

THE CAMBRIDGE LAW JOURNAL

VOLUME 61, PART 3

NOVEMBER 2002

CASE AND COMMENT

APPEALS

APPEALS in cases noted in earlier numbers of the *Journal* have now been disposed of as shown:

Aneco Reinsurance Underwriting Ltd. v. Johnson & Higgins Ltd., noted [2000] C.L.J. 446. Appeal dismissed: [2001] UKHL 51.

Turner v. Grovit, noted [2000] C.L.J. 45. Question on the interpretation of the Brussels Convention of 1968 referred by the House of Lords to the European Court of Justice: [2001] UKHL 65, noted [2002] 1 All E.R. 960.

ENGLISH PUBLIC POLICY INTERNATIONALISED—AND CONVERSION CLARIFIED TOO

WAR may be hell but it's a godsend for litigators. Having previously ruled on the threshold questions of effective service of the writ and State immunity, and then in respect of an allegation of perjured evidence, the House of Lords was called on in *Kuwait Airways Corporation v. Iraqi Airways Company (Nos. 4 & 5)* [2002] UKHL 19, [2002] 2 W.L.R. 1353 to consider the merits of this complicated case arising out of Iraq's invasion and annexation of Kuwait in August 1990.

Pursuant to the invasion and annexation, which were condemned by the United Nations Security Council, Iraqi forces had seized and removed to Iraq ten commercial aircraft belonging to Kuwait Airways Corporation (KAC). A month later, on 17 September, the Revolutionary Command Council (RCC) of Iraq adopted RCC resolution 369, dissolving KAC and transferring all its property

worldwide, including the ten aircraft, to Iraqi Airways Company (IAC), a State-owned commercial enterprise. Days before coalition forces launched UN-authorized military action against Iraq in January 1991 (in which four of the planes were destroyed), KAC commenced proceedings in the Commercial Court against IAC, claiming the return of its aircraft or payment of their value, and damages. Their Lordships subsequently ruled in *Kuwait Airways Corporation v. Iraqi Airways Company* [1995] 1 W.L.R. 1147 that IAC was entitled to State immunity in respect of acts done by it prior to the coming into force of RCC resolution 369, with the result that the case proceeded only in respect of subsequent acts, namely IAC's retention and use of the aircraft after this date. At trial, the proceedings were split between issues relating to liability and issues relating to damages. Only the former, and only those aspects of them touching on the relationship between public international law and English law, will be discussed in this part of this note.

As the alleged tortious acts took place abroad prior to the coming into force of the Private International Law (Miscellaneous Provisions) Act 1995, the court was called on to apply the common-law "double actionability" rule of English private international law, *viz.* that to be actionable in the English courts, the acts complained of must be such that they would be tortious if done in England or Wales and, in addition, must be civilly actionable under the law of the country where they occurred. The problem for KAC was that, in order to maintain a cause of action under either limb, it had to have owned the aircraft when IAC performed the acts in question. The case therefore turned on the effect to be given to RCC resolution 369, which purported to vest title to the aircraft, then in Iraq, in IAC—with the result, on its face, that IAC, not KAC, was the lawful owner of the planes during the period when the acts complained of took place.

Under English conflicts rules, the transfer of title to tangible movable property is generally governed by the law of the country where the property was at the time. In this regard, in an application of the "(foreign) act of State" doctrine, the English courts are generally bound to give effect to foreign governmental acts pertaining to property situated, at the time of those acts, within the territory of the foreign State in question. The English courts will not call into question such acts—or "sit in judgment" on them, as the saying goes. But the foreign act of State doctrine is subject to an exception. As held by the House of Lords in *Oppenheimer v. Cattermole* [1976] A.C. 249, the courts will decline to recognise the acts of a foreign State in its own territory if to do so would be contrary to English public policy.

Affirming, for the most part, the judgment of the Court of Appeal, which in turn had upheld the decision of Mance J. at first instance, a majority of the Lords refused, in the event, to give effect to RCC resolution 369 for the purposes of either the English tort of conversion, under the first limb of the double actionability rule, or the Iraqi action for “usurpation”, under the second. Iraq’s invasion and annexation of Kuwait constituted flagrant violations of established rules of international law, as evidenced by the international reaction to them in the form of a raft of resolutions passed by the UN Security Council under Chapter VII of the Charter. To recognise RCC resolution 369, passed in furtherance of the invasion and annexation, would therefore be contrary to English public policy. Finding support in the judgment of Lord Cross, with whom the four other Lords agreed, in *Oppenheimer v. Cattermole* (the ratio of which had been restricted to grave infringements of human rights), their Lordships extended the public policy exception to the foreign act of State doctrine to encompass flagrant breaches of public international law. In this regard, Lord Steyn added the rider that not every breach of public international law will give rise to the public policy exception, and Lord Nicholls, with whom Lord Hoffmann concurred, spoke of breaches of rules “of fundamental importance”.

Nor was the court prevented from taking cognisance of the international unlawfulness of Iraq’s actions by the additional, broader principle of non-justiciability enunciated by Lord Wilberforce in *Buttes Gas and Oil Co. v. Hammer (No. 3)* [1982] A.C. 888, a non-territorially limited doctrine which states that the English courts will not adjudicate upon the legality, under either domestic or international law, of the transactions of foreign States. Their Lordships pointed out that Lord Wilberforce’s concern in *Buttes* had been directed towards a lack of “judicial or manageable standards” by which to judge such issues. The present case was quite different. Here, the breach of a rule of international law was plain and, indeed, acknowledged by Iraq in its acceptance of the Security Council-mandated ceasefire conditions in the wake of the Gulf War.

The House of Lords’ decision is a deft and defensibly progressive one, reflective of the English courts’ move in recent times towards a more direct engagement, where English law permits, with the United Kingdom’s international responsibilities. Its emphasis on public international law as public policy, rather than as a source of obligation, enabled the court to side-step the fact that, formally speaking, international law binds the “State”, as an internally undifferentiated legal construct, and not the judiciary as such—or, indeed, any other specific organ of government. The

same emphasis also allowed their Lordships to overcome the constitutional objection that Security Council resolutions have no direct effect in English law. At the same time, the limitations placed by Lords Steyn and Nicholls on the court's "public international law" extension of the public policy exception obviously raise important questions. All in all, *Kuwait Airways (Nos. 4 & 5)* represents an intriguing development in the ever more nuanced relationship between public international law and English law.

ROGER O'KEEFE

Apart from the more high-profile questions of public and private international law noted above, *Kuwait Airways* also raised some nice issues about the often enigmatic English tort of conversion.

To recapitulate, ten aircraft were grabbed in Kuwait by invading Iraqi forces in August 1990, taken to Iraq, and then purportedly incorporated in IAC's fleet. Four of them were later moved to Mosul and destroyed by Allied bombs: with these we will not be concerned. The other six, which form the subject of this note, were sent to Iran for safe-keeping, survived and were eventually returned to KAC. Nevertheless KAC remained less than satisfied, since it had lost the use of them in the meantime—being constrained to charter substitutes—and had had in addition to pay Iran some \$20 million for looking after them. These sums, *inter alia*, KAC sought to recover from IAC under the rubric of conversion.

The first query that arose was whether IAC had ever converted the aircraft at all. This may seem a disingenuous question: but one must remember that State immunity cloaked all events before RCC resolution 369 on 17 September, a period that included the aeroplanes' physical seizure and delivery to a doubtless grateful IAC. KAC therefore had to limit their claim to subsequent, less unequivocal, acts of IAC, notably their conduct in registering and insuring the aircraft, having them repainted, and even occasionally flying them. Were these acts sufficient to amount to conversion? IAC said not. They had not (they observed) taken, destroyed or disposed of the aircraft, or otherwise in any way interfered with KAC's possessory rights in them. All they had done was to make use of them and generally act as an owner might: but such activities were not, as such, conversion.

This pettifogger's point convinced neither the Court of Appeal nor the House of Lords. IAC had, it was said, gone further than mere use or minor interference: they had been "asserting rights inconsistent with KAC's rights as owner" (Lord Nicholls) or

“manifest[ing] an assertion of rights or dominion over the goods which [was] inconsistent with the rights of the plaintiff” (Lord Steyn), and that was enough to make them liable.

On the facts this is intuitively—and indeed legally—correct. But (with respect) it could have been better expressed. Take a simple example. Suppose you borrow my BMW and tell everybody it is yours. Besides showing abominable manners, you undeniably assert a right to the car inconsistent with mine. But equally incontrovertibly—*pace* Lords Nicholls and Steyn—you do not convert it. As section 11(3) of the Torts (Interference with Goods) Act 1977 pithily puts it, denial of title is not of itself conversion. Indeed, imagine you go further and actually sell (or rather, affect to sell) the vehicle to a finance company. An unequivocal claim of a right entirely at odds with mine, certainly. But a conversion? Unless and until you physically deliver it, the answer is a clear “No”: see, for example, *Lancashire Waggon v. Fitzhugh* (1861) 6 H. & N. 502, *Consolidated Co. v. Curtis* [1892] 1 Q.B. 495, 498.

However, if assertion of inconsistent rights is not the touchstone of conversion, what is? The answer, it is suggested, is: some indication that the defendant intends not only to promote his own spurious right, but to block or hinder the claimant in exercising his genuine one. So while you can say you own my BMW with impunity, you convert it as soon as you go further and tell me I can't have it back, or put a barbed wire entanglement round it (rather like the defendant in *Oakley v. Lyster* [1931] 1 K.B. 148, who barred the plaintiff from collecting his own building rubble). And, effectively, this is what IAC had done: what mattered was not so much their own claims with regard to KAC's aircraft but the clear indication that beyond any doubt they would resist any claim by KAC to exercise the rights they had.

Secondly, IAC raised a neat point about KAC's claim for damages for loss of use, including the expense of chartering replacements. IAC pointed out that, even if they had never touched the aircraft, KAC would still have been unable to use them—the Iraqi Government had, after all, abstracted them in the first place and would hardly have given them back to KAC without a fight. It followed, said IAC, that any loss of use was not the result of any conversion committed by them, but rather of the original seizure. Now, this kind of causation plea—“if I hadn't done it you would still have suffered the same loss from other events”—is always awkward. In some torts, such as negligence, it is on principle available; elsewhere, as in deceit, it is excluded (*e.g.*, *Slough Estates plc v. Welwyn Hatfield District Council* [1996] 2 E.G.L.R. 219). Lord Nicholls, faced with a straight choice, declined to admit it

into the tort of conversion. A converter, his Lordship said, was liable for depriving the owner of possession: the very act of receiving another's chattel obliged him personally to let that other have his property back. For this reason, it was beside the point that some other factor might equally have deprived him of it anyway. Despite the apparent violence to generally accepted principles of causation, there is (it is suggested) much to be said for this view. It certainly makes for simplicity: furthermore, where serial conversions are in issue, there is something unattractive about the plea of subsequent converters that the entire loss of use claim should fall on the first converter and that they should escape scot-free.

The third question concerned consequential damages and the rule of remoteness. Was a converter liable expansively, for all direct consequences of his conversion, or only in a more limited way, for such results as were foreseeable? In the House of Lords the issue strictly did not arise; nevertheless, Lord Nicholls chose to discuss it. Once again, the message from other torts was mixed. In negligence foreseeability governs, as it does in nuisance and *Rylands v. Fletcher*; by contrast, in deceit direct causation is the test. The Court of Appeal in *Kuwait* (see [2001] 3 W.L.R. 1117) had inclined to the "foreseeability" view as regards conversion. Lord Nicholls was not so sure, however, and his reason was refreshingly original. Converters, he observed, were less homogeneous than defendants in deceit or negligence suits, ranging as they did from thieves to mere dupes. And if so, there was no reason why the rule of remoteness should not equally vary: direct consequences for bad faith defendants, but foreseeability for those who acted in good faith. This may be a novel approach: but it seems (if one may say so) eminently sound. Moreover, if his Lordship's suggestions are taken up, similar reasoning could equally well apply to other torts, such as assault or trespass to goods. We may have a law of torts rather than a law of tort: but there is no necessary reason why all instances of one tort should be subject to the same rules merely because they happen to share the same name.

