UNIVERSAL TORT JURISDICTION OVER TORTURE?

This is a prime example of how radical a court can be in its eagerness to protect human rights. In Jones v. Ministry of Interior of Saudi Arabia [2004] EWCA Civ 1394, the Court of Appeal reached an unprecedented decision by disregarding the relevant legislation, by going against its own previous decisions and higher authorities, and by reading an extremely liberal understanding into an international convention. In this case, the claimants sought damages in tort in civil proceedings against the Ministry of Interior of Saudi Arabia and a number of Saudi officials, including the head of the Ministry of Interior, alleging, among other things, systematic torture while they were in official custody in Saudi Arabia in 2001. What is remarkable about this case is that the alleged torture took place in Saudi Arabia, and that none of the individual defendants was present at any time on UK territory.

Two issues were before the Court of Appeal: first, whether Saudi Arabia (with which the Ministry of Interior was equated) was entitled to jurisdictional immunity in respect of allegations of torture; second, whether Saudi Arabia could claim immunity on behalf of its officials with regard to such allegations. The Court of Appeal held that Saudi Arabia could claim immunity for itself but not for its officials.

The State Immunity Act 1978, which deals with foreign State immunity in civil proceedings before UK courts, provides in section 5 that “A State is not immune as respects proceedings in respect of . . . death or personal injury . . . caused by an act or omission in the United Kingdom”. The manifest territorial nexus requirement

1
means that section 5 would be of no assistance to the claimants where, as here, the alleged acts of torture had taken place not in the UK but in a foreign State (i.e., Saudi Arabia), just as in the case of *Al-Adsani v. Government of Kuwait* (1996) 107 I.L.R. 536. Thus, in the present case, the claimants argued their claims, and the Court decided the case, outside the 1978 Act.

Against the immunity of Saudi Arabia it was mainly submitted (1) that the prohibition of torture had become a peremptory norm of general international law (*ius cogens*), from which immunity would constitute a derogation; (2) that Article 14 (1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (“the Torture Convention”), to which both the UK and Saudi Arabia are parties, required each State to ensure that “the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation”; and (3) that systematic torture could not be regarded as a State function and therefore should not attract immunity.

The Court rejected all these submissions. First, following the European Court of Human Rights’ ruling in *Al-Adsani v. United Kingdom* (2002) 34 E.H.R.R. 11, the Court held that a substantive norm of international law (such as the prohibition of torture) did not necessarily bear upon the application of a procedural rule (such as that of immunity from civil proceedings). Second, the Court opined that Article 14 (1) of the Torture Convention only required the State whose official had committed torture (in this case, Saudi Arabia), but not other States, to provide redress. Third, the Court held that, at common law, a foreign State still enjoyed personal immunity (immunity *ratione personae*) in respect of any acts, whatever their character. Thus the Court concluded that Saudi Arabia enjoyed immunity from the proceedings.

The Court’s main discussion, however, focused on the denial of immunity to the individual defendants. The Court took special note of US jurisprudence under the Alien Tort Claims Act 1789 (ATCA), which asserts civil jurisdiction over acts of torture committed in foreign States by foreign officials, on the ground that such acts are outwith official functions and contrary to international law. Relying on the special character of systematic torture under current international law and on a distinction between the State itself and its officials with regard to immunity, the Court resorted to a cluster of arguments centring around Article 14 of the Torture Convention and Article 6 (1) of the European Convention on Human Rights 1950.

In the Court’s opinion, once the conclusion was reached that torture could not be treated as the exercise of a State function so
as to attract immunity *ratione materiae* in criminal proceedings against individuals, it could not logically be so treated in civil proceedings against them. Conceding that Article 14 of the Torture Convention did not establish universal tort jurisdiction, the Court nonetheless asserted that no absolute immunity should survive in respect of certain universally condemned behaviour, including torture, over which universal jurisdiction could be established.

The crucial point in the Court’s reasoning is that the jurisdiction under the Torture Convention should be extended beyond that Convention:

... there is the obvious potential for anomalies, if the international criminal jurisdiction which exists under the Torture Convention is not matched by some wider parallel power to adjudicate over civil claims. (para. [79], *per* Mance L.J.)

The Court went on to state that there were important differences between claims against a State itself and claims against an official alleged to have committed systematic torture. Although torture by one of its officials was a matter for which a State might be made civilly responsible under Article 14 of the Torture Convention, any claim to enforce that responsibility must be pursued in the State in question (or in an international forum). On the other hand, if claims against its officials could be pursued elsewhere, the State would not be impleaded in any direct sense, and would not be obliged to indemnify any official found to have committed systematic torture. Since there should under Article 14 be a domestic remedy for torture in the State where or by whose officials the torture was committed, other national courts should as a general rule refuse to exercise jurisdiction where an adequate remedy existed in the State where the torture was allegedly committed and the alleged torturer remained. But, in the absence of such adequate remedy,

it can no longer be appropriate to give blanket effect to a foreign state’s claim to state immunity *ratione materiae* in respect of a state official alleged to have committed acts of systematic torture. To do so could deprive the right of access to a court under article 6 [of the European Convention on Human Rights] of real meaning in a case where the victim of torture had no prospect of recourse in the state whose officials committed the torture. (para. [92], *per* Mance L.J.)

In effect, the Court asserted a universal tort jurisdiction, which it declared as non-existent *vis-à-vis* foreign States, over foreign State officials in respect of allegations of systematic torture. In doing this, the Court obviously read the Torture Convention in different ways...
depending on whose immunity was in question. Most importantly, the “wider parallel power to adjudicate over civil claims”, crucial as it was for this case, is nowhere to be found in the Torture Convention.

This decision is controversial in several respects. First, it expressly contradicts the House of Lords’ statements in *Pinochet (No. 3)* [2000] 1 A.C. 147 assuming or maintaining the continued existence of immunity for a former head of State or other officials in civil proceedings (even proceedings based on systematic torture). It also contradicts the Court of Appeal’s own previous decisions, namely, *Al-Adsani v. Government of Kuwait* (1996) 107 I.L.R. 536, where the Court held that section 5 of the 1978 Act precluded claims for torture committed outside the UK; and *Propend Finance Pty. Ltd. v. Sing* (1997) 111 I.L.R. 611, where it reasoned that, regarding civil proceedings, the 1978 Act afforded the same protection to both a foreign State and its officials. Second, the ATCA cases do not, and cannot, support the Court of Appeal’s decision on State immunity, as the ATCA itself does not impinge on the issue of immunity. The US Supreme Court held in *Argentine Republic v. Amerada Hess Shipping Corporation* 488 U.S. 428 (1989) that, whenever the issue of immunity arose, it must be decided under the US Foreign Sovereign Immunities Act 1976, which contains a similar territorial nexus requirement for tortious liability to that in the UK 1978 Act. Third, the Court of Appeal purported to deduce a universal *tort* jurisdiction from the universal *criminal* jurisdiction conferred by the Torture Convention, and in doing so relied on a consideration (i.e., that the absence of adequate remedy in the State where the torture was committed entitles other States to exercise jurisdiction) that cannot be found in the Convention.

**XIAODONG YANG**

**FREEDOM OF THE PRESS AND PRIOR RESTRAINT**

The constitutional implications of the decision of the Court of Appeal in *Cream Holdings Ltd. v. Banerjee* [2003] EWCA Civ 103, [2004] Ch. 650 (noted [2004] C.L.J. 4) to grant an injunction restraining a newspaper from publishing allegations of corruption in local government on the grounds of breach of confidence were such that it was not surprising that leave to appeal to the House of Lords was readily granted and that the matter has been speedily resolved: [2004] UKHL 44, [2004] 3 W.L.R. 918.
A disgruntled former employee of Cream Holdings had approached a local newspaper alleging that her former employers were engaged in the corruption of a local authority official by offering money to secure entertainment licences. The employers sought an injunction restraining both the employee and the newspaper from publication on the grounds of breach of confidence (but no defamation was alleged by those running the company). The Court of Appeal granted interim relief, restraining publication pending the fuller determination of the issues at a trial to be held at some time in the future. Argument in that court had centred around the precise meaning to be attached to section 12(3) of the Human Rights Act 1998 which says that the courts are not to grant relief having the effect of preventing publication unless it can be established that the claimant was “likely” at trial to establish that publication should not be allowed. In the House, the forensic focus shifted somewhat, away from the precise language of the Act and towards Parliament’s purpose in enacting section 12(3); the case affords a neat illustration of the difference that can flow from adopting a purposive as opposed to a literal approach to statutory interpretation.

The problem that the language of the Act generates is that on its face it requires the same test—“a test of universal application” in the words of Lord Nicholls—to be applied to the central issue in these cases, which is whether or not the courts should restrain at the interlocutory stage publication of material of which complaint is made, whatever the cause of action might be. On a literal reading, the Act appears to require the courts to apply the same test whether the cause of action is in defamation, or breach of confidence or (in so far as it can be distinguished from confidence) in the case of a threatened breach of privacy. Too ready an intervention by the courts has serious repercussions for freedom of speech and the common law has long fought shy of turning the courts into censors. But when the Human Rights Bill was in Parliament, containing as it did a guarantee of the right to respect for private life, the press was concerned that, as Lord Nicholls of Birkenhead put it at [15], “applying the … conventional approach, orders imposing prior restraint on newspapers might readily be granted by the courts to preserve the status quo until trial whenever applicants claimed that a threatened publication would infringe their rights under article 8. Section 12(3) was enacted to allay these fears. Its principal purpose was to buttress the protection afforded to freedom of speech at the interlocutory stage.”

All that being so, the House held, the interpretation of the word “likely” in section 12(3) cannot be treated as being equally applicable in all situations in which it may have to be brought to
bear. Parliament had been “painting with a broad brush and setting a general standard”. The degree of likelihood of success at the trial that will be required before an order can be made must depend on all the circumstances. If the adverse consequences of a particular disclosure were particularly serious (disclosure of the whereabouts of a person convicted of a particular crime was an example offered by Lord Nicholls) it would be “extraordinary” if the courts could not offer even interim protection until disputed issues of fact could be resolved at the trial. “There can be no single, rigid standard governing all applications for interim restraint orders” (at [22]). “This interpretation achieves the purpose underlying section 12(3)” (at [23]).

On the application of the law to the facts, the House agreed with the dissenting position adopted by Sedley L.J. in the court below. Plainly, the principal happenings that the newspaper wished to ventilate were matters of serious public interest. As Lord Scott put it, the allegations were such that “if the information is true [disclose] iniquity by any standards”. On that basis (which would afford the newspaper a powerful defence at the trial itself) the Cream group’s prospects of success were not sufficiently likely to justify making an interim restraint order, and the appeal was allowed.

There was no discussion in the House as to how this approach to and reading of the Act might be translated into the somewhat different context of defamation. But a mere two days after the speeches of the Appellate Committee had been handed down, an application had been made to the High Court in *Greene v. Associated Newspapers Ltd.* for an interim order preventing the publication of an allegedly defamatory article. Before the enactment of the Human Rights Act, the position had been governed by the well known authority of *Bonnard v. Perryman* [1891] 2 Ch. 269; the courts would not issue an interlocutory injunction to restrain the publication of a libel which the defence sought to justify except where it was clear that the defence would fail. How far had the common law survived the enactment of section 12(3)? The robust answer given to this question by the Court of Appeal [2004] EWCA Civ 1462 was that the Act had made no difference whatsoever, because Parliament cannot have intended it to do so.

Quoting Blackstone: “Every freeman ... has an undoubted right to lay what sentiments he pleases before the public: to forbid this is to destroy the freedom of the press”, and building upon Blackstone’s clear distinction between prior restraint and post-publication penalties, Brooke L.J. re-affirms the rationale for the rule in *Bonnard v. Perryman* at [57]
This is partly due to the importance the court attaches to freedom of speech. It is partly because the judge must not usurp the constitutional function of the jury unless he is satisfied that there is no case to go to a jury. The rule is also partly founded on the pragmatic grounds that until there had been disclosure of documents and cross-examination at the trial a court cannot safely proceed on the basis that what the defendants wish to say is not true. And if it is or might be true the court has no business to stop them saying it.

For all of these reasons, his Lordship concluded that the factors to be taken into account when consideration is being given to the prior restraint of a libel are really quite different from those relating to a breach of confidence. Adopting the purposive approach of the House of Lords and without revisiting the differences between the Court of Appeal and the House in *Cream Holdings* as to the correct interpretation of the section, the Court concluded that “In a section of an Act of Parliament which is expressly concerned with the protection of freedom of expression and not with undermining it, Parliament cannot be interpreted as having abrogated the rule in *Bonnard v. Perryman* by a side wind” (at [61]).

Although the pre-existing rule therefore survives, there are nevertheless some differences to be noted. The Court said that it was content to assume that a person’s right to reputation is among the rights guaranteed by Article 8 of the Convention, which must then be balanced against other rights that might be engaged, but particularly freedom of expression protected by Article 10. No mention was made of the approach to Article 10 adopted by the Court of Human Rights in *Sunday Times v. United Kingdom* (1979) 2 E.H.R.R. 245 where it was said that that court took the view that it was not a matter of “balancing”: “The court is faced not with a choice between two conflicting principles, but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted”. This sets up a tension in English jurisprudence which is yet to be reconciled.

Counsel seeking to persuade a judge to prevent publication of an article alleged to be in some respects unlawful are apt to essay the argument that they are, after all, merely seeking a postponement, and that no harm is done by a short delay. It is an argument deployed to great effect by the late Robert Maxwell, and one that the courts increasingly reject, acknowledging as in *Greene* that “scoops … are the lifeblood of the newspaper industry … stale news is no news at all”. Freedom to publish encompasses not
only what to publish, but when to publish. The spirit of Blackstone is abroad in the Strand.

A.T.H. Smith

PUBLIC LAW LIABILITY—THE HUMAN RIGHTS ACT AND BEYOND

English law traditionally draws no distinction between the liability of public bodies and that of private individuals. There is no general right to recover damages in respect of loss caused by an administrative act, even where that act is unlawful according to public law principles. An aggrieved individual must establish an ordinary private law cause of action: Supreme Court Act 1981, section 31(4). One of the most important innovations contained in the Human Rights Act 1998 is the creation of a form of public law liability. Section 6(1) states that it is unlawful for a public authority to act incompatibly with a Convention right. Section 7 enables a victim of an act contrary to section 6 to bring proceedings against the offending authority. Section 8(3) empowers the court to award damages if it is satisfied that such an award is necessary to afford just satisfaction to the victim.

