ibid*, at page 73

Returning to the traditional system

Before examining the viability of the government's proposals, it is as well to recall the failure of the traditional common law system in protecting our basic rights and ensuring compliance with European human rights law.[45] Under that system the UK government was persistently brought before the European Court of Human Rights to defend cases where individuals had failed to get a remedy for human right violations in the domestic courts.[46] These cases were the prime reason for introducing the Human Rights Act 1998 and could be grouped under the following headings:

Some rights not protected by the common law

Although, the common law and statute recognized certain rights, such as property and freedom of the person, certain international rights were not recognized, most notably the right to private life. Thus, in *Malone* v *United Kingdom*,[47] the English courts held, reluctantly, that domestic law did not recognise the right to private life as such, resulting in a successful claim being brought under the European Convention with respect to telephone tapping.[48] This specific gap has been rectified by the development of privacy laws, and it is unlikely that the right to private life (or any other Convention right) will be excluded in the new Bill of Rights and Responsibilities. What is less certain is whether the new law will reintroduce rules and principles which would deny basic rights and remedies to certain individuals, such as prisoners, for breach of their human rights.[49] It is also unclear whether rules providing immunity to the police authorities against actions in negligence would be re-developed if European Convention rights were withdrawn and replaced by domestic rights, representing British traditions.[50]

Parliamentary sovereignty over fundamental rights

The courts do not have (even under the Human Rights Act) the power to disregard statutory provisions simply because they interfere with fundamental human rights.[51] This has led to a number of defeats for the United Kingdom government under the European Convention.[52] It is unclear how the doctrine will be affected by the

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[45] See Gearty, C 'On fantasy island: British politics, English judges and the European Convention on Human Rights [2015] EHRLR 1

[46] See Foster, S *Human Rights and Civil Liberties*, 3rd ed. Longman 2011, chapter 3.

[47] *Malone* v *Metropolitan Police Commissioner* (*No 2*) [1979] Ch 344, confirmed in *Wainwright* v *Home Office* [2004] 2 AC 406.

[48] *Malone v United Kingdom* (1984) 7 EHRR 141. See, also *Halford* v *United Kingdom* (1997) 24 EHRR 523, and *Khan* v *United Kingdom* (2001) 31 EHRR 45.

[49] See, *Golder* v *United Kingdom* (1975) 1 EHRR 524; and *Silver* v *United Kingdom* (1985) 3 EHRR 347.

[50] *Michael v Chief Constable of South Wales* [2015] UKSC 2. Under the present law civil actions are generally not available against the police, but claimants can rely on other Convention rights, given effect to under the 1998 Act - such as the right to life and freedom from inhuman and degrading treatment - to bring a claim.

[51] See, for example, *R* v *IRC, ex parte Rossminster* [1980] AC 852.

[52] For example, in *Sutherland* v *United Kingdom, The Times*, 13 April 2001, the European Commission of Human Rights held that a law, which distinguished between homosexuals and heterosexuals with regard to the age of consent, was contrary to Articles 8 and 14 of the European Convention.

introduction of the new Bill of Rights, and whether the current power – under s.4 of the 1998 Act – to declare legislation incompatible with Convention rights, will be included with respect to compatibility with the rights contained in the Bill. As the government is concerned with the transfer of power from Parliament and the people to the (European) judiciary it is not unlikely that the Bill will provide a mandate to the domestic courts to follow the democratic will of Parliament; specifically in those cases where it would want the courts to ignore the private and family rights of deportees and those subject to extradition. The danger of majority oppression of individual rights for the benefit of the 'public interest' is thus high.

Inadequate weight given to human rights issues

Under the traditional system, although both Parliament and the courts attempted to ensure that any interference with such rights and liberties was justified as the minimum necessary in the circumstances, on countless occasions the United Kingdom failed to achieve the correct balance between the protection of fundamental rights and the securing of other social or individual goals. For example, in the area of free speech, the European Court of Human Rights has found a large number of domestic provisions and judicial decisions to be out of line with the jurisprudence of the Convention.[53]

This was largely rectified by the passing of the 1998 Act, the employment of the doctrine of proportionality, and reliance on the case law of the European Court of Human Rights. The new Bill will, of course, include provision for the protection of democratic rights, but if it reduces the courts' power to employ necessity and proportionality, in addition to freeing the courts from the case law of the European Court, it is likely that our law will return to a situation where it fails to achieve the correct balance, resulting in more defeats for the government (assuming that the government wishes to continue its present obligations under the Convention).

Limited protection of minority rights

Under a constitution dominated by parliamentary sovereignty, the human rights of minorities were often left unprotected; the rights of minorities consistently being overlooked. Thus with regard to prisoners, both parliament and the courts continued to deny such persons their basic rights and a number of decisions of the European Court of Human Rights were required to provide prisoners with their rights of access to the courts,[54] private and family life[55] and correspondence[56] and liberty and security of the

[53] See, for example, *Sunday Times* v *United Kingdom* (1979) 2 EHRR 245. See, also *Observer and Guardian* v *United Kingdom* (1991) 14 EHRR 153; *Tolstoy Miloslavsky* v *United Kingdom* (1995) 20 EHRR 442; *Bowman* v *United Kingdom* (1998) 25 EHRR 1; *Goodwin* v *United Kingdom* (1996) 22 EHRR 128, with regard to freedom of speech. See also *Gaskin* v *United Kingdom* (1989) 12 EHRR 36 (right to access to private information); *McLeod* v *United Kingdom* (1999) 27 EHRR 493 (right to private and home life).

[54] *Golder* v *United Kingdom* (1975) 1 EHRR 524; *Silver* v *United Kingdom* (1983) 5 EHRR 347.

[55] *Hamer* v *United Kingdom* (1979) 24 DR 5.

[56] *Golder* v *United Kingdom* (1975) 1 EHRR 524; *Silver* v *United Kingdom* (1983) 5 EHRR 347; *Campbell* v *United Kingdom* (1992) 15 EHRR 137.

person.[57] This was also evident in relation to deportees and asylum seekers, where a number of decisions of the European Court of Human Rights have found the United Kingdom in violation of the Convention with regard to the treatment of such persons.[58] The government's concern over the use of human rights law by whole life sentence prisoners and by deportees, and plans to reduce the reach of human rights law to such persons is, thus, particularly worrying.

These deficiencies were largely rectified by the Human Rights Act, ensuring that our law was more compatible with the Convention and the case law of the European Court, whilst retaining the basic principles of our constitutional and democratic system. The repeal of the Human Rights Act will throw these developments into jeopardy and risks jeopardizing the reputation of our European and international human rights' record.

A British Bill of Rights and responsibilities

It should be noted from the outset that a British Bill of Rights and repeal of the HRA will not *necessarily* be in breach of the obligations owed under the Convention, as Articles 1 and 13 require domestic law to give *effective* protection of ECHR rights, and incorporation of the ECHR (via the HRA or otherwise) is not essential. Also, it is unlikely that the government would seek to reverse many changes to the law made as a result of ECHR intervention; although it would presumably continue its current refusal to give voting rights to prisoners,[59] or to provide clear guidance on the release of whole lifers.[60]

The Joint Committee on Human Rights warned against a concept of a 'British' Bill of rights' as it alienates non British residents and fails to comply with the international and universal nature of human rights.[61] These warnings have been ignored by the government, as have many other concerns about the constitutional ramifications of such a Bill.[62] As to content, presumably the Bill will include rights similar to the ECHR (and, less certainly the EU Charter on Fundamental Rights) and include reference to other values such as the rule of law, the right to judicial and administrative justice. However, it is likely to adjust certain rights by, for example, diluting the right to private and family life in cases involving deportation or

[57] *Weeks* v *United Kingdom* (1987) 10 EHRR 293; *Thynne, Wilson and Gunnell* v *United Kingdom* (1990) 13 EHRR 666; *Hussain and Singh* v *United Kingdom* (1996) 22 EHRR 1; *V and T* v *United Kingdom* (2000) 30 EHRR 121; *Stafford* v *United Kingdom* (2002) 35 EHRR 32.

[58] See, for example, the decisions in *Soering* v *United Kingdom* (1989) 11 EHRR 439, *Chahal* v *United Kingdom* (1997) 23 EHRR 413; *D* v *United Kingdom* (1997) 24 EHRR 423.

[59] The government has still failed to respond to the Grand Chamber's ruling in *Hirst v United Kingdom (No 2)* (2006) 42 EHRR 41.

[60] Following the decision of the Grand Chamber in *Vinter v United Kingdom* (2014) 34 BHRC 65, the Court of Appeal re-interpreted the relevant statutory powers so as to allow release on grounds of rehabilitation*: R v Mc Loughlin and Newell* [2014] EWCA Crim. 188.

[61] '*A Bill of rights for the UK*?' Report of the Joint Committee of Human Rights, 10 August 2008, HL Paper 165-1; HC 150-1.

[62] Ross, T 'How the Human Rights Act escaped the Tory Axe' *Daily Telegraph*, 30 May 2015

extradition; a major concern of the government, as expressed in its election manifesto, above. [63]

The Bill will also make specific reference to *responsibilities* with respect to qualified and conditional rights, ensuring that the enjoyment of these rights will be dependent on the right holder carrying out their responsibilities to society and other rights' holders. This proposal will have to comply with Convention standards of rights' restriction, unless the government is proposing to free itself from European human right law. In any case, the Convention already accommodates restrictions on human rights to facilitate compliance with the law and the rights of others. It does not, however, in general, expressly limit the enjoyment of any rights by insisting on compliance with responsibilities, as this concept is inconsistent with fundamental rights.[64] On the other hand, the government appears to concede that these responsibilities cannot reduce its duty to safeguard *absolute* rights, such as the right to life and freedom from torture - although it has argued for the relaxation of the rules banning the deportation or extradition of suspected terrorists, and had concerns over the stopping of the extradition of Abu Qatada because he faced a trial on the basis of torture evidence.

What is unclear is whether the domestic courts will be able to even consider ECHR case law; interpret legislation in conformity with the ECHR as well as the new British Bill of Rights; or declare legislation incompatible with the new Bill of Rights. It is also unclear whether the Bill will allow the domestic courts to employ the principles of legality and proportionality when balancing and interpreting rights. If this is not the case, this will lead to multiple applications to the European Court; again, unless the government frees itself from European human rights law

Following the Supreme Court instead of the European Court of Human Rights

At present the domestic courts must *take into account* the case law of the European Court,[65] although they are not bound to follow that case law. It should also be noted that under the Act the courts cannot provide a remedy to comply with a European Court ruling in defiance of a clear statutory power to violate human rights – witness the prisoner voting case law; the government still refusing to respond to the Grand Chamber's ruling,[66] and the domestic courts unable to offer even a declaration of incompatibility.

What the proposals also ignore is that the courts can and do depart from European case law when there is no clear line of authority from the ECHR which binds domestic

[63] Already, s.19 of the Immigration Act 2014 dictates to the courts the factors it must take into account, including their weight when considering expulsion from the UK under the Nationality, Immigration and Asylum Act 2002.
[64] The sole exception to this, is article 10, relating to freedom of expression, where that right is expressly stated to be subject to *duties and responsibilities*.
[65] Section 2 HRA
[66] *Hirst v United Kingdom (No 2)*, note 21 above. See also *Chester v Ministry of Justice* [2013] UKSC 63, where the Supreme Court refused to grant a declaration of incompatibility with respect to legislation barring prisoners from voting because to do such would usurp Parliament's power to legislate in this field.

law (as in the admissibility of hearsay evidence),[67] and the domestic courts have also made it clear that they have the power and duty to interpret and apply Convention rights, and their limitations, as domestic rights (the right to die).[68] Further, the domestic courts have often chosen to follow the wide margin of appreciation offered by the European Court to justify their refusal to interfere with parliamentary and executive actions (right to die, control of assemblies).[69]

The government will, of course, hope that the Supreme Court will offer due deference and respect to the executive and legislative bodies where in the past the European Court has refused to extend the margin of appreciation to those bodies (for example, in cases concerning stop and search,[70] admissibility of torture evidence abroad,[71] and prisoner voting). However, many of the defeats to legislation and executive acts have come from the British courts, applying traditional principles to cases involving detention without trial,[72] admissibility of torture evidence in domestic proceedings,[73] and freedom of information.[74] The government should ask itself whether the domestic courts, including the Supreme Court - will become compliant, or in contrast react to any attempted curtailment of their judicial powers.

Conclusions

The present government's proposals to abolish the Human Rights Act 1998 place our relationship with international and European human right law in jeopardy. To secure the proposals' complete success, we will have to re-think our relationship with the Council of Europe as well as our standing in the international community. But is it all worth it? Are the concerns over European human rights law and the power of the European Court of Human Rights justified; particularly given the fact that the Council is already considering changes to those powers in the light of general concerns over the Convention and adherence to the doctrine of subsidiarity? Is it wise to embark on the drastic step of repealing the 1998 Act on the basis of a relatively small number of controversial cases that have annoyed politicians and certain sectors of the public? Will the decisions of the Supreme and other domestic courts be more palatable to Parliament and the government than those of the European Court; and are our courts likely to abandon European principles?

Whatever the answer to those questions, the government should use the opportunity provided by the recent delay to consider those questions carefully, including the ramifications of repealing the Act and returning to traditional principles of rights protection. That involves listening to experts who have consistently advised them of the dangers of such proposals and the alternatives available to the government to

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[67] *R v Horncastle* [2009] UKSC 14, approved by the European Court of Human Rights in *Horncastle v United Kingdom*, judgment of the European Court of Human Rights, 16 December 2014.
[68] *Nicklinson v Ministry of Justice and others* [2014] UKSC 38.
[69] See *Nicklinson*, above, note 29 and *Austin v MPC* [2009] 1 AC 564.
[70] *R (Gillan) v MPC* [2006] 2 AC 307; overturned by the European Court in *Gillan v United Kingdom* (2010) 52 EHRR 45
[71] *Othman (Qatada) v United Kingdom*, (2012) 55 EHRR 1
[72] *A v Secretary of State for the Home Department* [2005] 2 AC 68
[73] *A v Secretary of State for the Home Department (No. 2)* [2006] 2 AC 221
[74] *Kennedy v Charity Commission* [2014] UKSC 20

ensure that human rights can be sensibly balanced with other rights and interests without departing from international standards of liberty and equality.

FAMILY LAW

The effect of criminalising forced marriages in the United Kingdom: a step too far?

Maryam Aqueel[*]

Introduction

In the United Kingdom, an estimated 5,000 to 8,000 forced marriages occur each year and approximately 41 per cent of victims are under the age of 18.[75] Forms of violence such as threats, physical or sexual abuse, and emotional or psychological pressure,[76] are all examples of the physical pressure of marriage. This type of pressure is recognized as forced marriage, and can occur against men, women and children. Forced marriages can also occur when one lacks the mental capacity to consent to the marriage,[77] and any form of deception with the intention of causing another person to leave the United Kingdom,[78] as presented in the high-profile case of Dr. Humayra Abedin.

Forced marriages are present in various multi-cultural communities in the UK, such as those of Pakistani and Bangladeshi background. Statistics show that 1,500 cases a year handled by the Forced Marriage Unit involve those of Pakistani backgrounds.[79] Bangladeshis count for 11 per cent and Indians 8 per cent, the remainder being spread across about 60 countries including Afghanistan, Somalia and Turkey.[80] This became controversial due to the weak provision of the Forced Marriage (Civil Protection) Act 2007. As a result, s.121 of the Anti-Social Behaviour Crime and Policing Act 2014 has now criminalised forced marriages in England and Wales.

This short article discusses the effectiveness of criminalising forced marriage under the 2014 Act.[81] It aims to distinguish between arranged marriage and forced marriage in order to aid a better understanding of when it is unlawful to coerce someone into

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[75] Wind-Cowie, M, 'Ending forced marriages', 30th April 2012: available at http://www.demos.co.uk/publications/endingforcedmarriage

[76] Foreign and Commonwealth Office and Home Office, Forced Marriage, GOV.UK. 4th February 2014: available at https://www.gov.uk/forced-marriage

[77] Section121(2) Anti-Social Behaviour Crime and Policing Act 2014

[78] Section121(3)(1)

[79] McSmith. A 'Girls escape forced marriage by concealing spoons in clothing to set off metal detectors at the airport' *The Independent*, 15th August 2013: available at http://www.independent.co.uk/news/uk/crime/girls-escape-forced-marriage-by-concealing-spoons-in-clothing-to-set-off-metal-detectors-at-the-airport-8764404.html

[80] *Ibid*.

[81] Anti-Social Behaviour Crime and Policing Act 2014

marriage. Moreover, it will examine the significance of the Forced Marriage (Civil Protection) Act 2007[82] and how its remedies have advanced the law.

Arranged or forced?

There is no definition of marriage in domestic law. The forced marriage definition is found in the Family Law Act 1996,[83] which states that forced marriage takes place when a citizen is forced to marry without "full and free consent."[84] In addition, s.12(c) Matrimonial Clauses Act 1973 states that a marriage shall be rendered void if "either party to the marriage did not validly consent to it, whether in consequence of duress, mistake, unsoundness of mind, or otherwise."[85] Despite such laws being in force within domestic and European law, forced marriages continue to take place. The right not to marry without one's consent is implied in article 12 of the Convention, which states that men and women of marriageable age have the right to marry and to found a family according to the national laws governing the exercise of this right.

This issue of consent is a key distinguishing factor between an arranged and forced marriage, as seen in *NS v MI*,[86] where the victim was forced to marry her cousin when she was aged 16 after being persuaded that she was going on a holiday to Pakistan. The High Court argued that arranged marriages are "*perfectly lawful*"[87] when families discuss the possibility of marriage and the choice of whether to accept the marriage or not, remains with the spouses.[88] In other words, if the individual consents, it is not deemed a forced marriage but rather is regarded as an arranged marriage. Additionally it is important to understand when an arranged marriage becomes forced upon the individual. In *Re SK*,[89] J Singer noted that "a grey area separates unacceptable forced marriages from marriages arranged traditionally …arranged marriage may become forced but forced is always different from arranged."[90] In this case the courts had a responsibility to ascertain whether the plaintiff was able to exercise her own free will.[91]

The facts of *NS* illustrate the challenge in distinguishing the two marriages, and the high-profile murder case of Shrien Dewani and Anni Dewani demonstrates that the victim was unable to escape her marriage due to high expectations, demanded by the Hindu tradition. This caused her emotional and psychological pressure to marry. The defendant and victim were both very unhappy in their marriage and the victim was murdered on their honeymoon in South Africa, which was claimed to be settled by her

[82] Forced Marriage (Civil Protection) Act 2007
[83] Family Law Act 1996: s.63A , inserted by s.1 Forced Marriage (Civil Protection) Act 2007 (SI 2008/2779)
[84] Section 63A(4) Family Law Act 1996
[85] See K. Gill, A and Anitha, S *Forced Marriages* (Zed Book Ltd 2011 1st Edition), at page 138
[86] *NS v MI* (2006) EWHX 1646 (Fam)
[87] *Ibid*, at paragraph 2
[88] HM Government Multi Agency Practice Guidelines Handling Cases of Forced Marriages 2009 at page 10: available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/35530/forced-marriage-guidelines09.pdf
[89] *(Proposed Plaintiff) (An adult by way of her litigation friend)* [2004] EWHC 3202 (Fam)
[90] *Ibid*, at paragraph 7
[91]: *SK (proposed plaintiff) (an adult)* [2004) EWHC 3202 (Fam) 2014 *Family Law* Week: available at: http://www.familylawweek.co.uk/site.aspx?i=ed516).

husband. This case demonstrates that although some women may agree to marry, in practice to decline the marriage due to family and traditional expectations creates great challenges leading up to and during the marriage. As a result, it is vital to understand when an arranged marriage could, in fact, be forced upon an individual; and that although a relationship or marriage may seem fine on the surface, in reality there are deeper, underlying issues that need to be resolved.

Forced Marriage (Civil Protection) Act 2007

The article will now examine the effect of the remedies prior to the Forced Marriage (Civil Protection) Act 2007 and the potential flaws in the law that put this legislation into place. Prior to the 2007 Act, family courts were unable to seek orders to protect individuals from being forced to marry; apart from non-molestation orders under s.42 Family Law Act 1996.[92] This provision was put into place in order to prohibit an individual from molesting another individual, and includes harassment. However it was felt that this failed to protect victims of forced marriages or to stop those guilty of performing a forced marriage on an individual. In July 2007 a Private Member's Bill received Royal Assent as the Forced Marriage (Civil Protection) Act 2007. Under this Act, forced marriage has been defined as "when person ("A") is forced into a marriage and another person ("B") forces A to enter into a marriage (whether with B or another person) without A's free and full consent."[93] Force is defined to include threats or other physiological means,[94] reflecting the fact that "threats of exclusion from the family and social isolation can be just as powerful as physical abuse for many victims."[95]

The Act assists victims of forced marriages or those threatened with forced marriages by providing civil remedies rather than imposing guilt of those forcing a marriage upon an individual. From 25 November 2008, the primary remedy for family courts to seek is an injunction: the Forced Marriage Protection Order (FMPO). Those who disobey this order may be found in contempt of court and sentenced up to two years imprisonment.[96] Injunctions prohibit certain acts that may lead to a force marriage on potential victims, extending to British citizens outside the UK.[97] An example is the high-profile case of the Dr Humayra Abedin,[98] who issued an injunction against her family when she was kept captive in Bangladesh and forced to marry.[99]

It is important to note that although people in support of injunctions believe it has provided a great benefit to victims to allow them to reconcile with their family,[100] the

[92] Section 42 Family Law Act 1996
[93] Section 63A(4) Family Law Act 1996
[94] *Ibid*, section 63A(6)
[95] Hansard, HL Debate: Forced Marriage (Civil Protection) Bill, 26 January 2007, Volume No.688, Part No. 34, Column 1332. Available at http://www.publications.parliament.uk/pa/ld200607/ldhansrd/text/70126-0004.htm#07012689000604
[96] Forced Marriage Protection Orders available at http://hmcourtsservice.gov.uk/cms/14490.htm
[97] K. Gill, A and Anitha, S *Forced Marriages* (Zed Book Ltd 2011), at page 143
[98] Statement from Humayra Abedin, *The Guardian*, 19 December 2008. Available at http://www.theguardian.com/world/2008/dec/19/statement-nhs-doctor-abedin-forced-marriage
[99] BBC News, The fight against forced marriage, 15th December 2008. Available at http://news.bbc.co.uk/1/hi/7783351.stm (Accessed 4th December 2014)
[100] K. Gill, A and Anitha, S *Forced Marriages* (Zed Book Ltd 2011 1st Edition) page 143

statistics showed that injunctions were not successful. Between November 2008 and June 2011 only 339 FMPO's were noted in the UK, which contained five breaches and only one prison sentence.[101] Generally the flaws in the FMPO illustrated that this was not a useful method to amend the civil law and thus the government decided to make forced marriages completely unlawful.

Criminalisation of forced marriages

Although the Forced Marriage (Civil Protection) Act 2007 permitted the family courts to seek orders to prevent victims of forced marriages, it allowed those guilty of practicing forced marriages to escape criminal liability. As a result there were a number of debates held with respect to criminalising forced marriages. For example the Conservative Party distributed a strategy paper in December 2008 entitled "Ending Violence against Women."[102] In it, it was specified that if current legislation is seen to be ineffective then a Conservative government will consider criminalising the practice of forced marriage.[103] Consequently these discussions placed immense pressure on the government to make forced marriages illegal.

After almost four years, on 12 June 2012, Prime Minister David Cameron stated that:

> ''To force anyone into a marriage against their will is simply wrong and that is why we have taken action to make it illegal. I have listened to concerns that criminalisation could force this issue underground; that is why we have a new comprehensive package to prevent criminality. Forced marriage is wrong, is illegal and will not be tolerated."[104]

The Anti-Social Behaviour Crime and Policing Act 2014 received royal assent on 13 March 2014, and under s.121(1) forced marriages are unlawful:

> '(1) A person commits an offence under the law of England and Wales if he or she:
>
> (a) uses violence, threats or any other form of coercion for the purpose of causing another person to enter into a marriage, and
>
> (b) believes, or ought reasonably to believe, that the conduct may cause the other person to enter into the marriage without free and full consent.

[101] Proudman. C.R. Forced Marriages and the Criminal Law, Family Law Week, September 2012. Available at http://www.familylawweek.co.uk/site.aspx?i=ed100479 (Accessed 24th November 2014)
[102] Conservatives, 'Ending violence against women', December 2008. Available at https://www.conservatives.com/~/media/Files/Downloadable%20Files/ending-violence-against-women.ashx?dl=true (Accessed 4th December 2013)
[103] Conservatives, 'Ending violence against women', December 2008. Available at https://www.conservatives.com/~/media/Files/Downloadable%20Files/ending-violence-against-women.ashx?dl=true (Accessed 4th December 2014)
[104] Strictland.P. Forced Marriage, Commons Library Standard Note SN01003, 8th June 2012, Home Affairs Section, page 11. Available at http://www.parliament.uk/briefing-papers/SN01003 (Accessed 4th December 2014)

Since 16 June 2014, it is now a crime to commit such an offence, protecting civilians in England and Wales and those taken overseas "who are at risk becoming the victims of forced marriage:"[105]

Those who disobey the law can receive sentence up to seven years.[106] In support of the Prime Minister's decision, there were many reassuring claims that the Act will cause fear to potential culprits and reduce the number of forced marriages. Blake indicated that the importance of making forced marriage unlawful would approve victims of having a means of legal redress and deter potential offenders.[107] Moreover, Holman J labelled forced marriages as "a scourge, which degrade the victim and can create untold human misery."[108] Nonetheless, the Act is believed to be a "quick fix" and not as effective as it appears, whereas others have questioned whether the effect of criminalising forced marriages in the UK is a step too far.

