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## Unlike as Two Peas?

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# Analysis

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## Offside Goals and Induced Breaches of Contract

### A. *GLOBAL RESOURCES LTD v MACKAY*

In *OBG Ltd v Allan*,<sup>1</sup> the House of Lords radically reformulated the economic delicts. *Global Resources Group Ltd v Mackay*<sup>2</sup> provided the first opportunity for judicial consideration of this decision's implications for Scotland.

Mr Mackay was an employee of G & D Pallets Ltd (GDP), which contracted to provide his services as a business consultant to the pursuers. His "whole... time, attention and abilities" were to be devoted to the pursuers' business and he and GDP were bound to maintain commercial confidentiality. The pursuers averred that Mr Mackay had worked for a competitor and downloaded commercially sensitive documents on to his laptop, putting GDP in breach of both obligations. By doing so in the knowledge of GDP's contract with the pursuers, they argued, Mr Mackay induced GDP to breach the contract and was therefore liable to them in delict.

The matter was not finally disposed of because Lord Hodge felt that the pleadings as they stood justified neither dismissal for irrelevancy nor a proof. He did, however, make it clear that the facts averred did not disclose an induced breach of contract. In doing so, he produced a summary of Scots law on the point admirable for its clarity and brevity.

Lord Hodge demonstrated that the Scottish courts had developed the delict of inducing breach of contract by extensive reference to English authorities. On that basis, he was content to follow the approach in *OBG*.<sup>3</sup> He went on to identify five "characteristics" which appear to be the essential elements of the delict:<sup>4</sup>

- (i) breach of contract;
- (ii) knowledge on the part of the inducing party that this will occur;
- (iii) breach which is either a means to an end sought by the inducing party or an end in itself;
- (iv) inducement in the form of persuasion, encouragement or assistance;
- (v) absence of lawful justification.

1 [2007] UKHL 21, [2008] 1 AC 1. The case has received extensive academic commentary: e.g. J Thomson, "Redrawing the landscape of the economic wrongs" (2008) 12 EdinLR 267; H Carty, "The economic torts in the 21<sup>st</sup> century" (2008) 124 LQR 641; S Balthasar, "Economic torts – Vermögensschäden und der Schutz relativer Rechte im englischen law of torts" 2008 Zeitschrift für Europäisches Privatrecht 864.

2 [2008] CSOH 148, 2009 SLT 104.

3 Paras 7-10.

4 Paras 11-14.

These might be reformulated as a typical case:

- (a) X has a contract with Y;
- (b) Z encourages, persuades or assists Y to do something which breaches his contract with X;
- (c) Z knows that Y's action will be a breach of contract;
- (d) unless there is some other circumstance justifying Z's conduct, Z is liable to X in delict.

The pursuers fell short on (c). Since Mr Mackay's actions brought the breach about directly, without the need for any further action by GDP, he could not be said to have persuaded, encouraged or assisted GDP's breach.<sup>5</sup>

### B. A PARALLEL RULE?

The typical form of induced breach calls to mind the so-called "offside goals rule" in property law.<sup>6</sup> While the rule's rationale and certain detailed questions of application remain controversial,<sup>7</sup> the basic concept is clear:<sup>8</sup>

- (a) X has a personal right against Y, binding Y to grant a real right to X;<sup>9</sup>
- (b) Y grants a real right to Z, in breach of his obligation to X;
- (c) Z is in bad faith or the grant to him is gratuitous;
- (d) X may have the Y-Z grant set aside.<sup>10</sup>

If Z is in bad faith, the situation looks very similar to inducing breach of contract:

- The rule can only apply if the grant to Z is in breach of a prior obligation.<sup>11</sup>
- Bad faith requires actual or constructive knowledge of the impending breach.<sup>12</sup>
- Z wishes Y to grant him the real right and in making that grant, Y breaches the contract with X. Thus Y's action is a means to an end which Z seeks.
- Since no-one can force a benefit on another, Y requires Z's consent to effect the transfer. Therefore, Z assists Y's breach.

<sup>5</sup> Paras 15, 18. See *OBG* at paras 174-180 per Lord Nicholls of Birkenhead.

<sup>6</sup> See, most recently, *Advice Centre for Mortgages v McNicoll* [2006] CSOH 58, 2006 SLT 591 and *Gibson v Royal Bank of Scotland* [2009] CSOH 14.

<sup>7</sup> See e.g. S Wortley, "Double sales and the offside trap: some thoughts on the rule penalising private knowledge of a prior right" 2002 JR 291; R G Anderson, *Assignment* (2008) paras 11-04-11-30; D L Carey Miller with D Irvine, *Corporeal Moveables in Scots Law*, 2<sup>nd</sup> edn (2005) para 8.31.

<sup>8</sup> But cf *Gibson v Royal Bank of Scotland* [2009] CSOH 14 at para 43 per Lord Emslie.

<sup>9</sup> Cf *Gibson v Royal Bank of Scotland* at paras 44-47 per Lord Emslie.

<sup>10</sup> K G C Reid, *The Law of Property in Scotland* (1996) para 695.

<sup>11</sup> *Advice Centre for Mortgages v McNicoll* 2006 SLT 591 at paras 47-48. Lord Drummond Young held that there was no such breach where X's right was a mere option to purchase in a lease. It could be argued, however, that a grant to Z in such circumstances is anticipatory breach. See *Synge v Synge* [1894] 1 QB 466; *Omnium d'Enterprise v Sutherland* [1919] 1 KB 618; *Universal Cargo Carriers Corp v Citati (No 1)* [1957] 2 QB 401; W M Gloag, *The Law of Contract*, 2<sup>nd</sup> edn (1929) 600-601; H Beale (ed), *Chitty on Contracts*, 29<sup>th</sup> edn (2004) paras 24-028-24-030; G H Treitel, *The Law of Contract*, 12<sup>th</sup> edn by E Peel (2007) para 17-075.

<sup>12</sup> *Advice Centre for Mortgages* at para 45 per Lord Drummond Young.

For present purposes, the explicit characterisation of assistance as a form of inducement is the most striking element of Lord Hodge's judgment. By extending inducement beyond its everyday meaning, it allows a parallel to be drawn between the two rules.<sup>13</sup>

The parallel is not, however, surprising. Both rules protect contractual rights against third parties,<sup>14</sup> and both are marked by the practical and dogmatic considerations peculiar to this enterprise: lack of public notice of contractual relations and concern that the personal nature of personal rights be maintained.<sup>15</sup> Both attempt to restore the *status quo ante*. This is obvious of offside goals but no less true of inducing breach of contract. Delictual damages attempt to put the pursuer in the position he would have been in had the wrong not been done.<sup>16</sup> If imminent risk of the breach of either rule were demonstrated, interdict would be available.<sup>17</sup>

Against this background, setting a bad faith transfer aside as an offside goal begins to look like a special remedy available in some cases of induced breach. However, the literature on offside goals makes little or no mention of inducing breach of contract and the two rules seem to have developed without reference to one another. Although strikingly similar in their modern form, they arose from very different sources. The offside goals rule has a long native history<sup>18</sup> and resembles an equivalent rule in Roman-Dutch law.<sup>19</sup> Located firmly within one of the most Civilian areas of Scots law, there was very little direct English influence on its development.<sup>20</sup> The *OBG* rules on inducing breach of contract, on the other hand, are creatures of the Common Law, with roots in the interaction between the action for wrongful retainer of a servant<sup>21</sup> and an action on the case for procuring desertion by a servant.<sup>22</sup> While, as Lord Hodge demonstrated, Scottish courts have referred frequently to English authority on the question, the compliment does not seem to have been returned.<sup>23</sup>

13 See *Gibson v Royal Bank of Scotland* [2009] CSOH 14 at para 40 per Lord Emslie.

14 *OBG* emphasised that this, rather than the protection of economic interests, lies at the heart of inducing breach of contract: *OBG Ltd v Allan* [2008] 1 AC 1 at para 8 per Lord Hoffmann.

15 *Global Resources Group* at para 15; *Advice Centre for Mortgages* at para 48.

16 *Stair, Inst* 1.9.2.

17 D M Walker, *The Law of Civil Remedies in Scotland* (1974) 234; D Maxwell, *The Practice of the Court of Session* (1980) 83. Interdict was granted against breach of the South African equivalent of the offside goals rule in *Wahloo Sand Bk v Trustees, Hambly Parker Trust* 2002 (2) SA 776 and *Harley v Upward Spiral* 1196 CC 2006 (4) SA 597.

18 See R G Anderson, *Assignment* (2008) paras 11-06-11-23.

19 G Lubbe, "A doctrine in search of a theory: reflections on the so-called doctrine of notice in South Africa" 1997 *Acta Juridica* 246 and authorities cited therein, particularly at n 4.

20 Lord Shand did make reference to the English rules as Lord Ordinary in *Stodart v Dalzell* (1876) 4 R 236 at 241.

21 Statute of Labourers 1351.

22 G H Jones, "*Per Quod Servitum Amisit*" (1958) 74 LQR 39 (esp at 50-53), cited by Lord Hoffmann in *OBG* at para 4. The action on the case developed out of trespass into a general action for miscellaneous wrongs: see F W Maitland, *The Forms of Action at Common Law*, 2<sup>nd</sup> edn by A H Chaytor and W H Whittaker (1968) Lecture VI.

23 In *OBG* cases from Australia, Canada and America were among the "[n]early 350 reported decisions and academic writings ... placed before the House" but the only Scottish cases were *Donoghue v Stevenson* 1932 SC (HL) 31 and *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* 1942 SC (HL) 1. The latter was decided on the basis of English authorities.

### C. DIFFERENCES IN DETAIL

#### (1) Mental element

In light of that background, it is not surprising that there are divergences on certain points. According to the offside goals rule's *locus classicus*:<sup>24</sup>

If an intending purchaser is aware of a prior contract for the sale of the subjects, he is bound to inquire into the nature and result of that prior contract, and his duty of inquiry is not satisfied by inquiry of the seller and an assurance by him that the contract is no longer in existence. If he merely obtains such an assurance, he cannot rely on the missives or on a disposition following thereon . . . It is sufficient if the intending purchaser fails to make the inquiry which he is bound to do. If he fails he is no longer *in bona fide* but *in mala fide*.

Thus, if Z knew there had been a contract between X and Y but failed to make proper inquiries as to whether Y was still bound, he would be in bad faith for the purposes of offside goals. However, such a buyer would not necessarily have the "*mens rea*" for inducing breach of contract unless the failure amounted to wilful blindness.<sup>25</sup> *Mainstream Properties Ltd v Young* was decided alongside *OBG*. The alleged tortfeasor entered into a joint venture, in which he assisted directors of Mainstream Properties to buy some land. The purchase put the directors in breach of their contractual duties to Mainstream. The alleged tortfeasor knew of the potential breach but contented himself with (incorrect) assurances from the directors that Mainstream had been offered the property and refused. The House of Lords held that such assurances were sufficient, in the circumstances, to exclude liability for inducing breach of contract.<sup>26</sup>

#### (2) Justification

While pursuing one's economic interest is not sufficient justification for inducing breach of contract, Lord Nicholls suggested in *OPG* that inducing a breach of contract was permissible "in order to protect an equal or superior right of [one's] own".<sup>27</sup> This sits uneasily with recent authority on chronology in offside goals. In *Alex Brewster & Sons v Caughey*,<sup>28</sup> Lord Eassie held that Z's knowledge of Y's prior contract with X would render Z's title voidable even if that knowledge was acquired *after* Z had concluded his own contract with Y (but before Z's completion of title pursuant to that contract). Since, all other things being equal, personal rights rank *pari passu* in insolvency, an innocently acquired contractual right (such as Z's against Y) might perhaps be regarded as an equal right and thus a justification for inducing breach.<sup>29</sup>

<sup>24</sup> *Rodger (Builders) Ltd v Fawdry* 1950 SC 483 at 499 per Lord Jamieson.

<sup>25</sup> *OBG* at paras 40-41 per Lord Hoffmann.

<sup>26</sup> *OBG* at paras 67-69 per Lord Hoffmann and paras 201-202 per Lord Nicholls of Birkenhead.

<sup>27</sup> *OBG* at para 193.

<sup>28</sup> 2002 GWD 15-506 at para 73. The text of Lord Eassie's opinion is available at <http://www.scotcourts.gov.uk/opinions/EAS0904.html>.

<sup>29</sup> Cf *Harley v Upward Spiral* 1196 CC 2006 (4) SA 597.

#### D. IMPLICATIONS

The differences mentioned create the potential for voidability where there is no delict and thus present obstacles to development of a unitary doctrine on the protection of contractual rights against third parties. These obstacles do not, however, seem insurmountable and such a development might be considered desirable as we strive for a mixed system which is a coherent synthesis rather than a mere heap. It would certainly be evidence of continuing vitality in the interaction between Common and Civil Law in Scotland.

*John MacLeod*

*Max Planck Institute for Comparative and International Private Law, Hamburg*

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## Causation, Idiopathic Conditions and the Limits of Epidemiology

The absence of scientific evidence with respect to the cause of damage is one of the most difficult problems faced by courts in determining causation. Occasionally, Scots law is required to resolve such cases.<sup>1</sup> They are essentially about scientific uncertainty, which may arise from limitations in scientific knowledge about a particular biological process (general causation) or from the difficulty in providing a scientific explanation for the sequence in an individual case (individual causation).<sup>2</sup> Both forms of scientific uncertainty arose in *Smith v McNair*,<sup>3</sup> where the difficult legal and medical issue addressed, and deemed to be “at the frontier edge of causation”,<sup>4</sup> was whether a road accident accelerated the development of Parkinson’s disease in a pursuer already suffering from the condition.<sup>5</sup>

#### A. THE FACTS

In January 2003, Mrs Smith was involved in a serious road accident. A lorry had come out of a lay-by on the A77, and the pursuer moved into the offside lane to avoid it.

1 See, for instance, *Bonthrone v Millan* [1985] *Lancet* ii, 1137 (Lord Jauncey) (existence of cryptogenic (unknown) causes to eliminate possible causal connection between pertussis vaccine and brain damage); *Kay v Ayrshire and Arran Health Board* 1987 SC (HL) 145 (penicillin overdose not capable of causing or aggravating deafness); *Dingley v Chief Constable, Strathclyde Police* 1998 SC 548 *affd* 2000 SC (HL) 77, discussed below.

2 L Khoury, *Uncertain Causation in Medical Liability* (2006) 48-54.

3 *Smith v McNair* [2008] CSOH 154, 2008 GWD 38-570.

4 Para 16.

5 Para 5. Parkinson’s disease is a neuro-degenerative disorder, the degeneration taking the form of accelerated ageing in areas deep in the brain which control movement. There is presently no cure: para 9.

The behaviour of the lorry caused her to brake and, as she did so, a car driven at high speed by the defender collided with the rear of the pursuer's car. The pursuer's car was lifted up and spun round, hitting the central reservation and ending up facing to the south. While Mrs Smith was able to escape from the car, she felt sick and experienced severe lower back pain. Later that day she was discharged from hospital and experienced pain to her neck, back and left leg. She became aware of pain in her left arm when moving it and was off work for some weeks. Problems with her left arm developed and the accident had an immediate impact on her ability to work. By November 2004 she was found to be suffering from Parkinson's disease. While the physical injuries were fortunately minor, proof that Parkinson's disease had been caused or triggered by the accident would have justified a significantly greater award of damages.

### B. THE ISSUES AND THE DECISION

There were two main questions of causation in *Smith*. The first, that of general causation, was whether trauma could in fact cause or accelerate Parkinson's disease. The second question was whether it did so in the case before the court. In determining this issue, Lord McEwan was assisted by two eminent doctors. It was agreed by both parties that the pursuer was already suffering from Parkinson's disease though unaware of it at the time, and that she would have developed it at some stage.<sup>6</sup> Both doctors agreed that the central problem with Parkinson's disease was that it is an idiopathic condition: that is, its specific pathology and cause are unknown.<sup>7</sup>

There were two main areas of dispute. The first was whether there had been a head injury to the pursuer. This was a *sine qua non* without which her major claim could not be proved.<sup>8</sup> The second area of dispute was the correct meaning to attribute to epidemiological studies which were produced for the court but not spoken to by their authors. An allied question was what to make of epidemiological studies not produced but whose conclusions appeared in review papers.<sup>9</sup> The crucial issues in the case were therefore, first, whether the pursuer had sustained a head injury, secondly, whether the epidemiological studies showed a causal connection between trauma and Parkinson's disease, and thirdly, if the pursuer did sustain a head injury, whether that head injury caused the acceleration of her pre-existing Parkinson's disease. While both doctors spoke at length about the studies, no epidemiologists were called as witnesses.<sup>10</sup>

Lord McEwan held that it was impossible to conclude on the facts that the pursuer had sustained a head injury.<sup>11</sup> However, assuming that such an injury had occurred, he

6 Para 6.

7 Para 5.

8 Para 14.

9 Para 15. Epidemiology is the study of disease and its distribution in defined populations. For discussion of the limitations of epidemiology, see R Goldberg, *Causation and Risk in the Law of Torts: Scientific Evidence and Medicinal Product Liability* (1999) 43-48.

10 Para 5.

11 Para 47.

held that the conclusions of the pursuer's expert witness on causation were based on epidemiological evidence, regarding which he had not been furnished with enough material to make an informed decision on the general question of head injury and causal link to Parkinson's disease. That was fatal to the pursuer's case.<sup>12</sup>

### C. DISCUSSION

There is a great difference between evidence of causation for purposes of science and evidence for legal purposes. In the law of negligence, it is enough to show that the balance of probabilities – meaning more than 50 per cent, or on a preponderance of the evidence – indicates a causal connection. For medical science, on the other hand, rules of epidemiology require evidential proof on a balance of probabilities of at least 95%. The most pertinent issue<sup>13</sup> is the lack of clarity in being able to determine at what point the balance of probabilities standard (legal) and the standard for epidemiology (science) intersect.<sup>14</sup>

The crux of *Smith* lies in its reaffirmation of the cautious approach of Scots law to the interpretation of epidemiological evidence.<sup>15</sup> While acknowledging that medical witnesses are entitled to refer to medical literature, including published papers by epidemiologists even though they themselves are not epidemiologists,<sup>16</sup> Lord McEwan stressed the need to look at such evidence critically because the writers of it could not be cross-examined. Such scientific evidence only became a factor for consideration if it was “intelligible, convincing and tested”.<sup>17</sup> Much was said by both sides about the decision of the Inner House in *Dingley v Chief Constable, Strathclyde Police*,<sup>18</sup> the facts of which raised similar issues to *Smith*.<sup>19</sup> In view of the judges' lack of unanimity in their reasoning in *Dingley*,<sup>20</sup> which had led to some uncertainty about its *ratio*, Lord McEwan stated that *Dingley* requires the court to undertake some analysis of the medical and scientific evidence, but only with the assistance of the experts and exercising particular care where expert opinion is divided.<sup>21</sup> *Dingley*

<sup>12</sup> Para 52.

<sup>13</sup> See Goldberg, *Causation and Risk in the Law of Torts* (n 9) 105.

<sup>14</sup> L Lasagna and S R Shulman, “Bendectin and the language of causation” in K R Foster, D E Bernstein and P W Huber (eds), *Phantom Risk: Scientific Inference and the Law* (1993) 112.

<sup>15</sup> See *Dingley v Chief Constable, Strathclyde Police* 1998 SC 548 at 555 per the Lord President (Rodger) and at 604 per Lord Prosser; *McTear v Imperial Tobacco Ltd* 2005 2 SC 1 at para 5.11 per Lord Nimmo Smith.

<sup>16</sup> *Main v McAndrew Wormald Ltd* 1988 SLT 141 at 142 per the Lord Justice-Clerk (Ross).

<sup>17</sup> *Smith* at para 18, citing *Davie v Magistrates of Edinburgh* 1953 SC 34 at 40.

<sup>18</sup> 1998 SC 548.

<sup>19</sup> The issue in *Dingley* was whether trauma in general or whiplash injury in particular could ever trigger the onset of multiple sclerosis. In the absence of such proof, the pursuer was unable to establish a causal connection between the pursuer's whiplash injury in a road traffic incident and the subsequent onset of multiple sclerosis: *Dingley* at 86 and 93.

<sup>20</sup> Although concurring in the result, they approached the reasoning in different ways: see *Dingley* at 601-602 per the Lord President (Rodger), at 618-620 per Lord Prosser, and at 634 per Lord Caplan.