ANDREW TETTENBORN

HUMAN RIGHTS AND THE MANDATORY DEATH PENALTY IN THE
PRIVY COUNCIL

At common law the penalty for murder was death. This simple rule came to apply to many territories of the Crown. It persisted, sometimes in modified form, in many territories now independent States. At independence such States adopted entrenched Constitutions heavily influenced by the European Convention on Human Rights (ECHR). The final appeal from several of these States lies to the Judicial Committee of the Privy Council.

In three appeals, the Privy Council (Lords Bingham, Hutton, Hobhouse, Millett and Rodger) considered whether the mandatory nature of the sentence offended against the constitutional prohibition on “inhuman or degrading” punishment: *Reyes v. The Queen*, *R. v. Hughes*, *Fox v. The Queen* [2002] UKPC 11, 12, 13, [2002] 2 W.L.R. 1034, 1058, 1077. The appeals were heard together, although separate judgments were given. In *Reyes* (from the Court of Appeal of Belize), the Crown took no part. However, in *R. v. Hughes* and *Fox v. The Queen* (from the Eastern Caribbean Court of Appeal (respectively St. Vincent and St. Lucia)) the Board heard full argument on all points, including those relevant to the issues in *Reyes*.

In *Reyes*, the defendant, a man of good character, argued with a neighbour about a fence next to his home. He fetched a gun and shot dead the neighbour and the neighbour’s wife before shooting himself in an unsuccessful suicide attempt. Under the Criminal Code (modelled on the British Homicide Act 1957) murders are classed by reference to certain factors. “Class A” murders, of which murder “by shooting” is one, attract the mandatory death penalty.

Under the Constitution the defendant was entitled (*inter alia*) to a fair hearing before an independent and impartial court established by law (section 6) and not to be subjected to “inhuman or degrading treatment or punishment” (section 7). He could not argue that the death penalty itself breached these rights: the Constitution expressly contemplated execution as an exception to the right to life (section 4(1)). He complained, instead, of the absence of any discretion for the sentencing court to take into account factors in mitigation.

The facts and law in the other appeals were similar, save that under the applicable legislation all murders attracted the mandatory death sentence.

Previously, the mandatory nature of the death penalty had gone unquestioned in many cases before the Privy Council; and in *Ong Ah Chuan v. Public Prosecutor* [1981] A.C. 648 the Board had

expressly held that a such a sentence for drug trafficking in Singapore was constitutional.

The Board observed (*Reyes* at paras. [11] *ff.*) that it had long been recognised that murder could involve widely varying degrees of culpability. This proposition was supported by citation of a raft of material, judicial and otherwise, from around the common law world. Some jurisdictions, such as India, permitted judicial discretion and reserved death for the worst cases. In others, as a matter of executive clemency, the defendant could seek mercy. This was the position in the United Kingdom before abolition, when many sentenced to hang were reprieved by the Home Secretary. It was the position too in Belize, where clemency was vested in an Advisory Council established by the Constitution under a chairman with a judicial qualification and comprising “persons of integrity and high national standing”.

The Privy Council set out (*Reyes* at paras. [25] *ff.*) “the approach to interpretation”. In the familiar expression, a “generous and purposive interpretation” was to be given to constitutional provisions protecting human rights. The court had “no licence to read its own predilections and moral values into the Constitution”, but was “required to consider the substance of the fundamental right at issue and ensure contemporary protection of that right”. This had to be done “in the light of evolving standards of decency that mark the progress of a maturing society”: *Trop v. Dulles* (1958) 356 U.S. 86, citing the observation in *Weems v. United States* (1910) 217 U.S. 349, 378 that the Eighth Amendment (“cruel and unusual punishment”) might “acquire meaning as public opinion becomes enlightened by a humane justice”.

The Crown had argued that public opinion, which in any event had not been consulted, was not a valid basis for rendering unconstitutional that which was formerly constitutional. The Board emphasised (citing *S. v. Makwanyane* 1995 (3) S.A. 391) that it was *not* concerned to give effect to public opinion, since this would render constitutional adjudication unnecessary. Rather,

In considering what norms have been accepted by Belize as consistent with the fundamental standards of humanity, it is relevant to take into account the international instruments incorporating such norms to which Belize has subscribed.

Those instruments included the ECHR (until independence), the Universal Declaration of Human Rights (1948) (at independence) and regional treaties, each of which contain in some form the rights on which the defendant relied. The Board emphasised that it was not concerned with the narrow question of whether such instruments had

the effect of incorporating rights into domestic law, nor even in fact with whether the State was actually a party to the relevant instrument. Rather, although States were

not bound to give effect in their Constitution to norms and standards accepted elsewhere ... the courts will not be astute to find that a Constitution fails to conform with international standards of humanity and individual rights, unless it is clear, on a proper interpretation of the Constitution, that it does.

The Board then cited (*Reyes* at paras. [31] *ff.*) decisions of no fewer than seven jurisdictions, the European Court of Human Rights, the Inter-American Commission on Human Rights and the Human Rights Committee of the International Covenant on Civil and Political Rights (1977). Two themes emerged from this material: that any sentence (death or otherwise) will be hard to square with basic constitutional rights where it is grossly disproportionate to the culpability of the offence; and that death is a uniquely severe punishment which consequently calls particularly for the exercise of discretion before it is imposed. Accordingly it was held (*Reyes* at para. [43]) that a process was inhumane which required a sentence of death, however much mitigation there might be. The Board left open whether there could ever be a provision for a mandatory death penalty in particular circumstances which was sufficiently discriminating to obviate any inhumanity in its operation.

Two additional points were considered. First (*Reyes* at paras. [44] *ff.*), whether any lack of humanity in the process was corrected by the existence of an Advisory Council or similar body whose procedures were amenable to judicial review (*Lewis v. Attorney-General of Jamaica* [2001] 2 A.C. 50). The Board held that the State could not rely on clemency as part of the process without asserting that the Council had a role in sentencing; yet the Council, even with constitutional safeguards, was not an “independent and impartial court” (cf. now *Stafford v. United Kingdom* (ECHR, 28 May 2002, noted at p. 508 below) on the Home Secretary’s power to set the tariff for prisoners subject to the mandatory “life” sentence).

The second point applied to St Lucia and St Vincent, whose Constitutions incorporated a “savings clause”:

Nothing contained in or done under the authority of any law shall be held to be inconsistent with [the prohibition on inhuman punishment] to the extent that the law in question authorises the infliction of any description of punishment that was lawful [before independence].

The Crown argued that the relevant words of the Criminal Code, “whoever commits murder is liable ... to suffer death”, were a

“description of punishment”, *i.e.* the mandatory death sentence, “contained in” a law which “authorised” the infliction of that punishment, which was lawful before independence. Thus the mandatory death penalty could not be held inconsistent with the Constitution. The Board’s response (*Hughes* at para. [47]) illustrates the corollary of the “generous and purposive” interpretation to which the individual is entitled. The pre-independence law, it held, not only authorised the death penalty for murder but *required* it. To the extent that it required it the law was not protected by the savings clause. There is an elegant sleight of hand here: when the defendants argued that their “punishment” was inhuman, “punishment” meant the *mandatory* death penalty; when the Crown argued that that “punishment” was authorised by a pre-independence law, “punishment” became the death penalty *simpliciter*.

Two techniques of modern constitutional interpretation are particularly illustrated in these decisions. First, a certain ambiguity as to the source of the imperative to change an established practice: the key passage in *Reyes* refers to “contemporary protection of the right”, “evolving standards of decency” and “the progress of a maturing society” before eliding into international material. Secondly, the very volume of such material. Only 10 of the 34 cases cited in *Reyes* were decided in the United Kingdom. Such internationalism tends to add legitimacy and authority to the decision. When, however, their Lordships feel compelled (*Hughes* at para. [35]) to cite the Court of Appeal of Botswana in support of the simple proposition that derogations from Constitutional rights should be narrowly construed, one wonders whether the technique may not perhaps have been taken a little far.

THOMAS ROE

WHAT ARE PRISONS FOR?

LET us start with what seems like an easier question: how long should a prison sentence be? The Criminal Justice Act 1991 confirmed that the basic rule is that the length should be commensurate with the seriousness of the offence committed (section 2(2)(a) of the 1991 Act, now section 80(2)(a) of the Powers of the Criminal Courts (Sentencing) Act 2000). Exceptionally a sentence may be longer, in order to protect the public from serious harm (section 2(2)(b) of the 1991 Act, now section 80(2)(b) of the Powers of the Criminal Courts (Sentencing) Act 2000).

Discretionary life sentences fall into this latter category: the indeterminate sentence is imposed because of the risk that the offender is perceived to present to the public (see section 80(4) of the Act of 2000; *Baker* [2001] 1 Cr.App.R.(S) 551). These longer than commensurate life sentences are seen to fall into two parts: one, the “tariff” (though the Lord Chief Justice in a Practice Statement on 31 May 2002 stated that the term “minimum term” should now be used), commensurate with the seriousness of the offence, and the second for public protection. Because the factors which cause an offender to be dangerous may vary over time, the European Court of Human Rights has long held that those detained for such reasons are entitled to a review of that part of their sentence at regular intervals by a “court”. After years of reluctance the British Government agreed in the 1991 Act to create panels of the Parole Board, chaired by judges, to review whether post-tariff discretionary lifers are still dangerous. But the detention of those sentenced simply for “punishment” is justified by the original sentencing decision, even though their release date is fixed in accordance with a flexible and discretionary early release scheme.

A life sentence is imposed mandatorily on those convicted of murder, but the Government has until now resisted the suggestion that murderers should also have the chance of an oral hearing before a panel of the Parole Board. The Home Secretary has also held on to his right to fix the first or “tariff” part of the sentence in murder cases. The case of *Stafford v. United Kingdom* (2002) 152 N.L.J. 880, *The Times* 31 May 2002, concerned the power of the Home Secretary not to accept a recommendation of the Parole Board to release on licence an offender subject to a mandatory life sentence, whose previous licence had been revoked. The ECHR acknowledged (at para. 58) that the Convention is a dynamic tool:

Since the Convention is first and foremost a system for the protection of human rights, the Court must ... have regard to the changing conditions in Contracting States and respond, for example, to any emerging consensus as to the standards to be achieved ... It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. A failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement.

Noting that the Home Secretary’s decision-making power in this field had been steadily eroding, the Court went on to hold (at para. 79) that:

it may now be regarded as established in domestic law that there is no distinction between mandatory life prisoners,

discretionary life prisoners and juvenile murderers as regards the nature of tariff-fixing. It is a sentencing exercise. The mandatory life sentence does not impose imprisonment for life as a punishment. The tariff, which reflects the individual circumstances of the offence and the offender, represents the element of punishment. The Court concludes that the finding in *Wynne* (1994) 19 E.H.R.R. 333 that the mandatory life sentence constituted punishment for life can no longer be regarded as reflecting the real position in the domestic criminal justice system of the mandatory life prisoner.

The Court therefore accepted that all life sentences are made up of two parts: the first, the punishment element of the sentence, is a sentencing exercise, not the administrative implementation of the sentence of the court. The second part, imposed for the protection of the public because of the offender's dangerousness, should be reviewed regularly by a body with a power to release and under a procedure with the necessary judicial safeguards, including, for example, the possibility of an oral hearing. The Court held unanimously that there had been a violation of both Article 5(1) and Article 5(4) of the Convention in the case before it. The Home Secretary should not have the power to detain post-tariff lifers against the recommendation of the Parole Board.