There has been some debate as to whether the cause of action under section 6 is a “new public law tort of acting in breach of the victim’s Convention rights” (A. Lester and D. Pannick, “The Impact of the Human Rights Act on Private Law: the Knight’s Move” (2000) 116 L.Q.R. 380 at 382) or whether it is unhelpful to describe it thus (Lord Woolf, “The Human Rights Act 1998 and Remedies” in M. Andenas and D. Fairgrieve (eds.), Judicial Review in International Perspective: II (2000)). Paul Craig observes that “[t]he nature of the cause of action will be significantly affected by the courts’ determination of the standard of liability” (Administrative Law (5th ed., 2003) at p. 887).

Anufrijeva v. Southwark London Borough Council [2003] EWCA Civ 1406, [2004] Q.B. 1124 shows that the HRA departs significantly from the tort law paradigm. In certain circumstances, Article 8 of the Convention imposes upon States an obligation to take positive action to secure respect for family life. The claimants argued that there is a positive obligation to provide welfare support. In its joint judgment, the Court of Appeal (Lord Woolf C.J., Lord Phillips of Worth Matravers M.R. and Auld L.J.) accepted this argument in principle while stressing that any such obligation is likely to be very limited. Although it went on to hold that there had been no breaches of Article 8 in the instant cases,
the court dealt at length with two key questions: when should damages be awarded for breaches of Convention rights, and how should such damages be assessed?

On the first question, the court began by observing that damages are not, as in tort claims, recoverable as of right in a claim under the HRA (at [50]). Where infringement of a Convention right has occurred, “the concern will usually be to bring the infringement to an end and any question of compensation will be of secondary, if any, importance” (at [53]). Significantly, the court added (at [56]): “In considering whether to award compensation and, if so, how much, there is a balance to be drawn between the interests of the victim and those of the public as a whole. . . . The court has a wide discretion in respect of the award of damages for breach of human rights. . . . Damages are not an automatic entitlement but . . . a remedy of ‘last resort’.” On the second question, the court stated that the “fundamental principle” is that the applicant should, as far as possible, be placed in the same position as if his Convention rights had not been infringed (at [59]). However, while this is fairly straightforward as regards pecuniary loss, problems arise in relation to consequences of an infringement which are “not capable of being computed in terms of financial loss”, such as anxiety and distress. Here the court stressed that tort law damages awards are not an appropriate point of comparison, whereas compensation levels set by the Judicial Studies Board, the Criminal Injuries Compensation Board and the public sector Ombudsmen may provide “some rough guidance” (at [74]).

The court’s strong composition and detailed analysis give these comments authority that belies their obiter status. Several key principles emerge from the judgment. Most important is the idea that the court must weigh the interests of victims against those of the public as a whole. There is much to recommend this approach. In considering whether to use public money to compensate individuals for loss caused by administrative action, identification and evaluation of the relevant public and private interests must surely be carried out. It will always be in the individual’s interest to receive damages. It may or may not be in the public interest for damages to be paid. If it is, then damages must be paid. If it is not, then the stronger interest should prevail. However, there is no obvious need to adopt the “all-or-nothing” approach of tort law, whereby the individual receives either full compensation for all foreseeable and causally connected loss or no compensation at all. A new approach, whereby a lesser amount of compensation is paid,
Anufrijeva confirms that the HRA does not merely create a new instance of tortious liability, but rather institutes a distinct form of compensation in public law. The principles laid down by the Court of Appeal could usefully inform non-HRA compensation claims against public bodies. The current application of ordinary private law principles provides the courts with little flexibility to address directly the competing public and private interests. Their attempts to do so are inevitably clumsy (e.g., the now-discarded policy/operational dichotomy) and risk distorting the private law principles in question (C. Harlow, State Liability—Tort Law and Beyond (2004), ch. 1). Furthermore, failure precisely to articulate and carefully to evaluate the considerations of principle and policy for and against liability has arguably resulted in liability being at once too narrow and too wide. These possibilities are not mutually exclusive. It is quite possible that some individuals are unjustly being denied compensation while others are unjustifiably receiving compensation, or are receiving more compensation than is justifiable. The most obvious example of injustice to aggrieved individuals arises from the courts’ inability, absent a tortious cause of action, to award compensation in respect of loss caused by unlawful administrative acts (see, e.g., R. (Quark) v. Secretary of State for Foreign and Commonwealth Affairs (No.2) [2003] EWHC 1743 (Admin), [2003] A.C.D. 96 at [44], affirmed [2004] EWCA Civ 527, [2004] 3 W.L.R. 1). On the other hand, unjustifiably large awards of compensation may result from the adoption in the public law context of the full private law measure of damages (M. Fordham, “Reparation for Maladministration: Public Law’s Final Frontier” [2003] J.R. 104).

The traditional maxim that the executive should be subject to the ordinary law of the land was formulated as a bulwark against total immunities for public bodies. It does not provide useful guidance when constructing a principled legal framework to govern their liability. That task raises issues of fundamental constitutional importance concerning the relationship between citizen and State and the correct balance of public and private interests. At present, these issues are concealed behind a façade of private law doctrine. Insofar as they challenge the unthinking application of private law rules in the public sphere, the Court of Appeal’s comments in Anufrijeva are to be welcomed. However, further legislative intervention may be needed to extend the more principled “balancing of interests” approach beyond the human rights context. Now that the Law Commission is investigating this area (see
REQUIEM FOR A FAIRYTALE

“The law is a ass!” said Mr. Bumble upon being told that he was considered more guilty than his wife in the eye of the law, for the law (quite contrary to Mr. Bumble’s humble personal experience of the matter) supposed that his wife acted under his direction (see Charles Dickens, *Oliver Twist*, ch. 51). A similar sentiment must have stirred in the breasts of Mr. and Mrs. E, the paid carers of Mr. L, a 49-year-old man suffering from autism and severe learning disabilities, when they heard that the highest court of the land had declared that L’s prolonged stay in a mental hospital following his informal admission as a “compliant incapacitated patient”—devoid of any of the procedural safeguards enjoyed by patients admitted compulsorily under the Mental Health Act 1983—did not amount to unlawful detention. This was because, as an informally admitted patient, L had legally speaking at all times been free to leave, though (what with his having been heavily sedated, and not being one of the brightest, and with his carers being discouraged from visiting him in order not to stir up any impulse within him of wanting to go home with them) that realisation of the legal niceties of his situation was unlikely to enter his mind and even more unlikely to be acted upon by him (*R. v. Bournewood Community and Mental Health NHS Trust, ex parte L* [1999] A.C. 458). The European Court of Human Rights has now held that L’s admission and stay in hospital as an informal patient violated L’s rights under Article 5(1) and Article 5(4) of the Convention (*HL v. United Kingdom*, application no. 45508/99, judgment of 5 October 2004).

Article 5(1) protects everybody’s right to liberty and security of person. It allows for a deprivation of liberty only in accordance with a procedure prescribed by law and on narrow substantive grounds, one of which is the lawful detention of persons of unsound mind. Whether restrictions on a person’s freedom of movement amount to a deprivation of that person’s liberty within the meaning of Article 5(1) depends a range of factors, particularly on the type, duration, effect and manner of implementation of the measure in question. It is a matter of degree or intensity, and not one of nature or substance (see further *Ashingdane v. United Kingdom*, judgment of 28 May 1985, Series A no. 93). Applying...
these considerations, the European Court of Human Rights makes short shrift of the “fairy tale” (Lord Steyn, dissenting on this point, in the House of Lords) that L had not been detained: “[T]he Court considers the key factor in the present case to be that the health care professionals treating and managing the applicant exercised complete and effective control over his care and movements from the moment he presented acute behavioral problems … [T]he applicant was under continuous supervision and was not free to leave. Any suggestion to the contrary was, in the Court’s view, fairly described by Lord Steyn as ‘stretching credulity to breaking point’ …” (para. 91). In this context, the Court also clarifies that the Convention standard for what amounts to a deprivation of liberty differs from the domestic tort of false imprisonment. While the latter may require actual restraint of a resisting individual, the former does not, provided that it is clear from the circumstances that the person would not be allowed to leave if he tried.

This gets the Court to the next question: was the applicant of unsound mind while he was detained? One might be forgiven for thinking the answer self-evident, and self-evidently yes. After all, it was common ground in the domestic proceedings that the applicant was severely autistic, incapable of verbal communication and probably also suffering from a cyclical mood disorder. But things are slightly more complicated than that. The decision of the Court in Winterwerp v. Netherlands (judgment of 24 October 1979, Series A no. 33) requires that, in addition to the detainee’s being “reliably shown to be of unsound mind”, his mental disorder must be of a kind or degree warranting compulsory confinement, and the validity of continued confinement depends on the persistence of such a disorder. The Court accepts that the doctors treating the applicant were at all times of the view that he did meet the preconditions for detention as an involuntary civil patient and would have used this route had he not been compliant. Furthermore, when the Court of Appeal signalled during the domestic proceedings that it would grant the applicant’s review application—a decision which was later overturned in the House of Lords—the applicant was in fact formally detained under the Mental Health Act, and not released. For the European Court, this indicates that the applicant’s mental state warranted his confinement throughout the time that he had been informally detained.

This brings the Court to the final, and crucial, point: Was the applicant’s detention lawful and in accordance with a procedure prescribed by law? Domestic law meets the standard of “lawfulness” set by the Convention if it is sufficiently precise to allow the citizen—if need be, with appropriate advice—to foresee,
to a degree that is reasonable in the circumstances, the consequences that a given action might entail. Furthermore, domestic law must contain “adequate legal protections” and “fair and proper procedures” to prevent its arbitrary application. In the view of the Court, it was sufficiently foreseeable for the applicant that he might be admitted to, and kept in, a mental hospital pursuant to the established common law doctrine of necessity, which, applied to the area of mental health, “accommodated the minimum conditions for the unlawful detention of those of unsound mind” (para. 116). However, the complete “lack of any fixed procedural rules by which the admission and detention of compliant incapacitated persons is conducted” meant that domestic law fell foul of the second requirement of lawfulness: the prevention of arbitrariness ( paras. 120 and 124). These rules need not necessarily be the ones that govern compulsory detention under the Mental Health Act 1983. But they should address the Court’s concerns, expressed in para. 120, about the absence of any formalised admission procedures which: (1) indicate who can propose admission, for what reasons and on what evidential basis, (2) fix the purpose of admission in order to bring limitations of time, treatment and care into play, (3) require continual clinical assessment of the persistence of a disorder warranting detention, and (4) nominate a representative for the patient who can make submissions on his behalf.

The Court also finds a violation of the applicant’s right to a speedy review of the lawfulness of his detention, contained in Article 5(4). Neither habeas corpus, proceedings nor “super-Wednesbury”-style judicial review guarantee the applicant a review that is “wide enough to bear on those conditions which are essential for the lawful detention of a person, in this case, on the ground of unsoundness of mind” (para. 135). The same is true for other legal avenues which the government somewhat dubiously suggested would have been “likely” to lead the courts to engage in a review of the lawfulness of the applicant’s detention. Ultimately, only a full and evidence-based enquiry into the question whether the applicant suffers from an unsoundness of mind that warrants his continued detention will do.

This decision necessitates a complete restructuring of the laws and practices which govern the detention of non-sectioned mental patients in the United Kingdom, and probably in other European countries, too. This does not come as a surprise to mental health lawyers. Practitioners have long been aware that informal admittance insufficiently protects compliant incapacitated patients against long and unnecessary stays in mental hospitals. While the
intent behind the original legislation was to spare such patients the stigma of compulsory confinement, better alternatives exist than to leave them completely outwith the scope of protective provisions which set time-limits for assessment and ensure periodic automatic reviews of the need for continued in-patient treatment. If and when the draft legislation on mental incapacity currently before Parliament, the Mental Capacity Bill 2004, becomes law, adequate protective mechanisms will be in place. Until then, mental hospitals will have to follow the procedures applicable to involuntary civil patients.

ANTJE PEDAIN

LIVING INSTRUMENTS AND THE DEATH PENALTY

A Written constitution is a “living instrument” (see, e.g., Commonwealth v. South Australia (1926) 38 C.L.R. 408, Dennis v. United States 341 U.S. 494 (1954) and Tyrer v. United Kingdom (1978) 2 E.H.R.R. 1). The judgments in Bovce v. The Queen, Matthew v. Trinidad and Tobago and Watson v. The Queen [2004] UKPC 32, 33, 34, [2004] 3 W.L.R. 786, 812, 841 accept this proposition but disclose profound disagreement as to its implications in practice.

In Reyes v. The Queen [2002] UKPC 11, [2002] 2 A.C. 235 (noted [2002] C.L.J. 505), the Privy Council held that the mandatory death sentence for murder in Belize was inhuman and degrading and thus contrary to the Constitution. In Boyce, Matthew and Watson the question was whether the same was true in Barbados, Trinidad and Tobago and Jamaica. There, “existing laws” clauses in the constitution rendered (or appeared to render) any law in existence when the constitution entered into force immune from challenge on fundamental rights grounds. The question had arisen in Roodal v. Trinidad and Tobago [2003] UKPC 78, [2004] 2 W.L.R. 652 where the majority had held that the clause did not preclude a finding that the mandatory death penalty was unconstitutional. When the same question arose in Boyce, the appeal was directed to be re-argued, along with the others mentioned above, before eight Law Lords (Lords Bingham, Nicholls, Steyn, Hoffmann, Hope, Scott, Rodger and Walker) and Zacca J., a former Chief Justice of Jamaica.

The Constitution of Barbados is the supreme law: “if any other law is inconsistent ... this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void” (section 1).
Section 15(1) prohibits “inhuman or degrading punishment”. But by section 26(l): “Nothing contained in or done under the authority of any written law shall be held to be inconsistent with or in contravention of . . .”, inter alia, section 15, to the extent that the law in question was in existence when the Constitution entered into force or is a re-enactment of such a law.

The Crown’s argument was straightforward. The mandatory death penalty was an existing law, so nothing in it could be held to be inconsistent with section 15. The defendants, however, relied on Article 4(1) of the Barbados Independence Order 1966, the United Kingdom legislation which brought the Constitution into effect: “… existing laws shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Barbados Independence Act 1966 and this Order”. “This Order” included the Constitution itself. Thus, without contending for any power to hold the relevant Act inconsistent with section 15, the defendants argued that it could be “modified” by the substitution of the word “may” for “shall”, suffer death.

The defendants supported their submissions by reference to authorities on the need for a “generous” (Minister of Home Affairs v. Fisher [1980] A.C. 319), “broad and purposive” (Attorney General of Trinidad and Tobago v. Whiteman [1991] 2 A.C. 240) construction of provisions concerned with the protection of fundamental rights. They relied, as in Reyes, on the fact that the mandatory death penalty had been held contrary to various international instruments. Similar arguments about similar provisions were canvassed in Matthews and Watson and the judges’ views are spread across the three cases.