<sup>21</sup> *Smith* at para 26.



also reaffirmed the central principle that epidemiology alone can never prove an individual case.<sup>22</sup>

This approach to epidemiological evidence was carried further and crystallised in *McTear*, where Lord Nimmo Smith held that it was necessary to consider whether the evidence of any expert witness had imparted special knowledge of the subject matter of epidemiology, including published material lying within the witness's field of expertise, so as to allow the court to form its own judgment about the subject matter and the conclusions to be drawn from it.<sup>23</sup> *Dingley*, *McTear* and now *Smith* are at one in stressing the need for experts to teach the court how to do the epidemiology before it can form its reasoned judgment on the evidence.

Such a cautious approach to epidemiological evidence was central to the decision in *Smith*.<sup>24</sup> While sympathetic to the experts who were "outwith their chosen discipline and abroad in the field of epidemiology", Lord McEwan concluded that they were unable to explain the studies, which seemed to him to "raise more questions than answers". There was no clear consistency in what was meant by "head trauma" and any link with causation was "at best controversial". No study existed to provide any conclusion on "early manifestation" of pre-existing Parkinson's disease. In such circumstances, he had to hold that it was not established that there was any link between head trauma and any onset of the disease. Unlike *McTear*, however, *Smith* evidences less of an impression of a "dogmatic aversion"<sup>25</sup> to statistical evidence. Lord McEwan felt that many of the problems with the evidence might have been ameliorated if the authors of the reports had been called and there had been some statistical evidence. Without such assistance, the judge was "at once disabled from being able properly to evaluate the worth of the study or to draw on the proper conclusions".<sup>26</sup> In his view, therefore, this was an appropriate case for epidemiologists to give evidence and for experts to explain their studies. He did not, however, believe that this was always the case, and suggested that reliance on doctors and epidemiologists "can almost lead the court unwittingly into a kind of satellite litigation on issues away from the pursuer's case".<sup>27</sup> He seemed to regard *McTear* and *Dingley* as two recent examples of this,<sup>28</sup> yet it is arguable that the use of statistics in determining causation is hardly satellite litigation: in both cases it was a primary issue which required resolution in the face of scientific uncertainty.

22 *Smith* at para 26. The impossibility of applying epidemiological studies to determine individual causation was cited as the main reason for the pursuer's failure in *McTear* to prove that, but for her husband's smoking of cigarettes, he would not have contracted lung cancer: *McTear* at paras 6.180 and 6.184-6.185 per Lord Nimmo Smith. See further R Goldberg, "Causation", in G Howells (ed), *The Law of Product Liability*, 2<sup>nd</sup> ed (2007) para 5.3.

23 *McTear* at paras 5.17 and 6.155 per Lord Nimmo Smith.

24 Para 81 from which the quotes which follow are taken.

25 C Miller, "Causation in personal injury: legal or epidemiological common sense" (2006) 26 LS 544 at 566.

26 *Smith* at para 80.

27 Para 16.

28 Paras 16, 29.

#### D. CONCLUSION

Like *McTear* but on a much smaller scale, *Smith* acts as a timely reminder to pursuers who rely on epidemiological evidence that a failure to take the court to the primary literature showing causation and to teach it how to do the epidemiology to a sufficient extent is likely to be fatal to the prospects of success. While it may be unnecessary to call epidemiologists in every case, the realisation must now be that epidemiologists and statisticians are often essential to the determination of cases involving idiopathic conditions like Parkinson's disease, and other cases involving medical causal uncertainty, where non-numerical solutions have proved elusive.

*Richard Goldberg*  
*University of Aberdeen*

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## The Continuing Confused Saga of Contract and Error

One of the areas of contract law which continues to trouble students, practitioners and judges alike is the question of error and how it affects the formation and enforceability of a contract. The continuing confusion is highlighted in the opinion handed down in *Parvaiz v Thresher Wines Acquisitions Ltd*,<sup>1</sup> a recent decision of the Outer House. The facts were simple enough. The pursuer viewed shop premises in Glasgow, and the following day successfully bid to purchase the subjects at a public roup (or auction) for a total price of £262,000. The pursuer, having paid a deposit of ten per cent of the total purchase price, subsequently discovered that the defender did not own the whole of the property which the pursuer had viewed: in particular, a lavatory which formed an integral part of the shop premises was not owned by the defender and thus not included in the title sheet as registered in the Land Register. The pursuer sought reduction of the contract of sale and repetition of the deposit on account of his error as to the true extent of the property. While these facts seem simple enough, the way in which the pursuer's error ought to be treated in law caused both counsel and judge some difficulty. Indeed, the Lord Ordinary, Lord Brodie, went so far as to commend both counsel appearing before him for having "wisely skirted round the edges"<sup>2</sup> of the law of error in their respective submissions. When judges commend practitioners for avoiding discussing too fully the law applicable to a case, this should set alarm bells ringing in both the academic and practising community.

#### A. THE TROUBLE WITH ERROR

What exactly makes assessment of the effect, if any, of the error alleged in this case so difficult for the courts? First, error will be problematic in any legal system

<sup>1</sup> [2008] CSOH 160, 2008 GWD 40-592.

<sup>2</sup> Para 10.

which stresses, as Scots law does, a subjective meeting of the minds (*consensus in idem*) as essential to contractual intent while at the same time proclaiming that it is the objective manifestation of consent to which courts will usually turn.<sup>3</sup> What people think and what people appear to do will not always be one and the same thing, and this tension between actual intention and appearance of intention is ripe for juristic difficulty. Even accepting the universality of the problem, however, Scots law has suffered peculiar troubles with the law of error. There are at least four different typologies which have been used in Scotland to characterise error: (1) error “in the substantial” of a contract; (2) common error, mutual error and unilateral error; (3) induced error and uninduced error; and (4) error in transaction and error in motive. The first categorisation, developed by Stair<sup>4</sup> and other institutional writers, proved inadequate as a means of excluding irrelevant errors, in consequence of which nineteenth century courts developed the language of common error, mutual error and unilateral error. The last of these was usually deemed irrelevant in contractual disputes unless—so later nineteenth century thinking maintained—induced by another’s misrepresentation (which led to development of the third typology) or taken advantage of in bad faith by the other party (as in *Steuart’s Trs v Hart*<sup>5</sup> or more recently *Angus v Bryden*<sup>6</sup>). Finally, under the influence of the late T B Smith<sup>7</sup> and the Scottish Law Commission,<sup>8</sup> a typology based upon error in motive (usually irrelevant, unless induced) and error in transaction (relevant if related to a substantial matter of the contract) was developed, although it has yet to be much used by the courts (it is, for instance, not referred to in *Parvaiz* by counsel or court, which is somewhat puzzling). In to this mixture, one must also add somewhere McBryde’s analysis of “error plus” (an analysis cited in *Parvaiz*), namely that error is relevant only where it appears alongside some other factor which argues in favour of correction. These typologies of error continue to be used interchangeably by commentators and courts, something which hinders adoption of a commonly agreed approach to cases involving error.

## B. THE PARVAIZ DECISION

To legal confusion one must add confusion caused by the pleadings and oral argument in *Parvaiz*. It is not entirely clear what the pursuer was arguing. The nature of the pursuer’s case as recited in the first paragraph of the judgment suggests that the pursuer was pleading that his error as to the extent of the property rendered

3 It is interesting to see, in support of the universality of this problem, counsel for the pursuer in *Parvaiz* citing Grotius, *De Jure Belli ac Pacis* 2.11.6.1: “de pacto errantis perplexa satis tractatio est” [as for a promise made by an error or mistake, the point is more intricate and perplexing].

4 *Inst* 1.10.13.

5 (1875) 3 R 192.

6 1992 SLT 884. Oddly, the case was not cited in *Parvaiz*.

7 T B Smith, *Studies Critical and Comparative* (1962) 99-100. Smith had developed only error in motive in his own writings, but, under his influence, the Scottish Law Commission added the error in transaction category also (see n 8).

8 Scottish Law Commission, Consultative Memorandum on *Defective Consent and Consequential Matters* (Scot Law Com CM No 42, 1978).

the contract voidable. Hence reduction was being sought. Yet it is clear from later remarks of Lord Brodie that, at least in oral argument, the pursuer seemed to be arguing in the alternative that there was no contract, or that the contract was void (which is the same thing). Lord Brodie states that the pursuer's position was "that there was no contract by reason of absence of consensus. In other words the contract was void *ab initio*".<sup>9</sup> To be fair to the pursuer, much of the confusion seems to have related to the fact that it was not clear to him what exactly the defender had known about the extent of its ownership of the subjects at the time they were exposed for sale: the defender may have been unaware that it did not own the lavatory, or it may have known the true position and attempted to mislead the pursuer.<sup>10</sup>

It certainly matters what the pursuer and the defender knew. If both believed that the property offered for sale included the lavatory, this would, to use the traditional nineteenth century terminology, be a case of common error: both parties shared a mistaken assumption which was not reflected in the objectively ascertainable position. Given that such a mistake would relate to a matter—the extent of the subjects—traditionally considered to be one of those *in substantialibus* of the contract, the conclusion reached in prior cases of common error in the substantial of the contract—that no contract exists—would seem to follow. On the other hand, if the pursuer believed that the property included the lavatory but the defender did not, and each of these subjective understandings was properly reflected in an objective determination of their contractual intentions, then there is a case of failure to reach an agreement, in other words dissensus: P was offering to buy *x* and D was offering to sell *y*. This could be called a case of mutual error, as indeed Lord Brodie so described it, and would again result in there being no contract. In fact Lord Brodie also called what has here been called "common error" a case of "mutual error", a fusion of two distinct factual categories which finds some support in certain commentaries on the subject.<sup>11</sup> Finally, if the defender knew the true extent of what it owned but the pursuer did not, and the defender tried to give the impression of owning more than it did in order to take advantage of the pursuer's mistaken belief, this would be a case of unilateral error. The presence of the defender's bad faith in such a case, acknowledged as a possibility by Lord Brodie, would result in this being one of those rare cases when an uninduced unilateral error operates so as to render the contract voidable. That the presence of bad faith renders the contract merely voidable, whereas an innocent common error *in substantialibus* renders the contract void, is one of those peculiarities of the law of error which perhaps merits revisiting.

Lord Brodie's judgment, acknowledging that the pursuer had stated a relevant case and allowing the matter to go to a proof before answer, recognised that it was largely a lack of knowledge as to what the defender actually knew which rendered precise

9 Para 9.

10 Given that, as the pursuer pointed out, the defender's solicitor attempted to include the lavatory area in the draft disposition exhibited to the pursuer, there is a strong sense that the defender was indeed mistaken as to the extent of the subjects owned, but was being deliberately evasive about this in its written and oral pleadings.

11 See W W McBryde, *The Law of Contract in Scotland*, 3<sup>rd</sup> edn (2007) paras 15-34-15-38 and the authorities referred to therein.

formulation of the pursuer's case difficult. Indeed, one of the principal defences to the action – that the conditions of the sale had put the pursuer on warning that no warranty was given as to the extent of the subjects offered – would only be relevant if there were indeed a contract in existence.

What if, for the sake of argument, there *was* a contract in existence, albeit one entered into by the pursuer under unilateral error: would the terms of the articles of roup, including that term which stated that “the subjects are sold *tantum et tale* as they exist with no warranty as descriptions, extents, boundaries ...”, operate to exclude the pursuer from pleading its error as to the extent of the subject being sold? Lord Brodie appears to tend to the view that they would not, and that “contracting out of material error” would not be permissible.<sup>12</sup> This view finds strong support from *Hamilton v Western Bank of Scotland*,<sup>13</sup> on which both the pursuer and Lord Brodie placed much store. That case also concerned property sold by public roup, the pursuer arguing that both parties were in error as to the extent of the defender's title (a “common error” in the terminology used in the foregoing discussion). The Inner House upheld the judgment at first instance in favour of the pursuer, although, somewhat frustratingly, it is not clear whether the court saw the contract as void or voidable. What was particularly helpful about the *Hamilton* decision for the pursuer in *Parvaiz* was the clear view of the appeal court that the articles of roup did not exclude the pursuer from pleading an error as to the extent of the subjects where that error was “material”, which the Inner House seemed to conceive of as meaning one which, being more than merely trivial, led to the identity of the property being in doubt.<sup>14</sup>

The decision in *Hamilton* seems to suggest that, even if the facts of *Parvaiz*, as proved, disclose contractual consensus, the pursuer should nonetheless be able to plead that his unilateral but material error is actionable despite the terms of the articles of roup, in other words that the pursuer was objectively and reasonably in error and should not therefore be deemed by the terms of the contract to be in possession of knowledge about the extent of the defender's title which he did not in fact possess. The pursuer should then be able to argue that the additional factor (“error plus”) of an error created (and perhaps taken advantage of) by the false impression given by the defender about the extent of the property should permit him to avoid the contract and reclaim the deposit.

While the prospect for ultimate success by the pursuer in this action seems reasonably good, it is evident from the pleadings and opinion in *Parvaiz* that Scots law still lacks a clear and universally accepted narrative for explaining the relevance of error to contract. For as long as terms like “mutual” and “material” error continue to be used in different ways, when uncertainty remains as to what precisely the “plus” is which can trigger “error plus”, and when judges commend counsel for skirting

<sup>12</sup> See para 15.

<sup>13</sup> (1861) 23 D 1033.

<sup>14</sup> A somewhat different definition of operative error, it must be said, than that given by Lord Watson in *Menzies v Menzies* (1893) 20 R (HL) 108 at 142: “Error becomes essential whenever it is shewn that but for it one of the parties would have declined to contract”.

around the subject of error, there is some way to go in the realm of contractual error before, to quote Winston Churchill, we are able to “move forward into broad, sunlit uplands”.<sup>15</sup>

*Martin Hogg*  
*University of Edinburgh*

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## The Effect of Past and Subsisting Breaches on Contractual Rights

Paraphrasing Lord Mansfield in *Vallejo v Wheeler*,<sup>1</sup> Lord Bingham of Cornhill recently observed in this journal that “[c]ertainty of interpretation, however hard to achieve, is of course a highly desirable goal in commercial transactions”.<sup>2</sup> Whilst clarity of expression in the drafting of agreements is to be encouraged, where more than one meaning is possible without doing violence to the language employed, then the court’s role as a bringer of certainty is engaged. *Trygort (Number 2) Limited v UK Home Finance Ltd*<sup>3</sup> is one recent case where the Inner House had the opportunity to consider its approach to the construction of words in a commercial lease which could be reasonably said, as a matter of ordinary language, to have two possible meanings. The case is of particular note for the interpretative criteria which were applied.

### A. TWO POSSIBLE INTERPRETATIONS

In *Trygort*, an express term gave the tenant a unilateral break option to terminate the lease prior to the ish. However, there would be no such right “if the Tenant has been in breach of its obligations to the Landlord in terms of [this Lease]”. When the tenant purported to exercise the break option to determine the lease prematurely as of 31 March 2005, the landlord raised an action for declarator that the tenant was contractually bound to use and occupy the subjects until the expiry date of 27 May 2007 and to pay the rent until that date.

The tenant argued that it was not in subsisting breach of the lease on 31 March 2005 and so had the right to exercise the break option on that date. If such a construction were rejected, and the tenant could only avail itself of the break option in circumstances where it had *never* committed a breach of the terms of the lease, the

<sup>15</sup> HC Deb 18 June 1940, col 60.

<sup>1</sup> (1774) 1 Cowp 143 at 153.

<sup>2</sup> Lord Bingham of Cornhill, “A new thing under the sun? The interpretation of contract and the *ICS* decision” (2008) 12 EdinLR 374.

<sup>3</sup> [2008] CSIH 56, 2008 SLT 1065.

result would be commercially absurd. The landlord submitted that if the parties had intended that the construction advanced by the tenant would govern the position, they could have used the present tense, namely “if the Tenant is in breach of its obligations to the Landlord...”.<sup>4</sup>

When the case came before the sheriff, he took the view that the landlord’s construction accorded with the ordinary meaning of the words in the lease. Nevertheless, following the speech of Lord Hope in *Melanesian Mission Trust Board v Australian Mutual Provident Society*,<sup>5</sup> the sheriff dismissed the landlord’s action on the basis that this was not a case where the ordinary meaning of the words could be applied since the context and surrounding circumstances indicated otherwise.

Delivering the judgment on behalf of the Inner House of the Court of Session, Lord Kingarth agreed that the exception only applied in circumstances where the tenant was in subsisting breach. However, the Inner House departed from the position of the sheriff in two important respects. First, unlike the sheriff, the Inner House was unable to extract any assistance from the surrounding circumstances or factual matrix. While counsel for the tenant submitted that the commercial lease had been negotiated and adjusted by the parties against the background of a clear line of authority in English law, most notably *Bass Holdings*,<sup>6</sup> to the effect that the words under consideration would be construed in the tenant’s favour, Lord Kingarth took the view that the existence of such background knowledge was something which the court was not entitled to assume.<sup>7</sup>

Secondly, the Inner House placed weight on the guidance of Lords Steyn and Rodger in, respectively, *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd*<sup>8</sup> and *Bank of Scotland v Dunedin Property Investment Co Ltd*<sup>9</sup> to the effect that a commercially sensible construction should be applied to the exception to the break option in a commercial lease. To that extent, the Inner House rejected considering the factual matrix in favour of applying a construction which was commercially sensible.<sup>10</sup> This construction, consonant with English authority,<sup>11</sup> was in tune with business common sense, since it was “difficult to conceive of tenants readily agreeing to be bound by a clause which would mean that the right to exercise the option would forever be lost on the occurrence of any breach whenever it occurred and whether or not it was immediately remedied”.<sup>12</sup> Moreover, to hold otherwise would result in the break option being practically worthless.<sup>13</sup> The “never any breach” interpretation advocated by the landlord also carried the danger that it would lead to absurdities in circumstances where the duration of the commercial lease was particularly long and

4 Para 7.

5 [1997] 2 EGLR 128 at 129 per Lord Hope of Craighead.

6 *Bass Holdings Ltd v Morton Music Ltd* [1988] 1 Ch. 493.

7 *Trygort* at para 11.

8 *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 at 771A.

9 1998 SC 657 at 661.

10 *Trygort* at para 11.

11 *Bass Holdings Ltd v Morton Music Ltd* [1988] 1 Ch 493

12 *Trygort* at para 16.

13 Para 14, paraphrasing from the judgment of Nicholls LJ in *Bass Holdings*.

the lease had been assigned to a third party. Taking into account each of these points, it is submitted that the decision of the court accords with commercial logic and was undoubtedly correct.

### B. THE APPLICATION OF THE INTERPRETATIVE CRITERIA

One might argue that the approach of the court to interpretation is not wholly consistent with that of Lord Rodger in *Dunedin*, where his Lordship opined that the application of a commercially sensible construction is only appropriate to ascertain the ordinary or plain meaning of the words employed.<sup>14</sup> In contrast, a commercially sensible construction was applied in *Trygort* only once it had been decided that the relevant term of the commercial lease was reasonably capable of more than one interpretation on the basis of the ordinary and plain meaning of the words. From one perspective, the tool of the commercially sensible construction was applied too late in the overall interpretative process.<sup>15</sup> However, such a contention is a function of the legal formalism which was resoundingly rejected by Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society*.<sup>16</sup> To quote Lord Macfadyen in the Outer House in *Glasgow City Council v Caststop Ltd* in a very similar, albeit not wholly identical, context, “[w]hichever of these approaches is adopted . . . the result should be the same”.<sup>17</sup> It is submitted that the point at which recourse to a commercially sensible construction is made is not particularly crucial whether it is deployed (1) as a means of establishing the ordinary meaning of the relevant words or (2) subsequent to the point at which the ordinary meaning of the words has been identified or (3) once it has been established that the words are capable of two interpretations on their natural reading.

Where it is decided that the terms of the contract are reasonably capable of more than one ordinary meaning or that the ordinary meaning is unclear or ambiguous, the court must have regard to the surrounding circumstances, the factual matrix, the background knowledge which was or ought reasonably to have been available to the parties, and take cognisance of the construction which accords with commercial common sense. However, one will recall that in *Trygort*, the court gave precedence to the commercially sensible interpretation and subordinated the factual matrix and circumstances surrounding the conclusion of the contract to commercial common sense. Indeed, the approach adopted in *Trygort* perhaps suggests that the courts rationalise such interpretative criteria in terms of a hierarchy. If that is indeed the case, this begs the question as to how the courts prioritise the application of these interpretative criteria. One might wonder whether such a prioritisation should always be applied in instrumental terms, particularly in the case of a contract entered into in a non-commercial context.