The criminal law has been critically analysed by feminists' scholars: the main topic of concern being violence against women. These scholars have emphasised the (then) inadequate criminal justice system by pointing out the intolerable incidents, which occur against women through marriage. Nonetheless Tehmina Kazi, a director of British Muslims for Secular Democracy, made a clear point that forced marriage contains greater mistreatment "than the sum of its parts, because it entrenches a framework for continuous ill-treatment."[109] In other words, violence against women should not be confused to the elements of forced marriages because the criminal law must place a clear distinction between the two. As a result, the criminialisation of forced marriages will play a major role in feminist debates.

Perhaps most importantly, criminalisation of forced marriages addressed an issue of victims reconciling with their loved ones. In support of this argument, Sameem Ali, a Labour Councilor who was a victim of a forced marriage, argued that victims will be "forced to testify against their parents"[110] and would stop them from seeking civil remedies. This was illustrated in *Bedfordshire Police Constabulary v R U F H S*,[111] where the victim claimed that if she did not go overseas to Pakistan, she would be shot,[112] and as a result the victim was provided with a FMPO. This prevented her from getting married completely; although she was obliged to marry a stranger in a religious ceremony under the responsibility of her mother and aunt. They were both in

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[105]Home Office. Forced Marriage Now A Crime, 16th June 2013. Available at https://www.gov.uk/government/news/forced-marriage-now-a-crime (Accessed 3rd December 2014)

[106] Ibid

[107] Baksi.C. 'Forced marriage to be criminalised' Law Society Gazette, 8 June 2012: available at http://www.lawgazette.co.uk/news/forced-marriage-be-criminalised

[108] *Bedfordshire Police Constabulary v R U, F H S* [2013] EWHC 2350 (Fam) 152

[109] Kazi, T 'Written submission from British Muslims for Secular Democracy', 11 December 2013: available at http://www.scottish.parliament.uk/S4_JusticeCommittee/Inquiries/ASB15._British_Muslims_for_Secular_Democracy.pdf

[110] Carter. H. 'Criminalisation of forced marriage will push issue underground,' The Guardian, 8th June 2012: available at http://www.guardian.co.uk/world/2012/jun/08/criminalisation-forced-marriage-push-issue-underground

[111] *Bedfordshire Police Constabulary v R U, F H S* [2013] EWHC 2350 (Fam)

[112] 'Forced Marriage Case: Teen Girl In Pyjamas 'Begged Bedfordshire Police For Help,' *The Huffington Post*, 5 April 2014: available at http://www.huffingtonpost.co.uk/2013/05/29/teen-forced-marriage_n_3350725.html

breach of the FMPO, and the victim, fearing for her mother and aunt when they were under arrest, reversed the original statement and stated that she was not forced into the marriage. In addition, according to Karma Nirvana, a forced marriage charity situated in Leeds, young victims have asked for a return to their families, although the FMPO is still put in place.

The importance of these issues is that they have highlighted the problem of emotional attachment a victim may have with their family. For example, those who are of gay, lesbian or bisexual people may be forced marry a person of their family's wishes because of the close relationship they have with their parents. Statistics show that 36 cases of forced marriages in 2010 are from gay, bisexual or lesbian people.[113] A reason for this could be that these people may not want to 'disappoint' their families; but will be emotionally forced to marry. Another problem is the irresistible burden placed on victims when they seek civil remedies against their family for their own protection, especially when the victims are of a vulnerable age and have a disability. For example, children may not have the confidence or intelligence to speak out, or they may be 'brushed off' when they have tried to speak to someone about their situation. Studies show a third of cases handled in 2010 were relating to people under the age of 18.[114] Another example is those with disabilities, who are very much dependent on their families. According to the Forced Marriage Unit in 2010, 70 cases relating to forced marriages were from disabled people.[115]

Conclusion

The government introduced the Forced Marriage (Civil Protection) Act 2007 for the purpose of providing the victims of forced marriages with effective remedies. Clearly this was not as effective as it was planned to be. As a result, it was hoped that the outcome of criminalizing forced marriages would encourage victims to come forward to seek help and assistance in times of distress, anxiety and suffering, and thus fixing the flaws in the previous law. Furthermore, by imposing criminal liability, the government attempted to send a powerful message to the families who conducted forced marriages on young, dependent and helpless girls.

Nonetheless the allegation that criminalisation may be a step too far lies in the question of what has been the real effect of criminalising forced marriages under the Anti-Social Behaviour Crime and Policing Act 2014. The Act came into action to support victims and to educate society on the harms of forced marriage. Yet there are many disagreements and controversies. Overall, the decision lies in the hands of the victims as to whether they want to come forward and report the forced marriage. As the majority of the cases are from the South Asian background, there is almost a stigma attached on the individual: they may feel as if they are disrespecting their community by reporting their parents and this can be seen as a question of pride.

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[113] Singh, M 'A Race Equality Foundation Briefing Paper,' 12 June 2011: available at http://www.merseycare.nhs.uk/Library/Who_we_are/Equality_and_Diversity/Forced_Marriage_and_Mental_Health.pdf

[114] *Ibid*

[115] *Ibid*

Therefore, essentially it can never be guaranteed that the criminalisation of forced marriages will be effective.

In conclusion, it can be said that the criminalisation of forced marriages in the United Kingdom is far from effective, and that the evidence from studies support this argument as the amount of unreported cases have been on the rise and statements have been retracted by the victims of forced marriages. Although the majority of the public has reinforced criminalisation of forced marriages, it has proved to impose a negative outcome by failing to improve the laws by preventing victims to come forward.

CYBER LAW

The implications of using a Peelian (police) model in policing online sexual crimes.

Harriet Lodge [*]

Introduction

When Sir Robert Peel contemplated the first Metropolitan Police Act in 1829, it is unlikely that he envisaged the massive technological revolution that would occur over the following centuries. His 'bobbies' would go from merely apprehending thieves and brigands to becoming experts in online, financial and international crimes. This inevitably leads us to the question whether the modern force are able to successfully police these new technologies and the new crimes that accompany them. In the area of online sexual crimes, the answer seems to be in the negative. The traditional Peelian model of policing was not institutionally designed to tackle the complexity of these new offences, nor does it have the resources to fully comprehend the technology used by offenders. Yet the police seem reluctant to let go of their role as public protectors, indicating that an overhaul of the current model is needed.

It is suggested, therefore, that an updated cyber-peelian model should be introduced to aid the police in meeting the challenge of Internet governance with regard to online sexual crimes. This model should reflect the traditional values of Peelian policing as well as understanding the online environment. This can be done by taking into consideration cyber regulatory theories - such as Andrew Murray's network communitarianism - to provide a viewpoint through which to consider how an updated Peelian model can police online sexual crimes, and by challenging how the police perceive their role and the role of civilians.

This article explores the problems with the current Peelian model and considers the further challenges that any new model will face. The first part will consider the definition of online sexual crimes and how the current Peelian model is failing to

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police this area effectively. The second part will then consider the regulatory debates concerning cyberspace and how a networked model could enable an updated Peelian system for the police. Finally, the third part will evaluate the challenges that a new cyber-peelian model would face and what can be done to overcome them.

Defining online sexual crimes

The concept of sexual offences is, generally complex and broad. With the addition of the Internet, the spectrum that the term covers becomes even wider. Not all sexual behaviour that occurs online is considered to be inappropriate by users and, more importantly, by legislation. This is turn raises questions about offences potentially being considered *de minimis* or *nullum crimen*. [116]

For simplicity, online sexual offences can be roughly split into two categories: those specifically committed against children, and those with a more general application. Understandably, there is greater public awareness of offences against children such as grooming, sexual exploitation, and child sex abuse images.[117] It is also easier to define sexual behaviour committed by adults against children as being offences. This is predominantly due to society's perceptions of these acts and the legislation that already exists, namely the Sexual Offences Act 2003 and the Protection of Children Act 1978.[118] There are also higher levels of international co-operation and funding in this area, including Council of Europe's Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse.[119] Whilst this increased international awareness and support for protecting children online demonstrates progress, a problem still remains with the harmonisation of individual countries' legislation in prosecuting and sentencing offenders. This is true of all online sexual offences and most other cybercrimes.

With regard to adults, there are three main categories of online sexual behaviour which can be identified as offences: extreme pornography, sexually orientated stalking and sexual harassment. Putting extreme pornography to one side,[120] there has been a rise in the number of reported sexual harassment and sexual stalking incidents, which is likely to be the result of how relatively easy it is to locate information about people online.[121] The last few years has also seen increasing numbers of non-consensual pornography - or 'revenge porn' - which is the act of publically sharing via the Internet intimate pictures of another person, usually when a relationship has ended. Revenge porn now constitutes a specific offence under the Criminal Justice and

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[116] *De mininmis non curat lex* – the law does not deal with trifles and *Nullum crimen sine lege* – no crime without law'

[117] Majid Yar '*The policing of Internet sex offences: pluralised governance versus hierarchies of standing*' in David S. Wall and Matthew Williams (eds) '*Policing Cybercrime'* (Routledge 2013). Originally published in the Journal of Policing and Society volume 23, issue 4 (December 2013)

[118] Sections 9-15 Sexual Offences Act 2003 – Offence against children

[119] Council of Europe legislature at http://conventions.coe.int/Treaty/EN/treaties/Html/201.htm

[120] There are key issues such as autonomy and consent that space precludes consideration of. For a detailed discussion, see Paul Johnson 'Law, Morality and Disgust: The Regulation of 'Extreme Pornography' in England and Wales' (2010) 19 (2), *Social & Legal Studies* 147.

[121] Hannah Fearn, *'Police retrain to tackle rise in cyber stalking' The Independent* Online, 10 January 2015)

Courts Act 2015.[122] Some have referred to this growing trend of offences deriving from consent (sharing information and pictures online etc.) as self-victimisation,[123] a view that can also occasionally be found amongst traditional police. This highlights the need for an updated policing model with not only clear legislative measures, but also more preventative measures such as public awareness campaigns and training to help Internet users (and the public police) to recognise the dangers.

Whilst it is possible to define online sexual offences, it is difficult to quantify how many people are affected by such sexual behaviour online. This may be due to high levels of underreporting by victims - much higher than in the physical world[124] - or that this behaviour is not as prevalent as may be believed. David Wall strongly believes that underreporting is the more likely option[125]. One reason for this might be that there is a misplaced view of some victims that the online behaviour is not serious to constitute a crime, or will not be taken seriously as it did not involve an element of harm. Often, some adults can be embarrassed by the situation and try to deal with it themselves; whereas with children many are not aware of the situation they find themselves in or that what they are being asked to do is wrong.

It is important to understand the complexity of online sexual crimes in order to understand some of the challenges that the current Peelian model exists and the environment to which the public police must adapt.

A Peelian model of policing

The Peelian model of policing refers not only to the values and principles of the UK police, but also to the structure and system in which they operate, including the prevention, investigation and prosecution of crimes. This model is often seen as being synonymous with the creation of the 'modern' British Police force by Sir Robert Peel in 1829 and the nine principles of policing, which can be seen in use globally in different law enforcement agencies.[126] The nine principles attributed to Peel reflect the

[122] Sections 32-33

[123] Jo Bryce 'Online sexual exploitation of children and young people' in Yvonne Jewkes and Majid Yar (eds) '*Handbook of Internet Crime'* (Willan Publishing 2010), at page. 322.

[124] *Ibid, at* 322

[125] David S. Wall 'Policing Cybercrimes: situating the Public Police in Networks of Security within Cyberspace' (2011) (2) *Police Practice and Research: An International Journal,* Revised 195

[126] The principles are: 1. The basic mission for which the police exist is to prevent crime and disorder; 2. The ability of the police to perform their duties is dependent upon public approval of police actions; 3. Police must secure the willing co-operation of the public in voluntary observance of the law to be able to secure and maintain the respect of the public; 4. The degree of co-operation of the public that can be secured diminishes proportionately to the necessity of the use of physical force; 5. Police seek and preserve public favour not by catering to public opinion but by constantly demonstrating absolute impartial service to the law; 6. Police use physical force to the extent necessary to secure observance of the law or to restore order only when the exercise of persuasion, advice and warning is found to be insufficient; 7. Police, at all times, should maintain a relationship with the public that gives reality to the historic tradition that the police are the public and the public are the police; the police being only members of the public who are paid to give full-time attention to duties which are incumbent on every citizen in the interests of community welfare and existence; 8. Police should always direct their action strictly towards their functions and never appear to usurp the powers of the judiciary; 9. The test of police efficiency is the absence of crime and disorder, not the visible evidence of police action in dealing with it.

general theme of policing by consent. As well as the basic concept that the public police should prevent crime and disorder, the principles also refer to "public approval of police actions," "willing co-operation of the public" and the idea that "the police are the public and the public are the police."

In the UK, the Peelian principles have very much survived within the police, although this has led to accusations that the national police have a possessive attitude over crime and protecting the public. This can be seen in the way in which the public participate in the policing process. Traditionally, a crime was reported by a member of the public, the police investigated and then the state prosecuted. Despite the overtones of public approval in Peel's principles, the Peelian model up until very recently did not require the interaction of the public beyond that of victim or witness. Whilst this stance may be effective in the real world, in cyberspace a reluctance to recognise their own limitations could marginalise the effectiveness of the public police role in policing sexually harmful behaviours online. In particular, it is possible to notice change over the last decade or so - with greater emphasis being put on the victim and the different ways in which the police are integrating with the public to prevent crime.

Another criticism of the traditional Peelian model is that it was designed for the 'real' world and not cyberspace. Whilst policing in the UK has a very regional orientation, cybercrime is not confined to a single location, can be committed on a scale impossible in the real world and is often transnational in nature. There is also the issue of the 'reassurance gap'[127] that lies between the realistic abilities of the police and public demands for the policing of cybercrime.

As Brenner points out, cybercrime creates challenges that the traditional Peelian policing model cannot effectively cope with.[128] The investigative model used by the British police - the Police and Criminal Evidence Act 1984 (PACE) - is rigid in its approach to investigating criminal offences. Despite updates by the Serious Organised Crime Act 2005, PACE limits the parameters of police investigation in emerging areas of crime. In particular, it lacks the scope to encourage partnerships with other organisations that would improve policing in these areas. The Peelian model, therefore, requires a system update, and any updated model should continue to uphold the traditional core values of the public police, reflect the transformative nature of the Internet as well as understanding how the reassurance gap can be closed.

Is it possible to police the internet? - updating the Peelian model

In order to revitalise the old Peelian model, we must now consider the question whether the Internet can actually be regulated and policed. At its inception, cyberspace was very much a new frontier and a land of opportunity not too dissimilar to the old American West. Cyber users were quite possessive of their new dominion as noted by John Perry Barlow,[129] whose dystopian view of cyberspace rejects the concept of

[127] *Ibid*, citing M. Innes 'Reinventing tradition?: Reassurance, neighborhood security and Policing' (2004) 4 (2) *Criminal Justice* 151.
[128] Susan W. Brenner "Private-Public Sector Cooperation in Combating Cybercrime: In Search of a Model" (2007) 2(2) *Journal of International Commercial Law and Technology* 58
[129] John Perry Barlow, "*A declaration of the independence of cyberspace*," Electronic Frontier Foundation, available at https://projects.eff.org/~barlow/Declaration-Final.html

state/organisation regulation and argues that governments "have no moral right to rule us [cyber users] nor do you possess any methods of enforcement that we have true reason to fear" - suggesting that upon entering cyberspace, cyberspace users cannot have the traditional laws of the real world foisted upon them. Instead, Barlow supports the creation of a "social contract"[130] or norms by cyberspace users, which enable a form of self-regulation.

Johnson and Post later developed Barlow's argument from a 'should not regulate' to a 'cannot regulate' cyberspace, due to its special nature. They suggested that external forces could not control cyberspace and cyber law, as "the law of cyberspace will reflect its special character which differs markedly from anything found in the physical world."[131] This, they argue, is due to the lack of borders in cyberspace and as such the laws of cyberspace cannot rest upon the doctrines of geographically based sovereign jurisdictions,[132] and cannot be regulated by those traditional laws. Johnson and Post maintain that the only way a cyberspace regulatory system could exist was if it had been created organically.[133]

This cyberlibertarian view of cyberspace seems to rely on the concept of clear impenetrable borders between cyberspace and the real world where in fact there no longer appears to be any. Barlow, in particular, fails to take into account the physicality of cyberspace users and their inherent physical locations within state jurisdictions. His is a moral argument that falls in the face of the necessity for regulation. In areas such as cybercrime and online sexual offences, it would be naïve to leave it purely to self-regulation, particularly from a penal perspective. What can be taken from cyberlibertarianism is the idea that in order to be truly effective a policing model for online sexual crimes would need to work with those users/groups who consider themselves exempt from state regulation.

Cyberpaternalism takes an opposing view and suggests that regulation could occur. Lawrence Lessig's modality theory is useful to consider when contemplating cyber crime policing as it enables an understanding of the factors that influence an individual's online behaviour. Lessig theorised that there were four modalities that applied force to control the choice of actions of an individual's behaviour online: law, architecture, norms and the market.[134] Lessig suggested that in certain areas[135] the law, as a direct form of control, was ineffective as it did little to prevent the action it sought to control. For instance, consider the UK's ban on smoking in public places. The aim of the legislation was to reduce the impact on non-smokers and hopefully reduce smoker numbers. Whilst people had to go outside to smoke, few actually gave up. Lessig suggested that the other modalities could be more effective in achieving a regulator's goal; for example, if greater taxes were placed on the cigarettes

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[130] *ibid*

[131] David R. Johnson and David G. Post, "Law and Borders: The Rise of Law in Cyberspace" (1996) 48 *Stanford Law Review* 1367

[132] *Ibid, at* 1401

[133] Andrew Murray *Information Technology Law* (2nd Edition Oxford University Press 2013), at page 59.

[134] Lawrence Lessig, "The Law of the Horse: What cyberlaw might teach*"* (1999) 113 Harvard Law Review 501

[135] Lawrence Lessig, "Code 2.0" 2006, at page 122

manufactures, then the prices of cigarettes would go up and thus fewer people could afford to smoke. This contrived example demonstrates how Lessig envisaged the modalities could interact to achieve regulation. It could be argued that Lessig's theory of regulation would work as a method of delivering an updated Peelian model. Using the example of child sexual exploitation as an offence, it is however, possible to see that Lessig's view of users would hinder the policing model.

Architecture

An individual is constrained by the technology affecting the supply[136] of what they seek, in this case access to potential victims. Access to these victims increasingly comes through social networking websites and chat rooms, where children are often vulnerable. The architecture of these sites could be altered either to better protect the children or to make it harder for offenders to communicate with children. Ideally, making it harder to do, could reduce the number of offenders with access to vulnerable children however, the burden here lie on the website owners to put these measures into place.

Norms

The stigma of online child exploitation is already in place and clearly, those that wish to exploit children will do so regardless. The norm that needs to be altered is the mindset of children when they use the Internet and the protection they give themselves. However, this can only be achieved through children engaging with awareness materials.

Market

This modality is more difficult to apply to a policing model as generally it drives action as opposed to preventing it (supply and demand).[137] However, the support of the other modalities working together to combat child exploitation could have the impact of reducing the market, i.e. indecent images of children.

Law

Law threatens sanctions when broken which theoretically acts as a deterrent for illegal action. However, the effectiveness of law alone is minimal. What are needed are law, detection and then punishment. Lessig refers to users as pathetic dots,[138] and does not see them as active in the environment in which they exist. The modalities act purely as constraints and do not allow for the dot to interact with the modalities or other dots. This regulatory model does not overcome the problems with the current Peelian policing system.

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[136] *Ibid,* at page 123
[137] *Ibid* at 124
[138] *Ibid*

Andrew Murray's network communitarianism theory takes Lessig's work further and provides a key to unlocking the potential of policing cybercrime.[139] Murray suggests that cyberpaternalism (Lessig) fails to take into account the "complexities of information flows found in modern telecommunications" systems such as the Internet.[140] He believes that the pathetic dot is in fact an active dot that forms part of a wider community of dots. Murray highlights that there are two key distinctions between his view and cyberpaternalism. Firstly, a networked community of dots that share information replaces the pathetic dot. The second is the recognition that Lessig's regulatory modalities (law, norms, market) gain their legitimacy and are accountable to the community of dots, implying that the whole regulatory process is in fact a conversation and not a one-way monologue.[141] Murray's theory goes the necessary extra mile in identifying the true nature of cyber users (public, private and law enforcement) and is representative of the realities interactions in cyberspace. Furthermore, it attempts to strike a balance between state regulation and cyber self-regulation by reflecting the idea of community-based control, which will prove key in updating the Peelian model.

Murray's recognition of the importance of communication and network flow, compliments that of David S. Wall, who suggests that the architecture of Internet policing is a web of networked nodes in which the public police need to find their place.[142] There are now other non-police players that form the nodes of networked internet governance, which the public police will need to be able to interact with in order to police online sexual crimes.[143] These players include Internet users, virtual environment managers, Internet Service Providers, corporate security organisations, non-governmental organisations, governmental non-police organisations and the public police themselves.[144] At present, the relationship between the public police and these different players is inconsistent and does not always result in the sharing of information which is necessary to combat online sexual crimes on a global scale.

A cyber-Peelian model

Having considered the variance of online sexual crimes, the problems with the current Peelian model and the cyber regulatory issues, it is suggested that a cyber-peelian model be introduced which can enable an effective approach to the policing of online sexual crimes. This model would retain the core Peelian principles, notably the strong concept of crime prevention and emphasising the need to work with the public and other organisations to achieve this goal. Public co-operation with the police should be embraced and a formalised civilian participation should be introduced into the online policing process.[145] This input could take the form of either individual participation - through the contribution of time - or corporate participation through the contribution of resources. However, formal arrangements could cause problems regarding

[139] Andrew Murray *The Regulation of Cyberspace: Control in the Online Environment* (London: Routledge-Cavendish 2006).
[140] *Ibid* 65
[141] *Ibid* 67-68
[142] *Ibid* 184
[143] *Ibid* 187
[144] *Ibid* 188-190
[145] Brenner (2007) , at page 60

impartiality and fairness, as well as concerns regarding the point at which civilians (public or private) are involved – are they hunting for offenders, investigating offences or compiling evidence for prosecution?

It is, therefore, more appropriate to build on the informal civilian participation in online policing that already exists, whereby civilians are 'policing' their own areas of cyberspace[146] and, when appropriate, providing information to the police. Brenner warns against this model, referring to it as a form of legalised vigilantism.[147] However, by ensuring that it is still the role of the police to formally investigate and the state to prosecute, then there is no power vacuum for true vigilantism to occur in this model.
There is also a role to be played by Internet Service Providers (ISPs) who may be bound by the law in the country that they operate from to assist with the policing of online sexual crimes. ISPs can regulate by influencing online behaviour through contractual governance, i.e. terms and conditions of service contracts. Furthermore, as a result of their global position in the Internet governance network, ISPs are also able to use software, which can recognise when certain behaviour is taking place.

This cyber-peelian model is already slowly coming into force as can be seen by increased partnerships between the public police, ISPs and charities such as the Internet Watch Foundation. However, this model faces further challenges which, if overcome, would increase the public police's effectiveness in combating online sexual crimes.

Challenges facing a Cyber-Peelian model

Legislation

Cyberspace is in a continuous state of evolution and therefore requires constant attention by legislative bodies at both national and international level. A strong legislative framework allows for strong policing of crimes. With regard to online sexual crimes, the majority of substantive and procedural laws of England and Wales require updating to reflect the different ways in which offences are being committed and to identify new types of offences as opposed to shoehorning online sexual behaviours into pre-existing statues.

Take, for example, the recent trend of "non-consensual pornography" - or revenge porn as it is better known. Prior to the Criminal Justice and Courts Act 2015, revenge porn was not a specific offence but rather prosecutors rely on legislation, such as the Communications Act 2003 and the Sexual Offences Act 2003, to bring prosecutions. These acts were not detailed enough to cover the technological components of the offence or recognise the impact it has on victims. Since January 2012 and July 2014, 149 allegations of revenge porn crimes were reported to eight police forces and of those, only six resulted in a police caution or charge.[148] Whilst this is only a small snapshot into crime reporting, it does however highlight either a lack of evidential

[146] Wall (2011) , at page 188
[147] Brenner (2007), at page 65
[148] Figures obtained by the Press Association published in Caroline Lowbridge 'Is revenge porn already illegal in England?' BBC News Online at http://www.bbc.co.uk/news/uk-england-30308942

ability of the police to charge a suspect or that not enough incidents meet the public interest threshold for the Crown Prosecution Service to pursue a conviction. There have been two reported successful prosecutions since 2011, both of whom were prosecuted for harassment. It could be argued that victims could have the option of bringing a civil case, should their case not satisfy prosecution guidelines. Whilst the evidential burden is lower in civil proceedings, the range of civil actions and remedies available to victims were limited and do not provide a realistic form of alternative protection.[149] Revenge porn is now a specific offence but it took several years before legislation caught up with technology, thus highlighting the need for legislation to be more reactive.

