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# Analysis

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## Final Appellate Jurisdiction in the Scottish Legal System: The End of the Anomaly?

In December 2008 the Cabinet Secretary for Justice asked Professor Neil Walker, Regius Professor of Public Law and the Law of Nature and Nations in the University of Edinburgh, to undertake an examination of final appellate jurisdiction in the Scottish legal system in the light of the establishment of the new United Kingdom Supreme Court by the Constitutional Reform Act 2005. In working out the new court's jurisdiction, it will be recalled, no attempt had been made to address the historical anomaly whereby appeals lay to the House of Lords from the Court of Session but not from the High Court of Justiciary. The failure to address the anomaly attracted some criticism at the time.<sup>1</sup> A subsequent attempt by Nationalist MSP Adam Ingram to abolish the right of appeal in civil cases by means of a member's bill in the Scottish Parliament effectively failed when the Presiding Officer ruled that a large number of the bill's provisions were outside the Parliament's legislative competence.<sup>2</sup> It was no surprise therefore that a Nationalist government should come back to the question.

A reading of Professor Walker's report<sup>3</sup> prompts a number of questions: about the nature of modern Scots law, by which I mean Scots law ten years after devolution; about the relationship between the different legal systems that make up the United Kingdom; about UK law and GB law, which appear "as through a glass darkly" at various points in the report; and about the essential nature of United Kingdom institutions such as the Supreme Court — are we to understand them as genuinely United Kingdom institutions, or are they essentially English institutions with a United Kingdom gloss, or a sometimes uneasy combination of the two? — Immediate interest in the report, however, is less likely to lie in these questions than in the six models of reform set out in the final chapter. Six models — nine if we include the variations on three of the models — might seem rather too many. Analysis reveals, however, that there are essentially four underlying models of reform, of which only two are practical

1 J Chalmers, "Scottish appeals and the proposed Supreme Court" (2004) 8 EdinLR 4; G Gretton, "Scotland and the Supreme Court" 2003 SLT (News) 265; H MacQueen, "Scotland and a Supreme Court for the UK?" 2003 SLT (News) 279; C Himsworth, "A Supreme Court for the United Kingdom" 2003 SCOLAG 178.

2 The bill was the Civil Appeals (Scotland) Bill 2006. For discussion, see C Himsworth "Presiding officer statements on the competence of bills" (2007) 11 EdinLR 397.

3 Scottish Government, *Final Appellate Jurisdiction in the Scottish Legal System* (2010, available at <http://www.scotland.gov.uk/Publications/2010/01/19154813/0>).

possibilities at the present time: the status quo and what we might term “Scots law plus” or “Scots law max”.

### A. THE MODELS

Model 1 – a fully autonomous appellate court system – is the independence model, which of course is not an option until such time as independence is an option. The report, however, includes an interesting discussion of what the final appellate jurisdiction in an independent Scotland might look like, and in particular how constitutional cases might be treated. It suggests that the Irish model of a self-standing Supreme Court with separate procedures for ordinary and constitutional cases would offer the ideal blueprint, but it should be remembered that Kelsen’s alternative model of a separate constitutional court had its origins in an unwillingness to entrust decisions of such importance to the ordinary courts. The question for an independent Scotland would indeed be whether it was willing to do so.

Model 2 – the fully integrated model with criminal and civil appeals as well as devolution issues being dealt with in London – pursues the logic of a unitary state to its ultimate conclusion. Since no one has ever proposed this, either at the time of the Union or since, it is not clear why it was felt necessary to include it, but the report waxes suitably indignant at the prospect of the “disappearance” of Scots law and the “effective destruction” of the Scottish legal system.<sup>4</sup>

Model 3 is the status quo, which was (re)affirmed when the Constitutional Reform Act 2005 was under discussion. At that time the United Kingdom government said there was “no evidence that the Scottish criminal appeals system required change”, and that the Scottish government was “in principle content for civil appeals to the new Court to be on the same basis as currently operates in relation to London”, adding that there “are benefits to the Scottish [civil] justice system in having important cases reviewed by judges with a different background, and indeed advantages to the larger jurisdiction also in drawing on the resources of a different legal tradition at the highest level”.<sup>5</sup> The report also finds merit in the status quo, because it is “able informally to capture with some success the appropriate mix of divergence and convergence between the separate but inextricable bodies of Scots and English law”.<sup>6</sup> But it rejects it as ultimately unsatisfactory, both because it does not address the anomalous treatment of civil and criminal appeals, and because it cannot guarantee the things that ensure “continuing respect for and commitment to the development of Scots law as a ‘relatively autonomous’ achievement”.<sup>7</sup> The report identifies these things as: a healthy flow of “good cases”, continuing Scottish representation on the Supreme Court – here the report arguably underestimates the strength of the safeguards of the separate identity of Scots law in the 2005 Act – and a commitment

4 Ch 6.3.1.

5 Department for Constitutional Affairs, *Constitutional Reform: A Supreme Court for the United Kingdom* (2003) paras 26-27.

6 Scottish Government, *Final Appellate Jurisdiction* (n 3) ch 6.4.

7 Ch 6.4.

on the part of the non-Scottish members of the Supreme Court to Scots law *qua* Scots law.<sup>8</sup>

Whether institutional reform alone can guarantee these things is an interesting question. Before we turn to the other three models, however, we should pause to note one feature of the status quo which the report leaves out of the account, but which is crucial to any consideration of the final appellate jurisdiction, and that is a Scottish Parliament with legislative competence over many areas of what is understood by Scots law. The Supreme Court in all its wisdom may say “the law is X” but it is perfectly open to the Scottish Parliament, within the limits of its legislative competence, to say “the law is Y”. The Damages (Asbestos-related Conditions) (Scotland) Act 2009 in which the Parliament took a different view from the House of Lords on whether pleural plaques should be actionable in damages offers a striking example in what might be regarded as one of the core areas of traditional Scots law.<sup>9</sup> The question of final appellate jurisdiction needs therefore to be seen in its proper constitutional context, a constitutional context that is rather more favourable to Scots law than the report’s assessment of the status quo suggests.

The remaining three models might be treated under the heading of “Scots law plus” or “Scots law max”. What they have in common is that they are directed to the more appropriate treatment of Scottish appeals that raise distinctly Scottish issues within the limits of our current constitutional arrangements; what is sought in these models is a final appellate system “guaranteed to treat with appropriate distinctiveness those areas of Scots law – civil *and* criminal – that diverge substantially from English law”.<sup>10</sup>

Model 4 – a Scottish chamber or division of the Supreme Court – would see the Supreme Court “reconfigured and ‘federalized’ such that in all or some Scottish cases it would sit as a dedicated Scottish divisional court with only Scottish judges serving, or at least with a guarantee of a majority of Scottish judges”.<sup>11</sup> The attractions of this model are not obvious save that it would be possible for the Supreme Court to come to Edinburgh – or Airdrie – but its essential weakness is that it overlooks the very real Scottish interest in the appeals from the rest of the United Kingdom that make up the bulk of the jurisdiction of the Supreme Court. The danger in our current constitutional arrangements is not that of the effective destruction of the Scottish legal system – the Parliament is guarantee enough against that – but rather that Scottish interests are assumed to be identical to those of England, overwhelmingly the most important jurisdiction in the United Kingdom, and it is for that reason if no other that Scottish representation on the Supreme Court will continue to be of paramount importance.

8 Ibid.

9 A challenge to the *vires* of the Act failed in *Axa General Insurance Ltd and others, Ptrs* [2010] CSOH 2, 2010 SLT 179; see F McCarthy, “Actionable rights and wrongs: human rights challenges in *AXA General Insurance Ltd*” (2010) 14 EdinLR 284.

10 Scottish Government, *Final Appellate Jurisdiction* (n 3) ch 6.3.2 (emphasis in original).

11 Ch 6.5.

Model 6 would see the Supreme Court recast as the United Kingdom equivalent of the European Court of Justice, responding to requests for preliminary rulings from the “member states”. The report rejects this model on the grounds that its advantages seem more apparent than real, and are in any case offset by other objections.<sup>12</sup>

That leaves model 5 – the preferred model of a “quasi-federal Supreme Court”.<sup>13</sup> Under this model there would be a requirement of leave, in place of the currently unrestricted right of appeal, and only those Scottish cases that were of common interest – criminal as well as civil – would be heard by the Supreme Court, preferably at a Scottish location, leaving distinctly Scottish cases to be dealt with by the Scottish courts. The current absence of a right of appeal in criminal matters, save indirectly in respect of devolution issues, would therefore be ended in favour of a more limited right of appeal to the Supreme Court in both criminal and civil matters.

The report addresses the criteria by which distinctly Scottish cases might be distinguished from those of common interest. The boundary between reserved and devolved matters features but as only one of a number of possible starting points. Given, however, that it is the basis of the Parliament’s legislative competence, it is difficult not to see it as the basis of the final appellate jurisdiction as well. The report argues that, were it to be used, the result would be to exclude “some matters of common principle which lack ... a common statutory background”,<sup>14</sup> but the preferred alternative of “matters common” sounds like an invitation to rewrite the devolution settlement under the guise of addressing matters of common interest. In this respect as in others the report may be said to take insufficient account of how far we have travelled and to make too much of the lack of “fixity and finality” in our current constitutional arrangements.<sup>15</sup>

The report sidesteps the question of the “repatriation” of criminal appeals raising devolution issues on the grounds that this is a matter for London.<sup>16</sup> Given that this is one of the real points of contention in the current system, the lack of discussion both here and in the report of the Calman Commission<sup>17</sup> is to be regretted. Scotland was regarded as perfectly capable of running its own criminal justice system in 1876, when the House of Lords finally declined jurisdiction in criminal appeals,<sup>18</sup> and it is by no means obvious that Convention rights alone provide sufficient justification for departing from that view now.

## B. CONCLUSION

Short of independence, therefore, what the report proposes is not the wholesale abandonment of appeals to London or the repatriation of civil appeals from London

<sup>12</sup> Ch 6.7.

<sup>13</sup> Ch 6.6.

<sup>14</sup> Ch 6.6 n 36.

<sup>15</sup> Ch 2.4.

<sup>16</sup> Ch 6.6.

<sup>17</sup> Commission on Scottish Devolution, *Serving Scotland Better: Scotland and the United Kingdom in the 21<sup>st</sup> Century* (2009) paras 5.31-5.37.

<sup>18</sup> *Mackintosh v Lord Advocate* (1876) 3 R (HL) 34.

but a more restricted right of appeal in criminal as well as civil matters. The report makes for heavy going in places, but one feels that Professor Walker is pointing us in the right direction. In a system in which the law is increasingly made in Edinburgh, it will come to be seen as more and more anomalous for questions about that law, issues of legislative competence aside, to be answered in London – even if London does come to Edinburgh for the purpose of answering them. Just as the final say on European law lies in Luxembourg and Strasbourg, and the final say on English law, and, for the time being at least, UK law and GB law, lies in London, so too we would expect the final say on a renascent Scots law to lie in Edinburgh. Such is the nature of our “pluralist” or as I would prefer to think of it “multi-level” legal system.

That is not to say it will happen or happen quickly. “Nationalists end centuries-old tie with London.” The prospect of such headlines may prompt nationalists to pause until such time as bigger questions are resolved, or, more sensibly, to wrap up the question of final appellate jurisdiction with the Gill Review. In the meantime there may be more merit in the current arrangements than the report allows.

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## Equity Rising? *Commonwealth Oil & Gas Co Ltd v Baxter*

The duties of a fiduciary can seem clear. The central duty, from which all others may be said to flow, is one of loyalty<sup>1</sup> – the fiduciary must exercise fidelity to the interests of his constituent. But the law relating to fiduciaries does not admit of simplification quite so conveniently. It is one thing to say that a fiduciary owes a duty of loyalty; it is quite another to identify what makes someone a fiduciary, let alone consider the competing legal mechanisms that protect the fiduciary’s constituent.

The legal tools that might be used to regulate fiduciary misconduct are varied. The most likely mechanisms may entail the following remedial responses: personal gain-based remedies, possibly derived from the prohibition against unjustified enrichment; personal delictual or reparatory remedies constituted by wrongful conduct; the imposition of a constructive trust; or other proprietary remedy which might flow from the law of trusts. It will be clear that these conceptually distinct remedial responses give different measures of recovery, and indeed affect third parties in different ways. In *Commonwealth Oil & Gas Co Ltd v Baxter*,<sup>2</sup> the Inner House

<sup>1</sup> See M Conaglen, “The nature and function of fiduciary loyalty” (2005) 121 LQR 452.