The correct response to these questions appears to depend on the particular context. Since legal formalism has been rejected, it is submitted that a casuistic,

<sup>14</sup> 1998 SC 657 at 661.

<sup>15</sup> The same approach was followed in *Bank of Scotland v Junior* 1999 SCLR 284.

<sup>16</sup> [1998] 1 WLR 896.

<sup>17</sup> 2002 SLT 47 at para 33.



rather than a formulaic, approach should be applied. The rejection of formalism suggests that an approach formulated in terms of a “hierarchy” and the prioritisation of application of interpretative tools is misconceived. Undoubtedly, there will be cases such as *Trygort* where an examination of the factual matrix or surrounding circumstances will not unearth anything which is sufficiently revealing to dislodge or affirm the court’s understanding of the ordinary meaning of the words.<sup>18</sup> In such circumstances, where the application of a commercially sensible construction will prove fruitful, it will be warranted for the court to test the sufficiency of what it understands to represent the natural meaning of the words against that commercial construction. Conversely, on occasion, recourse to commercial common sense may be unilluminating, in the sense that there is no single settled understanding of what is sensible or desirable in a commercial context or environment, whereas recourse to the surrounding circumstances, factual matrix, or the background knowledge which was or ought reasonably to have been available to the parties may indeed produce insights which are particularly useful. On these grounds, it seems counter-productive to conceptualise matters in terms of fixed rules espousing a hierarchy of interpretative criteria. How the criteria are applied from case to case ought to be understood in terms of a casuistic rather than dogmatically rigid process, with the selection of criteria being dependent on their relevancy to the interpretative endeavour in hand.

### C. CONCLUSION

The courts have said time and again that the construction of particular words in a particular contract in a given case cannot be taken forward to the interpretation of similar words in a different contract in a subsequent case.<sup>19</sup> However, what can be said about *Trygort* is that, by electing to invoke the commercially sensible construction in preference to the factual matrix and surrounding circumstances, the Inner House may have intended to set down a proposition of Scots law. Where the court adopts a certain construction of a term in a particular contract in a particular case, pursuant to the consideration of the background knowledge which was or ought reasonably to have been available to the parties, the circumstances surrounding the inception of the contract and the whole matrix of facts, that construction is not one which can be taken to have crystallised into a legal rule of universal application in the future. However, it is submitted that where the terms under consideration (such as the provisions in *Trygort*) are ones which are routinely encountered in a commercial lease generally, and such terms are interpreted by the court in accordance with a commercial construction, the interpretation is one which is as good (albeit not quite the same thing) as a fixed rule of law. To the extent that the interpretation adopted in *Trygort* is in line with that in *Bass Holdings*,<sup>20</sup> the case also has the added attraction of

18 *Caststop* at para 21; *Walter Connell & Co v John Hart & Co* [2008] CSIH 67, 2009 GWD 1-12 at para 28 per Lord Carloway.

19 As Mummery LJ said in *Gillatt v Sky TV Ltd and others* [2000] 2 BCLC 103 at 109, “Little assistance on the construction of [the agreement under consideration in *Gillatt*] can be gathered from decisions in other cases on differently worded agreements concluded in different circumstances”.

20 *Bass Holdings Ltd v Morton Music Ltd* [1988] 1 Ch 493.

aligning Scots law with English law in an area where commercial issues and practice are largely identical.

David Cabrelli  
University of Edinburgh

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## Chalk Dust in the Law of Inhibition

Tennis, football and many other sports have rules determining what should happen when the ball hits a line marking the edge of the field of play.<sup>1</sup> *Park, Ptrs*<sup>2</sup> raised an equivalent problem but the rules which faced Lady Dorrian were rather less clear-cut.

Mr and Mrs Park were the tenants in a long lease of a restaurant. On 18 September 2007 creditors served letters of inhibition on the Parks, following registration of a notice of inhibition on 31 August 2007. Since the case was governed by section 155 of the Titles to Land Consolidation (Scotland) Act 1868 in its pre-Bankruptcy and Diligence etc (Scotland) Act 2007 form, the inhibition took effect “from the date of the registration” of the notice – that is, 31 August – giving the inhibitors the right to reduce any voluntary transfer or grant affecting the Parks’ heritable property after that date, including the interest under the lease. 31 August also saw the conclusion of missives for the sale of the lease. An inhibition does not prevent the inhibited party from fulfilling prior contracts because such fulfilment is not a voluntary transfer.<sup>3</sup> The question for Lady Dorrian was whether missives of even date amounted to a prior contract.

In the absence of an express rule on concurrence of missives and inhibition, and following a suggestion of Professor Gretton’s,<sup>4</sup> Lady Dorrian sought to narrow the threshold in question. She found that inhibitions took effect from the end of the day on which they were registered,<sup>5</sup> supplemented by a rule allowing reduction of bad faith transactions entered into before that time with a view to frustrating the diligence.<sup>6</sup> The missives thus constituted a prior contract which could be fulfilled despite the inhibition.

1 International Tennis Federation, *Rules of Tennis 2009* r 12; FIFA, *Laws of the Game* law 9; IRB, *Laws of the Game: Rugby Union*, Definitions, “Out of play”; Camanachd Association bye-law 1.11.2.

2 [2008] CSOH 121, 2008 SLT 1026.

3 See *Halifax Building Society v Smith* 1985 SLT (Sh Ct) 25 at 30 per Sheriff Principal Caplan, relying on *Scottish Wagon Co Ltd v Hamilton’s Tr* (1906) 13 SLT 779 at 780 per Lord Mackenzie.

4 G L Gretton, *The Law of Inhibition and Adjudication*, 2<sup>nd</sup> edn (1996) 38.

5 *Park* at paras 15-18.

6 Para 14 and Gretton, *Inhibition and Adjudication* 38. There is authority for such a rule: Stair, *Inst* 1.9.15 (Seventhly) and 4.50.11; Erskine, *Inst* 2.11.7. However, these passages are based on the Bankruptcy Act 1621, which was repealed by the Bankruptcy (Scotland) Act 1985 s 75(2), Sch 8, so they may no longer be good law.

### A. LOOKING BACK

The approach taken by Professor Gretton and Lady Dorrian is practical and consistent with the wording of section 155 as it stood at the time of the judgment. This seems to have been the main motivation for a result with which few could quarrel. Professor Gretton's analysis is one of necessity. Between 1693 and 1981, the Keeper was required to record the time at which a document was submitted for registration.<sup>7</sup> Time recording was abolished by the Land Registration (Scotland) Act 1979.<sup>8</sup> Gretton gives the impression that registration is deemed to occur at the end of the day simply because no other information is available.<sup>9</sup> This suggests that, were the information available, the actual time of registration would be used. Lady Dorrian goes much further, suggesting not only that the end-of-the-day threshold was applicable when registration became the sole requirement for publication in 1868<sup>10</sup> but also that an equivalent rule applied to the pre-1868 formalities.<sup>11</sup> In doing so, she presents a picture of continuity which is not entirely borne out by the earlier sources.

#### (1) The pre-1868 law

Inhibition dates back at least to the fifteenth century.<sup>12</sup> Legislative interventions over the years<sup>13</sup> have altered aspects of the law but there has been no systematic restatement. This means that long-dead rules retain some relevance for the interpretation of the modern rules.

Section 16 of the Land Registers (Scotland) Act 1868 declares *inter alia* that "registration shall for all purposes whatsoever have all the legal effect of the publication at present in use". The publication referred to in the section was crying of the three oyeses,<sup>14</sup> reading the letters of inhibition and affixing a copy of them and the certificate of execution to the market cross.<sup>15</sup> Counsel for the inhibitor argued that market cross publication had immediate effect and that section 16 meant that delaying the effect of inhibition until the end of the day was therefore incorrect.

Lady Dorrian did not feel it necessary to deal with the implications counsel sought to draw from section 16 because she considered that inhibition had always been "effective from the date of publication, not from the hour or moment".<sup>16</sup> This seems doubtful. Inhibition was a royal proclamation prohibiting the inhibited party

7 Register of Sasines Act 1693.

8 Section 29(4) and Sch 4.

9 Gretton, *Inhibition and Adjudication* 38.

10 *Park* at paras 17-18.

11 Paras 15-16.

12 See J Graham Stewart, *A Treatise on the Law of Diligence* (1898) 525.

13 Principally in 1581, 1868 and 2007.

14 The Scottish equivalent of "Hear ye": W Bell, *A Dictionary and Digest of the Law of Scotland*, 7<sup>th</sup> edn by G Watson (1890) "Oyess".

15 Graham Stewart, *Diligence* 538. From 1581, registration within forty days was necessary.

16 *Park* at para 17.

from granting rights and the lieges from accepting them.<sup>17</sup> The wording of this proclamation made no mention of any delay until the end of the day.<sup>18</sup> Stair describes publication as putting the lieges “*in mala fide*”, which meant that it gave rise to constructive knowledge.<sup>19</sup> Against this background, it is difficult to believe that there was any delay in the inhibition taking effect.

This reading is supported by the early authorities. In *Cruickshanks v Watt*<sup>20</sup> the court held that “after [publication] is compleat, and thereby the Debitor and the Leidges are inhibite to give and take Rights, the Inhibition *ipso momento*, thereafter, is valide and perfect”. Bankton<sup>21</sup> and More<sup>22</sup> are similarly emphatic, while Erskine and Walter Ross rely on Dirleton’s report of *Cruickshanks*.<sup>23</sup>

## (2) The 1868 reforms

As commerce grew, publication at the market cross became less effective, and concern grew about the forty days allowed for registration after publication, when an inhibition could be effective yet unregistered.<sup>24</sup> The 1868 reforms sought to deal with this problem by abolishing publication at the market cross<sup>25</sup> and providing that inhibition should take effect from the date of registration of a notice of intended inhibition, provided that the inhibition was executed against the debtor and registered within twenty-one days (otherwise the inhibition took effect from the date of the latter registration).<sup>26</sup>

At first sight, this seems to be the point at which the focus shifted from time to date, since, although the Keeper would have taken note of the time of registration in his minute book, there is no mention of time in section 155 of the Titles to Land Consolidation (Scotland) Act 1868. However, some care is called for because the legislature used the term “date of registration” in a rather strange way in that statute. It was not defined in relation to section 155 but section 142 (which dealt with recording in the General Register of Sasines) provided that deeds registered should “in competition be preferable according to the date of registration, and the date of entry in the minute book shall be held to be the date of registration”. The section went on to say that, where two deeds were received by post “at the same *time*, the entries thereof in the presentment book and the minute book shall be of the same year, month, day and hour, and such deeds and conveyances shall be deemed and taken to be presented and registered contemporaneously”.<sup>27</sup>

17 See Bell, *Comm*, 5<sup>th</sup> edn (1826) II, 134.

18 Stair, *Inst* 4.50.4.

19 Stair, *Inst* 4.50.7.

20 (1676) Mor 8393, Dirleton’s report.

21 Bankton, *Inst* 1.7.140.

22 Stair, *Inst*, 5<sup>th</sup> edn by J S More (1832) vol 2 ccccxv.

23 Erskine, *Inst* 2.11.7, W Ross, *Lectures on the History and Practice of the Law of Scotland*, 2<sup>nd</sup> edn (1822) I, 486-487.

24 See e.g. Ross, *Lectures* I, 487; Bell, *Comm*, 5<sup>th</sup> edn (1826) II, 142.

25 Land Registers (Scotland) Act 1868 s 16.

26 Titles to Land Consolidation (Scotland) Act 1868 s 155.

27 Emphasis added.

The references to time were removed by the Land Registration (Scotland) Act 1979<sup>28</sup> but they raise a question about how the legislature viewed the words “date of registration”. If competition was according to date, why was it necessary to provide that the record in the minute book should state that they were received at the same hour and why does the rule apply to those received at the same time rather than on the same day? One possible explanation is that competition by date implied competition by time where the dates were the same. Graham Stewart employed a similar conflation of time and date in his summary of the abovementioned authorities on the effect of publication of inhibitions before 1868.<sup>29</sup>

Lady Dorrian suggests that section 155’s purpose of ensuring proper publicity would be frustrated if inhibition took immediate effect, because “[a] search of the register on [the day of registration] would presumably not show an inhibition registered during the currency of the day”.<sup>30</sup> However, the 1693 Act required that the minute book be signed by the person presenting the deed and by the Keeper “immediately” and that it be freely available for public consultation, thus providing instant publicity.

These considerations, together with section 16 of the Land Registers (Scotland) Act 1868, and the fact that publication led to instant effect before 1868, make the contention that registration of the notice had instant effect much more plausible than initial consideration of section 155 might suggest.

Of course, none of this affects the decision in *Park, Ptrs*. The 1979 amendments meant that the time of submission was no longer recorded and thus it could have no effect on the result. It does show, however, that the end-of-day threshold and the attendant opportunities for evasion are the work of a relatively recent statute rather than a historic feature of the law of inhibition.

## B. LOOKING FORWARD

Section 155 was radically revised by section 149 of the Bankruptcy and Diligence etc (Scotland) Act 2007. It provides a clear rule which should avoid an inhibition taking effect concurrently with missives in all but the most obscure cases.<sup>31</sup> Inhibition now takes effect at the beginning of the day on which the schedule is served on the debtor, provided that a notice of inhibition has been registered in the previous twenty-one days.

Since the Scottish Law Commission’s motivation for proposing this change was a concern that no-one should be inhibited without knowing it,<sup>32</sup> it is difficult to see why this rule was employed. Rule of Court 16.3 already requires the court officer serving the inhibition to complete a form recording the time of personal service in certain circumstances. This could be amended quite simply so that the time of citation is recorded in every case. Registration of the form along with the inhibition would

28 Section 29(1), Sch 2 para 2.

29 Graham Stewart, *Diligence* 539.

30 *Park* at para 18.

31 It remains possible if missives are drafted so as to take effect at the beginning of a day.

32 Scottish Law Commission, Report on *Diligence* (Scot Law Com No 183, 2001) paras 6.34-6.35.

provide certainty as to the time of service. This would allow an inhibition to take effect from the moment of service, which would be more consistent with both the Commission's policy concerns and the history of the law of inhibition.

Be that as it may, it is somewhat perplexing that sporting organisations can deal with threshold problems more simply than Scots law.

*John MacLeod*

*Max Planck Institute for Foreign and Comparative Law, Hamburg*

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## Unalike as Two Peas? *R* (*on the application of Purdy*) *v* DPP

Ms Purdy is suffering from progressive multiple sclerosis and intends, when she so chooses, to have her life legally terminated in the best conditions possible. To do this, essentially, she would have to travel abroad—presumably to Switzerland, a route which, to common knowledge, has already been taken by more than 90 British citizens. There have been no resulting prosecutions in those earlier cases; nevertheless, she and her husband, Mr Puente, wished to know the likelihood of his being prosecuted under section 2(1) of the Suicide Act 1961<sup>1</sup> should he make the arrangements and accompany her.<sup>2</sup> The judicial review which they obtained under section 7 of the Human Rights Act 1998 centred on Ms Purdy's rights under articles 8(1) and 8(2) of the European Convention on Human Rights (right to respect for private and family life); it did not address Mr Puente's interests directly and, as a result, the case and its *ratio* are confused.

### A. MS PURDY AND MRS PRETTY

Only some six years previously, a Mrs Pretty had made a very similar, albeit unsuccessful, appeal to the domestic<sup>3</sup> and European<sup>4</sup> courts on her husband's behalf seeking a proleptic declaration that he would not be prosecuted for taking an active part in her death. The factors common to both cases need to be noted: first, that both Mrs Pretty and Ms Purdy intended to tread the path of assisted suicide; secondly, that both wished to ensure that their husbands would not face sanction under section 2(1)

1 Which criminalises aiding, abetting, counselling or procuring the suicide of another. It is central to *Purdy* that prosecution can only be undertaken with the consent of the Director of Public Prosecutions (s 2(4)). The Act applies to England and Wales only.

2 *R (on the application of Purdy) v DPP* [2008] EWHC 2565 (Admin), (2008) 104 BMLR 28 at para 4 per Scott Baker LJ.

3 *R (on the application of Pretty) v DPP* [2002] 1 AC 800.

4 *Pretty v United Kingdom* (2002) 35 EHRR 1.

of the 1961 Act should they provide assistance; and thirdly, that both argued their cases by way of article 8 of the Convention.<sup>5</sup> Nonetheless, as Scott Baker LJ said, in giving the definitive opinion of the court in Ms Purdy's case: "[t]he issue raised in the present case is very similar to, but distinct from, that raised in *R (Pretty)*".<sup>6</sup> In this commentator's opinion, the most interesting analytical features of *Purdy* lie in the extent to which the Court depended upon *Pretty* and in its justification for so doing.

### B. THE ENGAGEMENT OF ARTICLE 8

The article 8 dimension in *Purdy* was argued at two independent levels – article 8(1) and, more innovatively, 8(2) – and, relative to these, the court made two assumptions which are open to doubt. The first is that the decision in *Pretty* to the effect that article 8 was not engaged was binding on the *Purdy* court. Much of the argument centred on the evident discrepancies in the interpretation of article 8 between the House of Lords and the European Court of Human Rights,<sup>7</sup> but I prefer to draw attention to the considerable factual differences between the two cases. There is no doubt that Mr Pretty envisaged active participation in his wife's death which, although the precise role anticipated was never disclosed, could have amounted to manslaughter or even murder. Put another way, the inference was that he was likely to be engaged in euthanasia<sup>8</sup> rather than assisted suicide. The balance between personal autonomy and protection of the public, which was such a feature of the European court's decision,<sup>9</sup> is, therefore, quite different in *Purdy* and *Pretty* and serves to distinguish them. Nevertheless, the Divisional Court held that, absent any evidence that the House of Lords had since altered its view, the decision in *Pretty* was binding and so article 8 could not be engaged in Ms Purdy's case.<sup>10</sup>

The second assumption is that section 2(1) of the 1961 Act is so widely phrased as to "encompass all cases, whatever the circumstances; it creates no exceptions".<sup>11</sup> This is so over-arching as to invite criticism. Indeed, the *Purdy* court itself seems to have recognised this in stating, later, that "the variety of facts which may give rise to the commission of [the] offence [under section 2(1)] is almost infinite".<sup>12</sup> The word "almost" implies that there must be *some* limit and raises the question of whether the action Mr Puente was likely to take did, in fact, constitute an offence. There is no evidence that he intended to have any part in causing his wife's death. The only aid, or assistance, he was providing was to a disabled traveller and it is at least arguable that there is nothing wrong in so doing or, at least, that such action comes within the

<sup>5</sup> Mrs Pretty cited other articles but it was art 8 that was common to both.

<sup>6</sup> *Purdy* at para 7.

<sup>7</sup> Interestingly, it was confirmed that, save in very exceptional circumstances, the Divisional Court must follow the House of Lords rather than Strasbourg if the two are in conflict. See paras 42–46.

<sup>8</sup> Which this commentator defines as the deliberate termination of life either at the request of or in the best interests of the subject. The essential distinction is that the *subject* performs the lethal act in assisted suicide.

<sup>9</sup> *Purdy* at para 61.

<sup>10</sup> *Purdy* at para 58.

<sup>11</sup> Para 2.

<sup>12</sup> Para 64.

restrictions on the application of section 2 imposed by the use of the word “almost”. There must be *some* restriction, *pace* what is said in *Purdy*. Otherwise, the porter on St Pancras station who carried Ms Purdy’s baggage in the full glare of media publicity would also be at risk of prosecution for assisting suicide – and it goes beyond belief that this could be intended.

This, of course, is no more than an illustration of why prosecution under section 2 was made subject to the authority of the Director of Public Prosecutions. Even so, the combined effect of the two assumptions above was to reduce Ms Purdy’s legal options to one of pleading that the existing regulations as to the application of section 2 of the 1961 Act were insufficiently clear to satisfy the “accordance with the law” criterion for permissible interference with the privacy of family life as laid down in article 8(2).<sup>13</sup> This, effectively, removed the case from the realm of medical law and ethics and turned it into an essay in administrative law – that is, was the Prosecution of Offenders Act 1985 together with its associated Code of Practice an adequate response to the protection of the individual demanded by article 8(2)?

After extensive discussion, the court held that it was.<sup>14</sup> It is, however, to be noted that the underlying doubts were sufficient to provoke the DPP into issuing a paper which analysed his reasons for not prosecuting in another comparable instance of “medico-legal tourism”.<sup>15</sup> This valuable explanation of the factors to be considered must cover cases such as that of Ms Purdy and Mr Puente, and must now put their minds – and those of the justices of the European Court of Human Rights – at rest.