The Law Lords divided evenly. Lords Bingham, Nicholls, Steyn and Walker accepted the defendants’ submissions. Lords Hoffmann, Hope, Scott and Rodger, and Zacca J., rejected them.

Lord Hoffmann, for the majority in Boyce and Matthew, described the “living instrument” approach to construction (Boyce at [28]):

[T]he fundamental rights provisions . . . are expressed in general and abstract terms which invite the participation of the judiciary in giving them sufficient flesh to answer concrete questions . . . [T]he judges, in giving body and substance to fundamental rights, will naturally be guided by what are thought to be the requirements of a just society in their own time . . . The text is a “living instrument” when the terms in which it is expressed, in their constitutional context, invite and require periodic re-examination of its application to contemporary life.
But the majority were clear as to the limits of this approach: “… not all parts of a constitution allow themselves to be judicially adapted … in the same way”, since they are not expressed in general or abstract terms which invite judicial participation in giving them practical content. In section 26(1) the framers “made themselves perfectly clear. Existing laws were not to be held inconsistent with [the sections concerning fundamental rights] and therefore could not be void for inconsistency with the Constitution.”

This left Article 4(1). But the proposed power of modification was irrational in its consequences. A single-section Act which authorised whipping (an inhuman and degrading punishment) would survive, being incapable of “modification” under Article 4(1). An Act which specified a number of possible punishments including whipping could be “modified” by deleting the reference to whipping. Moreover, properly read, Article 4(1) only applied where an existing law was not in conformity with “the Constitution” as a whole, not just with section 15. But section 26(1) “makes it clear that there is no possibility of lack of conformity between existing laws and section 15(1)”.

Lord Hoffmann summarised remarkably robustly the majority’s reasons for rejecting the submission that a different result could follow from treating the Constitution as a “living instrument” (at [59]):

The “living instrument” principle has its reasons, its logic and its limitations. It is not a magic ingredient which can be stirred into a jurisprudential pot together with “international obligations”, “generous construction” and other such phrases, sprinkled with a cherished aphorism or two and brewed up into a potion which will make the Constitution mean something which it obviously does not.

Thus the mandatory death penalty was held not to be unconstitutional; and Roodal to have been wrongly decided.

The minority considered the majority’s construction of section 26(1) “narrow and over-literal” and to give “little or no weight to the principles which should guide the approach to interpretation of constitutional provisions” (Boyce at [78]). Rather, section 26(1) was ambiguous. A permissible construction was that it only applied to prevent a court from holding that an existing law was void altogether. All that the defendants sought was that the existing law should be construed with modifications to bring it into conformity with the Constitution. The minority cited numerous authorities as to the proper interpretation of entrenched human rights provisions; and gave illustrations of the practice of courts in numerous
jurisdictions, including under the Human Rights Act 1998, in construing provisions with modifications. Their construction would bring the Constitution into line with international obligations. They accepted that its effect was to require the rectification of some disconformities with fundamental rights while leaving others unrectified.

Regret at the majority’s decision is unsurprising: the Privy Council held itself powerless to prevent the continuation of what all the judges regarded as inhuman and degrading punishment. The minority made their regret clear with the pointed observation that “[i]n recent years the Privy Council has generally shown itself to be an enlightened and forward-looking tribunal” (Matthew at [34]). But it is respectfully submitted that the majority were right. It was neither backward-looking nor unenlightened to recognise that the “living instrument” principle cannot make a specific, concrete provision in a Constitution mean something that it does not. The minority’s analogy with modification of legislation under the Human Rights Act 1998 (as to which see the discussion in Ghaidan v. Godin-Mendoza [2004] UKHL 30, [2004] 2 A.C. 557) gives insufficient weight to the fact that a written constitution is itself the supreme law. As Lord Hope, for the majority in Watson, put it at [53]: “Their Lordships firmly believe that respect for the rule of law requires them to give effect to [the existing laws clause], not to ignore it, when it says that existing laws are not to be held inconsistent with any of the provisions of Chapter III.”

THOMAS ROE

THE BURDEN OF PROOF UNRESOLVED

The House of Lords may have pondered the proper limits of the criminal law when hearing Attorney General’s Reference No. 4 of 2002; Sheldrake v. DPP [2004] UKHL 43, [2004] 3 W.L.R. 976, conjoined appeals which concerned the interpretation of section 5 of the Road Traffic Act 1988 (a blood alcohol offence) and section 11 of the Terrorism Act 2000, but the specific questions they were asked were rather narrower and the answers rather unsatisfactory.

The reach of the offence in issue in the first appeal is broad. By section 11 of the Terrorism Act 2000,

(1) A person commits an offence if he belongs or professes to belong to a proscribed organization.

(2) It is a defence for a person charged with an offence under subsection (1) to prove—
(a) that the organization was not proscribed on the last (or only) occasion on which he became a member or began to profess to be a member, and

(b) that he has not taken part in the activities of the organization at any time while it was proscribed.

A person guilty of an offence under this section is liable, on conviction on indictment, to imprisonment for up to ten years. Let us imagine, for example, that you had unwisely decided to give a subscription to the International Sikh Youth Federation (listed amongst the 25 proscribed organizations on the Home Office’s website) as a present to a friend interested in comparative religion. Or that your friend simply went along enthusiastically to some meetings of the Federation to find out more about it. Would she in either circumstance have committed an offence under section 11? (The facts are not so far-fetched. In Hundal and Dhaliwal [2004] EWCA Crim 389, [2004] 2 Cr. App. R. 19 the Court of Appeal upheld the convictions of two people who had been leading members of the ISYF, though they said they had left the organization some time before coming to the UK. They had entered the UK from Germany with an ISYF membership card, not knowing that the ISYF was a proscribed organization in the UK, and indeed it was not illegal in Germany. Their sentences were reduced from 30 months to 12 months imprisonment.)

The Attorney General’s Reference No. 4 of 2002 concerned the “reverse burden” of proof in section 11(2) of the 2000 Act. No doubt Parliament intended to impose a legal burden on the defendant in section 11(2), since section 118 of the Act lists a number of sections which are to be understood as imposing an evidential burden only, and section 11(2) is not among those listed. However, the majority of the House of Lords (Lords Steyn and Phillips agreed with Lord Bingham) decided that the imposition of a legal burden on the defendant was not a proportionate and justifiable legislative response to the problem of deterring people from joining and taking part in the activities of a proscribed terrorist organization. For Lord Bingham, an important consideration was that “there would be a clear breach of the presumption of innocence, and a real risk of unfair conviction, if such persons could exonerate themselves only by establishing the defence provided on the balance of probabilities” (at [51]).

Lord Rodger and Lord Carswell disagreed with the majority, accepting that the defence under section 11(2) imposed a legal burden of proof, but held that this was compatible with both Articles 6 and 10 of the European Convention on Human Rights.
As Lord Rodger put it, “the nature of the offence created by section 11(1) does not engage any right of the defendant under article 6, since the article is concerned with the fair trial of offences and not with the substance of the offences themselves” (at [66]). He states that since section 11(2) served only to improve the defendant’s situation, it could not precipitate a violation of Article 6. The dangers of this narrow interpretation of the “procedural” rights under Article 6 were evident to the majority, who wisely rejected it.

However, in the conjoined appeal, all five judges agreed that the Crown’s appeal should be allowed. Sheldrake had been convicted of being in charge of a motor vehicle having consumed excess alcohol, under section 5(l)(b) of the Road Traffic Act 1988. Section 5(2) of the Act provides that it is a defence for a person charged with an offence under section 5(l)(b) “to prove that at the time he is alleged to have committed the offence the circumstances were such that there was no likelihood of his driving the vehicle whilst the proportion of alcohol in his breath, blood or urine remained likely to exceed the prescribed limit”. The Divisional Court (by a majority) had allowed an appeal by way of case stated and had quashed the conviction: all three judges had agreed that section 5(2) violated the presumption of innocence because it meant that a defendant could be convicted even though the court was not sure that there was a likelihood of his driving, and the majority concluded that it was not necessary to accomplish the objective of the 1988 Act to impose a legal burden on the defendant. However, the House of Lords (unanimously agreeing with Lord Bingham) did not accept that Sheldrake’s conviction rested on a presumption that he was likely to drive: “it rested on his being in charge of a car while unfit in a public place. If it rested on a presumption that he was likely to drive, that did indeed flow directly from proof of his unfitness while in charge and his inability to show, despite a full opportunity to do so, that there was no likelihood of his driving” (at [43]). Thus the House has imposed on the accused a burden to disprove an ingredient of the offence, even if they suggest it is an “unimportant” ingredient. Don’t ever wash your car when drunk: you may be convicted of this offence.

The “reverse burden” problem is not rare. Ashworth and Blake discovered 219 examples amongst 540 offences triable in the Crown Court of legal burden or presumptions operating against the defendant (see [1996] Crim.L.R. 314) and the number has undoubtedly grown since then. The time has come for a category of “administrative regulations” which would carry little stigma and no possibility of imprisonment. Only for such “non-crimes” should
strict liability or reverse burdens be acceptable. Meanwhile, we will continue to have a “blizzard of single instances” (as Roberts and Zuckerman nicely put it, in their Criminal Evidence (Oxford 2004), at p. 383) until the courts shout loudly that whenever an accused is required to prove some fact to avoid conviction, the provision violates the presumption of innocence.

NICOLA PADFIELD

CRIMINAL LIABILITY FOR THE TRANSMISSION OF HIV

In R. v. Dica [2004] 3 W.L.R. 213, the Court of Appeal decided that a man who knows that he is infected with the HIV virus but who infects his unsuspecting sexual partner through unprotected sexual intercourse should be punishable for inflicting grievous bodily harm, contrary to section 20 of the Offences Against the Person Act 1861. The Court did in fact quash the conviction of the accused, because the judge at the Old Bailey had not instructed the jury to decide whether or not the two infected partners of the accused had known of his infection and agreed to take the risk of contracting it themselves (this having been in dispute at the trial). Yet the case was sent for retrial, and if the next jury, properly directed, should find that his partners did not agree to take the risk of contracting the potentially fatal virus, then Dica would be properly convicted under OAPA, section 20.

Two important points of principle were decided in the Court of Appeal. First, if a person does consent to the risk of contracting HIV through sexual intercourse (through love of an infected partner, perhaps, or through a conscientious objection to using contraceptives) then no offence is committed by the carrier if the disease is transmitted. The trial judge, following R. v. Brown [1993] 2 All E.R. 75, had thought otherwise, and that is why (believing that there could be no defence based upon consent) he had (wrongly) instructed the jury that it did not need to decide whether Dica’s victims had consented. But the cases are properly distinguishable. In Brown, sexual gratification was achieved through the harm itself—that is, pleasure was sought only through the pain of another; whereas the parties who have sexual intercourse will be seeking their gratification through the intercourse itself and will be hoping fervently that the harm potentially caused by the virus will not occur. It is not clear, however, whether this part of the decision in Dica should be interpreted to be (a) that the need to find a “good reason” (as first required in Attorney-General’s Reference
(No.6 of 1980) [1981] Q.B. 715, 719 (CA) and confirmed by the House of Lords in Brown for consented-to activity only applies to cases where the bodily harm is intended by the defendant, and that there need not be any good reason at all for taking a consented-to risk of causing serious harm, or (b) that there still needs to be a “good reason” for the activity even where the doer does not wish to cause bodily harm but is aware of the risk that he might do so, but it is now much easier to find that good reason, and the pursuit of sexual gratification might normally qualify.

The second important point of principle in Dica is that consent to sexual intercourse is not to be equated with consent to the risk of contracting HIV through sex. The latter is more difficult to establish because it depends upon an assessment of risks of possible consequences. To put it in another way: consent to sexual intercourse requires only a general understanding of sex; and so, provided that a woman understands that all sexual intercourse carries an inherent risk of pregnancy and disease, rape is not committed. But to consent to the risk of bodily harm requires a more nuanced understanding of the nature of the risk involved, and here ignorance of a fact which affects the risk from a particular act of congress (such as the fact that the man suffers from HIV) might negate the consent of the other. Now, almost every person who agrees to unprotected sexual intercourse surely knows that there is always, statistically, some risk of contracting HIV. Someone may unknowingly carry it without showing symptoms. A careful person might yet choose to take that risk, for it is much smaller than the risk of contracting the disease from someone who is known to be carrying it. The difference is so great that we might say that consent to the small risk is not at all consent to the much larger risk. That may have been the case in Dica: thus the retrial. But where the victim has information about her partner which would put him in a high risk category, then a jury will need to decide whether she consented to a risk of contracting the virus which was sufficiently close to the real risk. Exactly how close the victim’s estimate of the risk of contracting HIV must be to the actual risk in order for her consent to be valid is a thorny question. If the (true) risk of transmission also varies between individuals, then clearly some difficult cases await us.

In fact, punishing the transmission of HIV will always be a perilous affair in practice, perhaps even more difficult than securing convictions for rape. First, there is the question of causation: to show that the victim contracted the virus from the defendant might lead to the sort of cross-examination of the victim’s sexual habits which used to deter so many women from reporting rape. There
will be separate problems where the HIV carrier did not know of his infection (i.e., if he had not been tested). Though he should still in law be reckless as to causing harm if he suspected that he had the virus, it will be surely much harder to prove beyond doubt a mere suspicion. Then a defence of consent to the risk of transmission may be run, with the difficulties outlined above. If that is not enough, the defendant may seek to avoid liability by claiming that he believed that his partner consented to the risk; and at common law, a mistaken belief would not need to be reasonably grounded. Here, the problems caused by mixed signals in sexual matters between men and women in rape cases might be magnified: perhaps a man will claim that by having alluded vaguely to “having had a bit of past”, he thought that he made it clear that he had had a number of unprotected encounters, and that his partner thus gave consent to something like the true nature of the risk of contracting HIV from him.