<sup>2</sup> *Commonwealth Oil & Gas Co Ltd v Baxter* [2009] CSIH 75, 2009 SLT 1123.

had to consider fiduciary liability in relation to an action of damages raised by an oil company, Commonwealth Oil & Gas Co Ltd, against one of its former non-executive directors, Nicholas Baxter, and another company, Eurasia Energy Ltd.

### A. THE FACTS

The facts may be summarised as follows.<sup>3</sup> Baxter and an associate formed and incorporated Commonwealth Oil in Anguilla in 1995, and Baxter was made chief operating officer in addition to his appointment as a director. At this time, Commonwealth Oil was a wholly owned subsidiary of A & B Geoscience Corporation (ABC), which itself was originally formed by Baxter and his associate. The companies were concerned with mineral exploration and exploitation.

In 2001 ABC entered into discussions with Vitol Services Ltd, and an agreement was reached whereby, in return for finance, Vitol acquired share options and effective control of Commonwealth Oil. Subsequently, “difficulties arose”<sup>4</sup> that effectively forced Baxter to resign his positions with both companies. In compensation, a number of termination and consultancy agreements were negotiated. An important aspect of these related to tax: essentially, if Baxter could retain a directorship he would reap a significant tax advantage. In April 2004 Baxter was re-appointed a director of Commonwealth Oil, albeit with no specific management duties or executive functions.

In February 2005 Baxter offered to assist with developing opportunities for Commonwealth Oil, as he had in the past. He specifically asked what sorts of project the company was interested in, to which the response was onshore projects. At no point did Baxter mention his involvement in a potential offshore project in Azerbaijan (the Eurasia block). This did not represent, from Baxter’s perspective, any conflict of interest – as far as he was concerned, the company was not interested in offshore projects.<sup>5</sup> In November 2005 Baxter was appointed president and chief executive officer of Eurasia Energy Ltd, and on 7 December 2005 a memorandum of understanding between the State Oil Company of the Azerbaijan Republic (SOCAR) and Eurasia was executed, giving Eurasia the exclusive right to negotiate exploitation rights with SOCAR. It was accepted in evidence that the conclusion of the memorandum had been achieved by Baxter using personal contacts and knowledge obtained independently of his role as a director of Commonwealth Oil. On 9 December Baxter informed Commonwealth Oil of the conclusion of the memorandum, resigning his directorship of that company shortly thereafter.

<sup>3</sup> Space prevents a detailed discussion of the convoluted facts, especially the numerous different legal persons: for an exhaustive account see *Commonwealth Oil & Gas Co Ltd* at paras 29-70, and the decision at first instance: [2007] CSOH 198 at paras 4-153 per Lord Reed.

<sup>4</sup> [2009] CSIH 75 at para 29 per Lord Nimmo Smith.

<sup>5</sup> Later, Commonwealth Oil was to regard this view as “ludicrous”, on the basis that what made mineral exploitation in Azerbaijan difficult was not finding and exploiting oil fields but securing an agreement with SOCAR to allow such exploitation in the first place. Baxter had shown himself to be effective at concluding such agreements.

Commonwealth Oil sought damages from both Baxter and Eurasia on the basis that Baxter, while still a director, had diverted to Eurasia a valuable commercial opportunity.

### B. DIRECTORS' FIDUCIARY LIABILITY

The legal issues for the court were tailored according to the defenders: the first legal issue related to the fact that Baxter was a director of the pursuer, and hence a fiduciary; the second issue concerned the liability of Eurasia, and as such was dependent upon Baxter's fiduciary character.

Baxter argued that a director's duty of loyalty was breached only where there was a conflict between a director's personal interests and those of his constituent, and where the conflicting interests arose from the exercise of his functions as director. This allowed Baxter to argue that, because the exploitation opportunity arose from activities outwith his role as a director of Commonwealth Oil, he could not be held to have breached his core duty of loyalty.<sup>6</sup> The Inner House had no difficulty in rejecting that argument,<sup>7</sup> though it was recognised that in circumstances where the constituent company had no interest at all there might not be a breach of the duty of loyalty. The key question of law was whether there was a "real sensible possibility of conflict".<sup>8</sup> It was held that there was a real sensible possibility that Commonwealth Oil would be interested in Baxter's agreement with SOCAR. To secure the tax advantage that the directorship was intended to achieve that office had to be real, and as such carried all the incidents of that office. Lord Nimmo Smith rejected the argument that Baxter's effective removal from executive functions for Commonwealth Oil rendered his directorship an empty shell without concomitant duties to the company.<sup>9</sup> This aspect of the decision is entirely consonant with the leading authorities on fiduciary liability and must be correct. More broadly, the decision is the latest of many assertions that Scottish and English authorities relating to the breach of a director's duty of loyalty, and probably with respect to fiduciary duties generally, are as one in terms of content,<sup>10</sup> even if their conceptual bases might be different.

6 Relying upon *London and Mashonaland Exploration Company Ltd v New Mashonaland Exploration Company Ltd* [1891] WN 165; *Bell v Lever Brothers Ltd* [1932] AC 161.

7 Relying on the standard authorities in the area: *Aberdeen Railway Co v Blaikie Bros* (1854) 1 Macq 461; *Bray v Ford* [1896] AC 44; *Boardman v Phipps* [1967] 2 AC 46.

8 *Commonwealth Oil* at para 78.

9 Para 78, and the Lord President (Hamilton) expressly concurred with this reasoning at para 13.

10 One should enter an important caveat here relating to a *positive* duty upon a director to disclose information to the company. At first instance the Lord Ordinary (Reed) stated, following consideration of English authorities, that a director would have to disclose such information: [2007] CSOH 198 at paras 183-185. The Lord President (at para 14) reserved his opinion on this matter, emphasising that the duties of a fiduciary are proscriptive and not prescriptive, and Lord Nimmo Smith appeared to go further by distancing himself from such an approach (at para 82).



### C. KNOWING RECEIPT

The legal issue which pertained to the liability of Eurasia will perhaps engender more unease. A form of liability of a recipient of property from a dishonest trustee or fiduciary is commonly known as “knowing receipt”, while the liability of a third party assisting a trustee or fiduciary in breaching a fiduciary obligation is commonly termed “knowing assistance”. Relying upon the doctrine of knowing receipt, the pursuer claimed that it was entitled to “reparation” from Eurasia on the basis that Eurasia had benefited from Baxter’s breach of his fiduciary duties. The court’s decision on this point rested upon a narrow basis:<sup>11</sup> in order to incur liability for knowing receipt there must be trust property which is capable of being disposed of by the trustee or fiduciary. This conclusion flows inexorably from the fact that liability for knowing receipt in English law is “receipt-based” – the action flows from receiving trust property. In *Commonwealth Oil* there was no ground for knowing receipt because there was no trust property.<sup>12</sup> This aspect of the decision must be correct – one may contract for future property but one may not own it – though there are broader issues that emerge from the decision.

### D. ANALYSIS

A major question posed by the case is the extent to which the doctrines of knowing receipt and knowing assistance constitute useful components of the law of Scotland; further, there is a related question as to whether these nominate doctrines actually do constitute the law of Scotland. The Inner House appeared to accept that, if there had been trust property involved, the doctrine of knowing receipt would have operated. In respect of the usefulness of the doctrines one should remember that the *locus classicus* of these forms of liability is the judgment of Lord Selborne in *Barnes v Addy*,<sup>13</sup> a decision of the Court of Appeal in Chancery, which pre-dated the fusion of equity and law courts,<sup>14</sup> and as such rests heavily upon equitable principles and talks in terms of constructive trusteeship.

In respect of knowing receipt – unlike knowing assistance<sup>15</sup> – a clearly enunciated approach in a leading case is still awaited in England to clarify enduring questions with respect to the features of such liability, and particularly the quality of third party

11 Relying upon the leading English case of *El Ajou v Dollar Land Holdings plc* [1994] 2 All ER 685 at 700 per Hoffmann LJ.

12 *Commonwealth Oil* at paras 94-96 per Lord Nimmo Smith.

13 *Barnes v Addy* (1874) LR 9 Ch App 244 at 251-252.

14 A process achieved through various Judicature Acts, 1873-75.

15 In England the doctrine of “knowing assistance”, or perhaps more accurately now “dishonest assistance”, has been the subject of considerable development and clarification at the highest level: *Royal Brunei Airlines v Tan* [1995] 2 AC 378; *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164; *Barlow Clowes International Ltd (In Liquidation) v Eurotrust International Ltd* [2005] UKPC 37, [2006] 1 WLR 1476; *Abou-Rahmah v Abacha* [2006] EWCA Civ 1492, [2007] All ER (Comm) 827; *Starglade Properties v Nash* [2009] EWHC 148 (Ch).

knowledge required, in a world of fusion between equity and the common law.<sup>16</sup> What is clear is that liability for knowing receipt in England is increasingly seen as a personal remedy – whether such personal liability rests upon the basis of an equitable wrong of receiving trust property with some, as yet unsettled, degree of knowledge,<sup>17</sup> or upon personal liability for receipt which is strict and flows from the principles of unjust enrichment.<sup>18</sup> There are also proprietary remedies which can arise in areas close to the fact situations in which liability for knowing receipt arises. Therefore, following the clarification in *Foskett v McKeown*,<sup>19</sup> it is clear that beneficiaries of a trust may raise proprietary claims based upon either following or tracing. However, it must be kept in mind that such proprietary remedies lie upon a different ground from the personal liability with which knowing receipt is concerned. Knowing receipt is therefore used to fix personal liability upon a “beneficial recipient”<sup>20</sup> of property, and often features in cases where the recipient has consumed or otherwise dispersed the property.

In *Commonwealth Oil* the Lord President (Hamilton) states that “[a]uthority in Scotland on the requisites of liability for knowing receipt is sparse. It is, however, clear that its foundation lies in the law of trusts...”.<sup>21</sup> In truth the authority for the nominate doctrine of knowing receipt (as opposed to another form of personal liability)<sup>22</sup> is sparse indeed.<sup>23</sup> Of course, the *substance* of third party personal liability might be found elsewhere in the law, such as within the law of reparation or unjustified enrichment, but, crucially, not expressed as those nominate claims derived from the Chancery jurisprudence of *Barnes v Addy*.

Later in his judgment the Lord President states “I would add only that knowing receipt appears to me to be, primarily at least, a restitutionary remedy”.<sup>24</sup> His

16 Lord Nicholls of Birkenhead, “Knowing receipt: the need for a new landmark”, in W Cornish et al (eds), *Restitution, Past, Present and Future: Essays in Honour of Gareth Jones* (1998); R Walker, “Dishonesty and unconscionable conduct in commercial life – some reflections on accessory liability and knowing receipt” (2005) 27 Sydney LR 187; M Bryan, “The liability of the recipient: restitution at common law or wrongdoing in equity?” in S Degeling and J Edelman (eds), *Equity in Commercial Law* (2005) 327; G Virgo, “The role of fault in the law of restitution”, in A Burrows and A Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (2006) 83.

17 S Elliott and C Mitchell, “Remedies for dishonest assistance” (2004) 67 MLR 16; C Mitchell, “Dishonest assistance, knowing receipt, and the law of limitation” (2008) 72 Conv 226. See also *Farah Constructions Pty Ltd v Say-Dee Ltd* [2007] HCA 22.

18 See the references in n 16 above.

19 *Foskett v McKeown* [2001] 1 AC 102.

20 If legal title passed to the recipient, the doctrine of knowing receipt is not applicable because a common law duty arises to compensate the value of the property, and there is no role for the intervention of equity: *Criterion Properties plc v Stratford* [2004] UKHL 28, [2004] 1 WLR 1846.

21 *Commonwealth Oil* at para 16, citing A J P Menzies, *The Law of Scotland Affecting Trustees*, 2<sup>nd</sup> edn (1913) para 1271. The danger of relying upon Menzies as an authority on Scottish law, given its free use of English precedents, has been expressed before: G W Wilton, “Trust law” (1933) 45 JR 295 at 295.

22 See the approach taken by the Lord Ordinary (Reed): [2007] CSOH 198 at para 197.

23 Before *Commonwealth Oil* it appears that *Barnes v Addy* had been cited in only two Scottish cases: *Raes v Meek* (1886) 13 R 1036 and *Bank of Scotland v Macleod Paxton Woolard & Co* 1998 SLT 258 at 274 per Lord Coulsfield.