### C. THE SIGNIFICANCE OF *PURDY*

Although Ms Purdy’s case was extensively considered by the Divisional Court, its judgment turns out to be disappointing in relation to medical jurisprudence. In the first place, and as recognised by the court,<sup>16</sup> the wide-ranging discussion of article 8(2) is superfluous once it is decided that article 8(1) rights are not engaged. It was only pursued on what can be paraphrased as “avoidance of doubt” grounds. Moreover, the fact that the court found itself “boxed in” by its reliance on *Pretty* means that *Purdy* makes a surprisingly small contribution to the termination of life debate – the exception being, perhaps, the stimulation of the DPP’s paper.<sup>17</sup>

This essentially negative result is particularly disappointing to the present writer who firmly believes that *Purdy* and *Pretty* raise distinct issues and should be

13 Article 8(2) provides: “There shall be no interference by a public authority with the exercise of this right [ie the right to private and family life] except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

14 Para 82.

15 K Starmer, “Decision on prosecution – the death by suicide of Daniel James”, 9 Dec 2008 (available at [http://www.cps.gov.uk/news/nationalnews/death\\_by\\_suicide\\_of\\_daniel\\_james.html](http://www.cps.gov.uk/news/nationalnews/death_by_suicide_of_daniel_james.html)).

16 *Purdy* at para 58.

17 Although, this commentator would suggest that, on common sense grounds alone, the absence of prosecution in over 90 previous cases should have been sufficient assurance.



recognised as doing so. Had it been possible to decide *Purdy* on a stand-alone basis, the specific question – is family privacy invaded by including travel assistance under the umbrella of assisting suicide? – could have been answered. The need for such specificity was, in fact, acknowledged when Scott Baker LJ said in *Purdy* that “there is now a very significant body of public opinion that feels that some circumstances should be excluded from [the ambit of section 2]”.<sup>18</sup> This leads, inexorably, to a consideration of the nature of Mr Puente’s potential offence.

#### D. WHEREIN LIES THE OFFENCE?

A fundamental feature of the decision is that counsel for all interested parties agreed that the actions anticipated by Ms Purdy and her husband could constitute an infringement of section 2(1),<sup>19</sup> which is fine until it is appreciated the basic purpose of the case was to decide whether or not such a situation existed. Absent this purpose, there was little or no point in bringing the claim, yet, as already mentioned, Mr Puente’s position went unnoted in the judgment.

Would it not be preferable to address the case from the opposite direction and, having done so, to argue that Mr Puente and his like are not assisting in suicide but, rather, are assisting in travel arrangements? This being accepted, it could be left to the prosecutors to prove that anything beyond this constitutes criminal activity. To adopt such an approach to a *very specific condition*, which, it is suggested, would be acceptable to the public, would not be to create a new moral playing pitch. We are, after all, currently happy to accept several hundred Irishwomen each year who wish to take advantage of the UK’s liberal abortion laws. In the absence of legislation, much would depend on the application of *R v Woollin*<sup>20</sup> in which it was held that a consequence could be said to be intentional if the actor was virtually certain that it would occur. It is widely supposed, however, that *Woollin* would not be applied in a therapeutic context and this leads on to what is likely to be the next question in the assisted suicide debate: can assisted suicide be subsumed under the umbrella of assistance with medical treatment?

There is no doubt that a movement is afoot to substitute the phrase “therapeutic killing” for assisted suicide – thereby, in one relatively easy semantic step, changing a criminal act into good medical practice.<sup>21</sup> Moreover, it appears from the leading case of *Blood*<sup>22</sup> that it is lawful for a British citizen to undergo *treatment* elsewhere in Europe which would still be unlawful in the UK. This argument, of course, has potential far beyond Ms Purdy’s case – that is, if “therapeutic killing” is available across the Channel, why should it not be provided in Bognor Regis? This is treading new ground but are we not already on the approach road? The DPP accepts in his paper

<sup>18</sup> *Purdy* at para 25.

<sup>19</sup> Para 4.

<sup>20</sup> [1999] 1 AC 82.

<sup>21</sup> For a professional introduction and criticism, see R J D George, I G Finlay and D Jeffrey, “Legalised euthanasia will violate the rights of vulnerable patients” (2005) 331 *British Medical Journal* 684. For a lay view, see D Lawson, “The ‘right to die’ is a fashionable nonsense” *Sunday Times* 14 Dec 2008, 22.

<sup>22</sup> *R v Human Fertilisation and Embryology Authority, ex parte Blood* [1999] Fam 151.

that there is a profound difference between assisted suicide and physician-assisted suicide, and to do so is close to admitting a therapeutic element in the latter. Debate as to whether such a distinction, and its logical extensions, would be a good thing is beyond the scope of this note. But the present commentator has to admit to having posited the proposition some time ago.<sup>23</sup>

### E. CONCLUSION

Insofar as Ms Purdy's case was intended to clarify the law in respect of tourism and section 2(1) of the Suicide Act 1961, it has failed and, in fact, has little direct effect on medical law. Indirectly, however, it has contributed to the publication of an important policy statement by the DPP<sup>24</sup> in which he outlines an envelope of conditions within which prosecution will *not* proceed—and this certainly fills the possible lacuna in administrative law which was exposed by *Purdy*. This seems to be as helpful a contribution to the debate as is possible in the circumstances. The debate on physician assisted suicide will not go away<sup>25</sup> but its solution lies in legislative rather than judicial activism.

This last observation is confirmed by the decision of the Court of Appeal, issued just as this note was going to press.<sup>26</sup> Ms Purdy's appeal against the findings of the Divisional Court failed in respect of all the major issues raised, and the court's detailed opinion does little more than confirm the original findings. It does, however, usefully emphasise the point of general significance that, Strasbourg notwithstanding, the lower courts are bound to follow the judgments of the House of Lords other than in exceptional circumstances.<sup>27</sup> The particular, and practical, significance of the appeal, however, lies in paragraph 80, which includes the following passage:

If the prosecution [under the Suicide Act 1961 s 2(1)] amounts to an abuse of process, the court will dismiss it. However even if a defendant were to be convicted, but the circumstances were such that in the judgment of the court, no penal sanction would be appropriate, the court . . . would order that the offender should be discharged.

In the end, *Purdy* can, at least, be said to represent something of a pyrrhic defeat.

J K Mason  
*University of Edinburgh*

*The author gratefully acknowledges the comments of Graeme Laurie and Niamh Nic Shuibhne on an earlier draft.*

23 J K Mason and D Mulligan, "Euthanasia by stages" (1996) 347 *Lancet* 810.

24 See n 15 above.

25 Witness the recent publication of a consultation document by Margo MacDonald MSP: "The proposed End of Life Choices (Scotland) Bill: consultation document" (2008) (available at <http://www.scottish.parliament.uk/s3/bills/MembersBills/pdfs/EndOfLifeChoicesConsultation.pdf>).

26 *R (on the application of Debbie Purdy) v Director of Public Prosecutions* [2009] EWCA Civ 92. The opinion of the court is given by Lord Judge CJ.

27 Para 62.

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## The Cullen Review of Fatal Accident Inquiries

A review into Scotland's system of judicial investigation into sudden or unexplained deaths, to be conducted under the leadership of Lord Cullen of Whitekirk, was initiated in March 2008.<sup>1</sup> A consultation paper was issued on 20 November 2008;<sup>2</sup> the deadline for lodging written responses was 20 February 2009, and a report is expected later in 2009.

### A. THE REMIT OF THE REVIEW

Lord Cullen's remit is to review the FAI system "so as to ensure that Scotland has an effective and practical system of public inquiry into deaths which is fit for the 21<sup>st</sup> century".<sup>3</sup> At the risk of ranging off-point, and without wishing to suggest that the review is unjustified, I would comment that this reference to fitness "for the 21<sup>st</sup> century" tells us rather more about the contemporary politician's apparently pathological need to be seen to be "modern"<sup>4</sup> than it does about the legitimate aims and objectives of a part of the legal system which is loaded with practical and symbolic significance.<sup>5</sup> The consultation paper tacitly acknowledges the deficiency in the terms of its remit by choosing its own language to describe Lord Cullen's aims. We are told that the review will work towards ensuring an "effective, robust and proportionate" FAI system.<sup>6</sup> Although an improvement upon the remit, this statement is rather

1 Scottish Government, "News release: review of fatal accident inquiries" 7 Mar 2008 (available at <http://www.scotland.gov.uk/News/Releases/2008/03/07095002>). The system is meantime governed by the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976. For a full account, see I H B Carmichael, *Sudden Deaths and Fatal Accident Inquiries*, 3<sup>rd</sup> edn (2005).

2 *Review of Fatal Accident Inquiry Legislation: A Consultation Paper* (2008, available at <http://www.scotland.gov.uk/About/fatal-accident-review/20094258/0>).

3 Para 1.2.

4 Any given period of history was modern when it was current. Politicians nevertheless seem to believe that the fact they are living in modern times of itself necessitates reform, without further justification. Perhaps the attitude is informed by the apparently endless technical innovation we see around us; perhaps it is a function of the historical accident of our having been alive at the turn of the millennium. Whatever its cause, as Genn noted in the 2008 Hamlyn Lectures, the belief that because we are modern we must make things anew is one of the factors which led to the proliferation of civil justice reforms throughout the Common Law world, the rationale for which is obscure and the consequences of which are often unwelcome: see H Genn, *Judging Civil Justice* (2009, forthcoming).

5 Investigations into certain deaths—most notably those which occur in custody—involve a public examination of state actors' role in the death. In such cases, the importance of an effective and independent inquiry can hardly be overstated. Moreover, even a FAI which concludes with a finding as apparently trite as noting that a death caused by fire might have been avoided had the premises been fitted with functioning smoke alarms can be of enormous symbolic and emotional significance for the family of the deceased: see e.g. the determination in respect of the death of Alexandra Schwenger (Dec 2008, available at <http://www.scotcourts.gov.uk/opinions/schwenger.html>).

6 *Consultation Paper* para 1.6.

vague, and it would have been preferable if the consultation paper had set out a lengthier list of more concrete aims and objectives of an FAI system. It is to be hoped that such an approach will be adopted in the final report.

### B. THE CONSULTATION PAPER: AN OVERVIEW

The consultation paper is divided into six sections, the first being an introduction. The second section (“General”) might more properly be entitled “Fundamentals”, as it describes the purpose and features of an FAI and addresses key questions such as in which forum FAIs should be held, and who should conduct them. The weakest section in the paper, it will be discussed further below. Thereafter the consultation paper moves on to consider the day-to-day operation of the present system of FAIs, and in doing so becomes markedly stronger. The third section discusses mandatory inquiries and the circumstances in which a discretionary inquiry will be held. The latter discussion is particularly valuable, revealing as it does the almost untrammelled breadth of the Lord Advocate’s discretion in this regard,<sup>7</sup> as well as the current system’s lack of transparency.<sup>8</sup> The fourth and fifth sections (“Holding an FAI” and “Evidence and Procedure”) deal with the “nuts and bolts” of the FAI system and do not shy away from noting many of the recurrent criticisms of the system, namely delay, inadequate notice,<sup>9</sup> a lack of availability of legal aid, and unreliable access to evidence in advance of the hearing. Inadequate funding, and the problems caused by the absence of authoritative guidance and the lack of transparency, strike the reader as the most serious deficiencies in the present system.

The final section, a few short paragraphs on “FAI Determinations”, is the most striking section of all. No public database of FAI determinations exists. Even that held by the Scottish Government is not up-to-date,<sup>10</sup> and the responses to recommendations made during the course of FAI determinations are not in the meantime being monitored.<sup>11</sup> These two thoroughly dispiriting pieces of information go a long way towards calling into question the present system. What is the point of giving warnings if they cannot be heard, or of making recommendations if they will not be the subject of so much as a polite enquiry as to whether they are being

7 The 1976 Act does not stipulate criteria for the Lord Advocate to take into account in deciding whether to hold a discretionary FAI. “Crown office relies on its own guidance”: *Consultation Paper* para 3.18. As the paper notes, a change in Crown Office policy appears to have been at least a contributing factor in the halving of the average number of FAIs.

8 If Crown Office decides not to hold an FAI, the relatives of the deceased must be informed but no reasoned decision need be provided: *Consultation Paper* para 3.18.

9 At first glance it might seem contradictory to identify both delay and inadequate notice as negative features of the current system, but this is not so. Experience shows that an overworked fiscal may very well delay commencing an FAI for a protracted period of time and then come to realise at the eleventh hour that parties over and above those initially in contemplation – for instance, the manufacturers of a particular piece of safety equipment – require to have their interests represented.

10 *Consultation Paper* para 6.6. For the sake of completeness, it should be added that a search of the Scottish Courts website for recent FAI determinations of which the present author is aware discloses that it is not comprehensive either.

11 Para 6.8.

followed? If the review has the effect of changing only these two aspects, it will not have been in vain.

### C. DISCUSSION AND CONCLUSIONS

The consultation paper is a snapshot of the review at an exploratory stage and as such any attempt at criticism is probably premature. However, there are at least three observations which may fairly be made at this point. First, the consultation paper is at points too brief. Too much concision is apt to mislead, as it does where the paper states, under reference to *Lord Advocate, Ptr*,<sup>12</sup> that “expenses cannot be awarded to parties following an FAI”.<sup>13</sup> That is not an assertion which can be advanced as a bald fact: *Lord Advocate, Ptr* is an Outer House decision which, at time of writing, is being argued on appeal before the Inner House.<sup>14</sup> Undue brevity also acts as a barrier to comprehension, particularly with a document which is intended at least in part for a lay readership.<sup>15</sup>

This problem is most notable in section 2A, entitled “The Purpose and Features of an FAI”. Here, the FAI system’s features and *dramatis personae* are sketched in two short paragraphs. Concepts central to a clear understanding of the system, such as the meaning of “inquisitorial” proceedings, and what is meant by an exercise “carried out in the public interest” go unexplained; the reader is also expected to understand, without further clarification, what is meant by “the standard of proof” in “civil cases”.<sup>16</sup> These expressions will be familiar to lawyers, but a few hundred well-chosen words of explanation would have rendered the document more intelligible for a non-legal audience.

Secondly, while no conclusions are advanced in relation to the matters specifically put out to consultation, the paper makes a number of important, and at least questionable, assumptions about fundamental aspects of the FAI system. For instance, while it discusses the possibility that FAIs should be taken out of the sheriff court,<sup>17</sup> it is taken as read that the procurator fiscal will continue to be the person responsible for pre-inquiry investigations and the adduction of evidence.<sup>18</sup> Of course it may well be that, after consultation and reflection, the fiscal would indeed emerge as the person best placed to assume that role, but, particularly as the paper notes that

12 2007 SLT 849.

13 *Consultation Paper* para 4.14.

14 In fairness, it should be noted that this is not a recurrent flaw within the paper: see the exemplary treatment at para 1.14 of *Kennedy and Black v Lord Advocate* [2008] CSOH 21, 2008 SLT 195. These cases, both judicial reviews of the Lord Advocate’s decision not to order FAIs into the deaths of relatives, repay close study. Since the paper was published, a supplementary opinion has been issued in the above cases which is also worthy of note: see *Kennedy and Black v Lord Advocate* [2009] CSOH 1.

15 See *Consultation Paper* Annex A for a list of organisations consulted.

16 *Consultation Paper* paras 2.2, 2.3.

17 Paras 2.4-2.9. Among the options considered are the retention of the *status quo*, the establishment of a dedicated tribunal, and the transfer of FAIs to the Court of Session (suggested by at least one contributor to the review on the basis that FAIs may involve issues pertaining to ECHR art 2).

18 The paper does, however, invite discussion as to whether the task should be handled by specialist fiscals, possibly within a dedicated, centralised team: see paras 2.13, 2.14.

it has received adverse comment about the standard of investigation and conduct of FAIs,<sup>19</sup> it seems rather strange that no other possibility is so much as contemplated. Similarly, the consultation paper does not seem to countenance the possibility that the mandatory category of FAIs could be abolished,<sup>20</sup> or that what it perceives to be the position on expenses could be altered.<sup>21</sup> A more questioning attitude to these issues would have been appropriate, at least at this stage of the review.

Finally, the news release which announced the review's launch stated that Lord Cullen would consider how FAIs "interact with other inquiries such as those by the Health and Safety Executive".<sup>22</sup> As this was one of the few objectives specifically mentioned, it might reasonably be supposed to be of importance. In fact, while the existence of other statutory regimes is noted in three paragraphs of the paper,<sup>23</sup> no systematic attempt is made to review their interaction, and none of the questions posed in the consultation paper relates to this matter. Perhaps this is an issue which will be addressed more directly in the report, but, if the remits of future reviews were to contain more substance and less rhetoric, then perhaps such apparent disconnections between what is expected and what is delivered might be avoided.

Even if these observations have force, there is much to praise in this consultation paper. It provides a balanced, temperately expressed but essentially uncompromising overview of the present system. In bringing the sometimes uncomfortable facts to the attention of the public, it has the potential to lay the foundation for making Scotland's system of FAIs more efficient, transparent, flexible, meaningful and responsive to the families of the deceased. The author does not know if these are the "21<sup>st</sup> century" values which the Scottish Government has in mind, but firmly believes that they should be.

Greg Gordon  
*University of Aberdeen*

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## Commercial Actions and *Jackson v Hughes Dowdall*

The Inner House decision in *Jackson v Hughes Dowdall*<sup>1</sup> arises from a case initiated in the Sheriff Court in Glasgow under the rules for commercial actions.<sup>2</sup> The pursuer

19 Para 2.13. See also the factual circumstances narrated in *Inquiry into the Circumstances of the Death of William Smith* 2005 SCLR 355, the inquiry which led to *Lord Advocate, Ptr* 2007 SLT 849.

20 Paras 3.2-3.9.

21 Para 4.14.

22 Scottish Government, "News release" (n 1) para 4.

23 *Consultation Paper* paras 1.13, 1.14, 3.4.

1 *Jackson v Hughes Dowdall* [2008] CSIH 41, 2008 SCLR 650. The opinion of the court was delivered by Lord Reid.

2 Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993, SI 1993/1956 as amended by chapter 40 of the Act of Sederunt (Ordinary Cause Rules) Amendment (Commercial Actions) 2001, SSI 2001/8.

seeks<sup>3</sup> to recover damages from the solicitors who had acted for her in connection with division of property arising from the breakdown of her marriage. In upholding an appeal against interlocutors issued after a second debate, the Inner House stated that the sheriff “stepped outside his proper role in adversarial procedure as an impartial arbiter between the parties to the action”,<sup>4</sup> thus bringing into sharp focus tensions between aspects of the adversarial system of litigation as it has operated in Scotland and approaches to case management in commercial actions.

### A. THE FACTS AND PROCEDURES

Mrs Jackson entered into a minute of agreement with her husband after their marriage broke down. It provided for a number of property transfers including the conveyance by Mrs Jackson to Mr Jackson of the former family home in Lenzie, and the conveyance by Mr Jackson to Mrs Jackson’s mother of a liferent interest in another property in Lenzie. The parties had divorced before entering into the agreement and Mr Jackson became bankrupt before all aspects of the minute had been fulfilled. Indeed, some terms could not have been enforced against him personally because they related to property owned not by Mr Jackson but by a company with which he was associated. In a commercial action raised in 2003 Mrs Jackson initiated her claim for loss and damage against Hughes Dowdall, who had acted for her in negotiating the agreement and when she conveyed the matrimonial home to Mr Jackson.

Rule 40.1(2)(a) of the Ordinary Cause Rules provides that a “commercial action” is an action “arising out of, or concerned with, any transaction or dispute of a commercial or business nature including, but not limited to, actions relating to... (vii) the provision of services”. Apart from reduced requirements of pleading and notice, the main identifying feature of a commercial action is the case management conference at which the parties must be prepared to provide such information as the sheriff may require, in order for the sheriff to determine what other orders are necessary.<sup>5</sup> The sheriff may order steps in procedure that are familiar in other sheriff court procedures such as disclosure of witnesses and reports, or fixing a debate or proof. All of these options are set out in rule 40.12(3), which follows an instruction to the sheriff in the case management conference to “seek to secure the expeditious resolution of the action”.<sup>6</sup> Indeed the proactive approach applies not only at the conference, since rule 40.14 states that at any time before final judgement the sheriff may “(a) of his own motion or on the motion of any party, fix a hearing for further procedure; and (b) make such other order as he thinks fit”. The commercial action will normally be heard by the sheriff nominated for such cases.<sup>7</sup>

3 At the time of writing the action is ongoing and subject to further appeal. This analysis relies upon the account of the case contained in the judgment of the Inner House, as a complete process remains inaccessible while further appeals proceed.