One might well think these points (and others) militate against the creation of criminal liability in Dica. Professor A.T.H. Smith has cogently argued that the Court of Appeal may have violated all the established principles in determining whether judicial (as opposed to legislative) extension of the criminal law might be proper ([2004] Crim. L.R. at 977). The objection that the decision brings about obscurity rather than finality is correct; for example, what will be the effect upon recklessness, consent and belief in consent to the risk of communicating HIV where a condom is used? But if the worst of the problems in prosecuting HIV carriers for transmission are likely to be practical (as outlined above) rather than purely legal, then the argument is not forceful by itself—legislation would not obviously be much more effective than judicial fiat in addressing these practical problems. It is also true that Parliament has avoided opportunities of addressing the liability of the HIV carrier. But the reality is that governments, and not Parliaments, decide which legislation is to be debated, and sometimes a government refrains from confronting a problem through sheer political cowardice. Perhaps the principle ought to be that the courts should refrain from making new law only whilst the government of the day is already taking active consultative measures towards revising it, or has promised to do so? In that case, we might welcome Dica for allowing the punishment of the undoubtedly culpable and selfish carrier but only on the condition that, in view of the myriad difficulties in prosecuting such cases, it is likely to be only clear-cut cases (where the man knows that he has the disease and goes so far as to hide all signs of it from his partner) which will be pursued. It is not a perfect solution. There is
still the risk of private prosecutions, and it is not obviously proper
to wish to restrict that right simply because the substantive criminal
law may be wider than it needs to be. But the record of British
governments in taking prompt action in clearing up controversial
points of criminal law is so dire (how long did we wait for the
Abortion Act 1967, and where is the legislation on euthanasia?)
that waiting for Parliament is no solution at all.

JONATHAN ROGERS

POISONED WELLS: “PROXIMITY” AND “ASSUMPTION OF RESPONSIBILITY”
IN NEGLIGENCE

In Sutradhar v. Natural Environment Research Council [2004] EWCA Civ 175 the claimant, who lived in Bangladesh, suffered
arsenic poisoning from drinking contaminated water. 699 other
villagers suffered the same harm. The defendant, a research
organization paid for by the British overseas development budget,
had written a report for the Bangladeshi authorities which those
authorities reasonably and foreseeably took to indicate that the
water supply in the claimant’s area was safe to drink. In fact, the
researchers had omitted to test for arsenic and to tell the
Bangladeshi that their tests did not include arsenic. The claimant
sued in negligence. The defendant applied to strike out the action.
The defendant failed at first instance, but, by a majority, the Court
of Appeal (Kennedy and Wall L.JJ.; Clarke L.J. dissenting) dismissed the claimant’s action.

The defendant’s most successful argument was that no
“proximity” existed between it and the claimant. The defendant
conceded that that it had been at fault and that injury to people in
the claimant’s position was foreseeable. Why then was there no
proximity?

The majority pointed to the fact that the report had not been
intended as comprehensive advice about whether the water was
drinkable. They also pointed to the Bangladeshi authorities’
responsibility for the safety of their own citizens. But no one
suggested that the Bangladeshi authorities were at fault in believing
the report or using it to decide whether the water was drinkable or
failing to commission another report or taking no further action to
ensure the claimant’s safety. If the report had said that the water
contained arsenic, the Bangladeshi authorities would not have
allowed the claimant to drink it. There was nothing extrinsic or
unreasonable in the Bangladeshi authorities’ conduct. Their
interventions were innocent, foreseeable, and not independent of the defendant’s fault.

The claimant failed, however, because, according to the majority, the defendant had not “assumed responsibility”. The majority’s key point was that, in contrast to Watson v. British Boxing Board of Control [2001] Q.B. 1134, the case of the boxer who suffered brain damage because the boxing authorities failed to provide proper ring-side medical facilities, the defendant had no control over the intervener or over the claimant. The majority also thought unlikely an assumption of responsibility for the safety of so many people.

The issue the Court of Appeal failed to address, however, was why the claimant had to show an assumption of responsibility in the first place. To take the most obvious example, the claimant did not have to show an assumption of responsibility in Donoghue v. Stevenson [1932] A.C. 562, in which there was also a chain of innocent, foreseeable and dependent interventions that led to personal injury. Nor did it matter how many ginger beer drinkers there were in Paisley. Although assumption of responsibility has produced much confusion, proof of it should not be necessary except to overcome an independent reason for denying liability, such as a pure omission or a third party intervention that would otherwise exonerate the defendant or an unrecoverable form of loss such as pure economic loss or, more generally, harm outside Lord Hoffmann’s “scope of the duty” (South Australia Asset Management Corp. v. York Montague Ltd. (“SAAMCO”) [1997] A.C. 191), whatever that might mean.

The majority was impressed that the accusation against the defendant was that it had passed false information to another person, which the other person had used as the basis of a decision. That seemed to bring in such cases as SAAMCO and Caparo Industries plc v. Dickman [1990] 2 A.C. 605, in which the defendant’s primary purpose for the use of the information (or at least what the claimant reasonably thought was the defendant’s purpose) and the number of potential recipients of the information were both relevant. But the form of loss in those cases was itself inherently suspect, namely pure economic loss, whereas in Sutradhar the type of loss, personal injury, was straightforwardly claimable.

The claimant drew support from Perrett v. Collins [1998] 2 Lloyd’s Rep. 255, in which the Court of Appeal found sufficient “proximity” where the defendant, an inspector of aircraft, carelessly failed to stop a defective aircraft being put into service, with the result that the claimant suffered personal injury. The
majority countered with *Marc Rich & Co. AG v. Bishop Rock Marine Co. Ltd., The Nicholas H* [1994] 1 W.L.R. 1071, in which an inspector of ships (a “classification society”) failed to prevent a damaged ship putting to sea. The ship sank and the plaintiff’s property was lost. Lord Steyn said that the relationship between the parties was not “direct” enough, since responsibility for the decision to put to sea lay more with the shipowners than with the inspector.

Contrary to the majority’s position, however, these cases support the claimant in *Sutradhar*. The *Nicholas H* shipowners were not interested in the defendant’s opinions. They were only interested in its regulatory power. In *Perrett*, however, the content of the defendant’s opinion mattered to the aircraft’s constructor and operator. The *Nicholas H* shipowners were thus at fault in putting to sea even after the inspector’s intervention, whereas in *Perrett*, the aircraft’s constructor was at fault at most only in the way he made the aircraft and was not at fault in relying on the inspector’s subsequent assurances. In *Sutradhar*, no one apart from the defendant was at fault at all, either before or after the report. *Sutradhar* is thus a stronger case than *Perrett*.

Even Lord Hoffmann’s infamous “Doctor-Mountaineer” example in *SAAMCO* favours the claimant in *Sutradhar*. The harm in *Sutradhar* comes about not because of a risk the claimant has accepted in deciding to take part in a particular activity, but because of a risk against which the defendant’s conduct was supposed to guard. The harm in *Sutradhar* is nearer to the mountaineer’s knee giving way than to the avalanche.

The court’s real worry in *Sutradhar* seems to have been the 699 other claimants waiting in the wings and that their success might put a large hole in Britain’s international development budget. But that goes to whether it is “fair, just and reasonable” that the duty of care should apply at all, not to “proximity”. In any case, it is a deplorable example of the form of the “floodgates” argument in which defendants whose faulty conduct causes large amounts of harm enjoy better treatment than those whose fault causes small amounts. Another idea lurking in the background is that the Bangladeshi government should take full responsibility for its citizens’ welfare and should not pass on that responsibility to another government. Although that point has some legitimacy as a “proximity” point, it would have been clearer and more accurate also to treat it as a “fair, just and reasonable” point. Moreover, it does not look like an appropriate argument for the government of one of the richest countries in the world to make about the government of one of the poorest.
Sutradhar should perhaps count as yet another case in which “proximity” is used to obscure the real reasons for a decision, reasons the court should have had the courage to explain openly and at length.

DAVID HOWARTH

TORT LIABILITY FOR BREACHING ASSET FREEZING INJUNCTIONS

Where an asset freezing injunction is granted against a defendant in civil litigation it is usually essential to the enforceability of the order that it also binds any banks holding accounts to which the defendant is beneficially entitled. If the defendant, in breach of the injunction, disposes of assets subject to the order of the court, there may be few, if any, effective steps that can be taken against it. The defendant may not be amenable to the contempt jurisdiction of the court and may not fear being barred from defending the action (a suggestion of Lord Donaldson M.R. in *Derby and Co. Ltd. v. Weldon (Nos. 3 and 4)* [1991] Ch. 65, at 80–82). The ability to require the bank to preserve the defendant’s assets is what really makes the injunction “stick”.

It is well known that a bank failing in this duty may be liable for contempt of court (see *Z Ltd. v. A-Z and AA-LL* [1982] Q.B. 558). The question whether the bank is also subject to a duty of care in tort came before the Court of Appeal in *Commissioners of Customs and Excise v. Barclays Bank plc* [2004] EWCA Civ 1555.

The material facts were that in two cases the Commissioners obtained “maximum sum” asset freezing injunctions to the extent of approximately £1.8m and £4m respectively. In each case sums of approximately £1.25m and £1m were transferred out of frozen accounts within two hours of service of the injunctions. Both transfers were via the bank’s Faxpay system under which a customer can make direct transfers out of an account without reference to the relevant branch. In the first case the relationship manager had been informed of the request for Faxpay transfer and had confirmed that payment could not be made. Payment was made because of operator error. In the second case withdrawals were made before the amended instructions to the Faxpay system could be put in place. In each case the Commissioners claimed as damages the amounts by which the credit balances of the relevant accounts had been reduced. The existence of a duty of care came before Colman J. as a preliminary issue.
In holding that no duty of care arose Colman J. relied mostly on the absence of any assumption of responsibility by the bank. The Court of Appeal, allowing the Commissioners’ appeal, correctly regarded this as a flawed approach. This is not one of those cases conforming to the *Hedley Byrne v. Heller* [1964] A.C. 465 template where an assumption of responsibility is needed as a peg on which to hang the duty of care. As Lindsay J. put it, the defendant would be fixed with a duty of care for assuring the claimant that “I’ll see to it” (see [2004] EWCA Civ 1555, at [51]). True, on service of the injunctions the bank wrote to the claimants acknowledging its responsibility to ensure that assets were preserved and notified them of the costs of compliance. But this letter went no further than an acknowledgment of legal responsibility which had already been imposed by the notification and service of the injunctions. Other significant tests for determining the existence of a duty of care are the threefold test of foreseeability, proximity and reasonableness; and the incremental test. The Court of Appeal appeared unsure about the argument of counsel for the bank that all three tests should lead to the same conclusion. Longmore L.J. appeared to think that they should ([2004] EWCA Civ 1555, at [38]) but also acknowledged (at [25], Lindsay J. at [52] agreeing) that making this assumption and starting with “assumption of responsibility” was circular since application of the other tests would tend to produce the same conclusion. It is submitted that where all three tests do produce the same conclusion then a duty definitely is or is not owed. Where different results are produced then the quest is to find the most appropriate test for the circumstances.

The Court of Appeal’s conclusion that application of the threefold test justified a duty of care should be welcomed. Asset freezing injunctions are an essential part of modern civil litigation. They cannot work unless they bind banks. Contempt is not a suitable sanction for non-compliance because it is too difficult to establish. In *Z Ltd. v. A-Z and AA-LL* [1982] Q.B. 558 Eveleigh L.J. stated that the bank’s conduct would have to be contumacious (see 583D). Lord Denning M.R. and Kerr L.J. used milder language but did not suggest that negligence would be sufficient. Although counsel had cited no authority where duty of care had been considered and there was no reason to suppose that banks’ conduct was a problem, rejection of a duty of care could have created difficulties. Were banks to believe that they could not be sued in negligence and that only the most egregious conduct could result in liability for contempt, there would be little incentive for them to operate effective systems for the enforcement of court orders. Longmore L.J. was right to point out that a “no duty of
“care” ruling could result in pressure for the law of contempt to be utilised more frequently (see [2004] EWCA Civ 1555, at [35]): surely an inefficient way to administer civil justice. The argument for a duty of care is essentially that it is in the public interest that banks be required to support the effective administration of civil justice.

As Lindsay J. pointed out, rejection of the “assumption of responsibility” test does not of itself mean that a bank could not exclude or limit its liability by means of a disclaimer (at [51]). Nevertheless disclaimers should be firmly discouraged, whether worded to define the bank’s responsibility or to exclude liability. They should be subject to scrutiny under the Unfair Contract Terms Act 1977 section 2(2) because a duty of care would arise “but for” the disclaimer (see Smith v. Bush [1990] 1 A.C. 831). Whatever one thinks of this test in the contractual context (see MacDonald [1992] L.S. 277), it seems appropriate for negligence cases. Disclaimers should fail the “reasonableness” test because they would rob the civil justice system of a tool integral to its efficient administration. The extent of the bank’s duty of care, considered in the next paragraph, also militates against the reasonableness of any exclusion.

If a bank is to be subject to a duty of care then its obligation is to take reasonable care to preserve assets under its control. Banks cannot be insurers of claimants’ losses but will probably be somewhat anxious about their position under a rule of reasonable care. A “no duty” rule would be more certain but would come at the expense of fairness and the due administration of civil justice. In the first of the two cases considered here there seems little doubt that the bank’s operational error would have failed the test of reasonable care. In the second case the bank’s failure was in adjusting its Faxpay system so that withdrawals could be prevented. Clearly banks must be given some time to make this adjustment and cannot be liable if a withdrawal takes place before the adjustment could reasonably be expected. Case by case adjudication of the length of time that is reasonable would be unsatisfactory. There will probably have to be a trial of this issue at some stage soon and a guideline time established as a precedent after the receipt of expert testimony on banking systems. Provided this is a realistic time, banks should know where they stand and the burden should not be such that recourse to exclusion clauses is necessary to keep banks’ exposure under control.

DAVID CAPPER
NEGligence lawyers have long appreciated that the apparently procedural rules of limitation drive the substance of the law, because one can only understand when a cause of action accrues by analysing precisely what its essential elements are. Sometimes the substance is distorted in the process: we only worry about concurrent liability in tort and contract, and tort actions by clients against their advisers, because the limitation period for breach of contract accrues, and thus runs out, earlier than the negligence period. But occasionally, and paradoxically, limitation leads the courts into misunderstanding the elements of the cause of action, as happened, alas, in Daniels v. Thompson [2004] EWCA Civ 307.

Mrs. Daniels, an elderly lady, wished to reduce the amount of inheritance tax (IHT) payable on her death by her estate, so as to maximise the value inherited by her only son, the sole beneficiary and executor of her estate. In 1989 she consulted the defendant solicitor, who advised that if she transferred her home to her son and then managed to survive for seven years thereafter (both of which she duly did), the property would be outside her estate and exempt from IHT under the Finance Act 1986. He negligently overlooked, however, that the legislation also provided that if a gift is made "subject to a reservation of benefit", the property is treated for IHT purposes as if it still belonged to the deceased on death. So, by continuing to live in her home without paying rent to her son, Mrs. Daniels’ tax saving scheme was wholly unsuccessful and, following her death in 1998, the estate was deemed to include the full value of her home, which meant that IHT of over £30,000 was paid.