24 *Commonwealth Oil* at para 20.

meaning, however, is unclear because “restitution” can refer either to an enrichment or to a proprietary claim. The Lord President may have been expressing the view that “knowing receipt” in Scots law, as a personal remedy, rests upon the principle against unjustified enrichment following the developing English analysis along similar lines.<sup>25</sup> Or again the suggestion may be that there is a distinctly Scottish personal “restitutionary” liability arising from the law of trusts. Yet, the mention of restitution and trusts might also be understood to relate to a form of proprietary action, especially because in *Commonwealth Oil & Gas Co* the pleadings sought specific property, and the judgments appear to proceed on this basis.<sup>26</sup> Such an approach, if relying upon English law, would rest upon a misapprehension of that law by conflating the personal and the proprietary. The liability that triggers a claim for knowing receipt is personal. Different legal mechanisms deal with proprietary claims for following specific property or tracing its proceeds.

The judgment of Lord Nimmo Smith might be interpreted as going further:<sup>27</sup>

It appears to me to be clear from the authorities quoted above that knowing receipt depends in the first place on the prior existence of an asset which is subject to a trust in favour of a beneficiary. It is the disposal of that asset, in breach of fiduciary duty, and receipt of that asset by the recipient in knowledge of that breach, which together give rise to a constructive trust over that asset in the hands of the recipient.

Lord Nimmo Smith’s first sentence is unimpeachable with respect to the requirements of the personal knowing receipt liability in English law, but its relation to the second sentence is likely to provoke interest. In English law the recipient in such a scenario might be subject to proprietary liability, but arguably only because there is an identifiable trust asset which can be followed or traced and in which the beneficiary may claim his continuing beneficial interest. If the asset, or more accurately the beneficial interest which it contains, is not capable of being traced or followed, a claim for “knowing receipt” may lie, and may be described as flowing from or erecting a “constructive trust”, but the liability dictated by such a constructive trust is almost certainly personal.<sup>28</sup>

It may be that Lord Nimmo Smith considered that the constructive trust he identified was such a personal constructive trust. On the other hand, the constructive trust conceived of might have been proprietary, and there are residual authorities, especially in Australia, that suggest liability for knowing receipt might entail something like a proprietary constructive trust.<sup>29</sup> It does seem odd that a doctrine which has little apparent credence in Scots law should be adopted in its strongest form, by reference to English authority, when English authority appears to be moving away from such an approach.

<sup>25</sup> See n 16 above.

<sup>26</sup> See *Commonwealth Oil* at para 20.

<sup>27</sup> Para 94.

<sup>28</sup> *Dubai Aluminium Company Ltd v Salaam* [2002] UKHL 48, [2003] 2 AC 366 at paras 132-142 per Lord Millett.

<sup>29</sup> See Bryan (n 16).

If there is a form of “knowing receipt” liability in Scots law which is indeed a proprietary claim from the law of trusts, a number of broader difficulties arise from the facts of this case in particular. It is submitted that receiving property from the trustee of a proper trust fund, whether express or constructive (if one accepts constructive trusts in Scots law), is not necessarily the same as receiving property which was being administered by a fiduciary.<sup>30</sup> A fiduciary, in this case a company director acting within his fiduciary role does not own the company property: the company owns the company property. It is thus difficult to see the scope for a *proprietary* remedy, presumably from the law of trusts, in respect of the recipient, for there is no trust fund or property to be aware of. If, however, one accepts that a proprietary constructive trust attaches to the property that a company director obtains in breach of his fiduciary duty, then clearly the proprietary dimension alters. The Inner House’s approach to “knowing receipt” suggests it was meant in a proprietary sense. Following its (justified) emphasis upon the need for a pre-existing trust asset or fund to ground an action for knowing receipt, the only way in which the recipient of property from a company director could be the subject of a proprietary (or indeed personal claim) would be if such a constructive trust existed. Such an approach raises the spectre of requiring the imposition of a proprietary constructive trust to create the basis for an accessory constructive trust.<sup>31</sup>

## E. CONCLUSION

The uncertainty surrounding the proper use of the term “constructive trust” in England has clear implications in relation to remedial responses to an action resting upon knowing receipt. Similarly contested theories, and difficulties, exist within Scots law, often as a result of the influence of English equity. There is no doubt that Scots law should, and indeed does, recognise personal liability with respect to factual situations similar to those dealt with by knowing assistance and knowing receipt. Looking to the content of the rules relating to knowing receipt and knowing assistance, as developed in the Common Law world, is therefore important. Care, however, must be taken to understand the context within which those rules operate, so that any adoption is conscious and deliberate. The Scots equivalent of knowing (or unconscionable) receipt might be framed by reference to the law on unjustified

<sup>30</sup> It is true that the English notion of knowing receipt is prestatable against fiduciaries as well as trustees: see *Belmont Finance Corp Ltd v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393; *Agip (Africa) Ltd v Jackson* [1991] Ch 547; *Royal Brunei Airlines v Tan* [1995] 2 AC 378 at 392 per Lord Nicholls of Birkenhead. This point was noted at first instance in *Commonwealth Oil* (see [2007] CSOH 198 at para 196), but not addressed in the Inner House. Of course, applying personal liability for the wrongful or unjustified receipt of property from a fiduciary is logically sound: the personal liability flows from the misconduct of the recipient in receiving that property—hence, as we have seen, the lack of a need to show some variety of dishonesty in the fiduciary beyond the breach of his duties. It is quite another matter however to attach a proprietary significance to the transfer of property by a fiduciary.

<sup>31</sup> The conceptual basis and extent of the constructive trust in Scots law is contested, as it is in England: see G L Gretton “Constructive trusts” (1997) 1 EdinLR 281 and 408; C Harpum, “The uses and abuses of constructive trusts: the experience of England and Wales” (1997) 1 EdinLR 437.

enrichment, and the Scots equivalent of knowing (or dishonest) assistance might be framed by reference to the law of delict; on the other hand, they might be dealt with by the law of trusts (and/or fiduciary liability) with proprietary consequences. *Commonwealth Oil & Gas* does not provide a definitive answer to these interrelated uncertainties, beyond the apparent acceptance of the term “knowing receipt” as part of Scots law. Therefore, to an already uncertain sea of concepts and authority we may now add the new currents of the terms “knowing receipt and assistance” – and the intellectual baggage that they carry. It remains to be seen whether these new currents will calm the waters, or make them that bit choppier.

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## Missives by Fax or PDF?

Contracts for the sale of land are subject to a requirement of form. They must be in writing, and signed.<sup>1</sup> But what about delivery? Can an offer or an acceptance – a missive – be sent by fax, or, what comes to the same thing, by a pdf attachment to an email? In practice missives are often sent by fax or pdf.<sup>2</sup> When this happens, the practice is also to send the original by mail, courier or hand delivery, and so the question of whether a missive sent in this way is a valid missive seldom arises, for even if it is not valid, the original arrives hard on its heels.

It matters only if something unexpected happens between (i) the time when the addressee receives the fax or pdf and (ii) the time when the addressee receives the original. The “something unexpected” might be one side having second thoughts about the deal. In *Park, Ptrs (No 2)*<sup>3</sup> it was third-party action, namely an inhibition against the seller. Missives were concluded for the sale of a property in Bothwell, Lanarkshire. Temporary Judge M G Thomson QC takes up the story:<sup>4</sup>

On 31 August 2007, at about 14.50 hours, SM faxed to CBC a copy of an executed qualified acceptance still bearing the date 10 August 2007. Later that afternoon and during business hours CBC faxed to SM a copy of an executed final letter accepting the qualified acceptance. Thereafter, and prior to 1700 hours on 31 August 2007, SM and CBC posted the original

1 Requirements of Writing (Scotland) Act 1995 ss 1, 2.

2 The latter term is used here to refer to a scanned copy of a paper and ink document.

3 [2009] CSOH 122, 2009 SLT 871.

4 Para 5. SM were the petitioners’ solicitors; CBC were solicitors for a prospective purchaser.

executed qualified acceptance and original executed final letter to each other by Legal Post. The original executed final letter from CBC reached the offices of SM after midnight on 31 August 2007. The original executed qualified acceptance from SM reached the offices of CBC on Monday 3 September 2007.

The question was whether missives had been concluded by midnight on the 31 August. That was because there was an inhibition against the sellers whose effective date was midnight, 31 August. The way the issue came before the court was that the sellers petitioned for the recall of the inhibition on the ground that it came too late to affect the missives.<sup>5</sup> The inhibitor took the opposite view, namely that by midnight on 31 August missives had not yet been concluded. There was no dispute about *whether* missives had been concluded, because the originals were physically delivered - shortly after 31 August - so that conclusion of missives had happened at latest when the originals were physically delivered. The question was *when* missives had been concluded: before or after midnight on 31 August? The "postal acceptance rule" was not applicable on these particular facts, because it applies only to the final acceptance, and in this case the earlier missive was not received until after the date of the inhibition.<sup>6</sup>

#### A. THE BACKGROUND LAW

The Requirements of Writing (Scotland) Act 1995 says that signed writing is needed to conclude missives, but it says nothing about how (or even whether) such signed writing has to be delivered to the other side, and the same was true of earlier legislation. The issue of missives by fax has been before the courts twice before. In *Merrick Homes Ltd v Duff*, it was said (*obiter*) at first instance<sup>7</sup> that missives can be concluded by fax but on appeal the court reserved its opinion on the point: "We should... not be taken to be endorsing the view expressed by the Lord Ordinary where he indicates that an *obligatio literis* could be constituted by fax".<sup>8</sup> In *McIntosh v Alam*<sup>9</sup> it was held that missives can be concluded by fax.

For ordinary contracts the question of delivery does not normally arise, because they are not subject to requirements of form. They can be concluded orally, either face-to-face or by phone. They can be concluded silently, for instance at the check-out queue at a supermarket. Obviously, therefore, they can be concluded by fax, pdf or text message. Romantic young men can propose marriage by sky-writing or by

<sup>5</sup> See para 2: "the petitioners seek recall of that inhibition but in so far only as it relates to the subjects".

With respect, the petition was in the wrong terms. In such a case it should be for recall of the inhibition *quoad* the transaction, not *quoad* the property: see G L Gretton, *The Law of Inhibition and Adjudication*, 2<sup>nd</sup> edn (1996) 60. But it seems that this issue was not raised, and it can be ignored for present purposes.

It may be added that the sellers also sought recall on the ground of oppression: see *Park, Ptrs* [2008] CSOH 121, 2008 SLT 1026, discussed in J MacLeod, "Chalk dust in the law of inhibition" (2009) 13 EdinLR 294. This issue was not dealt with in this particular phase of the litigation.

<sup>6</sup> There is also the question of whether the postal acceptance rule applies to private couriers.

<sup>7</sup> 1996 GWD 9-508.

<sup>8</sup> 1996 SC 497 at 499

<sup>9</sup> 1998 SLT (Sh Ct) 19.

tracing the big question in newly-fallen snow, and contracts could be concluded in the same way by romantic business people, if there are romantic business people. Or by telepathy, if there is telepathy.<sup>10</sup> Of course, there can be exceptions. If Jack writes to Jill making an (unromantic) offer to buy moveables, and the offer says that acceptance must be by signed letter, then a response by phone would not work, for the acceptance would not have met the offer. But whatever degree of formality is employed or insisted on, the need for communication is indispensable. The delivery of paper is often the means of communication that the parties choose, but that is a matter of choice, not a requirement of law. Or one could put it another way: in such cases delivery is needed, but all that means is the delivery of the message, the manifestation of the will.

So that is the general rule for contracts. At the other side of the room, so to speak, is the case of a deed, such as a disposition. If the grantee has not received the deed, it is impossible to complete title. In such cases the issue is not normally whether the grantor is “bound”. Assuming (as is typically the case) that the deed is to implement a contract, such as missives, the grantor is already bound anyway. Missives are different from ordinary contracts, because there are requirements of form, but also different from deeds, in that the missives do not need to be registered.