4 *Jackson* at para 1.

5 Rule 40.12 (2).

6 Rule 40.12(1).

7 Rule 40.2. When the case commenced it was allocated to Sheriff J A Taylor who continued to deal with it after his appointment as Sheriff Principal.

An initial conference was duly fixed, followed by a number of continuations thereof, four days of a first debate over a period of months, motions and disputed orders in the interim, another conference, and a second debate. However, in accordance with normal practice in the Sheriff Court in Glasgow and in certain other courts that operate commercial action procedure, many of the stages in procedure were conducted by telephone conference call or by e-mail.<sup>8</sup>

The debates both concerned the relevance of the pleadings. The defenders were substantially successful at the first debate. In the second debate on 6 December 2006 the sheriff was asked to dismiss the pursuer's remaining case as irrelevant, part of the argument being that the pleadings remaining contained averments that were mutually inconsistent. The pursuer had sought to amend at that debate in order to remove one of the lines of argument, but the sheriff was not willing to allow the motion at that time. A further pursuer's motion to limit the terms of one of those lines of argument was also made at debate but not dealt with then. In his interlocutor and note issued on 17 January 2007 the sheriff noted that, in argument at debate, the pursuer, if forced to choose between the inconsistent pleadings, was said to wish to rely on her primary argument. The sheriff noted that parts of the pursuer's pleadings were irrelevant, but that *if* he refused probation on a number of the pursuer's averments, he was inclined to allow the case to proceed to proof before answer on a remaining point. He did not formally sustain the defender's plea in law on which the debate had proceeded, but continued the case to a further case management conference.

On receipt of that note, the defenders' agent called upon the sheriff to proceed to rule on the outcome of the debate "as your Lordship is, with respect, obliged by law so to do". Intention to appeal was also intimated.<sup>9</sup> By e-mail to the sheriff the pursuer's agent also sought clarification of the interlocutor of 17 January in order to define the scope of the proof and assist the pursuer in deciding whether a cross-appeal would be necessary. The sheriff issued a further note on 5 February 2007 in which, *ex proprio motu*, he discharged the conference, refused probation on the parts of the pleadings he considered irrelevant, and allowed a proof before answer on the narrow remaining point (condensed by him) that "there was a substantial chance that had she withheld delivery of the disposition Mr J would not have procured the counterpart delivery of the lease and liferent".<sup>10</sup>

## B. THE DECISION

On appeal against the competence of orders made by the sheriff after the second debate, it was not in dispute between the parties that certain incompetent steps had been taken by the sheriff, but there was dispute as to which were incompetent and which were not. As well as dealing with the issues of competence, the Extra Division

<sup>8</sup> The opportunity that this presents for principal solicitors to remain directly involved in the case has been a key feature of the operation of commercial actions in Glasgow Sheriff Court, and was noted favourably in an independent review: E Samuel, *Commercial Procedure in Glasgow Sheriff Court* (2005) paras 6.7-6.13.

<sup>9</sup> *Jackson* at para 31.

<sup>10</sup> Para 33.



took the opportunity to comment on aspects of the handling of the case, and of commercial actions generally in Glasgow.

The Division ruled that the sheriff had acted incompetently after the second debate, stating that “if the Pursuer’s case as a whole was irrelevant (being based on mutually inconsistent averments) it was not the sheriff’s function to pick out favoured parts of it and allow that re-cast case to proceed to proof”.<sup>11</sup> Having decided in the second debate that the pursuer’s averments were mutually inconsistent he “should have put down his pen” rather than asking “where do we go from here?”<sup>12</sup> Although not asked to decide on other points, the court comments that in earlier stages of the proceedings the sheriff had acted as if motions had been made to amend when they had not or had been granted when they had not, and as if a motion for recovery of documents not yet argued would produce material to support allowing amendment of the pleadings, and had acted contrary to adversarial norms in refusing to order a diet of taxation of expenses until an undertaking not to enforce any order for quantified expenses had been given by the defenders.<sup>13</sup>

Although not addressed upon or asked to rule on the practice of conducting the commercial action by conference call or e-mail, the Extra Division took the opportunity to stress that they “would not wish . . . to be taken to have tacitly approved” the procedure or practice followed in the case.<sup>14</sup> In particular, the court comments upon the use of case management by conference call and e-mail, and how this sits uncomfortably with tenets of the adversarial system such as the right to a fair hearing in open court.<sup>15</sup>

### C. DISCUSSION

The Extra Division stressed that it had no reason to doubt that the sheriff acted “in complete good faith and with the best of intentions” in making the orders and taking the steps that he did take.<sup>16</sup> However, that did not stop the Division from conducting a multi-faceted demolition of commercial action practice in the sheriff court in Glasgow. Noting that a sheriff in “a commercial action is not conducting an arbitration”,<sup>17</sup> and referring to extracts from court rules, the Division concludes that, although the role of a commercial judge differs from that in other actions because rules of court allow for pro-activity, this is limited to procedures and administration in the case. What was beyond competence in the present case was the failure to rule after the debate on the defenders’ plea in law and on any formal motions to amend made by the pursuer, and instead, without the sanction of the parties or

<sup>11</sup> Para 30.

<sup>12</sup> Para 29.

<sup>13</sup> Enforcement of an order for expenses would have made further procedure unaffordable for the pursuer: on these expenses see paras 14 and 18.

<sup>14</sup> See para 5 (regarding the conference call) and para 9 (regarding e-mail).

<sup>15</sup> Under reference to *Attorney-General v Leveller Magazine* [1979] AC 440; *Diennet v France* (1995) A 325-A at para 33; *McPherson v McPherson* [1936] AC 177; *Storer v British Gas plc* [2000] 1 WLR 1237.

<sup>16</sup> *Jackson* at para 43.

<sup>17</sup> Para 5.

allowing them to be heard on the point, treating the debate as if advisory on the pleadings and putting the case out to a further conference after the debate had occurred.

An independent evaluation of the commercial action procedure in Glasgow has noted that “the culture of proportionate justice is consistent with the culture of the commercial world”.<sup>18</sup> The nature of the dispute, arising as it did after the breakdown of a marriage, personal bankruptcy, and a claim by a consumer against her lawyers in their own territory of the civil court, was not naturally “commercial”. The Extra Division noted that an application had been made to transfer the case to the Court of Session but that this had been refused.<sup>19</sup> Although the commercial action rules provide expressly for appointment to ordinary cause,<sup>20</sup> they do not provide for transfer to the Court of Session. On the face of it, any transfer to the Court of Session would have had to occur in two stages: first to ordinary cause procedure in the sheriff court and only then to the Court of Session.

The chapter 40 procedures do not make entirely clear the parameters of the role of the decision-maker in commercial actions. A liberal reading would permit advisory debates, whether sought by the parties or not.<sup>21</sup> The required focus on expeditious determination under rule 40.12, if directed to the parties’ *dispute*, would lead the sheriff to keep alive as much of the pleadings as could logically survive debate in order to allow any remaining issues to be determined in the current proceedings. This problem-solving approach in commercial actions was rated highly by lawyers interviewed for the independent review,<sup>22</sup> and further examples of pro-activity are cited there<sup>23</sup> although, on the approach taken in *Jackson*, these would not find favour with the Inner House.<sup>24</sup>

Expeditious determination of *litigation* for its own sake, on the other hand, could suggest that adversarial norms should prevail and so irrelevant pleadings should be discarded at debate, whether or not that leaves hanging a salvageable kernel of the original dispute brought to the court for action. All of the case law relied upon in the Inner House judgment concerns traditional adversarial approaches to *litigation*. Although expressed in terms of the need for justice to be seen to be done, and the responsibility of the judge to make a ruling on points put to him or her, it is the integrity of the adversarial process rather than the expeditious resolution of the parties’ (commercial) action that is their Lordships’ focus. Had the parties been on more balanced commercial footing would the same issues have arisen or been brought on appeal at all?

18 Samuel, *Commercial Procedure* (n 8) para 6.31.

19 The Division did not say by whom the application was made (presumably the defenders) or give the reason for its refusal.

20 Rule 40.6.

21 Relying on rule 40.14.

22 Samuel, *Commercial Procedure* (n 8) ch 6.

23 Samuel, *Commercial Procedure* (n 8) para 6.25.

24 Samuel, *Commercial Procedure* (n 8) para 6.25. Samuel mentions summary decree being granted in a case management conference on conference call, but this practice was disapproved by a differently constituted Extra Division in the post-*Jackson* case of *ASC Anglo Scottish Concrete Ltd v Geminax Ltd* [2008] CSIH 55, 2009 SLT 75.

The clash of principle surfaces more often in academic literature, although divergences of approach did arise in the responses to Lord Cullen's review of procedures in the Outer House of the Court of Session<sup>25</sup> and again in the responses to Lord Gill's review of civil justice.<sup>26</sup> There are many relevant academic contributions about conflicting needs: the need to preserve integrity of litigation for litigation's own sake as distinct from the needs and interests of litigants;<sup>27</sup> the need for procedural justice in compulsory in-court dispute resolution models;<sup>28</sup> and the need of courts and tribunals for new processes to be in forms recognisable to them.<sup>29</sup>

#### D. CONCLUSION

Advocates of adversarial norms have significant jurisprudence upon which to draw, and it was perhaps inevitable that they would do so in an action where a procedure intended for commercial use had been selected for a dispute that had many non-commercial characteristics. However, in highlighting differences between approaches in commercial actions and adversarial norms the case is certainly topical. As Lord Gill's review reaches conclusion, the case should prompt us not "to put down our pen" but to ask critically "where do we go from here"? Should rules for commercial actions be reined in towards adversarial norms or made even more explicit to sanction judicial pro-activity in substantive decision-making as well as in procedural or administrative matters?<sup>30</sup> If the latter, will the Inner House become more open to supporting that approach on appeal? Should the rules allow for parties to opt out more readily if the commercial procedure is manifestly unsuitable? And should the Sheriff Court in Glasgow go on offering the public, as it continues to do after publication of the *Jackson* judgement,<sup>31</sup> the opportunity to be present while conference calls are ongoing in commercial actions so that justice can be seen to be done?

Margaret L Ross  
University of Aberdeen

25 Lord Cullen, *Review of Business in the Outer House of the Court of Session* (1995) para 6.11.

26 See [www.scotcourts.gov.uk/civilcourtsreview/publications.asp](http://www.scotcourts.gov.uk/civilcourtsreview/publications.asp).

27 The underlying premise of A Jolowicz, *On Civil Procedure* (2000).

28 N Welsh, "Disputants' decision control in court-connected mediation: a hollow promise without procedural justice" 2002 J of Dispute Resolution 179.

29 C M Campbell, "Lawyers and their public", in D N MacCormick (ed), *Lawyers in their Social Setting* (1976) 195 at 212.

30 Recommended in the *Report by the Business Experts and Law Forum* (2008) ch 2 (available at [www.scotland.gov.uk/Publications/2008/10/30105800/0](http://www.scotland.gov.uk/Publications/2008/10/30105800/0)).

31 At the time of writing, it was normal practice for Glasgow Sheriff Court lists published on the Scotcourts website (see <http://www.scotcourts.gov.uk/rolls/sheriff/index.asp>) to include the following wording: "Most of the Case Management Conferences will be conducted by conference call facilities. Should any person wish to observe such proceedings they should let the Sheriff Clerk know. He will make the necessary arrangements."

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## Judicial Impartiality: Involvement, Opinion and the Judicial Oath

Challenges to the decisions of courts on the grounds of want of independence or impartiality have been an increasingly frequent occurrence since the enactment of the Human Rights Act 1998.<sup>1</sup> Quite why this should be so is not entirely clear, because the relevant portion of the European Convention on Human Rights<sup>2</sup> does no more than restate the long-standing common law principle that the courts must be independent and impartial,<sup>3</sup> an ideal embodied in the familiar artistic image of justice being depicted blindfold. However, since 1999 there have been many such cases, perhaps the most prominent of the English decisions being *R v Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No 2)*<sup>4</sup> and in Scotland *Starrs v Ruxton*,<sup>5</sup> which led to the abolition of the post of temporary sheriff for want of apparent independence. But, whatever the cause, as the courts have become increasingly sensitive to accusations of bias and as the grounds for challenges have correspondingly widened, so inevitably have the numbers of appeals based on those grounds. In recent years the courts, whilst remaining consistent in their reluctance to concede the existence of *actual* bias in a judge,<sup>6</sup> have increasingly widened the grounds upon which they are willing to concede the existence of *apparent* bias. “The question”, it has been said, “is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased”.<sup>7</sup>

Over the last ten years the concept of apparent bias has been widened in two particular respects. First, it now includes involvement by the judge as a party in the proceedings,<sup>8</sup> or the judge’s prior involvement with the parties or the

1 See S C Styles, “Judicial opinions and judicial impartiality” 2007 JR 293; G W Gordon, “Keeping up appearances: judicial partiality, natural justice and article 6(1) in Scots law” 2006 JR 241; K Malleon, “Judicial bias and disqualification after *Pinochet (No 2)*” (2000) 63 MLR 119.

2 The first sentence of article 6(1).

3 See *Law v Chartered Institute of Patent Agents* [1919] 2 Ch 276; *Stewart v Agnew*, High Court, 18 June 1953, unreported.

4 [2000] 1 AC 119.

5 2000 JC 208.

6 There has been relatively little judicial discussion of real bias, the one significant exception being *R v Gough* [1993] AC 646 (concerning a juror). See also J Goudkamp, “Facing up to actual bias” (2008) 27 *Civil Justice Quarterly* 32.

7 *Porter v Magill* [2002] 2 AC 357 at 494H per Lord Hope of Craighead, expressly approved by Lord Rodger of Earlsferry at para 14 of *Helou v Secretary of State for the Home Department* [2008] UKHL 62, 2008 SLT 967.

8 *R v Bow Street Metropolitan Stipendiary Magistrate and Others ex parte Pinochet Ugarte (No 2)* [2000] 1 AC 119.

proceedings<sup>9</sup> (the “involvement” ground). Secondly, the concept of apparent bias increasingly encompasses any expression of opinion by the judge before, during or after the hearing (the “opinion” ground).

*Helow v Secretary of State for the Home Department*,<sup>10</sup> which concerned an immigration appeal by a Palestinian asylum seeker, saw a bold attempt to widen the scope of both of these grounds. In respect of the involvement ground, the appellant argued that membership by the judge, Lady Cosgrove, of the International Association of Jewish Lawyers and Jurists (IAJLJ) was evidence of her inherent bias. In respect of the opinion ground, it was argued that, by reading anti-Palestinian material published in the IAJLJ’s journal, Lady Cosgrove would be unconsciously biased. In essence, counsel for the appellant sought to extend the principles concerning *active* involvement and the *active* expression of opinion to *passive* involvement and the *passive* reading of opinions. Unsurprisingly, both submissions failed.

#### A. APPARENT BIAS ON GROUND OF INVOLVEMENT IN A CASE

Involvement with the parties to a case has long been recognised as creating a presumption of bias,<sup>11</sup> but this concept has been greatly widened in scope from its origins to include any prior involvement in proceedings whether as a party, a friend or associate of a party,<sup>12</sup> as counsel who has sat as a judge with members of the current bench,<sup>13</sup> as a Government minister,<sup>14</sup> or even an advocate-depute who appeared only at the advising of a prior appeal.<sup>15</sup>

Of the case law on prior involvement in proceedings the case which most resembled the facts in *Helow* was *Pinochet*.<sup>16</sup> Lord Hoffmann was part of the leadership of Amnesty International as the chair of one of its committees, and Amnesty International was one of the parties to the case. Given these two factors there was a clear conflict of interest and violation of the *nemo iudex in causa sua* principle, and the court expressly extended the concept of “interest” beyond mere pecuniary interest.<sup>17</sup> By contrast, Lady Cosgrove was merely a member of the IAJLJ, and not a leader of that association. Even more importantly, the IAJLJ was not a party to the proceedings in *Helow*, and these differences were significant enough for

9 See e.g. *Davidson v Scottish Ministers (No 2)* 2005 SC (HL) 7.

10 [2008] UKHL 62, 2008 SLT 967.

11 See *Dimes v Proprietors of Grand Junction Canal* (1852) HL Cas 759 and the important English case of *R v Sussex Justices ex parte McCarthy* [1924] 1 KB 256.

12 *Pinochet (No 2)* [2000] 1 AC 119.

13 *Lawal v Northern Spirit Ltd* [2003] UKHL 35, [2004] 1 All ER 187.

14 *Davidson v Scottish Ministers (No 2)* 2005 SC (HL) 7.

15 *Gilmour v HM Advocate* 2006 SLT 1099. The Court of Appeal has even gone so far as to say that, even where no perception of apparent bias would appear in the eyes of a fair minded observer, a judge may nevertheless be rescued on the ground of having encountered a party in a previous case. See *Drury v BBC* [2007] EWCA Civ 605, [2007] All ER (D) 205.

16 *Pinochet (No 2)* [2000] 1 AC 119.

17 As laid down in *Dimes v Proprietors of Grand Junction Canal* (1852) HL Cas 759.

the House of Lords to find that there was no apparent bias on involvement grounds.<sup>18</sup>

Would Lady Cosgrove by virtue of her membership alone be taken to subscribe to or approve all that the Association's President or spokesperson may publish or communicate...? In my opinion, the answer is a clear negative. Membership of such an association... connotes no form of approval or endorsement of that which is said or done by the association's representatives or officers.

While the judges were unanimous on this point, Lord Walker of Gestingthorpe made it clear that he had some reservations about Lady Cosgrove's membership of the IAJLJ. Had she been any more actively involved in the association it is quite possible he would have considered apparent bias established, and his statement that "[t]hose who take on the responsibility of judicial office have to exercise a measure of restraint in associating themselves publicly with controversial causes"<sup>19</sup> should be considered as a warning to all those who hold or aspire to hold judicial office.

## B. APPARENT BIAS ON GROUND OF THE OPINIONS OF THE JUDGE

There have been several recent cases where judges have been held to be apparently biased on the grounds that they have previously expressed opinions on the issue before the court.<sup>20</sup> Arguably the high-water mark was *Locabail (UK) Ltd v Bayfield Properties Ltd*,<sup>21</sup> where it was held that even views by a judge in a scholarly work could found a plea of apparent bias if they had been expressed in too strong a tone.<sup>22</sup>

All the speeches in *Helow* devoted more time to expression of opinion than to involvement. The IAJLJ's journal, *Justice*, has a scholarly aspect but also a more political one, and it was on the basis of some of the stronger views expressed there—especially certain passages written by the association's president—that the appellant made two distinct arguments. These were, first, that Lady Cosgrove should be presumed biased on the basis of a *nosctitur a sociis* argument and, secondly, that she might be unconsciously biased as a result of reading such material. Whilst rejecting that argument, the Lords made it clear that had Lady Cosgrove endorsed the views concerned, then apparent bias would have been made out. In the words of Lord Rodger:<sup>23</sup>

[T]he [IAJLJ] president said: "As a matter of personal choice I define myself as a Jew, a Zionist, an Israeli and a member of the legal community, in that order." This appeared in the winter 2001 issue of *Justice*. In my view, a judge who defined herself in that way would indeed be unable to deal with the appellant's petition: a fair minded and informed observer would readily conclude that there was more than a real possibility that such a judge was biased.

<sup>18</sup> *Helow* at para 54 per Lord Mance.

<sup>19</sup> Para 26.

<sup>20</sup> The leading examples of this are *Bradford v McLeod* 1986 SLT 244; *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451; *Porter v Magill* [2002] 2 AC 357; and *Hoekstra v HM Advocate (No. 2)* 2000 JC 391.

<sup>21</sup> [2000] QB 451.

<sup>22</sup> See *Locabail* at para 85 per Lord Bingham of Cornhill CJ, referring to "the tone of the recorder's opinions and the trenchancy with which they were expressed".

<sup>23</sup> *Helow* at para 17.