The European Court of Human Rights has spoken and the British Government, like Shakespeare's schoolboy, creeps unwillingly towards reform. The Home Secretary appears to have reluctantly accepted that this means that he has lost the power to decide the release of adult murderers whose tariffs have expired. However, he is still determined to maintain the power to fix the tariff, having taken into account the view of the trial judge and Lord Chief Justice. Will murderers now have the right to an oral hearing?

If life, or indeterminate, sentences are made up of two parts in this way, can the same be said of determinate sentences which, for the protection of the public, are expressly longer than commensurate? Elias J. held in *R. (Giles) v. Parole Board and the Home Secretary* [2001] EWHC (Admin) 834 that there was no distinction between a person who is, for example, subject to a sentence of two years as punishment and ten years preventative sentence, and a discretionary life sentence prisoner. But the Court of Appeal (see [2002] EWCA Civ 951) has reversed this bold decision. Inexplicably the Court of Appeal took encouragement from the ruling of the European Court of Human Rights in *Stafford* to decide that the length of any determinate sentence is a judicial decision determined at the time of sentence. This decision is understandable on pragmatic grounds: Elias J.'s application of Article 5(4) to longer than commensurate sentences would have

demanded not only greater clarity from judges when imposing sentence, but also a large increase in Parole Board funding. But on principle the Court of Appeal's decision makes little sense. The Court has failed to acknowledge that the length of a prison sentence of four years or more is not determined by the judge when sentencing: that decision lies in the hands of the Parole Board, who focus on questions of risk.

The underlying problem is the continuing uncertainty about what prison sentences are for; indeed what prisons are for. The White Paper, *Justice for All* (CM 5563), published in July 2002, stresses yet again the need for a "stronger focus" on public protection. But it also acknowledges that longer sentences do not necessarily reduce crime. To pursue comparison with Shakespeare's schoolboy, the Government should take its shining morning face to school and learn the lesson that those who are to be detained "simply" for public protection deserve a system which pays much greater respect to their many human rights, of which the right to liberty is but one.

NICOLA PADFIELD

ASSISTED SUICIDE AND PERSONAL AUTONOMY

THE European Court of Human Rights recently confirmed that the exceptionless prohibition of assisted suicide under section 2(1) of the Suicide Act 1961, which had been unsuccessfully challenged by the applicant in the House of Lords because of its effects on persons physically unable to commit suicide unassisted by another (*R. (Pretty) v. DPP*, [2001] UKHL 61, [2001] 3 W.L.R. 1598, noted by Keown (2002) 61 C.L.J. 8), is compatible with the United Kingdom's obligations towards the applicant under the European Convention on Human Rights: *Pretty v. United Kingdom*, judgment of 29 April 2002. As she had before the House of Lords, Mrs. Pretty put forward arguments under Articles 2, 3, 8, 9 and 14 of the Convention. Important differences between the decisions of the European Court of Human Rights and the House of Lords emerged only in the assessment of the merits of Mrs. Pretty's case with regard to Article 8 and Article 14.

Unlike the House of Lords, the European Court of Human Rights accepted that Mrs. Pretty's right to respect for her private life under Article 8 of the Convention was affected by the prohibition of assisted suicide under UK law. The Court took the view that making choices regarding the manner and time of one's

death is protected by Article 8 para. 1 as one of the integral aspects of respect for private life. The Strasbourg judges saw no merit in Lord Bingham's contention that Article 8 "is ... directed to protection of personal autonomy while individuals are living their lives, and there is nothing to suggest that the article has reference to the choice to live no longer" ([2001] 3 W.L.R. 1598 at para. [23]), stressing (at para. 65) that:

it is under Article 8 that notions of the quality of life take on significance. In an era of growing medical sophistication combined with longer life expectancies, many people are concerned that they should not be forced to linger on in old age or in states of advanced physical or mental decrepitude which conflict with strongly held ideas of self and personal identity.

However, this guarantee of personal autonomy is not absolute. Restrictions will be justified in terms of Article 8 para. 2 if they are "necessary in a democratic society" to achieve a legitimate legislative aim or objective (para. 68). The less fundamental the restricted activity is for a person's self-determination, the wider the margin of appreciation left to the Member States (para. 70).

The legislative aim of the unqualified and exceptionless prohibition of assistance to others in committing suicide is twofold: first, the prohibition reflects the public (*i.e.* State) interest in preserving the lives of its citizens. The prohibition discourages citizens generally from taking their own lives by preventing them from getting access to convenient means to achieve their objective. Secondly—and this was the aspect stressed by the United Kingdom Government in the case at hand—the prohibition is meant to protect vulnerable persons from acting upon a death wish which might be merely transitory in nature, induced by third parties, or related to personal conditions affecting the validity of individual judgments. Any loosening of the absolute and unqualified prohibition of assisted suicide risks weakening the effectiveness of the protection afforded under the current law to vulnerable persons, over whom undue influence might be exercised. Given the difficulties and inherent risks of a system of "advance notice" or "clearance-based" physician-assisted suicide on the one hand, and the generally limited effects on personal autonomy of the restriction as it stands on the other, an absolute ban on assisted suicide can in a democratic society be justified as a legitimate legislative choice in favour of the most effective system of protection for vulnerable persons (paras. 74–76).

But the fact that the absolute prohibition of assisted suicide is generally justifiable under Article 8 para. 2 does not mean that it is also justified towards every subject of the law. Article 14 of the

Convention guarantees the enjoyment of the rights and freedoms set forth in the Convention without discrimination on any ground. Mrs. Pretty argued that section 2(1) of the Suicide Act 1961 was discriminatory because its effect was to prevent the disabled, but not the able-bodied, from committing suicide. Since her rights under Article 8 were engaged, the Court had to consider whether the applicant as a person physically incapable of committing suicide unaided was discriminated against by a legislative provision which for all practical purposes prevented her from committing suicide at all. Dismissing by implication Lord Bingham's assertion that "[t]he criminal law cannot in any event be criticised as objectionably discriminatory because it applies to all" ([2001] 3 W.L.R. 1598, at para. [36]), the Strasbourg Court pointed out that "[d]iscrimination may also arise where States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different" (para. 87) and suggested that this principle was applicable to the applicant's situation (para. 88). Since according to this guideline discrimination will only be conclusively established if the burden is imposed arbitrarily, the more burdensome effects of an indistinctly applicable law on a particular category of persons do not amount to unlawful discrimination under Article 14 if the harsher burden cannot be avoided in order to achieve a legislative objective which is sufficiently weighty to justify the restriction as it affects the disadvantaged group. This was the upshot of the case put in the last resort by the British Government and accepted by the European Court of Human Rights (at para. 88):

[T]o seek to build into the law an exemption for those judged to be incapable of committing suicide would seriously undermine the protection of life which the 1961 Act was intended to safeguard and greatly increase the risk of abuse.

Whether an exemption for people in Mrs. Pretty's condition would really have this effect is questionable. As the recent and equally tragic case of *Re B (Adult: Refusal of Medical Treatment)* [2002] EWHC 428 (Fam), [2002] 2 All E.R. 449 has dramatically shown, doctors—and sometimes judges—already have to assess the capacity of individuals to make life-and-death choices in the related context of a patient's wish to refuse treatment necessary to keep her or him alive. The additional determination of whether a person is so physically handicapped that they cannot commit suicide unaided might be thought to present comparatively few extra difficulties. It could be said that a limited exception to the absolute prohibition of assisted suicide for competent persons who cannot

take their own life unaided would not threaten the sanctity of life principle, but would merely acknowledge that it is deeply unfair to condemn someone like Mrs. Pretty to die a natural death for the sake of giving to others a kind of protection that Mrs. Pretty herself neither wants nor needs. The reason why we ought to respect her choice is the same reason that makes us respect the choice of able-bodied persons to commit suicide: not that it is *the right* choice, but that it is *her* choice.

These issues of principle will be more fully discussed in the author's forthcoming article, "The Human Rights Dimension of the Diane Pretty Case", in the March 2003 issue of this journal.

ANTJE PEDAIN

SECURITY SERVICES, LEAKS AND THE PUBLIC INTEREST

ONCE upon a time, the Crown faced almost no difficulties in securing convictions for breaches of the Official Secrets Act 1911, particularly section 2. After the somewhat embarrassing decision to proceed had been taken, it was like shooting fish in a barrel. Occasionally, the jury revolted, as they did in *Ponting* [1985] Crim. L.R. 315, producing something like a perverse verdict in the face of the judicial direction that it was no defence that the defendant believed himself to be acting in the public interest. That decision, and the ruling of the House of Lords in the *Spycatcher* litigation [1990] 1 A.C. 109 to the effect that the former security service agent Peter Wright did not commit an actionable breach of confidence by making his allegations of improper practices within the services, prompted the government of the day to promote legislation that purported to impose life-long obligations of confidence upon members and former members of the security intelligence services. "Purported" because, with the enactment of the Human Rights Act 1998, it is now open to the courts *inter alia* to declare that Parliament has acted incompatibly with one of the rights protected by that Act.

The proceedings in *R. v. Shayler* [2002] UKHL 11, [2002] 2 W.L.R. 754 are somewhat unusual. Mr. Shayler, a former member of the Security Service, is being prosecuted for breaches of the Official Secrets Act 1989. One possible line of defence that he wished to pursue was that the disclosures to the newspapers were made in the public and national interest. Moses J. presided over a preparatory hearing and ruled that no such defence was available under the Act, a decision affirmed by the Court of Appeal. The

same point (and others that need not concern us in this note) was pursued in the House of Lords.

Critics of the draft legislation complained at the time of its enactment that the government was seeking to have the best of all worlds. The Official Secrets Act 1989 was premised upon the perfectly principled consideration that nothing should be protected unless its disclosure was “damaging”, a test that is to be found almost throughout the Act. That being so, it was said, it was unnecessary to provide for a general public interest type of defence, as the critics demanded. How could something that is genuinely damaging to the public good possibly be simultaneously in the public interest? And so, like its predecessor, the Act makes no provision for any such defence. But the damage test is not to be found in section 1(1) of the Act relating to disclosures by members and former members of the intelligence services. Here, the assumption was that revelations by such persons were *ipso facto* damaging. Which means that if a member or former member wished to blow the whistle on what he or she considered to be improper activities within the services themselves, he or she was bound to commit a criminal offence by going to the press to ventilate those concerns. Was that, then, as *Shayler* sought to argue, a violation of Article 10 of the Convention guaranteeing as it does the right to freedom of expression?

The House unanimously held not, but three of their Lordships delivered speeches, with slight differences of approach and emphasis. Article 10(2) acknowledged that the rights of free speech affirmed in Article 10(1) are not absolute, and permitted the Member States to act in the protection of *inter alia* their national security interests. But when they acted in such a way, they had to observe the twin limitations of legality and proportionality to be found in the Strasbourg jurisprudence, or, as Lord Bingham summarised the position: “any national restriction on freedom of expression can be consistent with art. 10(2) only if it is prescribed by law, is directed to one or more of the objectives specified in the article and is shown by the state concerned to be necessary in a democratic society”. The majority found that what Parliament had done did not fall foul of those tests.

Lord Hope conceded most candidly that he approached the question at the heart of the case “from a position of considerable doubt as to whether the problems which it raises really have been faced up to by the legislature”. He reasoned as follows: the offence under section 1 is committed only where the leaker acted “without lawful authority”. There were in the Act two mechanisms through which such authority might be sought and conferred.