As a unilateral and written juridical act, a missive letter must probably be delivered if it is to bind the grantor. But if delivery is needed, the question then arises as to whether that has to be actual delivery, or whether something less could suffice. That “something less” could in principle take two forms. The first would be the sending of an image of the wet-signed paper, by fax or pdf. Or one could hold the document to the window and allow the other side, passing in the street, to photograph it. Or perhaps one could make, and send, an exact copy, done in oil paint. This could be called “delivery by image”. The second would be for the sender to be deemed to hold the wet-signed paper on behalf of the other side, a possibility that does not necessarily involve the receipt, by the other side, of an image. For example, Jack could phone Jill, read out the words of the letter, and agree with her that he held the letter on her behalf. This might be called “delivery by agreement”.

## B. THE DECISION

In *Park, Ptrs* the Temporary Judge held that missives had not been concluded by midnight 31 August. Thus he declined to follow *McIntosh v Alam*. But he did not go so far as to say that missives cannot be concluded by fax or pdf. As for that question, he said:<sup>11</sup>

The answer. . . depends upon the intention of the parties which may be derived either from a general practice among solicitors or from a specific agreement between the particular solicitors exchanging the particular missives.

<sup>10</sup> Though for telepathy the question might arise as to the manifestation of will, the *Willenserklärung*.

<sup>11</sup> Para 23.

By “a general practice among solicitors” he did not mean, I think, a general practice of sending missives by fax or pdf, but rather a general practice of regarding such missives as binding. And he considered that no such practice existed. As for “specific agreement” he said:<sup>12</sup>

It would... be open to the sender of any missive by fax to state thereon that from the time of transmission of the fax the sending solicitor would thereafter hold the missive which had been transmitted on behalf of the receiving solicitor, thereby achieving constructive delivery.

But that had not happened. Since neither branch of the “intention” test had been satisfied, missives had not been concluded before the inhibition took effect.

### C. DISCUSSION

Until this case, it had been generally assumed that the answer to the question “can you conclude missives by fax or pdf?” was either yes or no. The “it depends” approach is a new development.

The two passages quoted above are not easy to reconcile. The first speaks of “a specific agreement between the particular solicitors”. But the second seems to say that mutual intention is not necessary: all that is needed is a unilateral statement. But both passages presuppose that some form of delivery is needed.

The law about methods of delivery has developed mainly in connection with goods rather than documents, but with goods there can in theory be constructive delivery through a “possessory agreement” (*constitutum possessorium*) in which both sides agree that the goods, though still in the hands of the transferor, are to be regarded as being held on behalf of the transferee.<sup>13</sup> But this requires the agreement of both parties. It may be added that the courts have traditionally been reluctant to accept possessory agreements as being valid. In short, constructive delivery on the basis of a unilateral statement is of doubtful competence, and even if there is mutual agreement its effect seems uncertain. If constructive delivery of this type is possible, then logically it should not be necessary to send the fax or pdf at all. For if one side holds the wet-signed paper on behalf of the other side, that is all that is needed. The whole thing could be done by phone.

So what is the law? I do not know. *Park, Ptrs* does not settle it. The *ratio* is arguable, and the remarks about constructive delivery may be *obiter dicta*. The case does not distinguish between “delivery by image” and “delivery by agreement”.

### D. LAW REFORM?

“Electronic missives” can mean two things. It can mean missives by fax or pdf. In that case, there is still paper and ink. Here the missives are not electronic,

<sup>12</sup> *Ibid.*

<sup>13</sup> For the whole subject see W M Gordon, *Studies in the Transfer of Property by Traditio* (1970); K G C Reid, *The Law of Property in Scotland* (1996) para 623 (W M Gordon); D L Carey Miller with D Irvine, *Corporeal Moveables in Scots Law*, 2<sup>nd</sup> edn (2005) ch 8.



but the delivery is. Or it can mean pure e-missives, i.e. electronic documents with electronic signatures. No paper, no ink. Seemingly the profession wants e-missives,<sup>14</sup> though the distinction between the two types is not always recognised. The Scottish Law Commission has recommended that the 1995 Act be amended to allow pure e-missives,<sup>15</sup> and there could also be secondary legislation under section 8 of the Electronic Communications Act 2000. One way or another, legislation seems likely.<sup>16</sup>

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## Actionable Rights and Wrongs: Human Rights Challenges in *AXA General Insurance Ltd*

Lord Emslie's recent opinion in *AXA General Insurance Ltd, Ptrs*<sup>1</sup> comprises 249 paragraphs of thoughtful and well-reasoned argument on the lawfulness of the Damages (Asbestos-Related Conditions) (Scotland) Act 2009. The decision contains useful guidance on a number of issues including the parameters of victim status in terms of article 34 of the European Convention on Human Rights and the extent to which Acts of the Scottish Parliament, as a *sui generis* form of subordinate legislation, are open to judicial review. This note will focus on the two substantive human rights challenges to the legislation's competency, made under article 6 and article 1 of the first protocol to the ECHR. Lord Emslie dismissed each of these challenges, and the petition as a whole. The petitioners have, however, indicated an intention to appeal.<sup>2</sup>

### A. BACKGROUND

Pleural plaques are scarring to the lung tissue caused by inhalation of asbestos fibres. They are almost invariably asymptomatic and do not trigger or develop into more

14 See eg J Ley, "Law out of step?" (2009) 54 JLSS Oct/56; E Sinclair, "Never waste a good crisis" (2009) 54 JLSS Nov/56; E Sinclair, "E-missives: it's time for delivery" (2009) 77 SLG 114; A Duncan, "Concluding missives in 2009? On your bike" (2009) 103 Greens Property Law Bulletin 5.

15 Scottish Law Commission, Report on *Land Registration* (Scot Law Com No 222 (2010), available at [www.scotlawcom.gov.uk](http://www.scotlawcom.gov.uk)) para 34.

16 This note draws on material which appears in K G C Reid and G L Gretton, *Conveyancing 2009* (2010) 85-89.

1 [2010] CSOH 2, 2010 SLT 179.

2 See Association of British Insurers, "News release: insurers lodge appeal against Scottish judgment on pleural plaques" 14 Jan 2010, available at [http://www.abi.org.uk/Media/Releases/2010/01/Insurers\\_lodge\\_appeal\\_against\\_Scottish\\_judgment\\_on\\_pleural\\_plaques.aspx](http://www.abi.org.uk/Media/Releases/2010/01/Insurers_lodge_appeal_against_Scottish_judgment_on_pleural_plaques.aspx).

serious asbestos-related conditions such as mesothelioma. Diagnosis of plaques does, however, confirm exposure to asbestos, indicating an elevated risk of development of such conditions, which may be grounds for significant anxiety. Over several decades, UK indemnity insurers of employers who negligently exposed workers to asbestos have settled personal injury claims in respect of plaques. Insurers adopted this policy on the basis of a “commercial decision”<sup>3</sup> rather than as the result of any clear authority as to the legal basis on which plaques might found a claim.<sup>4</sup>

The position changed two years ago. In *Rothwell v Chemical and Insulating Co Limited*,<sup>5</sup> a conjoined group of English test cases, the House of Lords unanimously affirmed the majority decision of the Court of Appeal in finding that pleural plaques could not form the basis of a damages action. Scarring which did not cause disability, disfigurement, or the risk of development into a more serious condition could not, it was held, amount to a harm for the purposes of the law of tort.<sup>6</sup> The Scottish Parliament responded to this decision with the 2009 legislation, which provides that pleural plaques, along with pleural thickening and asbestosis, are to be considered as actionable harms. The petitioners in *AXA General Insurance*, a group of insurance companies, argued that this Act had the effect of unlawfully imposing millions of pounds of additional liabilities upon them.

## B. THE ARTICLE 6 CHALLENGE

Article 6 of the ECHR begins: “In the determination of his civil rights and obligations... everyone is entitled to a fair and public hearing”. The contention put forward by the petitioners was that the 2009 legislation represented an unjustifiable Parliamentary interference in the determination of the petitioners’ civil rights and obligations. The scope of this challenge was admitted to be restricted to the several hundred pleural plaques claims which had been sisted since 2006 pending the decision in *Rothwell*. The 2009 Act, it was asserted, directly interfered in the outcome of these cases. It was additionally contended that this interference would operate to “reconfigure’ past indemnity insurance contracts in such a way as to impose new liabilities for which premiums were never taken”.<sup>7</sup>

The background to this challenge was in the nature of a debate between the parties as to the true purpose of the 2009 legislation. The petitioners’ position was essentially that *Rothwell* had been acknowledged by Holyrood as fatal to existing plaques claims, and the Act had been introduced specifically to prevent that result, deliberately targeting insurers. The argument for the Scottish government was that the legislation was designed to resolve uncertainty as to the applicability of *Rothwell*,

3 Paras 9 and 10.

4 See in England, *Sykes v Ministry of Defence*, *The Times* 23 Mar 1984, and in Scotland, *Gibson v McAndrew Wormald & Co Ltd* 1998 SLT 562. Neither case turned on this point, however.

5 [2008] 1 AC 281.

6 Lord Hope differed from the other judges in concluding that plaques might be recognised as an injury or a disease, but since no symptoms resulted, they must be considered *de minimis*. See paras 38 and 39.

7 *AXA General Insurance* at para 148.

a case decided under principles of English law, in Scotland and to give effect to the legal and political view that pleural plaques should be an actionable wrong.

Lord Emslie concluded from the Strasbourg authorities<sup>8</sup> that a successful challenge required the petitioners to demonstrate:<sup>9</sup>

- (i) that the close involvement which they claimed in pleural plaques litigation should be held equivalent to party status;
- (ii) that the outcome of pleural plaques actions should be deemed decisive for their own civil rights and obligations as indemnity insurers; and
- (iii) that the 2009 Act relevantly interfered with judicial determination of such proceedings.

The petitioners were unsuccessful in every element. Two key difficulties emerged. The first was that, regardless of the extent to which the resolution of the sisted cases might impact on insurers' finances, nothing determinative of their own civil rights and obligations could result. It seems that the "reconfiguration of policies" argument may have been intended to meet the criterion of direct determination, but Lord Emslie noted that, like the petitioners (and the writer), he did not find this contention easy to follow.<sup>10</sup> Either the policies covered actionable damage or they did not, and nothing in the legislation could rewrite the terms of those contracts. Secondly, Lord Emslie was not satisfied that the 2009 Act was designed to influence directly the determination of the sisted cases. The purpose of the legislation, on the evidence, was to ensure that individuals diagnosed with pleural plaques, pleural thickening or asbestosis, whether in the past or the future, would have an actionable basis for a claim in Scots law. The retrospective effect of the legislation on the sisted cases was a secondary issue.

It is difficult to imagine an alternative outcome to this challenge when the nature of the dispute between insurers and the Government is set alongside the authorities in the area.<sup>11</sup> Article 6 cannot operate to prevent a state from introducing legislation which may impact on ongoing litigation, for, if it did, legislating would be an impossible task. The cases where a challenge of this kind has found favour almost inevitably involve existing litigation between the applicant and the state itself in which the state has used legislation purely and specifically to evade an otherwise inevitable defeat.<sup>12</sup> Although Lord Emslie, probably correctly, placed little significance on the fact the government was not party to the sisted cases,<sup>13</sup> the reality remains that the battle between the government and insurers here is one of broad legal and political principle. Indeed, the fact that so many ongoing actions existed in the first place tends to support rather than undermine this conclusion. The legislation itself provides

8 Although various cases were canvassed, *Zielinski and Ors v France* (2001) 31 EHRR 19 was clearly the most influential.

9 *AXA General Insurance* at para 164.

10 Para 243.

11 The numerous cases referred to by the parties are listed at para 147. *Al-Fayed v United Kingdom* (1994) 18 EHRR 393 and *Perez v France* (2005) 40 EHRR 39 are also of interest in this context.

12 The exceptions are App No 16043/03 *Achache v France* 3 Oct 2006 and App No 67847/01 *Lecarpentier v France* 14 Feb 2006. The applicants in these cases were engaged in litigation with quasi-nationalised French banks, where the virtual party status of the state was easier to make out than in the sisted plaques actions, although the principle may be of wider application.

13 *AXA General Insurance* at para 169.

baldly that plaques, pleural thickening and asbestosis are actionable in Scotland, with no clarifications or restrictions. The point is of wide social and legal significance. An attempt to view it solely through the prism of article 6 could only ever be an artificial construction of the argument, and is evidently not what rights under article 6 were designed for.