Lord Mance explicitly concurred on this point.<sup>24</sup> Lord Walker, in a short concurring speech, clearly felt that Lady Cosgrove's actions had come very close to crossing the line into apparent or perhaps even actual bias:<sup>25</sup>

It is said that there is insufficient evidence that Lady Cosgrove did endorse those views. I accept that, and for that reason I would dismiss this appeal. But I do not accept that membership of an association such as the IAJLJ can be equated with subscribing to a daily or weekly newspaper, or that there is any room for conjecture that Lady Cosgrove may simply have omitted to cancel her annual subscription to the IAJLJ. She had been a high profile member of the Scottish branch at its inaugural meeting.

The Lords also took the view that judges, given their training and experience, could be presumed independent enough to read diverse opinions with being prejudiced by them.<sup>26</sup> The dominant view, as expressed by the majority of the court, was that there is a significant difference between merely reading an opinion, even one expressed in a publication to which one has subscribed, and expressing that opinion oneself. This is certainly a welcome decision, in that judges might otherwise have to renounce reading almost anything. But would the courts ever deem subscription to a particular newspaper or magazine to be evidence of views so strongly held they could give rise to bias? Also, what would happen if judicial libraries were exposed to public view? Would, for example, a copy of, say, *Das Kapital* or *Mein Kampf* be evidence of extremist political views, or would they merely be indicative of a historical or scholarly interest in the periods in question?

### C. THE RELATIVE UNIMPORTANCE OF THE JUDICIAL OATH?

One last feature of *Helow* worth noting is the relatively low importance afforded by some of their Lordships to the judicial oath. In the past the courts have placed much weight on the oath's solemnity, offering it up as evidence of the presumed impartiality of the judiciary, an impartiality which could only be displaced by clear evidence to the contrary or by a "structural" problem such as the tenuous tenure of temporary sheriffs.<sup>27</sup> In *Helow*, the Inner House had again stressed the weight to be attached to the judicial oath.<sup>28</sup> In the House of Lords, Lord Rodger essentially endorsed this position,<sup>29</sup> but the remaining judges seemed less enamoured with the protection provided by the oath. Lord Cullen simply ignored the issue altogether, whilst Lord Hope stressed the role of the professional judge, rather than the protection of the oath, as being indicative of impartiality.<sup>30</sup> Moreover, Lords Walker and Mance went out of their way to say that they did not seem to think the oath was particularly relevant. Lord Walker seems almost disparaging about its utility when he remarks

<sup>24</sup> *Helow* at para 53.

<sup>25</sup> *Helow* at para 27.

<sup>26</sup> *Helow* at para 30 per Lord Cullen of Whitekirk. See also paras 21-23 per Lord Rodger of Earlsferry.

<sup>27</sup> *Starrs v Ruxton* 2000 JC 208, especially the remarks of Lord Reed at 253.

<sup>28</sup> *Helow v Advocate General for Scotland* 2007 SLT 201 at para 35.

<sup>29</sup> *Helow* 2008 SLT 967 at para 23.

<sup>30</sup> *Helow* at para 8.

that “the fair minded and informed observer would be tending towards complacency if he treated the fact of having taken the judicial oath as a panacea”.<sup>31</sup> Lord Mance goes still further, reducing the judicial oath to a mere symbol:<sup>32</sup>

[T]he judicial oath appears to me more a symbol than of itself a guarantee of the impartiality that any professional judge is by training and experience expected to practise and display. But on no view can it or a judge’s professional status and experience be more than one factor which a fair-minded observer would have in mind when forming his or her objective judgment as to the risk of bias.

Issues of *apparent* bias aside, these remarks call into question what, if anything, the oath adds to the *actual* impartiality of the judiciary. They raise the question of why the oath should be sworn at all, if the courts place so little faith in it. The logical outcome would be to abandon the oath as no more than a superstitious relict of an earlier age. But whilst it is highly unlikely that the judicial oath will be abolished any time soon, it is worth stressing that once its importance is downplayed, this opens up the possibility that it might become easier for parties to challenge judicial decisions for want of *actual* impartiality rather than mere *apparent* impartiality. Up until now the judicial oath has operated rather like a judicial “corporate veil” which higher courts have refused to pierce for fear of finding naked prejudice underneath; but these remarks, if pursued in subsequent cases, suggest that this judicial veil may be transparent.

#### D. CONCLUSION

*Helow v Advocate General for Scotland* may prove to be the high-water mark of attempts to widen the grounds on which a judge will be deemed to lack impartiality, but it is perhaps the disparaging remarks about the judicial oath which will prove to be of most significance in future case law regarding judicial bias.

Scott Crichton Styles  
University of Aberdeen

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## Withholding Culpable Homicide: *Ferguson v HM Advocate*

*Ferguson v HM Advocate*<sup>1</sup> raises the question of withholding the culpable homicide verdict from the jury in a murder trial. It also touches upon the inference to be drawn

<sup>31</sup> Para 27.

<sup>32</sup> Para 57.

<sup>1</sup> [2008] HCJAC 71, 2009 SLT 67.



from the use of a lethal weapon in an attack which is eventually fatal. This comment considers both of these points.

### A. THE FACTS

Derek Ferguson, aged 23, appealed his conviction for the murder of 16-year old Steven Pettigrew. The attack took place on 1 April 2005. The facts were that the victim had been drinking with some friends in the grounds of a primary school in Airdrie. Initially, two of the appellant's cousins assaulted Steven Pettigrew, knocking him to the ground and repeatedly punching and kicking him. As Pettigrew was getting up, the appellant "walked or jogged up to [him] from behind and thrust a silver knife into his back just below the right shoulder blade".<sup>2</sup> The knife penetrated to a depth of about seven inches, such that it nearly came out again at the front. The victim was able to cry out and run away. In the end, massive blood loss caused a severe brain injury and his life support machine was switched off five days later.

At the trial, the possibility of returning a verdict of culpable homicide was not put to the jury, and this failure became the main ground of appeal. In analysing this decision, it is first of all necessary to be clear as to the parameters of murder and culpable homicide in Scots law.<sup>3</sup>

### B. PRINCIPLES OF HOMICIDE

The *actus reus* of both forms of homicide is "the destruction of life",<sup>4</sup> and there was no doubt that Derek Ferguson destroyed Steven Pettigrew's life by the stab wound which he inflicted.<sup>5</sup> The line between murder and culpable homicide is drawn by reference to the *mens rea*. Murder requires either a wicked intention to kill<sup>6</sup> or wicked recklessness, the basis of which is an intention to cause personal injury<sup>7</sup> and an absolute indifference as to whether the victim lives or dies.<sup>8</sup> In considering whether the accused was utterly indifferent as to the life of the victim, it is acceptable to draw an inference from his use of a lethal weapon. In this case, the weapon was a 10-inch silver knife.<sup>9</sup> It was, therefore, clearly "lethal".

<sup>2</sup> Para 8.

<sup>3</sup> The argument advanced here proceeds on the basis that culpable homicide is a lesser form of homicide rather than a different crime altogether.

<sup>4</sup> See Macdonald's "classic" definition of murder as being "constituted by any wilful act causing the destruction of life whether intended to kill or displaying such wicked recklessness as to imply a disposition depraved enough to be regardless of consequences": J H A Macdonald, *A Practical Treatise on the Criminal Law of Scotland*, 5<sup>th</sup> edn by J Walker and D J Stevenson (1948) 89.

<sup>5</sup> It was determined in *Finlayson v HM Advocate* 1979 JC 33 that the switching off of a life-support machine does not constitute a *novus actus interveniens* between an initial assault and the death.

<sup>6</sup> The requirement of "wickedness" in relation to the "intention to kill" arm of the *mens rea* of murder was added by *Drury v HM Advocate* 2001 SLT 1013.

<sup>7</sup> See *Purcell v HM Advocate* 2008 SLT 44.

<sup>8</sup> Hume, *Commentaries* i, 257-258; *Halliday v HM Advocate* 1999 SLT 485.

<sup>9</sup> See *Ferguson* at para 25.

In his charge to the jury in *HM Advocate v McGuinness*, Lord Justice-Clerk Aitchison stated that:<sup>10</sup>

People who use knives and pokers and hatchets against a fellow citizen are not entitled to say “we did not mean to kill,” if death results. If people resort to the use of deadly weapons of this kind, they are guilty of murder, whether or not they intended to kill.

The point is here stated so forcefully that it could easily be read as if it were conclusive. In other words, if the accused uses a lethal weapon, this, in itself, demonstrates (at least) wicked recklessness and, without further ado, the accused should be convicted of murder. In fact, however, the prevailing view is that expressed by Lord Justice-Clerk Ross in *Broadley v HM Advocate*: “every case depends upon its own facts. . . in many cases where an accused has used a lethal weapon which has caused fatal injuries, it will be for the jury to determine whether the proper verdict is one of murder or culpable homicide”.<sup>11</sup> Thus, the use of a lethal weapon is simply one factor which may be taken into account in making the determination. While the use of the knife is relevant, then, it is not enough, in itself, to categorise the crime as murder. It is not a sufficient justification for withholding the option of a culpable homicide verdict from the jury. It is necessary, therefore, to consider how such a decision might be justified.

### C. WITHHOLDING CULPABLE HOMICIDE

It is accepted that circumstances exist where the only possible verdicts are “guilty of murder” or acquittal. In *Brown v HM Advocate*, Lord Justice-General Hope stated that “there may be cases where the number or nature of the blows struck or the weapons used are of such a character that there is no room for a verdict of culpable homicide”.<sup>12</sup> For example, in *Parr v HM Advocate*,<sup>13</sup> the lesser verdict was correctly withdrawn where the accused had killed his elderly mother by striking her eight times on the head<sup>14</sup> with a two pound hammer. In *Broadley*,<sup>15</sup> the accused caused death by inflicting five stab wounds, to the head, neck and body of the victim. The point at issue is whether, from the nature of the attack, it is possible to draw the inference that the accused was (at least) wickedly reckless. In *Parr* and *Broadley*, the level of violence used gave rise to this inference. In *Ferguson* itself, the view was expressed that shooting the victim in the head, stabbing in the heart, or cutting the throat might constitute means of killing which would be similarly conclusive of murder.<sup>16</sup> Unfortunately, the trial judge here did not withdraw the alternative verdict by reference to any inference of *mens rea*. Instead, he stated that he had not put

10 1937 JC 37 at 40.

11 1991 JC 108 at 114.

12 1993 SCCR 382 at 391.

13 1991 JC 39.

14 The indictment simply stated “you . . . did strike her repeatedly on the head or body with a hammer or similar instrument”.

15 1991 JC 108.

16 *Ferguson* at para 30.

culpable homicide to the jury because (a) it was not raised expressly either by the Crown or by the defence and (b) it might have been unfavourable to the accused.<sup>17</sup> Accordingly the appeal court had to determine firstly, whether his approach was correct and, secondly, whether the attack perpetrated by Ferguson might have given rise to an inference of (merely) culpable homicide.

In making his decision the trial judge may well have derived support from *Mackay v HM Advocate*, decided only eight months earlier, where, in a similar homicide case, the appeal court said that:<sup>18</sup>

the obligation on the trial judge to charge the jury is fenced by the way the case is presented to the jury by both or all parties. It is not for the trial judge to speculate upon or embark upon areas of possible verdict which have not been canvassed in the evidence or form part of a submission to the jury.

The appeal court in *Ferguson* “[found] it necessary to disapprove of [these] observations”.<sup>19</sup> In its opinion, the point that the possible verdicts are fenced by the parties’ presentation of the issues was, simply, wrong.<sup>20</sup> Instead, it chose to be guided by the English case of *R v Coutts*<sup>21</sup> where the corresponding issue arose. The House of Lords took the view that the public interest requires that defendants are convicted at the appropriate *level*.<sup>22</sup> Responsibility for ensuring that this happens rests with the trial judge. Accordingly, it is irrelevant whether either side raises the issue.<sup>23</sup> (Coutts’s counsel had apparently asked him, “Do you want us to make representation [for a manslaughter verdict], or do you want to roll the dice and be home with Lisa and the boys?”)<sup>24</sup> Conviction commensurate with the seriousness of the actual crime committed is so important that the matter cannot be left to chance in this way.

The test which the appeal court finally set down in *Ferguson* applies this principle. If the alternative verdict is “reasonably available on the evidence”<sup>25</sup> then it should be put to the jury. This reflects the received view that the possibility of culpable homicide should be withdrawn “only with great caution” and that it “should normally be . . . [left] to the jury to decide whether the necessary degree of wicked recklessness had been established by the Crown”.<sup>26</sup>

This approach is sensible. The public interest is not served well by a set of principles which effectively gives the accused the right to determine whether to raise the issue of culpable homicide and, if the gamble is unsuccessful, then allows an appeal on the basis that the matter was not put to the jury. It is equally poorly served if a murder conviction is returned because the jury decided that the accused was blameworthy but was given no option to indicate the level of culpability.

17 *Ferguson* at para 20.

18 2008 SCCR 371 at 375 per Lord Johnston.

19 *Ferguson* at para 35.

20 Para 35.

21 [2006] UKHL 39, [2006] 1 WLR 2154.

22 See *Coutts* at para 12 per Lord Bingham of Cornhill.

23 See *Coutts* at para 24 per Lord Bingham of Cornhill; *Ferguson* at para 31.

24 See *Coutts* at para 8.

25 *Ferguson* at para 36.

26 *Brown v HM Advocate* 1993 SCCR 382 at 391 per the Lord Justice-General (Hope).

#### D. CATEGORISING *FERGUSON*

The facts of *Ferguson* may sit on the borderline between murder and culpable homicide but it seems important that there should be a retrial (rather than substitution of a culpable homicide verdict by the appeal court) to make that determination. From the facts as established, the appellant's argument that the stabbing was an accident which occurred in the course of a struggle with the deceased seems to have been rejected.<sup>27</sup> It follows from this that the accused was guilty of at least involuntary unlawful act culpable homicide. This usually arises where the accused has the evil intent to inflict the immediate bodily harm required for assault but, unexpectedly, death results.<sup>28</sup> Gordon states that:<sup>29</sup>

when it comes to a choice between murder and culpable homicide the result does not depend on mathematical assessments of probability measured against the standard of reasonable foreseeability, but depends on a moral judgment. . .

Homicide allows the degree of blameworthiness to be reflected at the stage of determining guilt, not only at the sentencing stage. The jury cannot exercise the moral judgment required of it unless it has both options. In this case, a retrial seems necessary to ensure that the conviction returned is at the appropriate level. Having the option of culpable homicide available does not pre-determine the outcome.<sup>30</sup> It merely ensures that the conviction is robust and fair. Stabbing a victim in the back with a ten-inch knife in an unprovoked attack may seem to have the hallmarks of murder but the decision should be the jury's.

*Claire McDiarmid*  
*University of Strathclyde*

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## The Modern Scottish Jury in Criminal Trials

The Scottish Government's consultation paper on *The Modern Scottish Jury in Criminal Trials*<sup>1</sup> is aimed at the general public rather than a more expert audience. However, while an easy and accessible read, its disadvantage is that at times the

<sup>27</sup> See *Ferguson* at para 16.

<sup>28</sup> See e.g. *Bird v HM Advocate* 1952 JC 23.

<sup>29</sup> G H Gordon, *The Criminal Law of Scotland*, 3<sup>rd</sup> edn by M G A Christie, vol 2 (2001) para 23.21.

<sup>30</sup> See e.g. *Drury v HM Advocate* 2001 SLT 1013 where the accused was convicted of murder at his retrial despite the appeal court's decision.

<sup>1</sup> 2008, available at <http://www.scotland.gov.uk/Publications/2008/09/17121921/0>.

discussion is superficial and insufficiently detailed to do justice to the issues. For instance, the paper deals adequately with the uncontroversial and welcome proposal to raise the age limit for jury service<sup>2</sup> but only superficially tackles the rather more problematic proposal to extend eligibility to those with occupations associated with the criminal justice process. Space precludes comment on all the suggestions canvassed, and I discuss here only three of the more important and controversial issues.<sup>3</sup>

### A. ELIGIBILITY

Much of the discussion in the paper focuses on the need to increase the size of the jury pool, thereby reducing the burden on those liable for jury service. In my view, the most questionable possibility raised is to render eligible for jury duty those who are presently barred because of the nature of their occupation, primarily those employed in the justice system – for instance, the judiciary, the police and members of the Parole Board.<sup>4</sup> This issue would have benefited from a more detailed and informed discussion than it receives.

The paper states that the rationale for excluding such groups of people is that they might have knowledge of the case, or of those involved in bringing or defending the case, or access to records which could interfere with their impartiality.<sup>5</sup> While it is possible that those employed in the criminal justice system might have personal knowledge of the case, particularly in a small jurisdiction like Scotland – a point which is emphasised in the paper – a stronger reason for excluding such categories of people is that they have too intimate a connection with the criminal process in general to appear to be disinterested adjudicators. The paper observes that the recent inclusion in England and Wales on the jury roll of those working in the criminal justice system “has presented some challenges”<sup>6</sup> but fails to describe or analyse these.

A closer examination of the English jurisprudence would have indicated that the problems have been more serious than the paper perhaps implies, and revolve around a fear that criminal justice personnel may not be seen to be impartial because of their loyalty to the particular agency for which they work. In a number of conjoined cases recently heard by the Court of Appeal,<sup>7</sup> appeals against conviction were heard because of an alleged appearance of bias stemming from the occupations of certain jurors: two police officers, an employee of the Crown Prosecution Service (CPS) (in a case prosecuted by the Department of Trade and Industry) and two prison officers. In only one of these cases was it alleged that the jurors might have had any personal knowledge of the defendant.

<sup>2</sup> Ch 3.

<sup>3</sup> For a fuller review of the consultation paper, see P W Ferguson, “The modern criminal jury” 2008 SLT (News) 229.

<sup>4</sup> For the full list of relevant professions, see *The Modern Scottish Jury* annex A.

<sup>5</sup> *The Modern Scottish Jury* paras 4.2, 4.9.

<sup>6</sup> Para 4.9.

<sup>7</sup> *R v Khan* [2008] EWCA Crim 531, [2008] 3 All ER 503.

In the event, none of these appeals was successful, unlike two of three earlier conjoined appeals which had reached the House of Lords and where convictions were quashed on the grounds that a juror in each case could not be seen to be free of bias. The jurors in question were an employee of the CPS (in a case prosecuted by the CPS) and a police officer in a case where there was a conflict between the evidence of the defendant and a police sergeant from the same area as the (police) juror although not personally known to him.<sup>8</sup> In both cases, the appeal courts emphasised that the trial judge needed to be made aware if any of the potential jurors were police officers, prosecutors, prison officers and the like and would need to consider carefully whether to stand such jurors down on the grounds of partiality or bias or the possible appearance of such. As one commentator observes, this places “an additional and difficult burden” on the trial judge and it is clear that the problems that have arisen were not fully foreseen.<sup>9</sup>

Further, I have always been dubious about the wisdom of allowing judges and sheriffs, and perhaps practising lawyers, to sit on juries because of the danger of their exercising a disproportionate influence on the other jurors if their profession becomes known. Thus, I would suggest that the bulk of those presently barred from jury service by dint of being employed in the criminal justice system should remain ineligible. The prospect of a proportionately small increase in the jury pool is outweighed by the risk of creating difficulties for the trial judge, slowing up the process and, potentially, a plethora of appeals.

### B. SIZE

The paper raises the possibility of reducing the size of the jury from the present 15, although it expresses no firm opinion on the matter.<sup>10</sup> It notes that this would reduce the number of citizens inconvenienced by jury service and that the Scottish criminal jury is larger than those in other jurisdictions. Quite correctly, the paper observes that historical tradition is not sufficient to justify retaining the jury of 15.<sup>11</sup> The paper acknowledges that the issue of the size of the jury cannot be considered separately from the simple majority verdict but, perhaps controversially, avoids exploring the three-verdict system on the basis that this would require a separate consultation paper and was considered in 1994.<sup>12</sup> Beyond the fact that I think it is regrettable to miss the opportunity to reconsider the not proven verdict, I am not convinced that this issue can be regarded as entirely separate from the size of the jury and the majority verdict. Indeed, the paper itself argues that one of the two key safeguards for the accused,

8 *R v Abdoukovic* [2007] UKHL 37, [2007] 1 WLR 2679. Lords Rodger of Earlsferry and Carswell dissented.

9 N Taylor [2008] Crim LR 641 at 643.

10 *The Modern Scottish Jury* ch 7.

11 Although it has its advantages for academics. I recall fondly once informing a rather parochial American academic, with my tongue firmly in my cheek, that “the Scottish criminal jury is the *biggest* in the world”.