In 2002 the son, in his capacity as executor, commenced proceedings, claiming damages for breach of the duty of care the defendant owed Mrs. Daniels. The defendant retorted that the claim was time-barred, so the limitation questions were tried as preliminary issues. The deputy district judge found (inter alia) that Mrs. Daniels suffered damage in 1989 when she acted on the negligent advice by transferring her home with no prospect of saving IHT, so the six-year limitation period for actions in the tort of negligence had expired when the claim was issued. The claimant appealed, arguing that damage was not suffered when Mrs. Daniels transferred the property, but only on her death in 1998 when IHT liability arose.

The judge’s decision that Mrs. Daniels suffered actionable damage when she transferred the property reflects the approach in cases such as Forster v. Outred [1982] 1 W.L.R. 86 that damage
occurs in a solicitor’s negligence action when the client executes a transaction that is potentially disadvantageous, even if it is subject to a contingency that may not occur, rather than at the later date when that contingency eventuates, resulting in financial loss to the client. This approach is open to criticism that, often, it does not match the gist of what the client regards as damage, namely the crystallised financial loss, and although its potentially harsh effect is partly ameliorated by a secondary period of three years from the date of knowledge, that nonetheless requires knowledge of the damage, defined in precisely the same way. The artificiality of the Forster v. Outred approach was rejected in Bacon v. Howard Kennedy [1999] P.N.L.R. 1, the judge holding that a disappointed beneficiary in a White v. Jones claim did not suffer actionable damage when the solicitor failed to draft the will but only on the testator’s death, because the beneficiary “does not sue for a reduction in value of his expectancy” but in respect of the eventual, irrevocable loss of his inheritance. The Court of Appeal in Daniels similarly rejected the artificiality of the argument that Mrs. Daniels suffered damage when she transferred her home, on the basis that she was never exposed to the IHT liability during her lifetime: the solicitor’s negligent advice did not cause loss to her in 1989 because it caused no loss to her at all.

So far, so good. At this point, most professional negligence lawyers would comfortably assume that the claimant (remember, he is suing in his capacity as Mrs. Daniels’ executor) should be allowed to proceed, because he is suing within six years of the IHT liability, on behalf of an estate that is self-evidently £30,000 poorer. After all, there is no objection to executors suing on behalf of the estate to recover the costs of probate proceedings needed because of the deceased’s solicitor’s negligent failure to consider testamentary capacity (Worby v. Rosser [1999] Lloyd’s Rep. P.N. 972) or where the estate is diminished in value because the solicitor failed to advise the deceased to sever a joint tenancy (Carr-Glyn v. Frearsons [1999] Ch. 326). However, it is at this point that, instead, the court’s reasoning heads swiftly round the bend. Although the claimant was suing as executor, he had pleaded that the defendant’s duty of care was owed to Mrs. Daniels, Dyson L.J. therefore regarded the claimant as caught “on the horns of a dilemma”: the only duty pleaded was owed to Mrs. Daniels but she did not suffer any loss before her death. The Law Reform (Miscellaneous Provisions) Act 1934 did not help, either, according to Carnwarth L.J., because it makes no provision for extending a cause of action in tort for the benefit of the deceased’s estate, where the deceased (as opposed to the tortfeasor) dies before damage is sustained.
Moreover, astonishingly, the court also refused the claimant permission to amend his pleading to plead that the defendant owed a duty to him as executor, despite expressing approval of *Macaulay and Farley v. Premium Life Assurance Co. Ltd.* (unreported, 29 April 1999) in which Park J. held, on almost identical facts, that the deceased did not suffer the loss in his lifetime; it was instead suffered by his estate when the IHT fell due. The court’s emphasis when declining to allow the amendment was its reluctance to prolong the litigation and the disproportionate level of costs compared with the amount at stake, but the substantive reason given was that the executor is not personally liable for the IHT (as it is paid out of the estate), so he suffers no loss either! Finally it stressed that the claimant was not pleading that a *White v. Jones* duty of care was owed to him as beneficiary and expressed no view on that question.

The result is objectionable for a number of reasons. It runs entirely contrary to the “lacuna” reasoning in *White v. Jones* itself, in which the House of Lords deemed that the solicitor’s duty extended to the beneficiaries only because, on the facts, the estate had not suffered any loss. In *Daniels*, there is no lacuna because the estate has suffered the loss: the court created one out of nowhere by misunderstanding the legal status of the deceased’s estate, seemingly regarding it as a legal person, separate from both the deceased and her executor, and requiring its own separate duty of care. It likewise ignores the good sense of *Chappell v. Somers and Blake* [2003] 3 All E.R. 1076, in which Neuberger J. held that where the estate has suffered loss (in that case, lost income on properties that stood vacant while the estate’s solicitors delayed for years in obtaining probate), the executor can assert the estate’s cause of action, there is no lacuna and thus no need for a *White v. Jones* claim by the beneficiaries. Nor was the claim in *Daniels*, unlike many negligent IHT-planning cases, doomed to fail anyway on the basis of factual causation. Although most testators would decide not to bother if advised that the tax could only be saved if they paid a market rent to remain in their homes, Mrs. Daniels owned three other properties, any of which she could have given away without reserving a benefit. Overall the court’s approach in declining to allow the amendment but hinting that the claimant should have tried a *White v. Jones* claim was absurdly technical (there was only one relevant human being to suffer the loss: the claimant was both the executor and the sole beneficiary) and ignored a far more pertinent issue of substance, namely whether Lord Goff’s forceful social justice considerations in *White v. Jones* about the importance of testamentary freedom and the role of the
solicitors’ profession apply quite so forcefully where tax avoidance is concerned.

JANET O’SULLIVAN

CAUSATION AND THE GIST OF NEGLIGENCE

The House of Lords in Chester v. Afshar [2004] UKHL 41, [2004] 3 W.L.R. 927, by a 3–2 majority, has upheld the Court of Appeal’s decision, which extended the principles of causation in medical non-disclosure cases. The claimant, who had long suffered back pain, underwent spinal surgery by the defendant, a highly regarded neurosurgeon who negligently failed to inform her of a 1–2% risk of paralysis. The risk materialized and the issue was whether causation of damage could be established. This depended on what the claimant would have done had she been warned of the risk. If she would have avoided the procedure or sought alternative treatment, it could be argued that the failure to inform caused the claimant to be exposed to the risk and consequently the injury that resulted (cf. McAllister v. Lewisham and North Southwark Health Authority (1994) 5 Med. L. Rev. 343). If she would have consented to the procedure despite the warning, then she would have knowingly exposed herself to the risk, in which case the failure to warn would not have been causative of the injury (cf. Smith v. Barking, Havering and Brentwood Health Authority (1994) 5 Med. L. Rev. 285).

Here, the claimant simply said that, had she been informed, she would have taken more time to consider the matter; she did not suggest that she would never have consented to the surgery. Prima facie, the claimant had not discharged the burden of proving causation. The majority (Lords Steyn, Hope of Craighead and Walker of Gestingthorpe) approved the High Court of Australia decision of Chappel v. Hart (1998) 195 C.L.R. 232, the facts of which were analogous to Chester. Chester, however, arguably goes further than Chappel; in the latter, the claimant had at least argued that, had she been informed of the inherent risk, she would have sought a more skilled doctor and thus gained a theoretical chance of a reduced risk. In Chester, no such claim was made and the focus shifted from the physical injury arising out of the risk to the loss of the right to make an informed choice. Chester is significant for three reasons: the dilution of the medical negligence test in Bolam v. Friern Hospital Management Committee [1957] 1 W.L.R. 582 with respect to the duty to inform, the application of causation
principles post-\emph{Fairchild} and the possible extension of the gist of negligence.

The \emph{Bolam} test states that a doctor is not negligent if there exists a reasonable body of medical opinion supporting the doctor’s conduct. This test has been applied to the duty to inform, leading to concerns of medical paternalism overriding individual autonomy (\emph{Sidaway v. Board of Governors of Bethlem Royal Hospital} [1985] A.C. 871). The majority in \emph{Chester} was unequivocal in stressing the importance of patient autonomy and the patient’s right to decide, resurrecting the spirit of Lord Scarman’s famous dissent in \emph{Sidaway}, which rejected the application of \emph{Bolam} to the duty to warn. According to the majority in \emph{Chester}, the purpose of the medical duty to warn was to protect the patient’s right to autonomy (\emph{Chester}, at [17]). Lord Steyn did not mince words when he declared, “In modern law medical paternalism no longer rules” (\emph{Chester}, at [16]). Lord Hope, after reviewing the English duty to warn cases, stated that the law had a “powerful symbolic and galvanizing role” in rebalancing the doctor-patient relationship and creating a greater “right” to truly informed consent (\emph{Chester}, at [58]).

The scope of the duty in \emph{Chester}, defined by the patient’s right to individual autonomy, provided the context for the causation inquiry. The House of Lords has committed itself to a purposive approach to causation and has held that in rare circumstances, causation principles should be relaxed (\emph{Fairchild v. Glenhaven Funeral Services Ltd.} [2003] 1 A.C. 32). The \emph{Fairchild} principle is triggered when the claimant’s injury is clearly within the scope of foreseeable harm, the defendant’s conduct has theoretically increased the risk of the injury and it is inherently impossible for the claimant to prove causation. In such cases, it may be fair, just and reasonable to reverse the burden of proof and hold the defendant causally responsible unless the defendant can prove otherwise. There are early indications that courts, motivated by sympathy for the claimant, may be using this relaxed approach in the absence of the triggering criteria (see \emph{Sylvia Barker v. Saint Gobain Pipelines plc} [2004] EWCA Civ 545; \emph{Brown v. Corus (UK) Ltd.} [2004] EWCA Civ 374). \emph{Chester} is a classic example of this sympathetic approach, which effectively throws out the requirement of causation. Lord Walker even suggested that to deny causal responsibility in such cases would be to punish honest claimants who confess that they might well have accepted the risk (\emph{Chester}, at [101]).

The medical duty to warn serves two purposes: to avoid the occurrence of physical injury from the materialization of the risk
and to ensure that “due respect is given to the autonomy and dignity of each patient” (Chester at [18] per Lord Steyn). In Chester, however, while the physical injury was clearly within the scope of the risk, it was not inherently impossible for the claimant to prove causation. Indeed, it was only the claimant who had the knowledge as to how she would have acted had she been warned of the risk. Therefore, it was not an appropriate situation to apply Fairchild and relax the rules of causation. The majority in Chester focused on the second purpose of the duty to warn and held that a failure to hold the defendant liable would deprive the duty of any value (at [24] per Lord Steyn, at [87] per Lord Hope, at [101] per Lord Walker). This purposive approach may establish a causal link between the negligence and the loss of the right to informed consent, but it does not establish causation with respect to the physical injury. In effect, the majority implicitly recognized the loss of the patient’s right as the gist of negligence; the physical injury, which turned on the patient’s response, merely went to the quantification of the loss. As Lord Hope said, the scope of duty and causation were “unaffected by the response which the patient may give” (at [59]).

The majority’s resolution of the causation inquiry in Chester was driven by policy considerations, a new emphasis on patient’s rights and a preference for corrective justice (cf. Rees v. Darlington Memorial Hospital NHS Trust [2004] 1 A.C. 309, which favoured distributive justice). The House of Lords’ policy-based, purposive approach to causation is no less satisfactory than the High Court of Australia’s common sense approach, which was criticized by Lord Hope for being too uncertain (at [83]). This criticism is somewhat ironic given that the purposive approach split the House of Lords in Chester along the same lines as the common sense approach split the High Court of Australia in Chappel. The minority in Chester recognized that what was being claimed was an infringement of a right and that that was not compensable under negligence (at [9] per Lord Bingham, at [34] per Lord Hoffmann).

It is suggested that if the loss of the patient’s right is formally recognized as the gist of negligence, the causation quagmire in medical non-disclosure cases can be resolved in a doctrinally satisfactory manner. The problem that will arise is the quantification of the loss. Should the loss of the patient’s right have an intrinsic value, or should it be conditional on the physical injury that results, or should it be calculated on a loss of chance basis? While these issues remain unanswered, one might have thought that Chester would have made it difficult for the House of Lords to reject the loss of chance claim in Gregg v. Scott [2005] UKHL 2. However,
the House of Lords in Gregg, by a 3-2 majority, did reject the claim; and inexplicably, all the Law Lords, with the exception of Baroness Hale, completely ignored Chester.

KUMARALINGAM AMIRTHALINGAM

SUBROGATION, RECOUPEMENT AND CONTRIBUTION:
PRINCIPLES NOT INCLUDED

Despite the complexity of the facts in Niru Battery Manufacturing Co. v. Milestone Trading Ltd. (No. 2) [2004] EWCA Civ 487, [2004] 2 All E.R. (Comm.) 289, the issue before the Court of Appeal was straightforward: could one party which had discharged the liability of another claim restitution from that other party? This would seem to raise an issue of contribution. However, the Court of Appeal treated the case as primarily involving issues of subrogation and “recoupment” and, whilst the judges sought to achieve a result which was just and equitable, their decision was both unjust and fatally flawed by virtue of confusion as to the operation of the underlying principles.

In Niru Battery (No. 1) [2003] EWCA Civ 1446, [2004] Q.B. 985 (noted [2004] C.L.J. 276) two parties were found to be jointly and severally liable to the claimant. One was SGS, which was liable for the tort of negligence; the other was CAI, which was liable to make restitution of a mistaken payment by virtue of the unjust enrichment principle. SGS then discharged this liability and sought restitution from CAI on three different bases.

Subrogation

The Court held that the equitable remedy of subrogation was available to enable SGS to recover the whole amount it had paid to discharge CAI’s liability, by enabling SGS to rely on the claimant’s restitutionary claim against CAI. But it is unclear both why this remedy was sought and whether it was actually available. The Court was aware that subrogation operates to reverse or prevent unjust enrichment, as had been recognised by the House of Lords in Banque Financière de la Cité v. Parc (Battersea) Ltd. [1999] 1 A.C. 221, but failed to identify clearly whether the key elements of that principle were satisfied. The starting point is the identification of an enrichment. Sedley L.J. asserted that CAI had not been enriched at all (at [88]), whereas Clarke L.J. apparently assumed that the enrichment constituted the initial mistaken payment made to CAI. But this was not obtained at the expense of SGS. The restitutionary claim of SGS turned on the discharge of
CAI’s liability. This was an incontrovertible benefit, since it constituted the saving of an inevitable expense, and was clearly obtained at the expense of SGS. So what was the ground of restitution? Again, it appears to have been assumed that it was the claimant’s initial mistake of fact in paying CAI, but this could not have been of any significance to a claim brought by SGS. The only mistake which could have been relevant was if SGS had mistakenly thought it was discharging its own liability; but that is exactly what it was doing. So, at this stage at least, the unjust enrichment principle does not appear to be engaged and so there was no justification for awarding a subrogation remedy.