### C. THE CHALLENGE UNDER ARTICLE 1 PROTOCOL 1

Article 1 protocol 1 protects the right to peaceful enjoyment of possessions. This right can be interfered with by the state where necessary in the public interest, provided the state action is lawful and proportionate. Two main issues arose in respect of this challenge. In the first place, what was the nature of the “possession” which the petitioners alleged was entitled to protection? Secondly, had peaceful enjoyment of this possession in fact been interfered with by the introduction of the 2009 Act? The court also considered whether the interference, if any, could be justified on public interest grounds.

#### (1) Possessions

Contentious under this head was the petitioners’ submission that the *Rothwell* decision was, in itself, an asset of value to insurers. *Rothwell*, it was argued, constituted an immunity from pleural plaques claims. Strasbourg jurisprudence, it was said, indicates that a reasonably-based *claim* carrying a legitimate expectation of success is a “possession” within the meaning of article 1 protocol 1. Why, then, should an *immunity* carrying a significant economic value not also be considered a possession in the article 1 protocol 1 sense?<sup>14</sup>

It is an established principle of ECHR jurisprudence that “possessions” has an autonomous meaning.<sup>15</sup> Although the guidance offered by the case law on the exact parameters of what may constitute a possession is far from conclusive, it is possible to identify certain key factors. Thus the purported possession must have an economic value; and it must have been acquired by the time of the state action, or there must have been a legitimate expectation of future acquisition which was prevented by state action.<sup>16</sup> Within this framework, it is clear that a court order is a possession, effectively equivalent to a debt.<sup>17</sup> The position of as yet unresolved court actions is somewhat unclear. The general line is that an ongoing action cannot be a possession: hence dismissal of an action by the courts is not in itself interference with a possession.<sup>18</sup>

14 Para 181.

15 App No 33202/96 *Beyeler v Italy* 5 Jan 2000, accepted domestically in e.g. *Wilson v First County Trust (No 2)* [2004] 1 AC 816.

16 The authorities are legion, but assistance may be found in *Inze v Austria* (1988) 10 EHRR 394; *Van Marle v Netherlands* (1986) 8 EHRR 483; *Tre Traktörer Aktiebolag v Sweden* (1991) 13 EHRR 309; and domestically in *Adams v Scottish Ministers* 2004 SC 665 and *Catscratch Limited v City of Glasgow Licensing Board (No 2)* 2002 SLT 503.

17 A recent example is *Broniowski v Poland* (2006) 43 EHRR 1.

18 *Agneessens v Belgium* (1988) 58 DR 74; *Kopécky v Slovakia* (2005) 41 EHRR 43.

A few exceptions do exist for ongoing claims, but these tend to involve the state as a party to the litigation in circumstances similar to the article 6 cases discussed above.<sup>19</sup>

Within this context, Lord Emslie identified a number of difficulties with the assertion that *Rothwell* equated to a possession. Chiefly, the decision did not offer the immunity petitioners claimed. The case was decided under English law, and whether the same conclusion would be reached using Scots principles was at least debatable. The agreed evidence in *Rothwell* might not be replicated in future cases. The appellate committee had specifically not ruled on the likely success of potential future contract-based plaques claims. Finally, the decision dealt only with plaques, not with the pleural thickening or asbestosis which were also identified as actionable damage by the 2009 Act. Given all the imponderables, it would be inaccurate to describe *Rothwell* as representing immunity from future claims which had been removed by the 2009 legislation. Such immunity had never existed.

More critically, immunity in itself could never amount to a possession. Lord Emslie noted that “possession” is not wide enough to cover every interest which has an economic value: the interest has to be proprietary in nature. In other words, the interest must have been acquired in the sense that property rights can be exercised in respect of it.<sup>20</sup> Immunity from suit cannot be sold, assigned or otherwise disposed of. Security cannot be granted over it. The idea that immunity might prevent future impact on the financial standing of insurers is too far removed from the notion of a proprietary interest to qualify as an article 1 protocol 1 possession.

This interpretation of the Strasbourg case law is undoubtedly correct. Economic value is not the sole test of possessions, and construing the right in this way would render it meaningless.<sup>21</sup> The importance of proprietary rights has been emphasised repeatedly both in identifying when a possession is held and in clarifying when the possession has been lost.<sup>22</sup> A claim in which there is a reasonably-based expectation of success may, uncomfortably, equate to a possession in the Strasbourg jurisprudence. The expectation of a successful defence to a claim will not.

## (2) Interference

The petitioners’ second argument focused on their capital resources, which were unquestionably a “possession”. The 2009 legislation would have the effect of compelling insurers to pay damages for pleural plaques claims. This, it was argued, represented an interference with their capital resources.

As with the article 6 challenge, Lord Emslie was not satisfied that the relationship between the legislation and the impact on the petitioners’ finances was sufficiently proximate to engage rights under article 1 protocol 1. “A line has to be drawn”,

19 *Stran Greek Refineries v Greece* (1995) 19 EHRR 293; *Pressos Compania Naviera SA v Belgium* (1996) 21 EHRR 301.

20 *Anheuser Busch v Portugal* (2007) 45 EHRR 36.

21 These ideas are paralleled in a very different context in *M v Austria* (1984) 39 DR 85.

22 The keynote decision of *Sporrong and Lönnroth v Sweden* (1983) 5 EHRR 35 is instructive in this regard.

he indicated, “between on the one hand, primary and immediate effects and, on the other, effects which are only secondary and derivative. The ripples spreading outwards from a legislative measure cannot be thought to confer or infringe legal rights to an infinite degree”.<sup>23</sup>

This conclusion seems entirely consistent with the Strasbourg case law. In *Bramelid and Malmström v Sweden*,<sup>24</sup> the European Commission on Human Rights explained that article 1 protocol 1 dealt with “the action whereby the State lays hand – or authorises a third party to lay hands – on a particular piece of property for a purpose which is to serve the public interest”.<sup>25</sup> The 2009 legislation could not sensibly be said to “authorise” individuals diagnosed with pleural plaques to withdraw funds from the petitioners’ capital resources. An action must be successfully pursued before damages would be awarded. The argument is similar to the article 6 challenge outlined above, and it fails for broadly the same reason.

### (3) Public interest

To bring the human rights arguments to a conclusion, and notwithstanding his earlier findings, Lord Emslie dealt fully with the petitioners’ assertion that any interference that might be established with their article 1 protocol 1 rights could not be justified in the public interest. Without rehearsing the arguments in full, some key points might be highlighted.

It had already been established that the aim of the legislation was much broader than the petitioners claimed. With that finding in place, many of the arguments under this head simply fell away. A legitimate aim had evidently been pursued and insurers had not been targeted. Lord Emslie was understandably unimpressed with the suggestion that legislating to reverse *Rothwell*, if the legislation even had that effect, was outrageous or irrational. The speeches of the appellate committee suggest that decision was reached with difficulty and by a very slender margin. In summing up, Lord Emslie notes:<sup>26</sup>

[A]wards of damages against negligent employers, at appropriate levels and under settled rules, cannot be thought to constitute an unwarranted or disproportionate end result. If that is right, alleged regulatory sterilisation of the petitioners’ reserves can in my view be no better placed...

This conclusion seems entirely in keeping with the Strasbourg approach to proportionality.

## D. CONCLUSION

With the clarification offered by Lord Emslie’s findings as to the fundamental purpose of the 2009 Act, it seems that insurers will have marked difficulty in mounting a

<sup>23</sup> Para 196.

<sup>24</sup> (1982) 29 DR 76.

<sup>25</sup> At 82.

<sup>26</sup> *AXA General Insurance* at para 225.

successful appeal. Regardless of the ECHR article in question, an effective challenge must concern clear violation of a person's rights. If the legislation in question is designed to clarify a broader point of legal principle, then it is difficult to imagine how such an individual violation could be found to exist.

Regardless of the view taken on the dismissal of the petition, the judgment is encouraging in its treatment of the Strasbourg jurisprudence. Both the parties and the court made thorough and thoughtful use of the authorities in areas where there has, as yet, been little opportunity for domestic exploration. In that sense, it may be that the appeal already marked will prove beneficial to us all.

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## The Scottish DNA Database and the Criminal Justice and Licensing (Scotland) Bill

The collection and retention of DNA samples is universally seen as crucial for purposes of criminal investigation and prosecution, as a means of excluding innocent suspects and of exonerating the wrongfully convicted. However, there is less consistency across jurisdictions on the question of whose DNA should be obtained by the state and for how long it should be stored. In Scotland, DNA samples may at present be obtained from anyone arrested, and then retained indefinitely after conviction in the criminal courts or for limited periods following acquittal for certain serious offences. The Criminal Justice and Licensing (Scotland) Bill, currently before the Scottish Parliament,<sup>1</sup> proposes to extend this to allow retention of DNA data obtained from children who have committed sexual or violent offences and who are being dealt with by the children's hearings system. The Bill also articulates explicitly the permitted uses of retained DNA data.

### A. THE LEGAL FRAMEWORK IN SCOTLAND

The existing law relating to DNA collection, retention, use and destruction is contained in sections 18-20 of the Criminal Procedure (Scotland) Act 1995.<sup>2</sup> Section 18 permits the collection of bodily samples, from which DNA profiles may be

<sup>1</sup> The Bill was introduced on 5 March 2009 and passed Stage 1 on 26 November 2009. For details of progress, and the text of the Bill, see <http://www.scottish.parliament.uk/s3/bills/24-CrimJustLc/index.htm>.

<sup>2</sup> As amended by the Criminal Justice (Scotland) Act 2003 and the Police, Public Order and Criminal Justice (Scotland) Act 2006.

gathered, when a person has been arrested and is in custody or detained. Reasonable force may be used for the purpose of collection.<sup>3</sup> Although section 18(3) outlines a general rule of destruction of samples following a decision not to institute criminal proceedings or when proceedings do not end with conviction, retention is permitted after conviction, and also after prosecution for certain sexual or violent offences even if no conviction follows.<sup>4</sup> In the latter instance indefinite retention is not allowed *per se*: according to section 18A(4) the destruction date is three years following conclusion of proceedings. However, section 18A(5) permits further extension by a sheriff, on application by a relevant chief constable, for no more than two years. Nothing prevents recurring police applications to amend further the destruction date.

The relevant provisions in the Criminal Justice and Licensing (Scotland) Bill do not change this scheme of DNA collection and retention from acquitted individuals. This is in line with the recommendations in the Fraser Report on *Acquisition and Retention of DNA and Fingerprint Data in Scotland*<sup>5</sup> and the subsequent Scottish Government proposals.<sup>6</sup> However, the Fraser Report did propose a power to take and retain DNA samples from children who are dealt with by the children's hearings system for certain serious offences.<sup>7</sup> This will be implemented by section 59 of the Bill,<sup>8</sup> which permits retention of samples from children referred to a children's hearing for sexual or violent offences for a three-year period with the possibility of extensions for two-year blocks. The child (and his or her parent or guardian) must accept the ground of referral, or a sheriff must find it to be established.

Furthermore, section 60 of the Bill specifies that any data or samples obtained may be used for the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution, or for the identification of a person, deceased or alive. In this context crime refers to conduct which is an offence within or outside the UK, and the reference to investigations and prosecutions includes those occurring outside the UK.

## B. THE BROADER CONTEXT

The proposed changes to DNA collection and retention in Scotland cannot be assessed without consideration of the decision of the European Court of Human Rights in *S and Marper v United Kingdom*,<sup>9</sup> which found the equivalent law in England and Wales to be in breach of the *European Convention on Human Rights*. In that jurisdiction, DNA is collected from convicted individuals and arrestees, whether adult or child, for all recordable offences. Moreover, such samples are retained

3 Criminal Procedure (Scotland) Act 1995 s 19B.

4 Section 18A. The relevant offences are listed in s 19A6.

5 J Fraser, *Acquisition and Retention of DNA and Fingerprint Data in Scotland* (2008, available at [http://www.sipr.ac.uk/downloads/Fraser\\_DNA\\_Report.pdf](http://www.sipr.ac.uk/downloads/Fraser_DNA_Report.pdf)).

6 Scottish Government, *Acquisition and Retention of DNA and Fingerprint Data in Scotland: Consultation Report* (2009) para 18.