It is clear that protection can be provided by legislation at a pace to match technology. Eleven US states enacted specific laws regarding the unlawful distribution of private images. In California,[150] Hawaii[151] and Arizona[152] the emphasis of the law is on the intentional disclosure of images of a sexual nature without consent, and in Colorado[153] the law is aimed specifically at the users of social media. Furthermore, in Germany a regional court held that the personal rights of the subject of non-consensual porn were higher than the ownership rights of the photographer and that any intimate pictures from a previous relationship should be deleted where a partner requests.[154] The Australian state of Victoria also has criminal sanctions for the non-consensual distribution of intimate images.[155] The UK seems to be lagging behind in the specific criminalisation of non-consensual pornography. Some would argue that there is no need to create further offences, whereas this article suggests that it is vital to criminal specific offences such as "revenge porn" to afford better protection for past and future victims.

At an international level, the European Convention on Cybercrime (The Budapest Convention)[156] has made the initial steps in harmonising national laws and creating a more united front, having been ratified by 44 countries including the USA.[157] However, this still leaves problems regarding non-signatory states and the possibility of 'safe havens' for cybercriminals. Whilst the Convention may have provided harmony in terms of definitions and sanctions, it does not yet seem to have had a direct effect on the policing of online sexual crimes in the UK. The UK only ratified the Convention in 2011 and it has not been until recently that new legislation has been introduced that has enabled the policing of online sexual crimes. The introduction of

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[149] Justine Mitchel *"*Censorship in cyberspace: closing the net on "revenge porn*"* (2014) 25(8) *Entertainment Law Review* 283

[150] California State Legislature at http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=PEN&sectionNum=647

[151] Hawaii State Legislature at www.capitol.hawaii.gov/session2014/bills/HB1750_CD1_.htm

[152] Arizona State Legislature at http://www.azleg.gov/FormatDocument.asp?inDoc=/ars/13/01425.htm&Title=13&DocType=ARS

[153] Colorado State Legislature at http://www.lexisnexis.com/hottopics/colorado/

[154] Heather Saul, "German court rules ex-lovers must delete explicit photos of partners after a break-up" The Independent 22 May 2014 at www.independent.co.uk/news/world/europe/german-court-rules-exlovers-must-delete-explicit-photos-of-partners-after-a-breakup-9419009.html

[155] Crimes Act 1958, s.21A (2) (Australia)

[156] Budapest Convention at http://conventions.coe.int/Treaty/EN/Treaties/Html/185.htm

[157] Related Convention publications at UK Government http://treaties.fco.gov.uk/treaties/treatyrecord.htm?tid=4555

the new Criminal Justice and Courts Act has created that specific offence but there has not yet been opportunity to assess whether it is providing adequate redress for victims.

The technological capabilities of the police

There is an unfortunate preconception that many regional police forces are online novices, failing to gauge social media networks and trailing in the wake of online criminals. Whilst police press officers have desperately tried to debunk this myth through extended use of Twitter, the reality is unaltered. It is vital that the information technology skills of all police officers and those involved in prosecuting (judges and lawyers) are improved to a level that enables them to at least understand the basics of cybercrime and online sexual offences. It is no longer practical to rely solely on specialist units, such as CEOP, as the majority of online sexual harassment or stalking incidents will be dealt with at a regional level. Higher standards of public police training would have a significant impact on not only the policing and prosecution of potential online sexual offences, such as understanding how social media operates, but in the way in which victims are dealt with especially by the older generation of police officers.

The creation of a preventative framework

A more holistic approach, as opposed to the current reactive one, is needed by states: combating online crimes is no longer something that can purely be left to law enforcement and policing bodies alone.[158] With regard to online sexual crimes, there are several preventative measures that states and law enforcement bodies could take. These measures are not aimed at reducing the number of offenders but rather target the potential victims to make them more aware of the dangers online.

Greater numbers of outreach campaigns, run in partnership with local charities or other educational organisations, should be used in order to educate young people of potential online. There are already some awareness campaigns in place, but these do not seem to be receiving the young person coverage needed to be truly effective. The Child Exploitation and Protection Centre (CEOP), for example, claim that 2.6 million children have seen their safety online Thinkuknow resources,[159] and yet there are approximate 7.5 million young people aged between 10 and 19 in the UK, all of whom will, probably, have access to the Internet.[160] It might even be prudent to introduce online safety as part of the primary curriculum,[161] particularly as children as young as two seem able to use a computer tablet.[162] Education in this area will make children aware of potential grooming or other forms of sexual exploitation and help them to resist advances by offenders. Campaigns should also be directed at adults;

[158] Laviero Buono, 'Fighting cybercrime through prevention, outreach and awareness raising' (2014) 15 (1) *ERA Forum* 1

[159] CEOP Annual Review 2012-2013, page 7, at http://ceop.police.uk/Documents/ceopdocs/AnnualReviewCentrePlan2013.pdf

[160] Office for National Statistics '*2011 Census: Population and household estimates for the United Kingdom*' Published December 2012.

[161] The author acknowledges that to some extent online safety is taught in schools but more needs to be done to ensure consistency throughout.

[162] Mike Wilson 'Baby Works iPad Perfectly. Amazing Must Watch!' at http://youtu.be/MGMsT4qNA-c

those in the 18-30 age group are in particular need of 're-education' regarding the risks of sharing personal information and intimate pictures with others online. However, whilst there has been increased reporting and awareness raised in this age group,[163] there are still those who do not take precautions online; indicating perhaps that the limited funding available should be focused on younger people.

Preventative measures can also be used at a law enforcement level through threat assessment and strategic analysis methods, such as data collection and trend evaluation.[164] However, as mentioned previously, this would rely upon increased funding for the training of police officers and greater resources being made available. There is also the possibility of working with private organisations such as the ISPs and website owners, placing some onus on them to create measures to help protect against online sexual crimes. Facebook demonstrate that it was possible by introducing features such as the 'child protection app' in partnership with CEOP, allowing users to report suspicious grooming type behaviour occurring on the social network.[165] Though this type of software does run the risk of unnecessary and vexatious witch-hunts by the public, it is important that the police can identify risks before they turn into offences. An effective preventative framework would reduce the number of online sexual crimes that occur, enabling the police to do more with their limited resources. This framework is significant to the success of the cyber-peelian model.

Conclusions

The public police have come a long way since 1829 and it is impressive that the core Peelian values have stayed with them throughout. The Peelian model of policing, however, is not able effectively to play a role in the Internet governance of online sexual crime, partially due to that fact it was never created to play such a part. The model has to be updated in order to continue the role of the public police in policing online sexual crime. The Peelian principles are not irrelevant, but have lost context amongst a bureaucratic and institutionalised organisation - the UK police - which requires revitalisation.

Understanding the role that the police and civilians have to play in policing online sexual crime is vital to the implementation of a new cyber-peelian model. As Murray demonstrates, users or 'dots' are not isolated – they form an active network of communication that the public police must tap into to extend their coverage of cyberspace. The use of partnerships, and working with civilians, are key to the success of this model. This can already be seen to be working in annual evidence produced by the Internet Watch Foundation of how they and the police deal with potential offences.[166]

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[163] Caroline Lowbridge 'Is revenge porn already illegal in England?' BBC News Online at http://www.bbc.co.uk/news/uk-england-30308942

[164] Buono (2014), at page 2

[165] Jemima Kiss, 'Facebook child protection app prompts 211 reports of suspicious online activity' *The Guardian* Online at http://www.theguardian.com/technology/2010/aug/12/ceop-facebook-child-protection

[166] Internet Watch Foundation's Annual Trend Report 2013 at https://www.iwf.org.uk/resources/trends

The cyber-peelian model will only be a success in policing online sexual crime if other challenges are dealt with. Stronger and more harmonised legislation needs to be created at both national and international levels in order to facilitate the work that the police and these new partnerships can do. Combined with better preventative campaign work aimed at the public and training for all those involved with law enforcement, this will ensure that the public police can assume a stronger role in the network of online governance. However, this model will only be effective if it remains the subject of continued scrutiny and regular updates in line with changes to technology or law. Whilst the reality may be that their online role is relatively small compared to that of the real world, the public police and Peelian values are, however, highly integral in the broader network of security that will police cyberspace.[167]

RECENT DEVELOPMENTS

SPORTS LAW AND TORT

Sports injuries and the liability of doctor and club

Hamed (A Protected Party through his father and Litigation Friend) v Mills and Tottenham Hotspur Football Club and Athletic [2015] EWHC 298 (QB)

Laurence Vick*

Introduction

The recent High Court judgment in favour of Rad Hamed - the 'extremely gifted and dedicated' young footballer who suffered a cardiac arrest and devastating brain damage when he collapsed playing in his first match for the Tottenham Hotspur youth team - raises a number of issues that have been gestating in the sports world for some time. Rad suffered his injury in Belgium, aged 17 and days after signing professional terms with the club in August 2006. The case is a variation on those we have seen over the years, arising from the conflicts that have become inevitable with increasing commercialisation of the game in the triangular relationship between club, doctor and player. The decision is significant in that it emphasises the fundamental duty of a

[167] David S. Wall *Cybercrime* (Polity 2007) 178

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doctor, who has a primary responsibility to his patient irrespective of the source and context of his employer's instructions. In this case, the disastrous outcome resulted from 'extremely poor communication' between the various members of the Club's in-house medical team and the external cardiologist, Dr Mills. This relationship between club, doctor and player, an arrangement that is so often opaque despite being often widely publicised, gives rise to sometimes subtle conflicts with complex and difficult legal questions at play. The *Hamed* case went some way to shedding light on the phenomenon.

The Trial

The claimant, through his father as litigation friend, submitted that the cardiac arrest, and consequent career-ending brain damage and disability, resulted from the negligence of the Cardiologist Dr Peter Mills, who had screened the claimant at his Club medical assessment; the claimant also made allegations of negligence against the Club itself, by virtue of the actions of the first and second third parties, Dr Cowie and Dr Curtin - sports physicians employed by the Club. Dr Cowie joined the medical team in 2004, overlapping with her predecessor for some of the relevant period. In the third party proceedings brought against them by the Club, Dr Cowie and Dr Curtin agreed, by Consent Order, to indemnify the Club for any damages it might be ordered to pay the claimant.

The liability trial began with virtually all issues in dispute. According to press reports of the early stages of the trial, Dr Mills maintained that his role was limited to screening, and not provision of medical advice to the claimant; his duty was to the Club and he denied owing a duty of care to the player. By the end of the trial, however, Dr Mills had accepted liability, and the claims against the Club were restricted to those alleging negligence by their two employed doctors. With Dr Cowie and Dr Curtin indemnifying the Club for any damages awarded against them, the Club accepted the claim on causation, subject only to the claimant proving breach of duty against them, and the court deciding the appropriate apportionment of liability between the Club and Dr Mills. Press reports refer to the claimant's lawyers describing the attempts of the defendants to blame each other for the tragedy as 'an unattractive spectacle.'

Convention and practice in cardiac screening

Under the FA cardiological screening programme, in place since April 2000, all new entrants to a football academy have to undergo routine cardiac screening by a Regional Consultant Cardiologist who is familiar with the FA Medical Screening Programme, so that the risk of various cardiac problems can be identified. The most common of these cardiac defects in young players is hypertrophic cardiomyopathy (HCM). HCM has been well-documented for 30 years and is a silent, potentially fatal, condition. Many young athletes are prone to cardiac fibrillation (irregular contractions of the heart muscles) that, unless treated very promptly, may be fatal, inducing sudden cardiac death (SCD).

Where HCM is not fatal, there is a serious risk of neurological damage when the brain is starved of oxygen because, during fibrillation, the heart does not pump oxygenated blood round the circulatory system. The most common cause of these fibrillations is HCM, but there are other, rarer cardiac diseases which can also produce fibrillation and the risk of SCD. HCM and most other heart diseases have a genetic cause. HCM and other heart diseases in young athletes will usually produce thickening of the left ventricle during the mid-teens to mid-20s.

Detecting cardiac conditions

Markers for heart disease in young athletes include abnormalities in the electrical activity of the heart recorded by electrocardiogram (ECG). Each pulse causes contraction of, first, the atrial muscles (which draw blood into the heart), and then the ventricular muscles, which pump the blood out of the heart. The pulse then dissipates, repolarising the heart for the next beat. Each of these phases is recorded on an ECG, the last of which (repolarisation) in the T-wave part of the ECG trace. In a normal, healthy heart, the T-waves project above the axis. A marker of an abnormal heart is an ECG in which the T-waves dip below the axis: a pattern of inverted T-waves.

The second marker for heart disease seen in young athletes is thickening of part of the myocardium (the heart muscle), notably the left ventricle (left ventricular hypertrophy, or LVH). This morphological abnormality is detected using an ultrasound echocardiogram (ECHO) or a cardiac MRI, showing the structure of the heart.

To complicate the diagnosis of these conditions, intense training by young athletes works the myocardium and may result in an enlarged heart; in particular, thickening of the left ventricle. 'Athlete's heart' is a healthy physiological condition, but one that may produce inverted T-waves, an abnormality similar to that produced by a diseased heart on an ECG.

The differential diagnosis between a potentially lethal pathology such as HCM, and the physiological consequences of intense training, is crucial. Confronted with an abnormal ECG, the cardiologist needs to rule out a benign condition by means of an ECHO or cardiac MRI.

Cardiac conditions – on the pitch and in the examination room

Genetic heart disease, leading to sudden cardiac arrest and death in young athletes, has been a distressingly recurrent phenomenon in recent years. Fatalities have included David Longhurst, who died playing for York City in 1990; Daniel Yorath (Leeds United, 1992); John Marshall (Everton, 1995) and Ian Bell (Hartlepool United, 2001). The Manchester City player Marc-Vivien Foe suffered a cardiac arrest and died playing for Cameroon against Columbia in 2003 and, more recently, Fabrice Muamba suffered a cardiac arrest in March 2012, playing for Bolton Wanderers against

Tottenham Hotspur in an FA Cup tie. Muamba fortunately recovered, despite his heart stopping for a significant period. He decided to abandon his career on medical advice.

Under the 2000 Protocol, a club is required to send a standard screening letter to the player, or, if the player is under 16, his parents, along with a family history medical questionnaire that has to be completed and sent on to the cardiologist. A regional FA cardiologist must be involved to oversee the process. In this case, the claimant's screening comprised an ECG and ECHO performed by a technician. The results were sent to Dr Mills, as FA Regional Cardiologist; he completed a standard form, which included 'recommendations for further investigation'. This form was sent to the FA Medical Centre and copied to the Club doctor. It was accepted that the Club, and not the cardiologist, was responsible for the follow-up; they did, however, have the opportunity to invite the cardiologist to carry out further investigations and/or comment on the ECG and ECHO. An FA panel of cardiologists is available to support Club medical staff, usually on the recommendation of the cardiologist involved with the screening procedure.

Analysis of Rad Hamed's results

The claimant's ECG and ECHO, performed on 21 July 2005, showed that he was asymptomatic. However, the ECG trace did show inverted T-waves. The expert cardiologists in the case agreed that the ECG of 21 July 2005 was 'unequivocally abnormal', and 'well beyond any manifestation of 'athlete's heart' expected in a 16-year-old', such that 'a diagnosis of athlete's heart was unlikely.' The ECG, it was said, was 'indicative of the claimant suffering from an underlying heart muscle disease'. Regarding the ECHO, it was agreed that the image quality was 'inadequate for accurate measurement or diagnosis' and that the 'findings of the ECHO do not explain the abnormalities on the ECG'. This was, therefore, an abnormal ECG, with no unequivocal, benign explanation for the abnormality.

The Club did not complete the questionnaire as it should have done, so this was not available to Dr Mills. Dr Mills recommended a scan and a clinical review. The scan did not disclose HCM, but it was common ground that a cardiac pathology could not be excluded by imaging alone. After reviewing the scans, Dr Mills confirmed to the Club that there were no features of HCM but indicated he was still worried about the ECG results, describing them as 'abnormal', with a 'very small risk of some underlying heart disease'.

From this point, the communication between Dr Mills and the Club doctors becomes abstruse. On 24 August, following a telephone conversation between the Club's physiotherapist and Dr Mills' secretary, the Club doctor recorded that the Claimant was not at risk and that Dr Mills was 'happy' for him to continue to train and play. On 2 September, Dr Mills wrote to the Club indicating that, because of the abnormal ECG, Rad should be screened annually. On 9 September, Dr Mills stated that it would be reasonable for the claimant to continue training and playing. In evidence, he stated that he had reached that decision by balancing the risks and benefits of the footballer

continuing his career. The claimant then signed professional terms with the Club and, three days later, suffered his cardiac arrest during his first match. Bystanders tried to resuscitate the player but it took 16 minutes for an ambulance to arrive with a defibrillator. The player was taken to Intensive Care.

By the end of the trial, Dr Mills accepted that he was in breach of his duty of care to the claimant by failing to make specific reference - in his letters of 2 September and 9 September - to the clinical review which he had recommended in July and which had never been carried out. It was accepted that had the claimant and his parents been properly informed of the risk he would have stopped training and abandoned his football career.

The decision of the High Court

The Court held firstly that the ECG had unequivocally shown an abnormality suggestive of a risk of HCM. Dr Mills did not suggest that, if the condition had not been HCM, it must necessarily have been benign – a reasonably competent sports physician, such as the Club's doctor, would have known that there was a small chance of some other pathology that could not be excluded by the scan (ECG). Accordingly, the Club doctor was negligent, whether as the player's employer or under the *Bolam* test: the standard of any contemporaneous responsible body of medical opinion.[168] While the communication on 24 August and the cardiologist's letters of 2 September and 9 September could have been made clearer, the Club doctor's conclusion, as recorded in the claimant's notes, was not one that a reasonably competent sports physician could have arrived at.

The court also found that had the Club doctor appreciated, as she ought to have done, the risk borne by the player, she would have ensured that he and his parents were made aware of it by arranging a clinical review with the cardiologist. The Claimant's medical records were in a very poor state, and were not fit for their purpose. The Club had introduced a system of computerised records; had these records been adequate, it would have been apparent that there had been no clinical review, and that it was highly likely that one would have been arranged. It was unlikely that anyone reviewing the records would have made the same error as that committed by the Club doctor – they would have seen that the player's health risk had not been communicated.

As to apportionment of liability, such apportionment between the defendants had to be just and equitable, taking into account the extent of blameworthiness and causative potency.[169] On this basis, the Club had to bear the major proportion of the liability, having particular regard to the serious error of the doctor in concluding that the claimant bore no risk of an adverse cardiac event, and the failure to make the claimant

[168] *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582
[169] *Downs v Chappell [1997] 1 WLR* 426

and his parents aware of that risk. Liability was apportioned 70per cent to the Club and 30 per cent to the cardiologist Dr Mills.

The Club had argued that it was reasonable for them to be able to rely on the advice of Dr Mills, as the cardiologist had not repeated his suggestion that the Club should carry out their own clinical review. The Club also argued that, even if the player had been reviewed before the game, it was unlikely that the disaster would have been averted. They pointed to the fact that the player had demonstrated no prior symptoms of heart problems, nor any history of cardiac disease in his family. The Club's counsel argued that, whilst a dangerous heart condition could not have been completely ruled out, the risk would have been assessed as 'low', and 'likely to be less than 1 per cent.'

Where the buck stops

Dr Mills had argued that his was merely a screening role; but this argument - that he had no duty to give the player any other advice - cannot be described as anything other than disingenuous. If the cardiologist had identified 'any degree of cardiac risk' he should have reported that to the player and his family, as well as to the Club. The Club's doctor, as head of its medical team, was negligent in failing to interpret and appreciate the risk posed to the claimant from his underlying cardiac condition; she failed to adequately communicate this to the claimant and his parents, which was wholly wrong. The Club's counsel also questioned whether the player would have in fact abandoned his career, even if he and his family had been given the full facts, as 'to do so would have been to abandon his dream and also a potentially lucrative career'. However, given what was contended to be the low level of risk, for a properly managed and monitored player, it was argued that it was 'highly unlikely' that he would have been advised to give up his footballing career.

With the benefit of hindsight, the failings identified in the judgement seem so obvious that some aspects of the positions adopted by the defendants, accepting the accuracy of the press reports, border on the distasteful. The decision underlines the crucial importance to all sports physicians of proper communication with young athletes under their care, particularly when dealing with potentially life-threatening conditions. In this case, there was an absolutely catastrophic breakdown in communication.

Other issues

This was not purely a clinical negligence claim. The claimant also asserted that the Club owed him a duty of care as his employer, in addition to the duty stemming from the doctor-patient relationship. In an unusual and complex situation, as in the present case where there was no direct doctor-patient relationship, it can be easy to overlook the additional duties to which the particular relationships of the parties might give rise. An employer has a duty to ensure that its employees are fit to undertake the tasks they are contractually employed to perform. The issue of physical fitness will apply in many of employment situations, and will not be restricted to professional sporting activities.

The figure to be awarded to the Claimant will be assessed at a quantum hearing at a future date but, in the meantime, damages have been estimated at between five and seven million pounds. The Club will not have to contribute to the settlement, because it was agreed during the trial that Dr Cowie and Dr Curtin's insurers would cover the Club's responsibility.

Dr Mills was aware of what he regarded as a very small risk but, if asked whether the club was justified in allowing the player to continue to train and play - balancing the risks and benefits - he said that it would be reasonable to allow him to continue. This 'balancing exercise' should, of course, have taken account of not just the likelihood of the injury occurring being small, but also that the potential outcome, should the injury occur, would be catastrophic.

With these markers of potentially serious cardiac issues, where there is a real risk of death or brain damage, there can be no place for paternalism, however well-intentioned, from club or doctor – the player and his family must be made aware of the risks, so that he can make an informed decision, even if that means abandoning his dreams.

Conclusions: sports injuries and the future

Stripping away the glamour of professional football and the fabulous salaries of our top players, injuries sustained by high-level footballers are big news, and every medical detail comes under public scrutiny. At the top level of the game, the public assumes that players receive a seamless package of expert care. Players are expensive assets, commodities even, of their clubs, and their employers aim to provide the highest standard of medical care, doing whatever is necessary to protect them.

Conflicts will inevitably arise, because the club will want its star players to be back in the line-up at the earliest opportunity, raising the possibility that an injury may not have fully healed before a player returns to the field. Returning prematurely, including, as happened in the past, club doctors injecting strong painkillers that keep the player going but mask intense pain, are symptoms of the amalgamation of sportspeople and revenue.

Times have moved on since some of the earlier cases, where difficult issues arose in this complex relationship between club, club doctor and player, including the conflicting duties involved therein. Failures of medical care at the highest level of the game have been reduced, reflecting the increasingly high standards of treatment and, possibly, with an eye to avoiding the potentially eye-watering sums of damages that an injured sportsperson may be entitled to following a successful negligence claim. Whether the same level of medical attention is afforded to players in lower sporting leagues is doubtful, and it can only be hoped that the fundamental duty, which is that of the physician to his patient, prevails over the pressures to put players on the field.

MEDICAL LAW

Revisiting consent: communication of risks, medical paternalism versus patient autonomy

Montgomery v Lanarkshire Health Board [2015] UKSC 11

Sue Vickery*

Introduction

Most people make the assumption that they have the right to decide what happens to their own body, in particular with regard to medical procedures. With some notable exceptions, such as children or incompetent patients, it has long been accepted that patients have the ultimate right to consent to or refuse treatment. However cases still arise where there is an allegation that a patient has been denied an opportunity to give informed consent to some treatment or procedure; in other words they may have given actual consent but this has not been made in possession of the full facts.

As a result negligence actions may lie where there has been incorrect or insufficient advice, together with cases where patients suffer psychological or physical damage following negligent treatment. Perhaps it is apt to remember at this stage that a finding of negligence requires three elements to be present: that a duty of care is owed (there is no difficulty in accepting this in the case of medical professionals); that a breach of that duty has occurred (in most cases this is the element which will need closest examination); and the claimant has suffered damage as a result of the breach - thus causation must be proved.

Re-visiting *Bolan* and others

The seminal case of *Bolam*[170] in 1955 was concerned with advice, diagnosis and treatment and presented a coherent and logical approach where negligence was alleged. McNair J directed the jury that negligence would not be present where a doctor had acted "in accordance with a practice accepted as proper by a responsible body of medical practitioners skilled in that particular art." This meant that doctors (and other professionals) would be compared with a "responsible body" of their peers and that provided they had acted as these others would have done, no negligence would be found. *Hunter v Hanley*[171] was decided in the same year as *Bolam* and was specifically approved in *Maynard v West Midlands Regional Health Authority*[172] where Lord Scarman noted that there may be competing opinions among medical professionals with regards to whether a procedure needed to be performed. He opined:

> "It is not enough to show that there is a body of competent professional opinion which considers that theirs was a wrong decision, if there also exists a

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[170] *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582
[171] *(*1955) SC 200
[172] [1984] 1 WLR 634

> body of professional opinion, equally competent, which supports the decision as reasonable in the circumstances."