Section 7(3)(a) provided that anxieties might be confided to a wide range of authorities including the staff counsellor, the Attorney General and ultimately the Prime Minister. Alternatively or in addition, the member or former member might seek official authorisation under section 7(3)(b). Should the member or former member harbour the unworthy suspicion that neither of these remedies would avail, there was always recourse to judicial review. Sceptics might argue that the British courts have not been particularly good at sustaining challenges to official action when confronted by official claims that the interests of national security are at stake. In what is perhaps the most significant part of the decision, Lord Hope says that in reviewing any decision not to grant official authorisation of a disclosure and thereby curtailing the leaker's protected free speech interests, the courts should eschew the old *Wednesbury* test of reasonableness (as had been done by the European Court in the case of *Smith v. UK*) and adopt instead the more precise method of analysis which is provided by the test of proportionality, which will be a much more effective safeguard (para. [78]) of the defendant's free speech rights. This would have the courts asking the questions: what was the justification for interfering with a Convention right? Was there a pressing social need for that information not to be disclosed? If the answer to that question is yes, was the interference with the Convention right no more than was necessary? Ultimately, Lord Hope sided with the majority, so no public interest defence can be raised when the trial itself actually occurs. But the process by which this conclusion was reached and the respect for the defendant's free speech interests that it involves are altogether more satisfactory than the practices of yesteryear.

A.T.H. SMITH

ARE HEALTHY CHILDREN ALWAYS A BLESSING?

IN *Rees v. Darlington Memorial Hospital NHS Trust Ltd.* [2002] EWCA Civ 88, [2002] 2 W.L.R. 1483, the Court of Appeal (Hale and Walker L.J.J., Waller L.J. dissenting) ruled that although the birth of a healthy but unplanned child brings blessings, it also brings costs, and that a disabled mother of such a child could be compensated for the extra costs of child care occasioned by her disability if the birth resulted from medical negligence.

The claimant sought damages for a negligently performed sterilisation operation, following which she gave birth to a son. She faced serious difficulties in caring for her son because of her severe

visual impairment and she would need help with the day-to-day raising of the child. The court decided that the claimant was entitled to recover the extra costs of bringing up the son attributable to her disability, since the surgeon knew of the disability and that this was the reason why the mother wished to avoid having a child.

The decision is controversial. For many years, English law permitted recovery not only for pain and associated expenses of pregnancy and childbirth, but also for the costs of raising a child whether the child was born healthy or not (*Thake v. Maurice* [1986] 2 Q.B. 84; *Emeh v. Kensington and Chelsea and Westminster AHA* [1985] Q.B. 1012). Judges occasionally questioned the appropriateness of such awards. For example, in *Gold v. Haringey Health Authority* [1988] 1 Q.B. 481, Lloyd L.J. expressed his disapproval of awards for the costs of rearing healthy children by raising the idea that a healthy child is a blessing rather than a burden. However, the courts continued to award damages in such cases until the decision of the House of Lords in *McFarlane v. Tayside Health Board* [2000] 2 A.C. 59. This decision seemingly established that the parents of a healthy child cannot claim the cost of maintenance from a person in negligent breach of his duty to take care to prevent that birth, although the mother can claim for the pain and suffering involved in the unwanted pregnancy and childbirth and for the loss of earnings she may suffer if she has to give up work temporarily because of the physical effects of her pregnancy.

In *Rees*, the Court of Appeal considered itself to be bound by *McFarlane*, as well as by its own decision in *Parkinson v. St James and Seacroft University Hospital NHS Trust* [2001] EWCA Civ 530, [2001] 3 W.L.R. 376, which was delivered shortly after *McFarlane*. In *Parkinson*, the Court of Appeal held that *McFarlane* left room for the recovery of damages for the extra costs of bringing up a disabled child. However, it was subsequently made clear in *Groom v. Selby* [2001] EWCA Civ 1522 that the source of the disability must be genetic or arise from the processes of intra-uterine development and birth.

In *Rees*, having distinguished the facts of *McFarlane* on the ground that the latter decision was concerned with a claim made by healthy parents, Hale and Walker L.JJ. addressed what they saw as the special problem of a disabled mother. Both judges concluded that, compared to an able-bodied parent, the disabled mother requires special consideration because she needs help if she is to be able to discharge the most ordinary tasks involved in the parental responsibility that has been placed upon her because of the

defendant's negligence. It therefore followed that the disabled parent should be given recompense for the extra costs of child care occasioned by her disability in order to put her in the same position as her able-bodied fellows. Walker L.J. based his decision simply on there being nothing unfair in permitting recovery for the expenses directly connected with the mother's severe visual impairment. However, Hale L.J. based her decision on a theory of "deemed equilibrium". According to her, we must assume that the benefits from having a child negative the claim for the ordinary costs of looking after him and bringing him up, since we cannot accurately calculate those benefits. Nevertheless, we cannot assume more than that. Thus, we cannot assume that the expenses uniquely referable to disablement (whether of mother or child) are relieved by any countervailing benefit or advantage.

The rule in *Rees* is clear: a disabled mother who has undergone a negligently performed sterilisation may be entitled to the extra costs of raising her child attributable to her disability. However, the decision begs at least three important questions.

First, is the "deemed equilibrium" theory valid? The answer seems to be "no". As Waller L.J. pointed out in his judgment, there is no logical reason to assume that the benefits from having a child match the ordinary costs of raising him, simply because the value of those benefits is incalculable.

Second, Hale L.J. in the majority and, more explicitly, Waller L.J. in the minority both took into account how the ordinary person would perceive the fairness of their decisions. However, is it safe to assume that there is a social consensus on the issues involved in claims for unwanted conceptions, pregnancies, and births? For example, is it uncontroversial to say that the birth of a healthy child is always "a reason for congratulation and a Hallmark card", as Tony Weir stated in his case note on *McFarlane*? ("The Unwanted Child" (2000) 59 C.L.J. 239, 241).

Some judges seem keen to appeal to an assumed social consensus. However, it is worth considering the possibility that there may be a lack of social consensus on certain issues. If the views of the ordinary person are so important in judicial decision-making, perhaps judges ought to commission surveys to find out what members of the public really think. It presently seems that judges sometimes make personal moral judgments under the guise of applying standards determined by "ordinary people".

Third, if there is harm to the mother who gives birth to the unplanned child, how is it to be categorised? In *McFarlane*, all their Lordships recognised that to cause a woman to become pregnant and bear a child against her will was an invasion of her

fundamental right to bodily integrity, although the case proceeded upon the basis that the claim was for “economic loss” caused by the costs of bringing up a healthy child born as a result of a failed sterilisation. However, their Lordships did not go into detail about what is entailed in the infringement of bodily integrity caused by pregnancy and childbirth. In contrast, Hale L.J. has spelt out the more obvious features that are the consequence of unwanted pregnancy. In *Parkinson*, although she recognised that the responsibility of parenthood can bring with it great joys and great compensations, she characterised unwanted pregnancy and childbirth as a “fundamental invasion”. She discussed the risks and suffering associated with pregnancy and childbirth, and the infringement of autonomy that pregnancy brings and that remains in terms of the mother’s parental responsibility for the child: “literally, one’s life is no longer just one’s own but also someone else’s”. Thus, as she made clear in *Rees*, the principal detriment suffered by anyone who becomes a parent against their will is the legal and factual responsibility to look after and bring up the child. This is an interesting perspective: it may be correct to classify the claim in cases like *Rees* as one for “economic loss”, since the mother’s claim was for certain financial costs, but Hale L.J.’s approach suggests that, whatever the law may say, the harm to the mother in cases like *Rees* is not simply “economic loss” and the temporary pain and suffering experienced during pregnancy and childbirth, but, amongst other things, the severe curtailment of personal autonomy associated with motherhood.

JESSE ELVIN

MAKING IT MORE LIKELY v. MAKING IT HAPPEN

WHEN the gods looked down and spied lusty Ares entangled with lovely Aphrodite in the net which her grimy husband used to entrap them, there arose on Mount Olympus “unquenchable laughter”—in Homer’s words “asbestos gelos”. In the modern world, however, asbestos is no laughing matter: inhale the fibres of that mineral wool and you may contract asbestosis, a debilitating lung disease, or, as was discovered 30 years later, mesothelioma, a fatal cancer. Asbestosis is cumulative—you get worse the more you inhale—so that everyone who culpably fails to protect you contributes to your ultimate condition. Mesothelioma is quite different, for it is most likely caused by a single fibre: of course the more you inhale, the greater the risk of getting that fatal fibre, but

until you get it, exposure makes you no more likely to get it, and once you have got it, you are a dead man, and further exposure makes no difference. Thus if you get mesothelioma after being exposed to fibres in six successive employments, each employer has contributed to the risk of your getting the disease, but the disease itself is due to only one of them. To ascertain in which employment the fatal fibre struck is, however, quite impossible and will likely remain so whatever advances are made in medical science, since the symptoms take up to forty years to manifest themselves, and before then no one can tell whether, much less when, the victim has been hit.

Asbestos affects lawyers, too. Cases of asbestosis have induced the Court of Appeal to hold, in flagrant deviation from the established rule that a person whose fault contributed to the occurrence of harm is liable for all of it, that an employer is liable only to the extent of his contribution, proportional to the period of employment (*Holtby v. Brigham & Cowan (Hull) Ltd.* [2000] 3 All E.R. 421), and now, in a mesothelioma case, the House of Lords, going the other way, has imposed full liability on all those who exposed the victim to the risk of the fatal fibre even though only one of them can actually have been responsible for it: *Fairchild v. Glenhaven Funeral Services Ltd.* [2002] UKHL 22, [2002] 3 W.L.R. 89. Novel though it is to hold in an English case that there are (un)certain circumstances in which it is enough for a claimant to show that the defendant's fault probably contributed not to the occurrence of the harm but only to the risk of its occurrence, the speeches in the House of Lords, unanimous in reversing a unanimous Court of Appeal, are Olympian in their assurance. Their Lordships' conviction was supported by principle, authority and the "wider jurisprudence".

Principle we must, in a case note, leave to works on the narrower jurisprudence. The "authority" was *McGhee v. National Coal Board* [1973] 1 W.L.R. 1 (H.L.). How silly we were to suppose that it had been demolished as an authority in 1988 when Lord Bridge, with the concurrence of all his brethren, had said that *McGhee* had turned on a bold inference of fact and "had added nothing to the law". Now we know that Lord Bridge was wrong to say so and that *McGhee* laid down a brand new, indeed revolutionary, rule of law, that, in Lord Reid's words, there is "no substantial difference between saying that what the [defenders] did materially increased the risk of injury to the [pursuer] and that what [they] did made a material contribution to his injury". He did, however, preface this with the words "From a broad and practical viewpoint", which is hardly the introit to a proposition of law, and

Lord Hoffmann has now explained that Lord Reid didn't mean what he said but rather that "a breach of duty which materially increased the risk should be treated *as if* it had materially contributed to the disease", a fiction now turned into a proposition of law.

But this is water over the bridge. No longer does a claimant always have to prove that the defendant's misconduct actually contributed to the harm he is complaining of; it may be enough for him to prove that it probably contributed to the risk of the occurrence of that harm. So the question is: When can he profit from this alleviation? Lord Bingham and Lord Rodger list six requirements each, Lord Hoffmann only five, while Lord Nicholls calls for considerable restraint and adds that "It is impossible to be more specific". It appears—to begin with, at any rate, until claimants' attorneys really get the bit between their teeth—that the standard test of causality will be relaxed only for a claimant who cannot possibly prove that the defendant's breach of duty actually contributed to the harm actually suffered, provided that the harm is of a kind against the risk of his suffering which it was the actionable duty of the defendant to guard him. Thus if a healthy young woman has unsafe sex with six partners, each of whom fails to disclose that he is HIV positive, all of them will be liable if she contracts AIDS: one of them must have infected her but she cannot possibly show which. It must be a comfort that if a child is born, medical science can now tell which was the actual father, or they would all be paying maintenance.