7 Fraser, *Acquisition and Retention of DNA and Fingerprint Data* (n 5) 19.

8 Inserting ss 18B and 18C into the Criminal Procedure (Scotland) Act 1995.

9 (2009) 48 EHRR 50.



indefinitely.<sup>10</sup> The “blanket and indiscriminate” retention of DNA profiles, the lack of a time limit for retention, and the limited opportunities for removal of data were found to interfere disproportionately with article 8 (the right to respect for private and family life).<sup>11</sup> Notably, the Grand Chamber explicitly mentioned the existing Scottish measures as a preferable and more moderate and proportionate approach.<sup>12</sup>

### C. COMMENTARY

Although the Scottish Government is to be praised for not seeking to increase the DNA retention periods for persons acquitted after prosecution in the criminal justice system, the proposed changes in the Bill concerning children are disproportionate and may affect the essential ethos of the children’s hearing system as a whole. Furthermore, the Bill represents a missed opportunity to address problems regarding repeated extensions, the sharing of data with other jurisdictions with more expansive schemes, and the destruction of samples after DNA profiles have been extracted.

The Bill will allow collection of a sample from a child, using reasonable force if necessary, and the holding of such data. Retention of a minor’s DNA after conviction is not in breach of the ECHR.<sup>13</sup> However, in *S and Marper* the Grand Chamber noted “the risk of stigmatisation” in treating persons who have not been convicted in the same way as convicted persons.<sup>14</sup> As the children’s hearing system, when dealing with offence grounds for referral, does not determine a criminal charge, children involved in this process have not been convicted and do not enjoy full article 6 rights.<sup>15</sup> Yet the retention of their data essentially equates them with convicted criminals and seems a dishonest means of drawing children into the criminal justice system and crime control mechanisms of the state. Although the proposed time period echoes that for suspects rather than convicted persons, a period of three years plus is unduly lengthy in relation to young people. Indeed in *S and Marper* the court noted that the retention of unconvicted persons’ data may be especially harmful in the case of minors “given their special situation and the importance of their development and integration in society”.<sup>16</sup> The inclusion of children’s DNA in the database, even for a limited period, may lead to stigmatisation and to the labelling of the child as a criminal, which conflicts with the welfare principle articulated in section 16 of the Children (Scotland) Act 1995. While the paramountcy accorded to welfare can be overridden to protect the public from serious harm,<sup>17</sup> the retention

10 Criminal Justice Act 2003 pt 1.

11 As a result, English law is being reassessed regarding the requisite degree of seriousness of the “qualifying” offence, the appropriate treatment of minors, and the duration of retention (see Home Office, *Keeping The Right People On The DNA Database* (2009)). See now the Crime and Security Bill, which was introduced into Parliament while this note was in press.

12 *S and Marper* at paras 109-110.

13 App No 20689/08 *W v The Netherlands*, 20 Jan 2009.

14 *S and Marper* at para 122.

15 *S v Miller* 2001 SC 977.

16 *S and Marper* at para 124.

17 Children (Scotland) Act 1995 s 16(5).

of DNA seems like an indirect and dubious means of achieving this. Moreover, as more serious alleged offences by children are dealt with through the criminal courts,<sup>18</sup> it is curious that the Bill will extend the scope of the database to encompass children who have committed serious offences but who are sought to be dealt with in a measured and holistic way in the children's hearing system. In essence, the measures relating to children appear disproportionate, and may alter the nature of children's hearings by suggesting a closer nexus between their work and that of the criminal courts.

A further problematic aspect of section 59 concerns the breadth of offences involved, which include rape, murder, culpable homicide, fire raising, assault and reckless conduct causing actual injury. While the Government's response to the Fraser Report indicated that less serious assaults should not result in DNA sampling and retention in line with adults,<sup>19</sup> this proviso is not in the Bill. Finally, DNA retention may be premised on the child's admission of the relevant behaviour rather than necessarily requiring determination by a sheriff. Given the Scottish requirement of corroboration for confessions in the criminal context,<sup>20</sup> inclusion on the database based on personal admission alone seems an aberration.

In addition, the Bill fails to restrict repeated requests for two-year extensions. Section 18A has only been in force since 2007, and so the need for such extensions has yet to arise. However, repeated extensions which would render the retention *de facto* indefinite would be inconsistent with the judgment in *S and Marper*, and so a provision to this effect is desirable. Moreover, the Bill does not preclude use in Scotland of data retained from acquitted individuals under the existing English scheme.<sup>21</sup> Though Scotland has its own DNA database, the included profiles are duplicated on the UK-wide National DNA Database, and thus samples may be checked against persons in England and Wales who have not been convicted and whose DNA is held indefinitely. As Johnson and Williams previously noted, this represents an imbalance in the material to which police forces across the UK have access.<sup>22</sup> More significantly, however, it means that Scotland's ostensibly principled scheme which is protective of human rights may be tarnished somewhat by the fact that police forces may avail themselves of the wider retention process in England and Wales. Furthermore, no distinction is made in the Bill between DNA samples and DNA profiles which are gleaned

18 Crown Office and Procurator Fiscal Service, *Lord Advocate's Direction to Chief Constables: Reporting to Procurator Fiscals of Offences Alleged to Have Been Committed By Children* (2004) category 1 (available at <http://www.copfs.gov.uk/Resource/Doc/13425/0000138.pdf>).

19 Scottish Government, *Fraser Report on Retention of DNA and Fingerprint Data – Government's Response* (2008) 17.

20 See e.g. *Armit v O'Donnell* 1999 JC 289.

21 Indeed the text of Council Decision 2008/615/JHA of 23 June 2008 "on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime" requires member states to allow others access to reference data in their DNA analysis files.

22 P Johnson and R Williams, "DNA and criminal investigation: Scotland and the 'UK National DNA Database'" (2004) 10 *Scottish Journal of Criminal Justice Studies* 71.

from samples.<sup>23</sup> Genewatch, in a written submission to the Justice Committee, argued that samples should be destroyed once DNA profiles have been obtained and inserted on to the DNA database because it is only the profile that is necessary for the purposes of future identification.<sup>24</sup> Retention of samples holds a heightened risk of abuse given the sensitive nature of genetic material, but the Scottish Government states that retention of full samples is preferable, for purposes of verification of the original profile, quality control, or the extraction of a more detailed profile.<sup>25</sup>

Finally, it is noteworthy that the Government's consultation paper also invited views on the fate of DNA data where an alleged offender accepts a direct measure, such as a fiscal fine. At the moment, DNA data obtained from such a person is destroyed. Various police associations expressed support for indefinite retention, while some support was also evident for a scheme mirroring the time frames applicable to persons charged with, but acquitted of, certain sexual or violent offences.<sup>26</sup> The Justice Committee was "less certain" about such an extension, on grounds of proportionality, consistency, and practicality.<sup>27</sup> The Bill does not address this issue, although the Scottish Government continues to consider it.<sup>28</sup>

#### D. CONCLUDING REMARKS

While section 59 of the Criminal Justice and Licensing (Scotland) Bill unjustifiably expands the categories of people whose DNA may be retained and in doing so potentially transgresses human rights principles and the core ethos of the children's hearing, the other measures in the Bill merely put on a clearer statutory footing powers that are currently enjoyed and exercised by the police. Scotland still maintains a more stringent process for inclusion on the DNA database, when contrasted with the situation south of the Border. This cautious approach should be preserved.

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<sup>23</sup> A DNA profile usually is understood as a set of identification characteristics from regions of DNA that are not known to provide for any physical characteristics or medical conditions of the person.

<sup>24</sup> Scottish Parliament Justice Committee, *Stage 1 Report on the Criminal Justice and Licensing (Scotland) Bill* (2009, available at <http://www.scottish.parliament.uk/s3/committees/justice/reports-09/jur09-18-01.htm>) para 355.

<sup>25</sup> Scottish Government, *Consultation Report* (n 6) para 41.

<sup>26</sup> See A above.

<sup>27</sup> Justice Committee, *Stage 1 Report on the Criminal Justice and Licensing (Scotland) Bill* (n 24) para 372.

<sup>28</sup> Scottish Government, "News Release: strengthening Scotland's forensic regime", 24 Feb 2009.

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## Assisted Suicide: Jurisdiction and Discretion

The facts of *R (Purdy) v DPP*,<sup>1</sup> the final decision of the House of Lords concerning the criminal law,<sup>2</sup> have received considerable public attention. Ms Purdy suffers from primary progressive multiple sclerosis, and further deterioration in her condition is inevitable. She envisages, at some future point, ending her life by travelling to a country (perhaps Switzerland) where assisted suicide is lawful. Her husband, Mr Puente, is prepared to assist her in this journey, but both he and Ms Purdy are concerned that this would render him liable to prosecution for aiding, abetting, counselling or procuring suicide under section 2(1) of the Suicide Act 1961. Ms Purdy therefore asked the Director of Public Prosecutions to “promulgate and/or disclose his policy in relation to the circumstances in which he will consent (or not consent) to a prosecution”<sup>3</sup> for the section 2(1) offence.<sup>4</sup> The DPP refused to do this, asserting that “any such policy—which would amount to a proleptic grant of immunity—would be unlawful”.<sup>5</sup> Ms Purdy’s application for judicial review, and subsequent appeal, failed. In the House of Lords, however, she succeeded.

### A. WOULD THERE BE ANY OFFENCE TO PROSECUTE?

The first point which the House considered—one which had not been argued in the courts below—was whether there was in fact any offence for which Mr Puente could be prosecuted were he to take the actions envisaged. Subsequent to the Court of Appeal’s decision, two different arguments appeared in the academic literature to the effect that there might be no crime committed by Mr Puente which would be prosecutable in the English courts. One of these was, in part, addressed by their Lordships; the other was not.

The point which was addressed was that made by Michael Hirst,<sup>6</sup> who argued that if a suicide took place in Switzerland—beyond the jurisdiction of the English courts—then it would not be possible to prosecute any individual for being, in England, complicit in that suicide. This new argument was rejected, but only tentatively. As Lord Hope of Craighead observed, the offence under section 2(1) is

1 [2009] UKHL 45, [2009] 3 WLR 403.

2 But, as an action for judicial review, not the last criminal appeal to come before the House: that case is *R v Cooper* [2009] UKHL 42, [2009] 1 WLR 1786. See G Maher, “Rape and other things: sexual offences and people with mental disorder” (2010) 14 EdinLR 129.

3 *R (Purdy) v DPP* [2009] EWCA Civ 92, [2009] 1 Cr App R 32 at para 12.

4 Any prosecution for the offence must be by or with the consent of the DPP: Suicide Act 1961 s 2(4).

5 See *Purdy* [2009] EWCA Civ 92 at para 12.

6 M Hirst, “Suicide in Switzerland: complicity in England?” [2009] Crim LR 335.

an offence in itself, rather than being ancillary to another crime.<sup>7</sup> Furthermore, he argued:<sup>8</sup>

Its application cannot be avoided by arranging for the final act of suicide to be performed on the high seas, for example, or in Scotland. Otherwise it would be all too easy to exclude the vulnerable or the easily led from its protection.

While attractive at first glance, this argument is unconvincing. Recourse to the high seas would be unlikely to avoid the application of the 1961 Act, because of the broad statutory provisions which allow English courts, within certain limits, to take cognisance of acts committed there as if they had taken place within ordinary English jurisdiction.<sup>9</sup> Arranging for the final act to take place in Scotland would be an even less attractive option, as it would most likely render the individual concerned liable to prosecution before the High Court of Justiciary for murder.<sup>10</sup> It is of course true that if the parties concerned could identify a jurisdiction where assisted suicide was lawful, and arranged for the final act to take place there, then Professor Hirst's argument would entail that no criminal liability attached. That seems, however, to be the very essence of his position and not a counter-argument.

The other reason for rejecting Professor Hirst's argument was that the basis of jurisdiction in English law in cases of complicity is not, as he argued, "terminatory". Instead, jurisdiction could be asserted on the basis that the English courts are entitled "to assume jurisdiction to try an offence if a substantial part of it took place within the jurisdiction, provided that there [is] no reason of international comity why the court should not do so".<sup>11</sup> Surely, however, the fact that the jurisdiction where the suicide occurred does not regard such acts as a criminal offence would be an extremely strong reason of "international comity" for declining to apply English criminal law, in the absence of Parliament having legislated for nationality-based jurisdiction?

These were not the only arguments for holding that the section 2(1) offence could be applied to circumstances such as those envisaged by Ms Purdy and Mr Puente. A full discussion, however, is beyond the scope of this note, and it is sufficient for present purposes to mention that Professor Hirst's position commands rather more weight than the speeches in *Purdy* suggest. For their Lordships' part, the key point

<sup>7</sup> Para 18.

<sup>8</sup> Para 18. See also para 23.