Thus, it is clear at this stage that under the *Bolam* test where competing opinions exist one will not prevail over the other if there is a responsible body which would promote each of the options available. The theme continued in *Sidaway*[173] where Lord Diplock, for the majority, was in no doubt that the correct test for assessing whether a doctor had breached their duty of care (whether relating to diagnosis, treatment or advice) was to use the *Bolam* test. Regarding the explanation of risks he noted that:

> "To decide what risks the existence of which a patient should be voluntarily warned and the terms in which such warning, if any, should be given, having regard to the effect that the warning may have, is as much an exercise of professional skill and judgment as any other part of the doctor's comprehensive duty of care to the individual patient….".

Lord Diplock continued in the vein that he, as a man with his training and high level of education, would no doubt wish to be fully informed of any risks that might be involved and concluded that if the patient manifested a similar attitude, "the doctor would tell him whatever it was the patient wanted to know." However, he was at pains to point out that there was no obligation to provide patients with unsolicited information regarding risks. This was predicated on the basis that:

> "The only effect that mention of risks can have on the patient's mind, if it has any at all, can be in the direction of deterring the patient from undergoing the treatment which in the expert opinion of the doctor it is in the patient's best interests to undergo."

This would seem to suggest a particularly paternalistic viewpoint in that "doctor knows best."

A further examination of *Sidaway* is helpful as it was, until recently, the leading case regarding consent. The judgments in *Sidaway* differ in their approach and it is notable that there was considerable discussion of the duty to warn patients of risks. Lord Scarman firmly took the view that a patient had a right to make their own decision, a basic human right in the eyes of the common law, and he agreed that, in principle, there was a cause of action in negligence if a patient is injured as a result of an undisclosed risk which would have been disclosed by a doctor exercising reasonable care to respect the right of a patient to decide whether to incur such risk. He went on to discuss the fact that doctors inevitably take a medical view of advice or recommended treatment but for patients the medical view may not be the most important.

An example of such an instance may occur where an operation to prolong the life of a patient may be medically indicated but the patient may be more concerned about quality rather than quantity of life and what is important to one patient may be of

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[173] *Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital* [1985] AC 871

much less importance to another patient. The conclusion must surely be that patients are fully informed so that they can make a decision based on what is most important for them as an individual, rather than only being given an option which the medical fraternity would see as the "correct" treatment.

Lord Scarman went on to state that a doctor was under a duty to inform the patient of any "material risks" associated with a particular treatment. He considered a risk to be material if a reasonably prudent patient would think it to be significant. Lord Diplock qualified this duty by indicating that there would be no necessity to inform if the doctor *reasonably believed* that such communication would be detrimental to either physical or mental health. Whilst it must be accepted that there are occasions where communicating risks could be truly detrimental to the health and wellbeing of the patient, these must surely be truly exceptional cases; once again the view that "doctor knows best" seems to prevail.

Lord Bridge also accepted that a patient must be able to decide whether to undertake a course of proposed treatment, but was of the opinion that the doctrine of "informed consent" - as accepted in the US courts - was somewhat impractical in application. He based this upon the fact that patients lack medical knowledge and they could be vulnerable to making irrational judgments, so therefore clinical judgment would need to be exercised when assessing what and how to communicate with patients. This begins to look once more like the old chestnut "doctor knows best" but greater he went on to state that there were some circumstances where disclosure of risk was a necessity. He had in mind the circumstances of *Reibl v Hughes*,[174] a Canadian case where there was a 10 per cent risk of a stroke, which had not been disclosed to the patient. Here he thought that, in the absence of a cogent clinical reason, a doctor "could hardly fail to appreciate the necessity for an appropriate warning.''

Lord Templeman accepted that there was an imbalance of knowledge and understanding between doctor and patient, but that the patient must still retain the right to make the final decision as to whether to proceed with some treatment or other. He could conceive that some patients may make an irrational or seemingly unbalanced judgment, but that it was their right to do so. His Lordship also emphasised not only the need for disclosure of risks but discussion of alternative treatments so as to assist the patient in making their decision.

It can be concluded, therefore, that *Sidaway* did not produce an unqualified acceptance of the *Bolam* test to be utilised in deciding whether negligence has occurred concerning the disclosure of risks, and in some more recent cases the courts have chosen a different approach which was espoused in *Pearce v United Bristol Healthcare NHS Trust.*[175] In this case a pregnant woman had gone over the date that she was to give birth. The obstetrician advised that the mother should allow nature to take its course rather than proceed with an elective caesarean section. The baby died in utero and it was determined that the mother had not been informed of this particular risk. Lord Woolf MR noted:

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[174] 114 (3d) 1

[175] [1999] PIQR P 53

> '…it seems to me to be the law,…that if there is a significant risk which would affect the judgment of a reasonable patient, then in the normal course it is the responsibility of a doctor to inform the patient of that significant risk.'

The decision in *Montgomery*

The question of a 'significant risk' arose again in the recent case of *Montgomery v Lanarkshire Health Board.*[176] The facts were that a diabetic patient (Mrs Montgomery) was concerned whether or not she would be able to deliver a large baby vaginally and it was accepted that she had mentioned this fact to her doctor on more than one occasion. She was small in stature and was particularly concerned about this matter and as a result the doctor decided that there should not be an ultrasound scan at 38 weeks because of Mrs Montgomery's concerns about being able to successfully deliver vaginally. The doctor - Doctor McLellan - had decided that she would deliver the baby by caesarean section if its estimated weight were to go over 4 kilograms. The doctor decided that labour should be induced at 38 weeks and 5 days and had estimated that the foetal weight would be 3.9 kilograms at this stage. However, she did not assess the estimated weight at 38 weeks and 5 days when the estimated birth weight would have been over 4 kilograms, the limit she herself had set. During delivery shoulder dystocia occurred where the shoulders become stuck in the birth canal. As a result there was a twelve minute delay between the baby's head appearing and the delivery, during which time he was deprived of oxygen that resulted in cerebral palsy affecting all four limbs and Erb's palsy which affects the arm.

Mrs Montgomery's claimed that she should have been warned about the possibility of shoulder dystocia occurring and the risks to mother and child which accompany such an occurrence, and said that she would have requested a caesarean section as a result of understanding this specific risk. It was agreed that the chance of shoulder dystocia occurring in circumstances such as these was around 9-10 per cent, but the risk of severe injury to the child such as cerebral palsy was less than 0.1 per cent. It was because the likelihood of severe injury to the child was so low, that Dr McLellan did not mention it to the patient, because she considered that Mrs Montgomery would have requested a caesarean section "as would any diabetic today."

On appeal to the Supreme Court, it was noted that since the decision in *Sidaway,* there had been a change in the doctor-patient relationship and that the paternalistic views expressed in that case had "ceased to reflect the reality and complexity of the way in which healthcare services are provided." Patients are to be treated as consumers with elements of choice in their care. It was also noted that it is far more common for patients to obtain information about risks and side-effects and that detailed information is now provided as a matter of course with pharmaceutical products. With this in mind both Lord Kerr and Lord Reid stated that it would "be a mistake to view patients as uninformed, incapable of understanding medical matters, or wholly dependent upon a flow of information from doctors.''

Guidance from the General Medical Council would also seem to support the notion of patient autonomy. In a publication entitled *Good Medical Practice* (2013) doctors are

[176] [2015] UKSC 11

urged to "work in partnership" with patients and give them information they want or need. Under this guidance, doctors should explain the different options available and discuss risks and benefits of each option, enabling the patient to make up his or her mind. Doctors are still free to recommend a particular course of action if they so wish or asked to do so by a patient. The document goes on to say that where there are potential serious adverse consequences to a particular treatment, the patient should be informed, even if the odds of it occurring are very small.

Lord Kerr and Lord Reid further noted that article 8 of the European Convention on Human Rights has had an effect on this area of law and resulted in a duty to involve patients in decision-making.[177] They also agreed that not all considerations in deciding whether or not to undertake a procedure were medical in nature and therefore the specific needs of an individual patient must be respected. It was also noted that some patients do not wish to be consulted about risks and may communicate this to their doctor, but that it is one thing for a patient to decide that they do want certain information and quite another for a doctor to effectively decide this for them. Therefore the notion of "therapeutic exception" - where doctors feel that the provision of information would be more injurious to the person than revealing relevant information to them - must be the exception to the general rule of disclosure. It is made abundantly clear in the ruling that a doctor may not invoke the therapeutic exception to prevent a patient from making a choice which the doctor considers "contrary to her best interests."

The Supreme Court concludes that the analysis of the law revealed in *Sidaway* is "unsatisfactory, and ''that here is no reason to perpetuate the application of the *Bolam* test in this context any longer." So if *Bolam* no longer applies in these cases, what test should be utilised to examine whether a doctor has breached their duty of care? The answer is that patients should be made aware of "material risks" and the meaning of "materiality" in this context is where "in the circumstances of the particular case, a reasonable person in the patient's position would be likely to attach significance to the risk." It is also noted that mere statistics are not enough to decide materiality and that the assessment is "fact-sensitive." With the demise of *Bolam* in this context, there is certainly less likelihood of doctors taking a paternalistic attitude as they will no longer be judged alongside a body of their peers who would have acted in a similar manner. Each case must now be examined on its own facts and each patient will need individually tailored advice.

Mrs Montgomery won her appeal and in doing so has helped to clarify the law in this area. There is little criticism of the doctor's conduct in the case - although Lady Hale concluded that Dr McLellan seemed to think that vaginal delivery was somehow morally superior to other methods - and it was accepted that she gave credible evidence to the court. As a result a chance was taken to examine the state of the law in this area and it has (hopefully) resulted in clearer guidelines for the medical and allied professions regarding their duty to disclose material risks to patients. One of the concerns noted by the Court was that extending rights to patients may result in defensive practices by the medical profession. In other words, they will play it safe, rather than indulge in riskier, but possibly more effective, procedures. The upside of

[177] See *Glass v United Kingdom* (2004) 39 EHRR 15

the new "rules" is that there is some evidence that patients are less likely to litigate if they have been fully involved in decision-making, even when worst case scenarios come to fruition. Taking all into account, the Court felt it necessary to impose legal obligations upon the medical fraternity, making it clear that those obligations may only be avoided in exceptional circumstances.

Conclusions

It remains to be seen if the law has been successfully clarified and time will inform us of that. The age of paternalistic medical practice can be hailed as being replaced with patient-centred decision-making. There are two obstacles which may yet blight the future picture; the first of these is the possible abuse of therapeutic exceptions and the second is the quality of training for medical personnel so that they truly understand the extent of their legal obligations.

INTERNATIONAL ENVIRONMENTAL LAW

The Oslo Principles and climate change

The Urgenda Foundation c.s. v The Kingdom of the Netherlands C/09/456689 - (English translation) HA ZA 13-1396 (International Court of Justice)

Introduction

The Urgenda Foundation v The Kingdom of the Netherlands[178] is a landmark case that once again has placed climate change under the legal microscope. The Urgenda Foundation, are seeking to force the Dutch Government to take action for its failure to reduce Carbon Dioxide emissions and enact adequate climate change measures. This is within the agreed time frame[179] laid out in the United Nations Framework Convention on Climate Change (UNFCCC).[180] At the current time, the Court summons has been served to the Ministry for Infrastructure and Environment. The decision, once proceedings are completed, could set an intriguing precedent with regards to the extent at which claims can be brought for damage to our environment. There are also a number of legal issues involved in the case that could have further far-reaching effects, which serves to display the growing importance of environmental law: while science remains at the forefront – it alone cannot bear the full responsibility for shaping protection policies and the clock is ticking for action.

The claims

Urgenda's claims revolve around three key points: that firstly, "…the Netherlands and the EU are fully aware of and have officially acknowledged the nature, seriousness

[178] C/09/456689 - (English translation) HA ZA 13-1396 (International Court of Justice)
[179] Annex B, the Kyoto Protocol, United Nations Framework Convention on Climate Change (1992)
[180] The United Nations Framework Convention on Climate Change (1992) was originally conceived at the UNCED in Rio De Janeiro

and timing of this issue"[181] secondly, "…the respective governments have stated in the context of international negotiations that industrial countries will have to realise the emissions targets to maintain at least a 50 per cent chance of mitigating serious disaster…"[182] and thirdly, and perhaps most importantly, that there is a general recognition that these set targets are "…both economically and technologically feasible…"[183]

To understand the reasoning behind the case it is important that there is a grasp of the relevant science. It is widely accepted in the scientific community that there is a causal link between the burning of fossil fuels and the alteration of the composition of the atmosphere.[184] This atmospheric change is causing an increase in the surface temperature of the planet: over the last century it has increased 0.68°C.[185] While this does not sound a substantial increase, according to ecological theory, the equilibrium of the environment and the surface temperature rests upon the maintenance of a fine balance.[186] This balance is quite clearly being disturbed, as manifestations can clearly be seen; the weather systems of the globe have become increasingly erratic and extreme weather is a more common occurrence.[187]

The full effects of today's emissions will not be felt until 2050,[188] due to the nature of the GHGs (Green House Gases) in the atmosphere. Likewise the effects we see today are a result of emissions that took place during the 1970's and 80's, which in layman's terms means that the damage has already been done; even if society were to immediately cease burning fossil fuels and switch to sustainable methods of production, the temperature of the planet would continue to increase 1.5°C. Despite the acceptance of parties that an agreement much be concluded, as the EU has realized, crossing the 2°C temperature rise will have gave ramifications.[189] With this in mind, the EU has concluded that to mitigate the effects of such a change, a reduction in emissions of 25-40 per cent compared to the levels in 1990 must be reached by the year 2020 (this is the common 'yard-stick' used by the UNFCCC for the reduction of atmospheric emissions).[190] But still there is no sense that there is an obligation to act, in effect the nations of the world are saying "…We all agree that

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[181] Translation Summons, Final draft Translation, Urgenda Foundation c.s v. The Kingdom of the Netherlands – Regarding the failure of the Dutch State to take sufficient actions to prevent dangerous climate change at para 27

[182] *Ibid*, at para 27

[183] *Supra*, at para 28

[184] Monks P.S *et al*, 'Atmospheric composition change – global and regional air quality.' (2009) 43 (33) Atmospheric Environment 5268

[185] Temperature data recorded at 18.48, 20^{t} June, 2015 <available at http://climate.nasa.gov/vital-signs/global-temperature/>

[186] Pimm L, *The Balance of Nature?: Ecological issues in the Conservation of Species*, University of Chicago Press, 1991, at page 4

[187] 'Flood alerts as wild weather lashes Britain', *The Guardian* Online, available at <http://www.theguardian.com/environment/2014/nov/14/flood-alerts-wild-weather-lashes-britain>

[188] Myles R A & Stocker F T, 'Impact of delay in reducing Carbon Dioxide emission.' (2014) 4 (4) *Nature Climate Change* 23

[189] Lavelle M, 'Scientists: Global Warming likely to Surpass 2 degree Target', National Geographic Magazine, 2014 Online article available at <http://news.nationalgeographic.com/news/energy/2014/02/1402277-global-warming-2-degree-target/>

[190] Appendix 1 of the United Nations Framework Convention on Climate Change, Quantified economy-wide emissions targets for 20204

something must be done, but cannot agree on who does what and how much they have to do, therefore there is no obligation…" However, the absence of a single document outlining the duties of the states does not mean that the obligations are non-existent. Like many regulatory systems, there is a network of agreements, policies and practices that indicate how a state should address the pressing issue of climate change.

Urgenda has argued that this yard-stick is not being used by the Netherlands, and that they have not set the minimum reduction target of 25 per cent which would inevitably lead them to fail in achieving their targets. Furthermore if it is a lack of action that is the case, this underscores how important it is for individuals to take action. At face value, it could be thought that a case such as this is outlandish, but it is not too dissimilar from the *Trail Smelter Arbitration* case (1941).[191] In *Trail*, principles of tort law were applied on an international scale, creating the concept of trans-boundary harm - states were free to do as they please in their own jurisdiction as long as no harm befell neighbouring states.

Furthermore, with the recent agreement on the Oslo Principles,[192] Urgenda's case is given more weight. The Oslo Principles focus on placing a legal and moral obligation on states for their failure to act. They were introduced by a number of leading judges, professors and academics – arguing that regardless of the existing climate change conventions and environmental law, failure to implement measures to avert the most serious consequences equate to a breach of human rights, and of tort and environmental law.

There are two key principles that are fundamental to international environmental law. The precautionary principle is based upon the notion that appropriate consideration of the environment must be shown by a state or corporation before they conduct any activity that could have an adverse effect.[193] Since *Trail Smelter*, this principle is recognised as a rule of customary international law.[194] Taking this further, the Oslo Principles outline more concrete obligations, that states should disregard the cost unless it is completely disproportionate.[195] Second is the principle of common but differentiated liability.[196] This principle evolved from the notion of 'the common heritage of mankind.'[197] Essentially it recognises that the capacity to enact environmental protection measures differs in developing and developed countries,

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[191] The Trail Smelter Arbitration (1941)

[192] The Principles were originally released at a symposium at Kings College, March 2015 available at <http://www.yale.edu/macmillan/globaljustice/OsloPrinciples.pdf>

[193] Part D of the Oslo Principles 2015

[194] This is widely recognised and established as a rule of customary international law, see principle 2 of the Rio Declaration on the Environment and Development 1997 "…the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction…"

[195] The Oslo Principles, s.1(b) state "...The measures required by the precautionary principle should be adopted without regard to costs, unless it is completely disproportionate..."

[196] Since the Stockholm Declaration, this principle has appeared in a number of declarations at the international level; Convention on Biodiversity 1992, the Outer Space Treaty 1967

[197] This is a philosophical concept that has been used as the basis for a number of environmental principles and concepts in International Law; the environment and the problems that arise from human activity are the responsibility of the human race as a whole. For more information see; Baslar K, *The concept of the common Heritage of Mankind in International Law* (Martinus Nijhoff Publishers, 1998)

which directly relates to the concept of the "best available techniques."[198] The "best available techniques" refers to the capacity of the country to achieve environmental protection goals through research, technology and the creation of appropriate infrastructure.

Since Urgenda issued the summons to the government of the Netherlands, a similar case has arisen in Belgium. The founder of the organisation 'Climate Case Belgium' has used similar principles as the *Urgenda* case, except it has focused primarily on the human rights aspect of the case. As with *Trail Smelter*, international environmental law is approaching another milestone and this case is fertile ground for developments to be made, regardless of the final outcome of the case.

There is an inextricable link between the environment (and environmental law) and human rights. For human rights to be enjoyed to the fullest there must be an adequate environment in which they can be enjoyed. Should the world see a 2°C rise in temperature and a subsequent rise in sea levels, the Netherlands, along with many other low level countries, could suffer greatly.

Of course, one of the guiding principles of international human rights law is universality, or the 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family.'[199] Even though law that is enacted today can have implications for future generations, the ambiguity of the future leaves this generation without legal personality how can persons in the future be represented today? This creates an interesting predicament. In environmental law the concept of "intergenerational equity" promotes the sustainable use of current resources so that future generations may enjoy them. Therefore, it could be implied that in international environmental law at least, future generations carry a modicum of legal significance – and that the common law duty of care also applied to them.

Conclusions

What is clear is that states that are party to climate change conventions must implement their obligations to the full within a pertinent time. While some of the effects are irreparable, the clock is ticking if we wish to avert serious environmental disaster.[200] To quote Lord Puttnam, one of the major issues is that, "…by our very nature we are reactive. We as human beings are a shining example of the "fight-or-flight" response. It has allowed us to evolve and remain at the top of the food chain…"[201] What is obvious is that when there is a "creeper" issue involved, the

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[198] Principle 9 of the Rio Declaration on the Environment and Development 1997, "…States should cooperate to strengthen endogenous capacity-building for sustainable development by improving scientific understanding through exchanges of scientific and technological knowledge, and by enhancing the development, adaptation, diffusion and transfer of technologies, including new innovative technologies…"

[199] Recognised in the preamble of both the International Covenant on Civil and Political Rights (1966) and the International Covenant on Economic, Social and Cultural Rights (1966)

[200] Lynas M, 'The Climate Change clock is ticking', The Guardian Online available at <http://www.theguardian.com/commentisfree/2008/aug/01/climatechange.carbonemissions>

[201] Puttnam D, "The Denialism of Climate Change", TedxTalks, available via <https://www.ted.com/talks>

flight-or-flight response is dulled. With these slow burning, creeping issues - the effects are not immediately apparent.

In a paper published in the Science Advances Journal, researchers have indicated that we, as a race, are experiencing the Holocene extinction. This is the sixth period in history marked by the rapid loss of species and biodiversity, and the blame lies squarely with us as the dominant species on the planet.[202] This is only one of the alarming indicators that inaction and excuse is no longer an acceptable path to continue for the international community. If anything, this case serves as inspiration for other NGOs and individuals to take action around the world, proving that the judiciary has a role to play in the protection of the environment.

COMPANY LAW

Small Business, Enterprise and Employment Act 2015

Keith Gompertz [*]

Introduction

It is not that unusual to find legislation affecting the limited liability company in a statute other than a Companies Act.[203] Such is the case with the Small Business, Enterprise and Employment Act 2015 (hereinafter SBEE), which came into force on 26 March 2015 just prior to Parliament being prorogued for the general election that was held on May 7 2015.[204] As a Bill the SBEE was government sponsored and so was always likely to be passed into law prior to prorogation without fundamental amendment. The Act covers a great deal of ground,[205] and in doing so makes a fundamental alteration to the existing law on those who may be a company director, as well as making clearer provision for shadow directors. The new Act also makes changes to company formation and share warrants to bearer, as well as enacting considerable detail relating to those seen to be, in the words of the SBEE,' persons with significant control of companies' (PSC's).

As this piece is largely written for those studying company law as part of their undergraduate studies it will be limited to the new corporate director, shadow director, and control/ownership provisions. The other new company law provisions of the Act are, of course, at least as important, but do not in the writers' experience .usually form an important part of undergraduate company law courses

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[202] Ceballos G *et al*. 'Accelerated modern human-induced species losses: Entering the sixth mass extinction.' Science Advances 1 (5) 2015 available at <http://advances.sciencemag.org/content/1/5/e1400253>

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[203] See for example s.9 (2) European Communities Act 1972, now incorporated into s.51Companies Act 2006; hereinafter CA06

[204] Also, just prior to the end of our first fixed term parliament by virtue of the Fixed Term Parliaments Act 2011: s 1 (2)

[205] From public houses to the so-called zero hours contracts.

The previous position

Corporate directors

It follows from the decision of the House of Lords in *Salomon*[206] that if a corporate body, such as a registered company, is a legal person with its own rights and duties, then it is perfectly capable, in law at least, of also being a director of such a company, alongside natural persons. Accordingly, subject to any contrary provision in a company's articles of association, a company may have a corporate body as its director, subject only to the overriding provision that a public company must have at least two directors, and a private company at least one.[207] Further, if there are to be any corporate directors, then *any* company must have at least one natural person as a director.[208]

Shadow directors

Section 250 CA06 contains what may be described as a carefully worded provision setting out what a director is, rather than attempting any narrow definition.[209] Consequently those deemed to be acting as shadow directors, are, be means of s.250, caught by the CA06. However, that part of the CA06 that sets out the statutory general duties of directors did not apply to shadow directors. They were left covered by pre-existing common law and equitable principles. Additionally, there is the very present risk that those that advise *de jure* directors might be deemed to be acting themselves, as shadow directors, so potentially causing over cautious advice by (among others) legal advisers and accountants.

The new law

Natural persons only

Section 87 of the new Act amends the CA06 by deleting s.155 and inserting s.156A which states that a person may not be appointed a director of a company unless that person is a natural person, the Act carefully distinguishing between natural persons on the one hand, and legal persons on the other. Although, this provision was expected to be in force by26 March 2015, at the time of publication it has not yet been brought into force.

Section 87 of the SBEE provides that an appointment made in contravention of the inserted s.156A will be void[210], although liability will continue to attach to any "director" so appointed.[211] Likewise, a non-natural person may be found to have acted as a *de facto* or shadow director and still be liable under those categories. Any purported appointment of a corporate director becomes an offence.[212] Any existing

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[206] *Salomon v A. Salomon & Co. Ltd* [1897] AC 22, HL
[207] Section 154 CA 06
[208] Section155 (1) CA06
[209] "…anyone occupying the position…by whatever name called…"
[210] See s.87 (4) (3)
[211] Section 87 (4) SBEE inserting ss.156A (3) and (4) into CA06
[212] See s.87 (4) (6), punishable by a fine ss (7)

legal person director is covered by a twelve month transitional period during which the corporate director must resign and be replaced, if necessary, in order to comply with existing requirements for the quantum of directors[213].

Powers of the Registrar

The Registrar of Companies is empowered, via an inserted s.156B, to exceptionally permit corporate directors to be appointed to bands. This is to be done by regulations for such cases.[214]

Secretary of State's review and report to Parliament

Section 88 imposes a not uncommon obligation upon the Secretary of State to carry out a review (every five years) of s.87, and to prepare a report and lay it before Parliament.