12 For discussion of that debate, see P Duff, “The not proven verdict: jury mythology and ‘moral panics’” 1996 JR 1.

which acts as a counter-balance to the simple majority, is the existence of two verdicts which count as a vote for acquittal.<sup>13</sup> If one reduces the size of the jury and moves towards a weighted majority for conviction, as the paper canvasses, one might well argue that permitting indecisive jurors “to sit on the fence” through the not proven verdict becomes an issue.

The paper seeks views on commissioning a review by experts on the size of the majority required for verdicts and its correlation with jury size. While this proposal has some merit, the sceptic might claim that the attempt to reach the perfect solution is akin to the search for the Holy Grail. Different jurisdictions have arrived at very different answers to these questions and these are both culturally specific and the product of historical accident. In England, the criminal jury numbers 12 and nowadays 10 votes are required for conviction (rather than unanimity as used to be the case);<sup>14</sup> in Hong Kong, there are 7 jurors and 5 votes are needed to convict (except in capital cases where there must be unanimity);<sup>15</sup> and in the state jurisdictions of the USA, juries range between 6 and 12 in size and unanimity is usually, although not always, required.<sup>16</sup> In essence, the size of the criminal jury and the proportion of guilty votes required for conviction are somewhat arbitrary figures and depend almost entirely on what is acceptable to politicians, the legal establishment and the general populace in each individual jurisdiction.

While the paper expresses no concluded view on the issue of the “hung” jury—which can, but does not necessarily, arise where a weighted majority is required—it does seem not to favour any arrangement which imports this phenomenon, with the resulting need for a retrial. I would agree wholeheartedly. The criminal courts are already overloaded with work. Further, retrials would involve calling more citizens for jury service which would be counter-productive if the aim is to reduce the number of potential jurors. Thus, if a weighted majority verdict were introduced—say 7 guilty votes out of 11 jurors in order to convict—failure to reach this target should result in a verdict of acquittal. In other words, if 6 jurors wished to convict and 5 wished to acquit, the accused would be acquitted and there would be no retrial. The resultant asymmetry between the numbers needed for conviction and for acquittal can be argued to be consistent with the need to prove guilt beyond reasonable doubt and the presumption of innocence.

### C. TRIAL WITHOUT A JURY

The paper raises the possibility of dispensing with the jury in “long and complex” trials.<sup>17</sup> Three concerns are raised. First, and most important, it is suggested that such trials impose an unfair burden on jurors, citing the example of the *Transco*

13 *The Modern Scottish Jury* para 7.13. In the paper’s view, the other safeguard is the doctrine of corroboration.

14 Juries Act 1974 s 17.

15 P Duff et al, *Juries: A Hong Kong Perspective* (1992) 40.

16 N King, “The American criminal jury”, in N Vidmar (ed), *World Jury Systems* (2000) 93 at 98.

17 *The Modern Scottish Jury* para 8.1.

case<sup>18</sup> which lasted for six months.<sup>19</sup> Secondly, there is the danger of juror attrition, for example through ill health, leading to fewer jurors remaining than the minimum number of 12 needed to return a verdict. Thirdly, a suggestion is raised, and then virtually dismissed, that jurors might have difficulties in coping with a large body of complex evidence. The paper expresses no concluded view as to whether jury trial should be abolished in certain types of case but does not seem to favour this radical move. Instead, the main recommendation is for the provision of substitute jurors in long cases who can step in if some of the original jurors are forced to seek excusal during the trial. This seems unobjectionable in principle, the problems of implementation being purely practical, and is a policy adopted in other various other jurisdictions.<sup>20</sup>

The problem with the approach adopted in the paper is well illustrated by the extremely short and superficial discussion of the issues in this area. I am not going to make any substantive comment on the suggestion of abandoning jury trial in complex cases, but would observe that the paper makes no reference to the wealth of debate and research in other jurisdictions over whether jurors are able to understand and evaluate the evidence in such cases and what more suitable mechanisms might be used to replace the jury. Given the radical nature of the suggestion, this is somewhat surprising and extremely regrettable. The only “evidence” (using the word loosely) in the paper is restricted to, on the one hand, a quote from Lord Osborne’s opinion in the *Transco* appeal to the effect that it has never been (judicially) decided in Scotland that a jury is incapable of reaching a just decision in a complex cases<sup>21</sup> and, on the other, an observation that in England the statutory provision which would enable the prosecution to seek a judge-only trial in a case of complex fraud has not been commenced.<sup>22</sup>

In contrast to the poverty of the discussion in this paper, the Roskill Committee in England devoted a chapter of over twenty pages to discussing whether jury trial was suitable for complex fraud trials<sup>23</sup> and, additionally, commissioned a series of research projects aimed at analysing and improving the performance of jurors in these cases.<sup>24</sup> More recently, Lord Justice Auld, in his review of the English criminal courts which led to the legislative provision mentioned above, devoted fifteen pages of a long chapter on jury trial to the question of whether there should be an alternative to jury trial in fraud and complex cases.<sup>25</sup> As part of this review he also commissioned a major evaluation of the plentiful empirical research on the jury.<sup>26</sup> None of this discussion and debate is referred to in the Scottish Government’s paper.

18 *Transco plc v HM Advocate (No 2)* 2004 SCCR 553.

19 Paras 8.4-8.5.

20 As the paper notes: see para 8.19.

21 *Transco plc v HM Advocate (No 2)* 2004 SCCR 553 at para 32.

22 *The Modern Scottish Jury* paras 8.6-8.7.

23 Fraud Trials Committee, *Report* (1986) 133-155.

24 Fraud Trials Committee, *Improving the Presentation of Information to Juries in Fraud Trials: A Report of Four Research Studies* (1986).

25 R E Auld, *Review of the Criminal Courts of England and Wales* (2001) 200-214.

26 P Darbyshire, A Maughan and A Stewart, *What Can the English Legal System Learn From Jury Research Published Up To 2001?* (2002; available at <http://www.kingston.ac.uk/~ku00596/elsres01.pdf>).



#### D. CONCLUSION

This is a rather odd paper because one might have expected a fuller and better informed discussion of the issues. While I appreciate the need to make such consultations accessible to the public, there is surely a duty to present some kind of reasoned analysis of the issues and the evidence.

*Peter Duff*  
*University of Aberdeen*

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### Rights in Succession for Cohabitants: *Savage v Purches*

In the eighteen months since they came into force, the provisions of the Family Law (Scotland) Act 2006 introducing financial rights for unmarried cohabitants<sup>1</sup> have seen little in the way of judicial illumination. The first reported case was disposed of on a point of jurisdiction.<sup>2</sup> Two subsequent cases on financial provision following breakdown of cohabitation suggested a disinclination on the part of the courts towards a munificent application of the legislation.<sup>3</sup>

The decision in *Savage v Purches*<sup>4</sup> appears to apply a similarly parsimonious approach in the area of cohabitants' rights in succession. Here, the pursuer, James Savage, had cohabitated with Graham Voysey for around two years and eight months prior to Voysey's unexpected death in April 2007. The deceased left no will. Under the general law of intestate succession, the entire estate would have fallen to the deceased's closest living relative, his half-sister Sandra Purches.<sup>5</sup> However, the pursuer sought to assert his rights as a cohabitant, seeking payment of a capital sum in terms of section 29 of the 2006 Act.

#### A. LEGAL ARGUMENTS

For section 29 of the 2006 Act to operate, an applicant must first establish title to make a claim, following which the court exercises its discretion in determining the

1 Family Law (Scotland) Act 2006 ss 25-29. Section 28 of the Act makes provision for cohabitants to apply to the court for financial provision where cohabitation ends otherwise than by death, while section 29 provides for a surviving cohabitant to apply to the court for financial provision on intestacy.

2 *Chebotareva v Khandro* 2008 Fam LR 66, on which see C Roodt, "Cohabitation: *Chebotareva v Khandro*" (2009) 13 EdinLR 147.

3 *M v S* [2008] CSOH 125, 2008 SLT 871; *Jamieson v Rodhouse* 2009 GWD 3-54.

4 Falkirk Sheriff Court, 19 Dec 2008. The sheriff's judgment is available at <http://www.scotcourts.gov.uk/opinions/savage.html>.

5 Succession (Scotland) Act 1964 s 2(1)(c).

level of any award. The requirements of title are that the applicant and the deceased were cohabitants as defined in section 25 of the Act, that the deceased was domiciled in Scotland and that the cohabitation was brought to an end by death.<sup>6</sup> None of these issues was in dispute in *Savage*, although the factors specified in section 25(2) as being relevant in establishing cohabitation – the duration and nature of the relationship, and the extent of any financial arrangements between the parties – proved to be the subject of some discussion later in the judgment.

With title established, the court is directed to consider four factors in determining whether a payment should be made, namely:<sup>7</sup>

- (a) the size and nature of the deceased's net intestate estate;
- (b) any benefit received, or to be received, by the survivor—
  - (i) on, or in consequence of, the deceased's death; and
  - (ii) from somewhere other than the deceased's net intestate estate;
- (c) the nature and extent of any other rights against, or claims on, the deceased's net intestate estate; and
- (d) any other matter the court considers appropriate.

Each of these factors was treated to detailed discussion from both sides of the bar.

### **(1) The size and nature of the deceased's intestate estate**

The net total of the intestate estate was agreed to be £186,113.<sup>8</sup> It was noted that, had the pursuer been the civil partner of the deceased, the entire sum would have been paid over to him in terms of his prior rights claim under sections 8 and 9 of the Succession (Scotland) Act 1964.<sup>9</sup>

### **(2) Any benefit received in consequence of the deceased's death**

The deceased had been a member of an occupational pension scheme which provided for a discretionary lump sum payment on death, in addition to a discretionary pension for dependents. The trustees of the scheme split the lump sum equally between the pursuer and the defender, resulting in payment of £124,840 each. The pursuer, as an adult dependent of the deceased, was also awarded payment of an annual pension of £9,530 gross, subject to inflationary increases. The defender's argument, accepted by the sheriff, was that this benefit should be valued on the basis of "replacement cost" – in other words, the price of purchasing an annuity from an insurance company that would provide the same annual income. The replacement cost was assessed at £298,900.<sup>10</sup> In total, therefore, the pursuer was considered to have received an aggregate of £420,000 in consequence of the pursuer's death before payment of any

6 Family Law (Scotland) Act 2006 ss 25 and 29(1).

7 Family Law (Scotland) Act 2006 s 29(3).

8 Para 8. For the purposes of this note, figures are given in pounds only, disregarding pence. Precise figures are given in the sheriff's judgment.

9 Finding in fact 9.

10 Findings in fact 6 and 7.

award under section 29:<sup>11</sup> a substantial sum, particularly relative to the net value of the estate as a whole.

### **(3) The nature and extent of other rights against the deceased's estate**

The only other claim on the estate came from the deceased's half-sister, the defender. The nature of the relationship between the deceased and Mrs Purches was the subject of some debate at proof, with the pursuer arguing the two had been "distant" or even "estranged",<sup>12</sup> while the defender gave evidence of a close and loving relationship, beginning with a shared difficult childhood and continuing with regular contact until the defender scattered the deceased's ashes on the beach.<sup>13</sup> The sheriff found the pursuer's evidence on the point to be of "limited credibility and reliability", having formed the view that Mr Savage deliberately downplayed the deceased's relationship with the defender in order to further his own claim. Sheriff Arthurson detected "a distinct whiff of avarice about the whole action raised by the pursuer".<sup>14</sup>

It may be worth noting that under section 2 of the Succession (Scotland) Act 1964, a half-blood collateral (sibling) would inherit in preference to a surviving spouse or civil partner. This provision would only come into play, however, after payment of prior rights to the surviving spouse or partner had already been made.

### **(4) Any other matter the court considers appropriate**

It was this factor which caused the greatest debate in the case. What exactly would it be appropriate for the court to consider under this head?

The pursuer contended, in the first place, that the factors determinative under section 25 of the existence of cohabitation – length and nature of the relationship, together with the nature of financial arrangements between the parties – could not be relevant. Once the section 25 test had been passed, as it had in this case, these factors had served their purpose and could play no further part.<sup>15</sup> The pursuer also contended that factors such as any economic disadvantage suffered by one party to the relationship or the position of any children – essentially the principles by which the court is guided in making an award of financial provision on divorce<sup>16</sup> – should not be relevant here. There was no scope in the legislation for what pursuer's counsel referred to as the "worthy" beneficiary.<sup>17</sup> Instead, it was argued, the court would be entitled to consider only matters which affected the estate or the survivor after the death, for example, if the survivor would be left destitute without payment under section 29.<sup>18</sup>

11 Para 14.

12 Para 4.

13 Finding in fact 14.

14 Para 5.

15 Para 11.

16 Family Law (Scotland) Act 1985 s 9. These provisions have been extended to cover dissolution of civil partnership by the Civil Partnership Act 2004 Sch 28. References to divorce in this note should be taken to encompass dissolution.

17 Para 7.

18 Para 11.

There is something attractive about the pursuer's argument when one considers the general law of intestate succession. Unlike the rules for financial provision on divorce, the Succession (Scotland) Act 1964 does not allow for consideration of what might be termed the equity of the situation when providing for payment of prior rights.<sup>19</sup> A surviving spouse is entitled to a set amount, provided the estate contains sufficient funds to pay it. This is true regardless of whether the parties were estranged, or if they had married only two days previously, or if the deceased left behind numerous impecunious student children.

However, the point strongly taken by the defender was that the regime of the 2006 Act was not designed to provide cohabitants with automatic rights equivalent to those of a surviving spouse.<sup>20</sup> Prior rights are an entitlement; a payment under section 29 is at the discretion of the court. Section 29(4) establishes an upper limit, by providing that a surviving cohabitant is not to receive more than a surviving spouse would be entitled to in prior rights, but sets no lower limit on an award. On what basis is the court expected to exercise its discretion, if not by taking into account factors such as the duration and nature of the cohabitation, or the other resources available to the survivor?

## B. DECISION AND ANALYSIS

Although satisfied that the pursuer had established title to make a claim under section 29, the court assessed the value of the claim at nil.<sup>21</sup> The decision turned primarily on the factors covered by sections 29(3)(b) and (d). The sheriff pointed out that the benefits the pursuer had already received as a result of the death, which were undoubtedly relevant for consideration under section 29(3)(b), were sufficient in themselves to militate against payment of anything more. This conclusion is difficult to argue with given the sums of money involved.

Usefully, however, the sheriff made further observations in respect of the matters which could appropriately be taken into account under section 29(3)(d). With regard to the duration and nature of the cohabitation, Sheriff Arthurson noted that the court "cannot close its eyes to such factors within the contextual hinterland in which the claim . . . presents itself".<sup>22</sup> This assertion is somewhat Delphic, but in essence it appears that the court accepted the defender's position. The court was clearly concerned by the fact the deceased had previously been in a cohabiting relationship of 15 years duration with a different partner. During that period the deceased had made a will with his then partner named as sole beneficiary, and that will had been destroyed without replacement. Taken together with the fact the pursuer and the deceased did not share a bank account, a picture was painted of the nature

19 For proposals for reform of the law of intestate succession, see Scottish Law Commission, Discussion Paper on *Succession* (Scot Law Com DP No 136, 2007), discussed by K McK Norrie, "Reforming succession law: intestate succession" (2008) 12 EdinLR 77, and D Reid, "From the cradle to the grave: politics, families and inheritance law" (2008) 12 EdinLR 391.

20 Para 12.

21 Para 14.

22 Para 15.

of the cohabitation from which the sheriff found an inference could be drawn about the deceased's testamentary intentions towards the pursuer.

The sheriff specifically stated that he was not seeking to categorise the pursuer as "unworthy",<sup>23</sup> which appears to suggest that factors used in determining financial provision on divorce should not form part of the court's considerations under section 29(3)(d). This interpretation is backed up by the notable absence of any reference in the sheriff's note to the financial situation between the pursuer and the deceased. This is, however set out in the sheriff's findings in fact, from which it appears that the pursuer's standard of living improved considerably after commencing cohabitation with the deceased, who provided free accommodation and several foreign holidays a year in addition to a car, two dogs and the ultimate romantic gesture of having the ironing "sent out". The pursuer, it was conceded, sometimes paid for the dogs to be groomed.

The sheriff did go on to say, however, that his view of the pursuer (as, it would appear, an unworthy beneficiary) bore directly on his assessment of the pursuer's credibility.<sup>24</sup> In other words, the economic advantages the pursuer enjoyed in cohabiting with the deceased may have led to the "avarice" the sheriff detected in assessing the pursuer as an unreliable witness. Although there is some scope for confusion in the wording of the sheriff's note here, it is not thought that the sheriff intended to assert that the pursuer's personal characteristics should be taken into account under section 29(3)(d). There would not appear to be any precedent for "good character" considerations in the law either of succession or of financial provision between cohabitants, and a move in that direction would seem to go directly against, for example, the trend in divorce law by which the concept of "blame" in the breakdown of a relationship is largely discounted.<sup>25</sup>

Overall, the decision continues the cautious approach adopted so far by the courts to interpretation of the provisions on financial rights for cohabitants. The guidance given on matters relevant to the exercise of the court's discretion suggests that claims by cohabitants in succession may straddle something of a middle ground between the traditional law of intestate succession and financial provision on divorce. The quality of the relationship will have some bearing on the value of any award ultimately made. Whether an unmarried cohabitant will ever receive an award equivalent to the claim of a surviving spouse or civil partner on intestacy is as yet unknown. In the interests of clarity, it is hoped that the provisions of the 2006 Act see another day in the judicial sun sooner rather than later.

*Frankie McCarthy*  
*University of Glasgow*

<sup>23</sup> Para 16.

<sup>24</sup> Para 16.

<sup>25</sup> Section 11(7)(d) of the Family Law (Scotland) Act 1985 provides that conduct of the parties will only be relevant to financial provision on divorce where their actions have directly impacted on the financial resources of the household, or where it would be manifestly inequitable to leave it out of account.

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## The Worst of All Worlds? *Common Services Agency v Scottish Information Commissioner*

In a previous volume of this journal we commented on *Collie*,<sup>1</sup> a decision by the Scottish Information Commissioner in a dispute regarding the disclosure of rare incidences of childhood leukaemia in the Dumfries and Galloway postal areas.<sup>2</sup> We noted that the *Collie* case was the first to explore the interface between data protection and freedom of information in the healthcare setting and with respect to freedom of information provisions which are more or less standard across the whole of the United Kingdom. In July 2008, the House of Lords set aside the Commissioner's initial decision to require release of data in a particular form, and remitted the application to him to be considered afresh.<sup>3</sup> This comment examines the judgment of the House of Lords and considers its significance at a point where two legal worlds collide.

### A. THE FACTS

The case arose from a request by Mr Collie to the Common Services Agency (CSA) for release of details of all incidents of childhood leukaemia for both sexes by year from 1990 to 2003 for all of the Dumfries and Galloway postal areas by census ward. The request was made under the Freedom of Information (Scotland) Act 2002. The CSA, while holding the information in question, was concerned about a significant risk of the identification of living individuals if the data were released because of the small numbers that would be generated by the combination of a rare diagnosis, specific age and small geographical area. Accordingly, the CSA refused to release the data. The Act exempts personal information from disclosure and, in an appeal by Mr Collie, the Scottish Information Commissioner agreed that the data – released in the form requested – would be personal data and that their release would be a breach of the Data Protection Act 1998. Notwithstanding, the Commissioner went on to hold that Mr Collie could, and should, have been provided with an alternative form of data generated by a technique known as “barnardisation”. This technique is applied to tables of data involving very small numbers. It randomly adds 0, +1 or –1 to all values

1 Decision of the Scottish Information Commissioner, *Mr Michael Collie and the Common Services Agency for the Scottish Health Service*, 15 Aug 2005, available at <http://www.itpublicknowledge.info/UploadedFiles/Decision021-2005.pdf>.

2 G Laurie and R Gertz, “When worlds collide: what are the obligations of the NHS at the interface between data protection and freedom of information regimes?” (2006) 10 EdinLR 151.

3 *Common Service Agency v Scottish Information Commissioner* [2008] UKHL 47, 2008 SLT 901, on appeal from *Common Services Agency v Scottish Information Commissioner* [2006] CSIH 58, 2007 SC 231.

between 2 and 4, and adds 0 or +1 to entries where the value is 1. A cell containing 0 remains unchanged. The technique is not foolproof but it is designed to reduce threats to privacy and is commonly employed.

The CSA appealed the decision on various grounds, but most importantly on the basis that it did not “hold” the data in the form it was now required to generate and release, and moreover, that release of such data in that format remained a release of “personal data” and prohibited under the Data Protection Act.