But even if it was possible to establish that CAI had been unjustly enriched at the expense of SGS, why was subrogation the appropriate remedy? In a simple case of unjust enrichment the typical remedy is that the defendant is required to restore the value of the benefit received, which would be the value of the debt discharged. This would be a personal remedy of money paid for the use of the defendant and there is no need to have recourse to subrogation. The true function of the subrogation remedy has been analysed elegantly and comprehensively by the Court of Appeal in Cheltenham and Gloucester plc v. Appleyard [2004] EWCA Civ 291, where it was recognised that the classic form of the remedy was proprietary, in that it enables a lender who expects to obtain a security to claim subrogation to another security. Exceptionally subrogation can also operate as a personal remedy, as occurred in Banque Financière de la Cité v. Parc (Battersea) Ltd. [1999] 1 A.C. 221, where subrogation enabled the claimant to benefit from a contractual undertaking rather than a proprietary security. But, whether in its proprietary or personal form, the usual function of the remedy is to enable a claimant to receive the benefit of a security which was not in fact available to it, by allowing the claimant to stand in the shoes of another party and rely on their security. But that was not the case in Niru Battery (No. 2). There was no security involved. In addition, there was no need to argue that SGS could stand in the shoes of the claimant to bring the claim for, if it could be established that CAI had been unjustly enriched at SGS’s expense, then SGS would have a direct personal claim against CAI for the value of the benefit. The facts of Banque Financière were fundamentally different. Indeed, in Appleyard it was recognised that reference to that case is unlikely to be of assistance in a conventional case. It was certainly a source of confusion in Niru Battery (No. 2).

Nevertheless, the Court of Appeal unanimously concluded that subrogation was available, with the result that CAI was required to
make full restitution to SGS, meaning that CAI bore full liability for the events which had happened and SGS escaped completely, even though SGS had been negligent. Clarke L.J. sought to justify this result by reference to CAI’s fault, in that it should have repaid the money it had received to the claimant rather than paying it on to another party: at [33]–[34]. It had been recognised in *Niru Battery (No. 1)* that this had occurred in circumstances of bad faith, since CAI was aware of the mistake but still paid the money away, and this prevented CAI from relying on the change of position defence. Clarke L.J. thought that this meant that CAI was more responsible than SGS for the claimant’s loss and that it was just and equitable that CAI should bear the whole liability: at [37]. Sedley L.J. expressed some disquiet about this result and he was right to do so. The strict operation of the law of unjust enrichment, requiring full restitution to the party who has discharged the joint and several liability, is not appropriate where the parties are equally responsible for the harm. That is why the law of contribution can be used to apportion liability between the parties. It is different where one party bears primary liability. Although Clarke L.J. concluded that CAI was indeed primarily liable, this was doubted by Sedley L.J. and rightly so. Where one defendant is liable for negligence and the other for unjust enrichment, which is a strict liability claim, how can the latter be regarded as more responsible? Both defendants had contributed to the claimant’s loss, as the trial judge had correctly concluded. From start to finish the analysis of the subrogation remedy was fundamentally confused.

**Recoupment**

As an alternative to subrogation, the Court also considered the so-called principle of “recoupment” and concluded that CAI would be liable to make full restitution on this basis as well. The Court assumed that “recoupment” constitutes both a cause of action and a remedy and is founded on the fact that the claimant is compelled by law to discharge the defendant’s liability. But there is nothing unusual about “recoupment”; it forms part of the law of unjust enrichment. Where the claimant is compelled to discharge the defendant’s liability, this constitutes a ground of restitution in its own right for which the appropriate remedy is payment of the value of the discharged debt.

But this type of claim is more complex than the Court of Appeal suggested. It was assumed that, because the defendant’s liability was discharged completely, it was liable to make full restitution to the claimant. But that is only relevant where the defendant bears the whole liability or is primarily liable: *Exall v.*
Partridge (1739) 8 Term Rep. 308, Moule v. Garrett (1872) L.R. 7 Exch. 101. That was not the case here and so the recoupment claim should have been rejected.

Contribution

Since the Court concluded that the defendant was liable to make full restitution by virtue of either subrogation or recoupment, it was not considered necessary to examine in any detail whether a remedy lay under the law of contribution, although Sedley L.J. would have preferred to focus on this claim. But since neither subrogation nor recoupment were actually available, this was the only appropriate basis for a claim. This too is a response to the defendant’s unjust enrichment (as was recognised in Dubai Aluminium Co. Ltd. v. Salaam [2002] UKHL 48, [2003] 2 A.C. 366, 388 per Lord Hobhouse) but, since the statutory regime under the Civil Liability (Contribution) Act 1978 applies, there is a judicial discretion to apportion the liability between the parties: section 2(1). The application of this Act to unjust enrichment claims has proved difficult, primarily because it is not drafted to cater for such claims. According to section 1(1) contribution is available where parties are liable in respect of the “same damage”. In Friends’ Provident Life Office v. Hillier Parker May and Rowden [1997] Q.B. 85, a decision of the Court of Appeal, this was held to cover defendants who were liable in tort and unjust enrichment respectively. This was doubted by Lord Steyn in Royal Brompton Hospital NHS Trust v. Hammond [2002] UKHL 14, [2002] 1 W.L.R. 1397, on the ground that liability in unjust enrichment does not involve “damage”. In Niru Battery (No 2.) the dictum of Lord Steyn was considered to be obiter and the Court was therefore bound by Friends’ Provident. Whilst the interpretation of the 1978 Act in the latter case may not be technically correct, for the reason identified by Lord Steyn, it is at least consistent with the purpose of the statute and would enable a court to reach the just result in a case such as this, namely that the liability should be divided equally between the parties.

The confused and incoherent reasoning of the judges in this case is a warning to all: you ignore principles at your peril.

Graham Virgo
RABBITS BEWARE: RESIDENTS GAIN RIGHTS TO DRIVE OVER COMMON LAND

Once the inspiration for the novel *Watership Down*, Newtown Common in Hampshire has become the breeding ground for litigation. In *Bakewell Management Ltd. v. Brandwood* [2004] UKHL 14, [2004] 2 A.C. 519, the House of Lords attempted to clarify the relationship between prescriptive acquisition of easements and illegality.

Several homes bordered the common. For decades, owners reached their properties by driving on tracks across the common. No-one questioned this state of affairs until Bakewell Management (BM), having acquired the freehold of the common, wrote to the homeowners explaining that they had no right to drive over the common, but offering “an amnesty” whereby the residents could buy an easement to access their dwellings “at a favourable rate”: 6% of the value of their property (£30,000 in some cases). Many residents refused, insisting that their properties already enjoyed prescriptive easements over the common. The House of Lords, disagreeing with the Court of Appeal and the judge at first instance, found unanimously for the residents.

Their Lordships were faced with a tricky conundrum because the facts spanned both civil and criminal law. Under the former, easements may be acquired through prescription. This entitles someone to an easement once they have exercised rights over another person’s land for 20 years, without using force or stealth or acting pursuant to a licence. Each ingredient was satisfied in *Bakewell*. Under the civil law alone, the residents would win. However, it is a criminal offence under the Law of Property Act 1925, section 193(4) to drive on such land “without lawful authority”. In effect, the landowner had a “dispensing power” to confer that authority and thereby to decriminalise the residents’ acts. No such authority ever having been given, the residents would have to rely on their illegal conduct to establish the long use required for prescription. The question for the House of Lords was whether this illegality prevented prescription.

The lower courts were bound by an earlier Court of Appeal decision (*Hanning v. Top Deck Travel Group Ltd.* (1993) 68 P. & C.R. 14) which held, applying the general principle under which illegal acts cannot give rise to claims (*ex turpi causa non oritur actio*), that no prescriptive easement could arise from criminal conduct. The House of Lords overruled *Hanning*: the fact that an offence was committed under LPA 1925, section 193(4) would no longer bar prescription.
The result is to be warmly welcomed. Prescription performs an important function: it “prevent[s] the disturbance of long-established de facto enjoyment” (R. v. Oxfordshire C.C., ex p. Sunningwell P.C. [2000] 1 A.C. 335, per Lord Hoffmann). There is no reason why the commission of a very minor crime should prevent the operation of this doctrine, and for it to do so is disproportionate.

But the reasons given by their Lordships for their decision are disappointing and offer little guidance for the future. On one interpretation of the case, prescription will operate in the face of a criminal infringement only where there is a dispensing power. Under a wider reading, however, prescriptive easements can arise despite any illegal conduct provided that the outcome does not infringe public policy.

The narrow view was propounded as follows by Lord Scott. As BM had the power to decriminalise the residents’ conduct, it had the capacity to grant the easement lawfully. Prescription operates according to a presumption that the dominant owner’s user is evidence that the servient owner granted the easement in the past. If the landowner can grant an easement without any offence being committed, there was no reason why a prescriptive easement could not lawfully arise.

Three problems arise. First, prescriptive acquisition by the presumption of grant has been acknowledged as a “revolting fiction” (Lush J. in Dalton v. Henry Angus & Co. (1877–78) L.R. 3 Q.B.D. 85). The narrow view perpetuates this unnecessary fiction.

Secondly, the argument ignores the ex turpi causa rule. The residents’ illegal conduct was relied upon in order to raise the presumption that the easement was lawfully granted. Lord Walker alone mentioned ex turpi causa. In his Lordship’s opinion, the rule is inapplicable where there is a dispensing power because it will serve no public interest. It serves no public interest because the easement could have been granted lawfully. The argument is circular.

Thirdly, the narrow view only permits prescription where the relevant offence contains a dispensing power. As Lord Walker conceded, “[s]ince a dispensing power of that sort is very unusual, it is unlikely to apply to many other cases of criminal illegality”. While the reasoning may apply to the offence of driving off-road, (Road Traffic Act 1988, s. 34), which also contains a dispensing power, it will not apply to other, similarly minor, offences that might be committed by driving over commons (e.g., Inclosure Act 1857, s. 12; Commons Act 1876, s. 29), where there happens to be no decriminalising option. In short, the fact that hypothetically the
landowner could have granted authority when in fact he actually did not is not reason enough to draw a distinction between offences.

The wider view, hinted at by Lords Scott and Walker, is preferable. Lord Scott, acknowledging that prescription necessarily involves the tort of trespass, considered that prescription should be barred only if “for public policy purposes” there is a “difference in kind” between criminal illegality under LPA, s. 193(4) and conduct illegal in the tortious sense. In his view, if the landowner can decriminalise the conduct, the infringement is more akin to tort than to crime. Likewise, Lord Walker’s statement that “the maxim ex turpi causa must be applied as an instrument of public policy” might be interpreted as meaning that public policy is the determining factor. Whilst the narrow view works from the premise that if there is a dispensing power, there is no public policy reason for illegality to negate prescription, the wider view operates conversely: prescription may operate despite illegal conduct provided that the outcome does not infringe public policy. Conduct which comprises offences containing a dispensing power is merely an example of this. The wider view inevitably suffers from lack of certainty but is surely preferable to an arbitrary bright-line rule.

The Bakewell litigation highlights a wider social concern. In the years following Hanning, opportunistic businessmen seized the chance to buy common land to make money from the thousands of people whose homes bordered commons. The public were outraged. Legislation was passed to cap the sums payable to 2% of the capital value of the dwelling (Countryside and Rights of Way Act 2000, section 68). Happily for residents bordering common land, at least those who have not negotiated the grant of an easement, their prescriptive rights can now safely be asserted. But what will happen to those who have paid over money already? Unjust enrichment lawyers will certainly have their work cut out: Rimer J. has already expressed doubts about the ability to recover because the residents had undertaken the risk of losing their money, thereby debarring an unjust enrichment claim (Cobbold v. Bakewell Management [2003] EWHC 2289 (Ch) (unreported)). One thing is certain: the law has not yet finished with the “strange, forbidding land” of Newtown Common.

Amy Goymour
ONE of the most litigated property law issues over the past decade has been the equitable jurisdiction to set aside a mortgage transaction procured by undue influence or some other vitiating conduct.

The most common scenario is where the complainant has executed a mortgage as co-mortgagor with the principal mortgagor or has otherwise postponed his or her interest in the mortgaged property in order to secure the debts of the principal mortgagor; and, by way of a defence to an action for possession by the mortgagee, the complainant seeks to have the transaction set aside on the ground that it was procured by vitiating conduct on the part of the principal mortgagor. Barclays Bank plc v. O’Brien [1994] A.C. 180 established the structure of the defence. The complainant must establish that there was some vitiating conduct on the part of the principal mortgagor such that a transaction between those parties would be set aside; and that the mortgagee had sufficient notice of the vitiating conduct and should therefore prima facie be subject to the complainant’s right to set aside the mortgage. However, the mortgagee may establish that it took appropriate steps to ensure that the complainant’s execution of the mortgage was not procured by vitiating conduct, in which case the mortgage will not be set aside. In Royal Bank of Scotland plc v. Etridge (No. 2) [2001] UKHL 44, [2002] 2 A.C. 773 the House of Lords endorsed the basic O’Brien structure but sought to refine the principles and to address a number of practical issues that had been identified in a series of subsequent cases.

Yorkshire Bank plc v. Tinsley [2004] EWCA Civ 816, [2004] 1 W.L.R. 2380 raised a related issue that had not previously been considered, namely whether a substitute mortgage could be set aside where the original mortgage was voidable in accordance with the principles in O’Brien and Etridge.

Mr. and Mrs. Tinsley were co-owners of their matrimonial home. In 1988, and again in 1991, they mortgaged the property to the claimant bank in order to secure the present and future business debts of Mr. Tinsley. In 1994 Mr. and Mrs. Tinsley separated. The matrimonial home was sold and another property was purchased for Mrs. Tinsley. As a condition of discharging the mortgage over the former matrimonial home, the bank required Mrs. Tinsley to execute a replacement mortgage over her new property.

When Mr. Tinsley failed to repay his debts, the bank brought possession proceedings against Mrs. Tinsley. The county court
judge held that Mrs. Tinsley had executed the 1988 and 1991 mortgages under the undue influence of Mr. Tinsley; that the bank had been put on inquiry as to that undue influence; and that the bank had failed to take appropriate steps to satisfy itself that Mrs. Tinsley had freely entered into both transactions. It followed that both mortgages had been voidable as against the bank and liable to be set aside at the instance of Mrs. Tinsley. However, the judge held that the undue influence in relation to the earlier mortgages could not be transferred to the 1994 mortgage ("which was on a different property altogether"); and, since the 1994 mortgage was otherwise unimpeachable, he made an order for possession.