Shadow directors

Such directors are said to be "…a person in accordance with whose directions or instructions the directors of the company are accustomed to act."[215] The codified general duties presently contained in the CA06[216] do not apply to such directors, who would have to look to the common law and equity for the relevant law.[217]

Section 89 of the SBEE inserts into s.170 (5) CA06 a provision that the general duties now also apply to shadow directors. Further, by s.90 of the new Act the present definition of shadow directors is clarified. Section 90 (1) amends s.251 of the Insolvency Act 1986 by providing that where advice is given to a director - for example, in a professional capacity - the advisor is not deemed to be acting as a shadow director.[218]

Persons with significant control (PSC's")

Section 81 SBEE (by amending the CA06) requires companies to keep a register of people who have significant control over the company. These details about such persons are somewhat complex and will only be briefly summarized here. Essentially the new Act seeks to discover the beneficial ownership of shares, so that certain companies[219] must register PSC's. Such persons are, very broadly, holders- either directly or indirectly - of 25 per cent or more of the shares, and who:

- either directly or indirectly can remove or appoint the board; or

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[213] See the inserted s.156 C
[214] Section 156 B (1) SBEE, where the necessary detail can be found
[215] Section 251(1) CA06
[216] Section 170 *ff*
[217] Section 170 (5) CA06 "where, and to the extent that, the corresponding common law rules or equitable principles so apply."
[218] Section 90 (1) ((a)-(c) SBEE
[219] Schedule 3

- either directly or indirectly are able to exercise more than 25 per cent of the voting rights; or
- have significant influence over the control of the company.[220]

The rationale

As the Secretary of State for the Department for Business, Innovation and Skills was the sponsor of the bill in the House of Commons[221] it is useful to look at that departments' supporting publication.[222] It contains the hope (expressed by way of an "aim") that the abolition of legal persons as directors will "…deter opaque arrangements…and increase accountability where they are used to no good end." Much the same is said in relation to the changes for Shadow Directors.

There surely can be nothing faulty, in principle, about corporate directors. However, problems can be envisaged in what might be described as a "chain" of directorships. For example this could be where one (private) company, with the minimum one natural person director, forms a number of other such companies, each in turn having this first company as a corporate director. Of course, in each case, it would also require a natural person director as well. But who has "control" of these corporate directors? It is tempting to rationalize this change by concluding that the current response to existential terrorism threats is the real driver for such a fundamental change. It would be very interesting to see some evidence, covering "opaque arrangements" and also to watch how many companies apply to the Registrar for an exemption.

Turning now to Shadow Directors, these changes seem welcome. It was anomalous that such directors were not covered by the general statutory duties[223]. The current authors of *Gower and Davies Principles of Modern Company Law*,[224] while obviously accepting what is set out in s.170(5), go on to suggest that there is "an element of commonality"[225] between both *de facto*[226] and shadow directors, such that this commonality is more important than the "elements of difference"[227] between the two types, and therefore the general duties should apply to shadows' too.[228] That has now happened.

Finally, the requirements concerning PSC's are significant. They may be considered significant in two ways: first, by attempting to disclose beneficial as well as legal ownership; and second, by the depth of penetration into that ownership. The PSC register will, *inter alia*, have to contain details of nationality. The same government

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[220] Schedule 3
[221] This piece is being written just after the 2015 general election, and its last incumbent was Dr Vince Cable, who has lost his seat notwithstanding a majority of some 12,140.
[222] Department for Business, Innovation and Skills: Small Business, Enterprise and Employment Act: Companies: Transparency 2015
[223] Section 170 (5) CA06
[224] P.L. Davies and S. Worthington *Gower and Davies Principles of Modern Company Law* (9th ed 2012 OUP)
[225] Which they describe as the "real influence", see p 514
[226] In other words, those that act as directors, but who lack *de jure* status.
[227] At page 514
[228] See para 16-17 at p 514

department guidance also claims that this provision is intended to create greater transparency over company ownership and control for "…enforcement agencies, business, citizens and civil society, both in the UK and overseas."[229] It is also claimed that the register will help ensure that the UK meets international standards on tackling the misuse of companies.[230] Whilst it is not intended to deal with Bearer share warrants here, it is plain to see how their abolition[231] fits in with ideas on transparency of beneficial ownership. By definition a bearer document is just that – ultimately held anonymously.

Conclusions

Whilst the tidying up surrounding Shadow Directors is to be welcomed – not least by those that advise directors - the abolition of corporate directors is a significant change to the status of corporate bodies. They may still have vested in them many rights and duties, but no longer the right to exercise influence over another corporate body by way of a director's office. As for the idea of PSC's, they are clearly a deep penetration behind the so-called veil, so carefully drawn across shareholders by their Lordships in *Salomon.* We may well ask if the UK is still "business friendly"? For the answer to that we will have to wait for the first review.

HUMAN RIGHTS

The great review and release swindle: the European Court, whole life sentences and the possibility of review and release

Hutchinson v United Kingdom, The Times, February 5 2015

Dr Steve Foster*

Introduction

The prospect of a prisoner being incarcerated for their whole life – as opposed to receiving a life sentence where they will - for life - be considered for release on licence after a determined, or flexible fixed term, begs the question whether such sentences are inconsistent with liberty (article 5 of the European Convention on Human Rights) and the dignity of the prisoner (article 3). In addition, the related question is whether each individual state (within the Council of Europe) should be at liberty to promulgate and apply its own domestic rules in this area, or whether a supra-national court – the European Court of Human Rights – should lay down common standards for all states, such rules being based on fundamental principles reflecting international human rights' standards. In July 2013 the Grand Chamber of the European Court – in *Vinter, Moore and Bamber v United Kingdom*,[232] held that the

[229] See note 20
[230] See note 20
[231] Section 84
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[232] Application Nos. 66609/09; 130/10 and 3896; *The Times*, 11 July 2013.

imposition of whole life sentences without review and the realistic possibility of release will violate article 3, and that UK law was in violation of that article as it did not provide a sufficiently clear power to review such sentences and order the release of such prisoners.[233] Following that decision, the UK Court of Appeal – in Re Attorney-General's Reference (No. 69 of 2013); *R v McLoughlin and R v Newel*[234] - found that UK law did in fact provide such a power to review and release and accordingly held that domestic law complied with both article 3 and the judgment of the Grand Chamber in Vinter. Further, a recent decision of the European Court has upheld the Court of Appeal's approach to this issue, finding domestic law in compliance with article 3.

Facts and decision in *Hutchinson*

In this case Hutchinson had been convicted of aggravated burglary, rape and three counts of murder in 1984 and was given a life sentence with a minimum tariff of 18 years set by the trial judge. The Secretary of State then informed him that he had decided to impose a whole life sentence and in 2008 the High Court, and then the Court of Appeal dismissed the prisoner's appeal against that sentence. Hutchinson then made an application to the European Court of Human Rights, alleging that the sentence amounted to inhuman and degrading treatment under Article 3 as the sentence offered no prospect of release. In particular, he argued that as the Grand Chamber in *Vinter* had found that domestic law did not clearly provide for review and possible release on grounds of rehabilitation, then his sentence was inconsistent with Article 3 and the Grand Chamber's judgment. The government, on the other hand, argued that following the Court of Appeal decision it was now clear that such sentences were open to review and thus compatible with article 3 and *Vinter*.

After summarizing the general principles established by the European Court with respect to the compatibility of whole life sentences with Article 3, the Court then considered whether the Secretary of State's discretion under s.30 of the Criminal Justice Act 2003 was sufficient to make the whole life sentence imposed on the applicant legally and effectively reducible. Having noted that the Grand Chamber in *Vinter* had decided that the statutory power could not be interpreted to cover release on grounds of rehabilitation, and that the Lifer Manual that gave guidance on review had not been amended since *Vinter*, the European Court nevertheless noted that subsequently the UK Court of Appeal had established that the secretary was bound to use the power in a manner that was compatible with Article 3.[235] Thus, in the Court's view if an offender subject to a whole life order could establish that 'exceptional circumstances' had arisen subsequent to the sentence, the secretary of state had to consider whether such circumstances justified release on compassionate grounds. Regardless of the policy set out in the Lifer Manual, the secretary had to consider all the relevant circumstances, in a manner compatible with Article 3.[236] Further, any decision by the Secretary would have to be reasoned by reference to the circumstances

[233] See Foster, S 'Whole life sentences and the European Court of Human Rights: now life might not mean life' (2013) JP 114
[234] [2014] 3 All ER 73; See Ashworth, A 'Case Comment' [2014) Crim Law 471; Foster, S 'Whole life sentences: resolving the conflict' (2014) 178 (10) JP 138
[235] *Hutchinson v United Kingdom*, note 1, at paragraph 23.
[236] *Ibid.*

of each case and would be subject to judicial review, which would serve to elucidate the meaning of the terms 'exceptional circumstances' and compassionate grounds, as was the usual practice under the common law.[237]

The European Court then recalled that it was primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation.[238] It then decided that where the national court had, following the Grand Chamber's judgment in *Vinter* addressed the doubts of the Grand Chamber and set out an unequivocal statement of the legal position, the European Court must accept the national court's interpretation of domestic law.[239] Accordingly the Court found no breach of Article 3 in the present case.

Commentary

The decision in *Hutchinson* appears to be at odds with the recent case law of the European Court of Human Rights, including *Vinter*, which seemed to insist on clarity with respect to the criteria for release. Thus, in *Magay v Hungary*,[240] the Court found that article 3 had been violated because although it noted that the authorities had a general duty to collect information about the prisoner and to enclose it with the pardon request, the law did not provide for any specific guidance as to what kind of criteria or conditions were to be taken into account in the gathering and organisation of such personal particulars and in the assessment of the request. In the Court's view, the regulation did not guarantee a proper consideration of the changes and the progress towards rehabilitation made by the prisoner, however significant they might be.[241]

Similarly, in *Ocalan v Turkey*,[242] the European Court found a violation of article 3 with regards to the applicant's sentence to life imprisonment with no possibility of release on parole. Although the Court conceded that the Turkish President had the power to release a prisoner on compassionate grounds in cases of illness or old age, release for such humanitarian reasons was not equivalent to the "prospect of release" required by *Vinter*. The Court acknowledged that the Turkish legislature had passed general or partial amnesties from time to time. However, it had not been demonstrated that there was any such proposal in relation to the applicant. Again, in *Trabelsi v Belgium*,[243] in deciding that an extradition to the USA was incompatible with Article 3 and *Vinter*, the European Court noted that none of the procedures provided by US law to consider and allow early release amounted to a review mechanism which required the national authorities to ascertain, *on the basis of objective, pre-established criteria of which the prisoner had precise cognisance at the time of the imposition of the life sentence* (italics added), whether, while serving his sentence, the prisoner had

[237] *Ibid.*
[238] *Hutchinson v United Kingdom*, at paragraph 24.
[239] *Hutchinson v United Kingdom*, at paragraph 25.

[240] Application No. 73593/10, decision of the European Court of Human Rights, 20 May 2014.
[241] ibid, at paras 57-58
[242] Application No.24069/03) , decision of the European Court of Human Rights, March 18, 2014. Noted in (2014) EHRLR 414
[243] Application No. 140/10, decision of the European Court of Human Rights 4 September 2014

changed and progressed to such an extent that continued detention could no longer be justified on legitimate penological grounds.[244]

Accordingly, it is submitted that the judgment in *Hutchinson* is flawed in its interpretation and understanding of both the *Vinter* judgment and the principles of legal certainty upon which the Grand Chamber based its judgment. As the dissenting judge – Judge Kalaydjieva - correctly notes, the question was not whether the European Court must accept the national court's interpretation of the domestic law as clarified in the process of progressive development of the law through judicial interpretation. Rather it was whether or not in 2008 the applicant was entitled to know - at the outset of his sentence - what he must do to be considered for release and under what conditions, including when a review of his sentences will take place or may be sought.[245]

The recent decision of the European Court in *Hutchinson* severely dilutes the requirement that the rules regulating review, and possible release, allow the prisoner to foresee the eligibility and possibility of such review. Although the majority of the Court in *Hutchinson* is correct in stating that the Court of Appeal have expressly stated that the statutory scheme of compassionate release can, on a human rights interpretation, cover review on grounds of rehabilitation and release, such a declaration does nothing to clarify the factors that an authority would or should take into account if and when they used that process to consider a prisoner's release. Although, the Court correctly states that the interpretation of domestic law is the primary responsibility of the domestic authorities, such law has to possess the basic requirements of certainty. State law can, of course, become clearer through time and the process of interpretation and application, but to uphold a provision which was clearly not intended to cover review on grounds of rehabilitation, does little justice to the prisoner who is entitled to know – at the time of the sentence - what factors will be taken into account in that decision, or at the very least, at what stage of the sentence the review may take place.

Indeed, it could be argued that a failure to identify the relevant criteria for review and release breaks the UK's obligations under article 13 of the Convention, which insists that domestic law must provide an effective remedy for breach of an individual's Convention rights. If a prisoner does not know that criteria, and must make a 'blind' application to the courts to judge the legality and proportionality of any decision not to review, or to refuse release, then that surely hampers their efforts to protect their Convention right not to be subjected to inhuman and degrading treatment under article 13, as recognized by the judgment in *Vinter*?

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[244] *Trabelsi v Belgium*, at paragraph 137. Subsequently, the UK High Court refused to stay the extradition of an individual who was to be extradited to the US to face terrorist charges on grounds that he would face a non-reducible life sentence*: R (Harkins*) *v Secretary of State for the Home Department* [2014] EWHC 309 (Admin). The High Court stated that the decision in *Trabelsi* did not advance the principles in *Vinter* apart from applying them to the context of extradition, and that it was not obliged to follow that decision.

[245] *Hutchinson v United Kingdom*, dissenting opinion of Judge Kalaydjieva.

Conclusions

The decision in *Hutchinson* will be welcomed by the UK government and the domestic courts, who will feel that it has vindicated UK law and interpretation, and halted the European Court's recent trend to interfere with respect to the interpretation and application of Convention rights. Indeed, it might be suggested that the decision has been informed by diplomatic reasons at a time when the role of the Convention and the Court is being reviewed in the context of a call for greater subsidiarity.

However, whatever steps the domestic authorities take in facilitating the review of whole life sentences, such provisions should be sufficiently clear to enable the criminal justice authorities and the prisoner to foresee the circumstances which would trigger such a review, and for the judiciary to review the exercise or non-exercise of those powers. To allow a provision which was clearly not intended to cover the possible release of a whole life sentence prisoner on grounds of rehabilitation and review of their risk to the public does little service to the true intention of the Grand Chamber's judgment in *Vinter*, or to the principles of certainty and legitimacy upon which Convention rights are founded.

At the time of writing the Grand Chamber of the European Court has accepted Hutchinson's request for a referral of his case to the Grand Chamber.[246] This means that the Grand Chamber will hear an appeal of the European Court's decision and will have the opportunity to see whether that decision followed the tenor and spirit of the Grand Chamber's ruling in *Vinter*. The decision will be eagerly awaited by whole lifers, but equally by the government who will want to know whether the Grand Chamber of the European Court is prepared to interfere with UK domestic law on this, and other sensitive issues involving the balance of human rights in the criminal justice system.

A rejection of the case on its merits will appease the government; but if the appeal were to succeed the government may be prepared to resume its face off with the Court and the Council of Europe on the issue of subsidiarity with renewed vigour. In particular this would mean resurrecting and strengthening its plans to repeal the Human Rights Act 1998 and replace it with a British Bill of Rights, which would instruct the courts to have less reliance on the principles and case law of the Convention. It is submitted, however, that a reversal of the Court's judgment in *Hutchinson* is imperative for prisoners' rights and legal certainty; whatever the political and diplomatic fall out of the Grand Chamber's decision.

[246] Press Release, European Court of Human Rights (ECHR 179 (2015) 3 June 2015

HUMAN RIGHTS

Stop me if you've heard this one before: judicial deference in free speech and security cases

R (on the application of Lord Carlile of Berriew QC and others) v Secretary of State for the Home Department [2014] UKSC 60

Supreme Court

Dr Steve Foster [*]

'The whispering may hurt you, but the printed word might kill you.'

Morrissey, '*You know I Could Not Last'*

'The protection afforded by article 10 is applicable not only to information and ideas that are favourably received or regarded as inoffensive…but also to those that offend, shock or disturb…Such…are the demands of pluralism, tolerance and broadmindedness *without which there is no democratic society*.'

European Court of Human Rights, in *Handyside v United Kingdom* (1976) 1 EHRR 737(italics added)

Introduction

Commenting on the Parent Music Resource Centre's decision to introduce a rating system for rock albums – following the outrage shown by a mother when she had purchased a Prince record (Darling Nikki) for her eight year-old daughter that had a reference to masturbation in it,[247] the great Frank Zappa stoutly defended free speech:

> 'It is my understanding that, in law, First Amendment issues are decided with a preference for the least restrictive alternatives. In this context, the PMRC's demands are the equivalent of treating dandruff with decapitation.'[248]

The least restrictive alternative is a well-established principle in human rights law to measure the necessity and proportionality of measures which threaten the enjoyment of human rights.[249] It provides protection against arbitrary interference with such rights as it ensures that no measure is taken which disproportionally encroaches on

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[247] Ironically, in later years Gail Zappa (Frank's widow) and Tipper Gore – one of the founding members of the Centre - became very good friends. My thanks go to my friend Andrew Beck for this extra information.

[248] Frank Zappa, Statement to Congress, 19 September 1985, reproduced in Heylin, C (ed) *The Penguin Book of Rock & Roll Writing*, Viking 1992. My thanks go to my friend David Alexander, who alerted me to this article.

[249] See Brems, E and Lavreyson, L 'Don't Use a Sledgehammer to Crack a Nut': Less Restrictive Means in the Case Law of the European Court of Human Rights' (2015) 15 (1) HRLR 139.

individual rights where there is a more liberal and less restrictive measure available; a measure which might achieve the aim of the restriction, but still allow a greater enjoyment of the right in question. But the protection of free speech is not simply about allowing the state or others to interfere with its enjoyment in the least restrictive manner. Inherent in Zappa's point is that human rights values require the law, and inevitably the judiciary, to give a preference to free speech whenever it is attacked. This includes assuming that the interference is unlawful and unreasonable, giving greater weight to free speech than the interest that is attacking it – even if that interest is a legitimate one – and insisting on cogent and coherent evidence before accepting that free speech might have to give way to a greater social or individual interest.

Without accepting the above as the starting point of any judicial review – including, most importantly, the democratic values of freedom of expression - challenges to state and other interference with free speech is meaningless and will lead inevitably to legal acceptance of free speech violation. The Supreme Court's decision in *R (on the application of Lord Carlile of Berriew QC and others) v Secretary of State for the Home Department* represents the most recent challenge to decisions made by government officers not to allow certain individuals, usually foreign nationals, to address the public or sectors of society on the grounds that their views and their presence would cause harm, to public safety, national security, or in this present case, to the foreign relations of the state.

The facts and decision in *Carlisle*

The relevant facts were that Maryam Rajavi, a dissident Iranian politician resident in Paris, had been excluded from the UK since 1997 on the basis of her involvement with an Iranian opposition organisation, formerly proscribed as a terrorist organisation. Members of the House of Lords and the House of Commons wanted her to address meetings in Westminster about policy issues relating to Iran, and asked the Home Secretary to lift the exclusion. The Home Secretary sought the advice of the Foreign Office, and then refused that request, considering that Iran would see any lifting of the exclusion as a political move against it, and would be likely to engage in reprisals that would put British interests and British nationals at risk. The members sought judicial review, claiming that the decision violated their right to freedom of expression guaranteed by article 10 of the European Convention on Human Rights

In the Divisional Court it was held the Home Secretary had lawfully excluded the politician since there was a credible risk that her attendance at such a meeting would result in unlawful reprisals by the Iranian government.[250] Dismissing the claim on grounds of lack of consultation or breach of the politician's right to private life, the court conceded that her right of free expression under article 10 was all the more important in the instant case since it involved the rights of members of the legislature to receive information and opinion from an authoritative source on subjects of national and international importance. The court also held that Secretary's contention that she could speak to the Parliamentarians via video link did not mean that the

[250] ***Lord Carlile of Berriew and others; Rajavi v Secretary of State for the Home Department*** [2012] EWHC 617 (Admin**)**

restriction of the claimants' article 10 rights was minor, Thus, in order to uphold what would otherwise be an infringement of article 10, the state had to establish convincingly that the measure in question was necessary in a democratic society. In the instant case there had been an assessment by the executive of the possibility of unwelcome action by a foreign government and the case was not one in which the court could make any findings of primary fact from which it could decide the principal issue of controversy. In the court's view, if there was a credible risk, it was for the executive branch of government to assess it and to react appropriately. Consequently, the secretary had established that her continued exclusion was justified.

The decision was upheld by the Court of Appeal,[251] who held that in considering the respective arguments for and against the interference with article 10 rights the court had to consider the value of the right in the context in which the parliamentarians sought to exercise it: the exercise in the instant case having an exceptionally high value, given that they sought to exercise their rights in Parliament.[252] The Court also noted that the value of free debate in a democratic society could not be underestimated and that the interference in the instant case was not trivial: it was in effect a denial of the right of free speech. However the court stressed that the principle that, in matters of foreign policy and security, the court should not substitute its judgment for that of the secretary of state was well established outside the field of proportionality.[253] That principle, which applied in the context of immigration control where an exclusion decision was challenged on the basis of article 10, must also apply to questions of foreign policy and security. Accordingly, the divisional court's decision that it could not gainsay the conclusion of the secretary of state with regard to the risk to local staff - despite its view that her exclusion would not affect Iran's decision to pursue atomic tests - was in accordance with legal principle.

The Court of Appeal also held that the Home Secretary was entitled to have regard to the welfare of the local staff and to the protection of British property in Iran. Once the court was satisfied that a decision was within a range of decisions that could properly be made, the proportionality test did not require it to be satisfied that the decision was correct, for that would clearly involve substituting its own judgment for that of the Secretary of State on the risk of retaliation by a regime that had in the past been prepared to sanction unlawful reprisals. Further, there was nothing to suggest that the parliamentarians' knowledge and experience on those matters was superior to that of the Secretary of State.

In considering the appeal from the Court of Appeal's decision, the Supreme Court stated that when determining whether a person's presence in the UK was conducive to

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[251] *R (on the application of Lord Carlile of Berriew and others) v Secretary of State for the Home Department* **[**2013] EWCA Civ 199

[252] Dissenting on this issue, McCombe, LJ held it was not clear that, in principle, the right to freedom of expression of parliamentarians was of more "value" than the rights of other persons. In his Lordship's view, all persons had the same protected rights under the Convention, notwithstanding that the extent of any justifiable restriction on such rights might vary depending on the circumstances (at paras 106-107).

[253] Following *R (on the application of Naik) v Secretary of State for the Home Department* [2011] EWCA Civ 1546, considered below.

the public good, the potential consequences of that person's admission had to be considered. In the Supreme Court's view, the existence and gravity of a threat to British nationals or interests were questions of fact and were not any less relevant because the threat emanated from a state that did not share British values. Thus, if, in order to protect the democratic values of British society from the repressive actions of a regime which did not share those values, it was necessary to interfere with a Convention right, then such interference was justified

On the question of the extent of review and the issue of judicial deference in this area the majority (Lord Kerr dissenting) held that when considering decisions of the executive, the courts would traditionally not usurp the function of the decision-maker. However, the majority stressed that the Human Rights Act 1998 made justiciable any arguable allegation that a person's Convention rights had been infringed, and that when it came to reviewing the compatibility of executive decisions with the Convention, there was no constitutional bar to any inquiry that was relevant and necessary to enable the court to adjudicate. However, the court was not entitled to substitute its own view for that of the decision-maker, and the degree of quality of the judicial scrutiny called for would depend on the significance of the right, the degree of interference, and the factors capable of justifying the interference. The court's role was to test the adequacy of the factual basis of the decision, consider whether the objective was necessary, and review the *rationality* (italics added) of the supposed connection between the objective and the means.

The Court then had to consider whether some less onerous alternative would have been available without unreasonably impairing the objective. Although the court was the ultimate arbiter of the appropriate balance between the Convention rights engaged and the interests of the community, it would not remake a decision reasonably open to the decision-maker, and it would not make a judgement about the relative advantages and disadvantages of the course selected, or of pure policy choices. On those matters, and in determining what weight to give to the evidence, the court was entitled to attach special weight to the judgement of a decision-maker with special institutional competence. If her admission to the UK would pose an appreciable risk of reprisals as claimed by the secretary of state, then the interference was clearly justified in the interests of national security, public safety and the protection of the rights of others.

The Court then considered the specific claims under article 10, stressing such rights were qualified and there had been no challenge either to the facts or to the Secretary of State's bona fides. In those circumstances the court could only quash her decision if she had underestimated the importance of freedom of expression, if the Foreign Office had overstated the risks, or if her objective could reasonably have been achieved by some lesser measure. In the present case, the Secretary had not underestimated the importance of freedom of expression; further the applicants and R had not been denied the right to express her views, and the parliamentarians had not been denied the right to receive them. Nor had the Foreign Office advice overstated the risks; its assessment was supported by subsequent events, and the making of predictions of that kind called for an experienced judgement, the consequences of getting it wrong being sufficiently serious to warrant a precautionary approach. Seeking the advice of the

Foreign Office had been the only reasonable course open to the Secretary of State, and it was difficult to see how she could rationally have rejected the advice she was given. To reject that advice would be to step beyond the proper function of a court of review. Finally, it was difficult to see what lesser measure would have sufficed. Accordingly, the appeal was dismissed.