The "wider jurisprudence" (with which the House was supplied at its own suggestion) shows that other systems sometimes dispense with the need to prove causation in the old sense. The *tour d'horizon* was admittedly superficial. Omitted is the salient fact that in almost none of the jurisdictions glanced at would the claimants in *Fairchild* have succeeded: in most places an employee simply cannot sue his employer in tort, since workmen's compensation or social security takes its place. We, too, have some social security, but the fact that these claimants were entitled to industrial disablement benefit was not mentioned in the speeches: indeed, the speeches rather suggest that unless the claimants could get damages in tort, they would get nothing at all. This might affect one's view of the unfairness of the rule now overturned. Of its effect, too, for now that the claimants do get damages, the state can claw back what it paid out: the decision consequently effects a huge transfer to the public purse from private insurers still reeling from Acts of God and his followers. This is surely to add a new twist to "public policy".

In the 1988 case Lord Bridge ended by saying "... whether we like it or not, the law, which only Parliament can change, requires proof of fault causing damage as the basis of liability in tort. We should do society nothing but disservice if we made the forensic process still more unpredictable and hazardous by distorting the law to accommodate the exigencies of what may seem hard cases." Their Lordships in *Fairchild* seem to disagree with him on this, too.

TONY WEIR

OCCUPIERS' LIABILITY: UNHEEDED WARNINGS

Is there a difference between the duty of care owed by an occupier to a trespasser under the Occupiers' Liability Act 1984 and that owed to a lawful visitor under the Occupiers' Liability Act 1957, as far as personal injuries are concerned? Not really, in the light of *Tomlinson v. Congleton Borough Council* [2002] EWCA Civ 309, where the Court of Appeal (Ward and Sedley L.J.J., Longmore L.J. dissenting) held the defendant Council liable for spinal injuries sustained by an 18-year-old who dived into the Council's lake, having seen one or more notices reading "DANGEROUS WATER: NO SWIMMING", and hit his head on the bottom. His damages were reduced by two-thirds for contributory negligence.

The lake in the centre of Breerton Heath Park was admitted by the Council to be a magnet to the public in hot weather. There were attractive sandy beaches where people picnicked (as lawful visitors), and sometimes as many as 100 at a time swam or ventured out in rubber boats. Over the years, several swimmers got into difficulties, and the Council was so concerned about the risks that as well as posting the notices, which were generally ignored, it employed rangers to give oral warnings and hand out leaflets explaining the risks of cold water, weeds, waterborne diseases and other hazards; the rangers' efforts met with little success and sometimes with abuse. In desperation, the Council decided to cover the beaches with soil and plant reeds at the water margin, but the planting was deferred because of financial constraints and had only just been started when the claimant's accident occurred.

At first instance Jack J., who dismissed the claim, held that the claimant became a trespasser when he entered the water, and this was conceded by the claimant on appeal (although, as Longmore L.J. pointed out, it is difficult to say whether such a transformation took place when an intending swimmer started to paddle or only on accomplishing some greater degree of immersion). This finding

made the 1984 Act, rather than the 1957 Act, applicable, and it was therefore necessary to show that the three conditions laid down in section 1(3) for the existence of a duty had been satisfied. There was no doubt about the first two: the Council was aware of the “danger” (identified by Ward L.J. as the risk of injury through drowning or through diving) and knew or had reasonable grounds to believe that the claimant—or someone like him—would come into the vicinity of the danger. Jack J. and the Court of Appeal held that the third was also satisfied: the risk was “one against which, in all the circumstances of the case, [the occupier] may reasonably be expected to offer the other some protection”. The crucial issues were therefore: (i) whether the Council had come up to the standard of care prescribed in section 1(4)—“to take such care as is reasonable in all the circumstances of the case to see that he does not suffer injury on the premises by reason of the danger concerned”; (ii) whether the warnings were sufficient to amount to a discharge of duty under section 1(5); and (iii) whether the risk had been “willingly accepted as his” by the claimant under section 1(6).

The Court of Appeal held that there was no willing acceptance of risk because the claimant “did not know that the water where he dived was so shallow and the dive he made so steep that he would be injured”, in contrast with *Ratcliff v. McConnell* [1999] 1 W.L.R. 670, where the claim of an inebriated student who made a similar miscalculation in a swimming-pool was defeated by section 1(6)—but then swimming-pools always have hard bottoms. What about the warnings? Jack J. held that they were sufficient to amount to a discharge of the Council’s duty, but the majority of the Court of Appeal considered that they were not because they were so frequently ignored. This might be a persuasive argument in relation to the duty under the 1957 Act, where a warning only amounts to a discharge of duty if it is “enough to enable the visitor to be reasonably safe” (section 2(4)(a)), but section 1(5) of the 1984 Act provides that the duty may be discharged “by taking such steps as are reasonable in all the circumstances of the case to give warning of the danger concerned *or to discourage persons from incurring the risk*” (emphasis added). Yet the notices and the efforts of the rangers were held to be insufficiently discouraging, given that, in Ward L.J.’s view, the Council was “inviting public use of this amenity knowing that the water was a siren call strong enough to turn stout men’s minds”.

So what ought the Council to have done? Reiterating Lord Steyn’s warning in *Jolley v. Sutton LBC* [2000] 1 W.L.R. 1082, 1089 that “the results of decided cases are inevitably very fact-sensitive”,

Ward L.J. gave a non-exhaustive list of facts and circumstances to be taken into account when deciding whether the duty had been discharged, including “the cost of taking precautions balanced against the gravity of the risks of injury”; this suggests that the standard is an objective one, and that the 1984 Act did not codify *British Railways Board v. Herrington* [1972] A.C. 877 in so far as that decision permitted consideration of a *particular* occupier’s financial position in determining whether he had discharged his duty to a trespasser. Admittedly the £15,000 estimated cost of deterrent planting was not very great, but Congleton Borough Council doubtless had many other demands on its resources. The likely response of public authorities to this nannyish decision (which appears to be the first successful claim by an adult under the 1984 Act) will be to fence off any open stretches of water on their properties, thereby denying access altogether to those who merely wish to picnic or dip their toes in the water.

C.A. HOPKINS

DISHONEST ASSISTANCE: GUILTY CONDUCT OR A GUILTY MIND?

CHANCERY lawyers have for many years awaited a definitive House of Lords ruling on the mental element required to make strangers to a trust liable for knowing or dishonest assistance in a breach of trust, and for knowing receipt of trust property. The appeal in *Twinsectra Ltd. v. Yardley* [2002] UKHL 12, [2002] 2 All E.R. 377 provided the opportunity for resolution of the issue in the former case but not the latter; the degree of knowledge required for a knowing receipt claim remains for final determination on another occasion.

The detailed facts of the case need not detain us unduly. Yardley was a businessman described by Lord Millett as “an entrepreneur with a number of irons in the fire” (para. [54]), and one major area of his activity was property development. Yardley negotiated a short-term loan of £1 million from Twinsectra Ltd. which, it was explicitly stated in the loan agreement, was to be used solely for the acquisition of property and for no other purpose. The defendant, Leach, was Yardley’s solicitor. Leach secured the release of the loan funds to himself and subsequently paid them out to Yardley without taking steps to ensure that the money would be spent in the way specified. In the event some £357,000 was misapplied by Yardley (being utilised to pay off existing debts rather than for the purchase of property) and became irrecoverable.

Twinsectra sought to make Leach personally liable to account to them for that sum on the basis that he had assisted in a breach of trust on Yardley's part.

The House of Lords were unanimous in ruling that Yardley held the loan moneys on trust, that his misapplication of the moneys amounted to a breach of trust, and that Leach had factually assisted that breach by his actions. The issue which divided their Lordships was whether Leach had the mental element necessary for liability.

The majority of the House adopted the standard of "dishonesty" laid down by Lord Nicholls in the Privy Council in *Royal Brunei Airlines v. Tan* [1995] 1 A.C. 378. Lord Nicholls in that case had spoken of dishonesty as comprising both a subjective and an objective element: subjective in that it denoted "advertent conduct" assessed in the light of the defendant's actual knowledge and not what a reasonable person would have known or appreciated, but objective in that the standard of honesty would not vary with the higher or lower moral values of each individual. As Lord Nicholls encapsulated it, "if a person knowingly appropriates another's property, he will not escape a finding of dishonesty simply because he sees nothing wrong in such behaviour" (p. 389).

The precise meaning and relationship of the subjective and objective aspects of Lord Nicholls' dishonesty test have been the source of some confusion since the *Tan* decision. In particular, the misconception arose that the subjective element required the defendant to be aware that what he or she was doing fell below accepted standards of honest behaviour (see, for example, *Abbey National plc v. Solicitors Indemnity Fund Ltd.* [1997] P.N.L.R. 306, 310). Unfortunately the majority of the House of Lords in *Twinsectra* adopted the same misreading of Lord Nicholls' judgment. Lord Hutton, with whom the three other majority judges all expressed agreement, laid down at para. [27] a two-stage "combined test" for dishonesty, requiring both that "the defendant's conduct was dishonest by the ordinary standards of reasonable and honest people" (objective) and that "he himself realised that by those standards his conduct was dishonest" (subjective). This second element, however, is nowhere to be found in Lord Nicholls' speech. The subjectivity to which his Lordship referred was merely that inherently embedded within the notion of dishonest conduct itself: acts which were deliberate or advertent, carried out with knowledge of the circumstances in which they were committed, but not necessarily of the moral censure which might attach to them. Lord Nicholls in *Tan* made only one passing

reference to awareness of wrongdoing, and that, far from stating it as in any sense a requirement for liability, was merely to observe as a matter of fact that “in most cases, an honest person should have little difficulty in knowing whether a proposed transaction . . . would offend the normally accepted standards of honest conduct” (p. 391).

Lord Millett, dissenting from the view of his brethren in *Twinsectra*, pointed out that the second stage of Lord Hutton’s combined test, requiring not only culpable conduct but also a culpable state of mind, came close to the criminal law standard of dishonesty enshrined in *R. v. Ghosh* [1982] Q.B. 1053, which was specifically rejected by Lord Nicholls in *Tan*, and which would appear inappropriate as a condition of civil liability. Lord Millett himself would have preferred a test based upon the defendant’s conduct alone, albeit assessed in the light of his or her subjective state of knowledge at the time: “it is not necessary that he should actually have appreciated that he was acting dishonestly; it is sufficient that he was” (para. [121]). This approach not only represents a better reading of Lord Nicholls’ original judgment, but also appears to set a more realistic standard for establishing liability on the part of those assisting in breaches of trust. The test adopted by the majority of the House will mean that many, like Mr. Leach, will escape liability, since consciousness of wrongdoing is a difficult thing to prove. It also, as Lord Millett remarked, creates an unfortunate anomaly when compared with the tort of inducement of breach of contract, where a dishonest state of mind is not a requirement of liability: a reversal of the usual expectation that equity sets higher standards of conduct than does the common law.

The other noteworthy aspect of the *Twinsectra* case is that it provided a vehicle for Lord Millett at last to set down in the judicial forum his distinctive analysis of the true nature of the *Quistclose* trust, which he had enunciated extra-judicially in a seminal article in the *Law Quarterly Review* in 1985 (“The *Quistclose* Trust: Who Can Enforce It?” (1985) 101 L.Q.R. 269). Of the five Law Lords only Lord Millett went into any detail regarding the characteristics of the trust imposed upon Yardley’s loan moneys, and indeed such an analysis was not strictly necessary for the determination of the appeal. His Lordship’s scholarly and most helpful exposition must therefore, unfortunately, be regarded as obiter.