Mrs. Tinsley appealed to the Court of Appeal. A range of arguments was pursued but, since the bank did not seek to challenge the voidability of the 1988 and 1991 mortgages, the principal issue was whether the 1994 mortgage was voidable and liable to be set aside because it was a substitute for the earlier voidable mortgages.

Longmore L.J. gave the leading judgment. Considering the issue as a matter of principle, he stated that "[i]t would be natural to expect that if, without more, an obligation incurred between two or three parties is legally ineffective in any way, any new obligation arising out of the release of such earlier obligation would be legally ineffective in a similar way". Applying that principle to the present case, the 1994 mortgage was a substitute for the earlier mortgages; it was granted as a condition of the discharge of the earlier mortgages (and on the assumption of both parties that the earlier mortgages were valid); but the voidability in fact attaching to those earlier mortgages continued to operate so as to render the 1994 mortgage voidable, even though there was no operative undue influence at the time of the 1994 mortgage. Since the reasoning was based on the continuation of the constructive notice of the undue influence that affected the conscience of the mortgagee, Longmore L.J. rejected the argument of the bank that the decision involved an unjustifiable over-extension of equitable principles.

Moreover, Longmore L.J. accepted that there was some authority for the principle—in two cases found by counsel for Mrs. Tinsley. *Crowe v. Ballard* (1790) 1 Ves. Jun. 214 and *Kempson v. Ashbee* (1874) L.R. 10 Ch. App. 15 both concerned the enforceability of substitute bonds (rather than mortgages); but both appeared to hold that a later bond, unimpeachable in itself, was unenforceable by reason of the fraud or undue influence that attached to an earlier bond with which it was "inseparably connected".
Longmore L.J. sought to define, both positively and negatively, the scope of the decision and the otherwise broad principle underlying the decision. First, the principle applies only where the substitute mortgage is granted to the same mortgagee, although it is irrelevant whether the substitute mortgage is a remortgage on the same property or relates to a different property. There is no question that a substitute mortgagee should be adversely affected by a voidable mortgage to which it was not a party since the principle is based on the continuation of the constructive notice of the vitiating conduct that affected the conscience of the original mortgagee. Secondly, the principle applies only where the substitute mortgage is “inseparably connected” with the earlier mortgage, for example where, as in the present case, the discharge of the earlier mortgage is conditional upon the grant of the substitute mortgage. Thirdly, the principle applies even though the vitiating conduct affecting the earlier mortgage is no longer operative and even though the substitute mortgage is not affected by any new vitiating conduct and would thus be unimpeachable in the absence of the history of the earlier mortgage. (Rix L.J. appears to have stated that the undue influence of Mr. Tinsley had not ceased to be operative. However, on that basis, the present case raised no new issue: it could have been decided simply by reference to the undue influence ex hypothesi affecting the substitute mortgage and without reference to the earlier mortgages.) Fourthly, although the vitiating conduct affecting the earlier mortgage need no longer be operative, it must not have been cured or negated, for example by the informed affirmation of the mortgage(s) by the complainant.

Peter Gibson L.J. and (subject to the point noted above) Rix L.J. agreed with the judgment of Longmore L.J. In addition, Peter Gibson L.J. expressed the view that, contrary to the argument advanced on behalf of the bank, the decision did not cause any significant practical difficulties for lending mortgagees. In accordance with the principles established in O’Brien and Etridge, the mortgagee should take steps to ensure that the co-mortgagor receives independent advice on the particular transaction. In the case of a substitute mortgage, the transaction involves the discharge of an earlier mortgage; and proper advice should necessarily extend to that aspect of the transaction.

Yorkshire Bank plc v. Tinsley raised a previously undecided point in a much litigated context. It is submitted that the Court of Appeal was correct in deciding that the voidability of the earlier mortgages was transferable to the substitute mortgage. It is further submitted that the limitations on the broad principle underlying the decision should ensure the proper balance between the parties in
such circumstances; but it remains to be seen whether the principle and its practical implications will generate yet more litigation.

NIGEL P. GRAVELLS

CONTESTS BETWEEN RIVAL TRUST BENEFICIARIES

Having been promised 15% per annum returns on their investments, hundreds of investors paid a total of over £6m to Mr. Prentis’ firm of solicitors, to be invested in short term, high interest mortgages. The payments were held on trust in a client account pending investment. Only some of the payments received were in fact invested in mortgages. For those that were, the documentation was woefully inadequate; frequently it did not identify which investor’s money had been applied towards each mortgage or in what amount. There were substantial shortfalls, both in capital and in income. The Law Society intervened and Mr. Prentis was struck off, preventing the firm from continuing to act as trustee. In Russell-Cooke Trust Co. v. Prentis [2002] EWHC 2227 (Ch), [2003] 2 All E.R. 478 the replacement trustee sought directions as to how it should distribute between the various investors the investments which had been made and the surplus funds remaining in the client account.

There was no contest between the trustee and the beneficiaries. The true contest was between the various beneficiaries, regarding whose claims would prevail over the investments and the remaining funds. In five instances, the documents made clear whose money had been used to invest in each mortgage and in what amounts. Those investors could assert a beneficial interest in the relevant mortgages as separate trusts existed for each of them: at [40].

This left the question how the remaining mortgage investments and the funds remaining in the client account were to be distributed. As the client account was a current account, the received wisdom in England is that Devaynes v. Noble; Clayton’s Case (1816) 1 Mer. 572; 35 E.R. 781 provides the starting point, requiring that the beneficiary whose money was first placed in the current account be treated as the person whose money was first taken out of the account. No-one argued in Prentis that this rule applied to the mortgage investments where specific investors were identified but it had not been made clear in what amounts each identified investor’s money had been used. The reason is that it is clear from Clayton’s Case itself, as well as from later decisions (In re Hallett’s Estate (1880) 13 Ch.D. 696, 728, 738–739; Cory Bros. &
Co. Ltd. v. Owners of The Turkish Steamship ''Mecca'' [1897] A.C. 286, 290, 295), that the “first in, first out” rule from Clayton’s Case is only a presumption or inference as to the intention of the parties, rather than an invariable rule of law. Thus, where the investments in Prentis had been allocated to particular investors, it was their money that had been used, rather than that of other investors whose money was placed into the client account earlier. However, it was not clear in what amounts each identified investor’s money had been applied, and so the mortgage investments were held for the identified investors rateably according to their respective contributions of principal: at [46].

Nor was Clayton’s Case applied to the problem of allocating the remaining funds in the client account. Lindsay J. commented that the rule in Clayton’s Case “can be displaced by even a slight counterweight. Indeed, in terms of its actual application between beneficiaries who have in any sense met a shared misfortune, it might be more accurate to refer to the exception that is, rather than the rule in, Clayton’s Case”: at [55].

This is eminently quotable, but requires caution when the authorities are borne in mind. Clayton’s Case involved a dispute between banker and customer, rather than between trust beneficiaries, and numerous jurisdictions have rejected it as a means of resolving the latter kind of dispute (Re Ontario Securities Commission & Greymac Credit Corp. (1986) 30 D.L.R. (4th) 1 and (1988) 52 D.L.R. (4th) 767; Re Registered Securities Ltd. [1991] 1 N.Z.L.R. 545; In re Esteem Settlement [2002] Jersey L.R. 53). However, the Court of Appeal has confirmed that binding authority holds that the rule in Clayton’s Case is the starting point in English law for the allocation of a deficient fund which has been held on trust for numerous beneficiaries in a current account (Barlow Clowes International Ltd. (in liq.) v. Vaughan [1992] 4 All E.R. 22, 33, 38–39, 42, 44). Clayton’s Case does not apply where a contrary intention is evident or can be inferred, or where it would be impracticable and unjust (Commerzbank Aktiengesellschaft v. IMB Morgan plc [2004] EWHC 2771 (Ch)) or would involve unjustifiable costs, but authority suggests that it cannot be treated as a mere “exception” in England.

The result in Prentis is consistent with this orthodoxy. Lindsay J. refused to apply Clayton’s Case when allocating the remaining funds in the client account because the scheme of investment made it clear that it was not intended to apply: in all the circumstances it was clear that investors’ money would not be used in strictly chronological order to make investments, as the investments actually made showed. A rule which presumed a “first in, first out”
process of allocating contributions to investments would have been contrary to the known facts and the reasonable expectations of the investors: at [56]. Accordingly, a pari passu scheme of allocation was applied.

The application of Clayton’s Case to contests between multiple trust beneficiaries needs a thorough review, conducted at a high level on the basis of both precedent and principle, of the sort conducted recently by Campbell J. in Re French Caledonia Travel [2003] NSWSC 1008, (2004) 22 A.C.L.C. 498. Here, a travel agency company had received around $1.43m from numerous airlines, travellers and other travel agencies. This had been placed in a trust account, but the account contained only $172,000 at the time of the company’s liquidation. As in Prentis, neither the company nor its creditors had any beneficial claim to the remaining fund, but there was a contest as to how it should be allocated between the various contributors for whom it was held in trust. Campbell J. held that the fund was to be shared pari passu among those contributors.

In refusing to apply Clayton’s Case, Campbell J. carefully reviewed in detail each of the English cases frequently cited as requiring its application. He accepted that its application did form part of the ratio in Re Diplock [1948] 1 Ch. 465, but noted that most of the other cases where it was discussed only contain obiter observations as to its applicability.

Perhaps of greatest importance in French Caledonia is Campbell J.’s explanation of why, applying basic principles of tracing, Clayton’s Case need not be considered relevant to allocation of trust money among multiple trust beneficiaries whose money has been wrongfully mixed. Clayton’s Case is relevant to the allocation of debits and credits as between banker and customer. In that situation, one needs to be able to determine, as each payment is made, which debts have been repaid or created by the payment. That sort of strict allocation is unnecessary in a trust context. This is so because, where a trustee has misapplied trust assets, the beneficiaries have a right to elect at the time of trial whether to claim against the trust fund, or against assets purchased using money from the trust fund, or against assets transferred out of the fund in breach of trust (Foskett v. McKeown [2001] 1 A.C. 102, 127, 130, 131). Until such election occurs, the beneficiaries have a charge over all of those various assets. As Campbell J. explained, this charge is notional (see also El Ajou v. Dollar Land Holdings plc [1993] 3 All E.R. 717, 737), and is distinct from the charge that the beneficiaries obtain from a court when it orders that certain assets be used to raise a sum of money in their favour: at [83]. The notional charge merely indicates a potential
claim against the asset. This is the analysis for a single-beneficiary trust, but there is no reason why it should not apply where more than one beneficiary from more than one trust is interested in the fund from which the trustee makes the transfer. In such a case, the notional charge arises in favour of all those interested in the fund from which the transfer was made. The rights of the various contributors to that fund do not need to be calculated precisely until the beneficiaries make their election at trial.

Where there is more than one contributor to the fund from which the transfer was made, their claims inter se are determined using the normal default rule for division of property among rival equitable claimants: if the equities are equal, they share rateably. However, as Campbell J. explained, the equities are not always equal: at [176]–[185]. As a simple example, if one of the contributors was the trustee, his claim must wait until the other innocent contributors’ claims have been met (In re Hallett’s Estate (1880) 13 Ch.D. 696; In re Oatway [1903] 2 Ch. 356). More importantly in the present context, where money is withdrawn from a fund comprising contributions from two persons, A and B, and, after that withdrawal, money from a third contributor, C, is then added to the fund, the equities between A, B and C are not equal as regards the resultant fund, and are best reflected using the “rolling charge” solution discussed in Barlow Clowes [1992] 4 All E.R. 22, 27, 35. If the equities cannot be calculated with sufficient certainty to allow that sort of analysis, a simple pari passu sharing can be adopted.

The supposedly “convenient rule” in Clayton’s Case (so described in Hallett’s Estate (1880) 13 Ch.D. 696, 728) is simply redundant here. If there is sufficient information to conduct the analysis required by Clayton’s Case, there should be sufficient information to perform a rolling charge analysis or, at the very least, a simple pari passu sharing. The choice between methods of allocation should depend upon the cost and practicability of applying each one in the circumstances, rather than on the false assumption that Clayton’s Case has any logic or convenience about it in the context of tracing.

MATTHEW CONAGLEN

DIRECTORIAL DISCLOSURE

When Item Software was seeking to renegotiate an important contract with a client, its duplicitous sales director, Fassihi, sought
to take the contract for himself. In conduct deserving of a “Janus
award”, Fassihi disparaged the negotiating parties to each other,
and encouraged the company to raise its price even as he made his
own advances to the client. Ultimately, neither the company nor
Fassihi got the contract. *Item Software (UK) Ltd. v. Fassihi* [2004]
EWCA Civ 1244 concerns the company’s claim, having dismissed
Fassihi, for compensation for lost profits in relation to the contract.

Compensation, whether in the form of damages or equitable
compensation, is only available where the loss is causally linked to
the breach of duty: *Target Holdings Ltd. v. Redfins* [1996] A.C.
421, 432, 434. The trial judge found that Fassihi’s misconduct had
not caused any loss: the client had never taken Fassihi’s offer
seriously and the company’s managing director would have
negotiated no more cautiously had Fassihi not been pressing him
([2003] EWHC 3116 (Ch), [2003] 2 B.C.L.C. 1). However, it was
also found that the managing director would have accepted the
client’s (lower) offer, had he been aware of Fassihi’s behaviour. The
judge held Fassihi in breach of an independent duty to disclose his
own misconduct, and awarded compensation to the company.

On appeal, Fassihi argued that a director owes his company no
duty to disclose his own misconduct, relying on *Bell v. Lever
Brothers Ltd.* [1932] A.C. 161. The Court of Appeal distinguished
*Bell*: that case had not decided that a director could not owe such
a duty of disclosure, nor, moreover, had it decided that an
employee could never owe any such duty. More interestingly, the
court held that fiduciaries owe no special duty of disclosure, but
rather that non-disclosure under such circumstances amounted to a
breach of a director’s fundamental duty of loyalty. Three issues
arise for comment.

First, authorities concerning “corporate opportunities” suggest
that a director who comes upon information or an opportunity
proximate to the company’s business must disclose it to the
company (e.g., *Industrial Developments Consultants Ltd. v. Cooley*
424, [2003] 2 B.C.L.C. 241 at [41]). This seems to imply that non-
disclosure would render the director liable for equitable
compensation, even if he did not take up the opportunity himself.
However, these cases need to be understood in their context, namely as claims to strip profits made by directors who had acted
with a “real sensible possibility” of conflict between their duty and
their personal interests. As Arden L.J. explained in *Fassihi*, the duty
breached in these cases was not a fiduciary “duty to disclose”, but
rather the fiduciary duty to avoid such conflicts.
There will be a “real sensible possibility” of conflict if a director takes up a proximate opportunity without first determining whether the company is agreeable to his doing so. Until the company is made aware of the opportunity, the location of its actual interests will often be unclear. Yet the fact that the information is proximate to its business suffices to establish that the company might possibly be interested. Thus, taking the opportunity without first obtaining authorisation is a breach of the director’s fiduciary duty to avoid possible conflicts.