### B. SHOULD TWO WORLDS COLLIDE?

It might seem at first that there should be no clash of cultures. The Freedom of Information Act makes explicit that personal information is exempt from its scope.<sup>4</sup> The relevant exemptions are tied to the provisions of the data protection legislation in that exempt information includes “personal data” within the terms of the Data Protection Act 1998, and the exemption applies if “the disclosure of the information to a member of the public . . . would contravene . . . any of the data protection principles”, again as defined in the 1998 Act.<sup>5</sup> Moreover, their Lordships were categorical that while freedom of information legislation should enjoy a liberal interpretation,<sup>6</sup> it did not follow that exemptions should be interpreted narrowly.<sup>7</sup>

The competing philosophies of the legislative regimes mean, however, that the worlds cannot be kept entirely apart. Section 1(1) of the Freedom of Information Act states that “[a] person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority”. This creates a right to information subject only to certain exemptions: “[d]iscretion does not enter into it”.<sup>8</sup> In turn this begs a question which was at the heart of the Commissioner’s decision: if personal data is held by a public authority and subject to an exemption but can be released in a form which might take the data outside that exemption, is there an *obligation* on the public authority so to modify and to release those data?

An initial question is whether the authority technically “holds” such data. Here, it was held that this part of the statutory regime should be interpreted in as liberal a manner as possible.<sup>9</sup> It was inappropriate for the CSA to argue that it did not hold the data in question, because the content of the information requested was undoubtedly in the possession of the authority at the relevant time. There is, then, a fundamental distinction to be drawn between *form* and *content* with respect to information held by authorities. Barnardisation would merely “camouflage” data in the interests of privacy. The proposed technique did not require the carrying out of new research or the creation of new information.<sup>10</sup>

4 Freedom of Information (Scotland) Act 2002 s 38. See also Freedom of Information Act 2000 s 40.

5 Data Protection Act 1998 Sch 1 Part I.

6 See e.g. *Collie* at para 4 per Lord Hope of Craighead, citing with approval Lord Marnoch in the Inner House: [2006] CSIH 58 at para 32.

7 See *Collie* at paras 4, 40 per Lord Hope and paras 63, 67 per Lord Rodger of Earlsferry.

8 *Collie* at para 68 per Lord Rodger.

9 Para 15 per Lord Hope.

10 *Ibid.*

Unfortunately, the House of Lords was unwilling to expand on the words of the legislation. “No hard and fast rules can be laid down as to what it may be reasonable to ask a public authority to do to put the information which it holds into a form which will enable it to be released consistently with the data protection principles.”<sup>11</sup> But that there is now a clear obligation to do so is not in any doubt.<sup>12</sup>

### C. THE MEANING OF “PERSONAL DATA”

The crux of the matter throughout these disputes was the meaning of “personal data” under the Data Protection Act 1998.<sup>13</sup> For want of a better expression, “personal data” is the threshold device employed by the Data Protection Directive<sup>14</sup> and embodied in domestic legislation which triggers protections for European citizens’ privacy with respect to the processing of information from which they are “identifiable”. The concepts of “personal data” and “identifiability” are intimately connected. As section 1(1) of the Data Protection Act 1998 provides:

“personal data” are “data which relate to a living individual who can be identified—

- (a) from those data, or
- (b) from those data and other information which is in the possession of, or likely to come into the possession of, the data controller. . .”

Put crudely, if an individual cannot be identified then the data being processed are not “personal data” and so data protection does not apply. In particular, if data can be anonymised to elide the possibility of identifiability then those data can be processed with impunity. But what, then, is required to achieve an adequate level of anonymisation? In particular, would barnardisation have been sufficient in *Collie*? If not, and if processing of “personal data” continued, could disclosure nonetheless be consistent with the data protection principles?

### D. ANONYMISATION

Lord Hope pointed to the error of law committed by the Commissioner in requiring the CSA to disclose the requested data in a barnardised form without having first asked whether the data were “personal data” in the hands of the Agency, and if they were, whether their release would contravene any of the data protection principles.<sup>15</sup> In remitting the case to the Commissioner for further consideration, he made it clear that the question of whether barnardisation can render personal data sufficiently anonymous to remove it from the regime of data protection principles is a question of fact. This would be far by the easier route for the Commissioner to take. If it cannot

11 Para 16 per Lord Hope.

12 See also para 73 per Lord Rodger.

13 As amended by the Freedom of Information Act 2000 s 68(2).

14 Council Directive 95/46/EC OJ 1995 L281/31.

15 *Collie* at para 18.



be taken, the only remaining option is to consider whether disclosure of the “personal data” can be justified within the data protection principles.

Full argument was heard on this last point and it essentially distils to this: if the data in question are “personal data” they are also likely to be “sensitive personal data” (relating to health) under the 1998 Act and as such it would be necessary for the processing to satisfy at least one condition in each of Schedule 2 (processing of any personal data) and Schedule 3 (processing of sensitive personal data) of that Act.<sup>16</sup> The House of Lords made it clear that at this stage there was no justification for reading these provisions liberally,<sup>17</sup> and counsel for the Commissioner was unable to point to any Schedule 3 condition relevant to the case.<sup>18</sup>

The only remaining possibility would be to argue that the processing was “necessary” for the CSA to perform its functions in the collection and dissemination of epidemiological data *and* that the processing would not be unwarranted by reason of prejudice to the rights and freedoms or legitimate interests for the data subject.<sup>19</sup> Once again, this is a question of fact for the Commissioner.

All of their Lordships who examined the process of barnardisation accepted that it is not foolproof. Contrary to the view taken by the Inner House, barnardised data does not *per se* cease to be “personal data”.<sup>20</sup> This must be decided on the facts on each case.

Thus far, the *Collie* decision deals with two elements in a tripartite analysis of anonymisation: facts and techniques. But what about law? Against which legal standard must the Commissioner or any other party determine whether a sufficient level of anonymity is reached? The language of impossibility permeates the speeches, but is impossibility of identifiability what the law requires?

It is well recognised as a matter of practice that a “spectrum of identifiability”<sup>21</sup> exists with respect to fragments of information about individuals which can be pieced together by a variety of means, and that absolute anonymity is elusive if not illusory. Anonymisation is often referred to as a craft. It is further recognised that anonymity and identifiability are, instead, relative concepts: “[a]n individual shall not be regarded as ‘identifiable’ if identification requires an unreasonable amount of time and manpower”.<sup>22</sup> Furthermore, the Article 29 Data Protection Working Party, established by the European Commission to provide expert opinion and to promote the uniform application of the data protection principles in all member states, has

16 See Data Protection Act 1998 Sch 1 para 1. The data must also, under this provision, be processed “fairly and lawfully”.

17 *Collie* at para 40 per Lord Hope.

18 Para 41.

19 Thus satisfying condition 5(b) in Sch 2 and condition 7(1)(b) in Sch 3, which are “surprisingly... in precisely the same terms”: *Collie* at para 60 per Lord Rodger.

20 *Collie* at para 86 per Lord Rodger.

21 For discussion, see W Lowrance, *Learning from Experience: Privacy and the Secondary Use of Data in Health Research* (2002) 29 ff.

22 Council of Europe, Recommendation R(97)5 on the *Protection of Medical Data* (1997). See also Council of Europe, Recommendation R(81)1 on *Regulations for Automated Medical Data Banks* (1981).

issued recent guidance on the meaning of “personal data” in which it similarly points to the fluidity of this concept and its recognition in law.<sup>23</sup> The Working Party is of the view that “a mere hypothetical possibility to single out the individual is not enough to consider the individual as ‘identifiable’... if that possibility does not exist or is negligible, the person should not be considered ‘identifiable’, and the information would not be considered as ‘personal data’”.<sup>24</sup>

Thus, when Lord Rodger states in the circumstances of the CSA case that even after barnardisation “it seems at least possible that, with the very small counts in the cells in the tables, the individuals could still be identified from those data”,<sup>25</sup> this must be tempered by probability as well as possibility: the law speaks of means “likely reasonably to be used”<sup>26</sup> and this must be moderated by notions of reasonableness. These legal parameters are simply not explored by the House of Lords.

It is, in fact, striking how little authority is cited or external reference is made to legal materials or guidance in this ruling. The Inner House decision and a decision of the Court of Appeal, *Durant*,<sup>27</sup> are summarily dismissed and no reference is made either to the Article 29 Working Party or to the plethora of guidance from the Information Commissioner’s Office on the meaning of “personal data”. Given that the core concern in this case did not relate to the comparatively new legal regimes concerning freedom of information but rather to the well-established, Europe-wide, system of data protection, it may be something of a missed opportunity not to draw on existing experiences and to attempt some clarity around central concepts and related obligations. There is a world of difference between eliminating risk of invasion of privacy and reducing a risk to acceptable limits. The former is arguably impossible to achieve, as is absolute anonymity with respect to the processing of personal data. What remains unclear is the legal standard to which public authorities and other data controllers might be held, and how far they should go in attempting to protect individual privacy when faced with a freedom of information request. Two duties potentially pull in diametrically opposing directions: a duty to disclose information even if it involves personal data (so long as sufficient safeguards are in place), and a duty to have in place sufficient safeguards, the standards for which remain elusive.

*Graeme Laurie*  
*University of Edinburgh*

*Rena Gertz*  
*University of Glasgow*

<sup>23</sup> Article 29 Data Protection Working Party, *Opinion 4/2007 on the Concept of Personal Data* (01248/07/EN WP 136, 2007).

<sup>24</sup> *Ibid* at 15.

<sup>25</sup> *Collie* at para 88.

<sup>26</sup> Council Directive 95/46/EC OJ 1995 L281/31, recital 26.

<sup>27</sup> *Durant v Financial Services Authority* [2003] EWCA Civ 1746, [2004] FSR 28. *Durant* is distinguishable as involving an access request from the data subject himself.

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## A Precautionary Approach to Pesticides?

There has been a long history of concern about the use of pesticides and the possible effects on human health and on the environment. *Downs v Secretary of State for the Environment, Food and Rural Affairs*<sup>1</sup> is a landmark decision raising significant questions about the UK Government's approach to the assessment of risk to rural communities living near sprayed fields. The issues raised are complex and contentious and the decision is likely to have significant political implications.

The crux of the claimant's case was that EC Directive 91/414 on the marketing of plant protection products (pesticides) requires that a pesticide should not be authorised for use unless it is established that it has no harmful effects on human health.<sup>2</sup> The High Court's decision in favour of the claimant might be seen as an historic victory for campaigners against pesticides, particularly as it mirrors the recommendations of the Royal Commission on Environmental Pollution (RCEP) in calling the Government to take a more precautionary approach to the use of pesticides.<sup>3</sup> The decision is also particularly pertinent given current European proposals to tighten up the regulation of pesticides.<sup>4</sup> Although this is not the central point on which the decision rests, it raises some interesting points on the need to apply the precautionary principle for the protection of human health.

### A. BACKGROUND

Georgina Downs, the claimant, has been a vociferous campaigner against crop-spraying for a number of years.<sup>5</sup> She has lived next to regularly sprayed fields for twenty-four years and has suffered long-standing health problems which can be attributed to ongoing exposure to pesticides. Her claim, originally lodged in September 2004, challenged the refusal of the Government to apply mandatory no-spray buffer zones around agricultural land. The case was adjourned pending the outcome of an RCEP report into the risks to human health from pesticide exposure

1 [2008] EWHC 2666 (Admin).

2 Council Directive 1991/414 OJ 1991 L230/1, art 4(1)(b).

3 Royal Commission on Environmental Pollution, *Crop Spraying and the Health of Residents and Bystanders* (2005, available at <http://www.rcep.org.uk/cropspraying.htm>).

4 European Parliament legislative resolution of 13 Jan 2009 on the Council common position for adopting a directive of the European Parliament and of the Council establishing a framework for Community action to achieve a sustainable use of pesticides (6124/2008-C6-0323/2008-2006/0132(COD)); European Parliament legislative resolution of 13 Jan 2009 on the Council common position for adopting a regulation of the European Parliament and of the Council on the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC (11119/8/2008-C6-0326/2008-2006/0136(COD)).

5 Downs runs the UK Pesticides Campaign: see [www.pesticidescampaign.co.uk](http://www.pesticidescampaign.co.uk).

and the response from the Department for Environment, Food and Rural Affairs (DEFRA). The RCEP report, published in September 2005, concluded that the UK approach to assessing resident and bystander exposure to pesticides needed urgent reconsideration. It found there could be a link between the exposure of residents and bystanders to pesticides and chronic ill-health, and that a more precautionary approach was therefore necessary.<sup>6</sup> It recommended the introduction of a number of measures, including buffer zones. In July 2006 DEFRA, in line with advice published by the Advisory Committee on Pesticides (ACP), rejected the RCEP recommendations and took the view that no further measures were necessary.

Following this decision, Downs' claim was amended so that the central challenge before the High Court was that the domestic regime for the implementation of EC Directive 91/414 did not provide for the necessary protection of public health, particularly of residents living near fields subject to crop spraying.<sup>7</sup> Three arguments were made: (1) the approach to assessing risk adopted by the defendant (the bystander model) was in breach of the Directive in failing to give adequate protection to local residents, as opposed to bystanders; (2) the approach adopted by the defendant, that there should be no *serious* harm to human health, was wrong in law since the Directive did not qualify the requirement that the use of pesticides should not result in harm to human health; and (3) the defendant's failure to act on the RCEP conclusion that a more precautionary approach was needed was erroneous. At the very least, it was argued, cogent and clear reasons were needed to justify such a failure.

## B. THE DECISION

Collins J, in a lengthy and complex judgment, ruled that the defendant had failed properly to apply EC Directive 91/414 in that it had failed properly to take account of the risks to bystanders and residents. He ordered, firstly, a declaration from the defendant that it is not acting in compliance with Directive 91/414, and, secondly, that the Government must reconsider and, where necessary according to the judgment, amend its policy on pesticides. The decision carefully considers each of the claimant's three grounds and these are now discussed in turn.

### (1) Inadequate Assessment

Collins J was satisfied that the arguments presented by the claimant provided cogent scientific evidence that the approach adopted by the Government does not adequately protect residents and is in breach of the Directive. He did, however, qualify this view, stating:<sup>8</sup>

There are conflicting views as to the adequacy of the approach adopted . . . I am not qualified to decide between those views, nor is it an appropriate exercise for a judge to undertake on judicial review. No doubt if it were clear that one view was tainted in the *Wednesbury*

6 Royal Commission on Environmental Pollution, *Crop Spraying* (n 3) para 1.51.

7 The Directive has been transposed by the Plant Protection Products Regulations 2005, SI 2005/1435.

8 *Downs* at para 22.

sense, the court could so declare. But that is most unlikely to be established and, as it seems to me, we are here at the very fringe of what should properly be the subject of judicial review.

He went on to quote from *Secretary of State for the Home Department v R (Campaign to End All Animal Experiments)*: “The scientific judgment is not immune from lawyers’ analysis. But the court must be careful not to substitute its own inexpert view of the science for a tenable expert opinion”.<sup>9</sup> The Downs case provides an interesting example of the fine line that judges must walk when dealing with complex scientific issues. In conclusion on this point, the court freely admitted that, were this the only ground relied on, it would not be able to find in the claimant’s favour. This certainly leaves the decision open to appeal. However, much greater weight seems to be placed on the second ground of the claim.

### **(2) No harmful effect on human health**

The second arm of the claimant’s case addresses the failure of the defendant to comply with the strict wording of the Directive. Article 4.1(b)(iv) requires that a pesticide shall not be authorised unless it is established in the light of current scientific and technical knowledge that it has “no harmful effect on human health”, whether directly or indirectly (e.g. through water or food). The view of the court was that this constituted an absolute and overriding requirement for the protection of human health. The Directive provides no qualification, elaboration or explanation of this requirement. All harm is prohibited, not just chronic or permanent harm.<sup>10</sup> The court further defined harm to human health as any harm which is not merely transient or trifling.<sup>11</sup> This is in stark contrast to the approach taken by DEFRA and the Health and Safety Executive, whose guidance on pesticide regulation asserts that one aim of the legislative framework is that “no-one should develop any *serious illness* through the use of pesticides”.<sup>12</sup>

### **(3) The precautionary principle**

The decision on this point seems slightly contradictory. It was that the minister did not err in law by rejecting the advice of the RCEP. Having received contradictory advice from the RCEP and the ACP the Minister was entitled to choose which to follow. Thus, again, it is true that this ground alone would not prevail. Nevertheless, the overall decision is clear: the defendant failed to comply with the requirements of the Directive. Despite finding that the Minister was entitled to choose the advice of the ACP over the advice of the RCEP calling for a more precautionary approach,

9 [2008] EWCA Civ 417 at para 1 per May LJ.

10 However, trivial harm would not be covered by this provision.

11 In line with *R v Donovan* [1934] 2 KB 498 at 509: “...bodily harm has its ordinary meaning and includes any hurt or injury calculated to interfere with the health or comfort of the prosecutor. Such hurt or injury need not be permanent, but must, no doubt, be more than merely transient and trifling.”

12 As quoted by Collins J in *Downs* at para 48 (emphasis added).

Collins J proposed that a more precautionary approach must be taken in respect of the effect of pesticides on human health.<sup>13</sup>

[T]he fundamental requirement that human health be not harmed must in my view require that the precautionary principle is to be applied so that measures to ensure the protection of all who may be affected by the use of the pesticide must be considered.

The outcome of the decision is that the Government must reconsider its policy on the use of pesticides and, in particular, the assessment of risk used with regard to residents affected by exposure.

In reality, then, despite some of the language of the decision, the case does not hinge on the precautionary principle. It does, however, call for the Government to reconsider its policy and practice, and it is clear from the detailed discussion of the RCEP and from parts of the decision that a precautionary approach to this reconsideration is recommended. It is an interesting and difficult issue. The meaning of the precautionary principle, like the principle of sustainable development, is the subject of considerable debate and controversy.<sup>14</sup> Without clear scientific evidence it is hard to determine the extent of the threat to human health. There must be limits to how far the precautionary approach can be taken. If the principle is applied in its strongest sense it might stagnate development, particularly in an increasingly risk averse society. Strict precautionary adherence to the requirement that there must be no harm to human health would be a disproportionate response since it is unlikely that it will ever be possible to say with complete certainty that pesticides have no harmful effects on human health.<sup>15</sup> Yet public concern about this issue is high despite uncertainty as to the number of people affected by pesticides, the causal relationship between pesticide exposure and ill health, and the extent of the risk to human health. Public anxiety is heightened by concerns that children, the elderly and pregnant women may be at particular risk. Ultimately, identifying the acceptable level of risk is really a political question, which should take into account current scientific analysis and public perception of the risk, and determine a proportionate response. This is particularly important as the decision could have knock-on effects in other areas of pesticide or chemical use. For example, issues could arise in relation to pesticide residues on food.

### C. CONCLUSION

This is certainly not the last we will hear of this case. A query was raised in the House of Lords in December 2008 as to the Government's response. Lord Hunt

<sup>13</sup> Para 23. See also para 40.

<sup>14</sup> There is an abundance of literature on this fascinating topic, which it is impossible to deal with here. See e.g. E Fisher, "Precaution, precaution everywhere: developing a 'common understanding' of the precautionary principle in the European Community" (2002) *Maastricht Journal of European and Comparative Law* 7; C D Stone, "Is there a precautionary principle?" (2001) 31 *Environmental Law Reporter* 10790; J Paterson, "Sustainable development, sustainable decisions and the precautionary principle" (2007) 42 *Natural Hazards* 515.

<sup>15</sup> Royal Commission on Environmental Pollution, *Crop Spraying* (n 3) para 1.12.

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was reluctant to comment, emphasising that the Secretary of State has already been given leave to appeal. He stated, however, that the ultimate goal is to see “good practice and proportionate regulation” and that “the protection of the health of those who live, work [in] or visit the countryside remains our highest priority”.<sup>16</sup> The view of environmental campaigners is that the United Kingdom Government has never taken the risks posed by pesticides seriously enough and will now have to reassess its position. The reality might be that the Government will try to reassert its traditional position, given that the political issues – particularly achieving the balance between the competing policy objectives of ensuring quality, affordable food production and protecting human health and the environment – are too complex to be easily or swiftly resolved. It will take some time to see exactly what the implications of this case are for pesticide use and the rural communities affected.

*Aylwin Pillai*  
*University of Aberdeen*

<sup>16</sup> HL Deb 16 Dec 2008, col 736.