ROSY THORNTON

A TALE OF TWO SUPREMACIES, FOUR GREENGROCERS, A FISHMONGER,
AND THE SEEDS OF A CONSTITUTIONAL COURT

THE phrase “hierarchy of norms” sounds alien or continental to the ears of most British constitutional lawyers: generations have been taught that, in order to respect the sovereignty of Parliament, they should compare statutes only in temporal terms, preferring a more recent statute over incompatible older ones. In *Thoburn v. Sunderland City Council* and related appeals [2002] EWHC 195 (Admin), [2002] 3 W.L.R. 247, four greengrocers and a fishmonger, backed by the UK Independence Party, unsuccessfully invoked this doctrine of implied repeal to challenge the validity of the UK’s messy implementation of European Metrication Directives. If obiter dicta by Laws L.J. are followed, it will be not for our political representatives but for our courts to decide whether to prefer older statutes protecting “constitutional rights” over more recent statutes, and to rank constitutional rights.

Under a series of EU Council Directives, the sale of goods loose from bulk by the pound was to be prohibited from 1 January 2000, although until 1 January 2010 imperial measurements can be used as “supplementary indications”. The Metrication Directives were implemented between 1994 and 2001 by a tangle of subordinate instruments, amending among other provisions section 1(1) of the Weights and Measures Act 1985 (“the 1985 Act”), which had defined the legal units of measurement of mass as “the pound or kilogram” without preference for either. Three of the greengrocers and the fishmonger were convicted under the relevant legislation and the fourth greengrocer lost his appeal against his local council’s decision to renew his street trading licence on the condition that he weighed and sold his goods in metric measurements. The five “metric martyrs” appealed to the Administrative Court, but Laws L.J. held that the metrication legislation was valid and so dismissed the appeals, Crane J. concurring. Leave to appeal has been refused by the House of Lords.

The metrication instruments were introduced using the executive’s powers under section 2(2) and (4) of the European Communities Act 1972 (the ECA) and the 1985 Act’s own section 8(6) (which confers a power on the Secretary of State to amend the list of multiples in which goods are to be calibrated and sold). The appellants argued that Parliament can only validly enact Henry VIII clauses (clauses empowering the executive to amend legislation) to permit amendment of statutes already enrolled: to allow a Henry VIII power to bite on future statutes would be to introduce constitutionally improper limits on the sovereignty of

subsequent Parliaments. This meant that the ECA, s. 2(2) and (4), could not lawfully be used to amend the 1985 Act: that Act allowed the continued use of imperial or metric measures for trade without preference and a power conferred by a statute of 1972 could not be invoked to extinguish this provision in favour of a metric system. They claimed that section 1 of the 1985 Act impliedly and *pro tanto* repealed the ECA, s. 2(2), and that *Factortame (No. 1)* [1990] 2 A.C. 85 was decided *per incuriam* since this point about implied repeal was not argued before the courts.

The respondents argued that there is no rule of English law that Henry VIII powers can only operate retrospectively, citing the many legally recognised applications of the ECA, s. 2(2), and of the Human Rights Act 1998, s. 10(2) and (3). Furthermore, they contended, so long as the UK remains a member of the EU, “the pre-accession model of Parliamentary sovereignty is of historical, but not actual, significance”: the EC Treaty’s entrenchment in domestic law depends decisively not on the terms of the ECA but on the principles of law of the European Community established in *Van Gend en Loos* [1963] E.C.R. 1 and *Costa v. ENEL* [1964] E.C.R. 585.

Seeking to steer between the model of sovereignty championed by the appellants and the European supremacy defended by the respondents, Laws L.J. resorted to the notion of a Parliament whose sovereignty resides not in its continuing unlimited power but in its capacity to alter the terms of its delegations of power. He accepted that a statute could be impliedly repealed in part or *pro tanto*, and that legislation that incorporates provisions of an international treaty is not immune from the doctrine (*Colloco Dealings Ltd.* [1962] A.C. 1). But he held that there is no general inconsistency between a prospective Henry VIII power and the terms of future legislation, and so no inconsistency between section 1 of the 1985 Act and section 2(2) of the ECA. A rule invalidating prospective Henry VIII clauses is “not required as a condition of legislative sovereignty”, since such clauses do not purport to bind future Parliaments, which retain the power to pass a statute stipulating “that its terms are not to be touched by the Henry VIII power” (paras. [50]–[51]).

But the constitutional objection to prospective Henry VIII clauses does rest (*pace* Laws L.J.) on the doctrine of implied repeal: that doctrine is an implication of the notion of continuing sovereignty. Laws L.J. treats Parliament as having the capacity to bind itself as to the form of future legislation, at least in requiring in subsequent statutes an express exclusion from the ambit of older Henry VIII clauses. This notion of sovereignty is not compatible

with the Diceyan one of the appellants, nor is it compatible with Laws L.J.'s reassertion later in his judgment that Parliament "cannot stipulate as to the manner and form of any subsequent legislation" (para. [59]).

In case he was wrong on the question of Henry VIII clauses, Laws L.J. also held that the ECA has a special status in British law protecting it from implied repeal. This status is *not* due to rules of EU law on the limits on the legislative power of member States:

there is nothing in the ECA which allows the Court of Justice, or any other institutions of the EU, to touch or qualify the conditions of Parliament's legislative supremacy in the United Kingdom. Not because the legislature chose not to allow it; because by our law it could not allow it. (para. 59)

Instead, he argued, the primacy of substantive provisions of EU law is founded on English law, and the scope and nature of Parliament's legislative sovereignty is "ultimately confided" to UK courts. And Parliament's sovereignty has been modified "by the common law, wholly consistently with constitutional principle".

The courts have "found their way through the *impasse* seemingly created by two supremacies, the supremacy of European law and the supremacy of Parliament" by allowing certain rights to prevail over the express terms of any UK statute. These rights include rights recently recognised by the common law as constitutional or fundamental and substantive Community rights (which can prevail over any inconsistent statute made or passed after the coming into force of the ECA (*Factortame (No. 1)*). And from this, "a further insight follows": Laws L.J. argues that there must be two categories of Acts of Parliament, some "ordinary" but others "constitutional" because they enshrine constitutional rights. Constitutional statutes can be repealed not by implication but only by "unambiguous words on the face of the later statute" (paras. [59]–[63], [66]). Laws L.J. presents his development of the common law as "highly beneficial" because it accords the special respect to fundamental rights given by entrenched constitutions while preserving "the sovereignty of the legislature and the flexibility of our uncodified constitution". The courts will "pay more or less deference to the legislature" according to the subject in hand (paras. [64], [69]).

Laws L.J.'s acknowledgement that the ECA may not be sufficient to incorporate a European measure repugnant to a fundamental or constitutional right guaranteed by the common law gives rise to a more general question of how constitutional statutes are to be ranked to resolve cases of conflict. Presumably the

categorisation and ranking of constitutional statutes, like the content and limits of constitutional rights, would be drawn by the courts paying only “more or less deference” to the legislature. Laws L.J.’s solution nominally preserves both Parliamentary sovereignty and the supremacy of EU law by pointing, implicitly, towards the creation of a Supreme or Constitutional Court for the UK.

At first sight it seems surprising that the campaigners challenged the validity of the metrication legislation only in terms of the limits on Parliament’s powers as a sovereign legislature, and not in terms of the limits on the powers of the EU Council. There are strong grounds for asking the ECJ for a partial annulment of the Metrication Directives. In extending compulsory metrication to loose “over-the-counter” sales, it could well be argued that the Directives, made under Articles 100 and 100a (now Articles 94 and 95), go beyond their proper scope of harmonising the establishment or functioning of the common market and abolishing current or likely future obstacles to the free movement of goods, persons, services and capital. Mr. Thoburn and his colleagues could have argued, through a reference to the ECJ under Article 235 EC (ex Article 177), that the Metrication Directives are *ultra vires* and violate the principle of proportionality. By arguing that the Directives took effect at the time of prosecution and so after 1 November 1993, they might also have been able to argue that the Directives violate the principle of subsidiarity in abolishing a British tradition unnecessarily.

The UK Independence Party would probably have objected that to have fought the case in this way would have been to sacrifice their war for the sake of winning this particular battle: it involves accepting a major role for EU institutions within the British constitution. But the ironic result of this case has been the recognition of the validity of a series of criminal provisions Dickensian in content and complexity, and the planting within the common law of the seed of a Constitutional Court, a beast with powers to limit Parliament and unlikely to preserve the UK Parliament’s sovereignty in the face of EU legislation.

The “metric martyrs”, relying now on Liberty rather than the UK Independence Party, have lodged an application to appeal to Strasbourg.

AMANDA PERREAU-SAUSSINE

THE SCOPE OF CONSENT IN ARTICLE 7(1) OF THE TRADE MARKS
DIRECTIVE

WHEN does a proprietor of a trade mark consent to goods bearing that mark being placed on the market in the EEA? Article 7(1) of the Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks [1989] O.J. L040/1 raises this question, the answer to which is critical since consent will “exhaust” the proprietor’s trade mark rights in respect of those goods, subject to the operation of Article 7(2). In *Silhouette International Schmiedt GmbH & Co. KG v. Hartlauer Handelsgesellschaft mbH* [1998] E.T.M.R. 539 the ECJ held that Article 7(1) does not support international exhaustion: this is where trade mark rights cannot be used to prevent imports into the EEA of goods placed on the market anywhere in the world under the trade mark. In *Zino Davidoff v. A & G Imports Ltd.* [2002] 2 W.L.R. 321 the ECJ gave a preliminary ruling on the interpretation of “consent” in Article 7(1). A broad or uncertain interpretation of consent to the marketing of goods in the EEA would have undermined the rule against international exhaustion established in *Silhouette*. The ECJ in *Davidoff* opted for a narrow and well-defined interpretation of “consent” within Article 7(1).

Davidoff combined references from two sets of High Court proceedings. The facts of the first case were these. Davidoff owned the UK trade marks COOL WATER and DAVIDOFF COOL WATER, which it used for toiletries and cosmetics. A & G Imports imported into the UK a quantity of Davidoff products, which had been manufactured under licence in France and originally placed on the market in Singapore, and started to sell them. Davidoff brought proceedings against A & G Imports, alleging that the importation and sale of those goods by the defendant infringed its trade mark rights, and sought summary judgment. Relying on *Silhouette* and *Sebago Inc. v. GN-UNIC SA* [1999] E.T.M.R. 681, Laddie J. emphasised that Member States cannot, by either direct or indirect means, impose a rule of international exhaustion. However, he gave a wide interpretation to “consent” in Article 7(1). He referred to the rebuttable presumption in English contract law that a purchaser of an article is free to dispose of it as he pleases, unless there is some clear and explicit agreement to the contrary (see *Betts v. Wilmott* (1879) 6 Ch. App. 239). From this presumption, Laddie J. reasoned that where a trade mark proprietor could have placed on purchasers an effective restraint on the further sale or distribution of goods, yet failed to do so, consent to marketing the goods elsewhere, including within the EEA, could be *implied*. Since

Davidoff had failed to proscribe completely the further sale and movement of the goods in issue, Laddie J. held this gave rise to an arguable defence that it had consented to the defendant's marketing of its goods in the EEA and he dismissed the application for summary judgment. He also referred certain questions to the ECJ on, *inter alia*, the issue of consent in Article 7(1) ([1999] E.T.M.R. 700).

The facts of the second case, *Levi Strauss & Co. v. Tesco Stores*, were broadly similar to *Davidoff* and Pumfrey J. also referred questions on the scope of consent in Article 7(1) to the ECJ.

The ECJ held that the concept of "consent" in Article 7(1) requires a uniform Community interpretation. Further, "consent" may be *implied* from facts and circumstances prior to, simultaneous with or subsequent to the placing of the goods on the market outside the EEA. However, in view of the serious consequence of finding consent, *i.e.* exhaustion of rights, the court held that the facts must "*unequivocally demonstrate* that the proprietor has renounced his right to oppose placing of the goods on the market within the EEA" (emphasis supplied).