<sup>9</sup> Merchant Shipping Act 1995 s 281, when read with the Magistrates' Courts Act 1980 s 3A and the Senior Courts Act 1981 s 46A. See e.g. *R v Kelly* [1982] AC 665 (applying the predecessor provisions of the Merchant Shipping Act 1894), holding that two British subjects who were passengers on a Danish ship could be prosecuted in the English courts for committing criminal damage on that ship while it was on the high seas. On the complexities of the statutory provisions, see M Hirst, *Jurisdiction and the Ambit of the Criminal Law* (2003) 291-296.

<sup>10</sup> See generally P R Ferguson, "Killing 'without getting into trouble'? Assisted suicide and Scots criminal law" (1998) 2 EdinLR 288.

<sup>11</sup> Para 22 per Lord Hope of Craighead, citing *R v Smith (Wallace Duncan) (No 4)* [2004] QB 1418. Lord Hope's language is subtly different from that found in *Smith (Wallace Duncan)*, where the court refers – quoting Rose LJ in *R v Smith (Wallace Duncan)* [1996] 2 Cr App R 1 – to activities which should "on the basis of international comity, be dealt with by another country" (para 55, emphasis added). The shift in language would seem to support the argument made in the text.

was that the applicability of section 2(1) was arguable. If it was arguable, there was a risk of prosecution, and if there was a risk of prosecution, it was necessary to consider Ms Purdy's principal argument.

The academic argument which the House did not address was that made by J K Mason, who suggested in this journal that a solution to the dilemma posed in *Purdy* was to recognise that Mr Puente would not be assisting in suicide but simply in travel arrangements.<sup>12</sup> Given the approach taken by their Lordships to Professor Hirst's position, however, the problem of arguability would again seem to preclude resolving the issue in this way.

### B. THE DISCRETION TO PROSECUTE

Their Lordships proceeded, therefore, to consider whether the DPP was required to promulgate the policy which Ms Purdy had requested. They concluded, first of all, that insofar as the law restricted Ms Purdy's ability to choose how she might end her life – and might, indeed, constrain her to do so at an earlier stage while she was able to do this without Mr Puente's assistance – this could amount to an interference with her right to respect for private life under article 8(1) of the European Convention on Human Rights.<sup>13</sup> Any interference would therefore – by virtue of article 8(2) – have to be in accordance with the law. Reviewing the Strasbourg jurisprudence, Lord Hope concluded that this requirement:<sup>14</sup>

...implies qualitative requirements, including those of accessibility and foreseeability. Accessibility means that an individual must know from the wording of the relevant provision and, if need be, with the assistance of the court's interpretation of it what acts and omissions will make him criminally liable. . . . The requirement of foreseeability will be satisfied where the person concerned is able to foresee, if need be with appropriate legal advice, the consequences which a given action may entail. A law which confers a discretion is not in itself inconsistent with this requirement, provided the scope of the discretion and the manner of its exercise are indicated with sufficient clarity to give the individual protection against interference which is arbitrary. . . .

This requirement is in most cases met by the *Code for Crown Prosecutors*,<sup>15</sup> which will “normally provide sufficient guidance to Crown Prosecutors and to the public as to how [prosecutorial] decisions should or are likely to be taken”.<sup>16</sup> However, the *Code* had demonstrably failed in this respect when the DPP had taken the decision

12 J K Mason, “Unalike as two peas? *R (on the application of Purdy) v DPP*” (2008) 13 EdinLR 298.

13 This involved a departure from the view taken in *R (Pretty) v DPP* [2002] 1 AC 800 in favour of that expressed by the European Court of Human Rights in *Pretty v United Kingdom* (2002) 35 EHRR 1 at para 67. In any event, as Lord Hope explained (at para 38), the factual differences between the cases meant that there were compelling reasons for holding that article 8(1) was engaged in Ms Purdy's case even if it had not been in Ms Pretty's.

14 Para 41.

15 Crown Prosecution Service, *The Code for Crown Prosecutors* (2004).

16 Para 54.

not to bring any prosecution in the case of Daniel James, a 23-year-old man who suffered from tetraplegia as the result of a serious spinal injury in a rugby accident and ended his life at a Swiss clinic. The DPP concluded that there was sufficient evidence to prosecute James's parents and a family friend under the 1961 Act, but that a prosecution would not be in the public interest. In reaching that decision, he said:<sup>17</sup>

I consider that the offence of aiding and abetting the suicide of another under section 2(1) Suicide Act 1961 is unique in that the critical act – suicide – is not itself unlawful, unlike any other aiding and abetting offence. For that reason, I have decided that many of the factors identified in the Code in favour or against a prosecution do not really apply in this case. . .

It followed from this “commendably frank analysis”<sup>18</sup> that the *Code* was insufficient to meet the requirements of article 8(2) of the ECHR, with the result that the DPP should be required to “promulgate an offence-specific policy identifying the facts and circumstances” to be taken into account in deciding whether or not to consent to a prosecution under section 2 of the 1961 Act.

Such a policy has now been published.<sup>19</sup> In the immediate aftermath of the House of Lords' decision, the Lord Advocate indicated reluctance to take any similar course of action in Scotland, emphasising that *Purdy* was an “English case” dealing with an “offence [which] does not apply in Scotland” and asserting that “any change in the current law related to homicide is properly a matter for the Scottish Parliament”.<sup>20</sup> Is this stance justifiable?

### C. THE SCOTTISH POSITION

It is sometimes asserted that suicide simply is not a crime in Scotland,<sup>21</sup> in contrast to the pre-1961 English position. In fact, the distinction between the two jurisdictions seems more a consequence of ancillary rules than a difference in substantive criminal law. The older Scottish writers do regard suicide as criminal in nature,<sup>22</sup> but with little or no scope for such an act to be recognised as criminally *punishable*.<sup>23</sup> In England,

17 K Starmer, “Decision on prosecution – the death by suicide of Daniel James”, 9 Dec 2008, para 29 (available at [www.cps.gov.uk/news/articles/death\\_by\\_suicide\\_of\\_daniel\\_james/](http://www.cps.gov.uk/news/articles/death_by_suicide_of_daniel_james/)). See also *Purdy* at para 49 per Lord Hope of Craighead.

18 Para 50 per Lord Hope of Craighead.

19 Crown Prosecution Service, *Policy for Prosecutors in respect of Cases of Encouraging or Assisting Suicide* (2010), available at [www.cps.gov.uk/publications/prosecution/assisted\\_suicide.html](http://www.cps.gov.uk/publications/prosecution/assisted_suicide.html).

20 The Lord Advocate's statement is reproduced at (2010) 14 EdinLR 12. See also S A M McLean, C Connelly and J K Mason, “*Purdy* in Scotland: we hear, but should we listen?” 2009 JR 265.

21 See e.g. R A A McCall Smith and D Sheldon, *Scots Criminal Law*, 2<sup>nd</sup> edn (1997) 171; McLean, Connelly and Mason (n 20) at 276.

22 G Mackenzie, *The Laws and Customes of Scotland, in Matters Criminal* (1678) 1.13; Erskine, *Inst* 4.4.46 (“as truly criminal as the murder of one's neighbour”); Hume, *Commentaries* i, 300.

23 See e.g. A M Anderson, *The Criminal Law of Scotland*, 2<sup>nd</sup> edn (1904) 148: suicide “is a crime, but it is one as to which it is impossible to visit the principal with punishment”.

by contrast, the forfeiture of a suicide's goods and chattels,<sup>24</sup> in conjunction with the system of coroner's courts, gave practical application to the theory that suicide was a felony: the point was "argued backwards" from forfeiture to criminality.<sup>25</sup>

It might be objected that if suicide were considered a criminal offence in Scots law, then this should have been evidenced by way of prosecutions for attempted suicide. The absence of such prosecutions, however, seems to have had more to do with the lack of any general theory of attempts in Scots law prior to 1887.<sup>26</sup> Although there is now a general rule that any attempt to commit a crime is itself criminal,<sup>27</sup> it seems that attempted suicide has not in practice been treated as a crime *per se* in Scots law, no doubt because if a prosecution were felt necessary resort might be made to the offence of breach of the peace.<sup>28</sup>

In any event, this is of little relevance to the problem raised in *Purdy*, as the modern Scottish position is in practice not very different from the pre-1961 English position:<sup>29</sup> an accessory to suicide may be guilty of murder.<sup>30</sup> Were Ms Purdy and Mr Puente Scottish residents, they would therefore face an even more unpalatable risk than Mr Puente's potential prosecution for complicity in suicide: a potential prosecution for murder.

This brings out the principal oddity in the Lord Advocate's stance, which seems to be that the applicability of *Purdy* in Scotland can be doubted because the statutory offence in question does not apply north of the Border. But it surely cannot be the case that because the potential consequences for an individual are *more* severe in Scotland than under English law, the case for prosecutorial guidelines is weakened. It is true that the DPP, in his decision on the Daniel James case, laid weight on the peculiarity of the offence under section 2 of the 1961 Act. It would be wrong, however, to elevate form over substance in this respect. In effect, the position regarding the "critical act" of suicide is little different in Scotland from England, given that suicide itself cannot and does not result in prosecution.

24 Abolished by the Forfeiture Act 1870. Hume (*Commentaries* i, 300) noted that "some authorities" supported the proposition that forfeiture was available in cases of suicide under Scots law. It would, however, have required positive action on the part of the Crown by way of an action before the Court of Session, and its practical significance seems unclear. Anderson, *Criminal Law* (n 23) refers (at 148) to the corpse of a suicide having been "in former times, subjected to indignities" but makes no mention of forfeiture. See also R A Houston, *Madness and Society in Eighteenth-Century Scotland* (2000) 71-72.

25 T F T Plucknett, *A Concise History of the Common Law*, 5th edn (1956) 445. See also N St John-Stevan, *Life, Death and the Law* (1961) 234.

26 As is clear from the reasoning employed by Erskine, *Inst* 4.4.46 (discussing Mackenzie, *Matters Criminal* (n 22) 1.12.3: the reference should properly be to 1.13.3).

27 Criminal Procedure (Scotland) Act 1995 s 294, which derives ultimately from s 61 of the Criminal Procedure (Scotland) Act 1887.

28 See J Morren, *Criminal Procedure and Law of Evidence in Scotland* (1928) 141; M G A Christie, *Breach of the Peace* (1990) para 3.33. The scope of such prosecutions would now be subject to the "public element" requirement articulated in *Harris v HM Advocate* [2009] HCJAC 80, 2009 SLT 1078. Although attempted suicide was a criminal offence under English law prior to the Suicide Act 1961, prosecutions were in practice resorted to only where necessary for the accused's protection, and proceedings under mental health legislation would now be appropriate in such circumstances: D C Ormerod, *Smith & Hogan: Criminal Law*, 12<sup>th</sup> edn (2008) 554.

29 For a brief overview, see Ormerod, *Criminal Law* (n 28) 553-554.

30 See generally Ferguson (n 10).



The question must be approached as one of principle. If guidance as to the exercise of prosecutorial discretion is required by article 8(2) of the ECHR, then the relevant source of guidance is that found in the Crown Office *Prosecution Code*.<sup>31</sup> Like the English *Code for Crown Prosecutors*, it sets out a list of general public interest factors to be taken into account both for and against prosecution.<sup>32</sup> While a detailed comparison of the two Codes is outwith the scope of this note, it is fair to say that they adopt a broadly similar approach in this respect, and it is difficult to see how an application of the Scottish code in the case of Daniel James would have provided any more helpful guidance than of which the DPP was able to avail himself.

There is a more interesting general point, of course, which is the extent to which article 8(2) may require specific prosecutorial guidelines to be issued in other areas. It seems unlikely that assisted suicide is *sui generis* to the extent that the general provisions of the *Code for Crown Prosecutors* suffice for every offence but that one.<sup>33</sup> That point, however, is for the future. For the meantime, the only relevant difference between the position in England and Scotland is that the Director of Public Prosecutions has been obliged by a court order to produce guidelines on the prosecution of assisted suicide, and the Lord Advocate has not. Given that the order made by the House of Lords was a consequence of the application of the ECHR, it should be self-evident that this difference cannot and does not justify the absence of such guidelines in Scotland.

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## The Right to Legal Advice During Detention: *HM Advocate v McLean*

It may come as a surprise to those not well versed in Scottish criminal procedure that a suspect who has been detained for police questioning has no right to legal advice during this period. In *HM Advocate v McLean*,<sup>1</sup> the ECHR compatibility of this position was considered by a Full Bench of seven judges.