What, though, is the underlying duty that is possibly in conflict with the director’s personal interest? Fassihi clearly identifies this duty not as a particular “duty to disclose”, but rather as the director’s duty to act in what he (subjectively) believes to be the best interests of the company. Non-disclosure of an opportunity in which the company might be interested would constitute a breach of that underlying duty (as distinct from the fiduciary conflict principle, which supplements it) only where the director in fact believed that the company’s interests would be served by receiving the information. It seems the court inferred such a belief on Fassihi’s part, on the basis that no reasonable director could possibly have believed it was not in the company’s interests to know of his misdeeds (at [44]).

For company directors, this is a helpful rationalisation of Bhullar and Cooley. If a director discovers an opportunity that is proximate to his company’s business, but he neither takes it up himself nor discloses it to the company, he will not be liable unless he (subjectively) believed it was in the company’s interests to know of it. This is much harder to establish than the (objective) “possibility” of conflict that would fix him with liability were he to exploit the opportunity himself.

A second point raised obliquely by Fassihi is the proper characterisation of this underlying duty to act in good faith in the best interests of the company. Arden L.J. described it as a “duty of loyalty”, and also as a “fiduciary principle” (at [41], [44]). It is clear that the “distinguishing obligation of a fiduciary is the obligation of loyalty” (Bristol and West B.S. v. Mothew [1998] Ch. 1, 18), but the fiduciary descriptor loses all analytical value unless it is “confined to those duties which are peculiar to fiduciaries” (Mothew, at p. 16). Arden L.J. did not need to decide, and did not decide, whether the duty she identified Fassihi as having breached was fiduciary in the sense of being peculiar to fiduciaries. Indeed, she seemed to accept (at [55], [60]) that it was possible for an employee to owe an equivalent duty, which suggests the duty may not be peculiarly fiduciary, given that employees are not normally
regarded as fiduciaries (e.g., Imperial Group Pension Trust Ltd. v. Imperial Tobacco Ltd. [1991] 1 W.L.R. 589 at pp. 596–597).

Finally, Fassihi is noteworthy for Arden L.J.’s employment of economic analysis. She referred to the economic theory of “agency costs”, concluding that it would be economically efficient for a director to be bound to disclose in this case, notwithstanding the vanishing likelihood of compliance. This is surely so. A director’s duty of loyalty is subjective because the director, rather than the court, is normally better placed to determine where the company’s interests lie. The fact that directors will rarely be shown to have breached this duty is no basis for not applying it; such cases will, by definition, be the most egregious examples of misconduct and should carry liability.

JOHN ARMOUR
MATTHEW CONAGLEN

FROM RIO TO MECA: ANOTHER STEP ON THE WINDING ROAD OF COMPETITION LAW AND SPORT

On 19 December 2003, a Football Association (“FA”) disciplinary hearing found Rio Ferdinand, the Manchester United and England defender, guilty of failing to submit to drug testing, and imposed a fine of £50,000 and an eight-month playing ban. Alex Ferguson publicly attributed United’s failure to win the 2003/04 Premiership title in part to the loss of his key defender. However, United’s loss was not merely sporting: reports suggest that the cost of the club’s decision to continue paying Ferdinand’s wages in full during his eight months of inactivity was more than £2.4 million. Chelsea was far less supportive in October 2004 when its Romanian striker Adrian Mutu tested positive for cocaine: in addition to receiving a £20,000 fine and a seven-month playing ban from the FA, Mutu had his contract terminated by the club on the ground of gross misconduct. Doping rules of the type applied to Ferdinand and Mutu are common in professional and amateur sports. In Case T-313/02 Meca-Medina v. Commission, the Court of First Instance (“CFI”) considered the compatibility with the competition rules of the EC Treaty of the doping control rules of the International Olympic Committee (“IOC”). In doing so, the CFI set out its approach to the vexed issue of how competition law, and in particular Article 81, should be applied to the rules of sporting organizations and agreements in the sporting sector more generally.
The issue is vexed because, as has been noted by commentators (e.g., Lewis and Taylor, Sport: Law and Practice (Butterworths, 2003), p. 346), “[t]he competition rules of the EC Treaty were drafted with more orthodox industries in mind than sport”. Horizontal co-operation between economic competitors is generally viewed with suspicion by competition law. In sport, however, a degree of co-operation between sporting competitors is often necessary to create the sporting product itself (e.g., a league competition) and/or to safeguard certain intrinsically valuable aspects of a sport (e.g., agreement on doping rules in order to maintain a perception of fairness of competition). A degree of financial redistribution between sporting competitors (typically from stronger to weaker participants) may also be desirable in order to maintain uncertainty of outcome. However, those considerations do not apply to all forms of co-operation in the sporting sector: certain agreements, such as the joint or centralised marketing of sporting media rights, are primarily economic in nature and are not directly related to the characteristics or organization of the sporting competition itself.

It is accepted by both the European Commission and the European Court of Justice (“ECJ”) that Article 81 EC should be applied in a way that is sensitive to the special characteristics of sport. The issue is precisely how this should be achieved within the legal framework. Even if a sporting rule or agreement imposes de facto restrictions on sporting undertakings, there are at least three potential pathways for it to be compatible with Article 81. First, agreements in the sporting sector will not be subject to Community law at all if they do not constitute economic activity within the meaning of Article 2 of the EC Treaty (C-36/74 Walrave and Koch [1974] E.C.R. 1405, paragraph 4). Second, agreements which might otherwise be considered to restrict competition may be compatible with Article 81(1) if they are “indispensable for attaining legitimate objectives deriving from the particular nature of [the sport]” (C-51/96 Deliege [2000] E.C.R. I–2549, Opinion of Advocate General Cosmas, paragraph 112). That possibility falls within the line of case law sometimes referred to as the “rule of reason” cases, including C-250/92 Gottrup-Klim [1994] E.C.R. I–5641 and C-303/99 Wouters [2002] E.C.R. I–1577. Third, even if sporting agreements are caught by Article 81(1), they may satisfy the Article 81(3) exemption criteria.

In Meca-Medina, two swimmers who had been banned under the IOC’s doping rules for two years for testing positive for the drug nandrolone argued that the doping provisions were contrary to Article 81 (and also Articles 82 and 49) EC. The CFI accepted
that high-level sport had become, to a great extent, an economic activity, and that sporting rules such as the IOC’s doping rules had economic repercussions for sportsmen and sportswomen. However, the CFI nonetheless held that the doping rules fell outside the scope of the competition rules and other Community provisions relating to the economic freedoms on the basis that “the prohibition of doping is based on purely sporting considerations and therefore has nothing to do with any economic consideration” (paragraph 47). In the light of that conclusion, it was not necessary for the CFI to consider whether the doping rules could be justified for the purpose of a Wouters-type analysis under Article 81(1) or under the Article 81(3) exemption criteria.

Although it is easy to accept that the IOC’s doping rules were justifiable and not contrary to Article 81, the CFI’s reasoning is problematic. The basis for the CFI’s judgment was that, although doping rules may have significant economic consequences (such as those experienced in the Ferdinand and Mutu examples), they fall outside the scope of Article 2 EC and hence the competition rules because their objective is sporting rather than economic. However, as a matter of principle, the question of whether rules relating to a certain activity fall within the scope of Article 2 should be determined by reference to whether or not the activity affected by the rules is economic in nature, and not by reference to the nature of the rules’ objective. In addition to being contrary to principle, an approach based on the objective of a rule is likely to generate uncertainty, as the actual objective of a rule may be the subject of controversy, and rules may have more than one objective.

The CFI’s approach is also difficult to reconcile with that of the ECJ in joined cases C-51/96 and C-191/97 Deliege [2000] E.C.R. I-2549, in which the ECJ considered whether certain tournament selection rules of a Belgian judo association fell within the scope of Article 2. As the case concerned two references under Article 177 (now Article 234) EC, the ECJ left the final decision on the facts to the national court. Nonetheless, in setting out its criteria of interpretation, the ECJ considered the activities affected by the selection rules and noted that “sporting activities and, in particular, a high-ranking athlete’s participation in international competition are capable of involving the provision of a number of separate, but closely related, services”. The ECJ did not state that the fact that the selection rules had a sporting objective was sufficient to take the rules outside the scope of Article 2. The ECJ therefore went on to consider whether the rules could be said to constitute a restriction on the freedom to provide services (under Article 59 (now 49) EC).
The CFI’s approach appears to be motivated by a desire to avoid subjecting rules with a sporting objective to a full assessment under Article 81, almost certainly because of doubts as to the appropriateness of close scrutiny of sporting rules by EC law. That is not a wholly unreasonable concern. However, it is not the case that competition law is incapable of taking sporting considerations into account: if a rule has a good sporting justification and is proportionate, there is no reason why it could not be justified either on the basis of a Wouters-type analysis under Article 81(1) or under the Article 81(3) exemption criteria. If, on the other hand, a rule in the sporting sector generates appreciably restrictive effects on competition and is not in fact necessary and proportionate, for example because the same benefits could be achieved by a less restrictive rule, it is not obvious why the rule should not be prohibited by Article 81. This area therefore remains difficult and the correct legal approach uncertain. It is to be hoped that the ECJ will in due course have an opportunity to consider the CFI’s judgment in Meca-Medina and provide clarity.

JULIAN GREGORY

LEGAL ADVICE PRIVILEGE AND PRESENTATIONAL ADVICE

In Three Rivers District Council v. Governor and Company of the Bank of England (No. 6) [2004] UKHL 48, [2004] 3 W.L.R. 1274 (‘’Three Rivers (No. 6)’’) the House of Lords held that legal advice privilege is not restricted to advice about legal rights and liabilities but extends to “presentational advice”.

The claim for privilege arose in litigation following an inquiry into the collapse of the Bank of Credit and Commerce International SA (“BCCI”). The inquiry considered the manner in which the Bank of England (“the Bank”) discharged its statutory role to supervise financial institutions in particular. The Bank engaged Freshfields, and appointed officials within the Bank (the Bingham Inquiry Unit (“BIU”)) to co-ordinate communications with and submissions to the inquiry. Section 1(4) of the Banking Act 1987 relieves the Bank of any liability unless it discharged its obligations “in bad faith”. As a result, the claim by BCCI’s liquidators and creditors against the Bank alleged misfeasance in public office. As Lord Scott noted, given the need to demonstrate bad faith, it was not surprising that the claimants sought disclosure from the Bank in the widest possible terms.
The Bank claimed that communications between BIU and Freshfields relating to a statement to be submitted to the inquiry qualified for legal professional privilege. The authorities distinguish between legal advice privilege and litigation privilege. In light of Re L (a minor) [1997] A.C. 16 (which held that litigation privilege attaches only to “adversarial” and not to “inquisitorial” or “investigative” proceedings) the Bank relied on legal advice privilege, which protects communications between lawyer and client for the purpose of seeking and furnishing legal advice.

Tomlinson J. held that it was implicit in an earlier Court of Appeal decision that privilege did not extend to advice as to how the Bank’s evidence might be best presented to the inquiry: [2003] EWHC 2565 (Comm). The Court of Appeal dismissed the Bank’s appeal on the basis that legal professional privilege is an extension of litigation privilege and is therefore restricted to advice about legal rights and obligations, and does not extend to “presentational advice”: [2004] EWCA Civ 218, [2004] Q.B. 916.

The House of Lords unanimously rejected this approach. Finding that there was no a priori reason why legal professional privilege should be regarded as stemming either from litigation privilege or more generally from the giving of legal advice, the House of Lords considered the authorities and held that they were clear: legal professional privilege is not dependent on there being a link to litigation.

The Court of Appeal’s narrow approach appears to have been prompted by more general doubts about the value of legal advice privilege. The House of Lords did not share these doubts. All judgments endorsed the desirability, in a complex world, of orderly arrangement of affairs. This requires candour in dealings with lawyers, which, in turn, depends on assurance that matters discussed will not be disclosed except with the client’s consent. However, the House of Lords acknowledged that the inevitable conflict with the interest in placing all relevant material before the court demands that the privilege be kept within limits.

With this in mind, the House of Lords endorsed the Court of Appeal’s approach in Balabel v. Air India [1988] Ch. 317, especially the observation of Taylor L.J. at 330 that “legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context”.

The consensus which emerges from Three Rivers (No. 6) is that advice is “legal” where it involves use of legal skills. Legal skills relate to matters “within the ordinary scope of a solicitor’s duty”. More specifically, advising on presentation of the client and the
client’s story in the most favourable light, determining which material is relevant and assembling it in an orderly fashion are “unquestionably legal skills”. Lord Rodger noted that the Bank was not seeking Freshfields’ assistance “as bankers, accountants, rhetoricians or anything else: it was seeking their comments and assistance as lawyers professing expertise in the field”.

This advice must be given in a legal context—it must relate to rights, liabilities, obligations or remedies under private or public law. However, this does not demand that the client’s rights or obligations are at stake. The importance of the interest in protecting personal reputation was noted, as was the fact that clients may legitimately consult their lawyers about someone else’s legal position. It was suggested that privilege will apply to advice given to participants in all courts, tribunals and inquiries including inquests and planning inquiries, to promoters and opponents of private bills and to advice by Parliamentary counsel to the Government relating to the preparation of public bills. Baroness Hale suggested that whether the context is legal “may depend upon whether it is one in which it is reasonable for the client to consult the special professional knowledge and skills of a lawyer”.

While accepting the possibility of marginal cases, the House of Lords thought that the case before it was “not in the least marginal”. The advice sought involved the application of legal skills in the context of an inquiry into whether the Bank’s discharge of its obligations under the Banking Acts had been reasonable in the circumstances.

This clarification of legal advice privilege is welcome. However, this privilege only protects communications between lawyer and client. In *Three Rivers District Council v. Governor and Company of the Bank of England (No. 5)* [2003] EWCA Civ 474, [2003] Q.B. 1556 the Court of Appeal held that Freshfields’ “client” was BIU only, not other employees of the Bank. That decision was not the subject of the appeal in *Three Rivers (No. 6)* and the House of Lords refused to approve or disapprove it. However, Lord Carswell drew attention to the fact that the Court of Appeal adopted this approach “even though it recognised that a corporation can only act through its employees”. The weight of opinion is against this restrictive approach to who is the “client” and it seems likely that this issue will also come to the House of Lords.

**Jillaine Seymour**