The ECJ also elucidated the sort of action (or, rather, inaction) by a trade mark proprietor that will *not* amount to implied consent. This includes: silence; the failure to communicate opposition to marketing goods within the EEA; the failure to place warnings on goods indicating that it is prohibited to place them on the market within the EEA; and the failure to impose contractual restrictions on the marketing of goods within the EEA. Importantly, the court held that the onus of proving consent rests on the trader alleging it.

Finally, arising solely out of the *Levi's* reference, the ECJ considered whether the following situations were relevant to establishing exhaustion: (1) the importer's lack of knowledge that the proprietor objects to its goods being placed on the market in the EEA or being sold there by traders other than authorised retailers; or (2) failure of authorised retailers and wholesalers to impose on their own purchasers contractual reservations setting out such opposition, even though they have been informed of it by the trade mark proprietor. The court held that, as consent cannot be inferred from the trade mark proprietor's silence, the lack of knowledge or inaction on the part of third parties in the distribution chain were also irrelevant to establishing exhaustion, and in so doing, clarified the meaning of "consent" in Article 7(1) in a way which preserves the spirit of the rule against international exhaustion in the EEA.

The *Davidoff* decision does leave scope for future consideration of the circumstances in which consent may be implied, such as where there is “acquiescence”. Further, there is the related issue of whether distribution agreements intended to apply in a territory outside the EEA and which prohibit the sale of products in any territory other than the contractual territory will contravene Article 81 of the EC Treaty (see *Javico International and Javico AG v. Yves St Laurent Parfums SA* Case-306/96 [1998] E.C.R. I-1983).

However, from now on the real battle over international exhaustion will occur at the political level. This is evidenced by the European Parliament’s request (in a resolution dated 3 October 2001) that the Commission undertake an extensive review of the merits and consequences of international exhaustion in the EEA. A number of matters will need to be resolved, however, before international exhaustion is introduced into European trade mark law: first, the lack of unanimity between Member States on this issue; second, the dearth of concrete evidence that consumers (and, if so, which consumers) benefit overall from such a principle; and third, the concern that importation of products made under licence in non-member countries with low manufacturing costs will adversely affect production and investment in innovation within the EEA. Thus, whilst the debate over international exhaustion in the EEA will continue to simmer for the foreseeable future, its supporters are unlikely to emerge victorious anytime soon.

TANYA APLIN

MIND THE GAP...: CHILD PROTECTION, STATUTORY INTERPRETATION
AND THE HUMAN RIGHTS ACT

“THE problem is more with what the [Children] Act does not say than with what it does”: Hale L.J., Court of Appeal at para. [50]. Therein lay the problem addressed in *Re S (Minors) (Care Order: Implementation of Care Plan)* [2002] UKHL 10, [2002] 2 W.L.R. 720; reversing in part [2001] EWCA Civ 757, [2001] 2 F.L.R. 582. This case involves key issues in child protection under the Children Act 1989 and provides further guidance regarding the courts’ interpretation of legislation under the Human Rights Act 1998.

The facts of the joined appeals are typical of reported child protection cases. The first involved failure to implement a care plan, which potentially jeopardised the family’s rehabilitation, and so risked breaching their rights under Article 8 of the European Convention by rendering the intervention in the family’s life no

longer necessary and proportionate to the aim of child protection. In the second, the proposed care plan was inchoate, owing to uncertainty regarding various assessments and therapy and the availability of alternative carers. In each case, full care orders had been made, conferring parental responsibility on the local authority free—on the long-established, pre-Human Rights Act view—from court supervision, save for applications on some major issues, notably contact and discharge of the order, and subject to judicial review; the authority was thus free, for example, to determine without prior court sanction the child's residence or whether family rehabilitation remained realistic. The parents had argued that interim orders should have been made, but case law dictated that such orders should not be used to engineer judicial supervision of care plan implementation; the Children Act scheme was understood to preclude such a role for the court, tacitly regarding local authorities as better placed to decide how to implement care orders. But interim orders would have postponed a decision whether to transfer control to the authority until a stage at which: (i) in the first case, attempted rehabilitation was clearly under way (and so the intervention remained proportionate); and, (ii) in the second, much of the factual uncertainty had been resolved, so that the justification for a care order and the particular care plan (and so for the inevitable *prima facie* infringement of Article 8(1) which the care order would entail) could be more clearly articulated.

Interim orders would also have enabled the Children's Guardian (an officer of the court who provides an independent assessment of the child's best interests) to remain involved, that person becoming *functus officio* once a full care order is made; contrast supervision orders: *Re H (A Child) (Care Proceedings: Children's Guardian)* [2002] 1 W.L.R. 189. Continued involvement of the Guardian would be especially helpful in cases (unlike these) in which the children were too young to act for themselves and had no adult family members able or willing to invoke any judicial remedies (substantially augmented now by sections 7–9 of the Human Rights Act, explored by Hale L.J. in the Court of Appeal), or to seek an administrative review. (Note, however, that Guardians' standing to make court applications for children is uncertain, applications for Human Rights Act remedies at least being outside their duties: *DC v. B MBC* [2002] EWHC 1438.) The appropriate balance of power between courts and local authorities in care cases has long been debated, but it is distorted where the affected individuals are unable to place any weight on the judicial side of the scales. Such children are effectively denied access to those remedies, in probable breach of Article 6 (which encompasses incorporated Convention rights as

“civil rights”), and left at the mercy of local authority decision-making; see the recent “lost in care” case, *F v. Lambeth LBC* [2002] 1 F.L.R. 217, for a possible outcome.

The Court of Appeal responded boldly to this problem. They issued guidelines intended to widen judges’ discretion to make interim orders. More radically, they instituted a scheme, which they purported to “read in” to the Children Act via section 3 of the Human Rights Act, whereby key stages in the care plan—those which, if not met, might give rise to a breach of Convention rights—would be “starred” by the court. Should a “starred” stage not be implemented within a reasonable time, the authority would be obliged to reconvene the care planning conference and to notify the Children’s Guardian, who then, like the authority, could seek further directions from court. This scheme would help proactively to prevent breaches of the otherwise unrepresented child’s (and the parents’) rights under Articles 8 and 6.

The scheme was, perhaps unsurprisingly, short-lived. The House of Lords offered guidance regarding the use of interim orders and the drafting of care plans, to enable parents and courts to have the clearest possible idea of what proposed orders would involve; an interim order was accordingly appropriate in the second case, but not in the first. However, whilst stressing the “pressing need” for “urgent” legislative action to deal with the problems highlighted by the Court’s judgment, particularly that of young, unrepresented children, their Lordships overturned the key innovation.

Judicial introduction of the starring scheme could not be justified, even under section 3 of the Human Rights Act. Their Lordships adopted the interpretative conservatism repeatedly advocated by Lord Hope (for example, *R. v. A (No. 2)* [2001] UKHL 26, [2002] 1 A.C. 45, at paras. [109]–[110]; cf. Lord Steyn): it was impossible to identify a *particular provision* which the Court could properly be said to be “interpreting”; the starring scheme “departed substantially from a fundamental feature” of the Children Act—the division of responsibility between court and local authority—and *as such* was not a “possible interpretation” (*pace* Lord Steyn, *ibid.*). The Court of Appeal had thus exceeded the bounds of possible “interpretation” and strayed into amendment. Since the courts could not read the scheme into the Children Act, were there grounds for a declaration of incompatibility? Implementation of a care order may breach the family members’ rights, but such breaches (or prospect of same) do not render the Act itself incompatible with those rights; conversely, the breach “flows from the local authority’s failure to comply with its obligations under the Act”. And the Human Rights Act remedies

will then meet the requirements of Article 6 in most such cases. However, there remains one violation: the absence of any practical means to vindicate the rights of young, unrepresented children. But their Lordships again found themselves powerless. The *absence* of a remedy here is not the result of any statute which can be said to be incompatible with the Convention. There is simply a gap—“a statutory lacuna, not a statutory incompatibility”—and so nothing on which a declaration of incompatibility can bite.

The “gap” phenomenon had been considered before *Re S: Adan v. Newham LBC* [2001] EWCA Civ 1916, [2002] 1 W.L.R. 2120; *R.(J) v. Enfield LBC* [2002] EWHC 432 (Admin), [2002] 2 F.L.R. 1. Judicial restraint in the face of a gap, depending on its scale and nature, may be wise. A distinction needs to be drawn between cases where interpretative putty—“reading in”—may legitimately be used (compare Lords Hope and Steyn in *R. v. A (No. 2)*), and those where there is a gap that cannot be filled in judicially. A failure of domestic law to confer a power necessary to protect Convention rights may be remediable in several ways: by amending one or more of several relevant statutes; by conferring a power on (and so impacting on the budgets of) or even *creating* one or more relevant public authorities, including courts and tribunals: *per* Elias J. in the *Enfield* case. In such cases, courts should not second-guess the legislature’s selection from these options by taking it upon themselves to “interpret” their way out of the problem.

These arguments do not militate against courts making declarations of incompatibility in gap cases, but a literal interpretation of sections 4 and 10 of the Human Rights Act may do so: see Elias J., *ibid.* Lord Nicholls left open whether a declaration might be available in the case of a statutory scheme whose “basic principle” positively (if implicitly) denies a Convention right. In such a case, there is no express provision which is in terms incompatible with the right, but can it be said that there is a “gap” (in relation to which no declaration can be made) where the whole thrust of the Act’s scheme is clearly to that effect?: see *R. (Rose) v. Secretary of State for Health* [2002] EWHC 1593. Without a declaration, the Human Rights Act’s remedial order scheme cannot be deployed to fill the gap swiftly. But that procedure may not be apt where substantial legislation is required to “remove” the incompatibility. In any case, it may be difficult to ignore judicial demands for legislation even without a declaration.

Indeed, Parliament has already responded to the gap identified by *Re S* (and latterly by *DB v. B MBC*) by introducing a scheme in the Adoption and Children Bill 2002 for independent review of care plans within local authorities, with the possibility of referral to a

Children's Guardian and thence to a court (clause 116). A review mechanism designed to forestall potential breaches, if necessary with judicial intervention, is clearly preferable to providing monetary remedies for past breaches, which simply deplete authorities' budgets for the benefit of a family whose life may already be irreparably blighted. Even better to avoid the need for judicial intervention. So often, as in the first case, these difficulties originate in local authorities' resourcing difficulties. Therein, of course, lies another problem. It needs to be addressed if those authorities are to meet their obligations under the Convention.

JOANNA MILES

INTERNATIONAL TORTS AND CHOICE OF LAW IN AUSTRALIA

IN *John Pfeiffer Pty. Ltd. v. Rogerson* (2000) 201 C.L.R. 552, the High Court of Australia had reconsidered the choice of law rules for "intra-national torts", *i.e.* torts involving elements occurring in more than one Australian state. There, the Court rejected the rule of double actionability derived from *Phillips v. Eyre* (1870) L.R. 6 Q.B. 1 in preference for the rule that all questions of substance should be governed by the *lex loci delicti*. In *Régie Nationale des Usines Renault v. Zhang* (2002) 187 A.L.R. 1, the High Court was asked to extend this preference to international torts as well. It did so emphatically. Except as regards a limited number of specific torts, for which the Court expressly reserved its consideration, the Australian common law rule is now that the substantive elements of tort actions are to be determined in accordance with the law of the place of the act or omission giving rise to the action.

Mr. Zhang, an Australian resident, travelled to New Caledonia, a French overseas territory, where he suffered serious injuries as a result of losing control while driving a Renault car he had hired. After spending two weeks in hospital in New Caledonia, he returned to Australia where he was treated in hospital for spinal injuries for several months. He remains severely and permanently disabled. The defendant Renault companies were at the relevant time foreign companies which neither had offices nor carried on business in Australia. Renault vehicles, which are manufactured outside of Australia, are sold within Australia by dealers who purchase them in France.