Analysis of *Carlile*

The decision of the majority is based on two principles: that it is not appropriate for the courts to substitute its view for that of the executive on matters relating to public safety unless that evidence can be proved to be flawed; and that in judging the rationality of the measure the court should recognise that in this case the executive interference did not destroy the essence of free speech. This can be contrasted with the dissenting speech made by Lord Kerr, who felt that the court's reviewing powers are not relinquished in such cases and that it was wrong for the government to be swayed by pressure from anti-democratic sources.

Lord Sumption's views on the level of interference and its relationship to the risks of allowing the visit is best summed up in this extract:

> ''I do not doubt that a face-to-face meeting between the parliamentarians and Mrs Rajavi is the most effective way of conducting their discussions. I would accept that the proposed venue (the Palace of Westminster) and the proposed attenders (members of the two Houses of Parliament) both add symbolic value to an occasion intended to promote democratic values, although it may equally be said to enhance any perception on the part of the Iranians that she is being officially endorsed by the organs of the British state. But Mrs Rajavi has not been denied the right to express her views. Nor have English parliamentarians or anyone else been denied the right to receive them. Putting the matter at its highest, the Secretary of State's decision deprives them of the use of one method and one location for their exchanges. It may be that the decision rules out the best method and the best venue for the purpose. For that reason it would be wrong to suggest that such a restriction is trivial. It is not. Nor did the Secretary of State say that it was. The restriction is fairly described in her reasons as "limited". But the force of the point does not lie in the choice of adjectives. It lies in the Secretary of State's view that the particular restrictions of freedom of expression involved in her decision, in whatever language described, were outweighed by the risk to the safety of British persons and property and Embassy staff. That was a question to which she plainly did address herself. [254]

Lord Sumption then considered the court's role in challenging that evidence and the Home Secretary's decision:

> ''How is the court to determine where the balance lies if (i) it has no means of independently assessing the seriousness of the risks or the gravity of the

[254] At para 44

> consequences were they to materialise, and (ii) the Secretary of State is not shown to have committed any error of principle in her own assessment of them…We are not in point of law bound to accept the factual assessment of the Foreign Office about the impact on our relations with Iran of admitting Mrs Rajavi to the United Kingdom. But if we reject it we must have a proper basis for doing so. In this case, there is none. There is no challenge to the primary facts. We have absolutely no evidential basis and no expertise with which to substitute our assessment of the risks to national security, public safety and the rights of others for that of the Foreign Office. We have only the material and the expertise to assess whether the Home Secretary has set about her task rationally, by reference to relevant matters and on the correct legal principle. Beyond that, in a case like this one, we would be substituting our own decision for that of the constitutional decision-maker without any proper ground for rejecting what she had done. Yet that appears to be where Lord Kerr JSC's analysis leads. "We do not ask whether the Secretary of State's view is tenable", he says (at para 158), "but whether it is right." …this is in fact nothing less than a transfer to the courts of the constitutional function of the Home Secretary, in circumstances where the court is wholly incapable of performing it.[255]

Dissenting on the rationality and necessity of the Home Secretary's refusal, Lord Kerr stressed that the courts have been given momentous obligations by the Human Rights Act, none more so than the duty to decide whether interferences with Convention rights are justified.[256] Although in conducting the review of government decisions, the courts must, of course, be keenly alive to the expertise and experience that ministers and public servants have, if the power and the duty to conduct fearless, independent review of the justification for interference with Convention rights is to mean anything, close, dispassionate and independent examination of the reasons for interfering with those rights must take place. Convincing reasons for the interference must be provided, convincing, that is, to the court that is required to examine and assess them.[257]

In Lord Kerr's view, it was unclear what specific consequences would flow from a decision to allow R to come to the United Kingdom., commenting that it was revealing that most of what is feared was already happening or has occurred in the past:

> ''Generalities such as that contained in Mr O'Flaherty's first statement, that "ramping up of rhetoric may … provoke an uncontrolled public reaction" really do not provide any tangible evidence that the admission of Mrs Rajavi to the United Kingdom carries a particular risk, the inherent unpredictability of such events as have occurred in the past making any forecast of what might or might not happen in the future extremely difficult.[258] This painted a picture of unpredictability and arbitrariness, making any assessment of the risk of adverse consequences of a general, non-specific nature. Thus, while this court

[255] At para 49
[256] At para 175
[257] At para 176
[258] At paras 177-78

> must have due regard to the assessment of the expert evidence, and to the judgment that the Home Secretary has made based on that evidence, it must not lose sight of the fact that the risks cannot be explicitly identified nor can they be precisely defined. They are a loosely expressed agglomeration of possible outcomes.[259]

In contrast, his Lordship then identified that the interference with the appellants' article 10 rights was direct and immediate; stressing that although such rights are, in any context, of especial significance, the critical importance of free speech in this case should not be underestimated.

His Lordship then used an aspect of parliamentary supremacy to justify the court's interference:

> ''Our Parliament is the sovereign part of our constitution. Its laws prevail over everything else. The courts accord greater deference to the decisions of Parliament than to those of any other body. *When a distinguished group of parliamentarians wishes, in the interests of democracy, to conduct a face-to-face exchange with someone whose views they consider to be of critical importance*, only evidence of the most compelling kind will be sufficient to deny them their right to do so… the instant court had a bounden duty to uphold that right unless convinced of the inescapable need to interfere with it; and that he had not been brought to that point of conviction.[260]

Although Lord Kerr's dissenting judgment is noteworthy for his willingness to challenge the expert evidence and the executive judgment of the Home Secretary, it is his statement on the attack of the democratic values of free speech - presented by the reasons accepted by the government - that is most compelling in safeguarding freedom of speech:

> ''The fact that the anticipated reaction of the Iranian authorities, if indeed it materialises, would be rooted in profoundly anti-democratic beliefs; would be antithetical to the standards and values of this country and its parliamentary system; and would significantly restrict one of the fundamental freedoms that has been a cornerstone of our democracy must weigh heavily against sanctioning such a drastic interference with the appellants' article 10 rights. While, therefore, the Secretary of State should have regard to the possibility of an adverse reaction by Iran, she must give due recognition to the fact that, if that anticipated response leads to the continued exclusion of Mrs Rajavi, this would be at the expense of one of the most fundamental rights of our Parliamentary democracy.''[261]

Later, Lord Kerr explains his reasoning for discounting the anticipated reaction of the Iranian authorities if R was to be invited to address Parliament:

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[259] At para 179
[260] At para 180
[261] At para 170

> ‘’It is one thing to countenance a significant interference with a Convention right when the basis for that interference is the anticipated reaction of a democratic regime. It is quite another when what is apprehended is a wholly anti-democratic reaction. It is not simply a question of discounting the Secretary of State's view about the reaction of Iran, therefore. This is a factor which should also be taken into account in relation to the significance of the article 10 rights of the appellants.’’[262]

It is on this principle, therefore, that Lord Kerr is prepared to dissent from the majority and challenge the Home Secretary’s decision and the evidence it is based on. Whilst the majority are prepared to accept this evidence – presumably on the basis that the risk to diplomatic relations was still real (on the evidence presented by the government) despite the lack of Iran’s democratic credentials, Lord Kerr refuses to surrender the democratic values of free speech on the basis of such threats. Lord Kerr’s dissent, therefore, is not based solely on his view of the proper constitutional role of the courts in challenging executive action and policy, more importantly it is founded in the proper role of free speech and other democratic values, and its protection from anti-democratic and arbitrary interference. By taking this stance, Lord Kerr is able to articulate the true value of free speech, and its importance in this case. This contrasts with the majority opinions in this, and other cases of this nature, which is to laud the values and fundamental nature and importance of freedom of expression before allowing its inevitable interference on the grounds of public safety or foreign relations, the evidence of which cannot be properly questioned by the judiciary.

Lord Kerr’s stance accepts that this case is not concerned solely with the question whether there was a risk of retribution by the Iranian authorities and who is the most appropriate body to decide that question. It is primarily about whether a democratically elected body should, assuming that there is some risk, take a decision to surrender the democratic values of its society to meet the demands of public safety and national security. To challenge that decision, including the evidence upon which that decision was reached, the courts must fully appreciate danger to democracy of restricting free speech, as too must the executive when making its judgment.

To insist merely that the government consider article 10, and for the courts to then expound general principles of free speech without examining in detail the repercussions of compromising it, is a derogation of the courts’ role in safeguarding free speech from arbitrary interference - particularly when it is being done to accommodate anti-democratic wishes On the other hand the majority decision can be justified for its pragmatism and its desire to ensure that public safety is most effectively protected. Thus, in rejecting Lord Kerr’s approach Lord Neurenburger stated:

> ‘’I have no doubt that many people in this country would enthusiastically agree with the sentiment implicit in those observations, but…I do not accept that they represent an appropriate basis for allowing this appeal. While it may be unwise to be categoric, I find it very hard to envisage any circumstances where a judge's decision to quash an executive decision to restrict a Convention right

[262] At para 174

> because its exercise might endanger the national interest, could turn on an assessment of the motives of the person responsible for the danger to the national interest…I cannot accept that, when considering whether anti-terrorist legislation was incompatible with the Convention in so far as it restrained citizens' human rights, a judge could take into account the fact that the legislation was motivated by the need to avoid risks to national security from actions by people motivated by unreasonable, violent and anti-democratic motives. The issue in this case concerns the nature, likelihood and impact of the reaction of the Iranian authorities and people to the admission of Mrs Rajavi into this country, not the legitimacy or defensibility of the reasons for that reaction. [263]

This approach is recognised by Hooper, who comments that although she shares the scepticism regarding the executive's case, it must be admitted that in such matters "the cost of failure can be high": and that second guessing the executive without evidence would be unwise.[264]

Whatever the correct constitutional approach, it is argued that in these cases both the executive and the judiciary have paid too little attention to the democratic arguments of upholding free speech, concentrating rather on the danger of upholding it and the undesirability of allowing the particular speaker from exercising that right. Thus, it is of little significance to free speech protection that the courts insist that the executive simply take freedom of expression and article 10 into account - and then use that factor as the sole ground for reviewing the legality of the executive decision - if the executive have not fully appreciated the full value of free speech and the damage done to its democratic credentials when it is censored. In this respect it is only Lord Kerr that takes a robust approach to defending free speech, the majority of the Supreme Court being prepared to stress its fundamental yet conditional status.

Conclusions

The majority decision in *Carlile* follows a long line of cases where free speech values have been overridden by concerns over public safety, national security and territorial and diplomatic matters.[265] In these cases, the courts have shown a great deal of judicial deference to the judgment of the executive, both on the question of whether the claimed risk actually exists and the measures that are necessary to deal with that risk. The result is that the true proportionality test is replaced by one of irrationality, so that the courts will defer to the executive and refuse to overrule that judgment unless the executive have refused to consider the human right in question or where it can be shown that the evidence upon which the executive decision has been made is flawed. This would involve the applicants, and the court, proving alternative evidence which would disprove the executive's case; it not being sufficient that the court remains unconvinced by the evidence put forward by the executive's evidence.

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[263] At para 77

[264] Hooper, H 'The future is a foreign country ' (2015) CLJ 23, at 28

[265] ***R v Secretary of State for the Home Department, ex parte Farrakhan*** [2002] EWCA Civ 606**;** [2011] EWCA Civ 1546; ***R (Geller and Spencer) v Secretary of State for the Home Department*** [2015] EWCA Civ 45.

Commenting on this case,[266] Hooper states that the decision reflects a divergence of opinion amongst the senior judiciary over both constitutional fundamentals and the practical mandate of the judiciary in human rights judicial review. Whilst Hooper shares Lord Clarke's scepticism regarding the executive's case, she admits that in such matters "the cost of failure can be high,"[267] and that second guessing the executive without evidence would be unwise. She warns, however, that it would be equally unwise to extrapolate general principles from such curious instances as this case:

> 'Parliament, via the Human Rights Act 1998, has constitutionally tasked the courts with independently scrutinising all areas of policy. Areas of "high policy" are difficult to define, and risk assessment is a pervasive task in modern administration. Therefore, to "roll back" both the constitutional position of the courts and the general intensity of rights review in relation to risk assessment potentially undermines a much greater sphere of operation of human rights law than the province of the present case.''[268]

This seems to accept that there will be a dual approach with respect to judicial review: one encompassing the greater level of interference allowed for by the Human Rights Act; and another applying in cases affecting national security and public safety. Although it is accepted that there will be a strong element of judicial deference in these latter cases, it is argued that these decisions are flawed on the basis that the courts have failed to take a sufficiently respectful approach in defence of free speech and its democratic values. This, it is argued, has led the courts to adopt an unnecessarily hands off approach in defending free speech from executive and other interference. The courts then attempt to defend such interferences by stressing that alternative methods of expression are available to the right holder. It is argued that democracy and free speech are often best protected by concluding that the least restrictive alternative is that there should be no restriction at all.

HUMAN RIGHTS AND TORT LAW

Police negligence and victims of crime: the survival of the rule in *Hill*

Michael and others v Chief Constable of South Wales and another [2015] UKSC 2

Dr Steve Foster [*]

Introduction

Whether police authorities can be liable in negligence with respect to their acts, or failure to act, in the investigation of crime has long been an issue for both the domestic courts and students studying the law of tort. In *Hill v Chief Constable of*

[266] Hooper, H 'The future is a foreign country' (2015) CLJ 23, at 27-28
[267] *R. v Secretary of State for the Home Department, ex parte Rehman* [2001] UKHL 47
[268] Hooper, H 'The future is a foreign country' (2015) CLJ 23, at 27.

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West Yorkshire,[269] the House of Lords held that the police could not, generally, be sued for alleged negligence in investigating crime because of the lack of proximate relationship between the police and the victim, and the existence of policy reasons - in not restricting the police's discretion in this area. It has been held that this general rule is not necessarily incompatible with a person's right to a fair trial under article 6 of the European Convention on Human Rights (1950),[270] and in the majority of cases the police as defendants will succeed in striking out the case before full trial.

This may leave the victims of such negligence without a civil remedy in the domestic courts and begs the question whether such exclusionary rules are fair and, more specifically, human rights compliant. This piece will examine those issues in the light of the recent Supreme Court's decision in *Michael v Chief Constable of South Wales and another*,[271] where the rule was upheld by a majority of the Court (Hale and Kerr JJSC dissenting). The decision maintains the right of the police to strike out the vast majority of tortious actions brought against them with respect to the investigation of crime. However, as we shall see, other remedies may be available to the victims in such cases, provided those individuals can engage and prove a violation of various European Convention rights presently contained in the Human Rights Act 1998.

The facts

Joanna Michael (M) had made a 999 call, which was received by Gwent police and told the operator that her former partner (W) had assaulted her and had said he would return to hit her. Later in the call she referred to W saying he was going to kill her, but it was at issue whether that part of the call was audible to the operator. The operator said that the call would be passed on to South Wales police, who would call her back, and the call was graded as requiring an immediate response. The operator then spoke to her counterpart in South Wales but referred to a threat to *hit* M, not to *kill* her, and as a result the call priority was downgraded. M made a further emergency call to Gwent police, and when screaming was heard the call was graded as requiring immediate response. When police attended her home she had been stabbed to death.

The family and estate of M brought claims for damages against the police, both in negligence at common law and under article 2 of the European Convention on Human Rights, which provides that everyone's right to life shall be protected by law. Although South Wales police had attended her home on a number of previous occasions to deal with domestic violence issues, and the Chief Constables accepted that there had been 'serious failures in the handling of the 999 calls,' the police sought to strike out the claims; alternatively they applied for summary judgment. The judge denied those requests and held that there were serious issues of fact which could only be determined at full trial.

On appeal, the Chief Constables contended that any police action in the course of investigating or suppressing crime could not generally be made the subject of an

[269] [1989] AC 53
[270] *Brooks v Commissioner of Police of the Metropolis* [2005] UKHL 24; *Smith v Glasgow CC* [2009] UKHL 11
[271] [2015] UKSC 2

action. Further, in relation to the article 2 claim, it was contended that many threats to kill were reported to the police, and that her call had revealed no more real and immediate threat than any other. In response, it was argued that the principle of 'non-actionability' under *Hill* (below) could not apply before any criminal investigation had begun; or in cases such as the present, where the police had assumed a responsibility to a member of the public.

The decision of the Court of Appeal

The Court of Appeal held that once Michael had reported that she had been hit and was seeking police assistance, the police, in seeking to go to her aid, *were* investigating the crime of assault and battery and hoping to suppress crimes of that nature. If she had said in audible terms that he was going to kill her, the police were investigating the crime of making a threat to kill and were endeavouring to avoid an actual killing. The fact that the police failed in that endeavour did not mean that no investigation into criminal activity had begun, so as to dissaply the rule in *Hill*.

The Court also rejected the claim with respect to assumed responsibility; South Wales police had assumed no responsibility to her because they were never in contact with her. In the Court's view, the highest it could be put against Gwent police was that its operator was saying that they would call her and that she should keep her phone free. That was more a routine expression of expectation that South Wales police would call her; it was not an assurance that they would, and still less any assumption of responsibility for her safety. That question was not susceptible of much elaboration and thus was suitable for disposal by summary judgment, and it was neither necessary nor appropriate that the factual inquiries envisaged by the judge should be determined at trial as part of a claim for common law negligence.

However, the Court held that there could be no case of 'non-actionability' in answer to the claim made under article 2 of the Convention. The Court of Appeal (Davies LJ dissenting) found that one of the critical features of the case was what a trial judge would make of the 999 call and the audibility of Michael's call to the Gwent police operator. In the majority's view, it was not appropriate for the instant court to assess the call on an application to dispose of the case summarily. On the facts there was arguably a breach of the authorities' obligations under article 2. Although the trial court might well determine that there had been no breach of article 2 on the facts, that issue should be established at trial and not as a result of a paper exercise without witnesses.[272] Accordingly, in respect of the second ground the judge's order would be upheld and a direction given that there would be a trial of the article 2 claim. Lord Justice Davies dissenting on the article 2 issue, reminded the Court that the test as set out in *Osman* was that the positive obligation under the Convention was breached only if the authorities had known or ought to have known, on the facts at the relevant time, that there existed a real and immediate risk to the life of an identified individual. In his Lordship's view, that test was clearly a stringent one and not easily satisfied; and the facts in the instant case did not, in his view, show a realistic prospect of satisfying that test.

[272] Applying the decision of the European Court of Human Rights in *Osman v United Kingdom* (2000) 29 EHRR 245.

On appeal and cross appeal to the Supreme Court, the Court had to consider the following questions: first, whether the police owed a common law duty of care to M; secondly, whether they had assumed responsibility to M in the circumstances; and thirdly, whether the police had arguably broken their obligation under article 2 of the European Convention on Human Rights.

The decision of the Supreme Court

The Supreme Court (Hale and Kerr JJSC dissenting) rejected the appeal and cross appeal. In their Justices' opinion the appeal issue could be split into two questions:

- Whether the police owed a duty to take reasonable care for the safety of a person where they were aware, or ought reasonably to be aware, of a threat to her life or physical safety;
- Whether, where a member of the public had given the police credible evidence that a third party, whose identity and whereabouts were known, presented an imminent threat to life or physical safety, the police owed her a duty to take reasonable steps to assess the threat and prevent it being executed.

The majority of the Supreme Court held that the answer to the first question was no. That was because, in general, English law did not impose liability for injury or damage caused by a third party. The Supreme Court explained that the courts' refusal to impose a private law duty on the police to exercise reasonable care to safeguard potential victims of crime - except where there had been a representation and reliance - was consistent with the way in which the common law applied to other authorities vested with powers or duties for the protection of the public. No exception was to be made to the ordinary common law principles so as to cover the facts of the instant case. Although statistics about the incidence of domestic violence were shocking, they were not such as to cause the court to create a new category of duty of care. If the foundation of a duty of care was the police's public law duty to preserve the peace, it was hard to see why the duty should be confined to particular potential victims, or to potential victims of a particular kind of breach of the peace. The duty was owed to members of the public at large and did not involve the kind of proximity necessary for the imposition of a private law duty of care. Moreover, it was not clear whether imposing a duty of care in respect of a specific person would improve the police's performance in dealing with domestic violence. It would, however, have potentially significant financial implications for the police and the public purse. Neither was the development of a private duty of care necessary for compliance with article 2 or 3.2 of the European Convention on Human Rights; there was no basis for creating a wider duty in negligence than would arise either under common law principles or under the Convention.[273]

With respect to the second question, the Supreme Court, again, felt that the answer was no, as whether there should be a public compensation scheme for the victims of certain types of crime in cases of pure omission by the police was for Parliament to determine. Further, in this case, the call handler had said nothing to M to give rise to

[273] Following the House of Lord's decision in *Van Colle v Chief Constable of Hertfordshire* [2008] UKHL 50

an assumption of responsibility: she had made no promise about how quickly the South Wales Police would respond, and had not said anything that amounted to an instruction to stay in the house.[274]

Dissenting on the issue of tortious liability, Lord Kerr held that the question whether there is a sufficient relationship of proximity must be primarily dependent on the particular facts of an individual case, and that the continuation of the existing, inflexible rule was unacceptable:

> ''In the case of the police it must transcend the ordinary contact that a member of the public has with the police force in general. But the notion that it can only arise where there has been an express assumption of responsibility by unambiguous undertakings on the part of the police and explicit reliance on those by the claimant or victim is not only arbitrary, it fails to reflect the practical realities of life. When someone such as Ms Michael telephones the police she is in a highly vulnerable, agitated and frightened state. Is it to be supposed that there must pass between her and the police representative to whom she speaks a form of words which can be said to amount to an express assumption of responsibility before liability can arise? That the incidence of liability should depend on the happenstance of the telephonist uttering words that can be construed as conveying an unmistakable undertaking that the police will prevent the feared attack is surely unacceptable.[275]

Lord Kerr then suggested that where police have been informed that a member of the public is about to be attacked and they have the capacity to prevent that, the proposition that they should not be held liable because of public policy considerations should be subject to the following questions: is the anticipated "harm" to the public incontestable? Is it based on tangible grounds rather than mere generalities? Has the burden of establishing the proposition been discharged? [276]

On the article 2 issue, he Supreme Court then held that the Convention and Human Rights Act claim turned on whether the call handler ought to have heard M say that there had been a threat to kill. That, in the Court's view, was a question of fact, and it would be rare for the instant court to reverse concurrent findings of two lower courts on a question of fact. What the call handler ought to have made of the call was properly a matter for investigation at trial and thus the cross appeal should be dismissed.

[274] *Kent v Griffiths (No 3)* [2001] QB 36, considered.
[275] At para 168
[276] At para 183

Commentary

The Majority of the Supreme Court retained the exclusionary rule in *Hill* on grounds of public policy – that it would not be fair and reasonable to impose tortious liability in those cases.[277] Further, the Supreme Court refused to extend the assumed responsibility rule to these facts on the basis that it was for Parliament, and not the courts to extend the law so as to create a scheme of public compensation for victims of particular crimes. The exclusionary rule does not violate the right to a fair trial under article 6 of the European Convention, because in *Z v United Kingdom*[278] the European Court held that the rule was one of substantive law, and that any striking out case merely involved applying that rule to the specific facts of the case.

However, the Supreme Court's decision on the article 2 issue was necessary for our law to remain consistent with the Convention and the UK's responsibilities under that treaty; otherwise the state will be in breach of article 13, which guarantees the right to an effective remedy for breach of Convention rights. Accordingly, cases under article 2 (the right to life) – and under article 3 (freedom from inhuman and degrading treatment) must proceed to full trial and the court will need to examine the case to see whether the test under article 2 has been met. Disposing of cases at the summary stage would, therefore, risk a breach of article 13. The issue now for the full court is whether the claim under article 2 can succeed on its facts, although as we shall see the claimant will need to show more than mere failures of procedure in the investigation of that incident, because the woman's death will have to be shown as foreseen by the authorities as real and immediate.

Thus, despite the exclusionary rule in *Hill*, in appropriate cases an alternative claim can be made under the Human Rights 1998 Act; arguing that the police failed to safeguard an individual's right to life in breach of article 2, which states that everyone's right to life shall be protected by law. Thus, under, s.6 of the Act a public authority must not violate a person's Convention rights and victims of violations can bring actions in domestic law for breach of their Convention rights. Further, as the courts are public authorities they must apply the law (including the private law of negligence) in a way which complies with the Convention. As confirmed in the present case, the courts are not forced to provide a remedy in tort, but an alternative claim, under article 2 must be available. The basis of liability under article 2 was established by the European Court in *Osman v United Kingdom*,[279] where it was held that a state must take appropriate steps to safeguard the lives of those within its jurisdiction, including taking preventative operational measures to protect an individual whose life is at risk from the criminal acts of another person. In such a case the victim would have to show that there was a real and immediate risk to life, and the Court stressed that article 2 should not impose an impossible and disproportionate burden on the authorities.[280]

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[277] Following the test laid down in *Caparro Industries v Dickman* [1990] 2 AC 605

[278] (2002 34 EHRR 3

[279] (2000) 29 EHRR 245

[280] In that case an individual had been killed by a teacher who had formed an attachment to the individual's son. The action under article 2 failed on the facts as the police could not be criticised for attaching greater weight to the presumption of innocence and for believing that they had not got the necessary suspicion to arrest.