<sup>31</sup> Crown Office and Procurator Fiscal Service, *Prosecution Code* (2001) (available at [www.copfs.gov.uk/Publications/2001/05/prosecutioncode](http://www.copfs.gov.uk/Publications/2001/05/prosecutioncode)).

<sup>32</sup> At 6-8.

<sup>33</sup> The CPS does, however, publish more detailed guidance on many offences: see [www.cps.gov.uk/legal/](http://www.cps.gov.uk/legal/). In Scotland, the Crown Office is rather more circumspect, with exceptions: see e.g. the (undated) "Crown Office and Procurator Fiscal Service Policy on Causing Death by Driving", available at [www.copfs.gov.uk/Publications/Driving](http://www.copfs.gov.uk/Publications/Driving).

<sup>1</sup> [2009] HCJAC 97, 2010 SLT 73.

### A. BACKGROUND

In Scots law, a distinction exists between “detention” and “arrest”. A suspect may be detained for police questioning for up to six hours.<sup>2</sup> He does not have the right to have a solicitor present, although he can have a solicitor informed of his detention.<sup>3</sup> Other than being obliged to give his name and address,<sup>4</sup> the suspect has the right to remain silent. No adverse inferences may be drawn from his silence<sup>5</sup> but any answers he does give can be used in evidence. Once a suspect is arrested and charged, however, any statements he makes to the police (other than a reply to the charge itself) cannot be used as evidence<sup>6</sup> and he gains the right to a private interview with a solicitor prior to his first court appearance or judicial examination.<sup>7</sup>

The ECHR compatibility of leading evidence of admissions made during detention and in the absence of legal advice had already been unsuccessfully challenged in *Paton v Ritchie*,<sup>8</sup> but the issue was potentially re-opened by *Salduz v Turkey*,<sup>9</sup> a decision of the Grand Chamber of the European Court of Human Rights. In *Salduz*, the applicant was convicted of aiding and abetting a terrorist organisation on the evidence of statements he made in custody without legal advice. The Grand Chamber held unanimously that article 6(1) had been violated, as it requires that:<sup>10</sup>

*as a rule*, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of the case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction . . . must not unduly prejudice the rights of the accused under Article 6. The rights of the defence will *in principle* be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction.

In the light of this statement, there was much speculation about the potential consequences for Scottish criminal practice,<sup>11</sup> a question that has now been answered in *McLean*.

2 Criminal Procedure (Scotland) Act 1995 s 14(2).

3 Section 15(1).

4 And other information necessary to establish identity: s 14(9).

5 *Larkin v HM Advocate* 2005 SLT 1087.

6 The position is more complex where a suspect has been arrested but *not* charged, as it was held in *Johnston v HM Advocate* 1993 JC 187 that in such circumstances it is possible for the police to continue to question him and for any answers he provides to be used in evidence, subject to the general test of fairness. More importantly for present purposes, however, *Johnston* confirmed that the suspect does gain the right to legal advice upon arrest, even if he has not been charged (at 195 per the Lord Justice Clerk (Ross)).

7 Criminal Procedure (Scotland) Act 1995 s 17(2).

8 2000 JC 271, endorsed by a Full Bench in *Dickson v HM Advocate* 2001 JC 203.

9 (2009) 49 EHRR 19.

10 Para 55 (emphasis added).

11 See e.g. P W Ferguson, “The right of access to a lawyer” 2009 SLT (News) 107 at 109-111.

### B. *HM ADVOCATE v McLEAN*

In *McLean*, the minuter had been detained in relation to the theft of a motor vehicle and wilful fire-raising. He had asked that a solicitor be informed of his detention but did not request legal advice prior to or during the interview and was not offered it. He made admissions during questioning that the Crown wished to rely on at his trial. A devolution minute was lodged claiming that the use of these admissions would violate article 6. In the light of *Dickson v HM Advocate*,<sup>12</sup> the issue was referred to a bench of seven judges.

In an opinion delivered by the Lord Justice General (Hamilton), the court held that reliance by the prosecutor on statements obtained in the absence of legal advice would not automatically render the proceedings unfair and remitted the case for trial. It offered two alternative lines of argument in support of its decision.

The first was based on its reading of *Salduz*. The court noted two possible interpretations of the statement set out above.<sup>13</sup> One was that the European Court intended to lay down an absolute rule that any statements made by the accused in the absence of legal advice cannot be used in evidence, regardless of any other safeguards present in the system. Alternatively, the court stated, *Salduz* could be interpreted to mean that:<sup>14</sup>

whether or not there has been a fair trial will depend on the particular circumstances of the case, including what arrangements the jurisdiction in question has made for access to legal advice, seen against the guarantees which are otherwise in place in that jurisdiction to secure a fair trial.

The court chose to favour the second interpretation.<sup>15</sup> In doing so, it relied on Judge Bratza's concurring opinion in *Salduz* in which he commented that the principle being enunciated was "consistent with the court's earlier case law".<sup>16</sup> In earlier cases,<sup>17</sup> the High Court noted, the European Court had not definitively stated that lack of access to a lawyer would, *in itself*, render incriminating statements inadmissible and therefore it had not intended to do so in *Salduz*.

Having settled on this interpretation of *Salduz*, the High Court had then to consider whether Scots law contained sufficient guarantees to ensure a fair trial, even in the absence of legal advice during detention. The court concluded that it did, pointing to a number of protections<sup>18</sup> including: (1) the caution given to suspects that they need not answer questions<sup>19</sup> but that any answers given may be used as evidence; (2) the tape-recording of interviews; (3) the inadmissibility of statements obtained

<sup>12</sup> 2001 JC 203.

<sup>13</sup> See text accompanying n 10.

<sup>14</sup> *McLean* at para 24.

<sup>15</sup> Para 25.

<sup>16</sup> Para 25 of *McLean*, citing para O-12 of *Salduz*.

<sup>17</sup> Such as *Murray v United Kingdom* (1996) 22 EHRR 29 and *Brennan v United Kingdom* (2002) 34 EHRR 18.

<sup>18</sup> *McLean* at para 27.

<sup>19</sup> Other than those concerning identity (see n 4).

through coercion; (4) the corroboration requirement, which ensures that a conviction cannot be based on a confession alone; (5) the fact that adverse inferences cannot be drawn at trial from silence during police questioning; (6) the limited duration of detention (six hours); and (7) the police's discretion to allow a lawyer to be present which is "likely to be exercised where the detainee is perceived to be a vulnerable person".<sup>20</sup>

The court's second line of argument was that, even if the Grand Chamber did intend to set out an absolute rule that statements made without access to legal advice are always inadmissible, this principle "cannot and should not"<sup>21</sup> be applied in Scotland. Section 2(1)(a) of the Human Rights Act 1998 only requires that judgments of the European Court are taken "into account" and as such the Grand Chamber's judgment was not binding. Against this, the court noted<sup>22</sup> the House of Lords' statement in *R (Anderson) v Home Secretary*<sup>23</sup> that it "will not without good reason depart from the principles laid down in a carefully considered judgment of the [European] court sitting as a Grand Chamber".<sup>24</sup> But as *Salduz* did not involve the United Kingdom or examine any of the features of the Scottish criminal justice system then it could not be said to have been "carefully considered" and although it "commands great respect, we are not obliged to apply it".<sup>25</sup>

### C. DISCUSSION

Given the mayhem that could have resulted for prosecutions if the opposite conclusion had been reached, there may be many on the side of the Crown who are breathing a sigh of relief. Whether the court was correct in its interpretation of *Salduz* may not be known until a subsequent case arises, but it is surely not the most obvious interpretation. The statement in *Salduz* that rights "will in principle be irretrievably prejudiced"<sup>26</sup> when admissions made without access to a lawyer are used in evidence seems pretty conclusive and the fact that the High Court did not rely on this argument alone suggests that it recognised that it might be open to criticism on this front. The court's assertion that its "balancing process" interpretation is "consistent with the [European] Court's earlier case law"<sup>27</sup> is not especially persuasive; the "absolute rule" interpretation could equally be read as consistent with prior case law. The court's second line of argument—that it is entitled to disregard a decision of the Grand Chamber of the European Court—might also be questioned. In *Secretary of State for the Home Department v F*,<sup>28</sup> a more recent case than *Anderson*, Lord Hoffmann

<sup>20</sup> *McLean* at para 27.

<sup>21</sup> Para 31.

<sup>22</sup> Para 29.

<sup>23</sup> [2002] UKHL 46, [2003] 1 AC 837.

<sup>24</sup> At para 18 per Lord Bingham of Cornhill.

<sup>25</sup> Para 29.

<sup>26</sup> *Salduz* at para 55.

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

<sup>28</sup> [2009] UKHL 28, [2009] 3 WLR 74.

suggested that to reject such a decision “would almost certainly put [the UK] in breach of the international obligation which it accepted when it acceded to the Convention”.<sup>29</sup>

Issues of interpretation aside, the question remains of whether suspects are, in fact, sufficiently protected by the present arrangements. It is true that there are a number of protections that make the need for legal advice less pressing. This can be contrasted to the situation in England and Wales, where suspects do have a right to legal advice during police questioning,<sup>30</sup> but where the maximum detention period is longer<sup>31</sup> and adverse inferences can be drawn at trial from a failure to answer questions.<sup>32</sup> Nonetheless, there are reasons for concern. First, although suspects have a right to silence, how effective the caution is in informing them of this is debateable, given that it is only mentioned once, at the start of the interview, when the suspect may be overwhelmed and confused, and there is no solicitor present to remind him of it as questioning progresses.<sup>33</sup> Secondly, much was made of the fact that confessions obtained as a result of coercion are inadmissible, and while, by and large, this rule does seem to have operated protectively, this has not always been the case.<sup>34</sup> Thirdly, one might question the court’s confidence that the police’s discretion to admit legal representation where the circumstances demand it provides sufficient protection to vulnerable persons. It will not always be obvious that a suspect is vulnerable<sup>35</sup> and the fact that people do make false confessions<sup>36</sup> shows that we should not be too complacent.<sup>37</sup> On the other hand, even if one accepts these concerns, it is perhaps simplistic to conclude that providing legal advice during police questioning will prevent miscarriages of justice occurring.<sup>38</sup> It might also be said that even if a right to legal advice was established, there is no guarantee it would be taken up by those who need it most.<sup>39</sup>

29 Para 70. See also *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15, [2008] 1 AC 1312 at para 37 per Lord Bingham of Cornhill.

30 Police and Criminal Evidence Act 1984 s 58.

31 Up to 36 hours under section 41 of the 1984 Act.

32 Criminal Justice and Public Order Act 1994 s 34.

33 A point made in prior European cases (see those cited in F P Davidson, *Evidence* (2007) para 9.51) and indeed alluded to in *Salduz* itself (at para 54).

34 See e.g. *Stewart v Hingston* 1997 SLT 442.

35 J Pearse, “Police interviewing: the identification of vulnerabilities” (2006) 5 *Journal of Community and Applied Social Psychology* 147; G H Gudjonsson et al, *Persons at Risk during Interviews in Police Custody: The Identification of Vulnerabilities* (1994).

36 See e.g. the cases cited in part 3 of G H Gudjonsson, *The Psychology of Interrogations and Confessions: A Handbook* (2003).

37 Admittedly the corroboration requirement provides additional protection, but this has been watered down considerably where confessions are concerned: see Davidson, *Evidence* (n 33) paras 15.64-15.71.

38 D Dixon, “Common sense, legal advice and the right of silence” [1991] PL 233 at 242; J Baldwin, *The Role of Legal Representatives at the Police Station* (1993).

39 Although in the English context, requests for legal advice did increase after the right was legislated for: see T Bucke and D Brown, *Police Custody: Police Powers and Suspects’ Rights under the Revised PACE Codes of Practice* (1997) 19.

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As a final point, *McLean* might not represent the end of the matter as it has been reported that the case will be appealed to the Supreme Court.<sup>40</sup> The High Court has once before found itself overruled by London in a significant case concerning article 6 and the use of statements made by the accused (albeit that the High Court's ruling there was in the accused's favour).<sup>41</sup> It remains to be seen whether the High Court's decision in *McLean* will withstand the Supreme Court's scrutiny.

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<sup>40</sup> "Judges reject police questioning human rights challenge", *Scottish Legal News* 23 Oct 2009.

<sup>41</sup> *Brown v Stott* 2001 SC (PC) 43.