Mr. Zhang brought proceedings in the Supreme Court of New South Wales alleging that the car he had been driving had been negligently designed and manufactured and that, as a result, he had

suffered and would continue to suffer injury and loss. He invoked the long-arm jurisdiction contained in the Rules of Court that permitted service of process outside Australia without leave where the proceedings are founded on damage suffered in New South Wales “caused by a tortious act or omission wherever occurring”. In accordance with the Rules, the defendants applied to the Supreme Court asking it to “decline in its discretion to exercise its jurisdiction” on the basis, *inter alia*, that the Court was “an inappropriate forum for the trial of the proceedings”.

Before turning to the question of the choice of law, the High Court had to consider what it was that the defendants had to do to establish that the court was “an inappropriate forum”. All the members of the Court recognised that the object of the inclusion of this provision in the Rules was to incorporate consideration of the sorts of factors commonly considered in the application of the common law doctrine of *forum non conveniens*. In Australia, this doctrine has developed differently from other jurisdictions. Whereas in England it directs attention to what is the natural forum and whether there is another forum which is appropriate in that it is where the case may more suitably be tried for the interests of all the parties and the ends of justice (*Spiliada Maritime Corporation v. Cansulex Ltd.* [1987] A.C. 460), in Australia the test has been whether the local court is “a clearly inappropriate forum”, which will be the case if continuation of the proceedings in that court would be oppressive or vexatious (*Oceanic Sun Line Special Shipping Company Inc. v. Fay* (1988) 165 C.L.R. 197; *Voth v. Manildra Flour Mills Pty. Ltd.* (1990) 171 C.L.R. 538). In *Renault v. Zhang*, the majority (Gleeson C.J., Gaudron, McHugh, Gummow and Hayne JJ., Kirby and Callinan JJ. dissenting on this point) held that although the term “an inappropriate forum” was less emphatic than “a clearly inappropriate forum”, it was by reference to the Australian common law standard that the term in the Rules was to be understood and applied.

In exercising his discretion in this case, the trial judge had found that the factors in favour of trial in the local forum and those in favour of trial in the foreign forum were finely balanced. His conclusion, therefore, that foreign law was the substantive law to be applied to the dispute was decisive in his declining to hear the proceedings in New South Wales. The correctness of his conclusion was the subject of appeal.

In the development of the choice of law rules relating to international torts, the double actionability rule has enjoyed a pervasive yet troublesome role. At its simplest, it provides that a plaintiff may sue in the forum in respect of an act done in a

foreign place if, had it been done in the forum, it would be actionable as a tort there, and if it is actionable under the law of the place where it occurred. There has been widespread criticism of the rule, not least because it is not clear that it is a choice of law rule at all rather than a rule of jurisdiction or of justiciability, and, indeed, because it is not necessarily clear which system of law it actually chooses. In England, it has now been displaced by statute other than in respect of defamation claims (Part III of the Private International Law (Miscellaneous Provisions) Act 1995) and it has been rejected in Canada (*Tolofson v. Jensen* [1994] 3 S.C.R. 1022). In *Renault v. Zhang*, the High Court reviewed the origins and development of the rule and concluded that although the first part of the rule might have come to be seen as imposing some sort of “threshold” requirement on the justiciability of a dispute in the forum, or even as indicating the substantive law, this was erroneous as it was never intended to act as anything other than a means by which the forum could restrict the bringing of actions which affronted its public policy. This issue, the majority held, should be confronted directly, just as it is in the rules relating to the recognition and enforcement of foreign judgments.

Having thus rejected the double actionability rule, the majority immediately adopted the *lex loci delicti* as the source of the substantive law for all international torts (though reserving for later consideration the law in respect of maritime and aerial torts and torts relating to real and intellectual property, and also where the dividing line between questions of substance and procedure might lie for international torts). The majority made only passing reference to the Court’s earlier decision in *Pfeiffer* and to the Canadian decision of *Tolofson*, and it made bare mention of the fact that adoption of the *lex loci delicti* rule promoted certainty in the law. It was left to Kirby J., who concurred with the majority on this point, to elaborate. His Honour was attracted to the “conceptual simplicity” and “desirability” of having a single rule for both intra-national and international torts; he observed that the *lex loci delicti* was the predominant choice of law rule for torts in common law, civilian and other systems; and he preferred a rule that accorded with the reasonable perception that “a person will ordinarily assume that he or she is governed by the law of the law area in which the event, critical to legal liability, happens”.

Two further points may be noted. First, the majority rejected the addition of a “flexible exception” which would allow the forum court to displace the *lex loci delicti* by the law of some other country which has a closer connection to the dispute (cf. *Boys v. Chaplin* [1971] A.C. 536; *Red Sea Insurance Co. Ltd. v. Bouygues*

SA [1995] 1 A.C. 190 (P.C.); Private International Law (Miscellaneous Provisions) Act 1995 (UK), s. 12). Secondly, in adopting the *lex loci delicti* rule, the High Court recognised that local courts would be more likely to be faced with questions of foreign law. Although acknowledging that this could be onerous, the Court observed that it was open to the parties not to plead the foreign law and to have the court decide the matter as if local law applied.

Having held that the substantive law to be applied to the dispute was the foreign law, the majority concluded that it was not oppressive or vexatious to the defendants to require them to plead and prove the foreign law, if they wanted to rely on it, and therefore they had failed to establish that the New South Wales court was “a clearly inappropriate forum”. On that basis, the Court declined to exercise its discretion in favour of granting a stay and allowed the proceedings to continue in New South Wales.

BEN OLBOURNE

PROFESSIONAL PRIVILEGE AND THE TAX MAN

R. (on the application of Morgan Grenfell & Co. Ltd.) v. Special Commissioner of Income Tax [2002] UKHL 21, [2002] 3 All E.R. 1 is an exercise in statutory interpretation in which different courts came to diametrically opposite views. The Revenue were trying to decide how MG, the taxpayer, should be assessed in relation to certain transactions and so asked MG to supply certain documents. MG declined, in part because these documents consisted of advice which MG had obtained from leading counsel and solicitors about whether the scheme behind the transactions would work; so the issue was the scope and nature of legal professional privilege (“LPP”). The Revenue asked for—and obtained—the consent of the Presiding Special Commissioner (His Honour Stephen Oliver Q.C.) for the issue of a notice by them to MG under Taxes Management Act 1970, s. 20(1), which allows an inspector by notice in writing “to require a person to deliver to him such documents as are in the person’s possession or power and which . . . contains information relevant to any tax liability of that person”. MG applied for judicial review to quash the notice, failing before the Divisional Court ([2000] S.T.C. 965, Buxton L.J. and Penry-Davey J.) and the Court of Appeal ([2001] EWCA 329, [2001] S.T.C. 497, Schiemann, Sedley L.JJ. and Blackburne J.), so that all

six judges were for the Revenue; MG must therefore have been both delighted and perhaps surprised when a unanimous House of Lords, led by Lord Hoffmann, decided in its favour.

The case concerned a relatively simple tax avoidance scheme, devised by MG, the success of which turned on whether MG could deduct a premium as a business expense (the background to the scheme is set out in the judgment of Buxton L.J. in the Divisional Court, at paras. [2] and [3]). The Revenue argued that it was outside the scope of MG's trading activities and so failed. MG was completely open about the scheme operated and did not conceal any relevant transactions.

One's first reaction to this is to ask what the Revenue were up to. Trying to see what the advisers said looks like trying to see if one has missed any relevant arguments; this is not how the legal process is meant to operate—one is meant to do one's own work even if one is a government department. The inspector asked to see documents relating to the advice which MG had obtained from leading counsel and solicitors about whether the scheme would work. MG had run an argument that the papers could not be relevant to the issue at all—but not above Divisional Court level. One's second reaction is likely to be puzzlement as to how the different courts came to disagree so vehemently; one might also be puzzled as to why there were no dissenting voices at any level, but then dissents are no doubt "inefficient" and so this point will not be developed.

It was agreed at all levels that LPP was so important that a statute could exclude it only by express words or by necessary implication. The Revenue argued that the necessary implication could be found either (a) by looking at the segment of the legislation as a whole, or (b) by noting that LPP had been expressly preserved in two other parts of the relevant legislation and so inferring that its omission from section 20(1) was no accident. Many of the provisions in this segment began life as a block of provisions added in 1976, so that the segment approach was valid. (The provisions were added as a result of disquiet over the *Rossminster* affair which had involved the legality of a raid by Revenue officials on the house of tax advisers: see *IRC v. Rossminster* [1980] A.C. 952.)

Revenue arguments (a) and (b) were accepted by the judges of the Divisional Court and the Court of Appeal, who found the exclusion of LPP from section 20(1) satisfied the test that it should be "compellingly clear" that LPP was to be excluded. Thus Blackburne J., speaking for the Court of Appeal at para. [17], described it as an "inescapable" implication from the express

mention of LPP in other parts of the segment of legislation that LPP was not available as a defence to a notice under section 20(1).

The Revenue argument was, equally clearly, rejected by the House of Lords. Lord Hoffmann examined the segment as a whole and concluded at para. [20] that it “did not come anywhere near” giving rise to an implication that LPP was intended to be excluded (so disposing of (a)). That left (b), which he disposed of with similar ferocity.

How then did Lord Hoffmann come to do what he did? Lord Hoffmann regretted that the Court of Appeal had not been referred to the “valuable judgments” of the Supreme Court of New Zealand in *IRC v. West-Walker* [1954] N.Z.L.R. 191. However, the case had formed part of the judgment of Buxton L.J. in the Divisional Court. For Lord Hoffmann, the importance of the New Zealand case lay in its emphasis on LPP as not merely a rule of evidence but a substantive right founded on important public policy. It is of course good to see a broader Commonwealth-based rights approach emerging from the House of Lords, but it would have been more impressive if their Lordships had referred to the valuable survey by Auburn, *Legal Professional Privilege Law and Theory* (Hart Publishing 2000), which their judicial colleague Lord Woolf in his preface described as “essential reading for all those interested in this subject”.

Another influence on Lord Hoffmann was the irrationality of a situation in which, if the Revenue and the lower courts were right, the Revenue could demand papers from the taxpayer while express provisions prevented them from obtaining them from the legal adviser (paras. [22]–[24]). What seemed irrational to Lord Hoffmann had seemed to the lower courts to strengthen the Revenue’s argument—if the express provision recognising the LPP of the lawyer was needed then this was because there was no role for LPP in section 20(1). What is undeniable is that if the Revenue were right, then the success of a taxpayer’s claim to LPP would depend on a variety of unpredictable factors.

Lord Hoffmann was very careful to base his judgment on common law principles—citing one case from 1562—but, inevitably, Article 8 of the Convention on Human Rights was cited. He warned the Revenue that any amending legislation would have to be limited to cases in which the interference with LPP could be shown to have a legitimate aim which is “necessary in a democratic society” (para. [44]).

So what is one to make of this case? At one level it shows how easy it is to justify divergent interpretations of statutes; read on its

own, the judgment of Buxton L.J. is just as cogent as that of Lord Hoffmann. Moreover one cannot say that the Lords had a freer hand to deal with a number of precedents. It is true that Lord Hoffmann goes out of his way to criticise and even overrule one or two judgments, but the lower courts did not appear to be hemmed in by these precedents.

Probably the explanation lies in something simpler. The House of Lords felt that privilege was overwhelmingly important; the lower courts felt that they had to balance the public interest in privilege against another public interest, the prompt, fair and complete collection of the public revenue, and although this was said when dealing with the Convention point (C.A., para. [18]) it no doubt went much deeper in their thinking. Those who insist on legislating for human rights without covering human obligations no doubt get what they deserve.

JOHN TILEY