In article 2 claims the test - real and immediate risk to life - is more stringent than the test in negligence - reasonable foreseeability - and thus a case under article 2 is more difficult to prove. For example, in *Chief Constable of Hertfordshire* v *Van Colle* [281] the action under article 2 for death of a vulnerable witness failed on the facts as not satisfying the Convention test. In this case, the claimant's son was a witness in the forthcoming trial of X and had been killed by X before the trial after the police had been alerted to threats made by X to his son and to others. The House of Lords dismissed the claim, stating that the police would only be liable under article 2 where the authorities knew, or ought to have known at the time of the existence of a real and immediate risk to life of an identified individual and they had not done all that was reasonably expected of them to avoid a real and immediate risk to life. That test, in their Lordship's view, applied to all cases, including the present and the lower courts had placed too much emphasis on the fact that the son had been a witness. In this case the risk was not so great given the general trivial nature of the offence for which X was to face trial.

That decision was confirmed by the European Court of Human Rights, in *Van Colle v United Kingdom*,[282] which held that there had been no violation of articles 2 or 8 ECHR as on the facts there did not exist a real and immediate risk to the applicant's life; neither was it evident that the threats that were made to the applicant were ever life-threatening; the defendant had no propensity to violence and there was nothing to distinguish the case from *Osman.* Although the Court also agreed that the fact that the states' actions had made the applicant vulnerable was a factor to take into account, it was not one that changed the relevant test laid down in *Osman*. Further, the test was not whether 'but for' the inactions of the police the applicant would have died - but rather whether the police knew or ought reasonably to have known of a real and immediate risk to life.

Thus, to bring a case under article 2 the claimant will need to show a very strong case, and the burden is more onerous than in the traditional action for negligence. For example, in *Mitchell v Glasgow City Council*,[283] the article 2 claim failed on the following facts. In 1994 the claimant's husband had told a neighbour (X) to turn his music down and X used an iron bar to break down the door and smash the windows of their house. Seven years later the Council invited the husband to a residents' meeting to discuss evicting X and X attended the meeting and became abusive. X then returned home and killed the husband. The claim in negligence was dismissed, and it was held that the article 2 claim failed on its merits as there was no immediate and real risk to the life of the husband: the previous attack had taken place seven years ago and there had been no direct threat at the meeting. Similarly in *R (AP and MP) v HM Coroner for Worcestershire and others*,[284] it was held that there did not exist a real and immediate risk that a vulnerable adult would be attacked by a man against whom the vulnerable adult had made a complaint. This was despite the fact that allegations of harassment and rape had been made and investigated by the authorities. On the facts

[281] [2008] UKHL 50
[282] Decision of the European Court of Human Rights 13 November 2012, Application No. 7678/09.
[283] [2009] UKHL 11
[284] [2011] EWHC 1453 (Admin)

there was nothing to suggest that the man would become seriously violent to the vulnerable adult.

Conclusions

The majority decision in *Michael* is a pragmatic one, upholding the exclusionary rule on public policy and constitutional grounds. The dissenting judgments however have much to commend them, exposing the inflexibility and arbitrariness of refusing to take a more flexible, fact-sensitive approach. Whatever the relative merits of each approach, the victim is not left without a remedy, as they can rely on human rights law to impose liability in appropriate cases where the public authority has failed to take appropriate steps to safeguard the life and physical safety of particular individuals. However the potential for that avenue of redress is subject to problems. First, as the case law under article 2 suggests, it will be very difficult for the claimant to prove a breach of the positive obligation under article 2; it not being sufficient that the harm was foreseeable and that procedures had been broken. In this sense, many of the public policy factors which have led the courts to develop and maintain the exclusionary rule are evident in the jurisprudence of both the European and domestic courts when they are balancing the rights of the claimant with the desirability of imposing a disproportionate burden on the public authorities.

Forcing the victim to pursue this more difficult remedy is not in violation of the right to a fair trial; nor is it defying the victim a real and effective remedy under article 13 as the standards laid down for imposing liability in such cases, although harsh, have been developed and sanctioned by the European Court itself. However, it is more worrying to think what would happen if the Human Rights Act 1998 was repealed and the domestic courts were no longer bound to apply Convention principles and case law. In such a case, genuine victims of police negligence may be left without a private remedy, save in cases where the authorities have assumed direct responsibility – a situation, as Lord Kerr points out, which is unlikely to arise in practice.

CASE NOTES

Human rights – electronic tagging – TPIMs – article 3 ECHR – article 8 ECHR

DD v Secretary of State for the Home Department [2015] EWHC 1681 (Admin)

The facts

DD, a Somali national, had arrived in the UK in 2003. He was granted asylum and indefinite leave to remain and lived with his wife and seven children. In 2008, he was

charged with fundraising for a terrorist group based in Somalia and remanded in custody. Although he was acquitted in 2009 and released, a Terrorism Prevention and Investigation Measure (TPIM) – made under the TPIM Act 2011 - was imposed in 2012 on national security grounds. Under that measure, D was required to live at home under an electronically monitored night-time curfew, with restrictions imposed on his use of banking facilities, association with named persons, his use or possession of electronic communication devices, daily reporting requirements, and exclusion from defined areas. DD breached the TPIM several times and was imprisoned each time; the TPIM being revoked on imprisonment and revived on release. Issues regarding D's mental health became apparent whilst he was in custody and he was diagnosed as suffering from mental health disorders, the symptoms worsening with the deterioration in his depressive and psychotic condition.

In November 2014 Ousley J, determined a preliminary issue arising in an appeal by D - that the imposition of such a measure violated his rights under article 3 ECHR (prohibiting inhuman and degrading treatment (*DD v Secretary of State for the Home Department* [2014] EWHC 3820 (Admin). In that case although his Lordship found that it was clear from the psychiatric evidence that the TPIM had exacerbated the symptoms of D's mental illness and had a much more significant effect than on a person of normal mental health, it held that it would only violate article 3 if it had no legitimate purpose, was unnecessary for the achievement of a legitimate purpose, was wholly out of proportion to the risk it was designed to meet, or was imposed with the intention of humiliating D or to cause him suffering. Thus a court could not simply look at the effect of a measure on the individual and conclude that the effect crossed some threshold of suffering such that they had to be released, even where detention was necessary and proportionate and the detainee was receiving proper treatment. In the circumstances it was found that the restrictions were lawfully and proportionally imposed and the manner of their execution did not cross the high threshold required at which the restrictions had to stop so as to breach article 3.

The decision

In the recent case the High Court was required to assess Ousley J's decision, both in terms of its legality and in the light of new evidence of the effect that the TPIM measures were having on D and his family. In particular, the present court considered the compatibility of two measures with respect to D's Convention rights: the 'monitoring measures' which required him to wear an electronic monitoring tag at all times (allegedly in breach of article 3); and restrictions on his possession of certain electronic communication devices, such as computers and mobile phones - which also restricted such use by other persons residing in his residence, most notably his wife and children (allegedly in breach of article 8).

On the issue of the tag and article 3, the present court agreed with the approach taken by Ousley J in that it was relevant to take into account not just the suffering of D, but also the reasons behind the imposition of what was a legitimate and necessary form of treatment for an admitted risk. The court then noted that there had been a clear deterioration in the appellant's mental health and that the tag may produce further deterioration: even if a greater degree of medical treatment is provided, there was a real concern such deterioration would result in serious self-harm by D. On the other

hand, contrary to earlier evidence, there was now reason to believe that D's ability to take part in any terrorist related activity had lessened. Thus, the necessity for the tag, and the deleterious effect it was having on his mental health had lessened, resulting in that part of the measures being in violation of article 3. The court recommended that as the tag was causing great anxiety to D, that great care be taken in dealing with its removing; and that it be removed perhaps under another pretext.

Turning to the restriction on electronic communications, the court was satisfied that the measure was having a serious effect on D's children (and their article 8 rights), not only on their education but also, in conjunction with the perceived difficulties in having friends visit, on them maintaining friendships. Although the court agreed that restricting D to one computer (no internet access) and one land line telephone was important, there was insufficient evidence to justify the restrictions on family members having access to laptops and iPads together with wireless connection to the internet. There was no evidence that the children were being radicalized or were assisting him in any way to breach his orders or the measures. Also, there was an equal risk of such abuse with respect to their mobile phones, which they were allowed to use when D was not in residence. The court thus quashed those orders, but left the remainder of the measures intact.

Commentary

The present court agreed that the correct test had been applied by Ousley J and that it was relevant for any court to consider not just the effect that the conditions had on a particular individual, but also the reasons why those conditions had been imposed together with the proportionality of those measures in achieving their purpose. Although article 3 is absolute, and its protection cannot be compromised by reason of the individuals' behaviour or any danger to society (*Chahal v United Kingdom* (1997) 27 EHRR 413), the treatment must cross a particular threshold before a violation of article 3 can be established. The rule is therefore that once a breach is established the act in question cannot be justified; but that it is permissible to look at the intent and social good of the act in deciding whether there is a breach in the first place. Hence, in the present case, the fact that imposing such measures will cause an inevitable element of distress and humiliation does not mean that there has been a breach of article 3 *per se*. Such measures, as with arrest and detention, are regarded as acceptable provided there are no aggravating factors, such as arbitrariness, or the specific harsh effects they may have on the individual because of their circumstances.

The present decision merely assesses those factors (in the light of further psychiatric evidence) and concludes that they had a disproportionately deleterious effect on the individual's mental health so as to cross the threshold. If the decision of Ousley J can be criticised, it may be on the basis that his Lordship might have appeared to excuse the illegal effect that the orders were having on the individual on the basis that that breach was justified by the social good resulting from imposing the measures. Article 3 and the present decision re-iterates that those social goods cannot override an individual's right not to be subjected to inhuman and degrading treatment *once* the necessary threshold of suffering has been crossed.

Although the court did refer to European Convention rights and the relevant case law of the European Court of Human Rights, it would be wrong to assume that the decision would have been different had the Act not been in place. Even before the Act, our courts have accepted the illegality of torture and its use in criminal and other proceedings (*A v Secretary of State for the Home Department (No. 2)* [2006] 2 AC 221; and the Bill of Rights 1689 prohibits the use of 'cruell and unusuall punishment'. Even if a Bill of Rights and Responsibilities were to replace the 1998 Act, a similar if not identical provision to article 3 would be included, and the government has made it clear that it has no intention of adding responsibilities to the absolute rights contained in international law, such as Article 3.

Public and political outrage have been expressed through many of the national newspapers recently following the decision; the newspapers, wrongly, stating that it was solely down to the fact that the individual was delusional and thought that the tag contained a bomb which could be detonated by MI5 ('Terror suspect's tag violates his human rights' *Daily Telegraph*, June 19 2015). Nevertheless, such coverage has re-fuelled the debate as to whether European human rights law should be used in domestic courts by, *inter alia*, terrorist suspects, who can use European Convention rights to frustrate the criminal justice system and the public interest in maintaining public safety and national security. As a result, the government's (currently postponed) plans to repeal the Human Rights Act 1998, and replace it with a British Bill of Rights and Responsibilities, is back on the agenda; this decision (*DD v Secretary of State for the Home Department* [2015] EWHC (Admin) being cited as a perfect example of the alleged dangerous influence of the Convention and the European Court of Human Rights on British justice.

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Prisoners' rights – social security benefits - discrimination – justifiable distinctions

S. v United Kingdom and F.A. and Others v. United Kingdom Application Nos. 40356/10 and 54460/10;

Admissibility decision, European Court of Human Rights 21 May 2015

The facts

The applicants are all convicted prisoners who served, or are serving part of their sentences in psychiatric hospitals under the Mental Health Act 1983. The first four applicants were convicted of a criminal offence and sentenced to prison but at a later date were transferred from prison to a psychiatric hospital for treatment under ss.47 and 49 of the Act. The last applicant was given a prison sentence for a crime but was then sent directly to a psychiatric hospital, being transferred under s.45A.

As a general rule prisoners are not entitled to social security benefits whilst they are serving their sentence. Prior to 2006, prisoners in psychiatric hospitals received the equivalent of pocket money when they were transferred to hospital, but new regulations stop them from receiving social security benefits until the date they would be entitled to release from prison. However under s.37 of the Act, individuals who are convicted of a criminal offence but ordered to be detained for psychiatric treatment as an alternative to being given a prison sentence are not subject to this rule and are therefore entitled to receive benefits: the difference due to the fact that they have not been given a prison sentence.

The applicants brought judicial review proceedings, complaining that the new regulations were unlawful because they discriminated between different categories of patients who had been placed in psychiatric care via the criminal system. Their claims were dismissed by the High Court and the Court of Appeal. The applicants relied on Article 14 (prohibition of discrimination) taken together with Article 1 of Protocol 1 (protection of property), complaining that denying them the social security benefits paid to all other patients in psychiatric hospitals, including those convicted of crimes but sent to hospital instead of being given a prison sentence, amounted to unjustified discrimination. The applicants argued that their situation was comparable to that of other patients in psychiatric hospitals and yet they were treated differently to them.

Decision of the European Court

The Court stressed that under Article 14 it is discriminatory to treat people in relevantly similar situations differently if there is no objective and reasonable justification for doing so. The Court considered that the applicants had significant elements in common both with other patients but also with other prisoners and that a meaningful comparison could be made in either direction. Notably, although comparisons could be drawn with other patients, the applicants' status as prisoners remained very relevant to the assessment of whether denying them social security benefits had amounted to discrimination. The applicants had the status of patients in psychiatric hospitals as they required treatment for relatively severe mental problems, but they were first and foremost prisoners as they had been placed in hospital after having been convicted of serious criminal offences and found to be deserving of incarceration as a form of punishment.

The Court felt that the different treatment had been disproportionate. The Court reiterated that States have a wide margin of appreciation in areas of domestic economic or social policy, such as decisions on who is entitled to social security benefits, and this also applied to prisoner and penal policy, including the decision to apply a general rule disqualifying convicted prisoners from receiving social security benefits. The Court noted that the applicants remained under sentence of imprisonment whilst in hospital, and time spent in hospital counted towards time served from their prison sentences. Further, prisoners' entitlements would be restored if they were detained in hospital beyond the completion of their prison sentence, but would return to prison if they were discharged from hospital before the completion of their sentence.

The Court found that the two justifications put forward by the government for not paying the applicants' benefits also carried weight. The government had argued that paying benefits would amount to double provision, as the state already meets the basic needs of prisoners detained in psychiatric hospitals: the prisoners would not therefore be left without a means of subsistence due to the non-payment of benefits as they were anyway in receipt of a discretionary allowance. The Government also argued that the non-payment of benefits should be viewed as an aspect of punishment. In this respect the Court observed that prisoners, although deprived of their liberty, did not forfeit the remainder of their rights under the Convention. However their enjoyment of those remaining rights *would inevitably be influenced by the prison context* (italics added). The Court concluded that the difference of treatment fell within the range of permissible choices open to the domestic authorities, and had not constituted discrimination contrary to Article 14. It accordingly rejected the applications as manifestly ill-founded under the admissibility criteria of article 35.

Commentary

In *Golder v United Kingdom* (1975) 1 EHRR 524, the European Court of Human Rights refused to accept that prisoners lost their Convention rights automatically, and insisted that any restriction on those rights had to be justified within the boundaries set out by the Convention itself; in other words the restriction had to be legal and proportionate. Thus, in that case, prisoners were entitled to both access to the courts and the right to correspondence with their lawyers, subject only to necessary restrictions which would secure prison safety and order or the rights of others; for example to ensure that the right was not abused. This principle has been generally accepted in domestic law, Lord Wilberforce's famous dictum stating that such rights can only be taken away expressly by Parliament (now subject, of course to the powers of the courts to declare such legislation incompatible under the Human Rights Act 1998) or by *necessary implication* (*Raymond v Honey* [1980] AC 1).

However, the difference between non-forfeiture of prisoners' rights and the principle of the 'inevitable influence' on such rights is not always clear. Thus, the European Court has insisted that prisoners do not forego their right to private and family life (and the right to found a family) simply by fact of incarceration (*Dickson v United Kingdom* (2008) 46 EHHR 41), but it has accepted that the enjoyment of those rights will be subject to the ordinary and reasonable requirements of prison administration (*Boyle v Rice v United Kingdom* (1988) 10 EHRRR 425). This means that a prisoner's right to (family life) will be subject to greater restriction than those outside prison because of the need to achieve order and discipline in prison, and as a result a prisoner will not be able to complain if visiting rights are restricted and are made inconvenient for them and their visitors.

Further, both domestic and European courts have accepted that the punishment of a prisoner resulting from their sentence can be a valid reason for curtailing those rights, provided the restriction is legal and proportionate and the aim of the restriction is not simply to punish the prisoner for being a prisoner. Thus in the prisoner voting cases the Grand Chamber stated that it is acceptable to restrict a prisoner's voting rights as part of the sentence, provided there is a sufficient and proportionate link between the sentence and disenfranchisement (*Hirst v United Kingdom (No 2)* (2006) 42 EHRRR

41). Hence, it not simply liberty that is affected as a consequence of imprisonment; although franchise curtailment is not *inevitable*, as it is within the discretion of the state to decide whether prisoners will be disenfranchised.

More controversially, although a prisoner's Convention rights should not be lost on grounds of public opinion or public animosity to the enjoyment of those rights, it is permissible for prion administrators and the government to take into account and consider public confidence in the criminal justice system when making decisions which will impact on prisoners' rights. Thus, in *Dickson*, above, the Grand Chamber held that it was acceptable for the Home Secretary to consider the public's reaction to a mandatory life sentence prisoner starting a family whilst in prison when deciding not to extend artificial insemination facilities to that prisoner; although the final decision was struck down on the grounds that the Secretary had given too little weight to the family rights of the prisoner and his partner (the 'lost victim'). The prisoner's right to freedom of expression provides another example: the courts accepting that a prisoner has a general right to freedom of expression, subject to reasonable restrictions (*Bamber v United Kingdom* (Application No. 33742/96)), but again tolerating restrictions based on the need for the Home Secretary to maintain public confidence in the criminal justice system (*Nilsen v Secretary of State for the Home Department* [2005] 1 WLR 1028).

The present decision of the European Court is based on the idea that a sentence of imprisonment for committing a criminal offence may carry with it certain incidental (yet not inevitable) restrictions on the Convention rights of prisoners, which can then be reflected in national law. Thus, the applicants in this case, although sharing many characteristics with other psychiatric patients who retained their right to social security payments, are classified as convicted prisoners – and 'the applicants' status as prisoners remained very relevant' to the Court's decision that the difference in treatment was objectively justified. In this respect it is interesting to compare the Court's approach in relation to different category of life sentence prisoners. Initially the European Court accepted the distinction between mandatory and discretionary life sentence prisoners because the latter had been sentenced by a court as a matter of law. This meant that it was lawful for the executive to set the minimum terms of the mandatory life sentence and to veto decisions on recall and release (*Wynne v United Kingdom* (1994) 19 EHRR 333). However, eventually the Court insisted that mandatory lifers – who served very similar sentences to the other lifers – should receive the benefit of the right to liberty of the person and the right to a fair trial and sentence (*Stafford v United Kingdom* (2002) 35 EHRR 32).

The present decision of the Court is hardly surprising given the jurisprudence of the Court in this area, and the wide margin of appreciation given to states with respect to the application of Article 14 in social security matters (*Stec v United Kingdom* (2006 43 EHHR 47). Under that approach states are entitled to dictate the rules of eligibility provided the distinctions are not based solely on unjustifiable discrimination against that particular class of persons; the Court leaving it to the state to resolve the conflicting issues. In this case the distinction might be regarded as fair, given that prisoners in general are not entitled to social security benefits.

Nevertheless, the decision provides us with another example of how both the state and human rights law treats prisoners with respect to the enjoyment of their human rights. The decision to withdraw benefits from serving prisoners is not an *inevitable* repercussion of incarceration, but is accepted as a reasonable and proportionate interference with their Convention right to property. The state's right to allocate its finite resources is obviously a strong reason for the judiciary's reluctance to challenge such decisions, but so too is the belief that some prisoners' rights can be justifiably compromised because of their status and the state's perception of such individuals.

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Press freedom – privacy – intentional torts – public interest - injunctions

O v A (also known as OPO v MLA) [2015] UKSC 32

Facts

The appellant (R) appealed against a decision of the Court of Appeal ([2014] EWCA 1277) to grant an interim injunction restraining him from publishing certain information in a semi-autobiographical book. R was a talented performing artist, who had been subject to sexual abuse at school, leading to episodes of severe mental illness and who wished to speak out about his experiences and to describe them in the book. The respondent (O) was his young son who suffered from significant disabilities, including Asperger's syndrome and a psychologist had commented that the book would be likely to cause him enduring psychological harm. R's case was that although the book was dedicated to O, he would not expect him to see it until he was much older.

The Court of Appeal held that the judge at first instance had been right to hold that there was no cause of action for misuse of private information as the information concerned R, not the private life of O. Also, the judge had been right to hold that there was no cause of action in negligence and to find that on policy grounds the law did not impose a duty of care on a parent in respect of matters arising out of his or her child's upbringing. In the Court's view, if such a duty were to be imposed, it would lead to liability in a large number of cases and encompass a whole range of commonplace activities in which a parent was involved in caring for his or her child.

However, the Court held that O had sufficiently favourable prospects of establishing his claim under *Wilkinson v Downton* [1897] 2 Q.B. 57 - that the book's publication would constitute intentional conduct causing him psychiatric harm, and this would justify an injunction restraining publication of parts of the book pending trial; it being likely at trial that would be held that the tort extended beyond conduct consisting of false words or threats. The Court was also content to proceed on the basis that lack of justification was required, but found that in this case such lack of justification was

present; the act need only be unjustified in the sense that the defendant was not entitled to do it vis a vis the particular claimant. In this case R had accepted a responsibility to use his best endeavours to ensure that O was protected from harmful information, and that was sufficient to mean that there was no justification for his words, if they were likely to produce psychiatric harm. Even if R did not intend to cause harm and was not reckless, the necessary intent could be imputed to him, and it was likely that harm would be established - expert evidence was adduced to show that if O saw any material part of the book, he was likely to want to know more and to suffer grave harm. Although he was unlikely to obtain the book as such, he might well see extracts or quotations from it on the internet and other sources.

Decision of the Supreme Court

On appeal to the Supreme Court the appeal was allowed. In the Court's view, Wright J in *Wilkinson v Downton* had recognised that willful infringement of the right to personal safety was a tort and that the tort had three elements: a conduct element, a mental element and a consequence element; the issues in this case relating to the first and second elements. The conduct element required words or conduct directed towards the claimant for which there was *no justification or reasonable excuse*. The Court of Appeal had treated the publication of the book as conduct directed towards O and considered that the question of justification had therefore to be judged vis-a-vis him, but that was wrong. The book was for a wide audience and the question of justification had to be considered accordingly, and not in relation to O in isolation.

In the Supreme Courts' view there was every justification for the publication. A person who had suffered in the way that R had, and had struggled to cope with the consequences of his suffering in the way that he had, had the right to tell the world about it, and there was a corresponding public interest in others being able to listen to his life story in all its searing detail. Although vulnerable children had to be protected as far as reasonably practicable from exposure to material which would harm them, the right way of doing so was not to expand *Wilkinson v Downton* to ban the publication of a work of general interest. Freedom to report the truth was a basic right to which the law gave a very high level of protection and it was difficult to envisage any circumstances in which speech, that was not deceptive, threatening or possibly abusive could give rise to liability in tort for willful infringement of another's right to personal safety. In this case the right to report the truth was justification in itself.

As to the mental element, the Supreme Court noted that the Court of Appeal had found that the necessary intention could be imputed to R. However, in the Supreme Court's view there was a critical difference between imputing the existence of an intention as a matter of law and inferring the existence of an intention as a matter of fact. The former was a vestige of a previous age and had no proper role in the modern law of tort. The abolition of imputed intent had cleared the way to proper consideration of two important questions about the mental element of the tort. The first was whether, where a recognised psychiatric illness was the product of severe mental or emotional distress, it was necessary that the defendant should have intended to cause illness or whether it was sufficient that he intended to cause severe distress which in fact resulted in recognisable illness. The second was whether recklessness was sufficient. In the Supreme Court's view, the answer to the first question was to

choose the second option: recklessness should not be included in the definition of the mental element. To hold that the necessary mental element was intention to cause physical harm or severe mental or emotional distress struck a just balance, meaning that a person who actually intended to cause another to suffer severe mental or emotional distress bore the risk of legal liability if the deliberately inflicted severe distress caused the other to suffer a recognised psychiatric illness.

The Supreme Court was also inclined to the view - which was necessarily obiter - that the tort was sufficiently contained by the combination of (a) the conduct element requiring words or conduct directed at the claimant for which there was no justification or excuse, (b) the mental element requiring an intention to cause at least severe mental or emotional distress, and (c) the consequence element requiring physical harm or recognised psychiatric illness. In the present case, there was no basis for supposing that R had an actual intention to cause psychiatric harm or severe mental or emotional distress to O. As there was no arguable case that publication of the book would constitute the requisite conduct element of the tort or that R had the requisite mental element, the appeal would be allowed and the injunctions discharged.

Commentary

The decision has been heralded as a victory for press freedom in the sense that the Supreme Court refused to extend the principle in *Wilkinson* and thus provide claimants with another legal mechanism to control the publication of public interest speech. The press and others are already subject to the laws of defamation, confidentiality and misuse of private information, and the law of harassment. These laws provide protection to claimants whose privacy interests are being attacked by the exercise of free speech, and in such cases the courts must balance the right of free speech with those interests and achieve a fair and appropriate balance.

The present case was different from the traditional free speech versus privacy cases where the courts have to balance the privacy or confidentiality rights of the claimant with freedom of speech, press freedom and the public right to know. This is because the information in question did not engage the privacy rights of O, as the information belonged to R - the person who was seeking to publish it. Accordingly, it was necessary for the claimant to prove the commission of the tort of intentional injury as established in *Wilkinson*.

The Supreme Court's decision impacts primarily and directly on the law of tort and the requirements of an action under *Wilkinson*. However the facts of the present case clearly impacted on R's right to freedom of expression and the public right to know, and the Supreme Court's approach, in contrast to that of the Court of Appeal, represent a victory for freedom of speech. The free speech issues were raised because the conduct element of the tort requires words or conduct directed towards the claimant, for which there was no *justification or reasonable excuse*. The Court of Appeal's approach was to consider that question purely from O's point of view and to treat the publication of the book as conduct directed towards O and to assess justification vis-a-vis him alone. The Supreme Court found that the Court of Appeal had erred in that respect, noting that the book was for a wide audience and holding

that the question of justification had to be considered not in relation to O in isolation, but with respect to that wider audience.

That finding opened up the question of public interest – applied as the balancing factor in private information cases (*Campbell v MGN Ltd* [2004] 2 AC 457) and in the Court's view there was every justification for the publication. This was because a person such as R had the right to tell the world about their experiences, and that there was a corresponding public interest in others being able to listen to their life story in all its detail. Further, although the Supreme Court accepted that vulnerable children had to be protected from exposure to material which would harm them, the right way of doing so was not to expand the rule in *Wilkinson* to ban the publication of a works of general interest. The Supreme Court decision also stressed that freedom to report the truth was a basic right to which the law should and did give a very high level of protection.

The decision is welcomed for the Supreme Court's approach – to consider the expansion of the law of tort not purely from a legal or policy point of view, but to consider the human right's implications of such. By clarifying the requirement of purpose and insisting that the court take into account the publisher's intention to exercise his right of freedom of expression and to inform the public opens the way for the court to look at the free speech values of the publication. The decision also appears to apply the well-known and utilized concept of public interest; leaving open the possibility of bringing a claim in these circumstances where there is no strong public interest in publication. It will be interesting therefore to see whether the courts would require the publication to be a matter of genuine public interest – for example a matter of legal, social, constitutional interest – to allow them to use the defence of justification. Whatever the answer to that question, it would appear that the mental element of the tort would prevent an action where the publication – even on matter of trivial importance – was not directed towards an individual and intended to cause harm.

The decision, of course, denies a remedy to arguably a vulnerable claimant, and it appears beyond doubt that the publication will cause some harm to the child. Yet, as the Supreme Court stresses, that fact should not be redressed by the domestic courts unjustifiably developing a tort in a manner which departs from the original intention of the court in *Wilkinson*, and which interferes with free speech.

Dr Steve Foster, Coventry Law School

Privacy – article 8 ECHR – misuse of private information - phone hacking – assessment of damages

Gulati and others v MGN Ltd [2015] EWHC 1482 (Ch)

The facts

The claimants were all persons in the public eye, such as actors and sportsmen or people associated with them. The defendant newspapers had conceded liability for infringements of privacy rights and misuse of private information by obtaining confidential or private information from phone hacking and private investigators which, apart from one claimant, had led to the publication of articles in its newspapers. It was conceded that the articles were themselves an invasion of privacy rights and would not have been published but for the earlier invasions which provided material for them. The claims were also based on the substantial hacking which did not result in articles. The claimants gave evidence as to their horror, distaste and distress at discovering that the defendant's journalists had been frequently listening to aspects of their personal, medical and professional lives by hacking into their voicemails, describing the effect on their lives caused by the distrust that the defendant's newspapers' activities had engendered in them.

The High Court was required to assess the damages payable to claimants for infringements of privacy rights arising primarily from the phone hacking by the defendant newspaper proprietor, and to give guidance on damages payable in other cases.

The decision

The court began by stating that he privacy right to which the UK was obliged to give effect under the Human Rights Act 1998 was reflected in, although not itself created by, article 8 of the European Convention – which guarantees the right to respect for private and family life and one's home and correspondence. In the court's view, a regime in which damages were confined to damages for distress would, to a degree, render privacy rights illusory and fail to provide an effective remedy for breach of article 8. Further, to award damages to reflect infringements of privacy rights in themselves would not amount to the wrongful reintroduction of vindicatory damages; such damages would be truly compensatory (*R (Lumba) v Secretary of State for the Home Departmen*t [2011] UKSC 12 and *Halford v United Kingdom* [1997] I.R.L.R. 471 considered and applied. Thus, compensation could be given in these cases not only for distress and injury to feelings, but also for infringements of privacy rights in themselves, so far as the defendant's acts had impacted on the values protected by the rights contained in article 8.

The High Court stressed that a court had to compensate a claimant properly and fairly for the wrong sustained by the breach of their privacy rights, and that in some cases a global award would be appropriate; in others a more divided-up approach would meet that objective. In the instant case, it was not appropriate to grant a global sum to compensate those claimants about whom articles had been published as the wrongs they had sustained had too great a degree of separation. As a starting point, each article should be treated separately in terms of an award of damages, and the activities of private investigators merited separate awards. It would also be right to reflect (in a separate award) general levels of distress, including distrust of and damage to relationships arising out of the whole pattern of conduct.

The High Court then gave some guidance on how damages in these cases should be assessed, stating that damages in privacy cases should compensate not merely for distress but also, if appropriate, for the loss of privacy or autonomy arising out of the infringement by hacking or other mechanisms. That might, in the Court's view, include a sum to compensate for meaningful damage to dignity or standing, so far as that was not already within the distress element. In the instant case, the loss of privacy or autonomy element would be significant, and existing case law showed an increasing tendency to appreciate and give effect to the seriousness of invasions of privacy; although no previous cases involved the award of sums approaching those claimed by the claimants. The Court noted that the scale of the invasions of privacy in the instant case was much greater than in any of the reported cases: the invasions had been carried out on a daily basis and had resulted in a number of articles over a period, but some had not resulted in any form of publication and none of the reported cases involved these factors. Those, in the Court's view, were very important distinguishing factors which made the direct application in this case of any of the figures in previous cases inappropriate. Further, the Court stressed that a parallel could not be drawn with the bands of damages for harassment claims set out in *Vento v Chief Constable of West Yorkshire* [20012] EWCA Civ 1871, as the nature of the wrong in harassment cases, compared with the wrongs in the instant case, made direct application of the bands established in that case inappropriate.

Before establishing the principles of assessment, below, the Court noted that in the present case that the defendant's practice of phone hacking had been widespread, institutionalised, long-standing and covert, and that they had initially adopted a posture of denial. That conduct, in the Court's view, was capable of constituting an aggravating factor. Further, the apologies tendered by the defendants were not relevant to measuring the totality of the hurt suffered by the claimants; rather they were a sensible tactical move for the purposes of the litigation rather than being born purely of a genuinely litigation-independent contrition and desire to make amends. In the Court's view, they had done nothing to mollify the claimants or reduce their level of hurt.

The Court then laid down the following principles: the disclosure of certain types of private information was more significant than others; information about mental and physical health and significant private financial matters attracted a *higher* degree of privacy, and therefore compensation; information about social meetings attracted a

lower degree of privacy and compensation; information about matters internal to a relationship would be treated as private, and disclosures which disrupted a relationship or were likely to adversely affect a couple's attempts to repair it were likely to be treated as a *serious infringement* deserving *substantial* compensation; the appropriate compensation would depend on the nature of the information, its significance as private information, and the effect on the victim of its disclosure; the effect of repeated intrusions by publication could be cumulative; in relation to distress, the "egg-shell skull" principle applied, so that a thinner-skinned individual might be caused more upset, and therefore receive more compensation, than a thicker-skinned individual who was the subject of the same intrusion; for each year of serious levels of phone hacking the starting point was an award of £10,000.

Applying those principles, the Court made the following awards, firstly to Alan Yentob, the claimant about whom no articles had been published, who was entitled to a global award of £85,000. The information in question was ‘wide-ranging, sometimes highly confidential, usually private, related to a lot of matters of great significance to Mr Yentob and others and was available to use to pursue, develop or stand up stories about people other than the claimant. In one instance it led to speculation whether he was having an affair.

The remaining awards were awarded as aggregate sums. For example, Lauren Alcorn, who had been in a relationship with a footballer (Rio Ferdinand), was awarded £72,500; the information relating to private calls to and from friends and including Rio Ferdinand. This information was used as the basis of a number of articles published about the pair, accusing the footballer of infidelity to his partner. (Other awards were made to Robert Ashworth, a television producer who had been married to a former soap actress, £201,250; Lucy Taggart, an actress known as Lucy Benjamin, £157,250; the actress Shobna Gulati £117,500; the entertainer and actor Shane Roche, known as Shane Richie, £155,000; Paul Gascoigne, a well-known football personality, £188,250; and Sadie Frost, an actress and businesswoman, £260,250).

The Court explained that those awards were greater than any other publicly available award because the invasions of privacy involved were so serious and prolonged. None of the articles in respect of which compensation was awarded would have been published had it not been for the underlying prolonged phone hacking, which was known by the defendants to be wrongful. People whose private voicemail messages were hacked so often and for so long, and had very significant parts of their private lives exposed and then reported on, were entitled to significant compensation. The Court also noted that the claimants had experienced significant disquiet from not knowing what private information had been listened to or discovered by unlawful means. Further, in principle, if justice and the facts required it, the court had jurisdiction to order some sort of inquiry as to what information the defendant had acquired about the claimants, and further awards might be made if there was to be no investigative relief. However, the parties should not assume that they would be great, if they were awarded at all.

Commentary

The decision raises a number of interesting legal and moral issues in an area which has attracted great publicity and general public sympathy for the victims. The events also called into question the ethics of press behaviour and the need for greater legal and other control of its tactics and legal liability.

With respect to the correct balance between press freedom and the protection of privacy, it should be noted that this case raised issues of illegal, repetitive and cynical use of private information by the defendants. Thus, normal concerns of the 'chilling effect' of press regulation and legal sanctions, and any public interest claim which might justify the revelation of certain private information, are barely relevant in these cases. Thus, although, in separate proceedings (*Ferdinand v MGN Ltd* [2011] EWHC 2454) the domestic courts rejected Rio Ferdinand's claim for breach of privacy/misuse of private information for disclosing details of the affair (on the grounds that there was a public interest in the revelation of those details), that was not relevant to the claim brought by Ms Alcorn. This reflects the fact that in this case the claimant is not a public interest figure; equally it reflects the illegality of the tactic employed by the press, for which there can hardly be a public interest. Nevertheless, the fact that the court considered, and rejected, the allegation that she had compromised her right to privacy by previously going public on the affair suggests that the facts which are relevant to the question of the expectation of privacy, may also be relevant to the assessment of damages in these cases.

The court's findings on damages, including the scope and criteria for assessment, are also of interest. Article 13 of the European Convention on Human Rights imposes an obligation on the government to provide an effective remedy for breach of a person's Convention rights. This means that any remedy provided by domestic law, including damages for breach of confidentiality and misuse of private information, should reflect the principles inherent in article 8 of the Convention as well as the case law of the European Court of Human Rights (as required by s.2 HRA). Thus, in the present case, damages were not simply awarded on domestic law principles so as to reflect the distress caused by the hacking and the subsequent publications, but also to compensate for the fact that the individual's private and family life and autonomy had been interfered with.

This is a good example of the 'horizontal' effect of the Human Rights Act: the domestic courts – as public authorities under s.6 - using Convention principles and case law to inform the interpretation and development of private law actions. In this way the courts can be sure that the Convention rights of the individuals – as given effect in domestic law as autonomous legal rights – are applied consistently with the UK's obligations under the Convention; and thus obviating the need, in most cases, for individuals to use the Convention machinery. It will be interesting to see what effect the intended repeal of the 1998 Act would have on this facility. Presumably any new Bill of Rights would include the right to private life, but if it were to prevent the courts from relying on European principles and case law, there will be a danger that

the remedies provided by the domestic courts (in this area) may not meet the demands of the Convention and the European Court of Human Rights.

Turning to the size of the awards made against the press, although the defence of 'chilling effect' is not as relevant with respect to hacking as it is in cases of traditional tactics and publication, it is still necessary that the awards are justified and proportionate. Thus, the European Court has insisted that damages awards against publishers and the press are not unduly disproportionate, even where the damage caused to the claimant is substantial (*Tolstoy v United Kingdom* (1995) 20 EHRR 422); and the same principle applies to costs' awards (*MGN Ltd v United Kingdom* (2011) 53 EHRR 5). In the present type of case the courts have to ensure that any award adequately compensates the individual for breach of their legal and Convention rights. It is also permissible in granting such awards to reflect the fact that the press have broken the law and seriously violated their professional standards; although in this case the High Court insist that the damages represent the loss suffered by the claimants rather than punishment of the press.

Nevertheless, the awards need to be objectively justified and in this respect the High Court justified their size with respect to the level and persistence of the press tactics as well as the level of privacy intrusion in these cases as opposed to previous cases where smaller awards had been given. For example, in *Campbell v MGN Ltd* [2004] 2 AC 457, Naomi Campbell received £2,500 plus £1,000 aggravated damages for the publication of details of her drug therapy sessions and photographs of her leaving such sessions; and in *Weller v Associated Newspapers* [2014] EWHC 1163, £5,000 was awarded to a 16 year old girl for publication of unauthorised photographs, with £2,500 being awarded to younger siblings. In the present case the court felt that these judgments showed an increasing tendency to appreciate, and give effect to, the seriousness of invasions of privacy, and that in retrospect they may have been too low. Provided they do not unduly hamper the press' efforts to report responsibly on matters of genuine public concern, and are awarded in cases such as the present involving clearly unlawful, behaviour, it is submitted that they will not fall foul of the principles of press freedom and the public right to know contained in article 10 of the Convention. Consequently, they offer a severe warning to the press on the courts' view of the seriousness of these and other press tactics which unlawfully and seriously infringe individual privacy.

Finally, with respect to the relevance of the apologies proffered by the defendants, the present decision can be contrasted with the earlier decision in *Brazier and Leslie v News Group Newspapers Ltd* ([2015] EWHC 125 (Ch), where claims alleging phone hacking by a newspaper were struck out because the claims had been compromised by a settlement agreement of earlier claims for phone hacking. In that case, although the claimants had settled the earlier claims before they knew the full extent of their claims, they had been aware of their lack of knowledge and had chosen to settle. In the present case, however, the court found that the apologies were given for tactical reasons and that in any case they did not reduce the effect of the very serious breaches of privacy and principles of responsible journalism committed by the defendants

Dr Steve Foster, Coventry Law School

Competition law – mixed collective labour agreements – application of article 101(1) TFEU - Albany exception

C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden* [2015] 4 C.M.L.R. 1 (ECJ (1st Chamber)) ECLI:EU:C:2014:2411

The Facts

The European Court of Justice was asked by a Dutch national court to consider whether EU Competition law should apply to a Dutch collective labour agreement (CLA) reached between employers' representatives (the Vereniging van Stichtingen Remplaçanten Nederlandse Orkesten ('VSR')), an organisation acting for employed musicians (FNV Kunsten Informatie en Media ('FNV')) and an association of self-employed musicians (Nederlandse tookunstenaarsbond ("Ntb"). The agreement concerned the minimum fees that should be earned by musicians playing for Dutch orchestras. An important feature of this case is that Dutch law allowed self-employed musicians to join the employees' trade organisation. The CLA contained provisions on the minimum fees to be paid not only to employees of an orchestra but also to self-employed musicians who work for orchestras on an occasional basis as substitutes for employed musicians.

Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) outlaws a wide variety of anticompetitive practices including, in principle, any attempt by a trade association to dictate the terms on which its members should enter into different forms of contracts with third parties. Under what is often known as the Albany exception (C-67/96, Albany, EU:C:1999:430.), the European Court of Justice has recognised that collective labour agreements between employees' organisations and employers' associations can serve a number of worthwhile socio-economic purposes and provided these agreements are designed to improve the working conditions of employees they will not be scrutinised under article 101(1) TFEU; even though such agreements prevent members of the employees' association (typically a trade union) from negotiating directly with employers.

In the present case, the Dutch National Competition Authority (NCA) (the Nederlandse Mededingingsautoriteit (NMa)) considered that the collective labour agreement between the VSR and the FNV infringed article 6(1) of the Dutch Law on competition (Mededingingswet, 'the Mw') because the agreement contained provisions concerning self-employed musicians. In general competition law terms, the NMa stated that self-employed service providers are normally treated as individual "undertakings" - loosely meaning businesses or certain individuals that exercise a commercial activity - and any attempt by a trade body to dictate the terms on which such undertakings should negotiate with third parties would usually constitute an unlawful restriction of article 6(1) of the Mw.
Following NMa's determination VSR and Ntb terminated the CLA. FNV sought a declaration from a Dutch national court concerning the legality of the mixed CLA and

an appellate court then referred the issue of its compatibility with EU competition law to the European Court of Justice under the preliminary ruling procedure of article 267 TFEU.

The ruling of the European Court of Justice (ECJ)

In the first half of the judgment the ECJ reaffirms existing understanding concerning the application of competition law to CLAs: the Albany ruling remains good law. The Court considers that workers' employment conditions could be undermined if collective labour agreements between employers' and employees' representatives could be exposed to scrutiny under article 101.

In its preliminary observations the ECJ notes too that although in general terms self-employed musicians perform the same activities as employed musicians, any self-employed musician should "*in principle*" be treated as an "undertaking" for the purpose of Article 101 TFEU because services are being provided for remuneration by independent economic operators to clients in a specific commercial market. Furthermore, in the Court's view, an organisation negotiating on behalf of self-employed service providers should not be treated as a social partner but should be characterised as an association of undertakings for competition law purposes (paragraph 28 of the judgment). In broad terms, the ECJ therefore rejects the idea that trade associations of self-employed service providers should automatically benefit from an Albany-style exemption.
The Court observes that the TFEU does not contain any provisions encouraging self-employed service providers to conduct negotiations with employers on standard terms of engagement and working conditions. This contrasts with the position for employees where articles 153 and 155 TFEU provides such encouragement. The Court concludes that a CLA which has been negotiated by an employees' organisation on behalf of its self-employed members does not amount to a collective negotiation between employers and employees under the Albany exception and could not be excluded "*by reason of its very nature*") from the scope of article 101 (1) TFEU (at paragraph 30.

At this juncture, the Court's reasoning points strongly towards a finding that the NMa's interpretation would be upheld, but that expectation is then quickly dispelled. The second half of the judgment analyses the conditions under which working conditions for self-employed musicians that are contained in a mixed CLA can fall outside competition law scrutiny. The ECJ identifies a category of workers which it calls the "false self-employed", namely "*service providers* [who are] *in a situation comparable to that of employees*" who, subject to certain conditions, can benefit from an Albany-type exemption.

In its subsequent analysis, the Court recognises that the boundaries between the self-employed (as undertakings) and employees are not easy to determine in a fluid employment market. The ECJ implicitly recognises that labels do not count; what matters is the real position in the marketplace. The Court notes that it has previously accepted that persons labelled self-employed under national law might actually be workers (employees) under EU Law because their actual working conditions mask a form of employer-employee relationship. In the view of the Court, an independent service provider might not be an undertaking for competition law purposes if that

provider does not determine independently its own conduct on the market, is entirely dependent on its principal, does not bear any of the financial or commercial risks arising out of the employer's activity and operates "*as an auxiliary"* within the employer's undertaking. Whether a service provider is an 'employee' for EU Law purposes should, says the Court, be assessed by reference to:

> "…objective criteria that characterise the employment relationship, taking into consideration the rights and responsibilities of the persons concerned. In that connection, it is settled case-law that the essential feature of that relationship is that for a certain period of time one person performs services for and under the direction of another person in return for which he receives remuneration." (At paragraph 34)

Ultimately a national court must determine is whether the reality of the relationship between the service provider and the employer is one that is more akin to an employee than not. This is to be determined by the degree of independence enjoyed by the service provider and whether that provider takes on any of the risks normally borne by the employer. In the orchestral context, arguably national courts would have to draw up a list of employers' concerns (such as making ticket sales, creating appropriate acoustics, securing appropriate administrative support etc.) and analyse whether any of those concerns are shared by self-employed musicians. If the latter do not share any of those employer burdens, and they cannot act independently in any meaningful sense when benchmarked against the tasks performed by employees of the orchestra, then a mixed CLA containing provisions relating to these "false self-employed persons" will not infringe article 101(1) TFEU.

The ECJ is essentially inviting national courts to assess whether the service provider has become sufficiently integrated within the employer's team to be viewed as creating an economic link with the employer. Relevant criteria for determining that link centre on the degree of independence enjoyed by the service provider. If a self-employed substitute musician is subject to the same employer requirements as employed musicians concerning the number of hours worked as well as attendance at venues for rehearsals and concerts then the self-employed musician would be considered as performing a task akin to that of an employee. For the purpose of assessing whether competition law concerns are triggered it does not appear to matter that the collectively negotiated remuneration conditions of the self-employed are different to those enjoyed by employees.

Commentary

This is a sensible judgment and one that has not received the media attention it deserves. The ECJ recognises that in a social market economy the boundary between employees and the self-employed has become ever more fluid as businesses search for more flexibility in their recruitment strategies to meet peaks and troughs of demand. The ECJ implicitly recognises that although a number of self-employed persons relinquish their employee status as a lifestyle choice, there are many self-employed persons who lose their jobs involuntarily and who then find themselves rehired by their former employer as independent contractors on a temporary basis to meet specific needs. Those who fall within the latter category have little or no protection in

terms of their working conditions when compared to employees. By applying, *sub silentio*, the general EU principle of equivalence to secure parity of treatment for the self-employed and the employed within admittedly tight boundaries, the judgment should improve the working conditions of the self-employed in certain sectors of the economy.

The ECJ's ruling implicitly recognises the realities of the marketplace in the performing arts. If an employee member of an orchestra falls ill and needs to be replaced urgently, the management of an orchestra is helped by having ready access to a pool of independent service providers on which it can draw quickly in the knowledge that the terms and conditions of recruitment of those self-employed providers has been agreed collectively in advance. Independent providers know they will be accorded equal status to employees and the remaining elements of the hire can be agreed quickly.

However, possibly the judgment, raises more issues than it resolves. One question mark concerns the extent to which the ruling applies to situations which do not involve the use of substitutes for existing employees. If, for example, a conductor decides that an orchestral performance would in future benefit from using four violinists instead of the usual three, would the use of an additional temporary independent self-employed violinist performing under the same conditions as the existing three violinists fall within or without the scope of the ECJ's judgment if the standard terms of engagement (including fees) for independent service providers have been included in the collective labour agreement? The position is unclear. In such a situation, the ECJ's probable starting point would be that an independent service provider is an undertaking for competition law purposes until such time that the same service provider can be judged to be performing essentially the same tasks as an employee of that orchestra; at which point the service provider becomes an employee for EU Law purposes, even if national law accords the service provider a different employment status. On that basis, it would be possible to argue that the additional independent service provider is performing the same task as one of the three existing employed violinists and so the judgment might be expected to apply because it would be possible to judge whether the independent provider is subordinated to the needs of the employer, has no independence and is made subject to the same performance requirements as employees (attendance at rehearsals, number of hours worked etc.). If, however, the conductor wishes to recruit temporarily an independent musician in circumstances where the orchestra has no existing equivalent musical expertise then the situation might be viewed differently, with the independent musician's CLA terms subject to competition law scrutiny, unless a national court could be satisfied that the independent musician would be subject to the same terms and conditions as employees of the orchestra who played different instruments. For decisions to rest on such fine distinctions clearly creates undesirable uncertainty.

A further question arises as to whether the judgment covers situations outside the performing arts. In many sectors of the economy, freelancers, locums and other self-employed service providers may have little collective negotiating power on remuneration related issues compared to their unionised employed colleagues. If a broad view of the ECJ's judgment is taken, then trade associations representing such independent service providers across many industrial and professional sectors may argue that where their members are essentially performing comparable tasks to

employed colleagues then employers' representatives should feel more confident that any collective agreement on fees agreed by those trade associations on behalf of their self-employed members would not infringe article 101. One might argue, for example, that there is little or no conceptual difference between a mixed team of musicians performing a classical music concert and a mixed team of surgeons operating on a patient. Each team has its defined goals and operates within narrow practical and/or regulatory limits; each team member (whether labelled employee or self-employed) knows their place in that team and their label has no bearing on the tasks to be performed. The *Kunsten* judgment could therefore be readily considered as having a more general application beyond the performing arts in circumstances where categories of "false self-employed" workers can be identified.

There are no indications yet from any subsequent court judgments that such a broad legal interpretation flows naturally from the ECJ's ruling, but many trade associations covering the activities of the self-employed will be contemplating the possibility that the judgment strengthens their ability to negotiate minimum fees on behalf of their self-employed members without fear of breaching competition law. This particular issue is highly topical and one that we might expect to reach the courts before long.

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